by adding that the Office will process requests granted expedited processing status ''as soon as is practicable.'' EFOIA sec. 8(a) (codified as 5 U.S.C. 552(a)(6)(E)(iii)).

E. Electronic Reading Room

The FOIA requires agencies to make available for inspection and copying statements of policy and interpretations not published in the **Federal Register**, and administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. 552(a)(2). The Office maintains these materials in paper form in its Public Information Office. *See* 37 CFR 203.4. The EFOIA requires agencies to make available by ''computer telecommunications or * * * by other electronic means'' all reading room materials that are created on or after October 1, 1996. EFOIA sec. 4 (codified at 5 U.S.C. 552(a)(2). The statute envisions that agencies will develop both a traditional reading room and an electronic reading room. The Office proposes an interim regulation stating which materials are available on-line or in an accessible electronic format.

List of Subjects in 37 CFR Part 203

Freedom of Information Act, Policies and procedures.

Interim Regulations

In consideration of the foregoing, the Copyright Office is amending part 203 of 37 CFR, chapter II, in the manner set forth below:

PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES

1. The authority citation for part 203 is amended to read as follows:

Authority: 17 U.S.C. 702; and 5 U.S.C. 552, as amended.

2. Section 203.3 is amended by revising paragraph (i) to read as follows:

§ 203.3 Organization.

* * * * *

(i) The Copyright Office maintains an ''electronic reading room'' by making available certain documents and records on its World Wide Web page and by providing access to documents that affect the public in electronic format pursuant to 5 USC 552(a)(2). Copyright Office records in machine-readable form cataloged from January 1, 1978, to the present, including registration information and recorded documents, are available on the Internet. Frequently requested Copyright Office circulars, announcements, and recently proposed as well as final regulations are available on-line. The address for the Copyright Office's home page is: http://www.loc.gov/copyright; information may also be accessed by connecting to the Library of Congress' home page on the World Wide Web. The address is: http://www.loc.gov. Other Copyright Office documents may be provided on disk when so requested.

3. Section 203.4 is amended by revising paragraph (f) and adding a new paragraph (i) to read as follows:

§ 203.4 Methods of operation.

* * * * *

(f) The Office will respond to all properly marked mailed requests and all personally delivered written requests for records within twenty (20) working days of receipt by the Supervisory Copyright Information Specialist. Inquiries should be mailed to: Copyright Office, GC/I&R, P.O. Box 70400 Southwest Station, Washington, D.C. 20024. If hand delivered, materials should go to: Copyright Public Information Office, LM 401, James Madison Memorial Building, Library of Congress, 101 Independence Avenue, S.E., Washington, D.C. Office hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, excluding holidays. If it is determined that an extension of time greater than ten (10) working days is necessary to respond to a request due to unusual circumstances, as defined in paragraph (i) of this section, the Supervisory Copyright Information Specialist shall so notify the requester and give the requester the opportunity to:

(1) Limit the scope of the request so that it may be processed within twenty (20) working days, or

(2) Arrange with the Office an alternative time frame for processing the request or a modified request. If a request is denied, the written notification will include the basis for the denial, names of all individuals who participated in the determination, and procedures available to appeal the determination.

* * * * *

(i) The Supervisory Copyright Information Specialist will consider requests for expedited processing of requests in cases where the requester demonstrates a compelling need for such processing. The term ''compelling need'' means:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. Requesters for expedited processing must include in their requests a statement setting forth the basis for the claim that a ''compelling need'' exists for the requested information, certified by the requester to be true and correct to the best of his or her knowledge and belief. The Office will determine whether to grant a request for expedited processing and will notify the requester of such determination within ten (10) days of receipt of the request. If a request for expedited processing is approved, documents responsive to the request will be processed as soon as is practicable. Denials of requests for expedited processing may be appealed to the Office of the General Counsel, who will expeditiously determine any such appeal.

§ 203.6 [Amended]

5. Section 203.6(b)(6) is amended by revising the parenthetical at the end of the sentence to read ''(at no less than $20.00 per hour or fraction thereof).''

Dated: October 21, 1997.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 97–28418 Filed 10–27–97; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 258

[Docket No. 96–3 CARP SRA]

Rate Adjustment for the Satellite Carrier Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the adjustment of the royalty rates for superstation and network signals under the satellite carrier compulsory license, 17 U.S.C. 119.

EFFECTIVE DATE: January 1, 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, or Tanya M. Sandros, Attorney Advisor, P.O. Box

70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380.

SUPPLEMENTARY INFORMATION:

Recommendation of the Register of Copyrights

I. Background

Congress passed the Satellite Home Viewer Act of 1988 to create a compulsory copyright license, codified at section 119 of the Copyright Act, for the retransmission of over-the-air television broadcast signals. 17 U.S.C. 119. Similar in many ways to the cable compulsory license enacted by Congress in 1976, the satellite carrier compulsory license permits satellite carriers to retransmit TV signals to their subscribers upon semiannual submission of royalty fees and statements of account to the Copyright Office. The royalty fees collected by the Copyright Office are deposited with the United States Treasury for subsequent distribution to copyright owners of programming retransmitted by the satellite carriers.

Section 119 identifies two types of television broadcast signals that are subject to compulsory licensing: superstations and network signals. A superstation is the signal of any commercial independent television station licensed by the Federal Communications Commission. Examples of superstations retransmitted by satellite carriers under section 119 are WTBS, Atlanta and WGN, Chicago. A network station is defined as follows:

> (A) A television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or
>
> (B) A noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934). [1]

17 U.S.C. 119(d)(2). Examples of network signals carried by satellite carriers are ABC, CBS, and NBC. A station of the Public Broadcasting Service (PBS) would also be considered a network signal under the statute.

Under the section 119 license, satellite carriers can retransmit any superstation they choose to any subscriber located anywhere in the United States. However, such is not the case with the retransmission of network signals. Satellite carriers may only make use of the license to retransmit a network signal to a subscriber who resides in an ''unserved household.'' An ''unserved household'' is defined as 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 (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and
>
> (B) Has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

17 U.S.C. 119(d)(10). Service of network signals to subscribers who do not reside in unserved households is an act of copyright infringement, subject to the remedies of chapter 5 of the Copyright Act, unless the carrier is able to negotiate a private agreement with copyright owners to license all the copyrighted works on those network signals.

In creating the section 119 license in 1988, Congress established different royalty rates for superstation and network signals, based upon approximations of what cable paid for such signals under the section 111 cable compulsory license. 17 U.S.C. 111. The original rate for a superstation was 12 cents per subscriber per month. The original rate for a network was 3 cents per subscriber per month. Congress, however, authorized a rate adjustment procedure to change these rates in 1992.

II. The 1992 Rate Adjustment

At the time of passage of section 119, the Copyright Royalty Tribunal was still in existence. However, rather than invest the Tribunal with authority to adjust the section 119 rates, as was the case for all other compulsory licenses in the Copyright Act, Congress instead gave the task to an ad hoc arbitration panel assembled solely for that purpose. The Tribunal was given authority to review the decision of the arbitration panel, as is the Librarian in this proceeding, but under a different standard of review.

Congress also established a number of factors for the arbitration panel to consider in reaching its determination. The statute provided:

> In determining royalty fees under this paragraph, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with paragraph (2),[2] and the last fee proposed by the parties, before proceedings under this paragraph, for the secondary transmission of superstations or network stations for private home viewing. The fee shall also be calculated to achieve the following objectives:
>
> (i) To maximize the availability of creative works to the public.
>
> (ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 119(c)(3)(B) (1988).

The arbitration panel was given 60 days to reach its determination; it delivered its report to the Copyright Royalty Tribunal on March 2, 1992. The panel recommended that the royalty fee for network signals be raised from 3 cents to 6 cents per subscriber. 57 FR 19061 (May 1, 1992). For superstations, the panel recommended a two-tiered rate structure. The panel was impressed with Congress' consideration of the application of syndicated exclusivity protection on the satellite industry. With respect to cable retransmissions of broadcast signals, broadcasters may purchase exclusive rights to broadcast programming within their local market, and any cable operator importing the same programming into the broadcaster's local market is required to black it out. Congress directed the FCC in 1988 to consider adopting syndicated exclusivity rules for the satellite industry, but the Commission ultimately determined that it was not technically feasible for satellite carriers to black-out programming. See 6 FCC Rcd. 725 (1991). To make up for this technological deficiency, the panel imposed a higher royalty rate to compensate for the loss of exclusivity protection.

For superstations, if they had been retransmitted by a cable system rather than a satellite carrier and would have been subject to the FCC's syndicated exclusivity rules, the panel adopted a rate of 17.5 cents per subscriber per month. 57 FR at 19061 (1992). For

[1] This is the definition of a network signal after the 1994 amendments to section 119. The earlier definition was the same one appearing in section 111 of the Copyright Act.

[2] No such voluntary agreements were reached.

signals that would not have been subject to the syndicated exclusivity rules for cable (known as ''syndex proof'' signals), the panel adopted a rate of 14 cents per subscriber per month. *id*.

The Copyright Royalty Tribunal, reviewing the panel's decision only under a contrary to law standard, adopted the rates recommended by the arbitration panel. 57 FR 19052 (1992). The Tribunal did, however, substitute a new effective date for the rates, because it determined that the panel misapplied the statute. *Id.* at 19053 (rates effective on date of issuance of Tribunal's order, May 1, 1992, not January 1, 1993 date recommended by panel). No appeal of the Tribunal's order was taken.

III. Satellite Home Viewer Act of 1994

The rates adopted by the Tribunal in 1992 were to last only until the end of 1994, when the section 119 license was slated to expire. However, in 1994, Congress passed the Satellite Home Viewer Act of 1994, which extended the section 119 license another 5 years. In reauthorizing the license, Congress made several changes to its provisions. Another rate adjustment—this proceeding—was scheduled to take place, and the duty of conducting the proceeding was given to a copyright arbitration royalty panel (CARP), with review by the Librarian of Congress.

The most significant change to section 119 made by the 1994 amendments, for purposes of this proceeding, was a change in the factors to be applied by the CARP to determine the new royalty rates. Rather than focus on the price paid by the cable industry for similar retransmissions, Congress required that the royalty fees for superstations and network signals represent the fair market value. 17 U.S.C. 119(c)(3)(D) (1994).

Although Congress intended to replace the statutory criteria for adjusting the royalty rates from the 1988 Act with the new ''fair market value'' standard, a scrivener's error was made in the 1994 Act. The result was that the original provisions of section 119(c)(3)(B) remained, and the new provisions inadvertently replaced the subparagraph determining those parties subject to pay the section 119 royalty fees. Certain copyright owners to this proceeding requested clarification of the statute, and the Library issued an order prior to commencement of the CARP instructing the CARP to apply only the new fair market value provisions, and to disregard the old criteria of section 119(c)(3)(B). Order in Docket No. 96–3 CARP SRA (January 6, 1997).

The royalty rates adopted in the 1992 rate adjustment were incorporated into the 1994 Act, subject to adjustment in this proceeding. The rates adopted in this Order shall remain effective until December 31, 1999, the current date for the section 119 compulsory license.

IV. This Proceeding

Pursuant to section 119(c)(2), the Librarian of Congress initiated this proceeding with publication of a **Federal Register** notice on June 11, 1996, establishing a voluntary negotiation period and a precontroversy discovery schedule.[3] 61 FR 29573 (June 11, 1996). The schedule was vacated on September 19, 1996, at the request of certain copyright owner parties, Order in Docket No. 96–3 CARP SRA (September 19, 1996), and rescheduled on October 29, 1996. Order in Docket No. 96–3 CARP SRA (October 29, 1996). The CARP was convened on March 3, 1997.

The following parties submitted written direct cases to the CARP: (1) Joint Sports Claimants (''JSC''), representing national sports associations including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association; (2) the Public Broadcasting Service (''PBS''); (3) the Commercial Network Claimants (''Commercial Networks''), representing the National Broadcasting Co., Inc., Capital Cities/ABC, Inc. and CBS, Inc.; (4) the Broadcaster Claimants Group (''Broadcaster Claimants Group''), representing certain commercial television stations whose signals are retransmitted by satellite carriers; (5) the Program Supplier Claimants (''Program Suppliers''), representing various copyright owners of motion pictures, television series and specials; (6) the Music Claimants (''Music Claimants''), representing the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.; (7) the Devotional Claimants (''Devotional Claimants''), representing various copyright owners of religious programming; (8) the Satellite Broadcasting & Communications Association (''SBCA''), representing AlphaStar Television, Inc., BosCom, Inc., Consumer Satellite Systems, DirecTV, Inc., EchoStar Communications Corp., Netlink USA, PrimeStar Partners L.P., Prime Time 24 Joint Venture, Southern Satellite Systems, Inc., and Superstar Satellite Entertainment; and (9) American Sky Broadcasting L.L.C. (''ASkyB'').

[3] The voluntary negotiation period proved unsuccessful as no agreements were reached.

The CARP held oral hearings on the written cases and evidence, and oral argument on the proposed findings of fact and conclusions of law. The CARP submitted its report to the Librarian on August 29, 1997.

The CARP concluded that rates for both networks signals and superstations should be adjusted upwards to 27 cents per subscriber per month. In addition, the Panel determined that no royalty fee should be paid for the retransmission of superstations within the superstations' local markets, and that it had no authority to set a royalty rate for retransmissions of network signals within their local markets. The Panel recommended July 1, 1997, as the effective date for the new rates.

Section 802(f) of the Copyright Act provides that [w]ithin 60 days after receiving the report of a copyright arbitration royalty panel * * *, the Librarian of Congress, upon the recommendation of the Register of Copyrights shall adopt or reject the determination of the panel.'' 17 U.S.C. 802(f). Today's order of the Librarian fulfills this statutory obligation.

V. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his narrow scope of review of CARP determinations. See 52 FR 6558 (February 12, 1997) (DART distribution order); 61 FR 55653 (October 26, 1996) (cable distribution order). The salient points regarding the scope of review, however, merit repeating.

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: the Librarian and the Court of Appeals for the District of Columbia Circuit. Section 802(f) directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination ''after full examination of the record created in the arbitration proceeding.'' *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP ''unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title.'' Neither the Reform Act nor its legislative history indicates what is meant specifically by ''arbitrary,'' but there is no reason to conclude that the use of the term is any different than the ''arbitrary'' standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the caselaw applying the APA ''arbitrary'' standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

(1) Relies on factors that Congress did not intend it to consider;

(2) Fails to consider entirely an important aspect of the problem that it was solving;

(3) Offers an explanation for its decision that runs counter to the evidence presented before it;

(4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

(5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

(6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Manufacturers Ass'n v. *State Farm Mutual Insurance Co.,* 463 U.S. 29 (1983); *Celcom Comm. Corp.* v. *FCC,* 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp* v. *FAA,* 758 F2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is ''arbitrary,'' prior decisions of the courts reviewing the determinations of the former Copyright Royalty Tribunal have been consulted. The decisions of the Tribunal were reviewed under the ''arbitrary and capricious'' standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: provided that the Tribunal adequately articulated the reasons for its decision, specific determinations were granted a relatively wide ''zone of reasonableness.'' See *National Ass'n of Broadcasters* v. *CRT,* 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network* v. *CRT,* 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Ass'n* v. *CRT,* 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Ass'n of America* v. *CRT,* 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

> To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a ''zone of reasonableness.''

Recording Industry Ass'n of America v. *CRT,* 662 F.2d 1, 9 (D.C. Cir. 1981). Because the Librarian is reviewing the CARP decision under the same ''arbitrary'' standard used by the courts to review the Tribunal, he must be presented with a detailed rational analysis of the CARP's decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a ''clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress.'' H.R. Rep. No. 103–286, 103 Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the CARP must ''weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully.'' *National Cable Television Ass'n* v. *CRT,* 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by ''attempt[ing] to distinguished apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record.'' *Christian Broadcasting Network, Inc.* v. *CRT,* 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

VI. Review of the CARP Report

Section 251.55(a) of the rules provides that ''[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination. 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

The following parties filed petitions to modify: SBCA, EchoStar Communications Corp. (''EchoStar''), and commercial Networks. Replies were filed by JSC, Broadcaster Claimants Group, PBS, Program Suppliers, Commercial Networks, Music Claimants and Devotional Claimants (collectively, ''Copyright Owners''), PBS, JSC and Broadcaster Claimants Group (collective, ''Certain Copyright Owners''), and EchoStar.

Satellite carriers oppose the decision of the CARP, while copyright owners are generally supportive of it. SBCA offers numerous reasons why, in its view, the Panel's decision is arbitrary and contrary to law. EchoStar confines its comments to the Panel's decision not to establish a royalty rate for the local retransmission of network signals by satellite carriers, and Commercial Networks request a ''clarification'' of the Panel's ruling in order to construe it to mean that the 27 cent fee for network signals applies to any local retransmission of network stations to subscribers in unserved households. Certain Copyright Owners challenge EchoStar's standing to file a § 251.55 petition to modify in this proceeding.

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the Copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must ''after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee * * *.'' 17 U.S.C. 802(f).

VII. Review and Recommendation of the Register

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this large proceeding, in the eyes of the petitioners, are areas where the Panel may have acted improperly, thereby requiring the Librarian to substitute his own determination. The law gives the Register the responsibility to make recommendations to the Librarian regarding the Panel's determination, 17 U.S.C. 802(f), and in so doing she must conduct a thorough review.

After reviewing the Panel's report and the record in this proceeding, the Register has determined that there are 6 primary aspects of the Panel's decision that warrant detailed discussion and analysis:

(1) Whether the Panel correctly interpreted and applied the statutory standard for determining royalty fees;

(2) Whether the Panel acted arbitrarily in adopting the license fees paid by cable networks as the benchmark for determining section 119 fees;

(3) Whether the Panel should have made certain adjustments in the benchmark rates it adopted;

(4) Whether it was permissible for the Panel to adopt the same rate for superstations and network signals;

(5) Whether the Panel correctly declined to adopt a royalty rate for local retransmission of network signals by satellite carriers; and

(6) Whether the Panel supplied the appropriate effective date for the newly established royalty fees.

SBCA has made additional arguments in its petition to modify as to why the Panel's decision should be set aside. These arguments, which primarily involve evaluation of the evidence and allege deficiencies in the discovery rules for CARP proceedings, are addressed at the end of this section.

A. Determination of Fair Market Value

1. Action of the Panel

A fundamental dispute between satellite carriers and copyright owners in this proceeding is the meaning of the term ''fair market value'' as used in section 119(c)(3)(D) of the Copyright Act. That section provides: [4]

In determining royalty fees under this paragraph, the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

(i) The competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

(ii) The economic impact of such fees on copyright owners and satellite carriers; and

(iii) The impact on the continued availability of secondary transmissions to the public.

17 U.S.C. 119(c)(3)(D).

The Panel examined this provision, and the legislative history, and determined that fair market value meant the prize that would be negotiated in a free market setting as compensation for the satellite carriers' right to retransmit network and superstation signals containing the copyright owners' copyrighted programming. The Panel stated that:

[T]he language, structure, and legislative history of the 1994 amendments to section 119 suggest the Panel is directed to determine actual *fair market value* and ''in determining the fair market value * * * base its decision * * *'' upon the non-exhaustive list of *considerations*. We interpret the phrase ''base its decision'' to require the Panel to *consider* each enumerated type of information but, the weight to be accorded each consideration must necessarily depend upon the quality and quantity of the evidence adduced and *its relative significance to a determination of actual fair market value*. All evidence falling within the enumerated types of information must be considered but the evidence which is more probative of *fair market value* must be accorded greater weight than less probative evidence * * *. The Panel agrees that the fair market value rate is that which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller.

Panel Report at 17 (emphasis in original).

2. Arguments of the Parties

SBCA asserts that the Panel misapprehended the meaning of ''fair market value,'' and that it should have determined the section 119 fees in accordance with what cable operators pay for distant signals under the section 111 cable compulsory license. SBCA Petition to Modify at 12. ''Fair market value is a Congressionally defined term, and thus cannot be considered under the 'traditional' sense, as urged by the [Copyright] Owners.'' *Id.* at 14. SBCA cites certain 1994 floor statements at length as evidence that Congress intended that section 119 royalty rates be set on a parity with cable rates.

DeConcini: Copyright license parity with cable is the central feature of the fair market standard articulated in this legislation. The inclusion of specific guidance to the arbitration panel to take into consideration the competitive environment in which satellite programming is distributed is essential to ensure that satellite carriers are not required to pay higher royalty fees than cable operators * * * I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value in this legislation will accomplish that objective.

* * * The fact that the Senate agrees with the House on this compromise language is due to the criteria that defines fair market value in the bill. I have long opposed the imposition of royalty fees based simply on the mechanical application of some conceptual fair market value formula * * * The arbitration panel will take steps to ensure that the royalty fees paid by satellite carriers are on par to those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value will accomplish this objective.

140 Cong. Rec. S14105, 14106 (daily ed. Oct. 4, 1994).

Brooks: In the hard-fought compromise reached on this bill, the factors to be considered under the bill's ''fair market value'' determination have been made more specific. I would note that in determining fair market value, we intend that the copyright arbitration panel consider all the factors raised by the parties, including cable rates.

140 Cong. Rec. H9270 (daily ed. Sept. 20, 1994).

Hughes: [L]egislation contemplates that the panel will look to the competitive environment in which section 119 retransmissions are distributed as well as the costs of distribution of similar signals in similar private and compulsory license marketplaces, including the cable copyright fees under section 111. This will help ensure that there is vigorous competition and diversity in the video programming distribution industry.

140 Cong. Rec. H9271 (daily ed. Sept. 20, 1994).

Synar: I am also hopeful that any fee resulting from the fair market value standard does not disadvantage the delivery of satellite transmissions vis-a-vis the delivery of cable retransmission under the section 111 compulsory license * * * It is my hope that the fees set for satellite retransmissions under the fair market value standard will, among other things, reflect the competitive environment in which those retransmissions are distributed. There is little question that Congress would like to ensure that there is vigorous competition and diversity in the distribution of video programming and the determination of fair market value fees should reflect that intent.

140 Cong. Rec. H9272 (daily ed. Sept. 20, 1994).

According to SBCA, these floor statements provide clear Congressional direction that the royalty fees for section 119 are to be either identical or substantially similar to those paid by cable operators under section111. SBCA provided testimony demonstrating that cable operators pay 9.8 cents per subscriber per month for superstations, and 2.45 cents per subscriber per month for network signals, and submits that the Librarian should adopt these rates. SBCA Petition to Modify at 18.

Copyright Owners contend that the Panel acted correctly in attributing the plain meaning to the term ''fair market value,'' and properly rejected SBCA's position that the rates paid by cable under section 111 is the governing factor in determining fair market value. Copyright Owners Reply at 12. Copyright Owners' note further that even one of SBCA's own expert witnesses, Mr. Harry Shooshan, conceded at the hearing that Congress intended to accord the conventional meaning to ''fair market value.'' *Id.*

[4] As discussed above, section 119(c)(3)(D) is the appropriate statutory provision governing the adjustment of royalty rates. Section 119(c)(3)(B), which also prescribes royalty adjustment factors, was inadvertently left in the statute after the 1994 amendments.

Copyright Owners also submit that portions of floor statements delivered at the time of passage of the 1994 Satellite Home Viewer Act are not proper legislative history and must be given little, if any, weight. *Id.* at 14–15 (citing *Overseas Educ. Ass'n, Inc.* v. *FLRA,* 876 F.2d 960 (D.C. Cir. 1989); *In the Matter of Sinclair,* 870 F.2d 1340 (7th Cir. 1989)). Rather, the text of the statute is the principle source for determining its meaning. *Id.* at 15 (citing *West Virginia Hosp.* v. *Casey,* 499 U.S. 83 (1991).

3. Recommendation of the Register

The Panel determined that the term ''fair market value'' should be accorded its plain meaning—i.e., the price a willing buyer and a willing seller would negotiate in a free marketplace—and that the economic, competitive, and programming information presented by the parties provided the evidence to determine what fair market value royalty rates would be under the satellite carrier compulsory license. The Register concludes that this decision is not arbitrary, nor is it contrary to law.

Both SBCA and Copyright Owners contend that the meaning of ''fair market value'' is a matter of statutory interpretation. Moreover, it is a well-established principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. Sutherland Stat. Const. § 46.01 (5th Ed.).

The express words of the statute charge the Panel with determining the fair market value of retransmitted broadcast signals by satellite carriers. *Id.* (plain meaning of the statute governs its interpretation). The Panel determined that ''fair market value'' meant the price that would be negotiated between a willing buyer and a willing seller in a free marketplace. Panel Report at 17. The Register determines that this is not an arbitrary interpretation of the meaning of ''fair market value,'' nor is it contrary to law. See Black's Law Dictionary 537 (5th Ed. 1989) (definition of ''fair market value'').

In the 1994 amendments Congress stated that ''[i]n determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties * * *'' 119 U.S.C. 119(c)(3)(d). Congress then included in that amendment a nonexhaustive list of the types of ''economic, competitive, and programming information'' that the Panel must consider in fashioning royalty rates that represent fair market value. That the list is nonexhaustive is significant, for there may be other types of information presented by the parties that, while not falling within one of the enumerated categories, is nevertheless relevant to the issue of what the fair market value royalty rates should be. The Panel would be responsible for considering this type of information as well, if it were relevant to determining fair market value.

The Register does not interpret the enumerated categories of ''economic, competitive, and programming information'' (for example, costs in similar private and compulsory license marketplaces) as establishing criteria that define the meaning of ''fair market value.'' To do so would, in the Register's view, run contrary to the plain meaning of the statute. Sutherland Stat. Const. § 47.07 (5th Ed.). Likewise, the Register does not see any support for the argument that one of the enumerated categories of information, such as the compulsory license fee paid by cable under 17 U.S.C. 111, must be accorded more weight than another. The House Committee Report to the 1994 amendments makes it clear that this should not be the case. See H.R. Rep. No. 703, 103d Cong., 2d Sess. 10 (1994) (''In order to aid the panel, the Committee adopted an amendment offered by Mr. Hughes directing the panel to consider economic, competitive, and programming information presented by the parties as well as the competitive environment in which such programming is distributed. This would, of course, include cable rates, but those rates are not to be a benchmark for setting rates under section 119; they are only one potentially [sic] piece of evidence in reaching the objective fair market value.''). The Register, therefore, determines that the Panel did not act arbitrarily or contrary to law in determining the meaning of fair market value.

Although the Panel determined that its plain meaning of fair market value controlled their interpretation, the Panel nevertheless consulted the legislative history to the 1994 amendments and concluded that ''[w]e find no support for the proposition that Congress did not mean what it said. The legislative history reveals no intent to attach a unique meaning to the commonly understood and well-established 'fair market value' term.'' Panel Report at 16.

A review of all floor statements offered at the time of passage of the 1994 amendments reveals considerable differences between the views of the two Chairmen and some of the members. These differences are accentuated by a later floor statement offered by Chairman Hughes when he introduced a bill that would make technical corrections to the 1994 Satellite Home Viewer Act. 140 Cong. Rec. E2290 (daily ed. November 29, 1994) (statement of Rep. Hughes).

The statement of Chairman DeConcini offers the greatest support to the argument that the rates established in this proceeding should approximate what cable pays under the cable compulsory license. 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994) (''I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators''). Representative Synar's comments suggest his desire that a satellite rate adjustment produce rates comparable to the cable compulsory license, but he does not state that application of the fair market value standard should or must produce such comparability. The statements of Representative Brooks and Hughes provide that cable compulsory license rates are one of the factors to be considered by the Panel, but they do not indicate that they are the only or controlling factor.

The Register has consulted the caselaw in determining the weight to be accorded floor statements made by Congressmen during the passage of legislation. The caselaw provides that floor statements of legislators are to be given little weight *Garcia* v. *U.S.,* 469 U.S. 70, 78, (1984); *Zuber* v. *Allen,* 396 U.S. 168, 186 (1969) (''Floor debates reflect at best the understanding of individual Congressmen''). The reasoning behind this principle was aptly described by the Federal Circuit Court for the District of Columbia:

> [I]t is necessary for judges to exercise extreme caution before concluding that statement made in floor debate, or at a hearing, or printed in a committee document may be taken as statutory gospel. Otherwise, they run the risk of reading authentic insight into remarks intended to serve quite different purposes. Furthermore, to the degree that judges are perceived as grasping any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to except * * *.

Int. Broth. of Elec. Wkrs. Loc. U. 474 v. *NLRB,* 814 F.2d 697 (D.C. Cir. 1987) (Buckley, concurring); see also *Overseas Educ. Ass'n. Inc.* v. *FLRA,* 876 F.2d 960, 975 (D.C. Cir. 1989) (''While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision'') (emphasis in original).

Of greater importance in discerning the intent of Congress, as opposed to the statements of individual Members, is the fact that Congress changed the statute in 1994. When Congress decides to change a statute, the decision to do so signifies that it intended to change the meaning. *Brewster* v. *Gage*, 280 U.S. 327, 338 (1932); *United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991); *In re Request for Assistance,* 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied sub. nom., Azar* v. *Minister of Legal Affairs,* 488 U.S. 1005 (1989). That is what occurred here. If Congress had truly intended cable compulsory license rates to govern the adjustment of fees in this proceeding, then it would not have amended the statute in1994 to provide for a fair market value determination.[5]

In sum, while floor statements by some Members indicate an intent that fair market value be determined in various ways, by looking at the statute, committee reports, floor statements and colloquies the Register does not find any special meaning or limitation attached to the term ''fair market value'' and, therefore, must rely on the plain language of the statute and the plain meaning of the term. The Panel, in the view of the Register, therefore, did not act arbitrarily, or contrary to law in its interpretation of the meaning of ''fair market value.''

B. The Cable Network Fee Benchmark

1. Action of the Panel

In order to determine fair market value royalty rates as required by section 119(c)(3)(D), the Panel considered the voluminous testimony and exhibits presented by the parties. Witnesses for PBS, JSC, the Commercial Networks, SBCA, and ASkyB sponsored economic analyses and testified as to their calculation of fair market value. The copyright owners used empirical data of license fees paid to certain cable networks by multichannel video programming distributors (principally cable operators), while satellite carriers focused primarily on the license fees paid by cable operators under section 111.

The Panel specifically endorsed the approach taken by PBS, and its principal witness, Ms. Linda McLaughlin. Using data supplied by an industry survey group,[6] Ms. McLaughlin examined the license fees paid by multichannel video programming distributors (''MVPDs'') to license the viewing rights to 12 popular basic cable networks. These networks are A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA. Ms. McLaughlin testified that these basic cable networks represented the closest alternative programming to broadcast programming for satellite homes, and that studies indicated that consumers value networks and superstations as least as highly as popular basic cable networks. Direct Testimony of Linda McLaughlin at 2–5. She then calculated a ''benchmark'' rate for these networks to be used by the Panel as representative of the fair market value of broadcast signals retransmitted by satellite carriers:

> * * * I have calculated a basic cable network benchmark price and used it to estimate a minimum compulsory license fee for satellite-retransmitted broadcast stations. The average license fee of the 12 popular basic cable networks was 18 cents in 1992—when the maximum satellite compulsory rate was 17.5 cents—and has risen to 24 cents in 1995, an annual increase of ten percent per year. The license fees for these 12 basic cable networks are forecast to increase to an average of 26 cents in 1997, 27 cents in 1998 and 28 cents in 1999. This suggests that the compulsory rate for satellite retransmitted stations should increase at least correspondingly with the average prices for basic cable networks, to an average at least 27 cents for the 1997–99 period.

Id. at 7.

The Panel endorsed Ms. McLaughlin's approach because it determined that it represented the closest model, of those presented, to a free market negotiation for satellite carriage of broadcast signals, and because it was the most conservative approach offered by the copyright owners. Panel Report at 29–30. The Panel rejected the analysis of JSC (Testimony of Mr. Larry Gerbrandt) as too narrow,[7] and the analysis of the Commercial Networks (testimony of Mr. Bruce Owen) as too speculative.[8] The Panel also rejected the analyses of SBCA and ASkyB because it determined that their analyses did not comport with the plain statutory meaning of the term ''fair market value.'' *Id.* at 29–30.

2. Arguments of the Parties

SBCA contends that cable network license fees are not an appropriate benchmark because cable networks are fundamentally different from retransmission of broadcast signals. It asserts that ''[e]xtracting an accurate, or even representative license fee per subscriber is basically impossible because multiple programming services are included within contracts, there are ceilings on aggregate license fees for MVPDs in some cases, free subscriptions in others, marketing and launch support provided by the cable networks, purchases of advertising time by the cable networks from MVPDs, and equity investments by each in the other.'' SBCA Petition to Modify at 20–21.

In reply, Copyright Owners assert that the Panel acted properly by utilizing cable networks as the benchmark of fair market value, and accepting the analysis of Ms. McLaughlin. Copyright Owners not that they wished to examine the license fees paid by satellite carriers to cable networks in particular, as opposed to the fee paid by all MVPDs in general, but SBCA refused to disclose through discovery the amounts that satellite carriers paid. Copyright Owners Reply at 17. They further note that while SBCA's witness, Mr. Jerry L. Parker, stated that a meaningful license fee could not be determined from satellite/cable network contracts, SBCA never produced the documents to support that assertion. *Id.* at 18. Copyright Owners assert that Ms. McLaughlin testified that the license fees presented by her analysis demonstrated at least the minimum amount that satellite carriers would pay for cable networks, and that her analysis offered the best evidence that was properly accepted by the Panel. *Id.*

3. Recommendation of the Register

In the Register's view, the Panel's decision to use cable network license fees as a benchmark for establishing the fair market value of section 119 rates was the product of rational decisionmaking, and its decision to use the PBS/McLaughlin approach was not improper.

Having determined that ''fair market value'' meant the price that would be paid by a willing buyer and seller in a free marketplace, it was not illogical for the Panel to give careful consideration to evidence of markets that most closely resembled the licensing of signals under section 119. In fact, section 119(c)(3)(D)(i) requires that the Panel consider ''the cost for similar signals in similar private * * * marketplaces.'' 17 U.S.C. 119(c)(3)(D).

All three of the evidentiary presentations of the copyright owners—PBS, JSC, and Commercial Networks—

---

[5] There is no question that the principal factor for determining rates under the 1988 legislation was the rates paid by cable. 17 U.S.C. 119(c)(3)(B) (1988) (the Panel ''shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station * * *.'').

[6] The data was supplied by Paul Kagan Associates, a leading information and data company in the video industry.

[7] Mr. Gerbrandt isolated the license fees paid for two basic cable networks: TNT and USA. Tr. 2025–2026.

[8] Mr. Owen used regression analysis in an attempt to demonstrate that MVPDs are willing to pay proportionally higher license fees for network signals which contain more expensive programming. Direct Testimony of Bruce Owen at 7–10.

focused upon the fees paid to cable networks by MVPDs. SBCA's evidence of fair market value, the cable license fees paid under section 111, was less relevant to the Panel's determination because the Panel had rejected the notion that cable fees equaled fair market value. Panel Report at 29–30. The Panel's adoption of cable network fees as the benchmark was not unqualified, however, because it stated that ''we agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters.'' *Id.* at 29. Nevertheless, the Panel ''adopt[ed] the copyright owners' *general* approach using the *most similar* free market we can observe.'' *Id.* at 30. After reviewing the record, the Register has determined that the Panel's conclusion is not ''arbitrary'' within the meaning of 17 U.S.C. 802(f).

SBCA contends that cable network fees are not a useful benchmark because the economics of cable networks are fundamentally different from those of broadcast networks and superstations. SBCA Petition to Modify at 20 (citing testimony of Mr. Harry Shooshan, Mr. John Haring and Mr. Edwin Desser). The testimony of Mr. Shooshan and Mr. Haring, in particular, suggest that there are some marked differences between the licensing of cable networks and broadcast signals. The Panel, however, took account of that. Panel Report at 29. Nevertheless, there was ample testimony that the two markets were also quite similar. Tr. 1202–04 (Mr. Robert Crandall); Tr. 1609 (Ms. McLaughlin); Tr. 1284 (Mr. Owen). The Panel weighed the evidence and accepted the copyright owners' approach using cable network fees because it was ''the *most similar* free market we can observe.'' Panel Report at 30 (emphasis in original). Because this conclusion is grounded in the record, it is not arbitrary. *National Cable Television Ass'n, Inc.* v. *CRT*, 724 F.2d 176, 189 (D.C. Cir. 1983) (decisions grounded in the record within the zone of reasonableness).

Likewise, the Panel's decision to rely on the PBS/McLaughlin testimony to establish the cable network benchmark was adequately grounded in the record. Panel Report at 18–20. Again, the Panel stated that use of cable networks was by no means flawless and, to account for this, the Panel was adopting the ''conservative'' approach offered in Ms. McLaughlin's analysis. *Id.* at 31. The Register determines that the Panel's decision to accord the PBS/McLaughlin testimony controlling weight is consistent with its determination to utilize the plain meaning of ''fair market value'' as the proper standard for setting royalty fees. Further, it is well established that using evidence of analogous markets is the best evidence in determining market price. *See National Cable Television*, 724 F.2d at 187. For these reasons, the Register determines that the Panel did not act arbitrarily or contrary to the Copyright Act.

C. Adjustments to the Cable Network Fee Benchmark

1. Adjustment to the Benchmark for Delivery Costs

a. Action of the Panel. After establishing cable network license fees, as presented by Ms. McLaughlin, as the benchmark for determining the section 119 royalty rates, the Panel examined, *inter alia*, the special features and conditions of the retransmission marketplace to determine if an upward, or downward, adjustment in the benchmark was appropriate. One of the aspects of satellite retransmission of broadcast signals that differ significantly from the transmission of cable networks involved the costs of delivering the signals to the MVPDs. The Panel found this issue, along with that of advertising inserts (discussed *infra*), as being ''among the most challenging issues for the Panel to resolve.'' Panel Report at 43.

The Panel found that the license fees charged for cable networks included the cost of delivering the cable network to the MPVD—i.e., making the signal readily available for reception by the MVPD for subsequent distribution to subscribers. *Id.* at 45. With satellite retransmission of broadcast signals, however, the satellite carriers absorb the costs of getting the broadcast signal from its geographic point of origin, and then delivering it to its subscribers. *Id.* The Panel considered whether the cost of delivering the signals should, therefore, be deducted from the benchmark.

The Panel declined to make such a deduction. The Panel found that there was no evidence presented to suggest that if satellite carriers and copyright owners negotiated in a free marketplace for the retransmission of broadcast signals, the copyright owners would offer satellite carriers a discount on license fees to accommodate delivery costs. The Panel discussed the testimony of Mr. Jerry L. Parker, an SBCA witness who offered testimony as to the history, nature and operation of the satellite industry:

> 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 [9] carriers (beyond those of HSD [10] carriers), DBS operators were unable to negotiate lower rates on that basis. Moreover, he declined to urge the Panel to set a discounted rate for DBS carriers to account for their higher costs than HSD carriers. We must similarly decline to discount the cable network benchmark to account for higher delivery costs of broadcast signals.

Panel Report at 45–46 (citations omitted).

b. Arguments of the Parties. SBCA vigorously contests the Panel's resistance to deducting delivery costs from the 27 cent benchmark figure, stating that ''it must be recognized that all cable networks that are charging and receiving 27 cents have made the necessary investment and expense in distributing the signal * * *. None of the [c]opyright [o]wners or broadcasters in this proceeding incurred this necessary expense for satellite distribution of superstations or network stations.'' SBCA Petition to Modify at 22. SBCA cites the testimony of Ms. McLaughlin, who acknowledged that broadcast stations are not responsible, and do not incur the cost of, delivering their signal to satellite carriers for subsequent retransmission. *Id.* at 22–23. SBCA submits that ''[t]he error in Ms. McLaughlin's analysis, implicitly accepted by the Panel, is that these expenses were basically the cost of the [s]atellite [c]arriers in distributing their own product.'' *Id.* at 23. SBCA asserts that the Panel understood that satellite carriers bore the cost of delivery, but then mistakenly categorized it as a ''discount'' to compensate carriers for their costs, when in fact it is a cost that must be borne by the copyright owners. *Id.* at 25–26.

SBCA submits that it demonstrated that the average delivery cost per signal, per subscriber, per month is 10 cents, and 6.5 cents for volume discounts. SBCA, therefore, contends that the 27 cent benchmark rate must be adjusted downward to between 17 and 21.5 cents. *Id.* at 23, f.n. 53.

In reply, Copyright Owners assert that SBCA mischaracterizes the transmission cost issue by suggesting that the major focus should be the structural nature of such costs, rather than whether they would result in any marketplace price adjustments. Copyright Owners Reply at 22. Copyright Owners cite Mr. Larry Gerbrandt's testimony that transmission

[9] ''DBS'' stands for Direct Broadcast Service, and is associated with high powered, high frequency direct broadcast satellite services. An example of a DBS operator is DirecTV.

[10] ''HSD'' stands for ''Home Satellite Dish,'' and typically refers to satellite providers who operate at lower frequencies than DBS providers.

costs do not yield different cable network license fees in the marketplace, and note that Mr. Jerry Parker was unable to demonstrate otherwise. *Id.* at 22–23.

c. Recommendation of the Register. The Panel discussed the issue of transmission costs quite extensively, finding that the record was devoid of credible evidence demonstrating that transmission costs of satellite carriers affected the rates negotiated between satellite carriers and cable networks. Panel Report at 45–46. The Panel expressly found that SBCA's witness. Mr. Parker, could not offer evidence of such an impact, and conceded that despite additional costs incurred by DBS carriers, DBS operators were unable to negotiate lower rates on that basis. Tr. 2528. The Panel grounded its determination in the record evidence, which is the hallmark of rational decision making. *National Cable Television Ass'n.* v. *CRT*, 724 F.2d 176 (D.C. Cir. 1983).

SBCA's discussion of transmission costs fails to focus on what impact, if any, they would have on negotiated license fees, and instead relates to which party should bear the cost. Costs can be shifted between parties in a business relationship, and SBCA asserts that their costs, when comparing delivery of broadcast signals with delivery of cable networks, must be shifted to copyright owners to prevent a windfall. However, costs can also be absorbed by a party as part and parcel of doing business, and must be when one party cannot shift the costs (or a portion thereof) to the other. Where there is no credible evidence demonstrating a party's ability to shift a cost, no change in the negotiated price should occur. The Panel found that to be the situation with transmission costs, and the Register has no grounds on which to reject that finding.

2. Adjustment to the Benchmark for Advertising Inserts

a. Action of the Panel. In addition to delivery costs, the Panel considered the issue of advertising inserts very significant. Cable networks typically grant MVPD's a certain number of time slots during the programming provided—known as advertising inserts—for the MVPDs to sell to advertisers. The monies raised from these inserts are retained by the MVPD, and can defray the cost of the license fee for the cable network approximately 8 cents per subscriber per month. Panel Report at 43–44. The Panel found, however, that because section 119(a)(4) requires satellite carriers to retransmit the signals of broadcast stations intact, they do not receive any advertising inserts for the retransmission of broadcast signals. *Id.* at 44. The Panel considered whether this should result in a downward adjustment of the benchmark rate.

The Panel declined to make an adjustment:

> [T]he 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. Moreover, multichannel distributors *appear* to pay the same cable network license fee regardless of whether they insert advertising.
>
> 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 [sic] ability to insert, affects the prices that cable networks charge. 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. 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.

Panel Report at 44–45 (citations omitted).

b. Arguments of the Parties. SBCA alleges that the Panel ''completely misconceived the adjustment necessary to reflect the value for insertable advertising.'' SBCA Petition to Modify at 26. They note that the arbitration panel in the 1992 rate adjustment made a downward adjustment for advertising inserts. 57 FR 19058 (May 1, 1992). SBCA asserts that the ''value of insertable advertising is significant,'' and that its value is ''no less than 7.5 cents'' per subscriber per month. *Id.* at 27.

As a ''variation'' on the advertising insert issue, SBCA offers that the increased national exposure of broadcast stations offered by satellite retransmissions increases the amount of revenue that copyright owners receive for the advertising slots that they retain. *Id.* at 28. SBCA submits that the Panel should have further adjusted downward for this value, and argues that it could not quantify the value because the necessary information was in the possession of the copyright owners who were not required to disclose it through the CARP discovery rules.[11]

In reply, Copyright Owners assert that the Panel fully considered the arguments of SBCA, and correctly rejected any downward adjustments for advertising inserts. Copyright Owners Reply at 23–24.

c. Recommendation of the Register. The Panel fully discussed what effect, if any, advertising inserts might have on the negotiated fee for retransmission of broadcast signals. Panel Report at 43–45. The Panel cited the testimony of Ms. McLaughlin and Mr. Gerbrandt that ''based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers ability [sic] to insert, affects the prices that cable networks charge * * *. The satellite carriers allowed this testimony to stand essentially unrefuted. Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined.'' *Id.* at 44. SBCA did not offer any testimony which incontrovertibly rebuts the testimony of Ms. McLaughlin and Mr. Gerbrandt. Consequently, the Panel's determination that no adjustment should be made is not arbitrary because it is grounded in the record.

D. Equality Between Superstation and Network Signal Rates

1. Action of the Panel

As discussed above, Congress established different royalty rates for superstation and network signals when it created the section 119 license. The initial rate for superstations was 12 cents per subscriber per month, and 3 cents per subscriber per month for network signals. This 4 to 1 ratio reflected the payment of royalties under the section 111 license. Under section 111, only copyright owners of nonnetwork programming are allowed to share in the royalty funds. Cable operators pay full value for retransmitting independent broadcast stations (of which superstations are a subset), and only one-quarter value for retransmission of network signals. 17 U.S.C. 11(f). The one-quarter value reflects Congress' determination in 1976 that approximately 25 percent of the programming on network signals is compensable nonnetwork programming, while the remainder is not. Congress

[11] SBCA alleges throughout its Petition to Modify that the CARP discovery rules, and particularly the Panel's application of the rule, precluded it from obtaining vital information from copyright owners to support its case, which resulted in negative inferences by the Panel as to the sufficiency of its presentation. This argument is addressed, *infra* in subsection G.

carried over this 4 to 1 ratio in the 1988 Satellite Home Viewer Act when it set the 12 cent and 3 cent rates in the statute.

The 1992 arbitration panel that adjusted the section 119 rates took into account the 4 to 1 ratio, but found that the amount of network programming on network stations had declined to approximately 50 percent, down from the 75 percent contemplated by section 111. That panel, however, set the network station rate at 6 cents, which represented roughly a 3 to 1 ratio to the superstation rate it set, because it was concerned with disruption in the satellite industry of carriage of network signals if it established a network signal rate at half (a 2 to 1 ratio) that of the superstation rate. 57 FR 19052, 19060 (May 1, 1992). The Copyright Royalty Tribunal, in reviewing the panel's decision on this matter, stated that:

> The Tribunal believes that the Panel was not bound by either a 4:1 ratio or a 1:1 ratio. When the Tribunal issued its declaratory ruling concerning network copyright owners, we did not intend to prejudge any future ratesetting. We noted that in cable and satellite, the pay-in may not necessarily correlate to the pay-out. Therefore, a 1:1 ratio is not required. However, we do believe the Panel had the authority to take our declaratory ruling into account, so that it was entitled to adjust the 4:1 ratio downward to reflect that network copyright owners are entitled to receive satellite royalties.

Id. at 19052.

The Panel in this proceeding rejected the notion that it was required to set different royalty rates for superstations and network signals, respectively, because it was seeking the fair market value of these signals. The Panel stated:

> 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.

Panel Report at 40.

2. Arguments of the Parties

SBCA challenges the Panel's refusal to apply the 4 to 1 ratio, asserting that such ratio is binding precedent upon the Panel. SBCA Petition to Modify at 38. SBCA contends that Congress determined, under section 111, that network programming is not compensable, and carried this rationale into the rate structure of section 119. The fact that networks are allowed to share in the section 119 royalties, but not the section 111 royalties, ''does not mean that the network signals are to be paid for any differently under the satellite license than under the cable license * * *'' *Id.* at 39. Furthermore, SBCA submits that satellite carriers give added value to network signals by carrying them to unserved households who would not otherwise receive such signals. *Id.* at 41. SBCA contends that, if anything, there should be no fee for network signals. *Id.* at 40.

Finally, SBCA argues that the Panel erred by creating a 27 cent royalty rate applicable to PBS (defined under the statute as a network) because ''PBS signals are free on the satellite by law.'' *Id.* at 41. These signals, SBCA contends, cannot possibly have a market value, and there should be no royalty fee for PBS signals. *Id.*

Copyright Owners contend that the Panel correctly rejected the 4 to 1 ratio because the new law requires a determination of fair market value. Copyright Owners Reply at 32. Copyright Owners note that the binding precedent referred to by SBCA was an interpretation of the 1988 Satellite Home Viewer Act, not the 1994 Act, and that nothing in the 1994 Act requires assignment of different rates for superstation and network signals. *Id.* at 33–34.

With regard to SBCA's contention that retransmission of PBS signals should not be compensated at the 27 cent level, Copyright Owners argue that such a contention ''flies in the face of the fair market value evidence,'' and that the PBS signal available for free on the satellite is not the signal of the member stations that are at issue in this proceeding. *Id.* at 35.

3. Recommendation of the Register

The Panel did not err by rejecting the 4 to 1 ratio and adopting a network signal rate that was equal to the value of the superstation rate. The Panel correctly observed that while the 1992 arbitration panel generally followed the ratio set by Congress in the 1988 Act, the 1994 amendments changed any reliance upon a pre-set ratio by directing the Panel to determine only the fair market value for network and superstation signals. Panel Report at 40. There is not evidence in the 1994 Act, or its legislative history, that Congress intended the Panel to set a rate for network signals that is one-fourth of that for superstations (or any other ratio, for that matter) if that rate did not represent the fair market value of network signals.

SBCA asserts that the 1994 amendments contemplate a CARP establishing two rates—one for network signals, and another for superstations—thereby inferring that Congress contemplated rate differentiation (i.e. that one rate would be less than the other). Such an inference is belied by language in the House Report, however, which states that the rates set by the CARP in this proceeding ''should reflect the fair market value of satellite carriers' secondary transmissions of superstations and network stations.'' H.R. Rep. No. 703, 102d Cong., 2d Sess. 7 (1994). The statute does not require or suggest that the rate for network signals, or superstations, be set at anything less than fair market value.

There is no binding precedent that required the Panel to apply a ratio in value between network signals and superstations, and set network signal rates lower than superstation rates. The 1992 arbitration panel applied a different criterion (rates paid by cable under section 111) to determine section 119 rates, and its decision therefore does not serve as precedent for this proceeding. Furthermore, even if the 1992 arbitration were binding precedent, the final order of the Copyright Royalty Tribunal (which constituted the final agency action in that proceeding) clearly stated that no differentiation between network and superstation rates was required. 57 FR 19052 (May 1, 1992) (''The Tribunal believes the Panel was not bound by either a 4:1 ratio or a 1:1 ratio.''). The Panel, therefore, did not act arbitrarily by rejecting application of the 4 to 1 ratio.

The Register has also examined the record to determine whether, under a fair market value analysis and regardless of application of a pre-set ratio, the evidence required a differentiation in network and superstation rates. The Panel determined that there was ''no credible evidence that retransmitted network stations are worth less than retransmitted superstations.'' Panel Report at 40. It was wholly within the Panel's discretion to arrive at such a determination. SBCA presented evidence demonstrating that network viewer ratings have declined, SBCA Proposed Findings of Fact and Conclusion of Law at 39, but it did not offer evidence as to what impact such a decline had relative to superstations, nor did it quantify the difference in value between network signals and superstations under a fair market value analysis, except to insist that all signals should be free. *See* SBCA Reply Findings of Fact and Conclusions of Law at 7. The Panel, consequently, did not act arbitrarily by adopting the same royalty rate for both network signals and superstations.

Finally, SBCA argues that because the Panel failed to take account of the fact that PBS signals are free on the satellite by law, it was error to accord them the same royalty rate as other network signals.[12] Section 605(c) of the Communications Act, 47 U.S.C., prohibits encryption of programs included in the National Program Service of the Public Broadcasting Service, essentially making the National Program Service free to all satellite home dish owners. Member stations of PBS, however, are not subject to 47 U.S.C. 605(c), and satellite carriers may charge their subscribers for retransmission of these stations. Furthermore, the National Program Service is not a network signal as defined under section 119(d)(2). Member stations of PBS are network signals under section 119(d)(2). Presumably, there are PBS programs available on the National Program Service that are the same programs available from PBS stations, although no such evidence was adduced in this proceeding. There are also likely to be different programs, particularly those produced by member stations. SBCA did not quantify by how much, under a fair market value analysis, the same programs on the National Program Service and PBS stations should reduce the royalty fee for PBS stations, beyond a blanket assertion that all PBS stations should be free. SBCA Reply Findings of Fact and Conclusions of Law at 68–69. The Panel concluded that there was ''no credible evidence'' warranting a conclusion that network signals were worth less, which would include PBS stations. The Register cannot find credible evidence to the contrary, and therefore the Panel's determination must be affirmed.

E. Local Retransmission of Network Signals

1. Action of the Panel

In setting the satellite carrier compulsory license royalty rates for networks and superstations, the Panel was asked to distinguish between satellite retransmission of ''distant'' broadcast signals, and satellite retransmissions of ''local'' broadcast signals. The Panel did make this distinction, setting a royalty rate of 27 cents for distant retransmission of superstations, and zero cents for local retransmission of superstations. Panel Report at 54.

While the Panel adopted a 27 cent rate for retransmission of distant network signals, *id.*, it declined to adopt a rate for local retransmission of network signals because it determined that it lacked subject matter jurisdiction to do so. *Id.* at 48. The Panel considered section 119(a)(2)(B), which provides that the satellite compulsory license is ''limited to secondary transmissions to persons who reside in unserved households,'' and examined the section 119(d)(10) definition of an unserved household. The Panel concluded that:

> [N]etwork signals generally may not retransmitted to the local coverage area of local network signals. The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to *served* households. 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.

Panel Report at 48 (emphasis in original).

The Panel did acknowledge in a footnote that there may be ''rare instances'' where a household located within the local market of a network signal was, indeed, an unserved household within the meaning of section 119(d)(10). *Id.* at 48, f.n. 62. The Panel stated that ''[t]hese households qualify as unserved but, under section 119, ASkyB would pay the conventional 'rate for non-local signals.' '' *Id.*

2. Arguments of the Parties

EchoStar contends that the Panel committed reversible error in determining that it has no jurisdiction to set a royalty rate for local retransmission of network signals, and that the rate should be zero. EchoStar Petition to Modify at 1. According to EchoStar, the language of section 119 regarding the permissibility of local retransmission of network signals is nuclear, and the Panel should therefore have consulted the legislative history, rather than decide the matter on the basis of the statutory language. *Id.* at 7–8. EchoStar submits that the Congressional intent behind the unserved household restriction of section 119(a)(2)(B) was to protect the network-affiliate relationship from importation of distant signals of the same network, citing the recent Copyright Office Report on revision of the cable and satellite carrier compulsory licenses. *Id.* at 4. Because local retransmissions do not harm the network-affiliate relationship, EchoStar asserts that ''[i]n light of the intent behind the compulsory license, therefore, the 'unserved household' limitation should be read as not precluding such local-into-local retransmissions—a form of retransmission which required technologies not in existence at the time of the legislation.'' *Id.* at 5.

In addition, EchoStar submits that the Panel should have interpreted section 119 flexibly enough to allow local retransmission of network signals, citing *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975). *Id.* at 10. Finally, EchoStar argues that, since the section 119 license was modeled after the section 111 license, and local retransmission of network signals is permitted under section 111, the two statutes should be interpreted similarly. *Id.* at 11 (citing *Northcross* v. *Board of Education*, 412 U.S. 427 (1973).

Commercial Networks seek a clarification of the Panel's ruling on local retransmission of network signals, albeit from a completely different perspective. Commercial Networks request the Librarian to make clear that where local retransmission of a network signal does not violate the unserved household restriction (a circumstance acknowledged by the Panel likely to be rare), the rate for such retransmission is 27 cents per subscriber per month. Commercial Networks Petition to Modify at 1.

In reply, EchoStar opposes Commercial Networks position, and argues that the same rationale that the Panel used in adopting the zero rate for superstations applies with equal force to network stations that are locally retransmitted to unserved households. EchoStar Reply at 2.

Certain Copyright Owners object to EchoStar's position, and contend that EchoStar does not have standing under the rules to file a petition to modify the Librarian's decision when it was not an active party in this proceeding. Certain Copyright Owners Reply at 1. Certain Copyright Owners contend that the Panel correctly interpreted section 119 as preventing retransmission of local network signals to served households, and that the legislative history does not warrant a different conclusion. *Id.* at 3–6.

3. Recommendation of the Register

Two separate issues are presented by the local retransmission of network signals. First, there is the retransmission of a network station within that station's local market. The Panel categorized this as local retransmission to served households, and concluded that section 119 did not permit such retransmissions. Second, there is retransmission of a network station within that station's local market to subscribers who satisfy the definition of an ''unserved household'' in section

[12] PBS signals are defined as network stations under section 119(d)(2).

119(d)(10). The Panel acknowledged that such retransmissions were permissible under section 119, though likely to occur in ''rare instances,'' but was unclear as to what the proper royalty rate should be.

Local retransmission of network signals to served households presents a challenging issue. The Copyright Office declined to issue a declaratory ruling that such retransmissions are permissible, though it did not preclude addressing such a matter through a rulemaking procedure. Letter of the Acting General Counsel to William Reyner, August 15, 1996. Moreover, the Office has, in its recent report to the Senate on revision of the satellite and cable compulsory licenses, expressly endorsed the permissibility of such retransmissions, and requested Congress to ''clarify'' the statute on the matter. ''A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals,'' Report of the Register of Copyrights at xx (1997) (hereinafter ''Register's Report''). As the agency responsible for administering the Copyright Act, the Office believes that it retains the authority to conduct a rulemaking proceeding to determine the permissibility of local retransmission of network signals to served households, regardless of the Panel's determination in this proceeding.

Nevertheless, the Register must determine whether the Panel's decision that such retransmissions are not permitted under section 119 is contrary to the provisions of the Copying Act.[13] The Register reviewed the language of section 119, and its legislative history, both in the context of this proceeding, and in her report to the Senate. Such review confirmed the Register's belief that Congress simply did not consider the issue of local retransmission of network signals to served households at the time of passage of section 119, principally because the technology to make such local retransmission did not commercially exist. It is evident from the history surrounding adoption of the unserved household restriction in 1998 that adoption of the restriction was motivated by concerns expressed by network affiliate stations that importation of distant network stations affiliated with the same network would erode their over-the-air viewership. Register's Report at 103–104. This suggests that if Congress had considered the issue, it might have condoned local retransmissions to served households. On the other hand, the section 119(d)(10)(A) portion of the definition of an ''unserved household'' does not specify receipt of what network signal over-the-air triggers the prohibition in making retransmissions of network signals. The language of section 119(d)(10)(A) could easily be read to prohibit retransmission by satellite whenever the subscriber receives an over-the-air signal of Grade B intensity from any network affiliate, including the local network affiliate that the satellite carrier intends to retransmit to the subscriber. This is the position that the Panel took.

In sum, the Register determines that the law is silent on this issue. Consequently, the Register cannot unequivocally say that the Panel's decision is arbitrary or contrary to law.

The second issue is the local retransmission of network signals to unserved households. The Panel appears to have presumed that such retransmissions are permissible. Panel Report at 48. The Register determines that they are permissible, as provided by the express terms of section 119. The Panel failed to articulate what royalty rate would be applicable to such local retransmissions. It mentioned, in a footnote, that the number of unserved households within a network station's local market were likely to be few, and cited the testimony of ASkyB's witness, Preston Padden, that ASkyB would, in those instances, ''pay the conventional 'rate for non-local signals.' '' *Id.* at 48, f.n. 62 (quoting written direct testimony of Mr. Padden). The Panel did not expressly state what the rate should be for all carriers making local retransmissions of network signals to unserved households.

Commerical Networks urge that the rate for such retransmissions should be 27 cents. EchoStar[14] argues that the rate should be zero, consistent with the Panel's adopted rate for local retransmissions of superstations. To the extent that the Panel sought to impose the 27 cent rate on local retransmissions of network signals to unserved households, the Register determines that such action is arbitrary. The Register cannot find testimony in the record that supports the conclusion that local retransimssion of network signals to unserved households has a fair market value rate of 27 cents, particularly where the Panel determined that the fair market value of local retransmissions of superstations was zero. Panel Report at 52. Likewise, the record does not support a conclusion that there is any differentiation between the fair market value of local retransimssions of network signals vis-a-vis superstations. Commercial Networks do not cite any testimony to the contrary in their petition to modify.

To the extent that the Panel failed to adopt a rate for local retransmissions of network signals to unserved households, the Register determines that such action is inconsistent with its task in this proceeding, and recommends that the Librarian substitute his own determination. 17 U.S.C. 802(g). The dearth of testimony on this issue and, for that matter, the Panel's cursory discussion of it, is not surprising because local retransmission of network signals to unserved households, and served households as well, is undoubtedly an unattractive business proposition to satellite carriers. Nevertheless, the issue was before the CARP, and requires a resolution.

The Register recommends that the Librarian adopt a zero rate for local retransmissions of network signals to unserved households because the Register is persuaded that the Panel's conclusions with respect to local retransmissions of superstations are equally applicable to local retransmissions of network signals to unserved households. Panel Report at 52-53. As noted above, there is no conclusive evidence to suggest that locally retransmitted network signals are of greater fair market value than locally retransmitted superstations. Accordingly, the Register recommends adoption of a zero rate for local retransmission of network signals to unserved households.

F. Effective Date of the New Rates

1. Action of the Panel

In announcing the royalty rate of 27 cents for distant retransmission of network and superstation signals, and zero cents for local retransmission of superstations, the Panel stated that the time period for payment of the rates would be from July 1, 1997, through December 31, 1999. Panel Report at 54.

2. Arguments of the Parties

SBCA contends that the Panel acted contrary to law by setting an effective

[13] Because the Panel's decision on this point is a conclusion of law, the arbitrary standard is not applicable.

[14] The Register agrees with Copyright Owners that EchoStar lacks standing to file a petition to modify the Panel's determination, and recommends dismissal of the petition. Section 251.55(a) of the rules, 37 CFR provides that only parties to the proceeding may file petitions to modify, and makes no provision for nonparties. EchoStar, though a member of, and represented by SBCA, was not a party to this proceeding because it did not file a Notice of Intent to Participate as required by the rules. *See* 37 CFR 251.45(a).

Dismissal of EchoStar's petition, however, does not preclude consideration of the issues surrounding local retransmissions of network signals, and the Register has considered these as required by section 802(g).

date of July 1, 1997, for the new rates. SBCA states that the Panel did not have any authority to set an effective date because section 119(c)(3)(C) states that the rates become effective as set forth in the Librarian's order. SBCA Petition to Modify at 46. Further, SBCA argues that the effective date of the new rates must be prospective only. *Id.* at 47. It notes that section 119 contemplates prospective application by discussing the rates ''to be paid.'' *Id.* at 48–49 (citing section 119(c)(3)(A) and the 1988 House Report to the Satellite Home Viewer Act). SBCA argues that the caselaw prevents retroactive application of agency rulemaking unless the enabling statute expressly states otherwise, and submits that the Librarian's order in this proceeding effectively constitutes a rulemaking because the Copyright Office's rules are being amended to reflect the new rates. *Id.* at 50–51.

Additionally, SBCA argues that applying the July 1, 1997, effective date would cause substantial harm to the satellite industry. *Id.* at 55. SBCA submits affidavits of representatives of the satellite industry discussing their inability to adequately inform their subscribers on a timely basis of the rate increase, and the difficulty of adjusting distribution contracts to accommodate fee increases. *Id.* at attachment A.

Finally, SBCA takes the Librarian to task for not complying precisely with the procedural schedule established in the statute for this proceeding. Specifically, SBCA contests the Library's decision to temporarily suspend the schedule to address issues raised by ASkyB, so that the CARP was initiated on March 3, 1997, as opposed to January 1, 1997, as contemplated in section 119(c)(3)(A). SBCA argues that because the Library violated the time requirement of section 119(c)(3)(A), and such delay caused substantial harm to satellite carriers, ''the Panel's report should be invalidated on due process grounds, particularly with respect to the prejudicial effective date directly resulting from the Librarian's failure to comply with a critically important statutory requirement.'' *Id.* at 55 (citing *Baumgardner* v. *Secretary, Dept. of Housing and Urban Development,* 960 F.2d 572 (6th Cir. 1992).

Copyright Owners assert that they have interpreted section 119 from the beginning of this proceeding as requiring an effective date of July 1, 1997, for the new rates, and that SBCA never challenged that position until now, thereby estopping SBCA from raising the issue. Copyright Owners Reply at 42–43. Copyright Owners also argue that the Librarian's good cause delay in commencing this proceeding does not invalidate it, and that the cases cited by SBCA are inapposite. *Id.* at 44–45. Copyright Owners also attach an accompanying motion to strike the affidavits offered by SBCA to corroborate its argument that the July 1 effective date will cause undue hardship on satellite carriers. SBCA opposes this motion.

3. Recommendation of the Register

Section 119(c)(3)(C) provides that:

The obligation to pay the royalty fee established under a determination which—

(i) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f), or

(ii) is established by the Librarian of Congress under section 802(f) shall become effective as provided in section 802(g) or July 1, 1997, whichever is later. 17 U.S.C. 119(c)(3)(C). Clause (i) of section 119(c)(3)(C) described the situation where the Librarian adopts the decision of the CARP, while clause (ii) describes the situation where the Librarian has rejected the CARP's decision and substituted his own determination.[15] The effective date of the established rates is either July 1, 1997, or the date set pursuant to section 802(g), whichever date is later.

Section 802(g) governs judicial review of the Librarian's decision in this proceeding. The section gives ''any aggrieved party who would be bound by the [Librarian's] determination,'' 30 days in which to notice an appeal with the United States Court of Appeals for the District of Columbia Circuit. The section then provides that ''[i]f no appeal is brought within such 30-day period, the decision of the Librarian is final, and the royalty fee * * * *shall take effect as set forth in the decision*.'' (emphasis added). Section 802(g) then provides that if an appeal is taken, ''[t]he pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under section ( ) * * * 119 * * *'' Nothing else is said in section 802(g) with regard to the possible effective date of royalty rates.

SBCA and Copyright Owners strongly disagree over the effective dates of the royalty rates established in this proceeding. SBCA believes that the effective date can be no sooner than 30 days after the Librarian's decision (i.e. November 26, 1997) at which time it will be known whether or not the Librarian's decision is final, while the Copyright Owners maintain that July 1, 1997, is the proper effective date. The Register has examined the governing language of sections 119(c)(3)(C) and 802(f), and notes an incongruity with respect to the July 1, 1997, date.

Section 119(c)(3)(A) provides that this proceeding was supposed to have started on January 1, 1997. Given the 180-day arbitration period, as provided by section 802(e), the latest the Panel could have delivered its report would have been June 29, 1997. The Librarian would then have the 60-day review period in which to either accept or reject the Panel's decision, which would place the date of final agency action at no later than August 28, 1997. This is almost two months after July 1, 1997. While Congress could have contemplated the Librarian completing his review in less than 60 days, it is hard to imagine that Congress could have expected him to complete it in just one day: the time period from delivery of the Panel's report on June 29 to the issuance of the Librarian's decision on July 1, 1997. The more likely explanation is that Congress envisioned the CARP delivering its report well before—at least two months—the 180-day deadline. Only in this manner could the Librarian have issued a decision that was before July 1, 1997, thereby justifying inclusion of the language ''July 1, 1997,'' and ''whichever date is later'' in section 119(c)(3)(C).

Contrary to the assertions of the Copyright Owners, July 1, 1997, is not the statutorily prescribed effective date for the new royalty rates announced in today's decision. July 1, 1997, is only a contingency date in the event that this proceeding had ended before July 1, 1997, which it clearly did not. Rather, the Register must look to section 802(g), which provides that the effective date of the new rates is ''as set forth in the decision.'' 17 U.S.C. 802(g). The Register interprets ''decision'' to mean the decision of the Librarian, and not the decision of the CARP, since section 802(g) only refers to the decision of the Librarian. Consequently, the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding, and it was contrary to law for the Panel to announce an effective date. *See* Panel Report at 54. The Register recommends that the Librarian reject the Panel's determination of an effective date.

The remaining issue is, if the Panel had no authority to set the effective date, what is the correct effective date for the Librarian to establish? Neither the statute, nor the legislative history, offers any guidance on this point.

[15] Interestingly, the statute does not address the situation, as in this proceeding, where the Panel's decision is accepted in part and rejected in part. Subclause (ii) most likely applies to this proceeding because the Librarian has established one of the royalty rates (the rate for local retransmission of network signals to unserved households).

Copyright Owners urge the July 1, 1997 date, and submit that SBCA is estopped from arguing for a later date since SBCA did not object to Copyright Owners' request to the Panel for a July 1, 1997, effective date. Copyright Owners Reply at 43–44. The Register recommends rejecting Copyright Owners' estoppel argument because the Panel did not have authority to set the effective date, and the matter is now being properly raised before the Librarian for the first time.

Copyright Owners also contend that July 1, 1997, must be the date because the evidence it presented to the Panel, particularly the PBS/McLaughlin testimony, was premised on a July 1, 1997, date. *Id.* at 42. According to Copyright Owners, if the Librarian adopts an effective date of January 1, 1998, he would have to increase the 27 cent fee to reflect the Panel's understanding of a thirty-month effective period for the new rates. *Id.* at 42–43.

The Register recommends rejection of Copyright Owner's contention for two reasons. First, the Panel accepts Ms. McLaughlin's testimony as a general matter to establish a workable benchmark. Panel Report at 31. The Panel did not accept her testimony, and its accompanying premises and assumptions, as *the* precise analysis of what the royalty rates should be. *Id.* Furthermore, although the Panel stated that ''Ms. McLaughlin's analysis yielded a rate of $0.27 per subscriber per month averaged over the three year statutory period,'' Panel Report at 30, a July 1 effective date accounts for only half of the year, and Ms. McLaughlin did not so limit her testimony. PBS Proposed Findings of Fact and Conclusions of Law at 18–19.[16]

In the Register's view, an effective date later than July 1, 1997, does not significantly undermine the Panel's use of the 27 cent benchmark generally, or its later decision to adopt that figure specifically, nor does a later effective date require an upward adjustment.

The second, and most significant, reason for not setting the effective date at July 1, 1997, involves the issue of retroactive rulemaking. Although the Librarian's decision today involves review of the Panel's determination, it is also a final rule with respect to setting the rates. The Copyright Office has previously determined that it lacks the authority to engage in retroactive rulemaking. 54 FR 14217 (1989). The United States Court of Appeals for the District of Columbia Circuit, the only court with jurisdiction to consider an appeal of today's decision, has expressly held that the Copyright Act does not confer retroactive rulemaking authority. *Motion Picture Ass'n of America, Inc.* v. *Oman,* 696 F.2d 1154, 1156 (D.C. Cir. 1992). The Register does not believe that the Librarian has the authority to set an effective date for the new royalty rates which is prior to the issuance of today's decision.

Given this limitation, the issue still remains regarding the proper effective date. Copyright owners obviously desire an effective date as soon as possible, so that they may reap the benefits of the higher rates. There are, however, significant administrative considerations surrounding implementation of the new rates. Satellite royalty rates are calculated on a monthly basis, so that an effective date other than the first day of a month will require application of two sets of royalty rates (the old rates and the new rates) to one monthly calculation. The Register finds this not only burdensome to satellite carriers calculating the rates, but to the Copyright Office as well in administering the section 119 license and examining the statement of account. The Register, therefore, counsels against adopting an effective date that is other than the first day of a month.

Also, there are significant costs to the Copyright Office associated with implementing the new rates. New statement of account forms must be created and sent to satellite carriers, and staff must be trained to examine for application of the new rates. The Register notes that satellite statements of account for the second accounting period of 1997 are due to be filed no later than January 30, 1998. 27 CFR 201.11(c). An effective date in the second accounting period of 1997 would cause significant burden and hardship to the Copyright Office to prepare to collect royalties and issue and process statements of account generated by the new royalty fees by the January 30, 1998, due date. Consequently, the Register recommends that the new royalty rates, adopted in today's decision, not be effective until January 1, 1998.

In recommending a January 1, 1998, effective date, the Register draws support from section 119(c)(3)(C). As discussed above, Congress apparently contemplated the possibility of the issuance of a final decision in this proceeding before (perhaps even well before) July 1, 1997. Congress could have chosen simply to make the decision effective on the date of adoption, but instead chose July 1, 1997, as the later effective date. July 1 is the first day of an accounting period which, has the final decision issued on or before that date, would have allowed the Copyright Office ample time to prepare for implementation of the new rates. Because today's decision is issuing only two months from the end of the 1997/2 accounting period, a January 1, 1998, effective date is consistent with Congressional intent.

The parties have raised two other issues, discussed above, which the Register briefly addresses. First, SBCA alleges that because initiation of the CARP was delayed 2 months to enable the Librarian to rule on the matter of whether local retransmissions should be a part of this proceeding, the entire proceeding is invalid. The Register agrees with Copyright Owners that the cases cited by SBCA for this rather remarkable contention are inapposite. *United States* v. *Amdahl Corp.,* 786 F.2d 387 (Fed. Cir. 1986) involved a contract entered into by the Treasury Department that was statutorily outside the scope of its authority. Contracting outside the scope of authority differs significantly from postponing procedural dates for good cause. *Albenga* v. *Ward,* 635 F. Supp. 660 (S.D.N.Y. 1986) involved an agency that created rules beyond its authority. Again, this is significantly different. Finally, *Baumgardner* v. *Secretary, Dept. of Housing and Urban Development,* 960 F.2d 572 (6th Cir. 1992) involved the failure of an agency to timely deliver an accurate complaint. As SBCA notes, the court in this case did not find the agency action invalidated because the delay was not sufficiently prejudicial. The Register cannot find any convincing evidence of irreparable prejudice incurred by SBCA as a result of the brief delay, particularly where the Register is recommending a January 1, 1998, effective date.

Furthermore, the Register notes that the same claim of invalidity has been raised in a Copyright Royalty Tribunal proceeding, and expressly rejected by the D.C. Circuit. The Court stated: ''It would be irrational and wholly unprecedented for a court to direct an agency to scrap a year's hearings and decisionmaking effort and start over because its proceeding did not conclude precisely on time.'' *National Cable Television Ass'n, Inc.* v. *CRT,* 724 F.2d 176, 189 n. 23 (D.C. Cir. 1983). The Register agrees with this view, and recommends rejection of SBCA's argument.

Second, in support of its position that satellite carriers would be unduly harmed by a July 1, 1997, effective date, SBCA submitted affidavits of satellite

[16] Ms. McLaughlin's testimony was based upon her projection of what the average cable network license fees would be for 1997 (26 cents), 1998 (27 cents) and 1999 (28 cents), not the actual figures. *Id.* at 19.

representatives. Copyright Owners moved to strike these affidavits, and SBCA opposed. The Register's recommendation of a January 1, 1998, effective date has mooted the issue. The Register does recommend, however, that the affidavits be stricken. The record is closed in this proceeding by order of August 14, 1997, section 251.55 does not permit submission of additional evidence. Although the matter of the effective date is for the Librarian, and not the CARP, to decide, such affidavits could only be accepted if the Librarian determined that the record needed to be reopened to take additional testimony. Since the matters discussed in SBCA's affidavits are moot, the Register recommends that they be stricken.

G. Additional Issues Raised by SBCA

SBCA raises several additional issues in its Petition to Modify. Because these issues all relate to evidence not adduced during the course of the proceeding, and the weight to be accorded evidence that was adduced, they are addressed together.

1. The first issue involves the history of retransmission consent negotiations under the communications law. Under retransmission consent, an MVPD must obtain the permission of a broadcaster before the MVPD can retransmit the broadcaster's signal to the MVPD's subscribers. Retransmission consent negotiations took place between the cable industry and broadcasters in 1993 and 1996. SBCA attempted to show that little compensation was obtained by broadcasters for permission to retransmit their signals in an effort to prove that the fees under the section 111 license represent actual fair market value. The Panel stated that ''[w]e agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence. Unfortunately, the evidence adduced is so vague and replete with qualifiers as to provide little guidance.'' Panel Report at 34. The Panel noted cross-examination testimony of Ms. McLaughlin and Mr. Gerbrandt indicating that some compensation was paid, but also noted that Mr. Shooshan's and Mr. Haring's testimony discussed retransmission consent negotiations only in the context of local, and not distant, retransmissions. *Id.* at 35. The Panel concluded that the ''testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis.'' *Id.*

SBCA submits that it could not present further evidence on the compensation received by copyright owners and broadcasters for retransmission consent negotiations because ''discovery procedures do not allow the Carriers to determine those amounts.'' SBCA Petition to Modify at 35. SBCA asserts that the failure to present such information ''should not be then turned against the Carriers to say that the retransmission consent negotiations cannot be properly quantified.'' *Id.*

Copyright Owners contend that the Panel correctly evaluated the evidence of retransmission consent negotiations and found it unavailing in making an adjustment to the benchmark. Copyright Owners Reply at 27–31.

2. The second issue involves the issue of the costs incurred by cable networks in assembling the clearances for their programming. SBCA attempted to show at hearing that copyright owners do not have costs in the broadcast signal retransmission context, and therefore an appropriate downward adjustment of the benchmark must be made. The Panel stated that the clearance costs in the cable network arena are unknown, but did not agree that a downward adjustment of the benchmark was required:

> In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH[17] 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.

Panel Report at 41.

SBCA argues that it could not determine the costs to copyright owners for clearances of cable networks since such information was not within the scope of discovery, and therefore one should not assume, as the Panel did, that such costs could automatically be shifted to satellite carriers. SBCA Petition to Modify at 30.

Likewise, SBCA argues that it could not quantify at hearing the added benefit that satellite retransmission gives copyrighted programming (digital picture quality, inclusion in electronic guides) because of ''the absence of any ability to take discovery.'' *Id.* at 31–32. The Panel determined that ''no quantifiable benefit was identified and no evidence adduced'' to demonstrate added value by satellite retransmission.'' Panel Report at 40. SBCA asserts that ''the Panel held the Carriers to an unworkable standard of proof.'' SBCA Petition to Modify at 32.

In reply, Copyright Owners contend that the Panel acted correctly. Copyright Owners Reply at 24–27.

3. A third issue involves quantifying the effect on advertising revenues and superstation fees of satellite retransmissions of broadcast signals. SBCA asserts that they quantified ''as well as could be in a regime which denies discovery'' that advertising revenues are higher because copyright owners known that their programming reaches a wider audience due to satellite retransmission. SBCA Petition to Modify at 36. Likewise, SBCA asserts that ''superstation taxes''—the amounts charged to broadcasters by copyright owners—are greater, particularly in the sports context, because copyright owners know that satellite retransmissions result in greater viewership. *Id.* at 37–38. SBCA presented evidence that both the professional baseball and basketball leagues extracted additional compensation from WGN in Chicago and WTBS in Atlanta—both superstations known to be widely distributed on satellite—though the amount was not quantified. SBCA Proposed Findings of Fact and Conclusions of Law at 72–73.

The Panel addressed the potential for increased advertising revenue due to satellite retransmissions, stating:

> The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues. At their own expense and risk, the satellite carriers developed a DTH market which expands the broadcasters [sic] 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, these benefits may not be amenable to measurement and quantification. The copyright owners further argue that because most basic cable networks also advertise, to the extent that broadcasters to benefit from expanded reach, the 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). 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 an adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

Panel Report at 36–37. The Panel did not use the term ''superstation tax'' in its discussion.

[17] ''DTH'' stands for ''direct to home.''

SBCA complains that the Panel ignored its evidence of increased revenues from satellite retransmissions, and that it is ''no excuse that the [o]wners refused to divulge the extent of the compensation.'' SBCA Petition to Modify at 38. SBCA asserts that not subtracting this added value from the benchmark would result in ''vastly overcompensat[ing]'' copyright owners. *Id*.

In reply, Copyright Owners assert that the Panel correctly determined that, while such revenues might conceptually result in a downward adjustment, SBCA failed to quantify such an adjustment. Copyright Owners Reply at 31.

4. The fourth issue concerns the impact of increased royalty fees on the satellite industry and the continued availability of retransmitted broadcast signals. The Panel accepted Ms. McLaughlin's testimony that the 27 cent fee would not significantly adversely impact satellite:

> 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. She concluded that despite an increase in the compulsory license 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. Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to $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.
>
> 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.

Panel Report at 46–47 (citations omitted).

SBCA contends that the Panel had no evidence upon which to base its conclusion that a dramatic rate increase would not adversely affect satellite carriers and their subscribers. SBCA Petition to Modify at 42. Rather, SBCA asserts, the evidence, including that relied upon by Ms. McLaughlin, ''shows that satellite carriers have yet to earn a profit, especially in the DBS market, and that the C-Band market is waning.'' *Id.* SBCA notes that Ms. McLaughlin did not perform a demand elasticity analysis for increased rates, and that her testimony that the 1992 rate increase did not impact subscriptions or the number of signals carried was not based upon anything in the record. *Id.* at 42–43. SBCA also mentions that the 1992 panel reduced its initial rate increase because of a concern for disruptive impact. 57 FR 19061.

SBCA also charges that the Panel ignored its evidence regarding the disruptive impact of a rate increase. It points to the testimony of Mr. Parker who stated that there is a limit on the package rate to be charged consumers, and that satellite carriers have traditionally gone back to cable networks to demand concessions in order to keep prices down. SBCA Petition to Modify at 44. SBCA argues that any increases in the rates should be examined in light of the impact lower fees would have on copyright owners. According to SBCA, there is no evidence that suggests that the current fees of section 119 have any adverse impact on the copyright and broadcast industries. *Id.* at 45.[18]

In reply, Copyright Owners assert that it was completely within the discretion of the Panel to accord weight to Ms. McLaughlin's testimony that satellite carriers would not be adversely impacted by the increased royalty rates. Copyright Owners Reply at 36. Copyright Owners argue that Mr. Parker's testimony is nonspecific, and that the testimony of Mr. Edwin Desser and Mr. James Trautman show that satellite carriers are owned by large corporate enterprises that can well afford the proposed rate increase. *Id.* at 39–40.

Recommendation of the Register

The Register is addressing these four arguments presented by SBCA together because they contain a common thread: the absence of evidence adduced before the Panel and, where evidence was produced, the weight and sufficiency to be accorded it.

Given the limited scope of the Librarian's review in this proceeding, ''the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it.'' 61 FR 55663 (Oct. 28, 1996) (citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). In the case of the impact of a rate increase on the satellite industry, the Panel chose to accord weight to Ms. McLaughlin's testimony that her proposed rate increase would not adversely affect the satellite industry, rather than Mr. Parker's testimony. It was clearly within the Panel's discretion to do so. There is record testimony that supports the Panel's conclusion, and the Librarian's review need go no further. *Recording Industry Ass'n of America, Inc.* v. *CRT*, 662 F.2d 1, 14 (D.C. Cir. 1981) (decision must be upheld where decisionmaker's path may reasonably be discerned).

The remaining issues contested by SBCA—the impact of retransmission consent negotiations, added value from digital picture/electronic guides and avoidance of clearance costs, and increased advertiser revenue and compensation from expanded markets—predominately involve the matter of evidence not presented to the CARP. In essence, SBCA contends that if the discovery rule of 37 CFR 251.45(c)(1) were broader, if could have presented evidence to the Panel on these issues that would have caused the Panel to reduce the 27 cent royalty fee. Instead, according to SBCA, the Panel punished it for failure to present the necessary evidence to quantify the reductions, and the 27 cent rate, consequently, is unfairly high.

Section 251.45(c)(1) of the rules provides that, after the exchange of the written direct cases, a party ''may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.'' 37 CFR 251.45(c)(1). The Librarian has clarified that discovery is limited in CARP proceedings:

> Discovery in CARP proceedings is intended to produce only the documents that underlie the witness' factual assertions. It is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties.

Order in Docket No. 94–3 CARP CD 90–92, 1–2 (October 30, 1995). There are several reasons for the limited discovery practice. CARP proceedings are relatively short in duration (180 days) and, like this proceeding, begin and end according to statutorily specified deadlines. There is not sufficient time to conduct wide-ranging discovery,

[18] Regarding the economic impact of royalty fees on copyright owners, the Panel stated that ''[t]he parties devoted little hearing time to this issue.'' Panel Report at 46. The Panel did ''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 supplies.' '' *Id.* (citation omitted).

particularly where, as in the case, the litigation is quite complex and involves the technically-oriented testimony of numerous witnesses. There are also cost considerations. Broad discovery rules would considerably increase the cost of CARP proceedings, without necessarily producing a corresponding increase in the quality of the evidentiary presentations. The parties may, therefore, as of right only request documents which underlie a witness's factual assertions.

The rules do not, however, prohibit a party, once the CARP has begun, from petitioning the Panel to take discovery on an issue or issues that it believes are critical to the resolution of the proceeding. As noted above, augmentation of the record is the prerogative of the CARP, and the Panel has the discretion to decide whether or not to allow additional discovery beyond that of section 251.45(c)(1). *See* 37 C.F.R. 251.42 (CARP may waive the rules upon a showing of good cause). SBCA complains that the Panel might have reduced the royalty rates based on the issues it raised had it allowed additional discovery. Yet, SBCA never petitioned the Panel to take such discovery. The Panel cannot be faulted for not reopening the record and allowing additional discovery when it was asked to do so. *See National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922, 936–937 (D.C. Cir. 1985) (claimant failed to petition Tribunal to allow it to adduce additional evidence regarding opposing party's alleged lack of copyright ownership).

The issue remains as to whether the Panel should have reopened the record, on its own motion, and allowed SBCA to take discovery on the issues it rates: i.e. whether it was arbitrary for the Panel not to do so. In the Register's view, the Panel did not act arbitrarily. Regarding the value of retransmission consent negotiations, the Panel found that Ms. McLaughin, and Messrs. Gerbrandt, Shooshan and Harin offered testimony regarding the probative value of retransmission consent negotiations on the fair market value of retransmitted broadcast signals. Panel Report at 34–35. The Panel found this testimony to be unsupportive of the proposition that retransmission consent negotiations affected the fair market value analysis. *Id*. at 35. Because there is record evidence to support the Panel's determination, the Panel did not act arbitrarily.

With regard to the purported added value to broadcast signals by satellite retransmission in digital format, and attractive electronic guides provided the subscribers, the Panel determined that "no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value * * *." Panel Report at 40. As the Copyright Owners correctly point out, any added value from digital picture quality and electronic guides would occur for both broadcast and cable network programming. Copyright Owners Reply at 25. SBCA could have presented evidence that demonstrated that satellite carriers pay a lower fee for licensing cable networks as a result of digital picture quality and electronic guides provided by the carriers. Such evidence, if it exists, is in the sole possession of the satellite carriers. SBCA presented no such evidence. The Panel, therefore, cannot be faulted from finding no evidence to support added value from these items.

Regarding clearance costs saved by broadcasters and copyright owners from satellite retransmissions, the Panel stated:

> 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 by 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. 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 higher clearance costs on the 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.

Panel Report at 41.

SBCA contends that Copyright Owners never put on any evidence demonstrating their cost savings, and it should not therefore be presumed that clearance costs would be passed on to satellite carriers. SBCA Petition to Modify at 30. SBCA's argument, however, is one of emphasis rather than evidence. SBCA asked the Panel to quantify what the average cost *might* be, in a *hypothetical market*, for clearance costs, and how satellite carriers and broadcasters *might* allocate such costs. Not surprisingly, SBCA does not indicate what, if any evidence, would conclusively demonstrate what such costs might be, or who might bear them.[19] It is not reversible error for the Panel to reason that in a marketplace which does not exist, clearance costs might have a positive effect on the cable network benchmark, rather than a negative one.[20]

Finally, with regard to the purported increase in advertising revenues and compensation from expanding coverage of broadcast signals by satellite retransmission, the Panel found that it could not quantify any potential reductions of the cable network benchmark. Panel Report at 37. While allowing SBCA expanded discovery on these points might have assisted the Panel in quantifying a downward adjustment to the cable network benchmark, the Register cannot determine anything in the record that compelled it. Furthermore, the Panel did conclude that its choice of the "conservative" PBS/McLaughlin cable network benchmark reflected its inability to quantify any increased advertising revenues that copyright owners might receive from expanded markets through satellite retransmission. *Id*. In the Register's view, the Panel's action was the product of rational decisionmaking.

H. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the royalty rate, effective January 1, 1998, of 27 cents per subscriber per month for retransmission of any distant superstation and network signals by satellite carriers to subscribers for private home viewing.

In addition, the Register recommends that the Librarian not adopt any royalty fee for the local retransmission of superstation signals, as defined under 17 U.S.C. 119(d)(11), and for the local retransmission of a network signal, as defined under § 119(d)(11), to any subscriber residing in an unserved household, as defined in § 119(d)(10).

Finally, the Register recommends that the petition to modify the Panel's decision filed by EchoStar be dismissed, and the motion of Copyright Owners to dismiss attachment A of SBCA's petition to modify (and the

---

[19] SBCA does cite a statement of FCC Commissioner Dennis that broadcasters might have to bear these costs. SBCA Petition to Modify at 30 (citing "In re Compulsory Copyright License for Cable Retransmissions," 4 FCC Rcd. 6711 (1989) (Commissioner Dennis, concurring). However, Commissioner Dennis' statement is speculative, describing what might happen to broadcasters "in some cases," 4 FCC Rcd. at 6711, and is far from conclusive evidence.

[20] In fact, the Panel did not make any change to the benchmark for clearance costs.

accompanying argument and discussion) be granted.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the adjustment of the royalty rates for the satellite carrier compulsory license, 17 U.S.C. 119, the Librarian of Congress fully endorses and adopts here recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates for the section 119 compulsory license.

The Librarian is also dismissing the petition to modify filed by EchoStar, and is dismissing the affidavits contained in attachment A of SBCA's petition to modify, and the accompanying discussion and argument.

List of Subjects in 37 CFR Part 258

Copyright, Satellites, Television.

Final Regulation

In consideration of the foregoing, the Library of Congress amends part 258 of 37 CFR as follows:

PART 258—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

1. The authority citation for part 258 continues to read as follows:

Authority: 17 U.S.C. 702, 802.

2. Section 258.3 is revised to read as follows:

§ 258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

(a) Commencing May 1, 1992, the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 17.5 cents per subscriber per month for superstations.

(2) 14 cents per subscriber per month for superstations whose signals are syndex-proof, as defined in § 258.2.

(3) 6 cents per subscriber per month for network stations and noncommercial educational stations.

(b) Commencing January 1, 1998, the royalty fee for secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 27 cents per subscriber per month for distant superstations.

(2) 27 cents per subscriber per month for distant network stations.

(3) No royalty rate (zero) for a superstation secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11).

(4) No royalty rate (zero) for a network station secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11), to subscribers residing in unserved households, as defined in 17 U.S.C. 119(d)(10).

Dated: October 23, 1997.
So Ordered.

James H. Billington,
The Librarian of Congress.

[FR Doc. 97–28543 Filed 10–27–97; 8:45 am]
BILLING CODE 1410–33–M

DEPARTMENT OF DEFENSE

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AI69

Miscellaneous Educational Revisions

AGENCIES: Department of Defense, Department of Transportation (Coast Guard), and Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the educational assistance and educational benefit regulations of the Department of Veterans Affairs (VA). It removes a number of provisions that no longer apply or otherwise have no substantive effect, and makes other changes for the purpose of clarification.

DATES: This final rule is effective October 28, 1997.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, 202–273–7187.

SUPPLEMENTARY INFORMATION: This document affects 38 CFR part 21, subparts C, D, G, H, K, and L. It removes provisions that are obsolete, duplicative, or otherwise without substantive effect, and makes changes for the purpose of clarification. This document makes no substantive changes. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

The Department of Defense (DOD) and VA are jointly issuing this final rule insofar as it relates to the Post-Vietnam Era Educational Assistance Program (VEAP) and the Educational Assistance Test Program (EATP). These programs are funded by DOD and administered by VA. DOD, the Department of Transportation (Coast Guard), and VA are jointly issuing this final rule insofar as it relates to the Montgomery GI Bill—Selected Reserve program. This program is funded by DOD and the Coast Guard, and is administered by VA. The remainder of this final rule is issued solely by VA.

The Secretary of Defense, the Commandant of the Coast Guard, and Acting Secretary of Veterans Affairs hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule makes no substantive changes. Pursuant to 5 U.S.C. 605(b), this final rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by this final rule are 64.117, 64.120, and 64.124. This document also affects the Montgomery GI Bill—Selected Reserve program which has no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.