Public Version

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V)	Docket No. 19-CRB-0005-WR (2021-2025)

SOUNDEXCHANGE'S MOTION TO COMPEL DISCOVERY FROM THE NATIONAL ASSOCIATION OF BROADCASTERS

Pursuant to 17 U.S.C. § 801(c) and 37 C.F.R. § 351.5(b), SoundExchange, Inc. respectfully requests that the Copyright Royalty Judges compel the National Association of Broadcasters ("NAB") to collect and produce documents that are highly relevant to scrutinizing and rebutting various representations made in NAB's written direct case. Specifically, SoundExchange moves to compel the production of documents related to (a) whether the major record companies are "must haves" for any service; (b) efforts by broadcasters to obtain direct licenses from independent labels; and (c) documents from non-participant broadcasters that NAB has directly put into issue through its written direct testimony.[1]

For ease of reference, these requests for production ("RFP") and interrogatories are reproduced in the text of this motion. They are also reproduced, alongside NAB's responses and objections, in the attached Exhibits A, B, C and D. The parties have met and conferred about NAB's obligation to produce the requested information but have been unable to resolve the matters

[1] SoundExchange provided NAB with notice that it reserves the right to challenge the sufficiency of NAB's productions, once they are completed. *See Order Denying, Without Prejudice, SoundExchange's Motion to Compel the Services' Production of Certain Documents* at 2-3, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Sept. 13, 2016) ("*SDARS III*").

discussed below. 37 C.F.R. § 351.5(b). *See* Declaration of Previn Warren ¶¶ 6-12 ("Warren Decl.").

ARGUMENT

I. The Judges Should Order NAB to Produce Documents from Commonwealth Broadcasting, Which Are Directly Related to the Testimony of Commonwealth Broadcasting's CEO.

SoundExchange has requested that NAB produce documents from NAB member Commonwealth Broadcasting Corporation ("Commonwealth"), to the same extent it is collecting and producing from other participants and witnesses such as iHeart. NAB has offered no reason why Commonwealth should be excluded from its collection and production of documents, other than the ipse dixit that doing so would be "unduly burdensome." But any discovery burden created by SoundExchange's requests is a direct function of NAB's decision to submit written direct testimony from Mr. Newberry—*the CEO of Commonwealth*. Not surprisingly given his title, Mr. Newberry's testimony discusses Commonwealth in numerous places. *See* Newberry WDT ¶¶ 18, 26. For example, Mr. Newberry relies on his experience at Commonwealth in explaining why and to what extent that broadcaster offered a simulcast stream:

> During my time at Commonwealth Broadcasting, we provided streaming as a platform for the same audience to hear the same content that is broadcast over-the-air from our terrestrial station. This is in sharp contrast to other music services like Pandora that stream to reach new listeners, regardless of local market. At Commonwealth Broadcasting, we wanted to make it possible for the same over-the-air listeners to hear our stations over the Internet if they wanted to. Although the main way we reached our listeners was with our over-the-air broadcasts, streaming offered a secondary way to reach them and extend the same local, public service benefits and programming.

Newberry WDT ¶ 18. Elsewhere, Mr. Newberry relies on his work with Commonwealth to explain why he believes simulcasting has the same promotional value as terrestrial broadcasting:

> *Over the course of my career*, I have not encountered any evidence to suggest that record labels value simulcast streaming less than over-the-air broadcasting in terms of its promotional value. For example, no artist or recording label has asked *my program directors* to play their song on the radio but not on the simulcast stream. In fact, based on

> my interactions with record labels and artists, they simply treat streaming as an extension of the over-the-air broadcast. *As a broadcaster*, I share this view because the content on radio stations' streams generally is the same as that on the over-the-air broadcast, which means that radio's promotional value extends to the stream and inures to the benefit of record labels and artists.

Newberry WDT ¶ 24 (emphasis added). And still elsewhere, Mr. Newberry relies on his experience at Commonwealth to explain why simulcasting streams "rarely result in a profit": "In fact, when I was at Commonwealth Broadcasting, on a daily basis we only streamed two of our ten music stations, both at a loss." Newberry WDT ¶ 26.

NAB has claimed in meet and confers that it offers the testimony of Mr. Newberry in his capacity as the Vice President for Strategic Planning/Industry Affairs at NAB, and not "on behalf of Commonwealth." That fiction ignores the fact that Mr. Newberry expressly relies on his experience at Commonwealth in the above-referenced testimony. It also ignores the dispositive fact that, in addition to offering new testimony from Mr. Newberry, NAB has designated Mr. Newberry's testimony from *Web IV*—in which he expressly testifies as "the President and Chief Executive Officer of Commonwealth Broadcasting Corporation," and "based on my long experience in the radio business as well as my personal involvement in the operation of Commonwealth." Newberry Designated WDT ¶ 1.

No CRB precedent supports NAB's position that Commonwealth can be shielded from discovery simply because its CEO has offered testimony "on behalf of" another entity (or, less plausibly still, in his capacity as CEO but only in his designated testimony). Warren Decl. ¶ 7. Indeed, in *Web IV* the Judges reached the opposite conclusion. There, iHeart had offered testimony from one David Pakman, who supported his opinion "in part, by reference to investment decisions made by Venrock, the venture capital company of which he is a principal." *Order Granting SoundExchange's Motion to Compel iHeartMedia to Produce Documents Related to the Testimony of David Pakman* at 3, Docket No. 14-CRB-0001-WR (2016-20) (Jan. 15, 2015) ("*Web IV*

Discovery Order 7"). iHeart attempted to argue that "documentary evidence of those very investment decisions are outside the proper scope of discovery because Venrock is not a participant in this proceeding." *Id.* The Judges rejected this position, holding that "iHeart cannot have it both ways. Once iHeart designated Mr. Pakman as a witness, SoundExchange became entitled to seek from iHeart documentary evidence that may support or undermine Mr. Pakman's testimony. SoundExchange properly directed its document request to iHeart, an opposing participant in this proceeding. The onus is on iHeart to obtain Venrock's and Mr. Pakman's cooperation in producing those documents." *Id.*

For the same reasons the Judges articulated during *Web IV*, NAB should be directed to obtain Commonwealth's cooperation in collecting and producing documents responsive to SoundExchange's requests for production.

II. The Judges Should Order NAB to Produce Documents Concerning the "Must Have Status" of the Major Record Companies.

In order to scrutinize and rebut NAB's direct case, SoundExchange has requested that NAB produce documents evaluating the market power of the major record labels, including documents concerning those labels' "must have" status or complementary oligopoly power in the markets for simulcasting, radio, and custom radio services. Specifically, SoundExchange moves to compel NAB's production of documents in responses to these requests:

- **RFP 64**: "All documents evaluating the market power of the major record companies in the market for simulcasting or radio, including but not limited to all documents concerning or related to the must have status or complementary oligopoly power of the major record labels in the market."

- **Unnumbered RFP**: "All documents evaluating the market power of the major record companies in the market for custom radio services, including but not limited to all documents concerning or related to the must have status or complementary oligopoly power of the major record labels in that market."

See Ex. A at 14. NAB's objections to the contrary, the documents sought by these requests are "directly related to the written direct statement" of Dr. Gregory Leonard, NAB's economic expert. 37 C.F.R. § 351.5(b). Indeed, they are material to both Dr. Leonard's opportunity cost and benchmarking analyses.

Dr. Leonard proposes an opportunity cost framework as an "approach to determining the appropriate royalty" that broadcasters should pay SoundExchange. Leonard WDT ¶ 99. In the course of computing the major labels' opportunity cost of licensing to noninteractive webcasters, Dr. Leonard makes an explicit adjustment "to account for" the major labels' "complementary oligopoly power." *Id.* ¶ 101. Dr. Leonard explains the labels' market power as follows:

> Complementary oligopoly power arises when each of the major labels, and perhaps some independent labels, is a "must have" from the point of view of the service. A label is a "must have" for a service if the service would be substantially negatively impacted, and perhaps not viable, if it was denied access to the label's sound recordings. If the majors are "must haves," but the resulting complementarity is not internalized by each major, they each would have the incentive to charge a royalty to the service that is too high from the perspective of economic efficiency (or even from the perspective of their joint profit maximization).

Id. ¶ 22. Given this "must have" status of the major record companies, Dr. Leonard applies a 12% "steering discount" to his opportunity cost calculation, which he imports from the Judges' determination in *Web IV*. *Id.* ¶ 115. Dr. Leonard's opportunity cost calculations, and in particular his steering adjustment, put at issue whether the major record companies are indeed "must haves" from the perspective of the noninteractive webcasters. *See id.* ¶¶ 101, 115.

Dr. Leonard's benchmarking approach is equally replete with references to the major labels' "complementary oligopoly power." *See* Leonard WDT ¶¶ 61, 65, 72, 77, 79. Dr. Leonard asserts that direct licenses between iHeart and certain independent labels are uniquely suitable as benchmarks because "independent labels likely have less complementary oligopoly power than the major labels." *Id.* ¶ 65. Leonard contrasts such licenses with agreements between Spotify and

the major record labels, a benchmark Dr. Leonard argues should be adjusted downward to account for "the exercise of label complementary oligopoly power." *Id.* ¶¶ 77, 79.

The documents sought by the above-referenced RFPs are plainly and directly relevant to evaluating the logic of the adjustments that Dr. Leonard proposes and the accuracy of the assertions about label market power on which they are in part predicated. Notably, whether and to what extent the major record labels have "complementary oligopoly power" vis-à-vis noninteractive webcasters is an issue disputed *by one of the Services*, highlighting the centrality of this issue to the proceeding as a whole. *See* Shapiro WDT at 14 ("Assuming in this proceeding that the major record companies are 'must-have' for non-interactive streaming services would not be justified.").

Because NAB has no credible argument against the direct relevance of the documents sought by these requests, it falls back on a specious assertion that "the term 'market' is vague, ambiguous, calls for a legal conclusion, or reflects a characterization by SoundExchange." *See* Ex. C at 51-52. That is not the case. In context, it is obvious that the word "market" in these requests refers to what the CRB has called the "upstream market," meaning the market in which the owners and controllers of copyrights in sound recordings (i.e. record companies) license certain rights to the distributors of sound recordings (i.e. digital music services). Determination at 39 n.69, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Mar. 4, 2016); *see* Shapiro WDT at 5 ("The target market for this proceeding is the (upstream) market for the licensing of recorded music to non-interactive streaming services."); *see also* Leonard WDT ¶ 35. Nor can NAB credibly claim that this request is "economically incoherent," whatever that is supposed to mean. Ex. C at 51-52. The request relies on phrases and concepts ("market power," "must have status," "complementary oligopoly power") that are familiar to these proceedings and, indeed, that NAB's own expert utilizes. *See* Leonard WDT ¶ 23 ("An additional dimension of effective competition is whether

any labels possess unilateral market power."); *id.* ¶ 22 ("Complementary oligopoly power arises when each of the major labels, and perhaps some independent labels, is a 'must have' from the point of view of the service.").

In short, RFP 64 and the Unnumbered RFP are clear and seek directly relevant documents. In order for SoundExchange to fully evaluate the wisdom of the "steering discount" Dr. Leonard applies to his opportunity cost analysis, and in order to evaluate whether any of his benchmark agreements should in fact be adjusted to account for label market power, NAB should be required to produce "documents evaluating the market power of the major record companies" in the markets for simulcasting, terrestrial radio, and custom radio services—including documents "related to the must have status or complementary oligopoly power of the major record labels" in those markets. *See* Exhibit A, RFP 64, Unnumbered RFP.

III. The Judges Should Order NAB to Respond to SoundExchange's Requests Related to Broadcasters' Effort to Obtain Direct Licenses from Labels.

In order to evaluate NAB's direct case, SoundExchange has requested that NAB produce documents related to efforts by certain broadcasters to negotiate and secure direct licenses with independent record labels. These documents are directly related to, and fundamentally necessary to assess, Dr. Leonard's benchmarking approach.

Dr. Leonard bases his benchmarking analysis on iHeart's "direct deals with numerous independent labels." Leonard WDT ¶ 63. But Dr. Leonard considers only 15 licenses with "indies that chose to renew their agreements with iHeart." *Id.* Dr. Leonard expressly refuses to consider agreements that did *not* renew, and he dismisses as "not useful comparables" a variety of specific agreements—including "an iHeart-Warner agreement, an Entercom-Big Machine agreement, an Entercom-Glassnote agreement, and a Beasley-Big Machine agreement." *Id.* ¶ 92. As a result,

the subset of agreements Dr. Leonard is willing to consider as "useful" amounts to only [ ] of the simulcast market.[2] *Id.* ¶ 72.

SoundExchange has requested documents that will shed light on whether Dr. Leonard was right or wrong to simply dismiss out of hand the aforementioned direct licenses. The requested documents would answer numerous questions teed up by Dr. Leonard's testimony. How many independent labels did iHeart approach about a direct license—and how many of those labels refused? Has Dr. Leonard cherry-picked his benchmark, for instance by considering only the 15 labels that said "yes" and not the unknown and potentially large number of labels that said "no"? Has Dr. Leonard even considered all of the licenses that renewed, or are there others that he simply failed to mention (and perhaps was never told about)?

NAB's view appears to be that SoundExchange is not entitled to discovery into any of these questions, because while Dr. Leonard *referenced* licenses other than the 15 he selected for his benchmark, he decided against *relying* on these. But if that interpretation of 37 C.F.R. § 351.5(b)'s "directly related" standard were accepted, then a participant would be able to gerrymander out of the scope of discovery any evidence harmful to its case. Fortunately, the Judges have considered and rejected NAB's pinched view. As the Judges have explained, "[a] document need not be specifically relied upon or referenced in a participant's written direct statement to be 'directly related' to it; documents that are related to a topic that a participant has put 'in issue' or made 'a part of its case' in its written testimony may also be 'directly related.'" *Web IV Discovery Order*

[2] In *SDARS III*, the Judges considered a benchmarking approach advanced by Sirius XM that relied on agreements covering a similar portion of the satellite radio market— "6.4% of the tracks on the Sirius XM playlists." Initial Determination at 82, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Dec. 14, 2017). The Judges rejected that approach, noting that these direct licenses "cover[ed] only a small portion of the sound recordings on Sirius XM's playlists" and therefore that the Judges "do not accept Sirius XM's direct licenses as sufficiently probative of the relevant market to accept them as a meaningful benchmark." *Id.* at 83.

7 at 2-3 (quoting *Order Granting in Part and Denying in Part SoundExchange's Motion to Compel Music Choice to Produce Documents and Respond to Interrogatories*, Docket No. 2011-1 CRB PSS/Satellite II (Aug. 8, 2012)).

SoundExchange does not know the identity of labels that were approached but did not execute a direct license with broadcasters. Because that information is not otherwise available to SoundExchange, and because it is directly relevant to assessing whether Dr. Leonard cherry-picked his benchmark, NAB should be compelled to answer the following interrogatory:

- **Interrogatory No. 6**: "For the period beginning with the inception of iHeart's direct license campaign in 2012 and through the present, identify any record company, distributor, representative, or other copyright owner that iHeart has approached, discussed, or otherwise communicated with about the possibility of executing a direct license for any type of transmission (including, but not limited to, internet simulcasts, custom webcasts, standard webcasts, and terrestrial broadcasts)."

See Ex. B. Again, this information is needed to assess whether iHeart's licenses with the 15 "renewal" indies can fairly be considered representative of the market, or whether they are outliers given the decision by potentially many other labels (comprising a greater share of the market) to reject the same terms.

In addition, documents related to direct licenses between independent labels and NAB members Entercom Communications Corporation ("Entercom") and Beasley Media Group ("Beasley") are necessary to evaluate the validity of Dr. Leonard's choice to not consider these agreements as part of his benchmarking analysis. By refusing to consider these direct licenses—which may contain different terms and, indeed, higher effective royalty rates—Dr. Leonard has put them at issue in this proceeding. NAB should be required to collect and produce from Entercom and Beasley in response to the following RFPs:

- **RFP 13**: "Documents sufficient to show the market share associated with Direct Licenses, including the percentage of plays on each Service Type that are of directly

licensed sound recordings, including documents relating to the calculations described in Paragraph 72 of the Written Direct Testimony of Gregory K. Leonard."

- **RFP 17**: "All documents and communications related to potential benefits to a sound recording copyright owner or distributor, or a representative thereof, of entering into a Direct License. *See, e.g.*, Paragraphs 65, 75 of the Written Direct Testimony of Gregory K. Leonard."

- **RFP 18**: "A list of all copyright owners, record companies, artists or composers that have signed Direct Licenses, or documents sufficient to show the same."

- **RFP 19**: "A list of all copyright owners, record companies, artists or composers contacted, either in writing or otherwise, about Direct Licenses or potential Direct Licenses, or documents sufficient to show the same."

- **RFP 20**: "All Direct Licenses currently in effect."

- **RFP 21**: "Documents sufficient to show: a. Royalties accrued and paid under the Direct Licenses by licensor and Service Type, on a monthly basis. b. Cost savings that the NAB entities achieved on an annual basis as a result of entering into Direct Licenses."

- **RFP 23**: "All performance projections and analyses of Direct Licenses, including but not limited to projections or analyses concerning (a) the total number of expected plays or performances of sound recordings covered by Direct Licenses, (b) the total amount of royalties payable for plays or performances covered by Direct Licenses, or (c) cost savings generated by Direct Licenses."

- **RFP 25**: "All reports, memoranda, communications, presentations, spreadsheets, or other documents discussing, analyzing or tracking the status of your Direct License activities."

- **RFP 26**: "For each copyright owner, record company, artist or composer that entered into a Direct License, information sufficient to show on a monthly basis the number of times its recordings were played on a NAB entity's terrestrial radio service, simulcast service, and custom radio service in the two years before the original Direct License was executed and in the time after the original Direct License was executed."

- **RFP 27**: "For each copyright owner, record company, artist or composer that has entered into a Direct License, all documents constituting reports provided to the licensor by the NAB entity pursuant to the terms of the Direct License, including but not limited to reports of use, statements of account, and payment histories."

- **RFP 29**: "All documents discussing, identifying, analyzing, or otherwise related to or concerned with a licensor or potential licensor's basis, motivation, or potential basis or motivation for executing a Direct License."

- **RFP 30**: "All documents discussing, analyzing, concerning, or otherwise related to Entercom's potential renewals with Big Machine and Glassnote, including but not limited to documents indicating that Entercom was not a willing buyer with respect to those renewals."[3]

- **RFP 32**: "All documents related to your ability or efforts to steer, including but not limited to documents related to the existence, consideration or implementation of any policy or practice of steering towards sound recordings covered by Direct Licenses and/or lower royalty bearing sound recordings."

- **RFP 33**: "The most current version of any document used by NAB to track the status of any Direct Licenses that the NAB Services are negotiating or have entered into, including any such documents maintained by NAB itself or the NAB Services."

See Ex. A. Again, Dr. Leonard's decision not to rely on the Entercom-Big Machine, Entercom-Glassnote, and Beasley-Big Machine agreements does not foreclose the possibility of discovery into those licenses. Dr. Leonard has put those licenses "in issue" by excising them from his analysis. *Web IV Discovery Order 7* at 2-3; Leonard WDT ¶ 92.

Finally, Dr. Leonard has made the *reasons* certain labels entered into direct licenses a central part of his benchmarking analysis. Dr. Leonard and other NAB witnesses suggest that the labels who renewed their licenses did so because steering was implicitly or explicitly promised. Specifically, Dr. Leonard asserts that, "[b]y agreeing to a lower rate, a label licensor gives iHeart an incentive to play more of its sound recordings," which "is the result of competition, and thus is a factor that should be taken into account when determining the appropriate royalty under the WBWS standard." Leonard WDT ¶ 75. Further, "the independent labels could have refused to agree to renew the agreements and received higher per play royalties under the statutory rates, suggesting an understanding that iHeart could and perhaps was steering toward the labels' recordings or that licensing iHeart offers other (e.g. promotional) benefits for the labels." *Id.* ¶ 65;

[3] SoundExchange has agreed that Beasley need not produce in response to this particular RFP.

see also Williams WDT ¶¶ 18, 21-23 (discussing the motivations of record labels to enter direct licenses).

Dr. Leonard's discussion presents a host of questions that can be resolved only by analyzing contemporaneous communications concerning negotiations between the licensors and licensees. SoundExchange is entitled to test Dr. Leonard's assertions about steering by understanding exactly what promises were made, not made, accepted, and rejected in the course of broadcasters' negotiation with labels (whether or not those labels wound up becoming direct licensors). Did the labels in fact expect to receive steering on iHeart? Was the promise of increased plays even made? Did iHeart understand itself to be offering "steering" or do internal documents reveal the opposite? Were other benefits extended that might have had more value to the licensors (for instance, consideration outside of the statutory license such as the labels' ability to avoid the SoundExchange administrative fee)?[4] Did the broadcasters attempt to quantify such benefits and share such analysis with the labels? Did each label know it was entitled to royalties under the statutory license absent a deal with iHeart?

The best and, indeed, only real way to answer these questions is to see the underlying negotiation documents. As such, NAB should be compelled to collect and produce without limitation in response to the following RFP:

- **RFP 28**: "For the time period January 1, 2012 through the present, all documents related to the negotiation of a Direct License or the renewal of a Direct License—including but not limited to (a) all drafts of licenses, (b) all internal email, and (c) all emails exchanged with record companies, distributors, representatives, or other content owners—regardless of whether or not the Direct License or renewal was executed."

[4] *See SDARS III* at 82-83 (noting that Sirius XM's "endorsement of direct license as a benchmark ignored the difficulties inherent in determining the effective royalty rates the parties negotiated" because of "consideration in [direct] licenses that is properly attributed to elements that are unavailable under the compulsory license").

See Ex. A. In the course of meet and confer discussions, NAB has agreed to produce only a subset of these documents—specifically, "valuation-related documents from January 1, 2012 to the present related to the negotiation or renewal of executed direct licenses, to the extent they exist." Warren Decl. ¶ 11. And NAB has declined to produce *any* documents responsive to this RFP from Entercom and Beasley, two broadcasters that (like iHeart) executed direct licenses with independent labels.

The Judges should require NAB to expand the scope of its collection, review, and production. *First*, there is no reason sounding in logic or law why NAB should be permitted to exclude from its production negotiation documents concerning direct licenses between Entercom and Beasley, on the one hand, and independent labels on the other. That Dr. Leonard decided to exclude these licenses from his benchmark does not place discovery into these agreements out of SoundExchange's reach, for the reasons already explained above. *Second*, NAB's restriction of negotiation documents to "executed" direct licenses is self-serving and overstates past CRB precedent. Imagine if iHeart reached out to 500 labels about a direct license (which is not an implausible hypothetical, given the scope of Sirius XM's direct license campaign in *SDARS III*).[5] And imagine if all but 15 of those labels refused to accept the low rate offered by iHeart. Such discovery would be directly related to—and would eviscerate—Dr. Leonard's claim that the 15 renewal licenses are "'representative'" of the rate that the parties would reach "in a WBWS context," particularly because Dr. Leonard's benchmark accounts for just [ ] of iHeart's total webcast performances over the September 2013 to May 2019 time period. Leonard WDT ¶¶ 72, 74, 75. Given Dr. Leonard's testimony about the representativeness of his benchmark licenses,

[5] *SDARS III* at 82.

the Judges' order in *Web IV* restricting discovery into the negotiation of unexecuted licenses is distinguishable.[6]

IV. The Judges Should Order NAB to Produce Documents Directly Related to Advertising Rates.

Finally, NAB should be directed to collect and produce documents from broadcasters Beasley, Cumulus Media Inc. ("Cumulus"), Salem Media Group ("Salem"), and Cromwell Group, Inc. ("Cromwell") in response to the following request:

- **RFP 49**: "Documents sufficient to show: a. Rates you charge for advertising on terrestrial radio, Simulcasting, and custom radio; b. The prevalence or percentage of advertisements swaps between terrestrial radio broadcasts and Simulcasting, as discussed in Paragraph 32 of the Written Direct Testimony of Gregory K. Leonard."

See Ex. A. Dr. Leonard has opened the door to this targeted, non-burdensome discovery from these four broadcasters. Dr. Leonard's written direct testimony discusses his interviews with these broadcasters and claims that they "confirmed the importance of non-music content to their radio programming." Leonard WDT ¶ 40. Given that testimony, the Judges should not permit NAB to play hide-the-ball by resisting discovery from Beasley, Cumulus, Salem, and Cromwell on the grounds that they are non-participants.

Part (a) of RFP 49 seeks documents that are directly related to Dr. Leonard's testimony concerning ad spot prices. According to Dr. Leonard, ad spot prices are a metric for determining the relative value of music versus non-music content to broadcasters. Dr. Leonard claims that "the highest revenue dayparts tend to be those where terrestrial radio stations devote the most airtime to non-music content," which "underscores the relative importance of non-music content, and the

[6] *See Order Granting In Part and Denying In Part Joint Motion By Pandora, iHeart, NAB, NRBNMLC and Sirius To Compel SoundExchange To Produce Negotiating Documents* at 3, Docket No. 14-CRB-0001-WR (2016-20) (Jan. 15, 2015) ("*Discovery Order 11*")(holding that "SoundExchange is not required to produce documents regarding unexecuted licenses").

corresponding lesser relative importance of musical content, to terrestrial broadcasters." Leonard WDT ¶ 42. Documents sufficient to show the rates that the aforementioned broadcasters charge for advertising on terrestrial, simulcasting, and custom radio are necessary to evaluate the veracity of Dr. Leonard's statement.

Part (b) of this same request seeks information concerning the extent to which advertisements may differ on simulcasting streams versus terrestrial broadcasts. As noted in the request itself, paragraph 32 of Dr. Leonard's testimony specifically references the idea that advertisements "may differ on some simulcast streams" as compared to the advertisements played on the terrestrial broadcast. NAB has offered no justification for withholding information from its broadcaster members responsive to part (b), which would allow SoundExchange to understand the extent to which this phenomenon does or does not occur. Again, SoundExchange's request is framed as a "sufficient to show" request, minimizing any burden on these non-participant NAB members.

CONCLUSION

For the foregoing reasons, and in light of the rapidly approaching deadline for written rebuttal testimony, SoundExchange respectfully requests that the Judges order NAB to produce the requested information within one week.

Respectfully submitted,

Dated: November 26, 2019

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Proof of Delivery

I hereby certify that on Tuesday, November 26, 2019, I provided a true and correct copy of the SoundExchange's Motion to Compel Discover from the National Association of Broadcasters to the following:

National Public Radio, Inc., represented by David P Mattern, served via Electronic Service at dmattern@kslaw.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via Electronic Service at ablin@fhhlaw.com

Corporation for Public Broadcasting, represented by Kenneth L Steinthal, served via Electronic Service at ksteinthal@kslaw.com

Sirius XM Radio Inc., represented by Bruce Rich, served via Electronic Service at bruce.rich@weil.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Educational Media Foundation, represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

Pandora Media, LLC, represented by Bruce Rich, served via Electronic Service at bruce.rich@weil.com

National Association of Broadcasters, represented by Joseph Wetzel, served via Electronic Service at joseph.wetzel@lw.com

College Broadcasters, Inc., represented by David D Golden, served via Electronic Service at dgolden@constantinecannon.com

Radio Paradise Inc., represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

Google Inc., represented by David P Mattern, served via Electronic Service at dmattern@kslaw.com

Signed: /s/ Previn Warren