Electronically Filed
Docket: 19-CRB-0005-WR (2021-2025)
Filing Date: 05/21/2020 12:30:00 AM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
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)

PARTICIPANTS' STATEMENT IN ADVANCE OF MAY 22, 2020 TELEPHONIC STATUS CONFERENCE

Pursuant to the May 1, 2020 Order Granting Joint Motion for Third Continuance of Hearing, as well as the direction of the Copyright Royalty Judges ("the Judges") at the April 24, 2020 telephonic status conference, the Participants[1] respectfully submit this statement in advance of the telephonic status conference scheduled for May 22, 2020 at 3:00 pm ET. This statement sets forth the Participants' joint and separate "detailed proposals concerning the hearing framework and . . . the possibility of an alternative procedure to a live hearing," as well as each Participant's response to any proposal that the Participant opposes. May 1, 2020 Order.

I. Introduction

The Participants agree that, given COVID-19 concerns, (1) the Judges should establish now a remote evidentiary hearing framework that will be implemented if it is determined that a

[1] Collectively, (a) Google LLC ("Google"), (b) the National Association of Broadcasters ("NAB"), (c) the National Religious Broadcasters Noncommercial Music License Committee and Educational Media Foundation ("NRBNMLC"), (d) Pandora Media, LLC ("Pandora"), (e) Sirius XM Radio Inc. ("Sirius XM"), and (f) SoundExchange, Inc., American Federation of Musicians of the United States and Canada, Screen Actors Guild-American Federation of Television and Radio Artists, American Association of Independent Music, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and Jagjaguwar Inc ("SoundExchange").

live hearing is not possible, and that features some direct and cross examination of witnesses, in addition to questioning by the Judges, conducted through some form of videoconferencing technology, (2) the Judges should not make a final decision on the viability of any in-person witness testimony until June 29, 2020, (3) the hearing should begin, whether live or via remote video, with opening statements on July 27, 2020, the current scheduled start date of the hearing, (4) there should be a short break between opening statements and the start of witness testimony to allow the Judges to provide guidance on the issues and witnesses that would be most helpful to their ultimate determination, and (5) there should be some type of written submissions in advance of the remote video hearing.

There is disagreement among the Participants, however, concerning: (1) the purpose, nature, and extent of written submissions in advance of the remote video hearing, (2) the appropriate format of opening statements, and (3) the appropriate length of a remote video hearing.

The Participants' positions are laid out in greater detail below, but at a high level:

1. SoundExchange

SoundExchange believes that the best way to present the Judges with a complete and reliable record in this case is to conduct an in-person hearing that allows for full examination and cross-examination of witnesses, unless the appearance of certain witnesses has been deemed unnecessary by mutual agreement of the participants and the Judges. That said, given the predictions of the scientific and medical community and the material safety risks that all Participants' witnesses would face in attempting to fly into Washington DC, SoundExchange considers it unlikely that conditions will permit an in-person hearing at any time this year. Thus, while SoundExchange is willing to defer until June 29, 2020 a final decision on whether some number of witnesses can be presented live, SoundExchange submits that the Judges and

participants should commit to begin the trial with opening statements on July 27, 2020, and be prepared shortly thereafter to conduct the entire trial virtually if necessary.

Unlike NAB, SoundExchange believes the technology to permit a virtual trial exists, has been proven effective in trials now on-going around the country (including criminal trials and grand jury proceedings), and will permit a full hearing in this case. SoundExchange strongly opposes NAB's effort to have a "trial-lite", with many witnesses offered on the basis of their written testimony only, having never been cross-examined at trial, having never been deposed (due to the limit on the number of depositions under the rules governing these proceedings), having never been questioned by the Judges, and foreclosing any opportunity for the Judges to assess credibility. SoundExchange believes that NAB presents no legal basis for allowing this proceeding to go forward without a full, complete, adversarial hearing. NAB may wish otherwise, but this is decidedly *not* a "paper proceeding" pursuant to 17 U.S.C. § 803(b)(5). According to that statute, and as reiterated in the Judges' regulations, "paper proceedings… shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure," conditions which are all absent here. 17 U.S.C. § 803(b)(5); *accord* 37 C.F.R. § 351.3(c)(1). SoundExchange is unaware of any situation where the Judges have exercised discretionary authority, over the objections of multiple parties (on both sides of the "v," no less), to decide a hearing of this complexity on the papers, summarily dispensing with testimony from witnesses that the parties wish to examine. Nor does SoundExchange believe that NAB's proposed pre-trial briefing process has value. At this point, prior to trial, briefing can do nothing but regurgitate the written testimony that the Judges have read or will read. Moreover, in the experience of SoundExchange's counsel, issues evolve in significant ways during the trial in response to questions from the Judges and some degree of back-

and-forth between the expert witnesses. As with most trials, the key issues may look different after the trial, and pre-trial briefing cannot capture that evolution.

SoundExchange believes that its position aligns with the positions of Pandora, Sirius XM, Google and the NRBNMLC insofar as all of these participants believe that the Judges and participants should make a final decision by June 29, 2020 with respect to whether the trial will be live or virtual or some combination of the two; the trial should commence in any event on July 27, 2020 with opening statements, followed by the commencement of witness testimony one week later; and the trial procedures previously agreed to with respect to order of witnesses and chess clock time should remain in place, with modifications only by agreement of all Participants and with approval of the Judges.

Contrary to the other Participants, SoundExchange submits that opening statements should be presented virtually rather than as pre-recorded statements, in order to facilitate questions from the Judges among other reasons. Furthermore while SoundExchange believes that objections to exhibits contained on the participants' joint exhibit list should be resolved before trial, SoundExchange would leave to the end of the trial resolution of line-by-line objections to written testimony.

2. Pandora, Sirius XM, Google, and the NRBNMLC

Pandora, Sirius XM, Google, and the NRBNMLC agree with the other participants that a final decision on proceeding in person or virtually be made on June 29 and that, whether in person or virtual, the hearing commence on July 27, 2020, as currently scheduled. They also propose, consistent with the other participants, that the participants convene with the Judges after opening statements and before the start of witness testimony (proposed to start on August 3) in an attempt to focus and streamline the presentation of testimony. This proposal is premised on their belief

that the substantive and procedural advantages of a live, in-person trial are so great that the participants should leave open the possibility of proceeding in person, at least in part, as long as reasonably possible. At the same time, they recognize the need for this matter to be adjudicated to enable the Judges to fulfill their statutory responsibilities and to provide rate certainty to all stakeholders. While proceeding in person is far preferable, proceeding virtually at least would permit real-time witness questioning by the Judges and counsel and thus is markedly superior to a paper proceeding with no real-time testimony, especially if the parties are given sufficient time before the trial to work through the technological issues surrounding a virtual trial.

Whether in person or virtual, this participant group largely agrees with SoundExchange that the proceeding generally should follow (a) the proven format and structure contemplated by the Judges' regulations and used in past proceedings and (b) the Judges' rulings and the participants' agreements previously in place in this proceeding, with some modest modifications aimed at streamlining the process. These participants further propose that all participants use the time before trial to (a) resolve evidentiary issues through a comprehensive pre-trial evidentiary dispute process (one area of dispute with SoundExchange's proposal) and (b) select and test a vendor to enable a smooth virtual hearing in the event that proceeding remotely becomes necessary. Pandora, Sirius XM, Google, and the NRBNMLC expect that using the time before trial commences as outlined herein may enable the participants to streamline the trial materially. Proceeding in this manner – including ensuring real-time testimony and following well-established procedures contemplated by the regulations and used in other statutory proceedings – also would minimize due process concerns, and potential resulting appeal issues, to the extent possible.

3. NAB

NAB believes that the Judges should put in place now an alternative trial framework that

is balanced and realistic about the limitations and risks of video-streaming technology for this complex proceeding—one that allows a remote video hearing to be shorter and appropriately focused, rather than a complete replacement of what was to be a 6-week in-person trial. Consistent with NAB's understanding that the Judges are appropriately considering their ability to conduct this matter as a paper proceeding in whole or in part, NAB proposes a framework that allows the Participants to present their full cases through a combination of written submissions and live testimony, including videoconference technology as necessary. Specifically: (1) the Participants should use the next two months to submit detailed but page-limited trial briefs setting forth a guiding narrative of each Participant's primary arguments and core evidence in support, (2) with the benefit of the Participants' written arguments and identification of key evidence (out of the thousands of pages of unwieldy and unorganized testimony and exhibits submitted thus far), the Judges can decide as they choose to make evidentiary or other rulings, pre-trial, that help guide the parties on the issues and witnesses that matter most to the Judges, and (3) with the core issues and witnesses having been identified by this process, a much shorter 2-3 week trial beginning in early/mid August would ensure appropriate process for all the Participants, allow the Judges to ask the questions that matter most to them on open issues, and ensure that the Judges have a full, unmarred record from which to make their ultimate determination under the relevant deadlines.

A 2-3 week trial would be far from a "trial-lite," as SoundExchange pejoratively states. A full but shorter trial in this matter (2-3 weeks, or longer if the Judges so decide)—after the thousands of pages of testimony already provided, along with detailed pretrial briefing and judicial direction crystallizing the issues in dispute—will afford everyone a full and fair opportunity to present their case. Indeed, SoundExchange's criticism of a shorter trial is contrary to Congress' decision to vest the Judges with broad authority to decide this *entire* matter on a "paper record

only," without *any* trial at all.[2] NAB does not go that far, of course, because some real-time cross examination and judicial questioning would be extremely valuable. But NAB does not think it is reasonable to simply ignore the Judges' own admonition about the limits of video streaming and pretend that a full video replacement of a 6-week in-person trial is realistic, or pretend that those limitations would not threaten significant risk to due process and fairness, when a more balanced approach is entirely possible. Simply put, this complex proceeding should not be used as a 6-week video streaming guinea pig.

SoundExchange's claim that trial briefing "has no value" and simply will "regurgitate the written testimony that the Judges have read or will read" is mistaken. That's like saying, in a Supreme Court case, briefs should never be filed because they have "no value" and the Justices should simply read the underlying record of the case rather than have it "regurgitated." Or that in motions for summary judgment, a party should only file supporting declarations and documents *en masse*, without writing any actual guiding *motion* to tell the court what matters, and why, in the record. Every Participant in this case should be extremely ready and *eager* to present their best arguments and evidence to the Judges in writing now, rather than expect the Judges to paw through thousands of pages of testimony on their own, in these circumstances, with no guiding direction.

NAB proposes below a specific schedule with this framework in mind. If the Judges agree with NAB's core proposal—that a combination of written submissions and a shorter, more focused video trial provides the right realistic and balanced framework—then all of the relevant specifics can be addressed and resolved by the Participants and Judges (*i.e.*, the right page lengths, relevant

---

[2] 17 U.S.C. § 803(b)(5); *see also* H. Rep. 108-408 (2004) (detailing broad authority of CRB to conduct paper proceedings).

limitations, and so on.) In other words, under NAB's balanced approach, all of SoundExchange's concerns regarding the specifics can be readily and appropriately addressed in the coming weeks.

II. Background

On April 24, 2020, the Judges held a telephonic status conference to discuss "a new hearing date (no earlier than July 20, 2020) and . . . any other hearing-related proposals." Judges' Apr. 15, 2020 Email. During that conference, the Judges and the Participants discussed that the time had come to develop detailed contingency proposals in the event that an in-person hearing in this matter would not be possible in the foreseeable future. To that end, the Judges directed the Participants to (i) file a joint motion continuing the hearing, (ii) set a date for a further telephonic status conference, and (iii) submit, in advance of the conference, a joint statement with detailed proposals concerning the hearing framework and the possibility of an alternative procedure to an in-person hearing.

On April 30, 2020, the Participants filed a joint motion requesting that the Judges continue the trial to July 27, 2020, and set a telephonic status conference for May 22, 2020. The Judges granted that motion on May 1, 2020, and directed the Participants to file on May 20, 2020 "a joint statement conference statement setting forth detailed proposals concerning the hearing framework and addressing the possibility of an alternative procedure to a live hearing." May 1, 2020 Order. The Judges further ordered that, "[i]f the Participants are not able to agree on a single set of proposals, they shall file a joint statement to the extent their positions overlap and separate proposals to the extent they do not. Any separate proposal by any participant shall also address the issues in the other proposal (or proposals) that the participant opposes." *Id.*

III. Participants' Joint Proposal

The Participants have been able to find unanimity on four significant issues. *First*, the

Judges should hold some form of real-time evidentiary hearing in this case, so that they can hear directly from certain witnesses and ask the questions deemed important to their determination, and so that the Participants are allowed some ability to cross-examine the most important witnesses in the case and to present sur-rebuttal testimony as would normally occur at the in-person hearing.

Second, the trial should proceed on July 27, 2020 without further delay.

Third, given the continued trajectory of the COVID-19 global pandemic, the Participants believe it is now necessary to establish a plan for a remote evidentiary hearing framework that features direct and cross examination of witnesses, in addition to questioning by the Judges, conducted through some form of videoconferencing technology.

Fourth, because the Participants agree that live, in-person testimony remains the most preferable option for the Judges, the Judges should not make a final decision on the viability of any in-person witness testimony until June 29, 2020 (with the participants' position on this issue set forth in submissions filed on June 24, 2020 at 9:00 pm EST).

Despite agreement on these core issues, and notwithstanding diligent efforts at reaching unanimity on other points, the Participants currently diverge on other key points. Below, the Participants present three distinct proposals: SoundExchange's proposed framework; Pandora, Sirius XM, Google, and the NRBNMLC's proposed framework; and NAB's proposed framework. Each framework, and the other participants' responses thereto, are set forth in detail below.

IV. Participants' Separate Proposals and Responses Thereto

1. SoundExchange's Separate Proposal

a. Proposed Schedule/Overview of Proposal

SoundExchange favors a live, in-person trial if at all possible, but remains skeptical that such a proceeding will be possible any time in 2020. SoundExchange recognizes that a virtual

trial is a feasible alternative, and may prove to be a necessary one. Moreover, a virtual trial is a far superior alternative to a paper proceeding with no real-time testimony—especially if the parties are given sufficient time before the hearing to evaluate and test various software platforms and work out other technical limitations.

To that end, in the event a live trial is not possible, SoundExchange favors a virtual proceeding that allows for real-time questioning of witnesses by both counsel and the Judges. Whether live or virtual, the proceeding should operate under the previously ordered schedule, with some modifications aimed at streamlining the process, including the following elements:

- Between the date of this submission and June 22, 2020, SoundExchange proposes that all participants work diligently and cooperatively with one another to develop a plan for conducting a remote hearing utilizing a videoconferencing platform. Among other issues, the participants should work together to determine the most suitable platform given the requirements of the hearing; how best to present witnesses with evidence and demonstratives; how to ensure that there are two separate livestreams (one public and one restricted); how to ensure that all parts of the proceeding can be recorded to permit the Judges' review at a later date; and how to minimize potential bandwidth, connectivity, and latency issues. The participants' collaborative work should focus on ensuring that the Judges are presented with as seamless a presentation as possible, should a remote hearing be the feasible and necessary path forward.
- Whether live in-person or virtual, the hearing should start on **July 27, 2020**, with no further continuances absent agreement of all participants;

- The Participants shall submit a brief on **June 24, 2020 at 9:00 pm EST** presenting their view(s) on the feasibility of a live hearing and, as appropriate, the logistics of a virtual hearing;
- Opening statements shall be presented in real time (whether virtually or in person) beginning on **July 27, 2020**, in advance of witness examinations;
- The Judges shall hold a video conference on **July 30, 2020**. This conference will afford the Judges and counsel an additional opportunity to "test drive" the virtual trial technology in the event the trial proceeds virtually. At this conference, the Judges and Participants can also discuss particular issues as to which the Judges want to hear testimony, and whether the Participants have been able to agree on waiving live examination of any witnesses.
- Live witness testimony will begin **August 3, 2020**. The hearing should be conducted generally as previously ordered, including the prior ordering of testimony agreed upon by the parties, whereby economic experts testify first, followed by non-economist experts and then fact witnesses.
- Proposed Findings of Fact and Conclusions of Law should be due **four weeks** after the conclusion of the trial. Reply Proposed Findings of Fact and Conclusions of law should be due **three weeks** thereafter.
- In accordance with traditional CRB practice, closing arguments shall be held after the participants have submitted both initial and reply proposed findings of fact and conclusions of law. After the parties' submissions are complete, the Judges may preview questions or issues of particular interest that they would like addressed during closing arguments.

Closing arguments shall be delivered live, in the same format as witness examinations (in-person or through videoconferencing).

b. SoundExchange's Rationale for Its Proposal

SoundExchange submits that its proposal hopes for the best (a live in-person hearing) but plans for a virtual hearing that largely preserves the benefits of a full trial. SoundExchange strongly believes that abbreviating the trial procedures degrades the fact-finding process. Witnesses should be subject to cross-examination and examination by the Judges, particularly given the limitations on pre-trial discovery inherent in these proceedings. There is no reason to believe this is not feasible, even if the trial must be conducted in a virtual fashion. Other courts around the county are successfully meeting the technical challenges. NAB, for its part, appears to accept that some witnesses can be examined by virtual means. If virtual examination works for some witnesses, there is no reason why it cannot work for all. In this case particularly, given the size and sophistication of the Participants, there is every reason to believe that the infrastructure and procedures necessary to conduct a virtual trial are within the capabilities of the Participants.

SoundExchange opposes any proposal to dramatically curtail the length of the hearing. It is critically important that the hearing be long enough to allow for the examination of all witnesses whose testimony may play a part in the Judges' ultimate decision-making. It is also critically important that each participant has the opportunity, should they choose to exercise it, to cross-examine witnesses who have presented written testimony. By the same token, SoundExchange recognizes that resolution of certain pretrial issues may permit a shortened amount of "chess clock" per side, and have agreed to defer this issue to a later date.

Further support for SoundExchange's proposal appears in SoundExchange's response to NAB's separate proposal and will not be repeated here.

c. Pandora, Sirius XM, Google, and the NRBNMLC's Response to SoundExchange's Separate Proposal

Although Pandora, Sirius XM, Google, and the NRBNMLC agree with SoundExchange on multiple important components of a trial schedule, there are still two notable areas of disagreement.

First, Pandora, Sirius XM, Google, and the NRBNMLC have proposed a more thorough mechanism for resolving evidentiary disputes prior to the hearing, with the aim of resolving all admissibility questions prior to trial to the maximum extent possible. Resolving these issues ahead of time will conserve trial time, which is beneficial whether trial is live or virtual. All Parties seem to agree that some effort should be made to resolve evidentiary matters ahead of trial, but this group of services has put forth the most practical and effective proposal for accomplishing that. Additionally, this group of services favors a mechanism for resolving disputes about expert testimony, while SoundExchange does not. This is an important difference. As this group of services describe in their proposal below, some of the expert testimony in this proceeding quotes third-party material at length, which creates a risk that an expert may act as a vehicle for introducing otherwise objectionable material into the record. It will be far more efficient to identify and resolve disputes concerning such instances prior to trial (or through a stipulation forbidding the use of such materials in post-trial filings unless separately admitted into evidence) than to waste time parsing an expert's testimony in real-time to address evidentiary matters. The potential for delay is not merely hypothetical, but heightened by the fact that such testimony typically is offered into evidence in its entirety at the beginning of the expert's oral examination, raising the possibility of a lengthy delay in the start of that examination as the parties and Judges work through objections to portions of the written testimony.

Second, Pandora, Sirius XM, Google, and the NRBNMLC oppose SoundExchange's suggestion that opening statements must be real-time and not pre-recorded. Submitting pre-recorded openings would allow the Judges to watch (or re-watch) the openings at their leisure and would prevent any chance that a party's openings will be disrupted or disproportionally impacted by latency issues or other technical difficulties. This group of services does not see a drawback to pre-recorded openings since the Judges have traditionally not asked a large number of questions during opening statements, and the Parties are proposing a conference several days later where the Judges could ask any lingering questions related to the opening statements.

d. NAB's Response to SoundExchange's Separate Proposal

As noted above, while NAB agrees with SoundExchange on certain issues (*i.e.*, that a remote video hearing should begin with video opening statements on July 27, 2020), NAB believes that SoundExchange's overall proposal—which essentially comes down to the idea that the Judges can replace the *entirety* of the scheduled 6-week in-person hearing with a video streaming experience—is imbalanced and inherently risky, and does not account for the Judges' own admonitions that the Participants should expect bandwidth and video streaming limitations. There are four primary areas of disagreement.

First, NAB does not believe that the 6-week, 58-hour-per-side remote video hearing proposed by SoundExchange is realistic or sensible. Live video streaming comes with inevitable technical problems—lag time, slow connections, dropped connections, etc., made worse when thousands of people attempt to use the same network or platform at the same time—that create serious process and fairness issues. The Judges have already told the Participants that network reliability is a real concern due to the amount of stress on the Library's infrastructure. A 6-week virtual trial thus comes with the near certainty of process issues for witnesses, lawyers, and the

Judges during critical moments of evidence presentation. Every additional trial day presses our luck further.

SoundExchange is asking the Judges to take a gamble on a process not successfully employed by *any* other tribunal under similar circumstances. Oral arguments and routine hearings involving a handful of lawyers and (in some cases) a handful of witnesses present nothing close to the technological and logistical demands of a 6-week trial with 5 separate law firms, representing over twice as many clients, more than 40 witnesses, and over 1,000 exhibits. An 8-day bench trial before a single judge is not comparable to a three-judge industrywide proceeding of this magnitude. *See* Civil Minutes, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. May 6, 2020), ECF No. 418. And the Cisco patent trial in the Eastern District of Virginia is ongoing—so it remains to be seen what kind of technological problems and fairness issues might arise there, as well as what challenges Cisco (who opposed an all-virtual trial) might raise on appeal. Indeed, both judges and commentators are recognizing the difficulties of conducting trials and other proceedings via remote video stream. In expressing reservations about video trials, Chief Judge Gilstrap of the Eastern District of Texas explained that "there's as much or more nonverbal communication in a bench or jury trial as there is verbal communication," which makes for "real concerns" about whether a "full-blown trial" via videoconferencing "would be workable."[3] And the dean emeritus of the Supreme Court press corps raised similar concerns about virtual oral

[3] Daniel Siegal, *Why Gilstrap Is Getting Ready For Trial — And Not On Zoom*, LAW360 (May 15, 2020), https://www.law360.com/articles/1273188/why-gilstrap-is-getting-ready-for-trial-and-not-on-zoom; *see also, e.g.*, Toni Messina, *Are Virtual Trials Our Future?*, ABOVE THE LAW (May 18, 2020), https://abovethelaw.com/2020/05/are-virtual-trials-our-future/ (cons of virtual trials include, "Would the camera adequately represent the body language and mannerisms of witnesses, so important in judging credibility?").

arguments, which are far less logistically challenging than the 40-witness, 1,200-exhibit trial at issue here.[4]

At bottom, there is no reason this proceeding should be the test case for conducting a complex, lengthy, multi-party trial via remote video stream—without any adjustment to the length or complex moving pieces of that trial. There is no reason that the Judges or the Participants should take such a gamble. To be sure, and as explained in NAB's rationale for its proposal, the ongoing COVID-19 pandemic means that the resolution of this matter almost certainly depends *in part* on remote video technology. But, given the well-recognized limitations of that technology, it cannot be the complete solution.

Second, SoundExchange's proposal does not allow the Participants or the Judges to take full advantage of the next two months to streamline the issues for trial. As discussed further in NAB's rationale for its proposal, trial briefs are essential to join the legal arguments and evidentiary issues, and they are routinely submitted in federal and state bench trials to frame the case for the court. The nature of Copyright Royalty Board proceedings is ordinarily such that there is little or no time for trial briefs; indeed, in this proceeding, expert depositions were still taking place just 10 days before the original trial start date. The postponement resulting from the pandemic, however, means that the Participants and the Judges now have the opportunity to submit detailed but page-limited trial briefs providing each Participant's primary arguments and core evidence in support after the benefit of full discovery. Those focused written arguments will

[4] Adam Liptak, *Were the Supreme Court's Phone Arguments a Success?*, THE NEW YORK TIMES (May 18, 2020), https://www.nytimes.com/2020/05/18/us/politics/supreme-court-phone-arguments-lyle-denniston.html?smtyp=cur&smid=fb-nytimes&fbclid=IwAR2sEfl2riwMjSqmTYCfhv22EEALHCj9xSbB24D2VdFoH7BOlaeszZheMPE.

provide an organizing mechanism to allow the Judges to guide the Participants regarding the issues and witnesses that matter most. That guidance, in turn, will allow for a much shorter—and much more manageable—2-3 week remote video hearing.

Third, NAB believes that pre-recorded opening statements, followed by a live videoconference during which the Judges may ask questions and provide guidance to the Participants, is the best approach to opening statements. It allows the Judges to watch opening statements at their convenience, more than once if desired, and ensures that this important piece of the trial will not be interrupted by any technical issues.[5] And the post-openings videoconference ensures that the Judges have an opportunity to ask questions of the Participants and provide guidance on the issues most important to their ultimate determination.

2. Pandora, Sirius XM, Google, and the NRBNMLC's Separate Proposal

a. Proposed Schedule/Overview of Proposal

Pandora, Sirius XM, Google, and the NRBNMLC strongly favor a live, in-person trial if at all possible, in which all witnesses who are able will attend in person, [6] but recognize that a virtual trial is a feasible alternative—and far superior to a paper proceeding with no real-time testimony—especially if the parties are given sufficient time before the hearing to evaluate and test various software platforms and work out other technical limitations. To that end, in the event a live trial

---

[5] While it may be possible to play back a recording from a live video opening, there are no guarantees that such recordings will be of good quality, and differences in recording quality from a live feed could serve to further prejudice individual Participants. With pre-recorded openings, the quality of the submission is dictated by the submitting party.

[6] Pandora, Sirius XM, Google, and the NRBNMLC recognize that even in the event of a live in-person trial, certain witnesses will be unable to attend due to personal health concerns or corporate restrictions on travel stemming from the COVID-19 public health crisis and would need to provide testimony virtually. The proposed schedule contemplates a meet-and-confer process between the participants to identify witnesses that would appear virtually or solely on the papers.

is not possible, these participants favor a virtual proceeding that allows for real-time questioning of witnesses by both counsel and the Judges. Whether live or virtual, they are largely in agreement with SoundExchange that the proceeding should operate under the previously ordered schedule, with some modifications aimed at streamlining the process, including the following elements:

- A hearing start date of **July 27, 2020**, whether live in-person or virtual;
- To continue to allow for the possibility of a live trial, deferring the decision on whether the trial will be in person or virtual until **June 29, 2020** (with a submission in advance, by 9:00 p.m. on June 24, presenting the Participants' views on the viability of a live in-person hearing);
- Submitting opening statements on **July 27, 2020**, in advance of witness presentation, followed by a video conference with the Judges on **July 30, 2020** to discuss areas of focus and witness priority, including whether certain witnesses may be submitted based on written testimony without further examination;
- Live witness testimony to begin on **August 3, 2020**.

The following areas of disagreement remain between the participants:

- The nature of the pre-trial process for resolving evidentiary objections: Pandora, Sirius XM, Google, and the NRBNMLC propose below a specific process for the parties to meet and confer to resolve evidentiary objections and raise unresolved issues with the Judges in advance of trial, whereas SoundExchange advocates that the parties attempt mutually to resolve evidentiary issues between them where possible, but that unresolved disputes be handled at trial rather than through pretrial submissions or briefing; and
- Whether opening statements should be submitted on pre-recorded video or held live via teleconference: Pandora, Sirius XM, Google, and the NRBNMLC propose the former while SoundExchange proposes the latter.

Pandora, Sirius XM, Google, and the NRBNMLC's proposal is laid out below. Building on the above, it includes several modest modifications from the prevailing schedule to use the time before trial productively and to make the eventual trial more efficient, including a pre-trial evidentiary dispute process to resolve exhibit objections and issues of admissibility in advance of trial (see #1 and #2, below) and a process for identifying, selecting, and testing a vendor to allow

for the virtual hearing in the event that proceeding remotely becomes necessary. Pandora, Sirius XM, Google, and the NRBNMLC expect that by using the time before trial commences as outlined herein, they may be able to streamline and reduce the duration of the trial materially.

Pandora, Sirius XM, Google, and the NRBNMLC's Proposed Schedule

1. Resolving Objections to Written Direct and Rebuttal Testimony and Identifying Witnesses Who Will Appear Solely on the Papers

- **June 16**: Identify (a) specific/line-by-line objections and (b) specific witnesses as to whom Participants do not believe require direct or cross examination at trial
- **June 26**: Meet and confer to resolve objections and to reach consensus on witnesses, if any, whom the participants believe should appear solely through previously submitted written testimony
- **July 3**: File motions objecting to unresolved portions
- **July 10**: File objections to Motions; no replies
- **TBD**: Telephonic/video hearing with Judges as necessary and as the Judges deem appropriate
- **TBD**: Submit "Final" versions of testimony based on rulings

2. Resolving Objections to/Admissibility of Proposed Exhibits

The parties have exchanged proposed exhibit lists and objections already. In an attempt to identify and resolve all other open issues regarding the admissibility of exhibits (whether categorical or document-by-document), Pandora, Sirius XM, Google, and the NRBNMLC propose the following procedures:

- **June 12**: In advance of the meet and confer:
  - Proponents provide lists of exhibits for admission that they believe may be resolvable with a brief (one or two sentence) description of the basis for admitting each item (*e.g.*, party admission);

- Evidence will be addressed on a categorical basis where possible (*e.g.*, all financial documents)

- **June 15-26**: Parties meet and confer

  - Objecting parties indicate whether they will waive objections (*i.e.*, accept justification) or maintain objection to specific exhibits, and why

  - Parties identify the subset of unresolved exhibits needing adjudication on admissibility

- **July 3**: File submissions as needed

  - Short, streamlined briefs to avoid flooding the Judges with paper: *e.g.*, using a list or outline format and no more than two to three sentences or a short paragraph for any given document, categorical presentation, etc.

- **July 13**: File responsive briefs (no replies)

- **TBD**: Telephonic/video hearing with Judges as necessary

3. Decision on Whether In-Person Hearing Is Possible

- **9:00 p.m. Eastern on June 24** : Participants file briefs on whether a live trial is feasible

- **June 29**: Decision on whether trial will be conducted in person or virtually

4. Opening Statements

- **July 27**: Submit opening statement via prerecorded video

5. Virtual Conference with Judges after Opening Statements

- **July 30**: Conduct hearing in which the Judges and Participants discuss issues about which the Judges want to hear witnesses and whether there are any other witnesses (not already identified in step #2 above) that the Participants and the Judges believe may be presented on the papers.

6. Hearing

- **August 3**: Hearing commences

- To be conducted generally as previously ordered, including the prior ordering of testimony agreed upon by the parties, whereby economic experts testify first, followed by non-economist experts and then fact witnesses.

7. Proposed Findings of Fact and Conclusions of Law (Initial and Reply)

- **Four (4) weeks after the trial concludes**: Submit initial proposed findings and conclusions

- **Three (3) weeks after submission of initial proposed findings and conclusions**: Submit proposed reply findings of fact and conclusions of law

- Pandora, Sirius XM, Google, and the NRBNMLC favor SoundExchange's proposal that the Judges continue with the traditional CRB practice of having both initial and reply findings of fact and conclusions of law followed by closing arguments, as well as SoundExchange's proposal that the Judges preview questions that will be asked of the Participants during closing arguments.

8. Closing Arguments

- **TBD**: Present closing arguments via live video conference after the submission of reply findings of fact and conclusions of law on a date to be determined by the Judges

b. Pandora, Sirius XM, Google, and the NRBNMLC's Rationale for Their Proposal

Pandora, Sirius XM, Google, and the NRBNMLC agree that it is advisable to maintain the current trial start date of July 27, 2020, with three notable variations from the current schedule. *First*, this participant group remains strongly in favor of proceeding with a ***live, in-person hearing*** as contemplated by the existing schedule but realizes that that approach may not be possible, and thus proposes deferring the decision on whether the trial will be live or virtual until June 29, 2020.

Second, Pandora, Sirius XM, Google, and the NRBNMLC propose that after the July 27 opening statements, the parties engage in a conferral process with the Judges aimed at focusing and streamlining their respective trial presentations, with the presentation of witnesses pausing until August 3. SoundExchange agrees with these two modifications.

Third, this proposal also provides for an expanded pre-trial process and submissions to the Judges aimed at resolving evidentiary disputes in advance of trial (which differs from SoundExchange's proposal). These participants address the rationale for these proposals below.

To begin with, Pandora, Sirius XM, Google, and the NRBNMLC fully appreciate the health and safety concerns presented by COVID-19 and take them extremely seriously. This participant group will not attempt here to challenge or debate predictions of the scientific community, and it recognizes that a live trial may not be possible in 2020. They note only that, even in the sources cited by SoundExchange, there is a tremendous amount of uncertainty as to how the pandemic will develop, and various private and governmental facilities and functions are reopening every day. In light of this rapidly changing landscape, the situation on the ground could look significantly different a month from now than it does now.

Given that uncertainty, Pandora, Sirius XM, Google, and the NRBNMLC respectfully submit that the decision to proceed via an in-person hearing or virtual hearing can and should be deferred until June 29, 2020. The benefits of a live, in-person trial are too noteworthy, and the dollars at issue too large, to forego the possibility of an in-person hearing unless and until it is absolutely necessary. Every party, including the Judges, has expressed a preference for a live hearing, and for good reason. In-person trials—including the ability to cross-examine opposing witnesses face to face—are the foundation of our judicial system. A live, in-person trial will allow the Judges to see the witnesses and counsel in person, to gauge credibility, and to ask questions and respond to objections without lag or technical glitches. Moreover, even if the odds of holding an in-person hearing are long, there are literally billions of dollars at stake given the swing between the parties' royalty-rate positions and the five-year license period. Given such stakes, it is well

worth taking every reasonable step to maximize the chances of employing the optimal trial process, especially if that merely means holding off for a few more weeks before deciding.

In addition, delaying the go/no-go decision does not mean just sitting and doing nothing in the interim. The Participants have proposed a number of pre-trial steps that can start immediately, use the time productively, and will lead to a more efficient trial, whether live or virtual. Chief among these is the identification and testing of a technology platform to ensure that a virtual trial is in fact feasible before deciding to go in that direction. It would be unwise, in this participant group's view, to forego the live-hearing possibility until the viability of a virtual hearing is confirmed. That technical process can (and must) begin now so that if a live hearing does not end up being feasible, all affected stakeholders are prepared to proceed with the virtual alternative. To that end, Pandora, Sirius XM, Google, and the NRBNMLC propose that the Participants establish a working group to identify an appropriate vendor(s) and test the technology – among themselves and with the Judges – starting immediately.

In addition, the schedule proposed by Pandora, Sirius XM, Google, and the NRBNMLC includes other steps to streamline and focus the hearing that also can start now, and would reap benefits whether the proceeding is in person or virtual (and thus not constitute wasted effort if a live in-person trial ultimately proves infeasible). These include:

- An expanded pre-trial process for addressing and briefing objections to the admissibility of exhibits and other evidentiary issues; and
- Recorded video openings presented on July 27, 2020, followed by a conference with the Judges on July 30 to identify areas of focus, witnesses who may not need

to present live testimony, etc.—each of which may allow the parties to streamline the presentation of witnesses starting on August 3.

Pandora, Sirius XM, Google, and the NRBNMLC have proposed a thorough mechanism for resolving evidentiary disputes prior to the hearing, with the aim of resolving admissibility questions prior to trial to the maximum extent possible. This process is detailed in sections 1 and 2 of the proposal above and addresses objections both to written testimony (Section 1) and Proposed Exhibits (Section 2).

With respect to the written testimony, the proposal would require the parties to identify objectionable portions, meet and confer in an attempt to resolve the objections, and then file submissions with the Judges seeking rulings on unresolved objections. Three points are noteworthy regarding the intended operation of the proposed mechanism. *First*, under the proposal, the objections would be narrow and limited: for example, to focus on instances of hearsay in the written testimony; the process should not provide a second opportunity for parties to move to strike portions of written testimony more generally given that the current schedule already provided an opportunity for motions in limine to strike testimony with a March 2 deadline.

Second, the sponsoring participants do not favor extensive or detailed briefs but rather a streamlined presentation format (*e.g.*, an outline or list) that simply identifies the objectionable line or citation and provides one or two sentences identifying why it is objectionable. The responsive submissions would follow a similar format.

Third, the objections mechanism would apply to expert submissions as well as fact witness testimony (a point that SoundExchange appears to dispute). While experts are able to rely on evidence that may not be admissible, this proceeding is somewhat unique in that the expert reports are not merely pre-trial disclosures, but testimony that is offered wholesale into evidence. To the

extent that expert testimony quotes third-party material at length (as is often the case), this opens the door for otherwise objectionable material (*e.g.*, hearsay) to be (a) admitted into evidence through the vehicle of written expert testimony (at odds with the typical rule that expert reliance on evidence does not make it admissible[7]; and (b) subsequently cited/quoted in the parties' post-trial filings. (To obviate this concern, the sponsoring services are open to a general agreement that parties may not cite, quote, or use such third-party material from expert testimony unless it has separately been admitted into evidence.)

With respect to exhibits, the proposal would impose a similar process of conferring to resolve objections that have been lodged, followed by submissions to the Judges to make admissibility determinations that the parties are not able to resolve on their own. As above, the intention is not for detailed briefs, but streamlined submissions that identify, for each exhibit (or category of exhibits), the basis for moving the exhibit into evidence and why the stated objection should be overruled. While the sponsoring services recognize that admitting certain exhibits may require a witness to lay the proper foundation for admissibility at trial, such foundation will be evident, or can be established from the face of the documents, with respect to many, if not all, of the proposed trial exhibits – *e.g.*, many exhibits may come directly from participant files, etc., allowing admissibility to be determined in advance of live witness testimony.

Importantly, resolving these issues ahead of time will conserve trial time, which is beneficial regardless of whether trial is live or virtual. If the trial is live, then not addressing these

[7] *See*, *e.g.*, Fed. R. Evid. 703 Committee Notes on Rules – 2000 Am. ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.").

issues in person allows for a shorter trial, which reduces health risks for all involved. If the trial is virtual, then resolving these issues removes what could be a cumbersome process of trying to offer and admit hundreds of exhibits during the trial.

With respect to opening statements, Pandora, Sirius XM, Google, and the NRBNMLC propose that they be pre-recorded. Using prerecorded openings allows the Judges to watch the openings at their leisure and to re-watch the openings later as necessary. The advanced openings also provide each participant with additional information concerning the issues the other participants are likely to focus on at trial, which could help narrow the scope of examinations.

Pandora, Sirius XM, Google, and the NRBNMLC also propose that opening statements be followed by a brief period in advance of witness testimony. As explained above, conducting opening statements in this fashion would provide the Judges with a window of time to review the statements and then give the parties guidance in a proposed July 30 hearing on issues the Judges consider key to the case. This approach presents a compromise by allowing for a narrowing of the issues, as proposed by NAB, without the need for expensive and labor-intensive pretrial briefing. The conference following opening statements also would enable the Judges and counsel to "test drive" the virtual trial technology in the event the trial proceeds virtually.

With respect to the trial itself, Pandora, Sirius XM, Google, and the NRBNMLC believe the procedures they have laid out for streamlining a trial – namely resolving evidentiary issues prior to trial, working cooperatively to eliminate live testimony of unnecessary witnesses, and exchanging opening statements in advance – may reduce the amount of needed trial time. For that reason, Pandora, Sirius XM, Google, and the NRBNMLC are not wedded to retaining the full 58 hour per-side time allotment that was previously put in place. Instead, these participants favor a later evaluation of the necessary amount of "chess clock" needed, which could take place after

evidentiary issues have been resolved and the parties have fully conferred on eliminating testimony from less important witnesses. While it is critical that the trial be long enough to allow for examination of all witnesses whose testimony may play a part in the Judges' ultimate decisionmaking, that may no longer require 116 hours to accomplish if the Participants take certain steps to streamline the hearing in the coming months (although dealing with technology glitches associated with a virtual trial may absorb some of that saved clock time).

* * *

Finally, this participant group notes that if the Participants are fortunate enough to be able to pursue an in-person hearing, they are prepared to implement all advisable safety measures as described in previous submissions: using a larger hearing room, limiting the number of personnel in the hearing room, ensuring proper ventilation and sanitization, and providing live feeds (restricted and public) for observers.

c. SoundExchange's Response to Pandora, Sirius XM, Google, and the NRBNMLC's Separate Proposal

1. Evidentiary Issues

SoundExchange agrees that there should be a streamlined mechanism for resolving certain evidentiary issues on a categorical basis in advance of trial. However, in order to avoid unnecessary complication and expense, pretrial briefing of evidentiary issues should be limited to resolving disputes regarding proposed exhibits that appear on the participants' joint exhibit list. The following paragraphs highlight the key differences between this approach and the approach proposed by Sirius XM, Pandora, Google, and the NRBNMLC.

Resolving Objections to Written Direct and Rebuttal Testimony:

SoundExchange does not agree that objections to written testimony should be resolved in advance of trial. Rather, SoundExchange proposes that (1) the participants limit line-by-line objections to fact witness testimony; (2) the participants submit only objections to written testimony, rather than supporting motions or briefing; and (3) the Judges defer ruling on these objections until after the evidence has been presented at trial.

SoundExchange's proposal would proceed on the following schedule, which largely comports with the timeline the Services have proposed:

- **Parties identify specific/line-by-line objections <u>to fact witness testimony</u> by June 16**

SoundExchange does not object to exchanging objections to fact witness testimony on June 16, the date the Services have proposed. *See supra* p. 19. Line-by-line objections, however, should not be required for expert testimony. Making pretrial line-by-line objections to expert testimony would be needlessly time-consuming for the Participants and the Judges, and at odds with the compromise reached by the parties in this matter. Experts are entitled to rely on a broad range of evidence and information, including hearsay. To the extent that a participant questions the reliability of the material on which an expert witness relies, these questions can be fully addressed through cross-examination. Limiting pretrial line-by-line objections to fact witness testimony will avoid a wasteful process that would burden the parties and require the Judges to resolve objections to expert testimony without the benefit of context.

- **Parties meet and confer to resolve objections <u>to fact witness testimony</u> by June 26**

SoundExchange does not object to the date the Services have proposed, *see supra* p. 19, so long as this process is limited to fact witness testimony.

- **Participants file objections to unresolved portions of fact witness testimony filed by July 3**

SoundExchange does not object to the date the Services have proposed for filing written submissions regarding line-by-line objections. *See supra* p. 19. This aspect of SoundExchange's proposal varies from the Services' in three key ways: First, consistent with the foregoing, written objections should be limited to fact witness testimony. Second, the Participants should submit streamlined written objections, rather than fully briefed motions. This process is sufficient to preserve objections and put opposing parties on notice of them, and will be more efficient and effective than providing the Judges with voluminous briefing on each disputed line of testimony. Additionally, some objections may be resolved by laying a proper foundation during trial; SoundExchange's proposed approach thus avoids premature rulings that may have to be revisited later. Third, and relatedly, the Judges should resolve objections to written testimony after post-trial findings of fact. This sequence would allow the Judges to consider any additional foundation presented during the hearing, and avoid having to resolve objections to testimony on which their determination does not rely.

Resolving Objections to/Admissibility of Proposed Exhibits:

SoundExchange does not object to the Services' proposed schedule for resolving objections to exhibits that appear on the participants' joint exhibit list, *see supra* p. 20. For the avoidance of doubt, SoundExchange does not understand the Services' proposal to provide any limitation on the participants' ability to introduce reserve exhibits (i.e. documents used on cross-examination that were not previously identified on the participants' joint exhibit list) at trial. Requiring pre-trial resolution of questions of admissibility of reserve exhibits would defeat their very purpose: to adapt evidence to the content of the hearing as it develops and confront witnesses with additional

exhibits on cross-examination. Mandatory pretrial briefing of these issues would force the offering party to predetermine which reserve exhibits to use without the benefit of the opposing participants' direct examinations. It would also allow opposing participants to preview the offering party's cross-examination strategy. Again, SoundExchange offers this paragraph as clarification, and does not understand its position regarding reserve exhibits to necessarily be at odds with the Services' proposal.

2. Opening Statements

SoundExchange proposes that opening statements happen in real time via videoconference, beginning on July 27, 2020 and continuing as necessary on July 28, 2020. There are several reasons why real time opening statements are preferable to prerecorded opening statements. First, real time opening statements will necessarily be interactive, permitting the Judges an opportunity (should they choose) to pose questions of the participants about their economic theories and the evidence and testimony they intend to elicit during the hearing. Second, real time opening statements will afford the Participants and Judges an opportunity to test the technological infrastructure of a remote hearing, should it come to pass that an in-person hearing is not practicable or feasible given the public health situation. The Participants can then use the brief recess between opening statements and witness examinations to troubleshoot any technological issues identified. Third, real time opening statements will ensure a level playing field among the Participants and best approximate the experience of in-person openings. Prerecorded opening statements, by contrast, will diverge by production quality, format, and style, depending solely on the resources of the Participant.

The services do not advance compelling reasons to prefer prerecorded opening statements. Real-time opening statements would still afford the Judges a "window of time to review the

statements and then given the parties guidance on issues the Judges consider key to the case." Indeed, SoundExchange has joined these services in proposing a July 30, 2020 status conference specifically for this purpose. Real-time opening statements provide each participant with just as much "additional information concerning the issues the other participants are likely to focus on at trial." Finally, to the extent the services advocate for prerecorded openings so that the Judges can "re-watch the openings later as necessary," this would be equally accomplished by recording the openings as they unfold in real time. That is to say, the Judges could be present at the opening statements and interact with counsel in real time—*and* they could re-watch the proceedings later, as they deem necessary.

3. Closing Arguments

SoundExchange agrees with Sirius XM, Pandora, Google, and the NRBNMLC that the Participants should present closing arguments via live video conference after the submission of reply findings of fact and conclusions of law on a date to be determined by the Judges. In the interest of clarity, SoundExchange writes separately to endorse the process used in prior proceedings before the Judges, with closing arguments presented before any form of determination by the Judges. This process has worked well and should be retained. Closing argument offers the Judges an important opportunity to probe and test each participant's claims by questioning the lawyers who present the closing arguments. Closing argument also offers a way for the Participants to summarize key points for the Judges in light of the necessarily substantial body of evidence presented during trial. SoundExchange believes the information and summaries obtained during closing arguments should inform any determination by the Judges, even if that determination is deemed preliminary or tentative.

d. NAB's Response to Pandora, Sirius XM, Google, and the NRBNMLC's Separate Proposal

In NAB's view, the problems with the separate proposal of Pandora, Sirius XM, Google, and the NRBNMLC are substantially the same as the problems with SoundExchange's separate proposal. NAB therefore refers to the Judges to its response to SoundExchange's separate proposal above. In particular, the other services' framework (i) leaves open the possibility of a 6-week, 58-hour-per-side remote video hearing and does not offer a concrete proposal to shorten the hearing other than by attempting to resolve evidentiary issues before trial (which NAB's proposal also addresses), and (ii) by focusing the pretrial written submissions solely on evidentiary issues, fails to provide the Judges with an organizing mechanism to aid in streamlining the hearing.

3. NAB's Separate Proposal

a. Proposed Schedule/Overview of Proposal

NAB presents the below schedule and framework for the Judges' consideration, but is of course open to adjusting whatever dates and specifics the Judges deem fit:

Date	Event
June 26	Participants file trial briefs. Specifics: • Brief to provide narrative and organizational structure of the Participant's central claims, arguments, and evidence • Brief to provide, as the Participant sees fit, written cross of other Participants' experts/witnesses (*i.e.*, problems with testimony, including through use of depositions and documentary evidence) • Brief to provide, as the Participant sees fit, sur-rebuttal arguments (*i.e.*, counsel's response to the points raised in the rebuttal witness statements that to date have not been responded to) • Ultimately, briefs to allow Participants to address all core issues and evidence in advance of openings, but as is typical with trial briefs, parties are not precluded from later raising specific issues, evidence, or points (including cross and sur-rebuttal evidence) during later

	direct or cross examination • Page limits: NAB suggests brief lengths of 35 pages per Service-side Participant, and 70 pages for SoundExchange
June 29	Judicial telephonic conference. Specifics: • Judges decide whether any ongoing COVID-19 developments counsel for additional adjustment to trial schedule/framework • Judges' determination to include whether anything has changed such that there is good cause to reinstate any in-person examinations, in lieu of the remote video proceeding established herein
July 10	Participants file objections to evidence cited in trial briefs. Specifics: • Prior to July 10, parties must meet and confer and attempt to resolve as many outstanding objections as possible • File remaining objections so that Judges can resolve large portions of the evidentiary landscape prior to any hearing. • Page limit: 10 pages per Participant.
July 17	Judicial telephone conference. Specifics: • Judges address/resolve as appropriate any evidentiary issues/disputes from the trial briefing
July 27-28	Participants present pre-recorded opening statements. Specifics: • Opportunity to further frame narratives set forth in the trial briefs/provide a holistic overview • Potential for post-opening Q&A from Judges, as desired • 90 minutes per Participant
August 3	Judges provide direction on topics/witnesses, as appropriate. Specifics: • Goal is to help Participants use remote video trial time wisely • Exact nature of direction TBD, at Judges' discretion, but the Participants would benefit from understanding the specific topics (and corresponding witnesses, as appropriate) the Judges deem most probative and relevant to the issues necessary for their determination

August 10 - September 3	2-3 Week Trial (In-Person, Remote, or Hybrid). Specifics: • Focused set of witnesses on core issues helpful to the Judges • Expected to be primarily experts, as determined by Judges' desire for Q&A/examination of particular topics, with some ability of Participants to pick a few additional witnesses they want to present • Much more limited chess clock, TBD pursuant to discussion with the Judges on topics/witnesses (including whether to provide specific limits for direct examinations) • "Hot-tub" of multiple experts on video link may work – by topic/issue – with strict debate-type rules of who speaks when and for how long
September 30	Proposed findings of fact and conclusions of law. Specifics: • Pages: 120 per Service, 240 for SoundExchange • Within 10 days, parties can file evidentiary objections (10-page limit) based on any new evidence cited in proposed FoF/CoL • Length and nature of Reply FoF/CoLs under this framework TBD in consultation with Judges
TBD	Closing statements in person or via remote video

b. NAB's Rationale for Its Proposal

As set forth above, NAB's proposal seeks to satisfy several core objectives.

First, it aims to resolve the ongoing uncertainty around COVID-19's effect on this proceeding by deciding now to implement an alternative framework that ensures the Judges are provided with a full record by which to make a timely determination, and in a manner that is fair and efficient for all Participants. Indeed, all Participants appear to agree that there is no indication that COVID-19 will disappear soon enough to enable a full in-person trial in the near future. That said, all Participants believe that it would be useful to have some witnesses heard in-person, and

NAB proposes that the Judges and Participants examine this issue one last time at the proposed June 29, 2020 telephonic hearing, one month from the start of witness examinations, to see if there is any possibility of reinstating some portion of the in-person hearing. In the interim, the proceeding should move forward on the expectation of a remote video trial.

Second, NAB's proposed hybrid written submission/evidentiary hearing framework seeks to provide a balanced approach to the Participants being allowed to present their full case, and the Judges getting a full record, in a manner that reduces the risk of serious process deficiencies. It is responsive to the Judges' desire expressed at the April 24, 2020 status conference for an organizing mechanism prior to the presentation of witness testimony—and it is a more effective organizing mechanism than opening statements alone, which are time-limited and necessarily less comprehensive than a written submission. Moreover, NAB's proposal is a practical alternative to the other Participants' extremely risky hope of, "let's do everything we were going to do in March, in July/August—but let's do it for 6 weeks by video streaming." As all of us know at this point in the pandemic, videoconferencing is not a magical salve to in-person gatherings, and latency, dropped connections, and failed connections—potentially while critical testimony is being relayed—is a significant process risk. This is made more acute given the number of video connections that we would need for a trial of this magnitude, with three Judges, critical CRB staff, at least 5 separate sets of Participants' counsel, the witness in question, and so on. Moreover, the inevitable existence of lag serves to undercut a key rationale for live testimony: the ability to adequately gauge credibility and weight. At the April 24, 2020 conference, NAB understood the Judges to be seeking an alternative trial framework that wasn't as simple as "replace everything with Zoom," particularly in light of the concern expressed by the Judges on video streaming bandwidth and connection issues. To be sure, NAB believes that there is an important role for

video streaming technology in its own proposal, but it can only be *part* of the solution—not the entirety—because the risks associated with the technology increase every day it is used as the sole mechanism for the parties to present their cases to the Judges.

Third, NAB's hybrid proposal ensures that the Participants do not waste the next two months merely hoping that a later solution makes everything all better, while resigning themselves to an unimaginative, untested, and fraught fallback position. Two months have already gone by while the Participants waited for potentially good news that would allow an in-person trial to continue. The statutory deadlines relevant to this proceeding, and the need to keep moving in this proceeding given the Judges' busy calendars and requirements, mean that the Parties should start presenting their cases to the Judges now, in writing, in case *any* sort of evidentiary hearing becomes untenable. To be clear, NAB very much wants some sort of real-time evidentiary hearing in this case. But it is also not blind to the possibility that health and government developments may thwart that desire, and it would be very different to face that potentiality, in July or August, in a world where the Participants have already provided focused and substantive trial briefs (with evidence) to the Judges, than in a world where they have not.

Fourth, NAB's proposal is the only one that provides a real mechanism for the Judges to hold a ***shorter*** evidentiary proceeding while still providing full process to the Participants to lay out their case. Earlier in the year, the Participants had proposed (and the Judges ultimately approved) a 58-hour-per side, 6-week trial for March 2020 because the Participants agreed that amount of time was necessary for all the issues to be joined, and all witnesses presented, to the Judges. In part, that was true because the Participants did not fully know exactly how the other Participants were going to put on their case, and what narrative, core arguments, and evidence they would highlight (and in what fashion). Indeed, expert depositions were still taking place during

the first week of March. A 6-week trial was thus required in part so that each Participant could organize and present the voluminous evidentiary record, respond, real-time, to the case the other presented, and respond to the Judges' real-time questions and focal points of interest. Substantive pretrial submissions were not practical given the 10-day window between the close of rebuttal discovery and the original trial start date.

But COVID-19 delays have allowed for a period of time where the Participants can in part organize and lay out their core cases ahead of time, in writing, and the Judges can process those organizing narratives and evidence and make rulings (and provide guidance for trial) ahead of any trial itself. This process allows for a far more efficient trial for the Judges, focused on what the Judges want and need to hear, and on the core areas of dispute between the Participants, rather than on tangential matters. And it means full process can be had in a 2-3 week trial period, rather than a 6-week trial period, subject to the Judges' particular rulings and directions on various issues.

* * *

The other Participants' criticisms of NAB's proposal are without merit and, frankly, surprising. We do not understand, at this stage of the case, the steadfast refusal to provide the Judges with detailed but page-limited, focused briefing that lays out each Participant's principal arguments and core evidence in support, along with substantive responses to the other Participants' claims, evidence, and criticism after the benefit of full discovery. "Trial by surprise" is never an appropriate strategy, particularly in extreme circumstances like the present case of a global pandemic.

The claim that the Participants have all "already provided" the Judges with everything they need to fully organize, frame and understand each Participant's views and evidence does not withstand scrutiny. It is a universal judicial maxim—articulately stated by so many judges in many

different fora—that judicial officers are not required to "sift" through mountains of evidence to try and figure out what core evidence supports a party's arguments (and why), and why contrary evidence and arguments should be disregarded. The idea that the Judges here should have to, on their own, sift through almost 4,000 pages of written testimony, including highly complex expert testimony, and many more thousands of pages of supporting articles, reports, analyses, data calculations, emails, and other documentary evidence in order to figure out what best supports or undercuts each Participant's arguments, is not reasonable. Ninety-minute opening statements, recorded or live-streamed, are not a substitute for explaining in a detailed trial brief the legal arguments and evidence in support of each Participant's case. Nor will opening statements suffice as the sole basis for the Judges to provide meaningful guidance regarding the issues and witnesses that would be most helpful to their determination. Equally without merit is the idea that a trial brief is "duplicative" of the short introductory memoranda that each Participant previously filed, along with their witness statements. That misunderstands what a well-written, evidence-supported trial brief looks like and provides. NAB has no doubt that, should the Judges order a trial brief along the lines it suggests, each Participant's trial brief would in fact look quite different than the introductory memoranda previously submitted, would in fact fully join the arguments and evidentiary issues in this case in a way that has nowhere been done to date, and would be immensely helpful for the Judges.

More specifically, the afternoon this filing was due, SoundExchange tacked on the hefty "17-theses" section below, raising for the very first time a host of new arguments against NAB's proposal. Most of SoundExchange's commentary amounts to mischaracterizations of NAB's proposal, expressions of unwarranted faith in unproven technological solutions, and strawman arguments on logistics that can easily be resolved between the Participants should the Judges find

favor in NAB's balanced approach. NAB addresses only a few of the points below, and of course would be happy to address others during the telephonic status conference on May 22.

First, SoundExchange's most surprising claim is its first thesis: that requiring the Participants to file a trial brief, directing the Judges to their strongest and best evidence and arguments, would somehow raise a "legitimate appellate issue." This appears to threaten that, should the Judges apparently rule against SoundExchange in any respect, SoundExchange will claim that it was prejudiced by having to file a brief laying out its positions in writing ahead of trial. This seeks to limit the Judges' ability to guide these proceedings, and is frivolous. Nothing in the regulations prohibits the Judges from directing the parties to file trial briefs in an effort to join the issues and streamline the trial—and SoundExchange can point to nothing. Indeed, the governing statute allows the Judges to decide this matter ***entirely*** on the papers. *See* 17 U.S.C. § 803(b)(5)(B) (Judges may conduct "paper proceedings" under "circumstances as the Copyright Royalty Judges consider appropriate"); *see also* H. Rep. 108-408 (2004) (detailing broad authority of CRB to conduct paper proceedings); 17 U.S.C. § 801(c) (Judges may make "any necessary procedural or evidentiary rulings" and "any such rulings that would apply to the proceedings"). SoundExchange's position would mean that the Judges may conduct either a full paper proceeding or a full trial, but ***nothing*** in between, under any circumstance—including a once-in-a-generation global pandemic. That is not the law, nor should it be. Further, NAB's proposal does *not*, as SoundExchange seems to believe, eliminate the filing of post-trial proposed findings of fact and conclusions of law. Those remain in NAB's schedule, and the claim otherwise is without merit. The claim that anything in NAB's proposal somehow is prohibited by statute is simply not true.

Second, NAB recognizes the importance of live cross-examination and the Judges' ability to question witnesses, and welcomes the opportunity to present at trial any of its witnesses from

whom the Judges wish to hear live. But the idea that live cross-examination is essential for every single one of 40+ witnesses, and that the Judges require the ability to question every single one of 40+ witnesses, is not defensible. NAB's hybrid written submission/evidentiary hearing proposal allows the Participants to frame the issues and evidence for the Judges in advance of trial, which in turn allows the Judges to provide the Participants with guidance on the issues and witnesses most important to their ultimate determination. That is how the Participants will determine which witnesses to present live—not by any Participant "selectively shielding" anyone. And, presumably, no Participant would waste time at trial cross-examining a witness whom the Judges have indicated is not essential to the outcome of the proceeding.

Third, the idea that because a live remote proceeding can work to present a subset of key witnesses, it will therefore work equally well to present 40+ witnesses over 6 weeks, fundamentally underestimates the potential technical difficulties of a virtual hearing and disregards the Judges' legitimate and accurate concerns about network reliability.

The rest of SoundExchange's scattershot argument are equally without merit—i.e., the claim that SoundExchange would find it "impossible" to write a 70-page trial brief in one month, when SoundExchange also admits that is has previously submitted 1,000+ page proposed findings of fact and conclusions of law in similar timeframes—but NAB does not need to spend time on them here, in this already too-long submission. The bottom line is that if the Judges find merit in having the parties direct the Judges to their best argument and evidence before trial, thus allowing for an appropriately focused remote video proceeding in the pandemic situation we find ourselves in, then the Judges and Participants can certainly sort out the particulars of page limits, witness presentations, and everything else.

c. SoundExchange's Response to NAB's Separate Proposal

SoundExchange believes that the structure of the hearing—even if it is held virtually—should hew as closely as possible to the CRB's regulations and to the structure originally agreed to by the Participants and approved by the Judges in February. Although NAB repeatedly claims that its proposal is intended to give the Judges a "full, unmarred record" and allow the Participants to "present their full case", SoundExchange submits that the NAB proposal will produce the opposite result. NAB asks the Judges to require that the Participants submit page-limited trial briefs that are nowhere contemplated in the CRB's regulations, dramatically shorten the hearing despite the Participants' settled expectations, limit the number of witnesses who provide oral testimony and thus foreclose any cross-examination of those witnesses or questions from the Judges, arbitrarily limit post-trial findings of fact, and potentially modify the length and nature of reply findings of fact. Adopting these procedures will undermine the ability of the Participants to present the Judges with a robust record, tested by a full adversarial trial process. There are no fewer than seventeen separate reasons why the Judges should reject NAB's proposal.

First, NAB's "trial brief" proposal is nowhere contemplated by the CRB's governing regulations. Those regulations set forth specific provisions requiring the submission of written direct statements (participants "must file" these, 37 C.F.R. § 351.4), written rebuttal statements (these "shall be filed at a time designated by the [Judges]," 37 C.F.R. § 351.11), and proposed findings of fact and conclusions of law (filings which "shall take place after the record has been closed"). By contrast, NAB does not and cannot cite any provision in the regulations allowing the Judges to order the participants to file "detailed but page-limited trial briefs" that include evidentiary, cross, and sur-rebuttal arguments, made *after* written statements, *before* the record has closed, and *in addition to* proposed findings of fact and conclusions of law. If anything, NAB's

proposal appears to contravene the regulations, which clearly require that the filing of "findings of fact and conclusions, briefs, or memoranda of law … shall take place *after* the record has been closed." 37 C.F.R. § 351.14(a) (emphasis added). Mandating NAB's additional, novel process while dramatically curtailing the scope of permitted witness examinations, over multiple participants' objections, would create a legitimate appellate issue and needlessly place a cloud of uncertainty over the Judges' final determination.

Second, NAB overstates the legal authority that it cites for its novel "trial brief" concept. According to NAB, "the governing statute allows the Judges to decide this matter ***entirely*** on the papers." *See supra* p. 39. That is inconsistent with the clear intent of this section. The "governing statute" that NAB cites is reproduced in full here:

> "**Paper proceedings.—**The Copyright Royalty Judges in proceedings under this chapter may decide, sua sponte or upon motion of a participant, to determine issues on the basis of the filing of the written direct statement by the participant, the response by any opposing participant, and one additional response by each such participant. Prior to making such decision to proceed on such a paper record only, the Copyright Royalty Judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph—
>
> (A) shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure; and
>
> (B) may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.

17 U.S.C. § 803(b)(5). Subsection (A) of this statute indicates the types of circumstances in which "paper proceedings" are advisable—none of which are present here. That context makes clear that Subsection (B) is not a blank check for the Judges to dispense with the examination of critical witnesses, despite the protest of multiple Participants on both sides of the "v," and irrespective of whether (as here) there are scores if not hundreds of disputed material facts. Tellingly, NAB cites to no actual historical example of the Judges ever utilizing the "paper proceeding" provision of the statute in this manner, and SoundExchange is aware of none.

Third, NAB's pretrial briefing process would fail to accomplish NAB's stated goal of clarifying and narrowing the relevant issues. These briefs would not serve to meaningfully narrow the scope of the evidence, as they would be filed *before* the Judges have made any admissibility determinations whatsoever. Nor would they meaningfully narrow the economic issues at stake in the Participants' expert testimony. If anything, an added round of briefing before trial will provide an opportunity for the Participants to engage in written surrebuttal of one another's experts, thereby expanding rather than contracting the amount of economic evidence for the Judges to consider. Finally, under NAB's proposal the trial briefs would not preclude the Participants from later raising specific issues and points, including cross-examination and surrebuttal evidence as they see fit. Thus, the trial briefs will not require and are therefore unlikely to result in any narrowing of issues or evidence. Indeed, rather than narrowing anything, pretrial briefing is far more likely to needlessly regurgitate and repackage the two rounds of written testimony, and the evidence cited therein, that the Participants have already submitted. Vanishingly little would be added to the written introductory statements that already accompanied each participants' respective filings.

Fourth, SoundExchange does not accept NAB's assumption that the Judges will lack the time, interest, and inclination to "paw through thousands of pages of testimony on their own," *see*

supra p. 7. The volume of written testimony submitted was consistent with past rate setting proceedings (including the 2,776 pages filed in *Web IV* and the 2,543 pages filed in *SDARS III*), where the Judges had no trouble synthesizing the evidence and had no need for an additional round of "clarifying" briefs. Moreover, NAB's proposal implies that the Judges will rely on the pre-trial briefs *in lieu of* reading the actual testimony. SoundExchange believes the Judges should rely on the actual testimony, not the Participants' page-limited summaries of that testimony. And if the Judges do in fact read the written testimony, NAB's proposed trial brief accomplishes nothing beyond increasing the volume of reading material. SoundExchange does not believe that the Judges need a pre-trial roadmap to understand the issues presented by the written testimony, and to the extent a further distillation of core issues is needed, that can and will be accomplished during opening statements and through the course of trial, as has always been the case during CRB proceedings.

Fifth, NAB confusingly proposes that the trial briefs would include "written cross" of other Participants' experts and witnesses. "Written cross" is not a thing. Cross-examination is designed to test the credibility and veracity of a witness, in real time, and to probe his or her theories by confronting the witness with documentary evidence and past inconsistent statements. It is profoundly unclear how these core adversarial functions could be accomplished in writing. What NAB actually appears to be proposing is not "written cross" but, rather, a fresh round of written surrebuttal testimony. Indeed, NAB expressly proposes that the briefs include surrebuttal arguments in the form of "counsel's response to the points raised in the rebuttal witness statements that to date have not been responded to." Of course, there is no provision in the regulations permitting written *sur*rebuttal to be added to the written direct and rebuttal statements already submitted. And for good reason: Surrebuttal will doubtless raise new issues and arguments that

the Participants wish to attack at trial, creating oral sur-sur-rebuttal, and perhaps sur-sur-sur-rebuttal when the economic experts return for their second round of live testimony. Moreover, in order to be useful, any surrebuttal permitted by the Judges should come from experts, not from lawyers. The Judges can and should abstain from diving headlong down this rabbit hole. Each Participant has had two rounds of briefing to lay out their best arguments and respond to the other side. Enough is enough. Anything further that needs to be said by the Participants can be said at trial.

Sixth, the Judges need not adopt the NAB's pretrial briefing proposal if they want to provide direction to the participants on the topics and witnesses they are most interested in. At any point in time, before or after opening statements, the Judges have the ability to notify the Participants that there are certain witnesses from which they would most like to hear live testimony, and certain issues about which they are most keen on exploring. If the Judges were to do so, the Participants could ensure that their respective presentations focus on these issues and include testimony from these witnesses.

Seventh, NAB's proposal treats SoundExchange in a facially inequitable manner. NAB proposes that the services be allocated a combined 140 pages for their "trial briefs," whereas SoundExchange would be limited to only 70 pages. There is no reason why SoundExchange should be entitled to anything less than an equivalent amount of briefing pages as the services.

Eighth, while it is clear that NAB intends its "trial briefs" to operate as a partial substitute for the traditional findings-of-fact process, they would be a poor substitute indeed. Unlike findings of fact, pretrial briefs cannot reflect the evidence as introduced and admitted, cannot reflect the credibility determinations made by the Judges, and cannot filter out the arguments that cross-examination has exposed as meritless. As such, the on-the-fly addition of trial briefs to the CRB's

regulations would not obviate the need for the full findings-of-fact process actually set out in those regulations, and would not justify dramatically shortening the length of findings or modifying the length or nature of reply findings as NAB proposes.[8] Indeed, there is a good reason why parties' findings of fact are traditionally voluminous. Findings of fact serve as a compendium of the parties' most persuasive arguments and best evidence, functioning as a consolidated resource for the Judges when drafting their initial determination. That function would be eliminated by NAB's proposal.

Ninth, there are standalone reasons why the Judges should not accept NAB's proposal to modify the length and nature of reply findings of fact. Participants simultaneously file their proposed findings of fact and conclusions of law. As a consequence, the *only* opportunity to respond to another Participant's proposed findings of fact and conclusions of law is through a reply. That opportunity is critical—to address errors, mistakes, and mischaracterizations of the evidence that might arise in another Participant's findings. Indeed, absent that ability, a Participant may be unable *at any point* to challenge an aspect of the Judges' determination predicated on an erroneous finding of fact. That is so because, per the regulations, "[a] party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party." 37 C.F.R. § 351.14(b). Reply findings therefore serve an important function, not only to permit Participants to challenge and test each other's findings, but

[8] NAB's proposal would limit findings of fact and conclusions of law to 120 pages per Service and 240 pages for SoundExchange. Once again, this distribution is inequitable, as it grants the services twice the pages as SoundExchange. Holding that problem aside, NAB's proposed limits are dramatically shorter than what Participants in CRB proceedings traditionally file. For instance, NAB's proposed findings of fact and conclusions of law in *Web IV* exceeded 320 pages, and SoundExchange's proposed findings of fact and conclusions of law in *SDARS III* exceeded 1000 pages.

to preserve issues for appeal. For that reason, the ability to reply is expressly contemplated by the regulations. *See* 37 C.F.R. § 351.14(a) (noting that findings of fact "and any replies to them, shall take place after the record has been closed.").

Tenth, NAB's trial brief proposal would create a needless distraction and diversion of resources for the Participants, who should focus on the already complicated task of setting up a seamless virtual hearing. While SoundExchange maintains that the coming nine weeks present sufficient time for the Participants to get ready for a virtual trial, that is not to diminish the amount of work that needs to get done and the amount of decisions that need to be made. The Participants need to agree on an appropriate software platform, ensure that it is procured by all Participants and the Judges, and work through the technological issues attendant to presenting remote testimony and demonstratives. Participants' counsel may need to find spaces within their offices (or elsewhere) where they can congregate safely during the hearing, and to ensure these spaces are compatible with the CDC's social distancing and hygiene guidelines. And the Participants will need to work diligently to resolve the many outstanding evidentiary issues, through meet and confers, negotiations, and briefing (as necessary) that is strictly limited to resolving evidentiary disputes. All of this work is plenty to keep the Participants busy until the July 27 start of trial. Indeed, it would be impossible for SoundExchange to get done while also preparing between 70 to 140 pages of trial briefing within the one month allotted by NAB's proposal.

Eleventh, beyond the novel and legally ungrounded trial brief process, NAB's proposal creates still more additional process where none is warranted. Under NAB's proposal, the Participants must submit an entire new set of objections to the evidence relied on in the Participants' trial briefs. But the Participants have already exchanged objections to each other's proposed exhibits. As such, many of these trial brief objections will be redundant of the objections

to the proposed exhibit list that were already exchanged. Having to restate and re-litigate these same objections will be a waste of time and resources for the Participants and Judges alike.

Twelfth, NAB's proposal to substantially shorten the trial means that Participants would not have the option to present all of their witnesses and would have to substantially reduce the number of witnesses who would present oral testimony. Contrary to NAB's claim, the participants have not had "the benefit of full discovery." As the Judges know, the Participants are limited to ten depositions per side during the discovery phase of the proceedings, and therefore only a few fact witnesses have been deposed. Limiting the number of witnesses who testify orally would mean that many witnesses would never be cross-examined by opposing Participants, questioned by the Judges or be subject to any assessment of their credibility. NAB's proposal, noting somewhat cryptically that there should be "some ability of Participants to pick a few additional witnesses they want to present," implies that NAB intends exactly this result, allowing NAB to selectively shield certain of its witnesses from cross-examination while allowing their testimony to come into the record through written filings.[9]

Thirteenth, if NAB is concerned about the Judges' ability to adequately gauge credibility and testimonial weight by video, it is not clear how pretrial briefing and a shorter trial would ameliorate this concern. The witnesses have already submitted written testimony. Hundreds of pages of additional argument by the participants would provide no insight to the credibility and weight of a witness's testimony beyond what is already presented in the written testimony. And

[9] NAB also notes that a "hot-tub" of multiple experts by video link "may" be possible under its proposal. But this issue has already been addressed by the participants pursuant to the Judges January 28, 2020 Order Seeking Comments on Examination of Expert Witnesses. SoundExchange stands by its position as articulated in its February 5, 2020 filing in response to that Order.

if the Judges are concerned with gauging the credibility and weight of each witness' testimony, the best solution is to hear real-time, albeit virtual, testimony from each witness. Shortening the trial and cutting out the real-time testimony of certain witnesses altogether would achieve the exact opposite effect.

Fourteenth, NAB offers no practical reason why a virtual trial would need to be shorter than an in-person trial. NAB asserts that, "[a]s all of us know … videoconferencing is not a magical salve to in-person gatherings and latency, dropped connections, and failed connections … is a significant process risk." Beyond this conclusory gesture to what "all of us know," NAB presents no actual reason to believe that such technological problems are insurmountable, or that they will get worse the longer the trial goes on. If anything, there are likely to be fewer issues as the trial proceeds, as the Participants and Judges become more familiar with the videoconferencing technology platform. In any case, there is a sensible, practical, and easy fix to all of NAB's technological fears: Witness testimony can be recorded as it is presented. That way, in the event the Judges lose their connections during a critical moment, they can call a brief recess to watch the instant replay—or they can review the testimony later. Notably, this video recording function would be in addition to the transcript prepared by the court reporter, creating a "belt and suspenders" system permitting multiple types of review. In any event, NAB presents no reason why the only possible solution to the technological problems it anticipates is the non sequitur of cutting the length of the trial in half.

Fifteenth, shortening the chess clock as NAB has proposed would not only fail to remedy the technological problems NAB predicts, it would prejudice the Participants and inject fairness and process concerns into this proceeding. The Participants have already agreed to the number of hours the participant groups will be afforded at the hearing. *See* Trial Order ¶ 4 (allocating 58

hours per Participant Group). The Participants have already preliminarily allocated this time among their witnesses in advance of the original trial date. NAB's proposal would needlessly disrupt the parties' settled expectations by suggesting that the Judges consider setting specific limits to the chess clock time for direct examination. There is no reason to further complicate these proceedings by micromanaging every aspect of the participants' presentation. The potential for "dropped connections" is not a sufficient reason to force SoundExchange to arbitrarily pick their "best" witnesses in a proceeding that implicates potentially over a billion dollars in royalty payments.

Sixteenth, contrary to NAB's straw-man argument, no one is suggesting that videoconferencing is "magical." But it *is* eminently workable. Indeed, courts around the nation have adapted to the necessities of holding virtual proceedings during the pandemic. By way of example, a district judge in the Eastern District of Alexandria is presently presiding over a bench trial via Zoom in a complex patent infringement.[10] A district judge in the North District of Florida just concluded an eight-day videoconference bench trial in a high-profile voting rights case.[11] State courts in Texas have been conducting hearings and bench trials in civil cases virtually via

---

[10] Ryan Davis, *Cisco Patent Trial Kicks off Over Zoom Without a Hitch*, Law360 (May 6, 2020), *available at* https://www.law360.com/articles/1269331/cisco-patent-trial-kicks-off-over-zoom-without-a-hitch ("A bench trial got underway Wednesday over Zoom due to the pandemic … starting with a technical tutorial that went smoothly even with the judge, attorneys, and witnesses all participating remotely.").

[11] *See Jones et al. v. DeSantis et al.*, No. 4:19-cv-00300 (N.D. Fl.); *see also* Carolina Bolado, *Fla. Judge Preps for Video Trial in Ex-Felon Voting Rights Suit*, Law360 (Apr. 2, 2020), *available at* https://www.law360.com/articles/1259694/fla-judge-preps-for-video-trial-in-ex-felon-voting-rights-suit; Michael Martin, *Major Trial Begins over Florida Felon Voting Rights*, NPR (May 2, 2020), *available at* https://www.npr.org/2020/05/02/849643065/major-trial-begins-over-florida-felon-voting-rights.

videoconference.[12] And, perhaps most notably, the Supreme Court has now successfully held two weeks of telephonic oral arguments.[13] Despite NAB's protests about the difficulties of holding a virtual hearing in this matter, states are moving forward with pilots of much more logistically complicated matters—virtual jury proceedings.[14] Counsel for SoundExchange has spoken with attorneys who have recently participated in virtual trials in federal district court. Counsel for SoundExchange has been informed that virtual witness examinations have generally not taken materially longer than they would have if conducted in-person and that technical issues have not impaired the ability for all parties to have fair proceedings. If anything, the remote format may reduce certain transaction costs—travel time is eliminated, dead time between witnesses can be

---

[12] Breanna Molloy, *'The legal system is proceeding': Courtrooms across Texas go virtual due to COVID-19*, WFAA.com (May 5, 2020), https://www.wfaa.com/article/news/local/the-legal-system-is-proceeding-courtrooms-across-north-texas-go-virtual-due-to-covid-19/287-fe03fb6d-adfb-4036-8d7b-c853c8392073. These courts have even adopted rules for taking telephonic witness testimony. *See* Emergency Standing Order, Dallas County, Texas District Court (Mar. 30, 2020), https://www.dallascounty.org/Assets/uploads/docs/courts/civil-district/14/District-Courts-Emergency-Standng-Order-20200330.pdf ("Wherever possible, when permitted by the Judge presiding, all Non-Jury trials and Motions shall proceed with the taking of all other testimonial evidence under oath either via telephonic or technological means (such as ZOOM or SKYPE). A rebuttable presumption concerning admissibility of said testimonial evidence is thereby established.").

[13] *Supreme Court Kicks of Second Week of Teleconference Oral Arguments*, CBS News (May 11, 2020), https://www.cbsnews.com/news/supreme-court-oral-arguments-remote-teleconference-mcgirt-oklahoma/.

[14] Zoe Schiffer, A court in Texas is holding the first jury trial by Zoom, The Verge (May 18, 2020), https://www.theverge.com/2020/5/18/21262506/texas-court-jury-trial-zoom-remote-virtual-verdict (reporting on a Collin County District Court Judge in Texas who is piloting a videoconference jury trial by having jurors deliver a nonbinding verdict); Notice to the Bar: Grand Jury – Supreme Court Authorization of Pilot Program for Virtual (Video) Grand Jury Sessions in Mercer and Bergen Counties from Hon. Glenn A, Grant, J.A.D., Administrative Director of the Courts (N.J. Sup. Ct., May 14, 2020), available at https://images.law.com/contrib/content/uploads/documents/399/43583/Notice-and-Order-Virtual-Grand-Jury-Pilot-Program-As-Signed-05-14-20-1.pdf (announcing pilot of virtual grand jury sessions).

reduced, and witnesses are easy to recall as needed.

Seventeenth, while SoundExchange agrees that the parties should resolve all evidentiary issues that can be resolved on a categorical basis in advance of trial, NAB's proposed pretrial briefing is not the best avenue to do so. To streamline the resolution of evidentiary issues, any pretrial briefing should be focused ***solely*** on resolving objections to proposed evidence that appears on the participants' joint exhibit list—and should avoid needless complexity, redundancy, and opportunity for impermissible surrebuttal. SoundExchange has proposed one mechanism for accomplishing these goals. *See supra* at p. 27.

d. Pandora, Sirius XM, Google, and the NRBNMLC's Response to NAB's Separate Proposal

Pandora, Sirius XM, Google, and the NRBNMLC do not favor the extensive pretrial briefing proposed by NAB or the prospect of diminishing the significance of real-time examination of key witnesses through a significantly shorter trial. NAB contends that pretrial briefing will streamline proceedings sufficient to allow for a two to three-week trial. To be clear, Pandora, Sirius XM, Google and the NRBNMLC favor efforts to streamline the trial (whether in-person or virtual) and using the period between now and trial efficiently to do so – as outlined in their proposed schedule, which provides for pre-trial proceedings to address, *e.g.*, evidentiary disputes before trial, in a manner that should meaningfully shorten the duration of the trial. But this participant group does not believe that pretrial submissions can provide an adequate substitute for real-time witness examination or materially diminish the necessary trial length.

If the Judges do wish to help the parties focus the issues by alerting the parties to witnesses and issues of particular interest to the Judges, that can be accomplished without elongated pre-trial submissions. Pandora, Sirius XM, Google, and the NRBNMLC have proposed in their schedule

that there be a short period between the presentation of the parties' recorded opening statements and the presentation of witnesses for this very purpose. Exchanging openings in advance of calling the first witnesses would serve essentially the same purpose as NAB seeks to achieve by providing the Judges with narrative pre-trial briefs and indicating therein what the parties themselves consider to be the key issues – without the additional expense associated with drafting lengthy pretrial briefs. Indeed, Pandora, Sirius XM, Google, and the NRBNMLC had understood from the April 24 status conference that the Judges viewed opening statements as performing precisely this function. The interval between openings and the start of witness testimony that this group of participants proposes would enable the Judges to provide feedback on how they would like to see emphasis placed during the witness examination period.

Further, layering lengthy pre-trial briefs that repackage merits issues already laid out in two rounds of witness testimony also would duplicate unnecessarily both that written testimony (which already makes the key disputed issues quite clear) and the purpose of opening statements, at great expense for limited incremental benefit. The reality is that participating in this proceeding is already extremely costly, particularly for non-profit participants such as the NRBNMLC; adding an extra round of briefing will only exacerbate that reality.[15] To the extent the Judges are willing to help the parties focus the issues at trial, the better course of action is to employ the more efficient alternative proposed by Pandora, Sirius XM, Google, and the NRBNMLC above.

Pre-trial briefs also are not firmly based in the Judges' regulations governing the conduct of this proceeding. Those regulations lay out in detail required submissions, which include, *inter*

[15] While no party benefits from a more expensive proceeding, it disproportionally impacts certain participants, in particular the NRBNMLC, which is a non-profit organization representing certain non-profit broadcasters with limited funding.

alia:

- petitions to participate (37 C.F.R. § 351.1(b));
- written direct statements, consisting of witness testimony, exhibits, and a rate proposal (*id.* § 351.4);
- a Joint Settlement Conference Report (*id.* § 351.7); and
- written rebuttal statements, consisting of witness testimony and exhibits (*id.* § 351.11).

The regulations also permit the filing of "proposed findings of fact and conclusions, briefs or memoranda of law" and "any replies to them" but specifically mandate that the filing of such documents "shall take place after the record has been closed." *Id.* § 351.14(a). Nowhere do the regulations discuss pre-trial briefs that may be filed before the opening of the record.

Moreover, while NAB asserts that the submission of pre-trial briefs will obviate the need for lengthy post-trial findings of fact and conclusions of law – and leaves open the timing and scope of replies to such findings – Pandora, Sirius XM, Google, and the NRBNMLC doubt that pre-trial briefs will allow for any material shortening of such submissions. The Judges' regulations require participants to raise in their post-trial findings all issues they may seek to appeal to the extent that the Judges' determination conflicts with the participants' desired outcome and warns that those issues will be waived if the participants do not do so. *See id.* § 351.14(b) ("A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party."). And the Judges' prior determination routinely rely and quote extensively from both the initial and reply proposed findings and conclusions. Given these high stakes, it is vital that the participants have a full opportunity not only to lay out robustly their proposed findings and conclusions, but also to

respond paragraph by paragraph to the proposed findings and conclusions of opposing parties in reply findings and conclusions to the extent that the Judges consider adopting any of those opposing views.

Pandora, Sirius XM, Google, and the NRBNMLC have additional concerns about the efficiency and utility of the pre-trial submissions advocated by NAB in aiding the Judges. The Judges already have access to written direct and rebuttal submissions from the parties and, even with additional pretrial submissions of the nature advocated by NAB, will need to familiarize themselves fully with the written record before and during trial. Also, these pre-trial submissions cannot, contrary to what NAB suggests, supplant written or oral testimony (or post-trial briefing summarizing such testimony) because the pre-trial briefs would not constitute evidence themselves (only attorney argument) and would come before the parties know exactly what evidence has been admitted and what testimony adduced. Thus, such submissions would not provide the Judges with the same value in marshalling the evidentiary record presented by initial and reply post-trial briefing.

For similar reasons, while Pandora, Sirius XM, Google, and the NRBNMLC are not opposed to streamlining the trial – and have suggested mechanisms for doing so – they also do not support limiting the trial to two or three weeks. This is too significant of a departure from the trial that the parties had envisioned pre-Pandemic when evaluating the number of parties, issues, and witnesses to be presented. If the trial ultimately will be virtual, then there are no added health risks associated with a longer trial. Also, as all of the parties recognize, there are likely to be hiccups associated with use of any virtual technology, including poor connections and latency, which will consume trial time to resolve. Reducing a six-week trial to half or less than half that time and then spending some portion of that truncated time dealing with technical issues is a recipe for ensuring

that a full record is not presented to the Judges, thus injecting substantive process issues into the proceeding. As stated previously, Pandora, Sirius XM, Google, and the NRBNMLC do not oppose taking readily available steps to streamline the trial, including not calling certain witnesses and addressing evidentiary issues ahead of time, but these participants cannot support a reduction in trial time so dramatic as to deprive any party of the ability to examine fully all necessary witnesses in real-time.

Finally, NAB's proposal for addressing evidentiary objections before the hearing—essentially folding that process into the proposed pre-trial briefing—is, by definition, fragmentary in that it only address objections to evidence that a participant happens to cite in its pre-trial brief. It does not appear to include a mechanism for resolving objections to other evidence not cited in those briefs, which would lead to unnecessary trial time consumed by resolving these additional objections. Pandora, Sirius XM, Google, and the NRBNMLC, by contrast, have proposed a process for addressing evidentiary objections holistically, in advance of the trial, which would enable the trial to focus more efficiently on the core disputed substantive issues.

Date: May 20, 2020

Respectfully submitted,

By: /s/ David Handzo
David A. Handzo (D.C. Bar No. 384023)
dhandzo@jenner.com
Previn Warren (D.C. Bar No. 1022447)
pwarren@jenner.com
JENNER & BLOCK LLP
1099 New York Avenue, N.W., Suite 900
Washington, DC 20001
Tel.: 202-639-6000

Counsel for SoundExchange, Inc., AMF, Screen Actors Guild-American Federation of

By: /s/ Karyn Ablin
Karyn K. Ablin (D.C. Bar No. 454473)
ablin@fhhlaw.com
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. 17th St., Suite 1100
Arlington, VA 22209
Tel: (703) 812-0443

Counsel for the National Religious Broadcasters Noncommercial Music License Committee

Television and Radio Artists, American Association of Independent Music, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and Jagjaguwar Inc.

By: /s/ Blake Cunningham
Kenneth L. Steinthal (CA Bar No. 268655)
ksteinthal@kslaw.com
J. Blake Cunningham (TX Bar No. 24099417)
bcunningham@kslaw.com
David P. Mattern (D.C. Bar No. 1024564)
dmattern@kslaw.com
Lida Ramsey (NY Bar No. 5591862)
lramsey@kslaw.com
King & Spalding LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
Tel: (415) 318-1211

Counsel for Google LLC

By: /s/ Sarang Damle
Sarang Vijay Damle (D.C. Bar No. 1619619)
sy.damle@lw.com
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Tel: (202) 637-2200

Joseph R. Wetzel (CA Bar No. 238008)
joe.wetzel@lw.com
Andrew M. Gass (CA Bar No. 259694)
andrew.gass@lw.com
Sadik Huseny (CA Bar No. 224659)
sadik.huseny@lw.com
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: (415) 391-0600

Counsel for the National Association of Broadcasters

By: /s/ Todd Larson
Benjamin E. Marks (NY Bar No. 2912921)
benjamin.marks@weil.com
Todd Larson (NY Bar No. 4358438)
todd.larson@weil.com
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000

Counsel to Pandora Media, LLC and Sirius XM Radio Inc.

By: /s/ Jennifer Tatel
Jennifer Tatel (D.C. Bar No. 472393)
jtatel@wbklaw.com
David Oxenford (D.C. Bar No. 342287)
doxenford@wbklaw.com
Wilkinson Barker Knauer, LLP
1800 M St, N.W., Suite 800N
Washington, D.C. 20036
Tel: (202) 383-3344

Counsel for Educational Media Foundation

Proof of Delivery

I hereby certify that on Thursday, May 21, 2020, I provided a true and correct copy of the Participants' Statement in Advance of May 22, 2020 Telephonic Status Conference to the following:

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

Signed: /s/ Sarang V Damle