Public Version

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

In the Matter of: Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)	Docket No. 16-CRB-0001 SR/PSSR (2018-2022)

SOUNDEXCHANGE, INC. AND COPYRIGHT OWNER AND ARTIST PARTICIPANTS' REPLIES TO MUSIC CHOICE'S PROPOSED FINDINGS OF FACT

July 7, 2017

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While the marketplace for digital music services has changed dramatically over the past twenty years, the statutory PSS rate has remained stuck near the low level at which it was originally set based on an inaccurate assessment of the value of sound recording rights and a decision to favor the PSS when they were start-ups. They are no longer fledgling companies offering consumers the only way to stream sound recordings digitally. Instead, Music Choice is a well-established and profitable company in a crowded market of digital music services, and Mr. Del Beccaro testified that Muzak is a has-been that has been operating a PSS only to obtain collateral benefits that are not shared with artists and copyright owners. The PSS currently pay a rate of 8.5% of revenue, which is far below the rates paid by digital music services in the free market, and lower than the rates paid by other statutory services, including Music Choice's principal competitor Stingray.

Music Choice's backward-looking case in this proceeding reflects the same sob story, and most of the same facts and theories, as it presented in *PSS I* and *SDARS II*. It asks the Judges to imagine a world in which record sales are robust, record piracy is a top issue, and if record companies were not happy to provide their recordings to streaming services for free, they would at least accept a royalty in the low single digits. However, apart from its advocacy in this proceeding Music Choice knows that not to be the world in which it operates. [

]

Music Choice also asks the Judges to imagine a world in which it provides only a PSS service that is struggling financially and facing mounting losses. However, that vision is just as

"improbable" today as the Judges found it to be in *SDARS II*. *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 78 FR 31842, 31844 n.5 (2013) (hereinafter "*SDARS II amend.*"). The fact is that Music Choice has regularly earned large profits and made significant profits distributions to its partners. Even at the rates proposed by SoundExchange [[redacted]]. SE FOF at ¶¶ 2152-2155.

Because 20 years of profiting from below-market rates is enough, SoundExchange proposes increasing the PSS rate to the level of the rate paid by the other cable radio services in the market – the CABSAT services that are functionally equivalent to the PSS and distributed through the same distribution channel, but were not in operation in 1998. In *SDARS II*, the Judges indicated that a benchmark for PSS rates would have to reflect the distinctive features of cable radio services. Because cable radio services other than the PSS pay CABSAT rates, the CABSAT benchmark is the benchmark the Judges asked for. Music Choice's principal competitor Stingray voluntarily entered the U.S. market paying CABSAT rates, and has continued to pay CABSAT rates without objection. This benchmark does not require any adjustments under Section 801(b)(1).

Music Choice's benchmark is based on the Asymmetric Nash Bargaining Framework and the testimony of its expert witness, Dr. Crawford. This is essentially the same benchmark that Dr. Crawford proposed on Music Choice's behalf – and that the Judges rejected decisively – in the *SDARS II* proceeding. The model does not satisfy necessary preconditions for its use, and rests on faulty assumptions and dubious cost and revenue allocations. It should be rejected again as it was in *SDARS II*. However, if the Judges were to try to fix those problems and use more

realistic assumptions, Dr. Wazzan's testimony showed that once the model is corrected, it yields results that are substantially higher than the rates proposed by Music Choice.

I. BACKGROUND

A. Parties

Response to ¶ 1. SoundExchange agrees that Music Choice provides a residential cable radio service in purported reliance on the statutory license. SoundExchange does not necessarily agree that all aspects of Music Choice's service fully conform with the requirements to qualify as a preexisting subscription service ("PSS") within the meaning of Section 114(j)(11) of the Copyright Act, but SoundExchange does not think it is necessary to decide in this proceeding whether or not that is the case. Trial Ex. 29 at 30 (Bender WDT); Trial Ex. 48 at 30-31 (Bender WRT).

Response to ¶ 2. No response.

Response to ¶ 3. No response.

Response to ¶ 4. No response.

B. Procedural History

Response to ¶ 5. No response.

Response to ¶ 6. No response.

C. Voluntary Negotiation Period

Response to ¶ 7. No response.

D. Preliminary Discovery And Disclosure Period

Response to ¶ 8. SoundExchange agrees that the Judges took the actions recited in Paragraph 8 of Music Choice's Proposed Findings of Fact. However, SoundExchange does not concede that the initial discovery in this proceeding was "pursuant to the authority granted to the

Judges by Chapter 8 of the Copyright Act." In any event, despite the high cost and distraction of conducting an additional period of discovery before the filing of written direct statements, Sirius XM and Music Choice made little or no use of materials produced by SoundExchange during that period in their direct statements.

E. Direct Phase And Discovery Period

Response to ¶ 9. No response.

Response to ¶ 10. No response.

Response to ¶ 11. No response.

Response to ¶ 12. SoundExchange agrees that it filed its written direct statement on October 19, 2016, but objects to Music Choice's characterization of its witnesses' testimony. To the extent that any of SoundExchange's witnesses testified to matters relevant to determination of royalty rates and terms for the PSS, the Judges must take that testimony into account as they set royalty rates and terms for the PSS. *See* Response to ¶ 22 *infra*.

Response to ¶ 13. No response.

F. Rebuttal Phase

Response to ¶ 14. No response.

Response to ¶ 15. SoundExchange agrees that it filed its written rebuttal statement on February 17, 2017. However, SoundExchange did not file rebuttal testimony from Mr. Kushner. SoundExchange also objects to Music Choice's characterization of its witnesses' testimony. To the extent that any of SoundExchange's witnesses testified to matters relevant to determination of royalty rates and terms for the PSS, the Judges must take that testimony into account as they set royalty rates and terms for the PSS. *See* Response to ¶ 22 *infra*.

Response to ¶ 16. No response.

Response to ¶ 17. No response.

Response to ¶ 18. No response.

II. WITNESSES

A. Music Choice

Response to ¶ 19. No response.

Response to ¶ 20. No response.

Response to ¶ 21. Dr. Crawford's *curriculum vitae* speaks for itself. Trial Ex. 54 at App. D (Crawford WDT). However, Paragraph 21 of Music Choice's Proposed Findings of Fact mischaracterizes Dr. Crawford's trial testimony concerning his publication record involving the Nash Framework. Dr. Crawford actually testified that he had *used* the Nash Framework in *one* paper (concerning unbundling of television channels). 4/24/17 Tr. 708:17-21 (Crawford). It is not uncommon to apply the Nash Framework in academic papers, but such papers less often assess whether the prerequisites for applying the Nash Framework have been met or whether the assumptions made hold true in the real world. Trial Ex. 502 at ¶ 28 (Wazzan Corr. WRT). There is no evidence that Dr. Crawford's paper demonstrates expertise relevant to the appropriateness of using the Nash Framework in the circumstances in which he employed it in this proceeding. In fact, it is not appropriate to apply the Nash Framework to set a rate for PSS. SE FOF at ¶¶ 2020-2028.

B. SoundExchange

Response to ¶ 22. SoundExchange objects to Music Choice's characterization of its witnesses' testimony. Various additional SoundExchange's witnesses testified to matters relevant to determination of royalty rates and terms for the PSS. As one example, Mr. Orszag's testimony concerning principles of benchmarking, rate structures, and economic analysis of the

Section 801(b)(1) objectives is relevant to PSS rate-setting as well as SDARS rate-setting. *See*, *e.g.*, Trial Ex. 26 at ¶¶ 12-22, 27 (Orszag Am. WDT). To the extent that any of SoundExchange's witnesses testified to matters relevant to determination of royalty rates and terms for the PSS, the Judges must take that testimony into account as they set royalty rates and terms for the PSS.

Response to ¶ 23. No response.

Response to ¶ 24. No response.

Response to ¶ 25. No response.

Response to ¶ 26. No response.

Response to ¶ 27. No response.

Response to ¶ 28. No response.

Response to ¶ 29. No response.

III. RATE PROPOSALS

A. Music Choice Proposal

Response to ¶ 30. For the reasons set forth in SoundExchange's Proposed Findings of Fact and Conclusions of Law, and the additional explanations below, the Judges should reject Music Choice's proposal to slash the statutory royalty rate for PSS, which is already significantly below market. Further reductions would be inconsistent with the Section 801(b)(1) objectives as applied to current conditions.

Response to ¶ 31. Ephemeral copies have economic value, although SoundExchange agrees that ephemeral copy rights are commonly licensed in tandem with performance rights. SE FOF at ¶¶ 2374-2377. Music Choice mischaracterizes the treatment of ephemeral copies under the Judges' current PSS regulations. Under those regulations, the Section 112(e) ephemeral copy

royalty is 5% of the licensee's overall royalty payment, not 5% of its Section 114 performance royalty payment. 37 C.F.R. § 382.3(c). That allocation is well-supported by the record. SE FOF at ¶¶ 2374-2380. Nonetheless, it is not apparent that the parties' rate proposals are substantively different with respect to the ephemeral royalty rate. SE FOF at ¶¶ 2372-2373.

B. SoundExchange Proposal

Response to ¶ 32. With its Proposed Findings of Fact and Conclusions of Law SoundExchange filed an amended rate request modifying its proposed definition of Subscriber for PSS. SoundExchange currently proposes defining a PSS Subscriber as follows:

> every residential subscriber to the underlying service of the Provider who receives Licensee's Service in the United States for all or any part of a month; provided, however, that for any Licensee that is not able to track the number of subscribers on a per-day basis, "Subscribers" shall be calculated based on the average of the number of subscribers on the last day of the preceding month and the last day of the applicable month, unless the Licensee is paid by the Provider based on end-of-month numbers, in which event "Subscribers" shall be counted based on end-of-month data.

SoundExchange Amended Proposed Rates and Terms at App. A § 382.10 (definition of Subscriber) (filed June 14, 2017).

IV. LEGISLATIVE BACKGROUND

A. Music Choice's Recitation Of Ancient History Is Irrelevant

Response to ¶ 33. As a demonstration that the PSS are mired in the past, Music Choice begins the substantive discussion in its Proposed Findings of Fact with a detour through the history of copyright protection for sound recordings. SoundExchange agrees that Congress did not extend federal copyright protection to sound recordings until 1971, principally as a result of political opposition initially by music publishers and later by radio broadcasters. *E.g.*, Barbara

A. Ringer, Copyright Law Revision, Study No. 26, Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 22-23, 25-27, 29, 33-34, 37 (Comm. Print 1961).

This ancient history is legally and factually irrelevant to the Judges' mandate in this proceeding. The Judges obviously are required to apply current copyright law, not the law as it existed in 1971 (or earlier). 17 U.S.C. §§ 112(e)(3)-(5), 114(f)(1), 801(b)(1). Under current law, the Judges are required to set "reasonable rates and terms" for the next five years, not the last century, 17 U.S.C. § 114(f)(1)(A), and to consider "existing economic conditions." 17 U.S.C. § 801(b)(1)(B). Information about existing conditions is to be found in the record of this proceeding, not the House Report cited by Music Choice, which is more than 45 years old.

Response to ¶ 34. The reasons why copyright law in 1971 was what it was are even less relevant to this proceeding. No useful information about setting "reasonable rates and terms" for the next five years, or about "existing economic conditions," is to be found in the reports cited by Music Choice: one fully 60 years old and the other almost 40 years old.

B. Congress Enacted A Digital Performance Right In Sound Recordings To Protect Artists And Record Companies As New Technologies Affect The Ways In Which Their Creative Works Are Used

Response to ¶ 35. The reason Music Choice's detour through copyright history is irrelevant to this proceeding is that in 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (the "DPRA"). That statute granted copyright owners of sound recordings the exclusive right "to perform the[ir] copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(6). That right is limited only in the same sense that all of the rights granted by Section 106 of the Copyright Act

are subject to various limitations and exceptions. *See generally* 17 U.S.C. §§ 107-122. Because this is a rate-setting proceeding, not an infringement action, the details of the scope of the performance right are not relevant here.

Response to ¶ 36. It is appropriate to consult legislative history as an aid in the interpretation of a statutory provision only if the statute is ambiguous. *E.g., Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). Music Choice has not suggested that any of the statutory provisions controlling this proceeding is ambiguous. However, to the extent that the Judges may wish to consult legislative history for general background concerning the digital performance right, the first sentence of explanatory text in both the House Report and Senate Report accompanying the DPRA could not be clearer that "[t]he purpose of [the DPRA] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used." H.R. Rep. No. 104-274, at 10 (1995); *see also* S. Rep. No. 104-128, at 10 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 357.

Response to ¶ 37. The statutory performance license is an exception to the general rule that copyright owners of sound recordings have exclusive rights to control the use of their works. 17 U.S.C. § 106(6). As a general matter in construing statutory provisions, when "a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739

(1989); *see also Tasini v. N.Y. Times Co*., 206 F.3d 161, 168 (2d Cir. 2000) (applying *Clark* in a copyright context), *aff'd*, 533 U.S. 483 (2001).

Consistent with that general principle, Congress has expressly recognized when enacting statutory licenses that they are an exception to the usual exclusive rights of a copyright owner and should be interpreted in a way that minimizes the effects of government intrusion into the marketplace. S. Rep. No. 106-42, at 10 (1999) ("in creating compulsory licenses, [Congress] is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and . . . it therefore needs to act as narrowly as possible to minimize the effects of the Government's intrusion on the broader market in which the affected property rights and industries operate); *see also* H.R. Rep. No. 108-660, at 8-9 (2004) (compulsory licenses constitute an "abrogation of copyright owners' exclusive rights"); *Fame Publ'g Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (§ 115 compulsory license is "a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition . . . [and] must be construed narrowly, lest the exception destroy, rather than prove, the rule").

Creation of the statutory license did not reflect a congressional determination that services eligible for the statutory license posed no threat to record companies' traditional business of selling records. To the contrary, the legislative history of the DPRA notes a concern that subscription services like the ones now known as the PSS "might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." S. Rep. 104-128, at 15, *reprinted in* 1995 U.S.C.C.A.N. at 362. The D.C. Circuit recently confirmed that the protective purposes of the DPRA extended to the services now

known as the PSS. After noting that the absence of a performance right allowed those services to use sound recordings without obtaining a license, the court explained, "sensing that emerging technology posed a threat to copyright owners' interests, Congress stepped in." *SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 714 (D.C. Cir. 2017).

C. The Political Opposition That Blocked Enactment Of A Performance Right In Sound Recordings Is Irrelevant To The Judges' Mandate In This Proceeding

Response to ¶ 38. Music Choice is right to acknowledge that the technology used in the distribution of recorded musical performances has a long history, and was not all invented by Mr. Del Beccaro and his team at Jerrold Communications. *See* Trial Ex. 55 at 19, 38 (Del Beccaro WDT). Music Choice is also right to note that various entrenched interests – first music publishers and later radio broadcasters – successfully blocked enactment of a performance right in sound recordings for many years. *E.g.*, Barbara A. Ringer, Copyright Law Revision, Study No. 26, Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 22-23, 25-27, 29, 33-34, 37 (Comm. Print 1961). However, the relevant point for this proceeding is that Congress eventually *did* enact a performance right in sound recordings along with the statutory license that provides the impetus for this proceeding. The Judges must apply current law as written without regard to the politics that led to it (or delayed it). 17 U.S.C. §§ 114(f)(1), § 801(b)(1).

V. HISTORY OF COMPULSORY LICENSE FOR PSS

A. Congress Enacted The DPRA To Protect Artists And Record Companies As New Technologies Began To Affect The Ways In Which Their Creative Works Were Used

Response to ¶ 39. The purpose of the DPRA was to provide copyright owners of sound recordings a performance right where there had not been one, and thus to either afford them

control over, or at least reasonable remuneration from, digital performances of their works. As the relevant congressional committees put it, "[t]he purpose of [the DPRA was] to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used." H.R. Rep. 104-274, at 10; *see also* S. Rep. 104-128, at 10, *reprinted in* 1995 U.S.C.C.A.N. at 357. The linkage between protection and compensation was explicitly recognized by the Congressional Budget Office, which said the "[b]ill purpose" was to "create a system to ensure that recording artists and companies are compensated for public performances of their works by means of certain types of digital audio transmissions." S. Rep. 104-128, at 46, *reprinted in* 1995 U.S.C.C.A.N. at 393.

Foreseeing the shift to performance-based services that is now occurring, Congress explained:

> [I]n the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies. Current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

H.R. Rep. 104-274, at 13; *see also* S. Rep. 104-128, at 14, *reprinted in* 1995 U.S.C.C.A.N. at 361.

Similarly, Senator Feinstein, a co-sponsor of the DPRA, stated upon the occasion of its passage:

> Why should the digital transmission businesses be making money by selling music when they are not paying the creators who have produced that music?
>
> If this should occur without copyright protection, investment in recorded music will decline, as performers and record companies produce recordings which are widely distributed without compensation to them. This would result in the decline of what presently constitutes one of America's most important, productive and competitive industries.

141 Cong. Rec. 22,790 (1995) (statement of Sen. Feinstein).

The D.C. Circuit recently confirmed the protective purposes of the DPRA. After noting that the absence of a performance right allowed the services now known as the PSS to use sound recordings without obtaining a license, the court explained, "sensing that emerging technology posed a threat to copyright owners' interests, Congress stepped in." *Muzak LLC*, 854 F.3d at 714.

Response to ¶ 40. To be sure, Congress intended "to strike a balance among all of the interests affected" by the new performance right. H.R. Rep. 104-274, at 14; *see also* S. Rep. 104-128, at 14, *reprinted in* 1995 U.S.C.C.A.N. at 361. However, Music Choice mischaracterizes the interests that Congress perceived as being at stake. The DPRA was not backward-looking legislation seeking to protect the record companies' traditional business of selling records, but rather forward-looking legislation designed to "provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies." H.R. Rep. 104-274, at 14; *see also* S. Rep. 104-128, at 15, *reprinted in* 1995 U.S.C.C.A.N. at 362.

Response to ¶ 41. One of the ways the DPRA accommodated established interests was by the creation of a statutory license. However, Congress never suggested that copyright owners

should get less than full and fair compensation for the use of their recordings under the statutory license, or that digital music services should receive the benefit of below-market rates for their exploitation of the labor, creative efforts, and financial investment of artists and copyright owners.

Response to ¶ 42. The statutory license has various conditions. As to the PSS, these are currently set forth in 17 U.S.C. § 114(d)(2)(A) and (B). However, Music Choice's suggestion that a service satisfying these conditions could not have a negative effect on record sales has no basis in the legislative history it cites. The closest that legislative history comes to stating the proposition for which Music Choice cites it is a statement that on-demand services "pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." H.R. Rep. 104-274, at 14; *see also* S. Rep. 104-128, at 16, *reprinted in* 1995 U.S.C.C.A.N. at 363. But that is well less than a congressional prediction that other services would pose little or no risk to sales or other revenue streams received by artists and copyright owners.

To the contrary, the legislative history also notes a concern that subscription services like the ones now known as the PSS "might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." S. Rep. 104-128, at 15, *reprinted in* 1995 U.S.C.C.A.N. at 362. Anticipating the shift to streaming that is now occurring, Congress sought to protect artists and copyright owners by giving them at least the right to reasonable compensation from all digital performance-based uses of their works, including by the PSS. The D.C. Circuit recently confirmed that the protective purposes of the DPRA extended to the services now known as the PSS. After noting that the absence of a performance

right allowed the services to use sound recordings without obtaining a license, the court explained, "sensing that emerging technology posed a threat to copyright owners' interests, Congress stepped in." *Muzak LLC*, 854 F.3d at 714.

Twenty years of experience with streaming services confirms that Congress' concern was well-founded. Streaming services of all kinds – including services relying on the statutory license – have had significant negative effects on the traditional business of selling copies of recordings. Trial Ex. 28 at ¶¶ 16-30 (Willig WDT).

Response to ¶ 43. The DPRA was only possible because the providers of two subscription streaming services then in operation – DMX and Music Choice – agreed not to oppose the bill. The CEO of DMX testified that he "believe[d] that sound recording copyright owners and recording artists deserve compensation" for their use of recordings. S. Rep. 104-128, at 15, r*eprinted in* 1995 U.S.C.C.A.N. at 362. Music Choice agreed to support the DPRA to secure investment from record company affiliates in the early 1990s. SE FOF at ¶ 1969. Congress never suggested that copyright owners should get less than full and fair compensation for the use of their recordings under the statutory license.

Response to ¶ 44. The choice of the Section 801(b)(1) rate standard to set rates under the statutory license is barely mentioned at all in the legislative history of the DPRA, and no rationale for its selection is specified. S. Rep. 104-128, at 30, *reprinted in* 1995 U.S.C.C.A.N. at 377. That standard had governed Section 115 statutory royalty rates for almost 20 years at that time and had been noncontroversial. Copyright Act of 1976, Pub. L. No. 94-553 § 801(b)(1), 90 Stat. 2541, 2594-95. Because the DPRA made significant revisions to Section 115 that largely mirrored the new Section 114 statutory license, it seems most likely that Section 801(b)(1) was

employed in Section 114 to maintain parallelism with Section 115. *See* DPRA, Pub. L. No. 104-39 § 4, 109 Stat. at 344.

The Section 801(b)(1) objectives were originally enacted to provide additional specificity concerning the concept of a reasonable rate, and thereby avoid possible constitutional issues as to the delegation of rate-setting authority to the Copyright Royalty Tribunal. *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 FR 4080, 4082 (2008) (hereinafter "*SDARS I*"). By the time of the DPRA, there had been only two litigated proceedings under Section 801(b)(1). In the 1980 Section 116 proceeding, the Copyright Royalty Tribunal gave scant consideration to the Section 801(b)(1) objectives, and simply concluded that the rate it had derived from "marketplace analogies" was consistent with each of the objectives. *SDARS I*, 73 FR at 4082 (citing *In re 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players*, 46 FR 884, 889 (1981)). In the 1981 Section 115 proceeding, the Copyright Royalty Tribunal "nearly doubled the existing rates" after applying the objectives to marketplace evidence. *SDARS I*, 73 FR at 4083.

Nothing in those decisions would have caused Congress in 1995 to think that by incorporating the Section 801(b)(1) rate standard in the DPRA, it was favoring the services or calling for a rate that would be maintained at below-market levels for decades. That would have been contrary to its expressed purpose of protecting the livelihoods of artists and record companies. H.R. Rep. 104-274, at 10; *see also* S. Rep. 104-128, at 10, *reprinted in* 1995 U.S.C.C.A.N. at 357. Certainly in its consideration of the DPRA, Congress never suggested that copyright owners should get less than full and fair compensation for the use of their recordings under the statutory license.

B. Congress Grandfathered The PSS Without Changing The Applicable Rate Standard

Response to ¶ 45. After enactment of the DPRA, it quickly became apparent that there was a lack of agreement concerning how it applied to webcasters, who were just emerging at the time and had not been a focus of the DPRA. H.R. Rep. No. 105-796, at 80 (1998) (Conf. Rep.), *as reprinted in* 1998 U.S.C.C.A.N. 639, 656; Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, H. Comm. on the Judiciary, 150th Cong. 50-52 (Comm. Print 1998). As part of the legislative negotiations leading to enactment of the Digital Millennium Copyright Act ("DMCA"), a compromise was reached to accommodate webcasters within the statutory license structure. However, the predecessors of Sirius XM and the services now known as the PSS opposed having those changes apply to them. Accordingly, an agreement was reached to "grandfather" certain of their service offerings under the statutory license conditions and rate standard that had applied under the DPRA. H.R. Conf. Rep. 105-796, at 80-81, 85, 88-89, *reprinted in* 1998 U.S.C.C.A.N. at 656-57, 661, 664-65.

Response to ¶ 46. The compromise concerning accommodation of webcasters within the statutory license was reached shortly after the Librarian's *PSS I* decision was released, and while that decision was on appeal to the D.C. Circuit. *See In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 FR 25394 (1998) (hereinafter "*PSS I*"); *Recording Industry Ass'n of America, Inc. v. Librarian of Congress*, 176 F.3d 528 (D.C. Cir. 1999). While record companies opposed extension of the statutory license to webcasters without the legislation being absolutely clear that a fair-market willing buyer/willing

seller rate standard would apply, *see* 17 U.S.C. § 114(f)(2)(B), the record companies and PSS were all surely mindful of interfering with the pending *PSS I* appeal.

Response to ¶ 47. The legislative history describing the DMCA's bifurcation of Section 114(f) into separate parts for the SDARS/PSS and other services could hardly devote less attention to the difference in rate standards. The two rate standards are noted in passing, but the Conference Report discusses the differing provisions concerning the timing of proceedings and the minimum fee at much greater length. H.R. Conf. Rep. 105-796, at 85-86, *reprinted in* 1998 U.S.C.C.A.N. at 661-62. Congress specified no rationale for the different rate standards other than continuing the status quo. *Id*. at 85, *reprinted in* 1998 U.S.C.C.A.N. at 661.

Response to ¶ 48. Music Choice argues that the different rate standards were intended to prevent disruption to the PSS. However, the legislative history Music Choice cites does not actually pertain to the different rate standards in Section 114(f). Instead, that part of the Conference Report discusses the different statutory license conditions in Section 114(d)(2). It makes sense that adding a number of new statutory license conditions (now codified in Section 114(d)(2)(C)) might have had the potential of disrupting "operations" of the PSS, because the conditions address matters involving the operation of a licensee's service. H.R. Conf. Rep. No. 105-796, at 80-81. Congress' desire to avoid adopting statutory license conditions that might be disruptive says nothing at all about its motivations for continuing the Section 801(b)(1) rate standard.

Response to ¶ 49. The DMCA made no changes in the statutory text articulating the rate standard for the PSS. Consistent with that result, a proper review of the DMCA legislative history (as described in the preceding paragraphs) shows only that Congress intended to preserve

the status quo as to the PSS rate standard. Thus, in this proceeding, the Judges must interpret and apply Section 801(b)(1) as to the PSS consistent with the statutory text, the same way Section 801(b)(1) has always been interpreted and applied, under both Section 114 and 115.

Section 801(b)(1) was originally enacted in 1976, and the four objectives continue substantively unchanged to this day. Copyright Act of 1976, Pub. L. No. 94-553 § 801(b)(1), 90 Stat. 2541, 2594-95. Thus, in interpreting the Section 801(b)(1) objectives, what matters is what Congress said and meant in 1976 when it enacted those objectives, not anything that Congress might or might not have thought when it referred to them in the DPRA or continued their application to the PSS in the DMCA. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 241-42 (2011) ("[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation"); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("'[p]ostenactment legislative history' . . . could have had no effect on the congressional vote"); *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (noting the "difficulties inherent in relying on subsequent legislative history").

Because the Section 801(b)(1) objectives have remained substantively unchanged since 1976, and legislative history from the 1990s can shed no light on what Congress intended when it enacted Section 801(b)(1) in 1976, it is appropriate to look at earlier interpretations of those provisions, as Music Choice urges the Judges to do. Specifically, Music Choice points to the 1981 decision of the Copyright Royalty Tribunal in the first litigated proceeding under Section 115. *In re Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords*, 46 FR 10466, 10478-79 (1981) (hereinafter "*1981 Phonorecords Determination*") (reviewing the legislative history of Section 801(b)(1)). The Judges reviewed

that decision when they were first called upon to interpret Section 801(b)(1) in *SDARS I*, and found that it left their path "well laid out." *SDARS I*, 73 FR at 4082-84.

Among other things, the *1981 Phonorecords Determination* held that (1) "a reasonable adjustment of the statutory rate should work to ensure the full play of market forces, while affording individual copyright owners a reasonable rate of return for their creative works"; (2) the first Section 810(b)(1) objective is intended "to encourage the creation and dissemination" of works subject to the statutory license; (3) "in most instances, the rate of return afforded the copyright owner is determined on the free market"; (4) the licensed work is "an essential input" to the licensee's offering; and (5) even a significant statutory rate increase is not disruptive if it "is necessary to afford copyright owners a fair return" and the licensee has an ability "to absorb, or pass on" the increase. *1981 Phonorecords Determination*, 46 FR at 10479-81. Those are principles that would have provided background to Congress as it decided what rate standard should apply to the PSS in the DPRA and continue to apply to the PSS in the DMCA. Congress's failure to do anything to depart from that market-oriented (although not strictly market-based) articulation of the Section 801(b)(1) standard can fairly be interpreted as acceptance thereof. *See United States v. Rutherford*, 442 US 544, 554 (1979) (deferring to agency interpretation where "Congress has not acted to correct any misperception of its statutory objectives"); *see also, e.g.*, *Bob Jones Univ. v. United States*, 461 US 574, 600-01 (1983).

Response to ¶ 50. No response.

VI. HISTORY OF MUSIC CHOICE

Response to ¶ 51. Apparently in search of some laurels on which to rest, Music Choice leads the Judges through a purported history of the service focused almost exclusively on things

that happened more than 20 years ago. However, even this recitation of Music Choice's own history is inaccurate or misleading in various respects. For example, the first line of Music Choice's history is wrong. It is possible that when Jerrold Communications first started working on the project that would become the Music Choice service, it was the only one working on such a project (although it is not clear how Mr. Del Beccaro would know that). By the time the Music Choice service actually launched, Mr. Del Beccaro testified that it was *not* the first digital music service. 5/18/17 Tr. 4513:5-9 (Del Beccaro).

Response to ¶ 52. The Judges have experience in proceedings like this with services' overstating their technological contributions. *SDARS I*, 73 FR at 4096. In this proceeding, Music Choice tries to claim credit for four years of technology development undertaken by Jerrold Communications before it spun off the Music Choice service in 1991. The implication seems to be that Music Choice the corporate entity participating in this proceeding should somehow be able to claim credit for Jerrold's work when it operated the service. However, Jerrold and Music Choice are separate entities, [ ]. SE FOF at ¶¶ 1965-1966. Jerrold is not the provider of a PSS or a participant in this proceeding, and Music Choice cannot claim credit for having invented technology of which it is [ ].

Moreover, Mr. Del Beccaro's extravagant claims of inventorship by Jerrold should be viewed with appropriate skepticism. When Mr. Del Beccaro was asked to provide an example of a specific invention made to launch what is now the Music Choice service, what he came up with was a technique for transmitting television content with a higher-than-usual radio of audio to video. 5/18/17 Tr. 4567:25-4568:19 (Del Beccaro). Of course, he had to acknowledge that there

was a television industry, and even cable and satellite television, well before 1987, and that such television obviously involved transmitting both audio and video. 5/18/17 Tr. 4568:7-12 (Del Beccaro). A technique to use MVPD bandwidth efficiently to transmit Music Choice's mix of audio and video programming may well have been [ ]. *See* 5/18/17 Tr. 4551:9-18 (Del Beccaro) ([ ]). However, it is a far cry from being "the first company to broadcast any kind of a digital signal in – in the entire world." 5/18/17 Tr. 4512:14-15 (Del Beccaro) (a hyperbolic claim that is further belied by Mr. Del Beccaro's concession that Music Choice was not even the first cable radio service to launch (*see* Response to ¶ 51 *supra*)).

Response to ¶ 53. As described in detail SoundExchange's Proposed Findings of Fact, the history of investment in Music Choice is relevant to determining an appropriate statutory royalty rate structure for the PSS, because from the very beginning, its partners have always participated in Music Choice for a mix of strategic, investment and commercial reasons, and [ ]. SE FOF at ¶¶ 1963-1977.

Over the course of this proceeding, there has been some controversy about whether Music Choice was or was not majority owned by its cable company partners at a particular time. [

[redacted] 5/18/17 Tr. 4638:18-4639:3 (Del Beccaro); SE FOF at ¶ 1968. Ultimately, Dr. Wazzan concluded that "it doesn't matter if they are majority-owned or significantly-owned." 5/3/17 Tr. 2363:24-25 (Wazzan).

Response to ¶ 54. When the PSS first launched, they were originally positioned as a separately-priced premium product comparable to today's so-called mid-tier subscription services. Unfortunately, they were ahead of their time. Trial Ex. 50 at ¶ 19 (Walker WRT).

Response to ¶ 55. When the PSS could not find a sufficient market for premium music services in the 1990s, they migrated to their current low-revenue business model. They continued to provide what record companies consider to be a premium product – 24x7 music with no in-stream advertising and little or no on-screen advertising; they just charged a lot less for it. This was possible because the percentage-rate statutory rate structure adopted in *PSS I* did not require the services to monetize recordings effectively. Trial Ex. 50 at ¶ 19 (Walker WRT).

Curiously, Music Choice's historical narrative puts this migration out of chronological order. The placement of Music Choice's ¶ 55 seems intended to suggest that the migration occurred during Music Choice's earliest years – in the 1991-1993 timeframe. However, the migration actually occurred during the late 1990s. *PSS I* CARP Report, Trial Ex. 979 at ¶¶ 54-55. It was not effectuated definitively until Music Choice's MVPD partners bought into the new business model by making the service a comprehensive basic cable inclusion in 1999. SE FOF at ¶¶ 1980-1994.

Response to ¶ 56. Companies affiliated with three record companies invested in Music Choice in the 1993-1994 timeframe. SE FOF at ¶¶ 1967-1971. None of those ownership interests is currently held within a record company. SE FOF at ¶¶ 1967-1968, 1971; Trial Ex. 501 at ¶ 92 (Wazzan Corr. WDT).

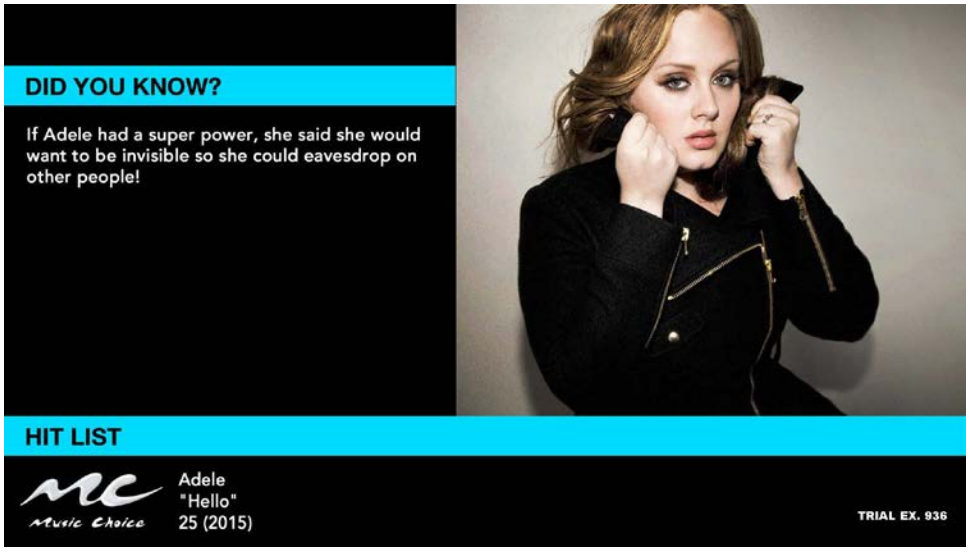
Response to ¶ 57. [ ] SE FOF at ¶¶ 1967-1971. In all, "eleven interdependent co-equal agreements . . . together constituted the partnership agreement between [Music Choice] and the record companies." *PSS I*, 63 FR at 25402. Among those agreements [ ]. Trial Ex. 504 at 7-9; Trial Ex. 912; Trial Ex. 913; Trial Ex. 914; *PSS I* CARP Report, Trial Ex. 979 at ¶¶ 162-164; *PSS I*, 63 FR at 25401-02. However, Music Choice's characterization of that payment in its Findings of Fact is at odds with the characterization of that payment by the *PSS I* CARP. There, the arbitrators found that the 2% rate covered only 60% of the recording industry, and that it is unclear what portion if any would go to performing artists. Accordingly, the arbitrators viewed the 2% rate as setting "a reasonable range between 3.3% to 6.6%" on an industry basis. *PSS I* CARP Report, Trial Ex. 979 at ¶ 166.

Response to ¶ 58. In addition to payment of a nominal percentage of Music Choice's revenues – at a time when Music Choice had no such obligation as a matter of law – the record companies received both (1) the ability to announce that for the first time, an entity performing sound recordings was paying royalties to sound recording copyright owners, something

terrestrial radio broadcasters had refused to do, and (2) the partnership's support for congressional enactment of the digital performance right. Because this significant additional value, along with an investment and other commercial arrangements, was all part of an integrated transaction, the Register found the agreements to be an unreliable indicator of the value of sound recording performance rights. *PSS I*, 63 FR at 25401-02; SE FOF at ¶¶ 1978-1979.

Response to ¶ 59. It is unclear whether Music Choice's ¶ 59 was merely intended to recapitulate its ¶ 55 or to suggest some evolution of its business model over the last 20 years. If the latter, there is no evidence of that in the record. Music Choice's service has been delivered through MVPDs from the very beginning, when it [ ]. SE FOF at ¶¶ 1964-1965. And it transitioned from being a premium service to a basic cable inclusion in the late 1990s. *See* Response to ¶ 55 *supra*.

Response to ¶ 60. The record of this proceeding contains very little evidence of innovation by Music Choice since the late 1990s. Time and again Music Choice points to its screen displays (including information such as the artist's name and album title) as its primary area of innovation. *E.g.*, Trial Ex. 54 at ¶ 30 (Crawford WDT); Trial Ex. 55 at 38 (Del Beccaro WDT); Trial Ex. 56 at 11 (Williams WDT). However, the illustration of such a display in Trial Ex. 936 demonstrates that the displays are less unique than Music Choice suggests.



Almost all services relying on the statutory license are required by statute to have screen displays that display text data identifying the title of each sound recording they play, along with the album title and the featured recording artist's name, as Music Choice's screen display does toward the bottom of Trial Ex. 936. 17 U.S.C. § 114(d)(2)(C)(ix). [ ] 5/18/17 Tr. 4576:1-14 (Del Beccaro); 5/18/17 Tr. 4738:16-23 (Williams). And "HIT LIST" is just the name of a Music Choice channel. Trial Ex. 910. What that leaves is a photograph of the artist Adele and a trivia question presented in a simple graphic layout with a black background and the Music Choice trademark. Mr. Williams agreed that while Music Choice's trivia questions are proprietary, the idea of displaying artist images and facts is not unique or proprietary. 5/18/17 Tr. 4738:24-4739:7 (Williams); *see also* SE FOF at ¶¶ 2062-2063.

Delivering webcasts through a mobile app, rather than just a website, is probably an improvement Music Choice has made since it started webcasting in 1996. However, it does not distinguish Music Choice from countless other providers of apps that have made accessing music from mobile devices ubiquitous and normal. *E.g.*, Trial Ex. 32 at ¶¶ 13, 27 (Harrison WDT).

In the end, Music Choice's inaccurate history focused on the period between 20 and 30 years ago provides no information useful for setting a rate for the next five years.

VII. PSS RATE HISTORY

A. *PSS I* Set A Rate Based Primarily On Musical Works Rates And A Policy Decision To Set A Low Rate Favoring The Services

Response to ¶ 61. No response.

Response to ¶ 62. No response.

Response to ¶ 63. In *PSS* I, the arbitrators estimated that the services now known as the PSS would pay musical works royalties in the range of 5-10% of gross revenues. This range was estimated because those rates had not been finally determined at the time of the proceeding. *See PSS I* CARP Report, Trial Ex. 979 at ¶ 167 & n.17.

Response to ¶ 64. The Register found the lower end of the range identified by the arbitrators to be arbitrary, and so seems to have assumed a number higher in the range described in the preceding paragraph. *PSS I*, 63 FR at 25403-04, 25409-10 & n.33. The musical works royalty rate ultimately paid by Music Choice ended up being [ ]. Trial Ex. 55 at 9 (Del Beccaro WDT). [ ] while she intended to set a rate "less than the value of the performance rights of the musical compositions," it does appear that the Register slightly overestimated the musical works royalty rate that Music Choice would ultimately pay. *PSS I*, 63 FR at 25410.

However, Music Choice's complaints about the accuracy of this estimate miss the much larger problem with the *PSS I* decision – that musical works royalty rates are not at all predictive of sound recording royalty rates. SE FOF at ¶¶ 1901-1906, 1921-1927. The Register was left

relying on musical works as a benchmark because there was no other evidence of the marketplace value of anything that seemed to her to be even remotely relevant. *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 FR 23054, 23055 (2013) (hereinafter "*SDARS II*"); SE FOF at ¶ 1899. The Register was keenly aware of the limitations of that benchmark, at one point asking rhetorically "whether this reference point is determinative of the marketplace value of the performance right in sound recordings," and agreeing with the arbitrators that the answer to that question was "no." *PSS I*, 63 FR at 25404. That is why every subsequent decision-maker to consider the utility of a musical works benchmark for setting sound recording royalties has thoroughly rejected such a benchmark. *SDARS II*, 78 FR at 23055, 23058; *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 FR 24084, 24094-95 (2007) (hereinafter "*Web II*"); *In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 FR 45240, 45246-47, 45258-59 (2002) (hereinafter "*Web I*"). It is reliance on musical works rates at all as an estimate of the market value of sound recordings, not a slight overestimate of musical works rates, that fundamentally makes the *PSS I* decision, and all subsequent PSS rate determinations, unreliable indicators of the value of sound recording rights for a PSS. SE FOF at ¶¶ 1892-1920.

Response to ¶ 65. Music Choice suggests that the Register's *PSS I* decision had a mathematical precision that is absent from the decision itself. The number ultimately derived by the Register was based primarily on musical works rates and a desire to set a low rate favoring the services, SE FOF at ¶ 1900, but rested to some extent on an unspecified combination of factors. *SDARS II*, 78 FR at 23055.

B. The 2003 And 2007 Settlements Were Anchored In The *PSS I* Decision

Response to ¶ 66. In 2003, RIAA, the musicians' unions and the PSS reached a settlement of rates and terms for the use of sound recordings by the PSS for the period 2002-2007. SE FOF at ¶¶ 1908-1911. SoundExchange, Inc. did not yet exist as a separate entity. *In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services*, 68 FR 4744, 4746 (2003) (hereinafter "*2003 NPRM*") (referring to SoundExchange as a division of RIAA). While Music Choice emphasizes its desire to avoid litigation costs, such costs are incurred by both sides in a rate proceeding, which can make settlement rational for both sides. 5/3/17 Tr. 2407:24-25 (Wazzan); SE FOF at ¶ 1913; *see Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1014-15 (D.C. Cir. 2014) (rejecting Music Choice argument that the 2007 settlement rates were "driven solely by the disparate impact of rate litigation costs"); 4/25/17 Tr. 930:24-931:13 (Crawford).

Response to ¶ 67. SoundExchange agrees with Music Choice that the 2003 settlement was anchored in the *PSS I* decision. However, Music Choice was no more "forced" to accept a settlement than RIAA and the unions were. Music Choice has provided no evidence of coercion and does not really suggest that the settlement was anything other than consensual. Instead, each party was constrained by the high costs of litigating and the risk of achieving a similar outcome as in *PSS I*. SE FOF at ¶¶ 1910-1911, 1913. Thus, the fact that an agreement was reached is not sufficient to overcome the regulatory overhang of the *PSS I* decision. The rates in the 2003 settlement are not a reliable indicator of a market rate for PSS. SE FOF at ¶¶ 1914, 1918. They also may not be a reliable indicator of the decision that would have been reached by the

Copyright Royalty Board applying Section 801(b)(1) if the participants had instead chosen to litigate. Trial Ex. 501 at ¶¶ 41-42 (Wazzan Corr. WDT).

Response to ¶ 68. SoundExchange also agrees with Music Choice that the 2007 settlement was anchored in the *PSS I* decision. Again, Music Choice was no more "forced" to accept a settlement than SoundExchange was. It had "significantly positive operating income" at the time. *SDARS II amend.*, 78 FR at 31844. And of course both SoundExchange and Music Choice confronted litigation costs. Responses to ¶¶ 66-67 *supra*; 5/3/17 Tr. 2407:24-25 (Wazzan); SE FOF at ¶ 1913; *see Music Choice*, 774 F.3d at 1014-15 (rejecting Music Choice argument that the 2007 settlement rates were "driven solely by the disparate impact of rate litigation costs"); 4/25/17 Tr. 930:24-931:13 (Crawford). Each party was constrained by the high costs of litigating and the risk of achieving a similar outcome as in *PSS I*. SE FOF at ¶¶ 1910, 1912-1913. Thus, the fact that an agreement was reached is not sufficient to overcome the regulatory overhang of the *PSS I* decision.

As the Judges found in *SDARS II*, the rates in the 2007 settlement are not a reliable indicator of a market rate for PSS. *SDARS II amend.*, 78 FR at 31844 ("[t]he current PSS rate is not a market rate"); *SDARS II*, 78 FR at 23058 ("it is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate"); SE FOF at ¶¶ 1914, 1918. The settled rate also may not be a reliable indicator of the decision that would have been reached by a CARP applying Section 801(b)(1) if the participants had instead chosen to litigate. Trial Ex. 501 at ¶¶ 41-42 (Wazzan Corr. WDT).

C. The SDARS II Proceeding

Response to ¶ 69. *SDARS II* was the first fully-litigated PSS rate proceeding after *PSS I*. Like the 2003 and 2007 settlements before it, the *SDARS II* decision embodied a basically status quo result – continuing the rate trajectory initially established by *PSS I*, rather than seeking to establish a rate free of the regulatory overhang of *PSS I*. Thus, the *SDARS II* rate cannot be said to be at all indicative of a market rate for PSS. *SDARS II amend.*, 78 FR at 31844 ("[t]he current PSS rate is not a market rate"); *SDARS II*, 78 FR at 23058 ("cannot properly be said to be a market benchmark rate"); SE FOF at ¶¶ 1915-1920. However, that does not necessarily mean that *SDARS II* was wrongly decided based on the record available and application of the Section 801(b)(1) objectives at the time. 5/3/17 Tr. 2305:2-11 (Wazzan). The decision was affirmed by the D.C. Circuit over objections by both SoundExchange and Music Choice. *Music Choice*, 774 F.3d at 1012-16.

To the extent that Music Choice's paragraph 69 might suggest otherwise, it should be noted that both the 2003 and 2007 settlements were adopted in proceedings conducted pursuant to the Copyright Act under the rules for CARP proceedings, or proceedings before the Judges, then in effect. *In re Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services*, 72 FR 71795 (2007); *In re Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services*, 72 FR 61585 (2007); *In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services*, 68 FR 39837 (2003); *2003 NPRM*, 68 FR at 4744.

Response to ¶ 70. In reciting the pre-litigation history of *SDARS II*, Music Choice takes the patronizing view that record companies would conclude that it is "reasonable" to cut the

statutory royalty rate dramatically, if only they understood their business as well as Music Choice thinks it understands their business. SE FOF at ¶ 1928. However, the PSS statutory royalty rate is significantly below market, SE FOF at ¶¶ 1889-1927, 1942-1947. [ ] For that reason, record companies would never agree to license Music Choice at a rate at or below the current rate. SE FOF at ¶¶ 1928-1941. That makes settlements challenging to achieve.

Response to ¶ 71. To avoid repetition, SoundExchange incorporates its response to paragraph 70 *supra*.

Response to ¶ 72. SoundExchange agrees that in *SDARS II*, the Judges set rates of 8% and 8.5% after finding no marketplace benchmarks they considered satisfactory. SE FOF at ¶¶ 1915-1916. However, Music Choice's critique of the Judges' rejection of the musical works benchmark is unfounded. To be sure, Music Choice is a buyer of both sound recording and musical works rights. That is apparently what Music Choice means when it says that its "unique characteristics are replicated in [its] PRO licenses." But the same could be said of Music Choice's acquisition of album cover art, computer servers and the services of programmers for its channels. It would be illogical to think that the price of any of these inputs to its service provides useful information about the price at which a record company would license sound recordings. Trial Ex. 502 at ¶ 12 (Wazzan Corr. WRT). Because musical work performance rights organizations are different sellers than record companies selling different things than the

rights at issue in this proceeding, rejection of the musical works benchmark in *SDARS II* (again) was fully warranted. SE FOF at ¶¶ 1901-1906.

Response to ¶ 73. SoundExchange agrees that in *SDARS II*, after concluding there was no satisfactory basis for applying the Section 801(b)(1) objectives to anything other than the existing 7.5% royalty rate, the Judges adopted an increase that they repeatedly characterized as "modest" based on application of Section 801(b)(1). *SDARS II amend.*, 78 FR at 31844; SE FOF at ¶ 1916. SoundExchange also agrees that starting with the existing rate was unsatisfying, because it was not a reliable benchmark. SE FOF at ¶¶ 1889-1947. The Judges acknowledged as much. *SDARS II amend.*, 78 FR at 31844 ("[t]he current PSS rate is not a market rate"); *SDARS II*, 78 FR at 23058 ("it is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate").

However, SoundExchange disagrees with Music Choice's reasons for finding the 2007 settlement rate an unsatisfying substitute for a marketplace benchmark. The 2007 settlement rate was *not* a poor benchmark because the Register in *PSS I* slightly overestimated the level at which Music Choice's effective musical works royalty rate would ultimately be set (*see* Response to ¶ 64 *supra*), or because the 2003 and 2007 settlements were coerced (indeed, they were consensual; *see* Responses to ¶¶ 66-68 *supra*). Instead, the fundamental issue is that in *PSS I* the Register used musical works rates as a benchmark for sound recording rates, when they have subsequently been proven to be an entirely unreliable indicator of the value of sound recordings, and intended to set a low rate relative to that poor benchmark. SE FOF at ¶¶ 1892-1906. The 2003 and 2007 settlements were anchored in the *PSS I* decision and did not overcome its regulatory overhang. SE FOF at ¶¶ 1907-1914.

Response to ¶ 74. While Music Choice's planned channel expansion that provided the basis for the small *SDARS II* rate increase was not a major focus of the participants' arguments, it was certainly part of the case. *E.g.*, Proposed Findings of Fact of SoundExchange, Inc. in Docket No. 2011-1 ¶ 64, 681 (Sept. 26, 2012).

Moreover, the adjustment the Judges made was directionally right, it just did not go far enough. The PSS statutory royalty rate is significantly below market, SE FOF at ¶¶ 1889-1927, 1942-1947. [ ] Yet Music Choice subscribers consume a massive amount of music. SE FOF at ¶ 1933. [ ] With no benchmark that the Judges believed to allow precise determination of a marketplace rate, it was "fair" to recognize Music Choice's heavy usage and take at least a "modest" step toward a marketplace rate. *SDARS II amend.*, 78 FR at 31844.

Response to ¶ 75. The D.C. Circuit affirmed the *SDARS II* PSS rate over objections by Music Choice similar to the ones it raises here, finding that "[t]he Judges acted reasonably when they inferred that the channel expansion would lead to increased performances of copyrighted works." *Music Choice*, 774 F.3d at 1015-16.

Response to ¶ 76. Moreover, while Music Choice, did not expand its channels to the extent it predicted, it nonetheless expanded its channels from 46 to 75 (25 of those Internet only). Trial Ex. 55 at 4, 15 (Del Beccaro WDT). [

[redacted]]

VIII. THE STARTING POINT FOR THE SECTION 801(b)(1) ANALYSIS

Response to ¶ 77. Music Choice suggests that the Judges could choose to set a rate by evaluating application of the Section 801(b)(1) objectives with respect to any of three equally-good possible starting points – a marketplace benchmark, an economic model, and the existing rate. This ignores what the Judges have recognized as their "well laid out" "path" for deciding rates in a case subject to Section 801(b)(1). *SDARS I*, 73 FR at 4084. It is also inconsistent with the Judges' statutory mandate to determine reasonable royalty rates, rather than merely adjust them. SE FOF at § IX.A. Insofar as it suggests that the Judges do not even need to try to identify a marketplace rate as their starting point, Music Choice's new fondness for the existing rate is even inconsistent with its own expert's testimony. Trial Ex. 54 at ¶¶ 8, 39 (Crawford WDT); *see* SE FOF at § XIII.B.1.

To be sure, in *SDARS II*, the Judges used the existing rate, rather than an estimated market rate, as the starting point for evaluating the Section 801(b)(1) objectives as to the PSS. However, that was only after evaluating the proffered benchmarks, failing to find what they perceived as any useful indication of a market rate, and being persuaded that the current rate was neither too low nor too high. *SDARS II amend.*, 78 FR at 31843; *SDARS II*, 78 FR at 23058. Thus, in this proceeding, the Judges must first consider the evidence of market rates proffered by the participants and see if they can establish a range of reasonable market rates. Even if the Judges are not persuaded that a market rate would be at a particular level (although SoundExchange believes that level should be the level of the CABSAT rates), there is in the

record of this proceeding ample evidence that the current rate is significantly below market. SE FOF at ¶¶ 1889-1947. [ ] Any application of the factors in the absence of a specific marketplace rate level would have to take that into account.

A. Marketplace Benchmarks

Response to ¶ 78. SoundExchange agrees that benchmarking is the most commonly used method to generate a starting point for evaluating the Section 801(b)(1) objectives, but it is more than that. Benchmarking is a standard way for economists to estimate reasonable royalty rates. SE FOF at ¶¶ 90, 1779. It is also the approach to determining (rather than merely adjusting) rates that is most likely to be anchored in solid evidence. *See* SE FOF at § IX.A. Trying to ascertain a market rate through some kind of benchmarking process should be the goal in every proceeding under Section 801(b)(1). As the Judges explained in *SDARS I*, after reviewing the history of rate-setting under Section 801(b)(1):

> the path for the Copyright Royalty Judges is well laid out. We shall adopt reasonable royalty rates that satisfy all of the objectives set forth in Section 801(b)(1)(A)-(D). In so doing, we begin with a consideration and analysis of the benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the statutory objectives to reach our decision. Section 114(f)(1)(B) also affords us the discretion to consider the relevance and probative value of any agreements for comparable types of digital audio transmission services . . . .

SDARS I, 73 FR at 4084; *see also* SE FOF at ¶ 95, § XIII.B.1. The Judges have never relied on an economic model as the sole basis for assessing market value; similarly, they have dispensed with trying to ascertain a market rate only once – and only after concluding that there was

insufficient evidence to ascertain a market rate and being persuaded that the current rate was neither too low nor too high. *SDARS II amend.*, 78 FR at 31843; *SDARS II*, 78 FR at 23058.

1. Selection Of A Comparable Benchmark

Response to ¶ 79. SoundExchange and Music Choice are broadly in agreement that a benchmark should be as comparable to the target market as practicable, and also as to considerations relevant to selection of a comparable benchmark. SE FOF at ¶¶ 96-99, 1782-1784. However, Music Choice at times seems to suggest that if an ideal benchmark cannot be found, the whole idea of trying to identify a range of marketplace rates should be discarded, and the Judges should as a "policy" matter just pull a rate out of the air without reference to the marketplace. MC FOF at ¶¶ 99-101; Trial Ex. 55 at 7 (Del Beccaro WDT). That is not the way the Judges or their predecessors have ever set rates under Section 801(b)(1). *E.g.*, *SDARS I,* 73 FR at 4084; *PSS I*, 63 FR at 25410 (after making a policy decision to set a low rate, choosing a number with reference to the perceived market).

Response to ¶ 80. No response.

Response to ¶ 81. SoundExchange agrees that Dr. Crawford identified five criteria that he considered relevant to selection of an ideal benchmark for the PSS. These are not necessarily "the" criteria for selection of a benchmark (for the PSS or otherwise), but they are generally consistent with criteria identified by Dr. Wazzan and Mr. Orszag, who stated similar principles in somewhat different ways. SE FOF at ¶¶ 1783-1784.

Response to ¶ 82. SoundExchange agrees that a true marketplace benchmark would be ideal. However, given the heavy regulation of sound recording royalty rates, marketplace benchmarks for sound recording rights that are not at all influenced by non-market factors are

scarce. SE FOF at ¶ 1789. As a result, it may sometimes be necessary to rely on a benchmark influenced to some extent by non-market factors, if no better option is available and appropriate caution is used. SE FOF at ¶¶ 1847-1848; *In re Determination of Royalty Rates and Terms for Ephemeral Recording and digital Performance of Sound Recordings (Web IV)*, 81 FR 26316, 26331 (2016) (hereinafter "*Web IV*") (a benchmark subject to some regulatory overhang is better than "the wholesale abandonment of benchmarking").

Response to ¶ 83. SoundExchange agrees that one form of regulatory overhang that can affect royalties is a structure in which royalty rates are set through a governmental proceeding in the absence of agreement, such as in the case of proceedings before the Judges and the ASCAP and BMI rate courts. Dr. Crawford refers to these as hybrid markets. SE FOF at ¶¶ 1858-1859. A rate set in a hybrid market is not an ideal benchmark, because it violates the criteria that "negotiation of royalty rates . . . take[s] place in an open market and not in a venue such as a statutory proceeding" and is "not influenced by non-market factors such as government regulations or statutes." MC FOF at ¶ 82. However, if no better option was available, and appropriate care was take, a rate set in what Dr. Crawford refers to as a hybrid market might be the best available option for trying to identify a market rate. SE FOF at ¶¶ 1856-1861.

Response to ¶ 84. SoundExchange agrees that having comparable sellers is important to identification of an appropriate benchmark. SE FOF at ¶¶ 1783, 1793. The absence of comparable sellers is one of the two reasons the Judges and their predecessors have rejected musical works benchmarks every time since *PSS I* that they have been proposed. SE FOF at ¶¶ 1902-1904.

Response to ¶ 85. SoundExchange agrees that having comparable buyers is important to identification of an appropriate benchmark. SE FOF at ¶¶ 1783, 1794, 1797-1846.

Response to ¶ 86. SoundExchange agrees that the rights conveyed in a benchmark market should be comparable to the rights conveyed in the target market. SE FOF at ¶¶ 1783, 1797-1831. The absence of comparable rights is the second of the two reasons the Judges and their predecessors have rejected musical works benchmarks every time since *PSS I* that they have been proposed. SE FOF at ¶¶ 1902-1904.

Response to ¶ 87. It is not clear to SoundExchange that Dr. Crawford's criterion of similar methods of end-user purchase and consumption is analytically distinct from having similar buyers and rights. However, SoundExchange agrees that in setting a statutory royalty rate for the PSS, it is appropriate to consider comparability of the services provided downstream, the channels through which they are distributed, and the ways in which they are used. SE FOF at ¶¶ 1797-1831.

Response to ¶ 88. SoundExchange agrees that in *Web IV* the Judges determined as a matter of law that they should consider whether an otherwise comparable benchmark incorporates value reflecting a lack of effective competition that should be excluded from the statutory rate. *Web IV*, 81 FR at 26331-34, 26353. That issue is currently on appeal. Applying that perceived requirement is also not a trivial determination. One would need to assess relative bargaining power in the benchmark market and look for indicia that the benchmark rates are not fair market rates, such as a suppression of output, supracompetitive profits, or a lack of alternatives. SE FOF at ¶¶ 280-282, 304-305. If an otherwise comparable benchmark were

found to incorporate a lack of effective competition, adjustment would be possible if required. SE FOF at ¶¶ 341-361.

2. Rejection Of Proffered Benchmarks In Past PSS Proceedings Leads To The Conclusion That The CABSAT Benchmark Is The Best Available

Response to ¶ 89. SoundExchange agrees that in *SDARS II* – the only fully-litigated proceeding in which the Judges considered PSS rates – the Judges rejected the benchmarks that Music Choice and SoundExchange proffered. *SDARS II*, 78 FR at 23058. However, that does not mean that they considered and rejected "all available potential benchmarks" that might ever be proposed. It is clear from the Judges' decision in *SDARS II* that they considered only the evidence they were presented. In fact, the Judges' rationale for rejecting SoundExchange's proffered marketplace benchmark for PSS in *SDARS II*, coupled with their *Web IV* determination that a benchmark subject to some regulatory overhang is better than "the wholesale abandonment of benchmarking," *Web IV*, 81 FR at 26331, leads directly to the conclusion that Dr. Wazzan's CABSAT benchmark should be employed here to determine a market rate for PSS.

Response to ¶ 90. SoundExchange agrees that in *PSS I*, the arbitrators rejected the benchmark proffered by RIAA, and the Register rejected one of the two benchmarks proposed by Music Choice – fees it paid to certain affiliated record companies under its partnership agreement. SE FOF at ¶¶ 1896-1899. Faced with no better alternatives, she relied primarily on Music Choice's proffered musical works benchmark as an indicator of the marketplace value of sound recordings, even though she recognized its unreliability. SE FOF at ¶ 1900; Response to ¶ 64 *supra*.

However, it is important to recognize that the *PSS I* proceeding occurred at a unique moment in time when sound recording licensing was in its infancy, the only services in operation were the ones now known as the PSS, and there were no agreements licensing the new digital performance right in sound recordings. SE FOF at ¶¶ 1893-1895. It is illogical for Music Choice to suggest that present marketplace conditions are similar to those at the time of *PSS I*. Many more services are in operation today. *E.g.*, Trial Ex. 32 at ¶ 10 (Harrison WDT) ("[o]ver the last decade, numerous services that digitally stream music to consumers have launched and gained popularity"). Rates for such services provide potential benchmarks that were not available in 1998. For example, the CABSAT services are cable radio services functionally equivalent to the PSS that were not in operation at the time of *PSS I* (that is why they are not PSS). SE FOF at ¶¶ 1797-1846; 17 U.S.C. § 114(j)(11).

Response to ¶ 91. SoundExchange agrees that at the time of *SDARS II*, its expert who testified concerning the PSS, Dr. Ford, was unable to identify any voluntary agreements for the licensing of sound recordings for a service having distribution comparable to the PSS. *See SDARS II*, 78 FR at 23057-58. That remains an issue today. The only such agreements Dr. Wazzan was able to identify were Sirius XM's direct licenses and a couple of Muzak licenses, all of which predominantly covered services other than residential cable radio services and had other significant problems. SE FOF at ¶¶ 885-1212, 1789-1791.

The question is what to do about this relative lack of voluntary agreements covering comparable services when trying to estimate a market rate for PSS. In *SDARS II*, Dr. Ford thought the best approach would be to look at robust licensing markets for a wide range of different types of services that happened not to be distributed through MVPDs. *SDARS II*, 78 FR

at 23057; Trial Ex. 501 at ¶ 48 (Wazzan Corr. WDT). The over 2,000 agreements he examined had the advantage of providing extensive information about marketplace royalty rate levels for sound recordings without much taint of regulation, but the disadvantage of not reflecting the MVPD distribution of cable radio services like Music Choice. *SDARS II*, 78 FR at 23057-58. Dr. Ford was not wrong to note that the PSS pay royalties at a rate that is conspicuously lower than the rate applicable to any other type of service. Trial Ex. 501 at ¶ 50 (Wazzan Corr. WDT). [redacted]

As for some purported but unidentified admission made by SoundExchange concerning the non-existence of services comparable to the PSS, MC FOF ¶ 91, the CABSAT services existed at the time of *SDARS II*. SE FOF at ¶¶ 1852-1853. However, as noted above, Dr. Ford thought the best approach would be to look at marketplace transactions rather than a regulated rate. The CABSAT services were also less material at the time of *SDARS II* than they are now, since Stingray only entered the U.S. market the year before *SDARS II* direct cases were filed, and did not begin making significant competitive inroads until later. SE FOF at ¶¶ 1875-1879.

Response to ¶ 92. SoundExchange agrees that in *SDARS II*, the Judges rejected the benchmark proffered by Dr. Ford due to differences between cable radio services and the services studied by Dr. Ford. *SDARS II*, 78 FR at 23058. However, Music Choice suggests that this rejection was "for the same reason," apparently referring back to the purported but unidentified SoundExchange admission it claims in ¶ 91. That is not accurate. The Judges'

rejected Dr. Ford's proposed marketplace benchmark because they found it non-comparable, not because no other benchmark was possible.

Response to ¶ 93. No response.

Response to ¶ 94. Music Choice's editing of quotations from the Judges' *SDARS II* decision distorts what the Judges said. The Judges rejected the data that Dr. Ford derived from marketplace agreements involving certain specific types of services, not all possible evidence relating to "other digital services." MC FOF at ¶ 94; *see SDARS II*, 78 FR at 23058.

Response to ¶ 95. No response.

Response to ¶ 96. Dr. Wazzan was clear that in his search for suitable benchmarks to use in setting PSS rates, he identified no true marketplace benchmark that is sufficiently comparable to the PSS (although he did not say that in the paragraph of his testimony cited by Music Choice). *E.g.*, Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT). Instead, Dr. Wazzan characterized his CABSAT benchmark as "market-like." 5/3/17 Tr. 2318:2-5, 2318:24-25 (Wazzan); see SE FOF at ¶¶ 1847-1870.

Dr. Wazzan's proffered CABSAT benchmark is a direct response to the Judges' rejection of Dr. Ford's benchmark in *SDARS II*. Trial Ex. 501 at ¶¶ 48-50 (Wazzan Corr. WDT). Unlike Dr. Ford's *SDARS II* benchmark, the CABSAT benchmark is extremely comparable to the PSS, because the PSS and CABSAT services are all functionally equivalent cable radio services that share the same MVPD distribution channel and are provided by similar multi-platform providers. SE FOF at ¶¶ 1792-1846. However, it is subject to greater regulatory overhang than Dr. Ford's *SDARS II* benchmark. In view of the Judges' *SDARS II* determination that comparability as to MVPD distribution and downstream bundling is critical to a PSS benchmark, *SDARS II*, 78 FR at

23058, and the Judges' *Web IV* determination that a benchmark subject to some regulatory overhang is better than "the wholesale abandonment of benchmarking," *Web IV*, 81 FR at 26331, the CABSAT benchmark is the best available option for the PSS. SE FOF at ¶¶ 1847-1870.

B. Economic Models

Response to ¶ 97. Music Choice suggests that an economic model could provide an alternative to a benchmark as a means of estimating a fair market value royalty. That might be true theoretically, but the Judges and their predecessors have rejected numerous proffered models. *E.g.*, *In re Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 FR 23102, 23106-09 (2014) (hereinafter "*Web III Remand*") (model based on webcaster operating margin); *SDARS I*, 73 FR at 4092 (division of surplus model for SDARS); *Web II*, 72 FR at 24092-93 (division of surplus model for webcasting); *Web I*, 67 FR at 45246-47 (model based on adjusted musical works rates).

Response to ¶ 98. SoundExchange agrees that Dr. Crawford proposed a model in this proceeding. However, the model he proposed is largely the same as one he proposed and the Judges decisively rejected in *SDARS II*. *SDARS II*, 78 FR at 23058. The Judges should reject Dr. Crawford's model again. SE FOF at ¶¶ 2017-2111.

C. Existing Rate

Response to ¶ 99. Evaluating the Section 801(b)(1) objectives with reference to a current rate is possible, but only in the sense that the Judges did that in *SDARS II*. *SDARS II amend.*, 78 FR at 31843-46.

Response to ¶ 100. In *SDARS II*, the Judges proceeded to apply the Section 801(b)(1) objectives to the then-current rate only after evaluating the proffered benchmarks, failing to find what they perceived as any useful indication of a market rate, and being persuaded that the

current rate was neither too low nor too high. *SDARS II amend.*, 78 FR at 31843; *SDARS II*, 78 FR at 23058.

Music Choice claims that the Judges did the same in *Phonorecords I*. However, that decision was different. To be sure, the Judges were not particularly impressed by most of the benchmarks they were presented in that proceeding. However, they adopted the ringtone benchmark for setting ringtone rates, and perceived a range of reasonable market rates guided by benchmarks. They even indicated that for CDs and downloads, "some rate closer to the lower boundary carries more weight." *In re Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 FR 4510, 4522 (2009) (hereinafter "*Phonorecords I*"). The Judges seem to have worked from the then-current statutory rate for CDs and downloads because it provided a specific number roughly consistent with their interpretation of the benchmark evidence. *See Phonorecords I*, 74 FR at 4522.

In this proceeding, the Judges cannot simply skip the step of first trying to ascertain a market rate for PSS. The Judges' statutory mandate here is to *determine* reasonable royalty rates, rather than merely *adjust* them. The statutory text and historical practice indicate that Congress intended the statutory royalty rates for PSS to be determined de novo for each rate period. SE FOF at § IX.A. That is why trying to ascertain a market rate is always the first step in the analysis in a proceeding under Section 801(b)(1). *SDARS II*, 78 FR at 23056, 23066; *SDARS I*, 73 FR at 4084, 4088, 4094; *Phonorecords I*, 74 FR at 4517; *PSS I*, 63 FR at 25399. Economists for both SoundExchange and Music Choice agree that it should be the first step here. Trial Ex. 26 at ¶ 13 (Orszag Am. WDT); Trial Ex. 54 at ¶¶ 8, 39 (Crawford WDT); Trial Ex. 501 at ¶ 17 (Wazzan Corr. WDT).

Even apart from the statutory text and historical practice, there is a critical reason that the Judges begin a Section 801(b)(1) analysis by trying to ascertain a market rate. At least the first three objectives "address issues that are accounted for in market prices." Trial Ex. 501 at ¶ 75 (Wazzan Corr. WDT). That is, effective markets allocate resources to "determine[] the maximum amount of product availability consistent with the efficient use of resources." *SDARS I*, 73 FR at 4094; *see also SDARS II*, 78 FR at 23067 (promotion and substitution "are already taken into account" in benchmark); Trial Ex. 26 at ¶ 15 (Orszag Am. WDT). With respect to the second objective, "a fair income is more consistent with reasonable market outcomes." *SDARS I*, 73 FR at 4095; *see also SDARS II*, 78 FR at 23067 ("any marketplace benchmark rate that guides the selection of rates will encompass such a [fair] return because it represents the best evidence of reasonable market outcomes"); Trial Ex. 26 at ¶ 16 (Orszag Am. WDT). With respect to the third objective, balancing relative roles is accomplished by market-based rates, unless there is something unique about the statutory licensees that requires divergence from a market rate. *SDARS II*, 78 FR at 23068; *SDARS I*, 73 FR at 4096; Trial Ex. 26 at ¶ 18 (Orszag Am. WDT). That is, market rates are likely usually to provide the best available evidence of how to set a rate that will achieve what the Judges are supposed to try to achieve under Section 801(b)(1).

The Section 801(b)(1) objectives may compel deviation from a market rate in certain circumstances. *PSS I*, 63 FR at 25399-400. However, in applying the Section 801(b)(1) objectives unmoored from any market information, the Judges would be left to rely on secondary evidence, probably often of an anecdotal nature, or worse, on intuition, to decide whether or not each objective is sufficiently satisfied. There would tend to be a bias toward the status quo, such

as deciding that availability is good enough under the current rates, rather than actually being maximized as Section 801(b)(1)(A) requires. With respect to the second objective, the Judges would be left considering whether the current rate feels fair enough based on how the participants seem to be doing, rather than actually deciding what *is* fair with reference to solid marketplace evidence of valuation. And the Judges risk making decisions about the third objective based on how important contributions seem, or the absolute dollar amount of certain expense items, rather than solid evidence comparing the relative values of the respective contributions. In short, there is a risk that application of the factors would turn into exactly the kind of "beauty pageant" the Judges have warned against. *SDARS I*, 73 FR at 4094.

Perhaps in some cases that is all that can be done. However, it should not be anything other than a last resort.

Here, there is a further complication: there is ample evidence that the current PSS statutory rate is significantly below market. SE FOF at ¶¶ 1889-1947. [

] Even if the Judges ultimately conclude that they are not able to determine a market rate with precision (although SoundExchange believes that a market rate is indicated by the CABSAT rates), any application of the factors cannot ignore that evidence, because artificially low prices can be just as harmful as artificially high prices, and numerous frictions can be introduced as a result. Trial Ex. 501 at ¶ 83 (Wazzan Corr. WDT). So far as the Section 801(b)(1) objectives are concerned, the current below-market statutory rate likely is (1) achieving less than maximum availability, less that a fair return for

copyright owners, and more than a fair income for the PSS; (2) not reflecting the relative roles of copyright owner and user; and (3) distorting competition between PSS and CABSAT services and thereby disrupting the structure of the cable radio industry. Trial Ex. 501 at ¶¶ 84-85 (Wazzan Corr. WDT). Those concerns are ones the Judges are commanded by Section 801(b)(1) to address even if they cannot identify a market rate with precision.

Response to ¶ 101. Mr. Del Beccaro's testimony concerning the Section 801(b)(1) objectives goes through the factors one by one (out of order) arguing that (1) if only there were a lower rate Music Choice would have a higher income and conduct more non-statutory promotional events; (2) Music Choice has taken various steps to provide its service over the last 30 years; and (3) in a market with declining demand for cable radio services, Music Choice should be further advantaged against its principal competitor Stingray. Trial Ex. 55 at 19-46 (Del Beccaro WDT). Rather than a reasoned, evidence-based comparison of Music Choice against a benchmark, this testimony invites "a beauty pageant where each factor is a stage of competition to be evaluated individually to determine the stage winner and the results aggregated to determine an overall winner." *SDARS I*, 73 FR at 4094. That is not how the Judges have applied the Section 801(b)(1) objectives before, and they should not start now.

IX. NASH BARGAINING MODEL

Response to ¶ 102. Dr. Crawford's Nash Bargaining Model is not a reliable way to set the statutory royalty rate for PSS in this proceeding. The Judges rejected essentially the same model in *SDARS II*, finding it "unworthy of further consideration" because there was no "real-world data" to support its "theoretical approximations" and "predictive capacity." *SDARS II*, 78 FR at 23058 & n.17. The Judges also found that use of the Nash Model was improper for the

specific task of setting PSS rates, because the role of a PSS as intermediary between record labels and cable operators "disrupts and complicates the Nash analysis . . . and requires that all three bargains be considered jointly." *SDARS II*, 78 FR at 23083 (Roberts, J. dissenting); *see also* 78 FR at 23058 n.17 (agreeing with Judge Roberts' "more spirited rejection of the probative value of the Nash Framework as proffered in this context"). Dr. Crawford's rejected model has not improved with age. It is still unsuitable for the purposes to which Dr. Crawford has put it. SE FOF at ¶¶ 2017-2028.

Response to ¶ 103. No response.

Response to ¶ 104. No response.

Response to ¶ 105. No response.

A. The Nash Bargaining Model Is Not Appropriate Here Because The Negotiations Between A Record Company And A PSS Are Not Independent Of Other Negotiations Or Strategic Considerations

Response to ¶ 106. SoundExchange agrees that "[t]he Nash Framework is a theoretical concept whose goal is to evaluate how the surplus from a hypothetical transaction might be divided between negotiating parties." *SDARS II*, 78 FR at 23058. However, it is not appropriately used in circumstances such as with respect to the PSS rates, where the negotiations are not independent of other negotiations or strategic considerations. SE FOF at ¶ 2021. *See also generally* SE FOF at § XIII.D.i.

Response to ¶ 107. The Nash Framework can be a useful tool for characterizing the features of bilateral bargaining. Trial Ex. 502 at ¶ 22 (Wazzan Corr. WRT). However, that does not mean that all applications of the Nash Framework are appropriate. It must be used only in appropriate circumstances. Trial Ex. 502 at ¶ 23-29 (Wazzan Corr. WRT).

B. Dr. Crawford's Nash Bargaining Model Is Flawed

Response to ¶ 108. SoundExchange agrees that Dr. Crawford used a Nash model, but does not agree that it was appropriate for him to do so in setting PSS rates, or that the Nash model was appropriately applied. See Response ¶¶ 106-107; SE FOF at § XIII.D.

1. Hypothetical Negotiation Between A Record Company And A PSS

Response to ¶ 109. No response.

Response to ¶ 110. No response.

Response to ¶ 111. While it is true that record companies and Music Choice each have a certain degree of market power, Dr. Crawford adopted an arbitrary bargaining power range. SE FOF at ¶¶ 2107-2111.

Response to ¶ 112. Music Choice does not have much, if any, market power relative to a major record company. The evidence shows that record labels tend to be indifferent to Music Choice's continued operation. SE FOF at ¶¶ 2109-2111. Nor does Music Choice have a "unique bundle of technology." To the contrary, the CABSAT services, including in particular Music Choice's principal competitor Stingray, are functionally equivalent to Music Choice's service. SE FOF at ¶¶ 1792-94, 1797-1820. If Music Choice were to cease providing its PSS, the cable radio void would be filled by Stingray or others. SE FOF at ¶¶ 2120, 2123, 2158. Alternatively, record companies might work directly with cable companies to provide music services, as Mr. Del Beccaro testified that record companies would like to do. 5/18/17 Tr. 4608:25-4609:3 (Del Beccaro). And of course, consumers have many other options for accessing performances of sound recordings in the modern music marketplace. SE FOF at ¶¶ 2118, 2122. All these other service options pay higher royalties to artists and record companies than Music Choice, so migration of only a small part of Music Choice's usage to other services would more than

replace the revenue artists and record labels receive from Music Choice. SE FOF at ¶¶ 2099-2106.

Response to ¶ 113. No response.

Response to ¶ 114. The Nash Bargaining Framework is not an appropriate model to use in this circumstance, because it assumes that the analyzed negotiation is independent of other negotiations or strategic considerations, which is not true here. SE FOF at ¶¶ 2017-2028.

Response to ¶ 115. No response.

Response to ¶ 116. No response.

Response to ¶ 117. No response.

Response to ¶ 118. No response.

Response to ¶ 119. No response.

Response to ¶ 120. While Dr. Crawford purported to quantify the three Nash factors based on Music Choice's costs and revenues for its hypothetical standalone business, his analysis of each of the Nash factors was hopelessly flawed. SE FOF at § XIII.D.ii.

Response to ¶ 121. Dr. Crawford's allocations are unreliable. As Music Choice admits, it is an integrated business that offers a portfolio of services, bundles its services in the downstream market because of synergies among them, enjoys efficiencies from sharing expenses across lines of business, and in the ordinary course of business maintains its books on a consolidated basis. MC FOF at ¶ 121; SE FOF at ¶¶ 1840-1844. Any allocation of Music Choice's revenues and expenses is necessarily artificial. *SDARS II amend*., 78 FR at 31844 (describing testimony by Mr. Del Beccaro that Music Choice's consolidated financials "cannot be disaggregated").

The particular allocations Dr. Crawford employed here are particularly unreliable. First, he is not an accountant and is not qualified to make the allocations. SE FOF at ¶¶ 2049-2051. He simply read an article about how allocations should be done, and then relied on un-named Music Choice employees to disaggregate Music Choice's costs and revenues and allocate a portion to a hypothetical standalone PSS service. SE FOF at ¶¶ 2050-2053. In a transparent attempt to address Dr. Crawford's lack of qualifications after the fact, Music Choice now tries to suggest that Dr. Crawford involved "independent accountants" in this exercise. But accountants are mentioned nowhere in the detailed explanation of his process that appears in his written testimony. In fact, Dr. Crawford admitted that Music Choice did not use an outside accounting firm in preparing the allocations. SE FOF at ¶ 2052. He also admitted that he did not speak with any of Music Choice's outside auditors to assess the accuracy of the Music Choice employees' allocations. SE FOF at ¶ 2052.

SoundExchange's Findings of Fact detail these and other flaws in Dr. Crawford's allocations. SE FOF at § XIII.D.ii.2.

Response to ¶ 122. It is true that the Judges criticized Dr. Crawford's Nash Bargaining Framework analysis in *SDARS II* for a host of reasons. Among other things, the Judges concluded that it was "not useful" evidence. SE FOF at ¶¶ 2017, 2025-2026.

Music Choice's description of the financial data Dr. Crawford presented in *SDARS II*, and of the Judges' reaction to it, is misleading. In his *SDARS II* Nash analysis, Dr. Crawford did not simply present aggregated financial data as suggested in its Findings at paragraph 122. Instead, as here, he attempted "to examine costs and revenues of the PSS service vis-à-vis Music Choice's other non-PSS services." *SDARS II amend*., 78 FR at 31844 n.4. To do so, he made an

"effort to extract costs and revenues from this [consolidated] data for the PSS service alone for use in his surplus analysis." *SDARS II amend*., 78 FR at 31844. The Judges found that the results of that exercise "cannot be credited because of his lack of familiarity with the data's source." *SDARS II amend*., 78 FR at 31844. In this proceeding, Dr. Crawford tried again to accomplish the task of satisfactorily disaggregating Music Choice's consolidated financials (which in *SDARS II*, Mr. Del Beccaro said could not be done, Response ¶ 121); Dr. Crawford just used a somewhat different methodology. The result is no more reliable than his last try.

Response to ¶ 123. [ ] SE FOF at ¶¶ 2152-2157. While the Judges have indicated that it might be relevant to understand the economics of the PSS business in isolation if possible for purposes of evaluating the second Section 801(b)(1) objective, *SDARS II amend*., 78 FR at 31844, trying artificially to constrain the Dr. Crawford's Nash model at the first stage of the Section 801(b)(1) analysis is self-serving, contradictory and simply not what Dr. Crawford set out to do.

The purpose of the first stage of the Section 801(b)(1) analysis is to establish a fair market value royalty rate that then can be measured against the Section 801(b)(1) objectives. *SDARS II*, 78 FR at 23076; *SDARS I*, 73 FR at 4084; MC FOF at ¶¶ 78-88; Sirius XM FOF at ¶ 76; SE FOF at § XIII.B. Dr. Crawford even describes his task as "estimat[ing] the royalty rate that would exist between individual record labels and PSSs in general, and Music Choice in particular, in the absence of a compulsory license." Trial Ex. 54 at ¶ 69 (Crawford WDT). It is thus clear that this exercise should emulate the real world – and according to Dr. Crawford, a

negotiation involving Music Choice – *not* some imaginary world constrained by the regulatory category established by Section 114(j)(11) in which a nonexistent standalone provider operates a business that has economics loosely based on Music Choice's. Dr. Crawford does not suggest otherwise.

Instead, Dr. Crawford's model, in a way that is right in concept although poor in execution, focuses on the PSS business as the place where the Nash "Joint Agreement Profits" are to be found, while leaving the other lines of business of both Music Choice and the hypothetical record label to be addressed by the Nash "Threat Points." Trial Ex. 54 at ¶¶ 67, 81, 85-87 (Crawford WDT). This makes sense. In a real-world negotiation between a record label and Music Choice, rather than a wholly artificial regulatory construct, both parties would surely be mindful of the costs and benefits outside the four corners of their possible agreement. 5/18/17 Tr. 4608:19-22 (Del Beccaro) (describing relationship between video and PSS rates in negotiations).

As Judge Strickler pointed out, the Threat Point is called that because, if the parties are unable to reach an agreement, there could be a threat extrinsic to the agreement. 4/24/17 Tr. 753:5-754:22 (Crawford) ("In other words, it is game theory here. Right? THE WITNESS: Absolutely."); *see also* MC FOF at ¶ 117. Dr. Crawford's model would not be much of a Nash analysis if regulatory constraints required ignoring extrinsic threats and benefits, which would suggest that the Threat Points should be zero. Instead, one would be left with something more like the surplus-splitting analysis that Dr. Crawford presented and the Judges rejected in *SDARS II*. SDARS II, 78 FR at 23083 (Roberts, J., dissenting) ("I do not agree that Dr. Crawford's

alternative surplus splitting analysis is probative"); 78 FR at 23058 n.17 (agreeing with Judge Roberts).

Accordingly, Dr. Crawford's Nash model does not disregard the record company's other lines of business. For example, in considering a record company's Threat Point Dr. Crawford considers the way in which (in his mistaken view), the relationship with Music Choice would promote a record company's other lines of business. SE FOF at ¶ 2056. But he cannot have it both ways. If a record company's other lines of business are relevant, then so are Music Choice's. SE FOF at ¶¶ 2032-2034. Dr. Crawford agreed as much when pressed at trial. SE FOF at ¶ 2043.

Response to ¶ 124. Again, Music Choice's Findings confuse Dr. Crawford's own design of his Nash model with application of the Section 801(b)(1) objectives. *See* Response to ¶ 123. Consideration of Music Choice's entire business for purposes of determining a market rate (as opposed to adjusting the market rate under the Section 801(b) factors) is consistent with prior decisions of the CARP and Register. Nothing in those decisions would preclude the Judges from determining a market rate that takes into account circumstances outside the PSS business, as Dr. Crawford's own description of the Threat Points commands. SE FOF at ¶¶ 2033-2034.

Response to ¶ 125. To avoid repetition, SoundExchange incorporates its Response to ¶ 124 *supra*.

Response to ¶ 126. Music Choice's unsupported claim about double-paying does not make sense. Music Choice has elsewhere said that Dr. Crawford intended to exclude Music Choice's revenues from its other lines of business; but in this paragraph Music Choice now asserts that Dr. Crawford has taken such revenues "into account" in his model. The assertions

are contradictory, and both cannot be true. However, at trial, Mr. Del Beccaro confirmed that in the real world, negotiators would not blind themselves to the overall economics of their relationship, and would take other lines of business into account in a negotiation. 5/18/17 Tr. 4608:19-24 (Del Beccaro). In addition, Dr. Crawford considered the effects of Music Choice's PSS service on a record company's other lines of business; there is no reason to treat the hypothetical PSS differently from the hypothetical record company. SE FOF at ¶¶ 2033-2034.

Response to ¶ 127. Trying to make any allocation of Music Choice's tightly-integrated revenues and expenses is necessarily artificial. *SDARS II amend*., 78 FR at 31844 (describing testimony by Mr. Del Beccaro that Music Choice's consolidated financials "cannot be disaggregated"). As discussed in SoundExchange's Findings of Fact, neither Dr. Crawford nor the unnamed Music Choice employees were qualified to make the allocations, and the allocations they made were fundamentally flawed. SE FOF at ¶¶ 2047-2055. And again, Music Choice's repeated references to "accountants" appear nowhere in Dr. Crawford's written testimony, which includes a detailed explanation of his methodology. Response to ¶ 121. If Dr. Crawford had truly relied on accountants, one would expect he would have mentioned it in his written testimony. The results of Dr. Crawford's allocation effort here are no more reliable than the results of his last try, which the Judges rejected in *SDARS II*. Response to ¶ 122.

Response to ¶ 128. SoundExchange disagrees that Dr. Crawford successfully "isolate[ed]" the costs and revenues of a *standalone* PSS service. In the real world, there is no such thing as a standalone PSS service. And if there were one, it would not necessarily have economics that mirror Dr. Crawford's allocations of Music Choice's financials. The standalone PSS service is purely hypothetical. *See, e.g.*, 4/25/17 Tr. 859:8-12 (Crawford). Yet Dr.

Crawford at times mistakenly confused the real world with his hypothetical. For example, in his written testimony he opined that "[i]f the Judges approve a PSS rate at the level proposed by SoundExchange, standalone PSS providers like Music Choice would simply be forced out of the market." Trial Ex. 59 at ¶ 119 (Crawford WRT). *See also* Trial Ex. 59 at ¶¶ 120-122 (Crawford WRT) (discussing the real world consequences of forcing the hypothetical standalone PSS provider out of the market); ¶ 121 (referring to "some popular PSS products (video channels)" even though a standalone hypothetical PSS provider would not offer video channels). But this of course makes no sense because there are no standalone PSS providers in the first place.

Indeed, Dr. Crawford admitted that his discussion of these the standalone PSS issues was "confused" and included "mistakes" such as including video services as part of a hypothetical standalone PSS service. 4/25/17 Tr. 909:1-911:13 (Crawford).

Moreover, Mr. Del Beccaro previously testified that Music Choice's PSS costs and revenues "cannot be disaggregated" from the costs and revenues from Music Choice's business as a whole. SE FOF at ¶ 2052. Music Choice fails to explain what has changed that would now make that possible. With respect to projections for future years in the rate period, Dr. Crawford's "adjustments" and assumptions were unreliable. SE FOF at ¶ 2053.

Response to ¶ 129. Dr. Crawford's estimates of Music Choice's hypothetical costs and revenues of operating a standalone PSS services are unreliable. *See* SE FOF at ¶¶ 2047-2055; Response ¶¶ 121, 128.

Response to ¶ 130. To avoid repetition, SoundExchange incorporates its response to ¶ 129 *supra*.

Response to ¶ 131. Because Dr. Crawford's allocations of Music Choice's revenues and expenses are unreliable, his estimate of the Joint Agreement Profits is unreliable. *See* SE FOF at ¶¶ 2045-2055; Responses to ¶¶ 121, 128.

Response to ¶ 132. No response.

Response to ¶ 133. To avoid repetition, SoundExchange incorporates its Response to paragraph 131 *supra*.

Response to ¶ 134. Dr. Crawford incorrectly calculated to threat points of each side in the hypothetical negotiation. SE FOF at § XIII.D.ii.2 (PSS threat point), § XIII.D.ii.3 (record company threat point).

Response to ¶ 135. Music Choice's assertion in this paragraph squarely contradicts the written testimony of Dr. Crawford, who testified that in the hypothetical market, "in the absence of an agreement between Music Choice and a record label, Music Choice would not be able to offer a viable residential audio service and would therefore have economic profits of zero." Trial Ex. 54 at ¶ 173 (Crawford WDT); *see also* Trial Ex. 54 at ¶ 78 & n.62 (Crawford WDT); SE FOF at ¶¶ 514-525, 2036.

Response to ¶ 136. Dr. Shapiro was wrong. A market with must-haves can be effectively competitive, and there is no evidence that any major's size and individual market power is the result of anything other than efficiencies and economies of scale and/or superior operations. SE FOF at ¶¶ 505-513. Moreover it is Dr. Crawford who chose to model a hypothetical negotiation between a single PSS (Music Choice) and a major record company. SE FOF at ¶ 2035. It follows directly from that choice that the hypothetical record label in his model has a broad and important catalog with recordings by contemporary superstars and music

legends, and that Music Choice subscribers want and expect to hear the hypothetical label's music. SE FOF at ¶¶ 518-520, 523. Perhaps Music Choice now wishes that Dr. Crawford had constructed a different model, but it is a little late to do anything about that.

Response to ¶ 137. Paragraph 137 of Music Choice's Findings is gobbledygook. It is in the middle of a discussion of Threat Points, and its reference to "profits the PSS would lose" sounds like it is trying to say something about Music Choice's Threat Point. MC FOF at ¶¶ 134-138. However, it also says that the "revenue the PSS would lose . . . would necessarily be a positive number between 0 and 1." MC FOF at ¶ 137. That sounds like a misdescription of the separate Bargaining Power parameter. Trial Ex. 54 at ¶ 81 (Crawford WDT) ("[e]ach firm's bargaining power is a number between 0 and 1"); MC FOF at ¶ 151. It would be very surprising if the Threat Point – "[t]he profit each receives when no agreement is reached," Trial Ex. 54 at ¶ 81 (Crawford WDT) – or even Music Choice's lost revenue (which is not a Nash factor), would necessarily be between $0 and $1.

To the extent there might be something intelligible about Threat Points in paragraph 137, Dr. Crawford incorrectly assumed that Music Choice's Threat Point should be zero. As explained in SoundExchange's Findings of Fact, Dr. Crawford's own testimony showed that Music Choice's Threat Point should actually be negative. Calculating its proper Threat Point is possible, and yields a much higher royalty rate than Music Choice is proposing. SE FOF at ¶¶ 2032-2046.

Response to ¶ 138. Music Choice mischaracterizes Dr. Crawford's testimony. Music Choice says the label's Threat Point is zero (citing paragraph 93 of Dr. Crawford's written direct testimony). However, that paragraph actually talks about Music Choice's Threat Point. Trial

Ex. 54 at ¶ 93 (Crawford WDT). Dr. Crawford addressed the record label's Threat Point in paragraphs 94-104 and 113. There he argued vigorously that the record label would have profits outside the PSS sphere that should give the label a negative threat point. Trial Ex. 54 at ¶¶ 94-104 (Crawford WDT). He only grudgingly set the record label's Threat Point to zero because he could not quantify how low it should go. Trial Ex. 54 at ¶ 113 (Crawford WDT). As explained in SoundExchange's Findings of Fact, the record company's Threat Point should actually be a large positive number. SE FOF at ¶¶ 2056-2059.

Response to ¶ 139. Music Choice's claims about the implications for a record company of a failure to reach an agreement with Music Choice are contrary to the overwhelming weight of evidence in the record. The record is clear that the PSS impose a significant opportunity cost on record companies. *See* SE FOF at ¶¶ 2098-2106. Moreover, Music Choice's so-called evidence of promotion is nothing more than the same kind of anecdotal evidence that the Judges have repeatedly found unreliable; and SoundExchange's Findings of Fact explain in detail why that evidence is once again unreliable and should be dismissed. *See* SE FOF at ¶¶ 2060-2097.

Response to ¶ 140. While Dr. Crawford excluded promotional benefits from his calculation of threat points, he also improperly ignored opportunity cost to the record company. SE FOF at ¶¶ 2098-2106.

Response to ¶ 141. To avoid repetition, SoundExchange incorporates its response to paragraph 140 *supra*.

2. Dr. Crawford Erred By Including CRB Litigation Costs

Response to ¶ 142. SoundExchange agrees that Dr. Crawford's Joint Agreement Surplus analysis contained a significant error. SE FOF at ¶¶ 2054-2055.

Response to ¶ 143. SoundExchange agrees that Dr. Crawford incorrectly included CRB litigation costs in his Joint Agreement Surplus analysis. SE FOF at ¶¶ 2054-2055.

Response to ¶ 144. Music Choice provides no citation to the record to support its assertion about the effect of this error on Music Choice's proposed rates. Moreover, Dr. Crawford's error casts doubt on his entire analysis, as it highlights the inherent problem of his attempt to allocate costs and revenues to a hypothetical standalone PSS service. Response to ¶¶ 121, 128.

Response to ¶ 145. Music Choice's assertion that the CRB litigation costs "would be replaced by the significant costs of a direct licensing initiative" is utterly false. In Dr. Crawford's hypothetical, there would be no "direct licensing initiative," because Music Choice would be negotiating with "a single record label." MC FOF at ¶ 109. Presumably both the label and Music Choice would incur some costs in that negotiation, and Music Choice provides no reason to think those costs would be unbalanced. Moreover, that single record label would be a major record label. Trial Ex. 54 at ¶ 78 & nn.62-63 (Crawford WDT). Talking about negotiations with 7,000 indie labels, MC FOF at ¶ 147, makes no sense in the context of a model involving a negotiation with one major record label.

Once again, Music Choice is confusing the real world (in which there are numerous record companies) with its hypothetical (in which there is one record company) in a desperate attempt to fix the errors in its hypothetical model after-the-fact. This effort is logically flawed and simply makes no sense.

Response to ¶ 146. As explained in Response to paragraph 145, Music Choice's cost of negotiating direct licenses with multiple record companies is irrelevant to Dr. Crawford's Nash

analysis, because his analysis is of a hypothetical market in which Music Choice would negotiate with a single record company. MC FOF at ¶ 109.

Even if the costs of negotiating with multiple labels were relevant, Music Choice has provided absolutely no documentary evidence to support Mr. Del Beccaro's highly dubious assertion that 50% of the recordings played on Music Choice are distributed (and not merely owned) by independent record labels. The documentary evidence in the record shows that more than 86% of recordings are distributed by the majors. SE FOF at ¶ 521.

Response to ¶ 147. See Response to paragraphs 145-146 as to why this is irrelevant. In addition, even if this issue were relevant, Music Choice would not need to negotiate direct licenses with every single record company. It could negotiate three direct licenses (with the three majors) and cover more than 86% of the market. Evidence in the record concerning Sirius XM's direct licensing program illustrates that ownership of other recordings that are likely to be played on a programmed service tends to be highly concentrated among indies as well. SE FOF at ¶ 940. Based on this documentary evidence, it seems highly improbable that Music Choice would need to negotiate more than a relative handful of direct licenses to cover all but a very small fraction of the music marketplace. Such negotiations would not impose substantial costs on Music Choice.

Response to ¶ 148. See Response to paragraphs145-146 as to why this is irrelevant. Music Choice has vastly over-stated the costs of negotiating direct licenses, because it would not need to negotiate 7,000 direct licenses; it could negotiate three and cover more than 86% of the market, and cover most of the rest of the market with a few more.

Response to ¶ 149. See Response to paragraphs 145-146 as to why this is irrelevant. Again, because Music Choice could cover 87% of the market with three licenses, the allegedly analogous Sirius XM costs associated with administering hundreds of direct licenses are irrelevant and inflated. Sirius XM's licensing costs are [ ]. SE FOF at ¶¶ 915-920.

Response to ¶ 150. Music Choice provides no citation to support its after-the-fact defense of Dr. Crawford's model. As discussed above, the proposed "fix" of replacing the erroneous costs with the costs of negotiating thousands of direct licenses makes no sense.

3. Dr. Crawford's Proposed Range Of Rates Is Unreliable

Response to ¶ 151. Music Choice falsely states that Dr. Crawford "calculated" the bargaining power of each firm in his hypothetical. He did no such thing. Rather, he arbitrarily assumed several bargaining power numbers for each firm, without any calculation whatsoever. SE FOF at ¶ 2107.

Response to ¶ 152. No response.

Response to ¶ 153. Dr. Crawford set the bargaining power at three arbitrary levels with little attempt at justification, and certainly "no data to support the theoretical approximations." *SDARS II*, 78 FR at 23058. His model thus leads to three arbitrary results and leaves it to the Judges to guess at the appropriate parameters. SE FOF at ¶ 2108. The evidence suggests that the bargaining power should be set close to one, to reflect a record company's relative bargaining power. SE FOF at ¶¶ 2109-2010. As Dr. Wazzan testified, assigning the record company a

bargaining power of 80% or more, after correcting for Music Choice's Threat Point, would yield a royalty rate in the range of [ ] or more. SE FOF at ¶ 2111.

Response to ¶ 154. No response.

Response to ¶ 155. What is actually split in Dr. Crawford's Nash model is the Incremental Profits, not the Joint Agreement Profits (although they are the same if each firm has a zero Threat Point). Trial Ex. 54 at ¶ 81 & n.65 (Crawford WDT). Because Music Choice has a negative Threat Point, that must be subtracted from the Joint Agreement Profits (*i.e.*, adding the opposite of the negative Threat Point to the Joint Agreement Profits) to yield the Incremental Profits. Dr. Wazzan showed that after correcting for Music Choice's negative Threat Point, the Incremental Profits (what is actually split) are [ ]. SE FOF at ¶¶ 2044-2045. That leads to much higher royalty rates. For example, the rate would be [ ] with a 50/50 split of bargaining power and [ ] with an 80/20 split. SE FOF at ¶ 2046.

Response to ¶ 156. To avoid repetition, SoundExchange incorporates its response to paragraph 155 *supra*.

Response to ¶ 157. To avoid repetition, SoundExchange incorporates its response to paragraph 155 *supra*.

C. Dr. Wazzan's Criticisms Of Dr. Crawford's Nash Model

Response to ¶ 158. SoundExchange disagrees with Music Choice's assessment of Dr. Wazzan's testimony. Dr. Wazzan's critique of Dr. Crawford's analysis is sound, and Dr. Wazzan is fully qualified to offer his opinion.

1. Dr. Wazzan Is Qualified To Opine On The Nash Model

Response to ¶ 159. Dr. Wazzan is qualified to critique Dr. Crawford's application of the Nash model. The Judges qualified Dr. Wazzan as an expert in economics, including finance and

valuation, and the Nash Framework is well known in economics. SE FOF at ¶ 36; MC FOF at ¶ 106. Dr. Wazzan has extensive professional and academic experience that qualify him to opine on Dr. Crawford's testimony. To be clear, Dr. Wazzan himself did not propose a Nash model; rather, he critiqued Dr. Crawford's application of the model. Dr. Wazzan is at least as qualified as Dr. Crawford to testify about the Nash model. Dr. Crawford himself has very limited experience using the Nash model: he used it once in a paper (*see* Response to ¶ 21) and he testified about it in the *SDARS II* proceeding, which testimony the Judges rejected.

Response to ¶ 160. To avoid repetition, SoundExchange incorporates its response to paragraph 159 *supra*.

2. Dr. Wazzan's Opinions Are Reliable

Response to ¶ 161. In its paragraph 161, Music Choice attacks testimony that is *not* in evidence. While the version of Dr. Crawford's testimony that was admitted into evidence included significant errors, *see, e.g.*, SE FOF at ¶ 2054, SoundExchange corrected any errors in Dr. Wazzan's testimony before it was admitted into evidence. Thus, unlike Dr. Crawford's written testimony, the versions of Dr. Wazzan's written testimony that were admitted into evidence are correct. *See* Trial Ex. 501 (Wazzan Corr. WDT); Trial Ex. 502 (Wazzan Corr. WRT). Moreover, none of the corrections was material to Dr. Wazzan's conclusions. 5/3/17 Tr. 2471:5-13 (Wazzan).

Response to ¶ 162. Dr. Wazzan corrected his testimony before it was admitted into evidence; Dr. Crawford did not. *See* Response to ¶ 161.

Response to ¶ 163. Dr. Wazzan's corrected testimony is accurate. Music Choice fails to point to any inaccuracies in the corrected testimony as admitted into the record.

3. Dr. Wazzan's Criticisms Are Sound

Response to ¶ 164. Music Choice's unsupported assertion is incorrect.

Response to ¶ 165. No response.

Response to ¶ 166. Dr. Crawford erred in assigning a Threat Point of zero to Music Choice, as explained in SoundExchange's Findings of Fact. SE FOF at ¶¶ 2032-2046.

Response to ¶ 167. Music Choice contends that it "was essentially impossible" for Dr. Crawford to accurately calculate Music Choice's Threat Point because it is "an incredibly complex task that can take years." But that is simply an admission that Dr. Crawford's application of the Nash model to the PSS was incomplete and unreliable. If Dr. Crawford was not able to complete the calculations he determined that his model required in the time available, then Dr. Crawford should not have proposed the model, and should have used a different approach to rate-setting instead.

Moreover, this new argument about quantifying the revenue Music Choice would lose without the catalog of one major record company is inconsistent with Dr. Crawford's testimony about his model. Dr. Crawford could not have been clearer that "that Music Choice could not offer a viable cable radio service without the catalog of even a single major record label." Trial Ex. 54 at ¶ 93 n.73 (Crawford WDT); *see also* SE FOF at ¶ 2036.

Response to ¶ 168. SoundExchange agrees with Music Choice that Dr. Crawford did "not accurately estimate" the correct Threat Point.

Response to ¶ 169. Music Choice mischaracterizes Dr. Wazzan's testimony. It is well established that the Nash Framework assumes that the analyzed negotiation (here, the negotiation between Music Choice and a record company) is independent of any other negotiation or

strategic consideration. SE FOF at ¶ 2021 (citing academic literature). What Dr. Wazzan actually testified was this condition for proper application of the Nash Framework was not satisfied because of Music Choice's relationships with MVPD providers. SE FOF at ¶¶ 2021-2026. At trial, Dr. Wazzan explained that he did *not* contemplate that there would actually be a three-way negotiation. 5/3/17 Tr. 2474:20-2475:21 (Wazzan).

In *SDARS II*, Judge Roberts faulted Dr. Crawford for exactly this reason, SE FOF at ¶ 2025, and the other Judges joined Judge Roberts in his "spirited rejection" of Dr. Crawford's model. SE FOF at ¶ 2025. In this proceeding, Dr. Crawford again ignored other negotiations and strategic considerations, such as the bargaining dynamics introduced by Music Choice's affiliation agreements with cable companies, even though he recognized their importance to the bargaining dynamics he purported to model. SE FOF at ¶¶ 2022-2024.

Response to ¶ 170. Music Choice's paragraph 170 is misleading and irrelevant. Like Judge Roberts in *SDARS II*, Dr. Wazzan gave a clear example of how Music Choice's position as an intermediary could affect the bargaining dynamics in Dr. Crawford's model. SE FOF at ¶ 2022. He never contemplated "a three-way deal." Response to ¶ 169.

Response to ¶ 171. SoundExchange agrees that the Nash framework is intended to model bilateral negotiations. SE FOF at ¶ 2020. However, the Nash Framework is not appropriate for modeling negotiations, such as those between Music Choice and a record company, that are not independent of any other negotiation or strategic consideration. SE FOF at ¶ 2021.

Response to ¶ 172. Music Choice's claim that cable companies do not involve themselves in record companies' negotiations of video products with Music Choice is beside the

point. The video products are not at issue here, and again the point is not that there needs to be a three-way negotiation for Music Choice's relationships with cable companies to affect the bargaining dynamics of its negotiations with a record company. Because Music Choice is an intermediary, the cable companies plainly introduce other negotiation and strategic considerations into the negotiation between Music Choice and record companies. SE FOF at ¶ 2022.

Response to ¶ 173. The record shows that Dr. Crawford was provided with detailed Music Choice financial forecasts for the years 2016-2022. Trial Ex. 406 (P&L Tab). These forecasts showed [ ]. Trial Ex. 502 at ¶ 44 (Wazzan Corr. WRT). However, Dr. Crawford chose to disregard Music Choice's forecasts and instead use his own – lower – projections. Needless to say, this maneuver by Dr. Crawford has the effect of significantly reducing the royalty rate Dr. Crawford calculated. Trial Ex. 502 at ¶¶ 44-46 (Wazzan Corr. WRT).

Response to ¶ 174. Dr. Crawford ignored the possibility that the hypothetical PSS provider (Music Choice) would lose profits from its non-PSS lines of business in the absence of an agreement with the hypothetical record company. SE FOF at ¶ 2034. Doing so was inconsistent with Dr. Crawford's own explanation of how Threat Points work. It is Dr. Crawford who explained that "*[e]ach firm* in a negotiation must allow for the possibility that no agreement will be reached." Trial Ex. 54 at ¶ 81 (Crawford WDT) (emphasis added) (explaining that "[t]he profit each receives when no agreement is reached is called their . . . 'Threat Point'"); *see also* SE FOF at ¶¶ 2033-2034. While Dr. Crawford considered a record company's potential profits

and losses profits from other lines of business (*e.g.*, downloads) in analyzing its Threat Point, he chose not to do the same for Music Choice. This manipulation of the model highlights Dr. Crawford's results-drive approach, plainly designed to artificially lower the resulting royalty rate.

Response to ¶ 175. Dr. Crawford did not faithfully follow prior precedent or sound economic principles. *See* Response to ¶¶ 122-123; *see generally* SE FOF at § XIII.D.

Response to ¶ 176. The Judges (and Judge Roberts in dissent) identified a host of problems with Dr. Crawford's Nash analysis in *SDARS II*, and ultimately concluded that his analysis was not useful in setting rates. *SDARS II*, 78 FR at 23059 (majority); 23081-84 (dissent). Dr. Crawford has failed to address those problems.

With respect to the particular problem identified by Music Choice in this paragraph, the Judges criticized Dr. Crawford for improperly or insufficiently disaggregating Music Choice's costs and revenues for purposes of analyzing whether any adjustment to the rates was necessary to achieve the second Section 801(b)(1) objective. *SDARS II amend.*, 78 FR at 31844; Response to ¶¶ 121-122, 128. However, the fact that in *SDARS II* Dr. Crawford mishandled the data about Music Choice's other lines of business for purposes of the Section 801(b)(1) analysis (which of course relates to adjusting the market rate) does not mean that the Judges should not hold Dr. Crawford to his own description of a Threat Point for purposes of his Nash analysis (which relates to identifying the market rate). Indeed, as discussed above, Dr. Crawford himself considers the effects of the negotiation on the record company's other lines of business, such as its download sales. *See* Response to ¶ 174.

Response to ¶ 177. Music Choice seems to be making an argument against the assumptions made in Dr. Crawford's model, which it elsewhere says was intended to emulate "a hypothetical competitive market." MC FOF at ¶ 102; *see also* MC FOF at ¶ 108. It is not SoundExchange's fault, or Dr. Wazzan's, that Music Choice now seems to wish Dr. Crawford's model was constructed differently. SE FOF at ¶¶ 2035-2041.

Response to ¶ 178. No response.

Response to ¶ 179. Again, Music Choice seems to be making an argument against the assumptions made in Dr. Crawford's model, which it elsewhere says was intended to emulate "a hypothetical competitive market." Response to ¶ 177. However, a market with must-haves can be effectively competitive. Response to ¶ 136.

Response to ¶ 180. *See* Response to ¶ 126.

Response to ¶ 181. Music Choice's effort to exclude from Dr. Crawford's Nash model lost profits from Music Choice's other lines of business is a transparent attempt to reengineer the model to achieve a lower royalty than would apply if the model was used as originally described. It is Dr. Crawford, not SoundExchange or Dr. Wazzan, who decided to use a Nash model with Threat Points to model a negotiation between Music Choice and a major record company, provided a reciprocal definition of the concept of a Threat Point, and reached beyond the scope of the PSS license to consider the record company's other lines of business. Music Choice might now regret those decisions, but it cannot escape their natural consequences. *See* Response to ¶¶ 123-126.

Response to ¶ 182. SoundExchange agrees that Dr. Wazzan testified that a record label's Threat Point should be a large positive in the hypothetical negotiation between Music Choice and a record company modeled by Dr. Crawford. SE FOF at ¶¶ 2056-2059.

Response to ¶ 183. Music Choice contends that Dr. Wazzan's argument about opportunity costs is based on "speculation." That criticism is meaningless. Dr. Wazzan testified about Dr. Crawford's Nash Framework analysis – which is entirely speculation. That is, it is a theoretical model about what Dr. Crawford believes (speculates) would happen in a hypothetical negotiation. All testimony about the model – whether by Dr. Crawford or Dr. Wazzan – is necessarily speculative. In light of the objective facts about the annual per-subscriber revenue that record companies earn from interactive and non-interactive services ([ ]), as compared to revenue from Music Choice ([ )], it is entirely reasonable to expect that record companies incur significant opportunity costs when they license their recordings to the PSS. SE FOF at ¶ 2099. Music Choice's claim that Dr. Wazzan lacks empirical evidence to support his testimony is thus plainly false, and Dr. Wazzan explained how even a small migration of users from Music Choice to other services could easily replace Music Choice revenues earned by the record companies. SE FOF at ¶¶ 2100-2106.

Response to ¶ 184. Music Choice's anecdotal claims of promotion have been thoroughly discredited. SE FOF at ¶¶ 2060-2078; SE FOF at ¶¶ 2079-2095. Since Music Choice tries to piggyback on Sirius XM's promotional arguments as well, SoundExchange notes that those anecdotal claims have been discredited too. SE FOF at § IV.H.ii.

Response to ¶ 185. There is no credible evidence of promotion. *See* Response to ¶ 184. There is substantial evidence of substitution. SE FOF at ¶¶ 2098-2106.

Response to ¶ 186. SoundExchange agrees that Dr. Crawford used arbitrary bargaining power parameters in his model, and that the precise bargaining power may be unknowable. But it is clear that the record company's bargaining power should be closer to one in the hypothetical. SE FOF at ¶¶ 2109-2111.

Response to ¶ 187. The fact that Dr. Crawford used three different arbitrary bargaining power numbers does not make them any less arbitrary. Unlike Dr. Crawford's arbitrary assignment of bargaining power, Dr. Wazzan's conclusion that the record company's bargaining power should be closer to one is supported by the evidence. SE FOF at ¶¶ 2109-2111. Music Choice also mischaracterizes Dr. Willig's testimony, which was offered in a different context and with respect to a different hypothetical negotiation; in any event, Dr. Willing said nothing about whether Dr. Wazzan's observation that a record company's bargaining power with Music Choice would be closer to one.

X. EXISTING RATE

A. The Existing PSS Statutory Rate Is Below Market

Response to ¶ 188. Music Choice's description of *SDARS II* is inaccurate. In *SDARS II*, the Judges did not "begin their analysis" with the current rate. MC FOF at ¶ 188. The Judges did eventually apply the Section 801(b)(1) objectives to the then-current statutory royalty rate, as well as a modestly-increased rate. However, they did so only after evaluating the proffered benchmarks, failing to find what they perceived as any useful indication of a market rate, and being persuaded that the current rate was neither too low nor too high. *SDARS II amend.*, 78 FR at 31843; *SDARS II*, 78 FR at 23058. The Judges believed that was the only option available to them based on the record before them in SDARS II.

On the record of this proceeding, it is clear that the current statutory royalty rate for PSS is well below market. SE FOF at § XIII.B.iii. [ ] The Judges should begin their analysis in this proceeding as they always do, by seeking to determine a marketplace royalty rate for PSS, and only then turning to consideration of whether the Section 801(b)(1) objectives compel an adjustment in the rate. Even if the Judges ultimately conclude that they are not able to determine a market rate with precision (although SoundExchange believes that a market rate is indicated by the CABSAT rates), any application of the factors cannot ignore the evidence that the current statutory royalty rate is well below market. Response to ¶¶ 77-78, 100.

Response to ¶ 189. In *SDARS II*, The Judges evaluated both the then-existing rate and modestly increased rates against the Section 801(b)(1) objectives. They found that the modestly-increased rates would be most consistent with providing a fair return to the copyright owner given Music Choice's planned channel expansion, and that in other respects neither rate failed to satisfactorily achieve the Section 801(b)(1) objectives. Music Choice's citation to the original *SDARS II* decision is inapposite, because the relevant part of the decision was amended. *SDARS II amend.*, 78 FR at 31843-46.

Response to ¶ 190. To avoid repetition, SoundExchange incorporates its response to paragraph 189 *supra*.

Response to ¶ 191. Music Choice's planned channel expansion was the rationale cited by the Judges for choosing between the 7.5% and 8.5% rates, which in other respects they found

would both satisfactorily achieve the Section 801(b)(1) objectives. *SDARS II amend.*, 78 FR at 31844-45.

Response to ¶ 192. While Music Choice's planned channel expansion was not a major focus of the participants' arguments, it was certainly part of the case. *E.g.*, Proposed Findings of Fact of SoundExchange, Inc. in Docket No. 2011-1 ¶¶ 64, 681 (Sept. 26, 2012).

Response to ¶ 193. Music Choice mischaracterizes the Judges' *SDARS II* decision. While SoundExchange agrees that the PSS rates should not necessarily depend on the number of channels offered, the Judges found that it was likely that Music Choice expected that "subscribers or advertisers would be more attracted to the expanded offerings." *SDARS II amend.*, 78 FR at 31845. Thus, the rate increase was predicated on the Judges' perceptions of fairness based on an expectation of modestly increased listenership, not some other vague concept of usage.

Response to ¶ 194. Music Choice subscribers consume a massive amount of music. SE FOF at ¶ 1933. [ ] With no benchmark that the Judges believed to allow precise determination of a marketplace rate, it was "fair" to recognize Music Choice's heavy usage and adopt a modest rate increase. *SDARS II amend.*, 78 FR at 31844.

Response to ¶ 195. Music Choice mischaracterizes Dr. Wazzan's testimony. Dr. Wazzan considered whether the difference between PSS and CABSAT rates might be explained by the number of channels provided, and whether any adjustment to the CABSAT rates might be appropriate based on differences in the number of channels provided by the PSS and CABSAT

services. He did not find any meaningful difference between the PSS and CABSAT services in that regard. Trial Ex. 501 at ¶ 66 (Wazzan Corr. WDT). However, Dr. Wazzan did not say that the number of channels offered should never have an effect on PSS rates.

Response to ¶ 196. No response.

Response to ¶ 197. No response.

Response to ¶ 198. No response.

Response to ¶ 199. As Music Choice itself admits, it has expanded its channel offerings. *See* MC FOF ¶ 194. It just hasn't expanded them as much as anticipated. Music Choice expanded its channels from 46 to 75 (25 of those Internet only), rather than to 300. *See* Trial Ex. 55 at 4, 15 (Del Beccaro WDT). More generally, Music Choice subscribers consume a massive amount of music. SE FOF at ¶ 1933.

SoundExchange disputes Music Choice's assertion that the rate increase implemented in *SDARS II* was responsible for Music Choice's decision not to go through with its planned expansion to 300 channels. That rate increase was "modest." *SDARS II amend.*, 78 FR at 31844. As to Music Choice's finances, in *SDARS II*, Music Choice presented essentially the same sob story it has presented here, and the Judges were unmoved. *SDARS II amend.*, 78 FR at 31844 ("[a]s a consolidated business, Music Choice has had significantly positive operating income between 2007 and 2011 and made profit distributions to its partners since 2009"). [

[redacted]

Response to ¶ 200. To avoid repetition, SoundExchange incorporates its response to paragraph 199 *supra*.

Response to ¶ 201. SoundExchange strongly disagrees that Music Choice has been overpaying for the past rate period. In *SDARS II*, the Judges believed that the only option available to them based on the record before them was to work from the current statutory rate. However, in this proceeding, SoundExchange has provided the Judges exactly the benchmark they asked for in *SDARS II*, one that is comparable to the PSS as to MVPD distribution and downstream bundling. *SDARS II*, 78 FR at 23058. That benchmark puts a precise figure on what is directionally obvious from the history of the PSS rates – that the decision in *PSS I* to use musical works rates as a proxy for the market value of sound recordings has led to a statutory royalty rate that has been below market for 20 years. SE FOF at § XIII.B.iii. [redacted]

Moreover, Music Choice did in fact expand its channel offerings following the *SDARS II* proceeding, [redacted] Response to ¶¶ 194, 199. Thus, even by the theory the Judges adopted in *SDARS II*, a rate increase was warranted.

Response to ¶ 202. Because the PSS have been paying a below-market rate for 20 years, it would be most consistent with a fair return to copyright owners to set an above-market rate pursuant to Section 801(b)(1). *See* 17 U.S.C. § 801(b)(1)(B).

Response to ¶ 203. For 20 years Music Choice has faced steadily declining demand for its service, at least as reflected in its prices. *SDARS II amend*., 78 FR at 31844; Trial Ex. 979 at ¶¶ 54-55. In recent years, its falling prices can also be attributed in part to competition from Stingray, which pays the CABSAT rates. Trial Ex. 55 at 20, 23 (Del Beccaro WDT) ("a highly competitive . . . marketplace"; "continued competitive pressure from various market entrants seeking to undercut our pricing"). [ ] As a result, it "had significantly positive operating income" as of the time of *SDARS II*. *SDARS II amend.*, 78 FR at 31844. [ ]

[ ]

Response to ¶ 204. Music Choice does not need to be "made whole" for any overpayment in the previous rate period. Music Choice has been enjoying below-market rates for the last 20 years [ ]. Response to ¶¶ 201, 203; SE FOF at § XIII.B.iii.

Response to ¶ 205. Mr. Del Beccaro's purported calculation of a compensatory rate rests on two false premises. First, it assumes an overpayment, which is not the case. Response ¶¶ 201, 203; SE FOF at § XIII.B.iii. Second, [ ]. Response to ¶ 203.

B. Current Conditions In The MVPD Market Do Not Justify A Rate Decrease

Response to ¶ 206. The objective evidence in the record of this proceeding shows [ ]

Music Choice simply is not the struggling entity it presents itself as in proceedings like this. This is a familiar picture. Five years ago in *SDARS II*, Mr. Del Beccaro testified that its per-subscriber revenue had been declining since the early 1990s, it was not profitable under the then-current 7.5% rate, and had been operating at a loss for years. The Judges saw through those claims then and should do so in this proceeding as well. *SDARS II amend*., 78 FR at 31844 & n.5.

Moreover, Music Choice's use of the Section 801(b)(1) objectives in this context is inconsistent with the proper application of Section 801(b)(1). The statutory objectives are not "a beauty pageant where each factor is a stage of competition to be evaluated individually to determine the stage winner and the results aggregated to determine an overall winner." *SDARS I*, 73 FR at 4094. Music Choice's discussion of the relationship between the MVPD market and the Section 801(b)(1) objectives unmoored from any consideration of benchmarks or differences between benchmark and target markets is an effort to lure the Judges into just the kind of "beauty pageant" they have warned against. The Judges should resist the temptation to give into Music Choice's pleas for pity, and instead conduct their analysis under Section 801(b)(1) as they always do, by first seeking to determine a marketplace royalty rate for PSS, and only then turning to consideration of whether the Section 801(b)(1) objectives compel an adjustment in the rate. Response to ¶¶ 77-78, 100.

Response to ¶ 207. To avoid repetition, SoundExchange incorporates its response to paragraph 206 *supra*.

Response to ¶ 208. Consolidation in the cable industry has meant that Music Choice's partners now account for a large part of the U.S. cable industry. 5/18/17 Tr. 4584:12-14, 4589:18-24 (Del Beccaro) (long-time partner Comcast is largest MVPD; Charter has acquired Time Warner Cable and is almost comparable in size). [

]

Response to ¶ 209. For the reasons explained in Response to paragraphs 203 and 206, focusing on per-subscriber revenue alone is an incomplete and misleading way to view Music Choice's business.

Response to ¶ 210. *See* Response to ¶ 203 *supra*.

Response to ¶ 211. *See* Response to ¶ 203 *supra*.

Response to ¶ 212. No response.

Response to ¶ 213. No response.

Response to ¶ 214. No response.

Response to ¶ 215. No response.

Response to ¶ 216. *See* Response to ¶¶ 203, 208 *supra*.

Response to ¶ 217. No response.

Response to ¶ 218. *See* Responses to ¶¶ 203, 206 *supra*.

Response to ¶ 219. Music Choice's claims of poverty simply are not true. [ ] *See* Responses to ¶¶ 203, 206 *supra*. There is no plausible argument that Music Choice is earning less than a fair income, facing unusual risk or otherwise making changes in its operations that might warrant a lower rate under Section 801(b)(1). The Judges should reject such claims just as they rejected essentially the same claims in *SDARS II*. *SDARS II amend*., 78 FR at 31844 & n.5.

XI. CABSAT RATES ARE THE BEST BENCHMARK FOR THE PSS

Response to ¶ 220. The PSS currently pay a rate of 8.5% of revenue, which is far below the rates paid by digital music services in the free market, and lower than the rates paid by other

statutory services, including Music Choice's principal competitor Stingray. The PSS have long paid such below-market rates, and they have regularly earned large profits. *See* SE FOF at ¶¶ 2152-2155. Because 20 years of profiting from below-market rates is enough, SoundExchange proposes increasing the PSS rate to the level of the rate paid by the other cable radio services in the market – the CABSAT services that are functionally equivalent to the PSS and distributed through the same distribution channel, but were not in operation in 1998. *See* SoundExchange Amended Proposed Rates and Terms, App. A § 382.11(a)(1) (filed June 14, 2017); *see also* Trial Ex. 501 at ¶ 53 (Wazzan Corr. WDT).

Response to ¶ 221. As explained in greater detail below and in SoundExchange's Findings of Fact, *see* SE FOF Section XIII.B, SoundExchange's proposal to rely on the CABSAT rates as a benchmark for the PSS is reasonable in light of the economic evidence. In *SDARS II*, the Judges indicated that a benchmark for PSS rates would have to reflect the "distinctive features that distinguish [the PSS] from other types of music services." *SDARS II*, 78 FR at 13060-61. Cable radio services other than the PSS pay CABSAT rates; indeed, Music Choice's principal competitor Stingray voluntarily entered the U.S. market paying CABSAT rates, and has continued to pay CABSAT rates without objection. SE FOF at ¶¶ 1866-67, 1871. Thus, the CABSAT benchmark address the Judges' concern. This benchmark does not require any adjustments under Section 801(b)(1).

Response to ¶ 222. The current CABSAT rates were established in a rate-making proceeding similar to this one. The participants in that proceeding were SoundExchange and Sirius XM, and they reached a settlement. After publication in the Federal Register, and in the absence of any negative comments, the Judges adopted the settlement. *See In re Digital*

Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, 72 FR 72253 (2007) (hereinafter "*CABSAT I*"); Trial Ex. 59 at ¶ 31 (Crawford WRT). SoundExchange relies on these adopted rates as a benchmark for the PSS. *See* SE FOF at Section XIII.B.2.v.

Music Choice is wrong that the settlement agreement between Sirius XM and SoundExchange prohibited use of the statutory CABSAT rates in this proceeding. To be sure, the settlement agreement included language that the "Agreement" and "[t]he royalty rates and terms set forth in the Proposed Regulations are intended to be nonprecedential," and that "[s]uch royalty rates and terms shall not be relied upon as precedent in any proceeding to set statutory royalty rates and terms." But, again, SoundExchange and its expert Dr. Wazzan relied on the rates adopted by the Judges, not the underlying agreement with Sirius XM or the proposed regulations attached thereto. *See, e.g.*, Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT) (referring to "rates in 37 C.F.R. Part 383"); Trial Ex. 501 at ¶ 60 (same); Trial Ex. 502 at ¶ 4 (Wazzan Corr. WRT) (same); Trial Ex. 502 at ¶ 15 (referring to "the statutory royalty rates paid by the CABSAT services").

The Judges have repeatedly distinguished adopted statutory rates from the settlements that led to them, and declined to say that the adopted statutory rates are without precedential effect. *See, e.g.*, *In re Noncommercial Educational Broadcasting Statutory License*, 72 FR 19138, 19169 (2007) (hereinafter "*Public Broadcasting I*") ("The Copyright Royalty Judges decline to include such a provision" stating that the rates reached by settlement agreement were without precedential effect because "[o]ur task, as set forth in section 118 and chapter 8 of the Copyright Act, is to adopt rates and terms for the noncommercial broadcasting license. It is not

our task to offer evaluations, limitations or characterizations of the rates and terms, or make statements about their use or value in proceedings other than this one."); *In re Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 73 FR 57033, 57034 (2008) (same); *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 75 FR 16377, 16378 (2010) (similar); *CABSAT I*, 72 FR 72253 (publishing final rule without the non-precedential language from the proposed rule).

Interpreting language similar to that contained in the Sirius XM-SoundExchange CABSAT agreement, the Register likewise distinguished non-precedential Webcaster Settlement Act (WSA) rates and terms agreements from rates and terms based thereon, and allowed reliance on the latter in subsequent proceedings. In *Web IV*, the Judges referred to the Register questions concerning their ability to consider agreements that "are substantively identical to, have been influenced by, or refer to" provisions of a WSA agreement. *In re Scope of the Copyright Royalty Judges' Continuing Jurisdiction*, 80 FR 58300, 58305 (2015). By statute the Judges are prohibited from considering "any provisions" of such an agreement, "including any rate structure [and] fees." 17 U.S.C. § 114(f)(5)(C). The Register interpreted that prohibition to extend only to the rates and terms in the WSA agreement itself, and not to the same or similar rates and terms if copied into a new agreement. 80 FR at 58,306.

In view of the foregoing, the no-precedent language in the CABSAT agreement should be understood to refer only to the agreement itself, and the rates and terms set forth in the accompanying proposed regulations themselves, and not to the regulations adopted by the Judges.

Response to ¶ 223. The CABSAT benchmark is not a marketplace benchmark. It is a regulated rate. SE FOF at ¶ 1847. Although SoundExchange agrees with Music Choice that such regulated rates should be viewed with caution when considering them as a possible benchmark, SE FOF at ¶ 1847, sometimes it not possible to find a benchmark that is entirely free of the shadow of the statutory license. Rather than "the wholesale abandonment of benchmarking," *Web IV*, 81 FR 26331, a benchmark based on a regulated rate may be the best available option where no marketplace benchmark exists. That is the case here. No one has identified any suitable marketplace benchmark for the PSS that is not constrained by regulation. Instead, the statutory CABSAT rates are "a market-like rate." 5/3/17 Tr. 2318:35 (Wazzan); *see also* Trial Ex. 502 at ¶¶ 19-20 (Wazzan Corr. WRT).

The CABSAT rates are "market-like" because they are subject to the willing buyer/willing seller standard under 17 U.S.C. § 114(f)(2). Trial Ex. 501 at ¶ 64 (Wazzan Corr. WDT). At least as important, the statutory CABSAT rates have been negotiated with relatively little regulatory overhang, 5/3/17 Tr. 2309:6-14 (Wazzan), and have been accepted over a sustained period by multiple providers of CABSAT services, including Stingray, which made a decision to enter the U.S. market knowing the magnitude of the statutory CABSAT rates. 5/3/17 Tr. 2307:18-24 (Wazzan). SE FOF at ¶ 1870.

Throughout the history of the statutory CABSAT rate, "Sirius XM negotiated with SoundExchange . . . in an arm's-length, willing buyer/willing seller transaction, and agreed on a rate." 5/3/17 Tr. 2307:5-9 (Wazzan). In doing so, they were constrained by the low PSS rate, which would probably bias the CABSAT rate downwards, but "ultimately as a willing buyer/willing seller they reached some settlement." 5/3/17 Tr. 2400:14-18 (Wazzan).

Presumably they would have been mindful of the willing buyer/willing seller standard that would have applied if they had failed to reach a settlement agreement. 17 U.S.C. § 114(f)(2)(B).

Music Choice's own expert, Dr. Crawford, endorsed the use of regulated musical works rates as a benchmark, noting that the rate standard applied in setting musical works royalty rates is "designed to approximate marketplace outcomes." Trial Ex. 54 at ¶ 58 (Crawford WDT). That standard is similar to the willing buyer/willing seller standard used in CABSAT proceedings. *See* 17 U.S.C. § 114(f)(2)(B). Dr. Crawford also readily found the negotiating stakes to be similar in the markets for musical works and sound recordings for a PSS. Trial Ex. 54 at ¶ 58 (Crawford WDT). Because the PSS and CABSAT services are so similar, their stakes in negotiating sound recording royalties are likewise similar. Trial Ex. 502 at ¶ 20 (Wazzan Corr. WRT). In short, the CABSAT market has the characteristics of the best available benchmark, even though it is not an *ideal* benchmark. SE FOF at ¶¶ 1859-60.

Response to ¶ 224. Music Choice's characterization of Dr. Wazzan's testimony is both hyperbolic and incorrect. Music Choice starts by claiming that Dr. Wazzan's testimony is "unreliable" because "[a]t the time of his written testimonies, Dr. Wazzan did not know those rates and terms were actually the product of a settlement agreement." Music Choice cites no source in Dr. Wazzan's testimony for this proposition because there is no source for it there. To be sure, Dr. Wazzan was confused at his deposition about when he knew about the settlement agreement. He initially stated unequivocally that he *was* aware, at the time he wrote his written testimony, that the CABSAT rates in Part 383 were the product of a settlement. 5/3/17 Tr. 2472:5-2473:7 (Wazzan). Then after multiple tries, Mr. Fakler eventually convinced Dr. Wazzan of the contrary. 5/3/17 Tr. 2397:20-2398:9 (Wazzan). But he quickly recognized that

he was "not sure when I became aware of that." 3/28/17 Depo. Tr. 130:1121 (Wazzan). *See also* Response to ¶ 273. Regardless, the fact that the CABSAT rates in Part 383 were adopted as the result of a settlement does not affect Dr. Wazzan's opinion that the CABSAT rates in Part 383 are the best available benchmark for PSS rates for the reasons explained in Response to paragraph 223.

Music Choice also claims that Dr. Wazzan's "testimony was replete with errors, demonstrating a level of carelessness and willingness to mischaracterize evidence that renders his opinions unreliable and useless for the purposes of this proceeding." Although Dr. Wazzan's testimony did contain some errors, *he corrected them* before his testimony was admitted into evidence. Dr. Wazzan's corrected testimony is accurate, and Music Choice fails to point to any inaccuracies in the corrected testimony as admitted into the record. Accordingly, it has made no argument that his opinions in the form in which they have been formally filed are "unreliable," much less that they are "useless." By contrast, the written testimony of Dr. Crawford (Music Choice's expert), as admitted into the record, contains major errors, as Dr. Crawford himself conceded. SE FOF at ¶¶ 2054-55.

Response to ¶ 225. As SoundExchange explained in its Findings of Fact, it is clear that Music Choice charges lower prices to its MVPD owners than to other MVPDs. *See* SE FOF at ¶¶ 1960-1999. Music Choice's simply stating that it is "demonstrably untrue" that "Music Choice gives its partners below market rates" does not make it so. [redacted]

[redacted].]

Trial Ex. 502, App. C-2 at 43-44 (Wazzan Corr. WRT).

Music Choice also challenges SoundExchange's proposal to use a per-subscriber rate structure for PSS. The principal reason for this proposal is that the benchmark CABSAT rates are a per-subscriber rate. 37 C.F.R. § 383.3(a)(1). Although one could convert these per-subscriber rates into percentage-of-revenue rates, there is no good reason to do so. *See* SE FOF at ¶¶ 1948-1959. [redacted] Trial Ex. 54 at ¶ 15 (Crawford WDT); Trial Ex. 55 at 22-23 (Del Beccaro WDT); 5/18/17 Tr. 4530:13-4531:13 (Del Beccaro). And a per-subscriber rate is easier to apply than a percentage rate because it does not require allocation of revenues, which is a frequently contentious process. *See* Response to ¶ 279, *infra*.

Response to ¶ 226. Music Choice is incorrect that SoundExchange provides no evidence in support of the "proposal that the PSS rates automatically increase by 3% per year." *See* Response to ¶ 318, *infra*.

A. The CABSAT Rates Were Set In A Proceeding Subject To The Willing Buyer/Willing Seller Standard And Are A Market-Like Rate

Response to ¶ 227. SoundExchange does not dispute that the CABSAT rates are not market rates. But they are "market-like" because they are subject to the willing buyer/willing seller standard under 17 U.S.C. § 114(f)(2). *See* Response to ¶ 223, *supra*. *See also* SE FOF at Section XIII.B.2.v. Moreover, the fact that the CABSAT rates were consistent with a settlement agreement stating that the *agreement* was non-precedential does not prevent SoundExchange or the Judges from relying on the adopted *rates*. *See* Response to ¶ 222, *supra*.

Response to ¶ 228. No response.

Response to ¶ 229. *See* Response to ¶ 222, *supra*.

Response to ¶ 230. Again, SoundExchange does not dispute that the parties "considered" the "no precedent" language in their settlement agreement. It simply disputes that the language in the *agreement* prevents the Judges or the parties from relying on the *rates* ultimately set by the Judges. *See* Response to ¶ 222, *supra*.

Response to ¶ 231. The email that Music Choice cites reflects Sirius XM's understanding of the CABSAT settlement agreement. It does not indicate SoundExchange's own interpretation of that language. Regardless of how the parties understood the agreement, the terms of the agreement do not bar reliance on the published rates themselves. The long line of decisions that set rates determined by a settlement agreement and that also declined to include non-precedential language regarding those rates proves as much. They certainly alerted the parties to the CABSAT settlement agreement that such an interpretation of the no-precedent language was more likely than not if the issue ever arose. *See* Response to ¶ 222, *supra*.

Response to ¶ 232. *See* Responses to ¶¶ 222, 231, *supra*.

Response to ¶ 233. *See* Responses to ¶¶ 222, 231, *supra*.

Response to ¶ 234. *See* Responses to ¶¶ 222, 231, *supra*.

Response to ¶ 235. Music Choice alleges that the statute provides that the "Judges had no legal authority to substantively review, alter, or reject the rates and terms contained in the settlement" agreement – including its no-precedent language. But Music Choice is incorrect. That statute actually says:

> the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges

> conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

17 U.S.C. § 801(b)(7)(A)(ii). The language in the joint motion to adopt the CABSAT settlement agreement references the same provision, but only to make the point that the "Judges generally are required to adopt the rates and terms provided in such an agreement." Trial Ex. 922, at 6 (SoundX_000477829). The long-standing practice of implementing such settlement agreements without specifying that the rates set pursuant to them are non-precedential, *see* Response to ¶ 222, shows that the Judges do have the authority to effectively amend the terms (or at least the no-precedent term) of a settlement agreement.

Response to ¶ 236. *See* Response to ¶ 235, *supra*.

B. The CABSAT Rates Are The Best Available Benchmark

Response to ¶ 237. SoundExchange and Music Choice broadly agree on considerations relevant to the selection of a comparable benchmark. A comparable benchmark should involve the same buyers and sellers and the same rights. Trial Ex. 501 at ¶ 37(c) (Wazzan Corr. WDT); Trial Ex. 26 at n.3 (Orszag WDT). In his direct testimony, Dr. Crawford similarly listed five characteristics for an "ideal" benchmark: (a) marketplace outcomes with similar stakes; (b) same sellers; (c) same buyers; (d) same rights sold to the same downstream buyers; and (e) same method of end user purchase and consumption. Trial Ex. 54 at ¶ 50 (Crawford WDT).

Finding a sufficiently comparable benchmark has historically been challenging when setting rates for the PSS. Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT). The CABSAT buyers and the PSS buyers are similarly situated, and the same rights are conveyed, because both create audio music channels incorporating the licensed sound recordings and sell them to MVPDs, who in turn resell those channels to consumers as part of subscription bundles. 5/3/17 Tr. 2305:24-

2306:8 (Wazzan). And there are the same methods of end-user purchase and consumption for both CABSAT and PSS services, because both are delivered to the television sets of consumers through their cable or satellite provider as part of a subscription bundle consisting overwhelmingly of television programming. Trial Ex. 501 at ¶¶ 59, 60 (Wazzan Corr. WDT). Thus, the CABSAT benchmark is consistent with four of Dr. Crawford's five characteristics for an "ideal" benchmark. Trial Ex. 54 at ¶ 50 (Crawford WDT). The CABSAT benchmark is clearly a better benchmark than the musical works benchmark, which Dr. Crawford calls "the best possible benchmark," Trial Ex. 54 at ¶ 61 (Crawford WDT), even though it does not "involve the same buyers and sellers for the same rights" as the PSS market. *SDARS II*, 78 FR at 23058.

Response to ¶ 238. It is true that the CABSAT rates are not marketplace rates. They are regulated rates. *See* Response to ¶ 223. That said, the portion of the settlement agreement that Music Choice itself cites states that "[t]he royalty rates and terms set forth in the Proposed Regulations are . . . based on the Parties' current understanding of *market* and legal conditions, among other things." Trial Ex. 922 at 2 (SoundX_000477825) (emphasis added). In other words, the rate was informed by market conditions – and it was also informed by legal conditions. In any event, as explained above, the willing buyer/willing standard applicable to CABSAT rates ensures that they are the closest approximation of a market benchmark available. SE FOF at Section XIII.B.2.v.

Response to ¶ 239. The portion of Dr. Wazzan's testimony cited here simply quotes the portion of the settlement agreement cited in the previous paragraph.

Response to ¶ 240. Dr. Wazzan acknowledged that litigation settlements must be approached with care, *see* Trial Ex. 501 at ¶ 41, but did not rule out relying on them if necessary. Specifically, he said that, "in the absence of a suitable marketplace benchmark, a benchmark based on a regulated rate may be the best available option, as I believe is the case here." Trial Ex. 502 at ¶ 19 (Wazzan Corr. WRT); *see also* Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT) (similar). This statement is consistent with Mr. Orszag's testimony; he simply acknowledges, as Dr. Wazzan does, that regulated rates are not ideal benchmarks.

Response to ¶ 241. That the rates were negotiated by Sirius XM, which is primarily an SDARS provider, does not affect the reliability of the statutory CABSAT rates as a benchmark. SE FOF at ¶ 1862. Music Choice says that Sirius XM "had no incentive to vigorously negotiate for a fair market deal." It has previously suggested that Sirius XM might view its CABSAT service as promotion for its SDARS. Trial Ex. 59 at ¶ 10 (Crawford WRT). But Dr. Wazzan did not find that argument compelling. 5/3/17 Tr. 2420:10-15 (Wazzan). He does not think that the possibility Sirius XM views its CABSAT as promotional should have an effect on the CABSAT rates they agreed to. 5/3/17 Tr. 2314:4-11 (Wazzan). "There's no evidence that they would simply accept a bad deal." 5/3/17 Tr. 2314:9-10 (Wazzan). Instead, Sirius XM should be motivated not to overpay, because "they are a profit-maximizing firm." 5/3/17 Tr. 2421:1-2 (Wazzan); *see also* 5/3/17 Tr. 2314:8-9 (Wazzan). In addition, Mr. Del Beccaro [redacted]. 5/18/17 Tr. 4575:6-13 (Del Beccaro) ([" [redacted] "]). SE FOF at ¶ 1862.

Dr. Wazzan was similarly unpersuaded by Dr. Crawford's argument that SoundExchange had excessive market power in negotiating the CABSAT settlements. 5/3/17 Tr. 2315:1-5 (Wazzan). Dr. Crawford conceded that argument "isn't the strongest objection." 4/24/17 Tr. 773:10-11 (Crawford). SE FOF at ¶ 1863. The analysis in Dr. Crawford's written direct statement is predicated on the assumption that at least the major record labels are "must-haves" for Music Choice, because it "would not be able to operate a viable PSS without sound recording performance licenses covering the vast majority of the licensable music library." Trial Ex. 54 at ¶ 78 & n.62 (Crawford WDT); *see also* 5/16/17 Tr. 3941:13:3942:6 (Harrison) [ ] If the majors are must-haves, there is no meaningful difference in market power between negotiating with SoundExchange and negotiating with an individual major label. 5/3/17 Tr. 2315:1-21 (Wazzan). SE FOF at ¶ 1863.

Moreover, the existing CABSAT providers other than Sirius XM have had the opportunity to participate in a rate proceeding, which would have given them an opportunity to seek a lower rate and standing to object to any settlement to any settlement. SE FOF at ¶ 1865. But DMX never participated in any of the proceedings, despite providing a CABSAT service from before the first CABSAT proceeding until the middle of the third proceeding. SE FOF at ¶ 1865.

[ ] SE FOF at ¶ 1866; 5/18/17 Tr. 4579:9-12 (Del Beccaro); Trial Ex. 54 at ¶ 147 (Crawford WDT). That was roughly the time of *CABSAT II*. Stingray is a large and sophisticated company with the resources to litigate rates if it wanted to. Trial Ex. 57 at 9 (Del Beccaro WRT); Trial Ex. 973 at SoundX_000145758-60. Stingray could not have been

unmindful of the statutory CABSAT rates in its thinking about entering the U.S. market. *See* 5/3/17 Tr. 2307:18-21 (Wazzan); 5/3/17 Tr. 2406:21-2407:9 (Wazzan) ("if Stingray then comes into the market afterwards and simply accepts the rate and enters the market and willingly pays it, that is evidence in favor of a market rate"). By the time of *CABSAT III*, [ ] Trial Ex. 501 at ¶ 62(h) (Wazzan Corr. WDT). If it thought that the statutory CABSAT rates were many times fair market value, it would have had strong incentives to do something about that, as Dr. Crawford suggests. Trial Ex. 59 at ¶ 124 (Crawford WRT) ("they would have a good case"). As Dr. Wazzan put it, "if they are willingly paying the CABSAT rate and they didn't participate, they must not be terribly troubled by it." 5/3/17 Tr. 2407:7-9 (Wazzan). SE FOF at ¶¶ 1865-67.

Response to ¶ 242. *See* Response to ¶ 241, *supra*.

Response to ¶ 243. *See* Response to ¶ 241, *supra*.

Response to ¶ 244. *See* Response to ¶ 241, *supra*.

Response to ¶ 245. *See* Response to ¶ 241, *supra*.

Response to ¶ 246. *See* Response to ¶ 241, *supra*.

Response to ¶ 247. *See* Response to ¶ 241, *supra*.

Response to ¶ 248. *See* Response to ¶ 241, *supra*.

Response to ¶ 249. *See* Response to ¶ 241, *supra*.

Response to ¶ 250. *See* Response to ¶ 241, *supra*.

Response to ¶ 251. The statutory CABSAT rates were set in a proceeding subject to the willing buyer/willing seller standard, with minimal regulatory overhang, and have been accepted by substantial and sophisticated providers of CABSAT services – particularly Stingray. 5/3/17

Tr. 2319:4-7 (Wazzan) ("We know that Stingray successfully competes while paying CABSAT rates. . . . It's acceptable in the marketplace."). Accordingly, the CABSAT rates are in Dr. Wazzan's words, "a market-like rate." 5/3/17 Tr. 2318:2-5 (Wazzan); 5/3/17 Tr. 2318:35 (Wazzan). They are certainly the "the best available proxy for a marketplace royalty for PSS." Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT). *See* SE FOF at Section XIII.B.2.v-vi.

Response to ¶ 252. The settlement negotiations between SoundExchange and Sirius XM occurred in what Dr. Crawford refers to as a hybrid market (*i.e.*, a market where "[n]egotiations occur in a marketplace setting, but, *in case of impasse*, either party to the negotiation can appeal to a judicial or regulatory body for a rate determination"). Trial Ex. 54 at ¶ 50(1) (Crawford WDT) (emphasis in original); 4/24/17 Tr. 773:6-7 (Crawford) ("clearly the CABSAT market is one of these hybrid markets").

Dr. Crawford considers a rate set in a hybrid market to be a suitable benchmark if the parties have similar stakes in the benchmark and target markets. Trial Ex. 54 at ¶ 50(1) (Crawford WDT); Trial Ex. 502 at ¶ 20 (Wazzan Corr. WRT). Dr. Crawford embraced use of regulated musical works rates as a benchmark, because the rate standard applied by the ASCAP and BMI rate courts is "designed to approximate marketplace outcomes." Trial Ex. 54 at ¶ 58 (Crawford WDT). That standard is similar to the willing buyer/willing seller standard that applies in CABSAT proceedings. *See* 17 U.S.C. § 114(f)(2)(B).

Dr. Crawford readily found the stakes to be similar in the markets for musical works and sound recordings for a PSS. Trial Ex. 54 at ¶ 58 (Crawford WDT). Because the PSS and CABSAT services are so similar, their stakes in negotiating sound recording royalties are likewise similar. Trial Ex. 502 at ¶ 20 (Wazzan Corr. WRT). SE FOF at ¶¶ 1859-60.

Response to ¶ 253. Music Choice mischaracterizes the CABSAT market. As explained at length in SoundExchange's Findings of Fact, the CABSAT services are functionally equivalent to the PSS, distributed through the same channels as the PSS, and indeed are the main competitors of the PSS. The two companies that currently use the statutory CABSAT license – Stingray and Sirius XM – are significant and sophisticated companies that have been using the CABSAT license for several years, and the record is clear that Stingray in particular competes directly with Music Choice. *See generally* SE FOF at Section XIII.B.2.

Response to ¶ 254. *See* Response to ¶ 253, *supra*.

Response to ¶ 255. *See* Response to ¶ 253, *supra*.

Response to ¶ 256. *See* Response to ¶ 253, *supra*.

Response to ¶ 257. The thought exercise that Music Choice asks the Judges to engage in here, contemplating what would happen if Music Choice exited the market and Stingray had to step into its shoes, is not only irrelevant but also incorrect. The only evidence that Music Choice offers for the proposition that Stingray would be unprofitable if it had *more* MVPD partners is unsubstantiated speculation of its witness, David Del Becarro. For its part, Stingray is competing aggressively to obtain more MVPD partners. It is highly unlikely that a profit-maximizing firm would pursue those opportunities if they would cause it to become unprofitable.

C. The CABSAT Rates Provide The Best Available Basis For Estimating The Fair Market Value Of The Use Of Sound Recordings In A Television-Based PSS

Response to ¶ 258. *See* Response to ¶ 223.

Response to ¶ 259. Music Choice misrepresents Dr. Wazzan's testimony. SoundExchange has explained at length why the CABSAT rates provide the best available basis

for setting PSS rates. *See generally* SE FOF at Section XIII.B. To the extent that Music Choice is now suggesting in ¶ 259 that the current PSS rates should be used to set the PSS rates for the upcoming rate period, SoundExchange has also explained in detail why that would be inappropriate. *See* SE FOF at Section XIII.B.3. In any event, Music Choice's rate proposal does not propose the current PSS rates as a benchmark.

Response to ¶ 260. *See* Responses to ¶¶ 222, 259.

Response to ¶ 261. *See* Responses to ¶¶ 222, 259.

Response to ¶ 262. *See* Responses to ¶¶ 222, 240.

Response to ¶ 263. *See* Responses to ¶¶ 222, 240.

Response to ¶ 264. *See* Responses to ¶¶ 222, 240.

Response to ¶ 265. *See* Responses to ¶¶ 222, 259.

Response to ¶ 266. *See* Responses to ¶¶ 222, 259.

Response to ¶ 267. *See* Responses to ¶¶ 222, 259.

Response to ¶ 268. Music Choice alleges that "Dr. Wazzan testified that he performed no analysis of the CABSAT settlement or the factors that led to its rates and terms, insisting that he did not need to perform such analysis because he believed that the Judges had reviewed the settlement and evaluated it as satisfying the willing buyer/willing seller standard." In fact, what the relevant portion of the transcript says is:

> Q. And you didn't do any analysis of this settlement for benchmarking purpose or look into any of the factors that the parties to the settlement might have considered in establishing the rates and terms in the agreement, right?
>
> A. Well, I took the rate as being reflective of a willing buyer/willing seller rate. In my mind that's always the best benchmark, if one is available.

5/3/17 Tr. 2415:17-25 (Wazzan). This testimony is entirely consistent with the view that the settlement agreement was reached under the statutory overhang of the willing buyer/willing seller standard that would have applied if the parties were unable to reach a settlement agreement and had to argue their respective positions before the Judges. In those circumstances, it is reasonable to think that the willing buyer/willing seller standard would inform the settlement negotiations.

Response to ¶ 269. Music Choice has already made these now-tired arguments several times, including in a motion *in limine*. SoundExchange has already responded to them. *See, e.g.*, Response to ¶ 224. Music Choice's insistence on this line of reasoning – the line of reasoning that Dr. Wazzan was unaware of the CABSAT settlement agreement at the time he filed his written direct testimony – is nothing more than a transparent effort to discredit the benchmark by any means.

Response to ¶ 270. *See* Response to ¶ 269, *supra*.

Response to ¶ 271. *See* Response to ¶ 269, *supra*.

Response to ¶ 272. *See* Response to ¶ 269, *supra*.

Response to ¶ 273. Not only did Dr. Wazzan clarify at his deposition that he was not sure when he became aware of the CABSAT settlement, *see* Response to ¶ 224, but also he subsequently filed a declaration stating that SoundExchange explained the history of the CABSAT rates to him early in his engagement for this proceeding. *See* Wazzan Decl. ¶ 4, SoundExchange's Opposition to Music Choice's Motion *In Limine* To Exclude SoundExchange's Use Of Testimony And Evidence Related To Or Based On The CABSAT Rates And Terms (filed Apr. 4, 2011). Thus, it is simply not true that Dr. Wazzan "did not at

any time during that process seek to change his clear testimony that he was unaware of the CABSAT settlement at the time he filed his written testimony."

Response to ¶ 274. It is true that Dr. Wazzan did not file an errata sheet to clarify the degree of his testimony about his awareness about the CABSAT settlement at the time he filed his written testimony. That is because it would have been inappropriate to do so. Federal Rule of Civil Procedure 30(e) cannot be interpreted to "allow one to alter what was said under oath. If that were the case, one could merely answer the question with no thought at all[], then return home and plan artful responses. . . . A deposition is not a take home examination." *Trout v. FirstEnergy Generation Corp.*, 339 F. App'x 560, 565 (6th Cir. 2009) (quotation marks omitted) (bracket in original). Music Choice's allegation that Dr. Wazzan somehow did something wrong by not filing an errata sheet after his deposition is a red herring. In any event, he did clarify his deposition testimony in subsequent filings, as already explained.

Response to ¶ 275. Music Choice claims that Dr. Wazzan "admitted at trial that he had not even reviewed the Federal Register notice implementing the CABSAT settlement rates and terms." But in the portion of the trial transcript that Music Choice cites, all Dr. Wazzan admitted to was (1) not recalling what Federal Register notice he reviewed, and (2) omitting the Federal Register notice setting the most recent CABSAT rates from his list of documents relied on. *See* 5/3/17 Tr. 2408:3-2404:7 (Wazzan). This attempted "gotcha" gets Music Choice nowhere.

D. Dr. Wazzan Did Not Need To Review The Settlement Agreement

Response to ¶ 276. Dr. Wazzan did not need to review the CABSAT settlement agreement itself in writing his rate proposal, as his rate proposal is not based on the settlement agreement, but upon the CABSAT rates themselves. *See* Response to ¶ 222, *supra*.

Response to ¶ 277. *See* Responses to ¶¶ 222, 259, *supra*.

Response to ¶ 278. *See* Responses to ¶¶ 273-275, *supra*.

E. Shifting To A Pre-Subscriber PSS Rate Is Appropriate

Response to ¶ 279. SoundExchange has explained in detail why a per-subscriber rate structure is justified for the PSS. *See* SE FOF at Section XIII.B.4. SoundExchange has proposed using a per-subscriber rate for PSS not for the willy-nilly reasons suggested by Music Choice, but mainly because that is the royalty rate calculation method used for the CABSAT services. *See* SE FOF at ¶ 1949. In addition, per-subscriber rate is the metric by which Music Choice is paid by its MVPD customers. Artists and record companies are of course forced sellers under the statutory license, but this proceeding is akin to Music Choice's renegotiations with its MVPD customers. Artists and record companies should receive the same kind of revenue protection from the PSS that lie downstream from them that Music Choice does in its market negotiations. *See* SE FOF at ¶ 1950.

A per-subscriber rate is also easier to apply than a percentage rate. *See* SE FOF at ¶ 1951. By contrast, the current percentage rate structure requires allocation of revenues. Music Choice's video-on-demand service is always bundled with its PSS service. Trial Ex. 54 at ¶ 146 (Crawford WDT). Thus, to isolate just "monies derived from the operation of the programming service of the Licensee," 37 C.F.R. § 382.2 (definition of Gross Revenues) requires a complicated allocation of its bundle revenue. Trial Ex. 54 at ¶¶ 147-48 (Crawford WDT). *See* SE FOF at ¶¶ 1951-1953.

1. Music Choice Provides Below-Market Rates To Its Cable Partners

Response to ¶ 280. Music Choice is partially owned by cable companies – including Comcast, Time Warner Cable, and Cox – and it is undisputed that Music Choice charges lower

prices to its MVPD owners than to other MVPDs. For example, in 2016, Music Choice's partners all paid [ ] per subscriber per month. The weighted average (based on the number of subscribers) was [ ] for non-partners, with a minimum of [ ]. SE FOF at ¶ 1960.

Music Choice's expert, Dr. Crawford, asserts that the pattern of pricing observed by Dr. Wazzan "is perfectly consistent with the widespread practice of providing quantity discounts to the largest cable companies by owners of content distributed on cable systems." The facts – explained in greater detail in SoundExchange's proposed findings of fact, *see* SE FOF at ¶¶ 1960-1999 – simply do not support this view of the world.

[.] For Jerrold, it was launching a business it had spent four years incubating, getting outside investment, and [ ]. For Comcast, Continental, Cox and Time Warner (through its Time Warner Cable subsidiary), it was being among the entities controlling a new television content supplier for their cable systems and among the first cable systems to offer digital music. In the case of the record company affiliates, it was securing a digital performance right and opening a new market for their recordings. SE FOF at ¶ 1976. In the case of Time Warner Cable, its affiliation agreement provided five years of *free* carriage. *PSS I* CARP Report, Trial Ex. 979 at ¶¶ 162-66.

Music Choice claims that its MVPD partner affiliate fees are simply a function of their size at the time their contracts were entered into. Trial Ex. 59 at ¶¶ 202-04 (Crawford WRT).

[.]

Trial Ex. 502, App. C-2 at 43-44 (Wazzan Corr. WRT).

[.]

[

[redacted]."] 5/18/17 Tr. 4581:1-3 (Del Beccaro). SE FOF at ¶ 1997.

Response to ¶ 281. During this proceeding, there has been some dispute about whether Music Choice was majority-owned by its cable company partners at a particular time. [redacted] SE FOF at ¶ 1975. Mr. Del Beccaro testified that at a later date it may have been in the [redacted] range. 5/18/17 Tr. 4638:11-4639:13 (Del Beccaro). [redacted] 5/18/17 Tr. 4638:18-4639:3 (Del Beccaro). Ultimately, Dr. Wazzan concluded that "it doesn't matter if they are majority-owned or significantly-owned." 5/3/17 Tr. 2363:24-25 (Wazzan). [redacted] *See* SE FOF at ¶¶ 1964-1975.

Response to ¶ 282. *See* Response to ¶ 281, *supra*.

Response to ¶ 283. *See* Response to ¶ 281, *supra*.

Response to ¶ 284. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 285. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 286. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 287. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 288. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 289. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 290. Again, Music Choice has used hyperbolic language to mask a lack of meaningful response to a valid point. The portion of the transcript that Music Choice cites simply quotes language from Dr. Wazzan's deposition, and his trial testimony that he stands by his deposition. That language is as follows:

> Q. "Question: So you don't have any actual reason to believe that that occurred, that they used to have a controlling interest?" "Answer: No. But it doesn't really matter to me. What I've convinced myself of is that there is a difference in the rates being paid to the partners, and by the partners versus the non-partners. That is the key fact. I was trying to illustrate, you know, why that might be, and I initially thought it may be because they had a controlling interest and so they were self-dealing. But if they are not self-dealing and it is purely contractual, that is fine too. I don't really care why they are getting a different rate. That is the point." That was my question and that was your answer, right?
>
> A. I will stand by that.

5/3/17 Tr. 2457:15-2458:7 (Wazzan). Dr. Wazzan is making the point that Music Choice's MVPD partners receive lower rates that its MVPD non-partners. [

]

Response to ¶ 291. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 292. *See* Response to ¶ 280, *supra*.

Response to ¶ 293. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 294. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 295. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 296. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 297. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 298. *See* Responses to ¶¶ 280, 281, *supra*.

Response to ¶ 299. That Music Choice's partners made concessions to a non-partner to help the partnership (and thus its own interests) does not prove that the partners were looking out for anything other than their own interests. As Del Beccaro explained Music Choice's [

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5/18/17 Tr. 4593:21-4954:10 (Del Beccaro). Nor do these facts change the fact that, at present, Music Choice charges its MVPD partners lower rates than its non-partners. (DirecTV is, after all, a *former* partner.) SE FOF at ¶¶ 1960-99. Music Choice has offered no credible evidence that any non-partner currently receives rates lower than those received by partners.

Response to ¶ 300. *See* Response to ¶ 299, *supra*.

Response to ¶ 301. *See* Response to ¶ 299, *supra*.

Response to ¶ 302. *See* Response to ¶ 280, *supra*. The claim that "companies with the most subscribers have the most revenue to offer Music Choice" is simply not plausible in light of the facts presented above.

Response to ¶ 303. *See* Responses to ¶¶ 280, 281, 299, *supra*.

Response to ¶ 304. Although Music Choice is correct that Dr. Wazzan said he did not consider the number of subscribers each MVPD partner had at the time they initially contracted with Music Choice, that information does not help Music Choice. [

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SE FOF at ¶ 1990; Trial Ex. 410, Sch. B at MC0012248. [

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Response to ¶ 305. That Dr. Wazzan did not analyze the length of the agreements does not change the facts recounted in the immediately previous paragraph – the MVPD partner affiliates get bigger discounts. SE FOF at ¶¶ 1960-99. *See also* Responses to ¶¶ 280, 281, 299, 304, *supra*. Indeed, Music Choice's failure to affirmatively identify *any* affiliate for which the

length of term of an affiliate agreement allowed it to contract a lower rate than it otherwise would have obtained is telling.

Response to ¶ 306. Dr. Wazzan admitted that he focused on Music Choice's top twenty affiliates. This was a heuristic, to be sure, but Music Choice points out no specific inaccuracy in Dr. Wazzan's analysis that flowed from it. Again, that failure to identify any error is telling.

Response to ¶ 307. *See* Responses to ¶¶ 304-306, *supra*.

Response to ¶ 308. Although Dr. Wazzan focused on Verizon, SoundExchange has not. Its Findings of Fact explain a point reiterated above: [[redacted].] Trial Ex. 502, App. C-2 at 43-44 (Wazzan Corr. WRT). *See* SE FOF at ¶ 1995. Moreover, the points that Music Choice makes [[redacted]]

Response to ¶ 309. *See* Response to ¶ 308.

Response to ¶ 310. Again, Music Choice has provided no evidence of *any* instance in which the length of an agreement affected the rates an affiliate was able to obtain. And Mr. Del Beccaro provided no basis for his speculation that Music Choice's current MVPD partners are actually paying rates *above* those they would be able to negotiate under current marketplace conditions. *See also* Response to ¶ 308.

Response to ¶ 311. *See* Responses to ¶¶ 280, 281, 304, *supra*.

Response to ¶ 312. *See* Responses to ¶¶ 280, 281, 304, *supra*.

Response to ¶ 313. *See* Responses to ¶¶ 280, 281, 304, *supra*.

Response to ¶ 314. It is true that Dr. Wazzan said the [ ] rates Sirius XM and DMX received for its CABSAT services were "market rates." But he also noted that these rates were [.] *See* 5/3/17 Tr. 2425:11-21. If anything, this point in the transcript that Music Choice cites proves that SoundExchange's rate proposal for the PSS should be higher, as the CABSAT rates are artificially deflated because of the existence of the PSS providers.

2. Changing The PSS Royalty Rate Calculation Methodology To A Per-Subscriber Rate Is Supported By Marketplace Evidence And Precedent

Response to ¶ 315. SoundExchange has already explained why a per-subscriber rate is appropriate for the PSS. *See* Response to ¶ 279; SE FOF § XIII.B.4.

F. SoundExchange's Proposed 3% Annual Rate Increase Accords With The CABSAT Rate Structure And Inflation.

Response to ¶ 316. No response.

Response to ¶ 317. No response.

Response to ¶ 318. SoundExchange has already provided ample justification for a 3% annual rate increase. SE FOF at ¶ 1770. It proposes a 3% annual step-up because that is how the CABSAT rates increase through 2020. For 2012 and 20122 – years for which statutory CABSAT rates have not been established – SoundExchange proposes continuing to step up the rates at the same increment throughout the current CABSAT rate period. *See* SE FOF at ¶ 1770. Moreover, even Music Choice confirms that "inflation adjustment" is "reasonable for a per-

subscriber rate." The OECD's consumer price inflation (CPI) index forecast for 2018 is 2.2%.[1] Although CPI inflation is typically calculated at year-end, *see* SoundX_000477840, the rate-setting proceeding of course cannot wait to set rates until the end of each year. A 3% annual increase is a reasonable prediction of annual CPI adjustments through 2022.

Response to ¶ 319. *See* Response to ¶ 318, *supra*.

Response to ¶ 320. *See* Responses to ¶¶ 207-208, *supra*.

Response to ¶ 321. Mr. Bender has stated that the 3% annual step-up is in accordance with the "step up [in] the CABSAT rates." Trial Ex. 29 at 31 (Bender WDT). That is true. That Mr. Bender, the Chief Operating Officer of SoundExchange, does not know how Music Choice's royalty rate receipts have fluctuated over the years or what rates it currently receives from its affiliates does not prove anything. Regardless, it is not his testimony alone on which SoundExchange relies to support the 3% annual step-up proposal for the PSS; it is the CABSAT rates themselves. *See* 37 C.F.R. § 383.3.

Response to ¶ 322. *See* Response to ¶ 321, *supra*.

XII. MEASURING THE SECTION 801(B)(1) OBJECTIVES

Response to ¶ 323. No response.

A. Market Rates Generally Achieve the Section 801(b)(1) Objectives

Response to ¶ 324. Although CABSAT rates are not marketplace rates, because they are regulated rates, it sometimes is not possible to find a benchmark that is entirely free of the

[1] OECD, Inflation Forecast, https://data.oecd.org/price/inflation-forecast.htm#indicator-chart (last visited June 26, 2017).

shadow of the statutory license. Dr. Wazzan concluded that the CABSAT rates are "market-like," and the best available proxy for a market royalty for the PSS. SE FOF at ¶¶ 1847-1848.

Dr. Wazzan reviewed Dr. Orszag's report in which he explained why setting market-based rates is generally consistent with Section 801(b)(1) objectives one through three, and Dr. Wazzan agreed with Dr. Orszag's analysis. Trial Ex. 501 at ¶ 19 (Wazzan Corr. WDT); *see* SE FOF at ¶ 2114.

Response to ¶ 325. SoundExchange has submitted substantial evidence and analysis regarding the section 801(b)(1) objectives as they relate to the PSS, in the testimony of Dr. Wazzan, as well as a number of record company fact witnesses. *See* SE FOF at § XIII.E.

Response to ¶ 326. Dr. Wazzan did not testify that he failed to consider policy or fairness based outcomes. In the portion of testimony that Music Choice cites, Dr. Wazzan testified that he determined that "a market rate is the most effective and efficient way to allocate resources," which satisfies the first 801(b) factor. 5/3/17 Tr. 2317:20-25 (Wazzan). That is hardly a radical proposition. The Judges agreed with Dr. Ordover when he used almost the same words in *SDARS I*. *SDARS I*, 73 FR at 4094 ("voluntary transactions between buyers and sellers as mediated by the market are the most effective way to implement efficient allocations of societal resources.") Dr. Wazzan did not testify that he considered efficiency to the exclusion of fairness or policy goals. Dr. Orszag also testified that "[m]arket-based rates are fair in the sense of . . . they are going to produce outcomes that are efficient and . . . that benefit the players involved." 4/25/17 Tr. 958:1-5 (Orszag).

This approach is consistent with the precedent of the Judges and their predecessors, who have consistently held that fairness to both parties is best accomplished by replicating to the

greatest extent possible the returns that would exist in workably competitive markets. In *SDARS I*, the Judges assigned an economic meaning to fairness, stating that "a fair income is . . . consistent with reasonable market outcomes." *SDARS I*, 73 FR at 4095. And in *SDARS II*, the Judges noted the presumption that a "marketplace-inspired" rate "already reflects a fair income and a fair return." *SDARS II*, 78 FR at 23067; *see also PSS I*, 63 FR at 25409 ("[u]sually this balance is struck in the marketplace through arms-length negotiations").

Response to ¶ 327. Music Choice again suggests a false dichotomy between economic analysis and fairness considerations. As quoted immediately above in Response to paragraph 326, Dr. Orszag explained that "market-based rates *are* fair." 4/25/17 Tr. 958:1 (Orszag) (emphasis added). And the Judges have agreed. *See, e.g.*, *SDARS I*, 73 FR at 4095 ("[A] fair income is . . . consistent with reasonable market outcomes."); *SDARS II*, 78 FR at 23067 (presumption that "marketplace-inspired" rate "already reflects a fair income and a fair return").

In Music Choice's worldview, fairness means low rates for PSS. SE FOF at ¶ 1928. However, Section 801(b)(1) takes a more evenhanded view that encompasses "afford[ing] the copyright owner a fair return" and "the copyright user a fair income." 17 U.S.C. § 801(b)(1)(B). SoundExchange addressed that objective at length in Section XIII.E.iii of its Proposed Findings of Fact and Conclusions of Law.

Response to ¶ 328. In its Proposed Findings of Fact and Conclusions of Law, SoundExchange explained why the Judges' precedent and economic theory indicate that the first three Section 801(b) factors are generally satisfied by a market rate. *See* SE FOF at §XIII.E.i. But it did not stop there. SoundExchange went on to analyze the evidence before the Judges under each of the four statutory objectives. *See* SE FOF at §XIII.E.ii-v. This is no mere

"cursory treatment[]" of the Section 801(b) analysis and is fully consistent with the legislative intent behind the PSS license and the implementation of the Section 801(b)(1) objectives.

Response to ¶ 329. As explained above, Music Choice again suggests a false dichotomy between economic analysis and fairness considerations. For brevity, SoundExchange incorporates its responses to paragraphs 326-327, *supra*. Contrary to Music Choice's assertion, Dr. Wazzan's testimony addressed each of the Section 801(b)(1) objectives. *See* Trial Ex. 501 at ¶¶ 19-20, 74-86 (Wazzan Corr. WDT).

Response to ¶ 330. For brevity, SoundExchange incorporates its responses to paragraphs 326-327, *supra*. Dr. Crawford explained that in the behavioral economics paper by Dr. Daniel Kahneman, "fair" outcomes are those that would provide both parties with an entitlement to the benefits that would arise in a "reference transaction," where the reference transaction might be based on posted prices or a history of previous transactions between the parties. Trial Ex. 59 at ¶ 153 (Crawford WRT). Dr. Wazzan reviewed this paper, and testified at trial that it is not applicable in the situation at hand. 5/3/17 Tr. 2320:2-8 (Wazzan). As Dr. Wazzan explained, for deviations from the reference point to be relevant, the reference transaction must be "unquestionably fair to begin with." 5/3/17 Tr. 2320:9-19 (Wazzan). Dr. Kahneman's paper provides the following example: a hardware store ordinarily sells a shovel for $15, but after a big snowstorm raises the price to $20. Consumers view this price increase as unfair. 5/3/17 Tr. 2320:20-2321:11 (Wazzan). But as Dr. Wazzan explained, the current statutory royalty rate for PSS presents the following situation:

> This is more akin to the hardware store selling a shovel that is worth 15 dollars, they've been selling it for 10, and then they say: Okay, well, I'm going to raise it from 10 to 15 to bring it to a market price. You could ask consumers the same question: Is that

> fair? They would probably say yes. Right? Now I'm back at a market rate.

5/3/17 Tr. 2321:12-19 (Wazzan). Thus, the behavioral economics notion of fairness is not applicable where, as here, the current statutory royalty rate is below the "fair" market. SE FOF at § XIII.B.iii.

Response to ¶ 331. Dr. Lys testified about the "fascinating field" of behavioral finance. 4/26/17 Tr. 1281:17-21 (Lys). But the relevant question for the Judges is not identifying the current "hot topic" in economics, but to apply *what Congress meant* by "fairness" in 1976 when it enacted the Section 801(b)(1) objectives. Dr. Kahneman's "classic article" on behavioral economics that Dr. Crawford cites was not written until the Section 801(b)(1) objectives had already been part of the Copyright Act for a decade. Trial Ex. 59 at ¶ 152 & n.116 (published 1986) (Crawford WRT). The Kahneman paper and its progeny are not appropriate places to look for what Congress meant when it enacted the Section 801(b)(1) objectives. *See* Response to ¶ 44.

Interpretation of Section 801(b)(1) is a question of law, and the law concerning fairness within the meaning of Section 801(b)(1) has been addressed by the Judges and their predecessors on many occasions. The Judges are obligated to follow that law. 17 U.S.C. § 803(a)(1). That law is most consistent with the neoclassical economics that Music Choice disparages. *See* Responses to ¶¶ 326-327.

Response to ¶ 332. Music Choice cites no evidence for its sweeping assertion. SoundExchange disagrees that Music Choice's witnesses presented abundant evidence that its proposed rate would further the 801(b)(1) objectives.

B. Maximizing The Availability of Creative Works

Response to ¶ 333. As an initial matter, Music Choice's approach to the Section 801(b)(1) objectives is inconsistent with the standards articulated by the Judges. When the Judges apply Section 801(b)(1), what they do is consider whether the "objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence." *SDARS I*, 73 FR at 4094. In deciding that, what matters is "the relative difference between the benchmark market and the hypothetical target market." *SDARS I*, 73 FR at 4095. "[T]he absence of solid empirical evidence of such a difference obviates the need for such further adjustment." The objectives are not "a beauty pageant where each factor is a stage of competition to be evaluated individually to determine the stage winner and the results aggregated to determine an overall winner." *SDARS I*, 73 FR at 4094. Music Choice talks very little about relative characteristics of its service that might warrant a deviation from a market rate, and it does even less to try to quantify what deviation might be appropriate as a result. Instead, it just proclaims loudly and repeatedly that it is beautiful. The Judges should apply the well-developed Section 801(b)(1) methodology, and not give in to Music Choice's plea to hold a beauty contest.

While Music Choice grudgingly acknowledges that record companies create the recordings that constitute almost 100% of the content it distributes, the law recognizes that "the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public." *PSS I*, 63 FR at 25407. The Judges have embraced a neoclassical economics interpretation that "an effective market determines the maximum amount of product availability consistent with the efficient use of resources." *SDARS I*, 73 FR at 4094. There is no interpretation of the law concerning availability that suggests that

it is best served by below-market rates for PSS. And Music choice provides no strong evidence it is different from the CABSAT services or other services in a way that would warrant a departure from a market rate.

Against that background, Music Choice's proposal will not promote the objective of maximizing the availability of creative works to the public. It is SoundExchange's proposal that will do so. If the PSS were paying higher royalties, such as at the CABSAT royalty rates, more funding would be available to artists and record labels for the creation of recordings, thus maximizing the availability of creative works to the public. *See* SE FOF at ¶ 2121. Conversely, low PSS rates have a negative effect on availability, because of opportunity costs to copyright owners, and greater competition for other services including CABSAT services. Adopting the CABSAT rates for PSS is fully consistent with the first objective; lower rates would be inconsistent with that objective. Trial Ex. 501 at ¶ 77 (Wazzan Corr. WDT).

1. Music Choice Does Not Make Any Distinctive Contribution To the Availability of Creative Works So As to Warrant An Adjustment From A Market Rate

Response to ¶ 334. As will be described more fully in response to the paragraphs below, Music Choice wildly overstates the amount of "original creative content" it creates and distributes.

Response to ¶ 335. The record of this proceeding contains very little evidence of innovation by Music Choice since the late 1990s. Time and again Music Choice points to its screen displays (including information such as the artist's name and album title) as its primary area of innovation. *E.g.*, Trial Ex. 54 at ¶ 30 (Crawford WDT); Trial Ex. 55 at 38 (Del Beccaro WDT); Trial Ex. 56 at 11 (Williams WDT). However, the illustration of such a display in Trial

Ex. 936 demonstrates that the displays are less unique than Music Choice claims, and certainly not a basis for distinguishing it from CABSAT services or other services. *See* Response to ¶ 60.

Almost all services relying on the statutory license are required by statute to have screen displays that display text data identifying the title of each sound recording they play, along with the album title and the featured recording artist's name, as Music Choice's screen display does toward the bottom of Trial Ex. 936. 17 U.S.C. § 114(d)(2)(C)(ix). [ ] 5/18/17 Tr. 4576:1-14 (Del Beccaro); 5/18/17 Tr. 4738:16-4739:7 (Williams). And "HIT LIST" is just the name of a Music Choice channel. Trial Ex. 910. What that leaves is a photograph of the artist Adele and a trivia question. Mr. Williams agreed that while Music Choice's trivia questions are proprietary, the idea of displaying artist images and facts is not unique or proprietary. 5/18/17 Tr. 4738:24-4739:7 (Williams); *see also* SE FOF at ¶¶ 2062-2063. Having screen displays is not a reason to adjust the CABSAT benchmark based on Section 801(b)(1)(A).

Response to ¶ 336. Similarly, Music Choice's channel curation is not unique, or even particularly special. All services with channels, need to program those channels, and Music Choice's channels are akin to the channels of other noninteractive services and the curated playlists of interactive services. For example, Stingray, Music Choice's principal competitor, offers "1000s of channels hand-curated by a team of 100 music programmers from around the globe." Trial Ex. 985. [ ]. 5/16/17 Tr. 3991:24-3992:12 (Harrison).

In *PSS I*, the arbitrators were unimpressed by the programming contributions claimed by Music Choice and the other services now known as the PSS, explaining that the performers and producers make "the musical work come alive," while the services' "more limited" programming contribution "merely enhanced the presentation of the final work." *PSS I*, 63 FR at 25407. The Register noted that the Copyright Royalty Tribunal had previously refused to award radio broadcasters cable royalties for their programming contributions, finding them to be "de minimis." *PSS I*, 63 FR at 25407 n.29. Similarly, in *SDARS I*, the Judges found such contributions to be "certainly subsidiary to and dependent on the creative contributions of the record companies and artists to the making of the sound recordings that are the primary focus of those music channels." *SDARS I*, 73 FR at 4096.

Music Choice's programming of its channels is not a reason to adjust the CABSAT benchmark pursuant to Section 801(b)(1)(A).

Response to ¶ 337. Music Choice's off-platform marketing of its service, using social media or otherwise, is not relevant to the first Section 801(b)(1) objective. Under the law of availability, as articulated by the Judges and their predecessors, the first objective is about ensuring that resources are allocated appropriately to the creation of sound recordings and their distribution. Response to ¶ 333. Music Choice's advertising is neither of those things.

Music Choice is also hardly alone in using social media as a marketing tool. The record labels create a large amount of original creative content to promote music through, among other social media platforms, Twitter, Instagram, Facebook, and YouTube. Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT); Trial Ex. 41 at 6-7 (Ford WRT); 5/1/17 Tr. 1844:15-1845:8, 1860:22-1861:3 (Ford) (noting that "promotion is multifaceted"). Artists likewise have their own social media

accounts, through which they promote their music. *See, e.g.*, Trial Ex. 41 at 20 (Ford WRT) (noting Ben Rector had 155,000 followers on Instagram, 117,000 likes on Facebook, and 110,000 followers on Twitter). Stingray also provides Facebook integration for its app, and has other social media. Trial Ex. 973 at SoundX_000145758, SoundX_000145761. Music Choice has provided that its use of social media promotes availability of recordings to a greater extent than Stingray's or record companies'. Using social media is not a reason to adjust the CABSAT benchmark pursuant to Section 801(b)(1)(A).

Response to ¶ 338. To avoid repetition, SoundExchange incorporates its response to paragraph 335 *supra*.

Response to ¶ 339. To avoid repetition, SoundExchange incorporates its response to paragraph 335 *supra*.

Response to ¶ 340. The number of sound recordings produced as a result of Music Choice in-studio events is quite small. Music Choice hosted only [ ]. 5/18/17 Tr. 4759:3-6 (Williams). By contrast, Music Choice's reports of use under the statutory license showed that the service played over [ ] unique sound recordings in the first 11 months of 2016 alone. Trial Ex. 41 at 2 (Ford WRT). Mr. Williams agreed that [ ] 5/18/17 Tr. 4759:11-24 (Williams). If the idea is supposed to be that Music Choice's contribution to the creation of sound recordings should be weighed against the creation of sound recordings by artists and record companies, Music Choice loses by a factor of more than 1000:1.

At any rate, these in-studio performances do not distinguish Music Choice from terrestrial radio stations or other digital music services. Special live and in-studio appearances by artists at radio stations and services is one among many promotional strategies employed by the labels. *See* Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT); Trial Ex. 41 at 6-7 (Ford WRT); 5/1/17 Tr. 1844:15-1845:8, 1860:22-1861:3 (Ford) (noting that "promotion is multifaceted"). Moreover, [ ] 5/18/17 Tr. 4760:25-4761:10 (Williams).

Creating recordings of in-studio appearances is not a reason to adjust the CABSAT benchmark pursuant to Section 801(b)(1)(A).

Response to ¶ 341. Although Music Choice claims it provides a promotional impact, its arguments are ultimately irrelevant, because they are directed to the wrong question. Music Choice "assert[s] that their service is promotional and impl[ies] that they should receive credit for this effect." *SDARS I*, 73 FR at 4095. However, that is not how analysis of the first objective works. What is needed is evidence quantifying average relative net promotion in a way that translates into an adjustment from a market rate. *SDARS II*, 78 FR at 23066; *SDARS I*, 73 FR at 4095; SE FOF at ¶¶ 2066-2072. None of that is to be found in Music Choice's next 15 pages of findings concerning promotion. SoundExchange refers to § XIII.D.ii.3 of its Findings for an extended discussion of Music Choice's overstated and irrelevant promotional claims. Additional information concerning promotional claims in general is in § IV.H.ii.4 of SoundExchange's Findings, which is focused on Sirius XM. Promotion is not a reason to adjust the CABSAT benchmark pursuant to Section 801(b)(1)(A).

Music Choice's expert economist, Dr. Crawford, did not even provide any direct evidence that plays on Music Choice today result in sales that would not otherwise have occurred in the absence of such plays. In addition, Dr. Crawford failed to provide any evidence whatsoever that, on balance, Music Choice brings collateral benefits to record companies in excess of the opportunity costs it imposes on them. Trial Ex. 502 at ¶ 50 (Wazzan Corr. WRT). Ultimately, Dr. Crawford was unable to quantify "an estimate of the economic profits associated with the promotional benefits to record companies of the Music Choice service." Trial Ex. 54 at ¶¶ 104, 176 (Crawford WDT). He therefore excludes the alleged promotional benefit from his bargaining analysis. Trial Ex. 54 at ¶ 94. Likewise, the Judges should in their Section 801(b)(1) analysis not consider any alleged, unsubstantiated promotional effects of Music Choice.

Music Choice's assertion that its alleged promotional effect is felt by some artists more than others is doubly irrelevant. If it cannot quantify any relative promotional effect, it certainly does not matter who arguably might benefit from that effect if it existed.

Response to ¶ 342. Music Choice cites no record evidence for its assertion, and made no effort to quantify how it might translate into an adjustment to a benchmark rate. This assertion is thus irrelevant.

(1) That Some Music Choice Channels Are Tracked By Certain Reporting Services Is Irrelevant

Response to ¶ 343. That Music Choice has some channels that are among the many outlets tracked by airplay monitoring services tells the Judges nothing about promotion, or more relevant, whether Music Choice has availability characteristics that would warrant adjustment of a market rate. Nielsen BDS and Mediabase track music *use*, but are agnostic as to the value of

that use. 5/18/17 Tr. 4699:23-4700:2 (Williams) (BDS and "Mediabase are third-party companies that track air play of terrestrial radio stations and satellite radio stations").

Response to ¶ 344. Mr. Williams opines without support that tracking on BDS allowed the labels to "more easily see the significant promotional impact provided by the residential audio service." Trial Ex. 56 at 25 (Williams WDT). However, that does not prove Music Choice's promotional value relative to any other service, or suggest any particular adjustment from a market rate. *See* Response to ¶ 333. It is also not a measure of listenership, which leaves record labels with serious doubts about the value of Music Choice play. SE FOF at ¶ 2086.

Response to ¶ 345. For brevity, SoundExchange incorporates its responses to paragraphs 343 and 344 *supra*.

Response to ¶ 346. For brevity, SoundExchange incorporates its responses to paragraphs 343 and 344 *supra*.

Response to ¶ 347. For brevity, SoundExchange incorporates its responses to paragraphs 343 and 344 *supra*.

Response to ¶ 348. For brevity, SoundExchange incorporates its responses to paragraphs 343 and 344 *supra*.

Response to ¶ 349. Not even the self-serving testimony by Mr. Williams that Music Choice cites provides support for the baseless propositions set out in this paragraph. To the extent the Judges consider this effectively unsupported paragraph, for brevity, SoundExchange incorporates its responses to paragraphs 343 and 344 *supra*.

Response to ¶ 350. Mr. Williams's testimony on "the development of an artist's story" is flatly contradicted by the testimony of the record label witnesses, who are far more credible on

this question. *See* Trial Ex. 34 at ¶ 16 (Kushner WDT) ("while many American homes have access to the PSS as part of their cable or satellite television packages, the PSS do not ever seem to have generated a lot of consumer excitement, and we at Atlantic have never viewed them as a major outlet for our music"); Trial Ex. 50 at ¶ 16 (Walker WRT) ("I have never heard anyone at Sony express the view that Music Choice is an important promotional platform. In fact, in the absence of the statutory license, Sony probably would not be willing to grant licenses to the PSS with their current business model. It certainly would not do so at anything like the current statutory rate."); *see also* Trial Ex. 32 at ¶ 30 (Harrison WDT) (while "Music Choice may be a good vehicle for its cable company owners to acquire music inexpensively for inclusion as a feature of their subscription packages," the "pricing makes no sense for a record company."). Indeed, Mr. Kushner explained that Atlantic shoots for "[p]ublicity to tell the artist's story in as many media outlets as possible through interviews, television appearances, events, reviews and blogs." Trial Ex. 34 at ¶56 (Kushner WDT). It is evident that Music Choice is not a driver in these stories.

Mr. Williams' claim that "Music Choice is typically the first media outlet to play an artist's music" is also contradicted by its own objective evidence. SE FOF at ¶¶ 2092-2093. Moreover, even if it were true, it would be impossible to establish a causal connection between Music Choice plays and any asserted downstream effects. SE FOF at ¶ 2094.

Response to ¶ 351. The labels' interest in spins on Music Choice does not prove their promotional value. Dr. Ford explained that "even if nobody was listening, you want them spinning the records because they could count it for something else." 5/1/17 Tr. 1846:25-1847:3 (Ford). This is particularly the case given that there is no available data concerning Music

Choice listenership, which leaves record labels with serious doubts about the value of Music Choice play. SE FOF at ¶ 2086.

(2) That Record Labels Seek Plays On Music Choice, Like Other Services, Provides No Useful Information For Adjusting The Rate

Response to ¶ 352. Anecdotal evidence of record company contact with Music Choice does not prove its alleged promotional impact. [ ] SE FOF at ¶¶ 2084-2086. Mr. Williams testified that he had no evidence or reason to believe that labels lobby Music Choice more than terrestrial radio stations. 5/18/17 Tr. 4750:18-4751:21 (Williams).

Even if the broad, general statement from Mr. Williams that is cited in paragraph 352 of Music Choice's Proposed Findings of Fact were true, anecdotal evidence of lobbying does not provide any useful information about average, relative net promotion, which is what is relevant. SE FOF at ¶¶ 2066-2072. As will be discussed further below, and as addressed in Section XIII.D.3.b of SoundExchange's Proposed Findings of Fact and Conclusions of Law, Mr. Williams's testimony regarding promotion relies on anecdotal evidence that overstates and misrepresents promotional effects.

Music Choice states that its promotional impact "has only increased" since 1999 when Mr. Williams made a change to the service's programming philosophy, but cites no record evidence besides Mr. Williams' own self-serving and unsupported statement on this point. MC FOF at ¶ 352 (citing Trial Ex. 56 at 19 (Williams WDT)). Although Mr. Williams may be credible on the factual question of when he changed the service's programming philosophy, his

unsupported testimony on Music Choice's relative promotional effect cannot be relied upon. Mr. Williams testified at trial that Music Choice has made no effort "to quantify how much of the increase in sales is attributable to Music Choice as a general matter." 5/18/17 Tr. 4749:15-22 (Williams).

In fact, the market has changed greatly during the time period Music Choice references. Consumers can access diverse selections of channels through many different types of noninteractive services (webcasting, SDARS, CABSAT) and even more diverse selections of recordings through on-demand services. As the Judges are well aware, there are vastly more consumer options for digital music programming than existed twenty years ago. While it may be that PSS once contributed uniquely to the availability of recordings, the PSS are not just one of many sources from which consumers may access recordings. Trial Ex. 501 at ¶ 77 (Wazzan Corr. WDT).

Response to ¶ 353. Mr. Williams's self-serving testimony on this question cites to no specific record evidence to support this opinion. In fact, the record blatantly contradicts this statement. As described immediately above, consumers can access diverse selections of channels through many different types of noninteractive services, and even more diverse selections of recordings through on-demand services. Trial Ex. 501 at ¶ 77 (Wazzan Corr. WDT). In other words, there are multiple ways for labels and artists to reach an audience.

Moreover, even if it were true that Music Choice *is* a "key platform," that says nothing about its promotional effects, let alone *measurable* promotional effects. For brevity, SoundExchange incorporates its response to paragraph 341, *supra*.

Response to ¶ 354. It is not true that Music Choice's promotional effect is "widely acknowledged by the record labels, artists, managers and the music industry as a whole." As will be discussed further below, and as addressed in § XIII.D.3.b of SoundExchange's Proposed Findings of Fact and Conclusions of Law, Music Choice relies on anecdotal evidence for this proposition, and these anecdotes are unreliable and significantly overstate whatever promotional benefits the service might provide. In addition, for brevity, SoundExchange incorporates its response to paragraph 341, *supra*.

(3) Music Choice's Anecdotal Evidence of Promotion Is Irrelevant

Response to ¶ 355. The record is not "replete" with acknowledgments of Music Choice's promotional effect. Rather, Music Choice presented a handful of cherry-picked and unrepresentative expressions of gratitude and common courtesy from record company employees. Mr. Williams agreed that such emails were "courtesy," "common practice in the industry," and "just a matter of practice of doing business." 5/18/17 Tr. 4747:1-7 (Williams). That should end the Judges' inquiry into promotion. *See* SE FOF at ¶¶ 2065-2072.

Music Choice specifically claims that record labels and artists' management lobby Music Choice to include their recordings in Music Choice's Brand New This Week program. It cites only to Mr. Williams's testimony for this proposition, as well as two exhibits that fail to support Mr. Williams' claims of lobbying. *See* Trial Exs. 939-940.

Music Choice also alleges that record company contact proves that labels and artist know that Music Choice provides a national platform to break new artists and sell records. Again, the only evidence cited for this proposition is Mr. Williams' testimony, and he does not state a basis for his opinion regarding the state of mind of record company employees. Nor is Mr. Williams'

opinion on this front credible. As Dr. Ford testified, "[r]ecord labels want their recordings to find an audience (and also want to get paid by royalty-paying services), so of course they encourage the services to play their recordings." Trial Ex. 41 at 11 (Ford WRT); *see also* Trial Ex. 34 at ¶ 16 (Kushner WDT) ("while many American homes have access to the PSS as part of their cable or satellite television packages, the PSS do not ever seem to have generated a lot of consumer excitement, and we at Atlantic have never viewed them as a major outlet for our music"); Trial Ex. 50 at ¶ 16 (Walker WRT) ("I have never heard anyone at Sony express the view that Music Choice is an important promotional platform. In fact, in the absence of the statutory license, Sony probably would not be willing to grant licenses to the PSS with their current business model. It certainly would not do so at anything like the current statutory rate."); *see also* Trial Ex. 32 at ¶ 30 (Harrison WDT) (while "Music Choice may be a good vehicle for its cable company owners to acquire music inexpensively for inclusion as a feature of their subscription packages," the "pricing makes no sense for a record company.").

Response to ¶ 356. Music Choice may receive a lot of calls simply because it claims to play recordings from 7,000 record labels. MC FOF at ¶ 147. Even if each of those 7,000 labels just called Music Choice once every quarter, that would translate into over 100 calls to Music Choice every business day (7,000 / 13 weeks per quarter / 5 business days per week = 108). That obviously does not prove that record labels devote much of their promotional effort to Music Choice. A call from a record company representative takes from between 30 minutes to an hour, in which four or five songs are discussed. These record company employees' entire job is to promote the music of the label they represent, and Mr. Williams agreed that "that leaves a lot of time to call other music outlets." Mr. Williams testified that he had no evidence or reason to

believe that labels lobby Music Choice more than any terrestrial radio station. 5/18/17 Tr. 4750:18-4751:21 (Williams). In addition, for brevity, SoundExchange incorporates its response to paragraph 357, *infra*.

Response to ¶ 357. It is neither surprising nor telling that record company employees email Music Choice. Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice. 5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT) (emphasizing that "we do not view any platform as uniquely promotional," and stating that in "significant respects the various platforms are similar"); 5/18/17 Tr. 4720:12-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry").

Promoting to Music Choice does not demonstrate that labels "treat Music Choice more like terrestrial radio than a digital music service." Labels also target digital services for promotion. *See, e.g.*, Trial Ex. 54 at ¶ 59 (Kushner WDT) ("On demand services like Spotify are increasingly important to our promotional efforts and to the ultimate success of a recording.").

Response to ¶ 358. Trial Ex. 944 shows only that Music Choice has received eight plaques over some unspecified time period. That stands in contrast to the over [ ] unique sound recordings that Music Choice played in the first 11 months of 2016 alone. Trial Ex. 41 at 2 (Ford WRT). The handful of plaques that Music Choice has received do not signify that Music Choice is uniquely promotional. Based on his interviews with 25 record company executives,

Dr. Ford concluded that "[t]he letters, the e-mails, the plaques and all that is generally a courtesy. They send those to pretty much everybody." 5/1/17 Tr. 1846:1-3 (Ford).

Response to ¶ 359. It is not the case that, as Music Choice claims, "[l]abels clearly recognize Music Choice as a key component of their national strategy." Providing Music Choice with electronic access to their digital libraries is costless to the labels. Mr. Williams agreed that providing Music Choice with a password to a website where the service can download copies of the recordings "doesn't cost anything." 5/18/17 Tr. 4750:1-17 (Williams); *see also* Trial Ex. 41 at 15 n.64 (Ford WRT) ("the marginal cost of allowing Music Choice to download a copy of a recording (along with every radio station) is approximately zero").

A call from a record company representative takes from between 30 minutes to an hour, in which four or five songs are discussed. These record company employees' entire job is to promote the music of the label they represent, and Mr. Williams agreed that "that leaves a lot of time to call other music outlets." Mr. Williams testified that he had no evidence or reason to believe that labels lobby Music Choice more than terrestrial radio stations. 5/18/17 Tr. 4750:18-4751:21 (Williams).

Response to ¶ 360. The exhibit Music Choice cites provides examples of artists listing Music Choice in long lists of outlets (terrestrial radio stations and Sirius XM) that played their tracks. *See* Trial Ex. 948. If anything, this exhibit shows that Music Choice is just one of many services that plays recordings. It certainly does not establish that an adjustment from a market rate is warranted. SoundExchange incorporates by reference its response to paragraph 361, *infra*.

Response to ¶ 361. Music Choice relies on anecdotal evidence that record labels express gratitude to the service for playing their music. At the page of Mr. Williams' testimony cited by

Music Choice, he provides two examples of "written testimonials." Trial Ex. 56 at 19 (Williams WDT). But, as Mr. Williams acknowledged at trial, the first email notes that [ ] 5/18/17 Tr. 4756:22-4757:2 (Williams) (emphasis added). [ ] 5/19/17 Tr. 4757:3-10 (Williams).

More generally, as Mr. Williams himself conceded at trial, the allegedly "promotional" emails between record companies and Music Choice are just a common "courtesy" to say "thank you" and are "just a matter of practice of doing business." 5/18/17 Tr. 4746:12-4747:7 (Williams). This view comports with the testimony of SoundExchange witnesses and with the Judges' past findings. *See, e.g., Web IV*, 81 FR at 26322 n.41 (finding it likely that expressions of gratitude were displays of "common courtesy"); 5/1/17 Tr. 1853:7-1855:10 (Ford) (expressions of gratitude are "primarily courtesy" and are "often requested by the Services themselves").

It is neither surprising nor telling that record company employees thank Music Choice or visit its offices. Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice. 5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT) (emphasizing that "we do not view any platform as uniquely promotional," and stating that in "significant respects the various platforms are similar"); 5/18/17 Tr. 4713:5-11 (Williams) (promotions departments that lobby Music Choice

also lobby terrestrial radio stations); 5/18/17 Tr. 4720:12-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry"). "It should not be surprising that as part of that process, record companies stroke the egos of the programmers to whom they pitch recordings, and express gratitude when their efforts at pitching recordings result in plays." Trial Ex. 41 at 11 (Ford WDT). Nothing about Music Choice's anecdotal evidence suggests that it is, on average, more net promotional than a benchmark service. In the absence of any such evidence, the anecdotes are irrelevant. SE FOF at ¶¶ 2065-2072.

Response to ¶ 362. It is neither surprising nor telling that artists and label representatives have visited Music Choice. It does not indicate that the artists and labels believe that Music Choice is uniquely promotional. For brevity, SoundExchange incorporates its response to paragraph 361, *supra*.

(4) Special Promotional Events Are Irrelevant To Determining A Royalty For Mere Plays Under The Statutory License

Response to ¶ 363. Music Choice highlights its "artist-specific promotions." As Dr. Ford explained, anecdotes about such promotional events are entirely irrelevant in this proceeding. Because promotional events are consensual, they are, in effect, separate transactions entirely removed from the statutory license. These consensual transactions would not happen unless they were mutually beneficial to the participants. They provide no useful information about either the absolute or relative promotional value of having a service merely play a recording outside the context of an agreed-upon promotional event. Trial Ex. 41 at 3-4 (Ford WRT).

Response to ¶ 364. The "grant[s] of right," or "DMCA waivers," to which Music Choice refers, allow Music Choice to feature multiple tracks from new albums in a short period of time, among other things. Even when copyright owners agree to such waivers, they typically do *not* waive the right to compensation for such performances. In other words, copyright owners do not see the resulting airplay as so promotional (or otherwise valuable) that they are willing to forego royalty payments. Trial Ex. 41 at 4 (Ford WRT); *see also* 5/10/17 Tr. 3401:19-3402:5 (Blatter); *see also* Trial Ex. 5 at ¶ 56 (Blatter WDT).

Response to ¶ 365. As detailed in Dr. Ford's Written Rebuttal Testimony, the anecdotes Music Choice selects – including for Chris Brown's album "Royalty" – overstate and misrepresent promotional effects. *See* Trial Ex. 41 at 11-24 (Ford WRT). It is not the case that, as a general matter, promotions on Music Choice have any demonstrable and quantifiable promotional effect. *See* SE FOF at ¶¶ 2081-2082.

Response to ¶ 366. That RCA granted the rights at issue to Music Choice and terrestrial radio cannot be read for any broad proposition as to Music Choice's similarity to terrestrial radio versus any other form of service.

Dr. Ford specifically asked executives from RCA about Music Choice's role as to their urban music sales, and [[redacted]]. Trial Ex. 41 at 14 (Ford WRT).

Response to ¶ 367. Music Choice confuses correlation with causation, failing to acknowledge the numerous factors that led to the success of this album, separate and apart from any impact the Service may have had. Chris Brown was an extremely successful artist long before Music Choice conducted its promotion, and the promotion does not seem to have

materially affected pre-release sales. Music Choice cites figures for preorder albums sold via the Music Choice custom i-Tunes URL, but fails to mention that both "Royalty" and Mr. Brown's previous album "X" had nearly identical preorders overall (approximately [ ]), indicating an established audience base for Brown. There is no indication that Music Choice's promotion is somehow responsible for "Royalty's" success. Trial Ex. 41 at 13-14 (Ford WRT).

In fact, [ ] Poignantly, Mr. Williams opined: [ ] 5/18/17 Tr. 4761:6-10 (Williams).

Response to ¶ 368. Mr. Williams testified that Music Choice plays albums after it has been released into the market. And he acknowledged that, "as a general matter, sales go up after a release." 5/18/17 Tr. 4749:3-14 (Williams). He further stated that Music Choice has not made an effort, as a general matter, to quantify how much of a post-release increase in sales is attributable to Music Choice. 5/18/17 Tr. 4749:15-22 (Williams). Moreover, this usage is not representative of use under the statutory license. SE FOF at ¶ 2071. Thus, the Judges should disregard any alleged promotional effect from the Brand New This Week program.

Response to ¶ 369. Artists and record labels use a wide range of promotional activities to build an audience for an artist's recordings. In addition to seeking plays on terrestrial and satellite radio and Music Choice, labels promote music through special appearances live and in the studios of radio stations and digital music services. Any studio visits is but one prong of a multifaceted promotions strategy; it does not recognize any unique promotional value of the

Music Choice service. *See* SE FOF at ¶¶ 2084-2086 (explaining that record companies do not consider Music Choice to be an important promotional platform).

At any rate, these visits are relatively few. Although the number of visits may have increased for a time, Music Choice hosted only [ ]. 5/18/17 Tr. 4759:3-6 (Williams). That is not many more on an annual basis than the 54 artists that may have "visited with Music Choice" in 2002. MC FOF at ¶ 369. The number of sound recordings that emerge from these events is quite small. Mr. Williams agreed that [ ] 5/18/17 Tr. 4759:11-24 (Williams). By way of comparison, Music Choice's reports of use under the statutory license showed that the service played over [ ] unique sound recordings in the first 11 months of 2016 alone. Trial Ex. 41 at 2 (Ford WRT).

In fact, [ ] 5/18/17 Tr. 4760:25-4761:10 (Williams). Nothing about these special promotional events provides useful information about the value of typical use of recordings by Music Choice under the statutory license. Trial Ex. 41 at 3-4 (Ford WRT).

Response to ¶ 370. For brevity, SoundExchange incorporates its response to paragraph 369, *supra*.

Response to ¶ 371. There is no quantitative evidence in the record that Music Choice drives record consumption. Mr. Williams testified that Music Choice has not made an effort, as a general matter, to quantify how much of a post-release increase in sales is attributable to Music Choice. 5/18/17 Tr. 4749:15-22 (Williams). Even if Music Choice *had* tried to do so, it would

have been a difficult task. As Dr. Ford explained, record labels use a wide range of promotional activities to build an audience for an artist's recordings, and records become hits only when a mix of these varied opportunities creates demand for the recording. Because, among other things, success is an accumulation of interests from multiple promotional activities, it is difficult to untangle which factors actually *cause* paid consumption. Trial Ex. 41 at 7-8 (Ford WRT). At any rate, there is significant evidence in the record that labels do not view Music Choice as particularly promotional. "It is simply not the case that the labels rely uniquely on . . . Music Choice to break records." Trial Ex 41 at 9 (Ford WRT).

Response to ¶ 372. Music Choice *received* significant promotional benefits from its collaboration with Five Finger Death Punch. As Dr. Ford notes, Music Choice's own documents indicate that the Service received benefits from this promotion: "Among the things it says worked well is that [[redacted]'] To secure these benefits in the future, it expresses its [[redacted]] In fact, among the batch of thank you emails accompanying Mr. Williams' testimony is [[redacted]]." Trial Ex 41 at 19-20 (Ford WRT) (citing Trial Exs. 938 & 943) (emphasis added).

Further, although Mr. Williams' written testimony had described the Service's Five Finger Death Punch promotion as a "premier," Music Choice has wisely backed off of this assertion in its Proposed Findings of Fact and Conclusions of Law. *Compare* Trial Ex. 56 at 13 *with* MC FOF at ¶ 372. As explained in SoundExchange's Proposed Findings, Mr. Williams clarified at trial that both Pandora and Sirius XM premiered the album before Music Choice, and

that such sequencing is typical of new releases. *See* SE FOF at ¶ 2093 (citing 5/18/17 Tr. 4743:16-4744:13 (Williams)).

Finally, this is simply another example of a special promotional event that provides no useful information about the promotional value (if any) of mere plays on the service. Trial Ex. 41 at 3-4 (Ford WRT).

Response to ¶ 373. This paragraph is pure unsubstantiated, undocumented, self-serving speculation. Mr. Williams cites no evidence for his prognostication that without Music Choice artists "would likely lose their recording contracts and cease releasing records." Trial Ex. 56 at 38 (Williams WRT). Moreover, this bald assertion is contradicted by evidence in the record. During each of Dr. Ford's teleconferences with nine record labels whose releases were highlighted in the Services' testimony, he was "told consistently that [[redacted]]" Trial Ex. 41 at 15 (Ford WRT).

Response to ¶ 374. Notably, Music Choice does not provide listenership figures for its stations that play these genres of music. What evidence there is in the record indicates that the listenership for these stations is low. For example, Mr. Williams testified that, of Music Choice's 50 channels, Trial Ex. 55 at 4 (Del Beccaro WDT), there are "probably 30 to 35 channels that have smaller audience[s]" than a single, large local radio station. 5/18/17 Tr. 4741:11-20 (Williams).

Response to ¶ 375. Even if it were true that airplay is the single biggest driver of record sales (and Music Choice provides no evidence of that other than Mr. Williams' opinion), that

says nothing about airplay on *Music Choice* as a driver of such sales. As explained above in response to paragraph 371, there is no quantitative evidence in the record showing that Music Choice has any particular promotional effect.

In addition, there are increasingly many ways for consumers to become exposed to new music, aside from hearing it on the radio or Music Choice. More and more, consumers are being exposed to new music through playlists. [

]

This is true even for interactive services. [

]. Trial Ex. 26 at ¶ 39 (Orszag Am. WDT). Data that the services provided to UMG [ ]; they indicate that [ ] percent of plays on Spotify and [ ] percent of the plays on Apple are playlist plays from user-created playlists, service created playlists, third-party created playlists, or other pre-programmed streams. Trial Ex. 32 at ¶ 28 (Harrison WDT). Thus, Music Choice is not at all unique in its ability to expose consumers to new music.

Response to ¶ 376. Dr. Ford stated he would be surprised if playing music didn't sell records "on occasion." 5/1/17 Tr. 1852:17-22 (Ford). In addition, for brevity, SoundExchange incorporates its response to paragraph 375, *supra*.

Response to ¶ 377. Music Choice provides no record citation for the dubious suggestion that record companies lose money on most of their releases because they can't promote them to radio. That bald assertion is inconsistent with the testimony of Mr. Kushner, who explained Atlantic's extensive efforts to market its recordings in ways appropriate to each specific release. Trial Ex. 34 at ¶ 53-71 (Kushner WDT).

Response to ¶ 378. It simply makes no sense that record labels would invest in signing artists and producing recordings if they were not going to market and promote those recordings. *See* Response to ¶ 377. To the contrary, a record company makes substantial investments in each release "to provide the threshold level of support that our artists need to have a fair chance to realize their potential, and to maximize our chances of having a profitable release." Trial Ex. 34 at ¶ 77 (Kushner WDT). Mr. Williams, who has never been a record label employee, lacks the necessary experience to make this sweeping generalization about labels' behavior.

Response to ¶ 379. Music Choice provides no evidence for this self-serving statement aside from the testimony of its employee, Mr. Williams. As explained above in response to paragraph 371, there is no quantitative evidence that Music Choice increases sales of recordings either by so-called "at-risk" artists or any other artists. There is abundant evidence that record companies do not rely uniquely on Music Choice for promotion. SE FOF at ¶ 2084.

Response to ¶ 380. Even assuming Music Choice plays "deeper cuts" than terrestrial radio (a proposition for which there is no evidence other than Mr. Williams' self-serving statement), as explained above in response to paragraph 371, there is no quantitative evidence in the record that Music Choice increases music sales *at all*, let alone sales of those deep cuts.

Response to ¶ 381. For brevity, SoundExchange incorporates its response to paragraph 371, *supra*.

b. It Is Not SoundExchange's Burden To Prove That No Adjustment Is Warranted

Response to ¶ 382. At the outset, Music Choice appears to be under the misapprehension that SoundExchange somehow has the burden of proving that Music Choice is *not* promotional. Not so. The Judges are permitted to deviate from a benchmark rate to achieve the Section 801(b)(1) objectives – for example, because some unique feature of a service suggests that availability of creative works would be maximized by a non-market rate – only where the evidence so requires. "The absence of solid empirical evidence that might suggest a difference between the benchmark and target markets cautions against the need for an adjustment." *SDARS II*, 78 FR at 23066. Music Choice has provided no such solid evidence that an adjustment is warranted.

Music Choice's attempt to fault SoundExchange for bringing senior record company executives to testify are unpersuasive. Mr. Kushner, as Atlantic's Executive Vice President, Business and Legal Affairs, works closely with Atlantic's A&R and Marketing Departments. Trial Ex. 34 at ¶ 2 (Kushner WDT). He testified at length regarding Atlantic's marketing and promotion of its albums, including the importance of its promotions with Spotify, Apple Music, YouTube, and Sirius XM. Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT). Likewise, Mr. Walker, Sony's Executive Vice President & Head of Business & Legal Affairs, is familiar "with how digital music services perform in the marketplace and with Sony Music's strategy for monetizing content, including on streaming and subscription services." Trial Ex. 38 at 1 (Walker WDT). From this experience, he testified that Music Choice's allegations of its promotional effect vis-à-

vis royalties do not comport with the way Sony views licensing in general or the PSS in particular. Trial Ex. 50 at ¶ 16 (Walker WRT).

The portions of the record to which Music Choice cites for an alleged "fundamental disconnect" between the business and legal departments do not provide support for that proposition. If Mr. Williams did so testify somewhere else, however, his employment history at radio stations and at Music Choice does not provide him with the experience necessary to testify to issues about internal record label operations. In contrast, SoundExchange's witnesses testified to their labels' opinion of Music Choice from their experience *from within those labels*. Plainly these executives understand their business better than Music Choice does. *See* SE FOF at ¶¶ 1777-1778.

Response to ¶ 383. Music Choice mischaracterizes Dr. Ford's methodology. In its written direct case, Music Choice provided anecdotal evidence of alleged promotional influences. *See* Trial Ex. 56 (Williams WDT). To inform the economic analysis in his rebuttal testimony, Dr. Ford participated in a number of teleconferences with record label and distribution company executives responsible for marketing, promotions, sales, and business affairs. Trial Ex. 41 at 3 (Ford WRT). To determine who to speak to, Dr. Ford began by combing through the Services' fact witnesses' testimony and identifying all of the examples of alleged promotions. 5/1/17 Tr. 1937:6-13 (Ford); *see also* 5/1/17 Tr. 1843:19-21 (Ford) (he "wrote them all down"). Next he "made a request to counsel to figure out a way to speak to them . . . to talk about what really happened, what was going on." 5/1/17 Tr. 1937:14-18 (Ford); *see also* 5/1/17 Tr. 1843:22-1844:1 (Ford) (asked to "get as many as you can" and was "interested in any or all of them"). Specifically, Dr. Ford "asked to speak with representatives

from record labels that had knowledge about as many of those releases as possible." 5/1/17 Tr. 1937:19-23 (Ford). No releases were intentionally omitted. 5/1/17 Tr. 1937:24-1938:1 (Ford). For the releases discussed in the Services' testimony about which Dr. Ford did not have interviews, Dr. Ford nonetheless did attempt to contact them. 5/1/17 Tr. 1938:1-6 (Ford); *see also* 5/1/17 Tr. 1843:22-23 (Ford) (they "just couldn't schedule it with some people").

Music Choice's critique of Dr. Ford's extensive efforts to investigate Music Choice's anecdotes is not persuasive. Music Choice makes the exceedingly overbroad assertion that because none of the individuals Dr. Ford interviewed are the people who wrote the "thank you" emails "none of them had personal knowledge about Music Choice." MC FOF at ¶ 383. This is contradicted by the record. Dr. Ford testified that in his calls with label employees "we discussed their marketing and promotion practices *with specific reference to . . . Music Choice*." Trial Ex. 41 at 3 (Ford WRT) (emphasis added). Likewise, Dr. Ford's testimony belies Music Choice's claim of lack of knowledge of Music Choice: "[a]lthough the labels I spoke with appreciate Music Choice as an outlet for their recordings, I spoke to no one who said that Music Choice is a major consideration in their marketing plans." Trial Ex. 41 at 8 n.34 (Ford WRT).

Response to ¶ 384. Music Choice seems to think that it is economically irrational for labels to push their product to Music Choice for the royalty revenue alone and therefore this *must* demonstrate that Music Choice is on average net promotional. But Music Choice has produced no evidence or data at all to support this speculation.

The truth is that record labels expend very few resources on promoting to Music Choice. Many of the labels' promotions are free or of little incremental cost to the labels. *See, e.g.*, Trial Ex. 41 at 15 n.64 (Ford WRT). For instance, although Music Choice highlights the fact that

some labels provide Music Choice with electronic access to a digital library of their tracks, *see* MC FOF at ¶ 359, even Mr. Williams agreed that this "doesn't cost anything." 5/18/17 Tr. 4750:1-17 (Williams); *see also* Trial Ex. 41 at 15 n.64 (Ford WRT) ("the marginal cost of allowing Music Choice to download a copy of a recording (along with every radio station) is approximately zero").

Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice. 5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, 5/18/17 Tr. 4713:5-11 (Williams) (promotions departments that lobby Music Choice also lobby terrestrial radio stations); 5/18/17 Tr. 4720:13-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry"). As Music Choice highlights in its Proposed Findings, the record label promotions employees who lobby Music Choice and other services "probably don't even know what a PSS royalty is." Their jobs are to promote air play throughout the industry, across numerous outlets. 5/18/17 Tr. 4721:15-20 (Williams); *see also* 5/18/17 Tr. 4728:22-4729:1 (Williams) (testifying that "Music Choice is just one part of the puzzle"). That is just what they are doing when they attempt to increase spins of a particular recording.

Record company promotional efforts are also irrelevant to a large amount of Music Choice usage. SE FOF at ¶ 2071.

c. Music Choice Has Provided No Evidence That Availability Of Creative Works Would Be Furthered By Giving It A Below-Market Rate

Response to ¶ 385. Of course Music Choice would like to be more profitable than it is. What company wouldn't? But its perennial pleas of poverty should not blind the Judges to the fact that it has long been a profitable company. In *SDARS II*, Music Choice presented essentially the same sob story it has presented here, and the Judges were unmoved. *SDARS II amend.*, 78 FR at 31844 ("[a]s a consolidated business, Music Choice has had significantly positive operating income between 2007 and 2011 and made profit distributions to its partners since 2009"). [

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Music Choice essentially encourages the Judges to turn back the clock twenty years to the *PSS I* proceeding. In that proceeding, the panel was persuaded that the services now known as the PSS increased the availability of recordings to the public because they offered diverse programming at a time when no other digital music services were in the market. Significantly, however, the panel recognized that "a future Panel may reach an entirely different result based on the then-current economic state of the industry." *PSS I*, 63 FR at 25405 (citing *PSS I* CARP Report, Trial Ex. 979 at ¶ 202).

In fact, the market has changed greatly in 20 years. Consumers can access similarly-diverse selections of channels through many different types of noninteractive services (webcasting, SDARS, CABSAT) and even more diverse selections of recordings through on-demand services. As the Judges are well aware, there are vastly more consumer options for digital music programming than existed twenty years ago. While it may be that PSS once contributed uniquely to the availability of recordings, the PSS are now just one of many sources from which consumers may access recordings. Trial Ex. 501 at ¶ 77 (Wazzan Corr. WDT).

As noted above, Music Choice's suggestions that it could potentially go out of business as a result of the current rate [ ] other music sources would fill any void created by Music Choice's absence. [.] 5/18/17 Tr. 4532:25-4533:6 (Del Becarro) (identifying Stingray as competitor). In fact, Stingray has already successfully replaced Music Choice on one major cable operator – AT&T. 5/18/17 Tr. 4641:25-4642:23 (Del Beccaro) (agreeing that Music Choice faces competition from Stingray; Stingray tries to undercut Music Choice on price; Music Choice lost AT&T to Stingray, and Stingray is trying to replace Music Choice with other cable carriers). [ ] Ex. 502 at ¶¶ 76, 83 (Wazzan Corr. WRT); 5/3/17 Tr. 2329:18-25 (Wazzan).

The law concerning Section 801(b)(1)(A) recognizes that its goal is to ensure production of creative works, while allocating an efficient level of resources to distribution. *See SDARS I*, 73 FR at 4094; *PSS I*, 63 FR at 25407. Because artists and record companies produce many more creative works than the handful of in-studio recordings Music Choice produces, *see* Response to ¶ 369, that goal would not be served by slashing the statutory royalty rate for PSS based on a vague suggestion that if Music Choice were even more profitable it might produce a few more in-studio recordings. To the contrary, the first objective would best be served by adopting the CABSAT rates, so that additional dollars would flow to artists and record companies to support their creative endeavors, while freeing Stingray to compete on a level playing field by continuing to compete with Music Choice in the downstream market, thereby increasing consumer welfare. *See* 5/18/17 Tr. 4646:4-4647:6 (Del Beccaro) (Stingray pays SoundExchange at a higher per-subscriber rate even as Stingray is charging lower per-subscriber rates to cable companies). In other words, the record companies and artists would be induced to create more recordings at the same time as customers and MVPDs pay a lower price – under this scenario, the availability of works to the public would be maximized.

Response to ¶ 386. Music Choice cites its alleged financial woes as a reason for its [ ]. First, as discussed above in response to paragraph 371, Music Choice has failed to demonstrate that these visits yield any promotional effect for the labels. Second, if Music Choice has [ ], this merely frees the artists up to promote their product through other platforms and through other means.

Music Choice states that when its studio opened in 2002 it hosted 54 artists, and "[t]hat number quickly and drastically increased after 2002" and [

[redacted] MC FOF at ¶¶ 369, 386. Since the summer of 2016, however, [redacted]. MC FOF at ¶ 386. If a decline in artist visits to Music Choice's studio had *any* effect on sales, that effect would have occurred in the past year. Music Choice has failed to produce any such evidence.

Response to ¶ 387. As discussed above in response to paragraph 371, Music Choice has failed to demonstrate its in-studio performances have any promotional effect. Moreover, as stated above in response to paragraph 386, if a decline in artist visits in September 2016 had any impact on album sales, that decline would already have occurred. Music Choice has failed to produce any such evidence.

2. That The Current Statutory Royalty Rate For PSS Is Below-Market Is Not A Reason To Reduce That Rate Further

Response to ¶ 388. As discussed above, Music Choice has failed to demonstrate that it has any promotional effects or resulting increase in record company revenue, or that a reduction in the statutory royalty rate for PSS would in any way increase availability of creative works.

Music Choice's argument seems to be that no matter where the PSS rate is set, it will not have any effect on the labels, and therefore it should continue to drop until it reaches zero. As described below, that is simply not the case. Nor is it the standard. The relevant goal under the first Section 801(b)(1) objective is a rate that will maximize the availability of creative works to the public. Music Choice has provided no good reason why a market rate is not the best way to achieve that objective.

Response to ¶ 389. The fact that revenues from the PSS performance license currently makes up only a small percentage of the record labels' revenues is not a sufficient reason to keep the current below-market rates. The reason it does not make up a higher percentage is because it

is below market. SE FOF at § XIII.B.iii. Music Choice has [ ] Trial Ex. 418 at MC0002939. If the PSS were paying higher royalties, the record companies and artists would be induced to create more recordings, this maximizing the availability of works to the public.

In addition, as Dr. Wazzan explained, if it really were the case that the royalties paid by Music Choice ([ ] in 2015) were too little to matter, and that its royalties should therefore be reduced (making its royalties even less significant), that logic would eventually lead to the conclusion that only the handful of statutory licensees paying more statutory royalties than Music Choice should pay royalties, and everyone else should have their statutory royalties reduced to zero. That is not consistent with how markets work or how the Judges have described the Section 801(b)(1) objectives. Trial Ex. 502 at ¶ 81 (Wazzan Corr. WRT).

Response to ¶ 390. Music Choice provides no support for its speculation that a change in the rate will have no appreciable impact on the labels' ability to produce and release records. An increase in PSS royalties would cause an increase in revenue, and Music Choice does not argue otherwise. Record company investment in creation depends on recovering its costs from all users of sound recordings. Trial Ex. 34 at ¶ 4 (Kushner WDT). The Judges' duty in applying the Section 801(b)(1) objectives is to determine whether a deviation from a market rate is warranted. That the current rate generates payments that are lower than some services (but

obviously much larger than payments made by webcasters paying only the minimum fee), is not a reason to deviate from a market rate.

Response to ¶ 391. A statutory royalty rate should not be selected from the range identified by Dr. Crawford, because his Nash analysis is entirely unreliable. SE FOF at § XIII.D. Music Choice has provided no compelling evidence that the Section 801(b)(1) objective would best be served by any rate other than the one most strongly indicated by marketplace evidence.

Response to ¶ 392. The Judges should not begin their rate-setting analysis with the existing rate, because their duty is first to estimate a market rate, and then determine whether the Section 801(b)(1) objectives require divergence from that rate. Responses to ¶¶ 77, 100. Even if they could not fix a market rate with precision, they still must take into account that the current statutory royalty rate for PSS is significantly below-market. SE FOF at § XIII.B.iii. Music Choice has provided no compelling evidence that the Section 801(b)(1) objective would best be served by any rate other than the one most strongly indicated by marketplace evidence.

C. Fair Return To The Copyright Owner And Fair Income To The Copyright User

1. Section 801(b)(1)(B) Requires Fairness To Both Copyright Owner And User

Response to ¶ 393. Section 801(b)(1)(B) requires the Judges to set a rate that "afford[s] the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions." 17 U.S.C. § 801(b)(1)(B). In *SDARS I*, the Judges assigned an economic meaning to fairness, stating that "a fair income is . . . consistent with reasonable market outcomes." *SDARS I*, 73 FR at 4095. The current statutory PSS rate is below-market, and so is presumptively unfair by the Judges' definition. SE FOF at § XIII.B.3.

Use of CABSAT and webcasting rates for PSS would be consistent with this statutory objective, as those rates approximate a marketplace rate. SE FOF at § XIII.B.2.v, C. Conversely, continuing to offer below-market rates to PSS would be manifestly contrary to any reasonable effort to approximate a market rate under "existing economic conditions." Trial Ex. 501 at ¶ 78 (Wazzan Corr. WDT). Music Choice is very profitable, and would remain so throughout the coming rate period at the CABSAT rates. SE FOF at § XIII.E.5.ii. Music Choice certainly does not need a below-market rate to obtain a fair income.

Response to ¶ 394. Dr. Wazzan considered the section 801(b) factors under the standards set by the Judges in *SDARS I* and *SDARS II*. For brevity, SoundExchange incorporates by reference its Responses to paragraphs 324-331 and 393.

a. It Is Not Fair To Set A Below Market Rate For The PSS While Music Choice Enjoys Substantial Profits

Response to ¶ 395. Music Choice's assertions are belied by the objective evidence in the record. [ ] Music Choice is also profitable. 5/18/17 Tr. 4623:21-23 (Del Beccaro). Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). As a result, the Judges were skeptical of the similar claims of poverty Music Choice made in *SDARS II*. *SDARS II amend*., 78 FR at 31844 n.5 ("[i]t is improbable that Music Choice would continue to operate for over 15 years with the considerable losses that it claims"). Now, Music Choice would remain profitable if required to pay the CABSAT rates. Response to ¶ 206; SE FOF at § XIII.E.5.ii.

Even if that were not the case, the Judges have held that no service is assured of a statutory royalty rate that will allow it to operate profitably. *SDARS I*, 73 FR at 4095; *SDARS II*, 78 FR at 23067. Indeed, even Music Choice's expert witness Dr. Crawford testified that "there's no requirement for the Judges to set rates to guarantee that the PSS survive." 4/25/17 Tr. 862:20-22 (Crawford). Dr. Crawford likewise agreed that there is nothing in Section 801(b)(1) that guarantees a copyright user a certain level of profitability, or that requires the Judges to set rates to ensure that an inefficiently operated service can remain in business. 4/25/17 Tr. 901:6-18 (Crawford). "To allow inefficient market participants to continue to use as much music as they want for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners." *Web II*, 72 FR at 24088 n.8.

If Music Choice's finances were deteriorating (and they are not), it is not because of the statutory royalty rate for PSS. Music Choice has [

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Response to ¶ 396. Music Choice myopically focuses on its PSS business, and relies for that myopia on the unreliable allocations generated under Dr. Crawford's supervision. SE FOF at § XIII.D.2.ii. Those allocations are no more appropriately relied upon in a Section 801(b)(1) context than a Nash model context. Moreover, financial forecasts for Music Choice's real

business – the way it views its business for operational purposes rather than purposes of litigation – are strong. Music Choice's enterprise-wide financial forecasts project that (assuming no rate increase) Music Choice's 2018 EBITDA will be [ ] and its 2018 after-tax net income will be [ ]. Trial Ex. 406 (P&L tab). The picture only improves from there, since Music Choice forecasts that its EBITDA will increase at about a [ ] compound annual growth rate to reach [ ] in 2022, and that its after-tax net income will increase at about a [ ] compound annual growth rate to reach [ ] in 2022. Trial Ex. 406 (P&L tab).

Furthermore, the evidence shows that Music Choice would have been even more profitable if it charged its partners [ ] Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). For example, Music Choice [.] Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). In addition, as Dr. Wazzan explained, "Music Choice also has the power to mitigate the effects of a rate increase, at least to a significant extent, because [ ] Trial Ex. 502 at ¶ 88 (Wazzan Corr. WRT).

Response to ¶ 397. Music Choice bundles its services. In this way, Music Choice is similar to a CABSAT. Both PSS and CABSATs obtain the same rights, create audio music channels incorporating the licensed sound recordings and sell them to MVPDs, who in turn resell those channels to consumers as part of subscription bundles. 5/3/17 Tr. 2305:24-2306:8

(Wazzan). SoundExchange agrees that Music Choice does not allocate shared costs among its lines of business in the ordinary course of business.

Response to ¶ 398. Forecasts of Music Choice's overall business remain strong. To avoid repetition, SoundExchange incorporates its Response to paragraph 396, *supra*.

Response to ¶ 399. Forecasts of Music Choice's overall business remain strong. To avoid repetition, SoundExchange incorporates its Response to paragraph 396, *supra*.

Response to ¶ 400. Documentary evidence in the record shows that Music Choice's forecasts are not as bad as it would have the Judges believe. [redacted]

Response to ¶ 401. In ¶ 401, Music Choice proposes findings of fact that are duplicative of those in ¶ 389. To avoid repetition, SoundExchange incorporates its Response to paragraph 389, *supra*.

b. Music Choice Would Still Be Profitable At SoundExchange's Proposed Rates

Response to ¶ 402. As discussed in detail in SoundExchange's Findings of Fact, *see* SE FOF at ¶¶ 2152-2159, the evidence shows that [redacted] 5/3/17 Tr. 2328:17-22 (Wazzan) ([redacted]).

As Music Choice's expert Dr. Crawford testified, Section 801(b) does not guarantee a copyright user a certain level of profitability. 4/25/17 Tr. 901:6-18 (Crawford). Indeed, Dr. Crawford testified that "there's no requirement for the Judges to set rates to guarantee that the PSS survive. I think that would be unreasonable." 4/25/17 Tr. 862:20-22 (Crawford).

Response to ¶ 403. This increase in Music Choice's royalties reflects the fact that it currently receives a significantly below-market rate. *See* SE FOF at ¶¶ 1890-1947.

Response to ¶ 404. [ ] 5/3/17 Tr. 2328:17-22 (Wazzan).Music Choice's own forecasts show that it would remain profitable as an enterprise at CABSAT rates in 2018 and for the remainder of the coming rate period. *See* SE FOF at ¶¶ 2152-2157. Music Choice's projected rate of growth [ ] the 3% annual adjustments built into the current CABSAT statutory rates through 2020, and that SoundExchange has proposed continuing in the PSS rates for 2021 and 2022. SE FOF at ¶ 2155. In addition, as Dr. Wazzan explained, "Music Choice also has the power to mitigate the effects of a rate increase, at least to a significant extent, because [.] Trial Ex. 502 at ¶ 88 (Wazzan Corr. WRT).

Response to ¶ 405. To avoid repetition, SoundExchange incorporates its Response to paragraph 404, *supra*.

Response to ¶ 406. To avoid repetition, SoundExchange incorporates its Response to paragraph 404, *supra*.

Response to ¶ 407. To avoid repetition, SoundExchange incorporates its Response to paragraph 404, *supra*.

Response to ¶ 408. To avoid repetition, SoundExchange incorporates its Response to paragraph 404, *supra*.

c. After 20 Years of Below-Market Rates For PSS, Providing A Fair Return to Artists And Record Companies Requires A Market Rate

Response to ¶ 409. The record shows unequivocally that the PSS pay lower royalty rates than all other music services. *See e.g.*, 5/18/17 Tr. 4621:25:4623:1 (Del Beccaro) (agreeing that Music Choice pays a lower royalty rate for sound recordings than all the other types of digital music services that pay for the use of sound recordings; and that SDARS, CABSAT, BES, webcasters, video services, interactive webcasters all pay higher royalty rates). *See also* SE FOF at Section XIII.B.3. The PSS rates are so low because the statutory rates have subsidized the companies that offer PSS (Music Choice and Muzak). But these below-market rates have a negative impact on copyright owners and artists, who receive unreasonably small royalty payments from the PSS.

If there were any doubt that the PSS rates do not provide a fair return to copyright owners, Mr. Del Beccaro resolved it at trial. If the statutory PSS rate was above or close to a fair market rate, one would expect to see record companies agree to direct licenses at or below the statutory rate. But Mr. Del Beccaro testified that no copyright owner has [ ] 5/18/17 Tr. 4618:21-4619:3, 4620:15-4621:9 (Del Beccaro). SE FOF at ¶¶ 1942-1947.

Mr. Del Beccaro is correct on this point. The evidence is clear that the current PSS rate is far below a market rate and thus does not provide record companies with a return that resembles a fair market return. Trial Ex. 50 at ¶ 16 (Walker WRT) ("In fact, in the absence of the statutory

license, Sony probably would not be willing to grant licenses to the PSS with their current business model. It certainly would not do so at anything like the current statutory rate."); Trial Ex. 32 at ¶ 29 (Harrison WDT) (stating that it would be "foolish" for a record company to enter into a license with Music Choice at the current statutory rate).

Response to ¶ 410. Music Choice's argument seems to be that because it *currently* pays rates that are well below market and make up a small amount of the labels' overall revenue it should be allowed to *continue* paying these low rates indefinitely. Notably, it cites no precedent that supports this preposterous argument.

Moreover, as set forth in SoundExchange's Findings of Fact, record companies are increasingly reliant on statutory royalties. SE FOF at ¶¶ 1465, 1474, 1481-1487. To be sure, PSS royalties are less than SDARS royalties, but the same point holds true: record companies must rely on an array of royalty streams to earn a fair return on their investments, and that includes royalties from the PSS. The PSS revenue to record companies is small because the statutory PSS royalty rate is low. That is not a fact that supports maintaining the PSS rate at such low levels. To the contrary, that is a reason to raise the rate.

Response to ¶ 411. *See* Responses to ¶¶ 395-396. As an overall enterprise, Music Choice is currently profitable. 5/18/17 Tr. 4623:21-23 (Del Beccaro). Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). As set out above, the evidence shows that at SoundExchange's proposed rates, Music Choice would continue to operate its PSS, albeit with less profit. As Music Choice's expert Dr. Crawford testified, Section 801(b) does not guarantee a copyright user a certain level of profitability. 4/25/17 Tr. 901:6-18 (Crawford).

Response to ¶ 412. SoundExchange painted an accurate picture of the current conditions that record labels and artists face. Music Choice provides no support for the contrary assertions in this paragraph.

Response to ¶ 413. There is nothing misleading about SoundExchange's testimony regarding the state of the record industry. SoundExchange has detailed the financial condition of the record industry. See generally SE FOF at § X. Music Choice does not dispute that, as Jason Gallien testified, since 2000, music sales in the United States have declined by approximately 50%, falling from a high of $14.3 billion to $7 billion in 2015. Trial Ex. 30 at 3 (Gallien WDT).

In addition, Music Choice's attempt to use Mr. Kushner's testimony in this regard is weak. Mr. Kushner's testimony regarding CD format replacement was "based on [his] lay knowledge as a consumer." 5/11/17 Tr. 3599:23-3600:8 (Kushner). He testified that he was "not an expert in that area" and was reluctant to answer counsel's questions on this subject because he would "be speculating." *Id.*

Response to ¶ 414. To avoid repetition, SoundExchange incorporates its Response to ¶ 413, *supra*.

Response to ¶ 415. To avoid repetition, SoundExchange incorporates its Response to ¶ 413, *supra*.

Response to ¶ 416. To avoid repetition, SoundExchange incorporates its Response to ¶ 413, *supra*.

Response to ¶ 417. Music Choice does not dispute that record company revenues peaked around 1999 or 2000. Nor does it dispute that streaming and other performance licensing is now the largest segment of the U.S. recording industry's revenue, at 34.3% as reported by

RIAA. Trial Ex. 34 at ¶ 15 (Kushner WDT). Thus, the critical point is that revenues from digital exploitation of recorded works are now primary sources of revenue. In such an environment, streaming services including the PSS cannot be viewed as incremental revenue or purely promotional of declining sales, and instead must contribute appropriately to the overall economics of the recording industry. SE FOF at ¶¶ 1485-1486.

Response to ¶ 418. To avoid repetition, SoundExchange incorporates its Responses to ¶ 413 and ¶ 417, *supra*. Music Choice provides no citation for its statement that "[b]oth of these developments provided significant benefits to consumers."

Response to ¶ 419. The evidence Music Choice cites for this proposition only relates to UMG. In any event, industry revenues were flat for many years, and record companies have achieved their results through substantial cost cutting. SE FOF at ¶¶ 1470-1491.

Response to ¶ 420. There is nothing fair about Music Choice being allowed to use the copyright owners' property at a rate well below market just because the record industry outlook has improved over the past couple of years. And the sources that Music Choice cites in the second sentence simply do not support the proposition that record company revenues "are projected to continue increasing for the foreseeable future." The valuations of UMG cited by Music Choice are not reliable. While the UMG witnesses confirmed that those valuations were made by third parties, neither of them endorsed those valuations as accurate or reliable. 5/16/17 Tr. 4194:2-25 (Gallien) ("I didn't personally see that report, but I have seen a range of valuations from different investment banks over the years. . . . So there is a spread of valuations across all the investment banks . . . . I would[] even hesitate to guess [at a valuation of UMG]. It is really beyond my expertise.").

Response to ¶ 421. There is nothing fair about allowing Music Choice to use the copyright owners' property at a rate well below market just because its PSS business's revenue would decline. Indeed, Music Choice has recognized in internal documents the incredible deal it is getting on the labels' and artists' creative works: [ ]

The Judges have held that no service is assured of a statutory royalty rate that will allow it to operate profitably. *SDARS I*, 73 FR at 4095; *SDARS II*, 78 FR at 23067. Indeed, even Music Choice's expert witness Dr. Crawford testified that "there's no requirement for the Judges to set rates to guarantee that the PSS survive." 4/25/17 Tr. 862:20-22 (Crawford). Dr. Crawford likewise agreed that there is nothing in Section 801(b)(1) that guarantees a copyright user a certain level of profitability, or that requires the Judges to set rates to ensure that an inefficiently operated service can remain in business. 4/25/17 Tr. 901:6-18 (Crawford).

Response to ¶ 422. There is nothing inconsistent about SoundExchange's position on the Services' financial performance. Sirius XM's financial success makes it blatantly obvious that it can afford the benchmark rates SoundExchange proposes.

Likewise, as an overall enterprise, Music Choice is currently profitable. SE FOF at ¶ 2134. Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). As discussed in greater detail in Responses to ¶¶ 396 and 404, the evidence shows that at SoundExchange's proposed rates,

Music Choice would continue to operate its PSS, albeit with less profit. As Music Choice's expert Dr. Crawford testified, Section 801(b) does not guarantee a copyright user a certain level of profitability. 4/25/17 Tr. 901:6-18 (Crawford).

As even Mr. Del Beccaro has admitted, Music Choice's primary competitor is Stingray. 5/18/17 Tr. 4641:25-4642:23 (Del Beccaro). While Music Choice may quibble that the quality of its service is superior to Stingray's, there can be no real dispute that Stingray's CABSAT service is interchangeable with Music Choice's PSS service. They offer consumers the same functionality – a residential audio service. Indeed, at least one cable provider (AT&T) has replaced Music Choice with Stingray. Stingray pays the CABSAT rate for its residential audio service. There is nothing unfair about asking Music Choice to pay the same rates for functionally the same service as its chief competitor. SE FOF at ¶ 2135.

But *even if* this were not the case, there is no requirement that the Judges set rates low enough to keep an unprofitable business afloat. "To allow inefficient market participants to continue to use as much music as they want for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners." *Web II*, 72 FR at 24088 n.8.

Response to ¶ 423. For all the reasons set forth in SoundExchange's Findings of Fact, there is every reason to raise the PSS rate, and no reason to lower it. Music Choice refers to the possibility that the Judges could use the existing rate as their starting point. No party has proposed that the Judges do that. If the Judges were to begin with the existing rate, then an upward adjustment would be necessary to afford record companies and artists a fair return. But

the Judges should adopt SoundExchange's rate proposal, under which no adjustment will be necessary to account for any of the four statutory factors.

D. Relative Roles of Copyright Owner And User

Response to ¶ 424. No response.

Response to ¶ 425. No response.

Response to ¶ 426. There is no reason for the judges to depart from the CABSAT rate SoundExchange proposes on the basis of the third objective. SE FOF at ¶¶ 2136-2141. PSS and CABSAT services have similar roles and make similar contributions, in that they all provide essentially the same service. Trial Ex. 501 at ¶ 79 (Wazzan Corr. WDT). Likewise, copyright owners perform the same roles with respect to both CABSAT services and PSS – creating, marketing, and distributing the recordings that the services monetize to attract an audience. For these reasons, there is no basis for a downward departure from SoundExchange's proposed CABSAT benchmark rate.

In contrast, Music Choice has not made an evidentiary showing sufficient to justify a lower rate. Music Choice's relative contributions are minimal.

1. Whatever Creative Contribution Music Choice May Make Pales In Comparison To Creation Of All The Sound Recordings It Uses

a. Music Choice Produces Minimal Creative Expression

Response to ¶ 427. Music Choice provides little in the way of creative contribution. The large catalog of recordings it has access to under the statutory license is the core of the service Music Choice provides.

Response to ¶ 428. As will be described in further detail below, Music Choice's creative inputs do not add much compared to the music created by the record labels and used by Music

Choice. The fact that Music Choice considers Stingray a competitor that can replace Music Choice on cable carriers demonstrates that Music Choice does not make a particularly valuable creative contribution – Music Choice can be easily replaced by a service like Stingray.

Response to ¶ 429. Each service attempts to differentiate itself from every other service. That does not mean that their creative contributions are significant. Cable carriers such as AT&T have switched from Music Choice to Stingray, which shows that Music Choice's creative contributions are not unique or significant.

Response to ¶ 430. Music Choice overestimates the uniqueness of its on-screen display. Pursuant to 17 U.S.C. § 114(d)(2)(C)(ix), almost all services operating under the statutory license are required to display text data identifying the title of each sound recording they play, along with the album title and the featured recording artist's name, as each recording is being played. 17 U.S.C. § 114(d)(2)(C)(ix). [[redacted]] 5/18/17 Tr. 4576:1-14 (Del Beccaro) (Sirius XM's CABSAT has screen displays); 5/18/17 Tr. 4738:16-4739:7 (Williams) (Stingray has screen displays). For brevity, SoundExchange incorporates by reference its Response to ¶ 335, *supra*.

Response to ¶ 431. Music Choice's channel curation is not unique. Its channels are akin to the channels of other non-interactive services and the curated playlists of interactive services. For example, Stingray, Music Choice's key competitor, offers "1000s of channels hand-curated by a team of 100 music programmers from around the globe." Trial Ex. 985. [[redacted]]. 5/16/17 Tr. 3991:24-3992:12 (Harrison).

Response to ¶ 432. No response.

Response to ¶ 433. There is no stark divide between interactive and non-interactive services, as Music Choice would have it. More and more, subscribers to on-demand services are listening to playlists. Rather than search for a particular recording or artist to play (although subscribers certainly continue to do that), subscribers listen to playlists that they or others (including the service) have created. Trial Ex. 32 at ¶ 28 (Harrison WDT). [

]. Trial Ex. 26 at ¶ 39 (Orszag Am. WDT). Data that the services provided to UMG [ ]; they indicate that [ ] percent of plays on Spotify and [ ] percent of the plays on Apple are playlist plays from user-created playlists, service created playlists, third-party created playlists, or other pre-programmed streams. Trial Ex. 32 at ¶ 28 (Harrison WDT). If these playlists were "haplessly grouped together," they would not be as popular.

Response to ¶ 434. Music Choice is not the only service with quality, curated channels. For example, Stingray, Music Choice's key competitor, offers "1000s of channels hand-curated by a team of 100 music programmers from around the globe." Trial Ex. 985. [

[redacted]. 5/16/17 Tr. 3991:24-3992:12 (Harrison).

Response to ¶ 435. No response.

Response to ¶ 436. No response.

Response to ¶ 437. No response.

Response to ¶ 438. In ¶ 438, Music Choice proposes findings of fact that are duplicative of those in ¶ 434. To avoid repetition, SoundExchange incorporates its response to ¶ 434, *supra*.

Response to ¶ 439. No response.

Response to ¶ 440. No response.

Response to ¶ 441. It is an overstatement to describe the relationships between Music Choice programmers and labels, artists, managers, and trade associations as "meaningful." Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice. 5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT) (emphasizing that "we do not view any platform as uniquely promotional," and stating that in "significant respects the various platforms are similar"); 5/18/17 Tr. 4713:5-11 (Williams) (promotions departments that lobby Music Choice also lobby terrestrial radio stations); 5/18/17 Tr. 4720:12-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry").

Response to ¶ 442. Music Choice provides no evidentiary support beyond the self-serving testimony of Mr. Williams for its allegation of its "competitive programming advantage."

Response to ¶ 443. As an overall enterprise, Music Choice is currently profitable. 5/18/17 Tr. 4623:21-23 (Del Beccaro). Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). [

]

Response to ¶ 444. To avoid repetition, SoundExchange incorporates its Response to ¶ 443, *supra*.

Response to ¶ 445. To avoid repetition, SoundExchange incorporates its Response to ¶ 443, *supra*.

Response to ¶ 446. To avoid repetition, SoundExchange incorporates its Response to ¶ 443, *supra*. In addition, as explained above, Music Choice has no demonstrated promotional effect, let alone any promotional effects specific to its on-screen display.

b. Artists and Record Companies Create Essentially All Of The Creative Works Used By The PSS

Response to ¶ 447. As Music Choice acknowledges, the third factor – consideration of the relative roles in making the product made available to the public – refers to sound recordings. *See* MC FOF at ¶ 245. Indeed, the record labels' and artists' creative contributions to making those sound recordings are the *reason* that Music Choice exists. Without those contributions,

there would be no PSS market. Record companies spend over 20% of their revenue on artists & repertoire and marketing. Trial Ex. 501 at ¶ 81 (Wazzan Corr. WDT). The contributions, investments and risks of record companies were discussed in the section of SoundExchange's Findings of Fact that discussed the Section 801 factors with respect to the SDARS. All of those contributions are equally relevant to analysis of the Section 801 factors with respect to the PSS, and should be considered here as well. That evidence makes clear that the copyright owners' massive contributions and investments dwarf those of Music Choice.

Response to ¶ 448. "In considering the third factor, the Judges' task is not to determine who individually . . . makes a greater contribution in the PSS market . . . . Rather, the consideration is whether these elements, taken as a whole, require adjustments" to the benchmark rate. *SDARS II amend.*, 78 FR at 31845. It is not necessary for the Judges to adjust SoundExchange's benchmark rate based on these factors. However, if the Judges adopt Music Choice's rate proposal, push forward the current statutory rate, or adopt a similarly low rate, then an upward adjustment would be necessary to reflect the record labels' greater contributions to the product made available to the public.

Response to ¶ 449. To avoid repetition, SoundExchange incorporates its Responses to ¶¶ 447 & 448, *supra*.

2. Relative Technical Contributions

a. Music Choice Cannot Claim Credit For Its Licensor's Work, And There Is Little Evidence Of Music Choice Technological Contribution In The Last 20 Years

Response to ¶ 450. Investments relating to Music Choice's inception in 1988 are irrelevant in a proceeding to set rates thirty years later.

Response to ¶ 451. In ¶ 451, Music Choice proposes findings of fact that are duplicative of those in ¶ 430. To avoid repetition, SoundExchange incorporates its response to ¶ 430, *supra*.

Response to ¶ 452. In ¶ 452, Music Choice proposes findings of fact that are duplicative of those in ¶¶ 385-387. To avoid repetition, SoundExchange incorporates its responses to ¶¶ 385-387, *supra*.

b. Technological Investments By Record Companies And SoundExchange

Response to ¶ 453. As Music Choice acknowledges, the third factor – consideration of the relative roles in making the product made available to the public – refers to sound recordings. *See* MC FOF at ¶ 245. Indeed, the record labels' and artists' creative contributions to creating those sound recordings are the *reason* that Music Choice exists. Without those contributions, there would be no PSS market.

The record labels make significant technological investments in creating the sound recordings themselves, without which Music Choice could not survive. As detailed in SoundExchange's Findings of Fact, ¶¶ 1559-1560, 1562, the labels expend significant sums on recording costs, mastering costs, and producer and sampling fees, as well as costs associated with the manufacturing and distribution of recordings, both in physical and digital form. Without these technological investments, sound recordings would not be made or distributed to the public.

Response to ¶ 454. To avoid repetition, SoundExchange incorporates its Response to ¶ 448, *supra*.

3. The Ongoing Investments By Artists And Record Companies In Creating And Popularizing The Recordings Used By The PSS

Outweighs The Sunk Costs Of Music Choice's Comparatively Inexpensive Distribution Infrastructure

a. Music Choice's Investments

Response to ¶ 455. All of the capital investment to which Music Choice refers was invested a long time ago; specifically, in the first twelve years of Music Choice, with no investments since then. In other words, there has been no investment by them in the last eighteen years, and the investors have realized returns on their investments. Moreover, these investments have helped fuel Music Choice's non-statutory video service line of business. 5/18/17 Tr. 4630:23-4631:21 (Del Beccaro).

In addition, Music Choice's partners received significant strategic and commercial benefits from their Music Choice investments, including in the case of the MVPD partners, [ ]. SE FOF at § XII.B.4.i.

As to Music Choice's ongoing costs, its wholesale distribution model seems to be relatively inexpensive to operate. Between 2013 and 2016, it spent less than [ ] of revenue on property and equipment. Trial Ex. 501 at ¶ 79 (Wazzan Corr. WDT). By way of comparison, Sirius XM's capital expenditures were 3% of its total revenues in 2015, and Pandora spent 2.8% of its total revenues on capital expenditures during the same period. Trial Ex. 501 at ¶ 80 (Wazzan Corr. WDT).

Response to ¶ 456. Music Choice has provided no evidence of the need for additional capital expenditures, including what these expenditures might be, when they are projected to be made, and how much they would cost. Thus, Music Choice's assertion regarding where it would come up with the money for these "additional capital expenditures" is irrelevant to this proceeding.

b. Artist, Record Company And SoundExchange Investments

Response to ¶ 457. As Music Choice acknowledges, the third factor – consideration of the relative roles in making the product made available to the public – refers to sound recordings. *See* MC FOF at ¶ 245. Indeed, the record labels' and artists' contributions to creating those sound recordings are the *reason* that Music Choice exists. Without those contributions, there would be no PSS market.

The record labels make significant capital investments in creating the sound recordings themselves, without which Music Choice could not survive. *See generally* SE FOF at Section X. For example, as detailed in the testimony of Messrs. Kushner and Gallien, the labels expend significant sums in developing and distributing music. Trial Ex. 34 at ¶¶ 28-74 (Kushner WDT); Trial Ex. 30 at 8-16 (Gallien WDT). Without these technological investments, sound recordings would not be made or distributed to the public.

The record companies make large investments, at significant risk, to sign artists, create recordings, release them to the market, help them find an audience, and build a fan base. The PSS bear none of those risks, and instead have the privilege of choosing from among all the most successful recordings to attract and retain subscribers who are fans of the labels' artists. Trial Ex. 34 at ¶ 4 (Kushner WDT).

Response to ¶ 458. To avoid repetition, SoundExchange incorporates its Response to ¶ 457, *supra*.

Response to ¶ 459. It is not necessary for the Judges to adjust SoundExchange's benchmark rate based on this factor. However, if the Judges adopt Music Choice's rate proposal, push forward the current statutory rate, or adopt a similarly low rate, then an upward adjustment

would be necessary to reflect the record labels' greater contributions to the product made available to the public.

4. Relative Costs And Risks

a. Producing Recordings Remains A Risky Business

Response to ¶ 460. There is nothing misleading about SoundExchange's testimony regarding the state of the record industry. Music Choice does not dispute that, as Jason Gallien testified, since 2000, music sales in the United States have declined by approximately 50%, falling from a high of $14.3 billion to $7 billion in 2015. Trial Ex. 30 at 3 (Gallien WDT). This testimony *recognizes* that 2000 was the peak of the industry.

Response to ¶ 461. To avoid repetition, SoundExchange incorporates its Response to ¶ 460, *supra*. Mr. Kushner's testimony regarding CD format replacement was "based on [his] lay knowledge as a consumer." 5/11/17 Tr. 3599:23-3600:8 (Kushner). He testified that he was "not an expert in that area" and was reluctant to answer counsel's questions on this subject because he would "be speculating." *Id.* He did *not* testify that the CD replacement cycle "artificially increased" revenues for the industry.

Response to ¶ 462. The record companies experienced significant risks associated with the transition from physical to digital distribution of music, and that transition required record companies to make substantial new investments and incur new categories of costs. Digital distribution requires complex negotiations with digital service providers, infrastructure to manage and deliver various versions of recordings to each service, development and delivery of extensive data about each recording, and employees to carry out these processes, while also maintaining the staff and infrastructure necessary for physical distribution. Trial Ex. 34 at ¶ 13 (Kushner WDT). *See e.g.*, SE FOF at ¶¶ 1474-1489, 1559-1563.

Response to ¶ 463. SoundExchange explained at length in its Findings of Fact that there is no credible evidence that Music Choice is promotional. SE FOF at Section XIII.D.2.iv. In addition, as explained above, Music Choice has failed to demonstrate that it has any quantitative promotional value. As Music Choice *itself* highlighted in ¶ 460, the record company has undergone vast changes since the late 1990s. That the PSS may have been considered promotional in 1998 has no relevance to the current ratesetting proceeding. Significantly, the panel in *PSS I* recognized that "a future Panel may reach an entirely different result based on the then-current economic state of the industry." *PSS I*, 63 FR at 25405 (citing *PSS I* CARP Report, Trial Ex. 979 at ¶ 202). The industry has undergone significant changes during this period and to the extent the PSS were considered promotional twenty years ago that is no longer the case.

Response to ¶ 464. In ¶ 464, Music Choice proposes findings of fact that are duplicative of those in ¶ 419. To avoid repetition, SoundExchange incorporates its response to ¶ 419, *supra*. Moreover, the record labels' profitability is irrelevant to the consideration of the costs and risks that they have undertaken.

Response to ¶ 465. In ¶ 464, Music Choice proposes findings of fact that are duplicative of those in ¶ 420. To avoid repetition, SoundExchange incorporates its response to ¶ 420, *supra*. Moreover, the record labels' profitability is irrelevant to the consideration of the costs and risks that they have undertaken.

Response to ¶ 466. Contrary to Music Choice's assertions, the record labels incur significant costs and risks to their overall profitability related to their significant outlay of capital, followed by possible recoupment. Record companies tend to absorb all the risk associated with creating a recording by fronting the costs and then sharing the rewards with the

artist only if the artist finds commercial success. *See generally* SE FOF at Section X; *see also* SE FOF at ¶¶ 1447, 2138. For example, for a new artist, Atlantic's advance would typically range from [ ], depending on competition. For an established artist with a track record of success, Atlantic may pay advances of many millions of dollars. The record company also typically pays all of the costs of producing the artist's recordings, including costs such as producer fees, studio fees, engineering costs, wages of session musicians, and costs of producing accompanying videos. For example, in the case of a first album from a new artist, Atlantic's recording costs typically range from [ ]. For an established artists, Atlantic sometimes pays recording costs for an album [ ]. *See* SE FOF at ¶¶ 1557-1563.

b. Music Choice Has A Stable Business, Strong Competitive Position And Is Very Profitable

Response to ¶ 467. The PSS industry should not be propped up on the backs of the record labels and artists. The Judges have held that no service is assured of a statutory royalty rate that will allow it to operate profitably. *SDARS I*, 73 FR at 4095; *SDARS II*, 78 FR at 23067. Indeed, even Music Choice's expert witness Dr. Crawford testified that "there's no requirement for the Judges to set rates to guarantee that the PSS survive." 4/25/17 Tr. 862:20-22 (Crawford). Dr. Crawford likewise agreed that there is nothing in Section 801(b)(1) that guarantees a copyright user a certain level of profitability, or that requires the Judges to set rates to ensure that an inefficiently operated service can remain in business. 4/25/17 Tr. 901:6-18 (Crawford). "To allow inefficient market participants to continue to use as much music as they want for as long a time period as they want without compensating copyright owners on the same basis as more

efficient market participants trivializes the property rights of copyright owners." *Web II*, 72 FR at 24088 n.8.

At any rate, Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). As discussed in greater detail above, the evidence shows that at SoundExchange's proposed rates, Music Choice would continue to operate its PSS, albeit with less profit. As Music Choice's expert Dr. Crawford testified, Section 801(b) does not guarantee a copyright user a certain level of profitability. 4/25/17 Tr. 901:6-18 (Crawford).

Response to ¶ 468. Music Choice's ¶ 468 improperly relies on extra-record evidence and should be disregarded. However, to the extent the Judges may wish to consult the article cited by Music Choice, that article makes clear that the bankruptcy filing is due to "severe financial problems in Canada" and involves an "attempt[] to restructure $650 million the company owes in Canada." Daniel Adrian Sanchez, Mood Media, Muzak's Parent Company, Seeks Federal Bankruptcy Court Protection, Digital Music News (May 25, 2017), https://www.digitalmusicnews.com/2017/05/25/mood-media-muzak-bankruptcy/. The bankruptcy has nothing at all to do with some underpaid statutory license royalties.

Response to ¶ 469. The evidence shows that Music Choice would offset losses from its residential audio operations if it charged its partners [ ]. Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). For example, Music Choice [ ]. Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). In addition, as Dr. Wazzan explained, "Music Choice also has the power to mitigate the effects of a rate increase, at least to a significant extent,

because [ ]. Trial Ex. 502 at ¶ 88 (Wazzan Corr. WRT).

Response to ¶ 470. Although Music Choice is fond of citing long-past history, alleged past risks are irrelevant to this proceeding.

Response to ¶ 471. To avoid repetition, SoundExchange incorporates its Response to ¶ 470, *supra*.

Response to ¶ 472. As an overall enterprise, Music Choice is currently profitable. 5/18/17 Tr. 4623:21-23 (Del Beccaro). Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). As discussed in greater detail above, the evidence shows that at SoundExchange's proposed rates, Music Choice would continue to operate its PSS, albeit with less profit. As Music Choice's expert Dr. Crawford testified, Section 801(b) does not guarantee a copyright user a certain level of profitability. 4/25/17 Tr. 901:6-18 (Crawford).

Response to ¶ 473. Concerning the accuracy of Music Choice's forecasts, see Response ¶ 400. To avoid repetition, SoundExchange incorporates its Responses to ¶¶ 470 & 472, *supra*.

Response to ¶ 474. As to Music Choice's finances, in *SDARS II*, Music Choice presented essentially the same claims it has presented here, and the Judges were unmoved. *SDARS II amend.*, 78 FR at 31844 ("[a]s a consolidated business, Music Choice has had significantly positive operating income between 2007 and 2011 and made profit distributions to its partners since 2009").

Response to ¶ 475. Music Choice has a long history of complaining about declining per-subscriber revenues in proceedings like this one while enjoying positive financial performance. Response to ¶ 206. [redacted]

Response to ¶ 476. To avoid repetition, SoundExchange incorporates its Response to ¶ 475, *supra*.

Response to ¶ 477. In recent years, Music Choice's falling prices can also be attributed in part to competition from Stingray, which pays the CABSAT rates. Trial Ex. 55 at 20, 23 (Del Beccaro WDT) ("a highly competitive . . . marketplace"; "continued competitive pressure from various market entrants seeking to undercut our pricing"). [redacted] *See* SE FOF at § XIII.B.2.vi (competition with Stingray).

Furthermore, the evidence shows that Music Choice would have been even more profitable if it charged its partners [redacted] Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). For example, Music Choice [redacted] Trial Ex. 502 at ¶ 87 (Wazzan Corr. WRT). In addition, as Dr. Wazzan explained, "Music Choice also has the power to mitigate the effects of a rate increase, at least to a significant extent, because [redacted]

[redacted] Trial Ex. 502 at ¶ 88 (Wazzan Corr. WRT).

Response to ¶ 478. Regardless of any changes to the MVPD market, Music Choice's own projections indicate that it [redacted]

c. There Is Substantial Evidence That Music Choice Is Substitutional

Response to ¶ 479. As described at length in Section V of SoundExchange's Findings of Fact, sellers incur an opportunity cost when sales in one market diminish sales in other markets. Music is consumed one service and one platform at a time, so the platforms and services are inherently substitutional in this regard. A song consumed on Music Choice is consumed exclusively on that platform at the loss of another. Trial Ex. 23 at 18 (Ford WDT). In other words, songs consumers listen to through a PSS is a song they are *not* listening to through a service that pays higher royalty rates. For this reason, Mr. Walker explained that Sony "would much rather users use the basic tier of a free, ad-supported digital radio services, rather than a PSS, because such services are more effective at monetizing our recordings and pay royalties at a much higher rate. Even though they do not generate nearly as much per-user revenue for us as mid-tier or on-demand services, they generate much more per-user revenue for us than the PSS." Trial Ex. 50 at ¶ 18 (Walker WRT); *see also* SE FOF at ¶¶ 2100-2102.

One additional opportunity cost of PSS is presented by the CABSAT services. With Stingray actively competing for MVPD customers and willing to pay the CABSAT rates, it would be foolish for record companies to license a PSS at the current statutory PSS rates when Stingray is prepared to pay almost [ ] times as much on a per-subscriber basis. *See* 5/3/17 Tr. 2350:3-10 (Wazzan) ([ ]).

Record company preferences for services other than PSS are economically rational. Annual per user revenue from Music Choice is approximately [ ]. The equivalent figure for subscription interactive and noninteractive music services is approximately [ ] and [ ], respectively. Even for nonsubscription noninteractive services, the annual per-user revenue is [ ]. Trial Ex. 502 at ¶ 57 (Wazzan Corr. WRT) (internal footnote citations to Willig WDT omitted). For a CABSAT service, the annual per-subscriber royalty for 2017 is 22.2 cents. 37 C.F.R. § 383.3(a)(1)(ii).

Response to ¶ 480. Music Choice mischaracterizes the testimony on this issue. [ ] 5/16/17 Tr. 4076:8-17 (Harrison). He did not testify to any broader issue regarding Music Choice's cannibalization of other record company revenues. In addition, Dr. Crawford's testimony that Music Choice cites does not address substitution. 4/25/17 Tr. 836:7-838:4 (Crawford). [ ]

[redacted] 4/19/17 Tr. 207:20-208:8 (Shapiro) (defining promotion); 4/20/17 Tr. 284:10-285:4 (Shapiro) [redacted]

SoundExchange explained in detail in its Findings of Fact that Music Choice is not promotional. SE FOF at Section XIII.D.2.iii. Of course, the record labels' lobbying of Music Choice is not unique. Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice. 5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT) (emphasizing that "we do not view any platform as uniquely promotional," and stating that in "significant respects the various platforms are similar"); 5/18/17 Tr. 4713:5-11 (Williams) (promotions departments that lobby Music Choice also lobby terrestrial radio stations); 5/18/17 Tr. 4720:12-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry").

(1) Dr. Ford's Testimony

Response to ¶ 481. Dr. Ford's rebuttal testimony analyzed the Services' anecdotes regarding promotion. Among other things, Dr. Ford considered the reliability of the specific anecdotes provided by the Services and incorporated into their economic analysis. Trial Ex. 41 at 11 (Ford WRT). As explained in SoundExchange's Opposition to the Services' motion in limine to exclude portions of Dr. Ford's testimony, Dr. Ford's testimony is admissible because hearsay is allowed under the regulations governing this proceeding, 37 C.F.R. § 351.10(a), and because experts in the field of economics would reasonably rely upon such facts in forming their opinions, Fed. R. Evid. 703. *See* SoundExchange's Opposition to Sirius XM and Music

Choice's Motion *In Limine* to Exclude Portions of the Written Direct Testimony, Written Rebuttal Testimony, and Proposed Hearing Testimony of George Ford (Apr. 11, 2017).

Response to ¶ 482. Music Choice alleges that Dr. Ford "cherry-picked" the examples he discusses in his written rebuttal testimony. Music Choice has it backwards. Dr. Ford's rebuttal testimony responds to cherry-picked examples that were chosen *by the Services*' *witnesses.* Music Choice's Mr. Williams chose to discuss a relative handful of examples from the many thousands of recordings that Music Choice has played over the last several years. Presumably, these anecdotes represent instances of promotion that most favor Music Choice's case, not SoundExchange's.

Dr. Ford's testimony represented his investigation into *all* of the examples provided by the Services. To figure out who to speak to, Dr. Ford began by combing through the Services' fact witnesses' testimony and identifying all of the examples of alleged promotions. 5/1/17 Tr. 1937:6-13 (Ford); *see also* 5/1/17 Tr. 1843:19-21 (Ford) (he "wrote them all down"). Next he "made a request to counsel to figure out a way to speak to them . . . to talk about what really happened, what was going on." 5/1/17 Tr. 1937:14-18 (Ford); *see also* 5/1/17 Tr. 1843:22-1844:1 (Ford) (asked to "get as many as you can" and was "interested in any or all of them"). Specifically, Dr. Ford "asked to speak with representatives from record labels that had knowledge about as many of those releases as possible." 5/1/17 Tr. 1937: 19-23 (Ford). No releases were intentionally omitted. 5/1/17 Tr. 1937:24-1938:1 (Ford). For the releases discussed in the Services' testimony about which Dr. Ford did not conduct an interview, Dr. Ford nonetheless did attempt to contact them. 5/1/17 Tr. 1938:1-6 (Ford); *see also* 5/1/17 Tr. 1843:22-23 (Ford) (they "just couldn't schedule it with some people").

Response to ¶ 483. Dr. Ford does not need to have worked at a record label or in record company promotions to testify regarding promotion in the music industry. Music Choice's expert Dr. Crawford likewise is not a record company executive. Dr. Ford is a respected economist who has repeatedly been qualified as an expert in matters related to the music industry. He has testified in multiple proceedings before the Judges, as well as before the Copyright Judges in Canada. Trial Ex. 23 at 1 (Ford WDT); 5/1/17 Tr. 1819:7-16 (Ford). Approximately 75% of Dr. Ford's consulting work relates to the music industry. 5/1/17 Tr. 1938:18-22 (Ford). Dr. Ford has also written papers relating to the music industry through his work at the Phoenix Center. 5/1/17 Tr. 1819:17-1820:2 (Ford). He has practical experience in the industry, having played in bands in high school and through college and graduate school, and doing public amplification work for bands during graduate school. 5/1/17 Tr. 1821:13-1822:3 (Ford). Dr. Ford also keeps up with the music industry, and uses various services, including Music Choice. 5/1/17 Tr. 1822:1-9, 1938:10-17 (Ford). Dr. Ford's written and oral testimony in this case draws from his knowledge and professional experience regarding the music industry, as well as the particular sources cited throughout his testimony. 5/1/17 Tr. 1938:23-1939:2 (Ford).

(2) Mr. Walker's Testimony

Response to ¶ 484. Mr. Walker testified regarding "[his] perception of the PSS," "Sony[']s views [regarding] licensing in general [and] the PSS in particular," and what Sony employees have "express[ed]" about the PSS. Trial Ex. 50 at ¶ 16. (Walker WRT). He also testified regarding Sony's "thinking about digital music service business partners," qualities necessary for "an attractive business partner for [Sony]," and the company's priorities, expectations, and preferences. Trial Ex. 50 at ¶¶ 17-19 (Walker WRT). This testimony falls

squarely within his experience as the Executive Vice President & Head of Business & Legal Affairs for Global Digital Business for Sony. Trial Ex. 50 at ¶ 1 (Walker WRT). Contrary to Music Choice's assertions, he was not required to provide empirical support for the opinions he reached as a result of his substantial experience.

Response to ¶ 485. No response.

Response to ¶ 486. Mr. Walker explained at trial that he understood Music Choice's direct case through his participation in the Licensing Committee of SoundExchange and through conversations with counsel. 5/15/17 Tr. 3889:17-3890:1 (Walker). Music Choice has made the same arguments in these cases like clockwork; Mr. Walker did not need to read the specific testimony to understand the gist of Music Choice's well-worn tune.

(3) Mr. Kushner's Testimony

Response to ¶ 487. Mr. Kushner testified that the decline of revenues from physical products was driven in significant part by advances in technology, competition from other forms of entertainment (such as streaming television and movies and video games), and consumers' preference for first downloads and streaming (which, for shorthand, included the PSS). Trial Ex. 34 at ¶ 10 & n.3 (Kushner WDT).

Response to ¶ 488. As stated above in response to ¶ 487, Mr. Kushner identified the PSS as one among many reasons for the decline in sales of physical products, which led to record company revenue reductions. Trial Ex. 34 at ¶¶ 10, 13 (Kushner WDT). As explained further below, this statement is supported by the record.

Response to ¶ 489. Mr. Kushner stated quite plainly that the decline in physical product sales "is the result of numerous factors," among them being the rise of streaming services, SDARS, and the PSS. Trial Ex. 34 at ¶ 10 (Kushner WDT).

Response to ¶ 490. The market penetration of the PSS through the MVPDs does not speak to Mr. Kushner's point regarding *consumer preference* for downloads and then streaming. Trial Ex. 34 at ¶ 10 (Kushner WDT). Moreover there is no need to speculate about effects of streaming on sales 20 years ago, when there is current record evidence concerning the effects of streaming. Trial Ex. 28 at ¶¶ 16-30 (Willig WDT).

Response to ¶ 491. In ¶ 491, Music Choice proposes findings of fact that are duplicative of those in ¶ 490. To avoid repetition, SoundExchange incorporates its Response to ¶ 490, *supra*.

Response to ¶ 492. Mr. Kushner testified unequivocally that "we at Atlantic have never viewed the [PSS] as a major outlet for our music." Trial Ex. 34 at ¶ 16 (Kushner WDT). Music Choice cites to *no* evidence, let alone *overwhelming* evidence, for its assertion to the contrary.

Response to ¶ 493. In ¶ 493, Music Choice proposes findings of fact that are on their face duplicative of those in ¶¶ 100-112. To avoid repetition, SoundExchange incorporates its responses to ¶¶ 110-112, *supra*.

Response to ¶ 494. Music Choice provides no citation for its "finding." In any event, its allegations about promotion are the same kind of anecdotes that the Judges have previously rejected. It is neither surprising nor telling that record company employees ask Music Choice to play their music. Record labels employ a promotions staff that is responsible for engaging with numerous outlets. None of these employees are tasked solely with promoting to Music Choice.

5/18/17 Tr. 4713:5-11 (Williams). Instead, labels' marketing and promotions teams employ a multifaceted approach, designed to build awareness in a variety of different ways. *See, e.g.*, Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT) (emphasizing that "we do not view any platform as uniquely promotional," and stating that in "significant respects the various platforms are similar"); 5/18/17 Tr. 4713:5-11 (Williams) (promotions departments that lobby Music Choice also lobby terrestrial radio stations); 5/18/17 Tr. 4720:12-4721:1 (Williams) (labels use the same approach "not just at Music Choice" but "across the entire industry"). As Dr. Ford testified, "[r]ecord labels want their recordings to find an audience (and also want to get paid by royalty-paying services), so of course they encourage the services to play their recordings." Trial Ex. 41 at 11 (Ford WRT).

Response to ¶ 495. Music Choice misattributes the citation to Mr. Kushner, when it is testimony from Mr. Williams. At any rate, Mr. Kushner, as Atlantic's Executive Vice President, Business and Legal Affairs, works closely with the A&R and Marketing Departments, the latter of which is responsible for Atlantic's "massive promotional effort to connect the artist and recording with an audience." Trial Ex. 34 at ¶¶ 2, 53 (Kushner WDT). Mr. Kushner testified at length regarding Atlantic's marketing and promotion of its albums, including the importance of its promotions with Spotify, Apple Music, YouTube, and Sirius XM. Trial Ex. 34 at ¶¶ 53-71 (Kushner WDT). There is no requirement for SoundExchange to call the low-level promotions staffer who promotes to Music Choice, rather than the executive who oversees these activities.

Response to ¶ 496. To avoid repetition, SoundExchange incorporates its response to ¶ 494, *supra*. [ ] 5/18/17 Tr. 4760:25-4761:6 (Williams).

Response to ¶ 497. To avoid repetition, SoundExchange incorporates its response to ¶ 494, *supra*.

Response to ¶ 498. It is not necessary for the Judges to adjust SoundExchange's benchmark rate based on this factor. However, if the Judges adopt Music Choice's rate proposal, push forward the current statutory rate, or adopt a similarly low rate, then an upward adjustment would be necessary to reflect the record labels' greater contributions to the product made available to the public.

5. Opening New Markets

Response to ¶ 499. Subscribers do not pay separately for Music Choice, so it is a stretch to say Music Choice created a consumer market for its services. PSS services, like CABSAT services, buy sound recording rights and sell cable radio services to cable and satellite operators. Trial Ex. 501, at ¶ 62(b), (h) (Wazzan Corr. WDT). The MVPD purchasers of all cable radio services bundle those services with other content (sports channels, news channels, and other content) and sell them in the retail market to households as part of a digital television service. Trial Ex. 502, at ¶ 18 (Wazzan Corr. WRT).

Response to ¶ 500. As Music Choice acknowledges, the third factor – consideration of the relative roles in making the product made available to the public – refers to sound recordings. *See* MC FOF at ¶ 245. Indeed, the record labels' and artists' creative contributions to making those sound recordings are the *reason* that Music Choice exists. Without those contributions, there would be no PSS market for Music Choice to open.

Response to ¶ 501. To avoid repetition, SoundExchange incorporates its response to ¶ 498, *supra*.

E. Minimizing Industry Disruption

Response to ¶ 502. The fourth statutory factor reflects a policy judgment that changes in statutory rates should be implemented in a manner that does not "directly produce[] an adverse impact that is substantial, immediate and irreversible in the short-run" and that "threaten[s] the viability of the music delivery service currently offered to consumers under this license." *SDARS I*, 73 FR at 4097.

1. Below-Market Rates For PSS Have Had A Disruptive Effect On The Cable Radio Industry

Response to ¶ 503. There is no evidence in the record that the current rate has had a "disruptive" effect on Music Choice or the PSS market, as the term "disruptive" has been interpreted by the Judges. It is important to note that the Judges have held that no service is assured of a statutory royalty rate that will allow it to operate profitably. *SDARS I*, 73 FR at 4095; *SDARS II*, 78 FR at 23067. If the PSS cannot, by some combination of lower profits, higher prices, reduced expenses, or subsidy from other lines of business operate their services while paying marketplace prices for the inputs used in their services, the economically-appropriate result is that other providers who can do so (such as the CABSAT services) should be allowed to do so. In fact, as discussed in SoundExchange's Findings of Fact, ¶¶ 1798-1820, 1871-1880, there are a number of substitutes for Music Choice's PSS, including Stingray, and it is likely that these sources would fill any void created by Music Choice's absence. Trial Ex. 502 at ¶¶ 83, 86 (Wazzan Corr. WRT).

Response to ¶ 504. Music Choice's expert witness, Dr. Crawford, testified that "there's no requirement for the Judges to set rates to guarantee that the PSS survive." 4/25/17 Tr. 862:20-22 (Crawford). Dr. Crawford likewise agreed that there is nothing in Section 801(b)(1)

that guarantees a copyright user a certain level of profitability, or that requires the Judges to set rates to ensure that an inefficiently operated service can remain in business. 4/25/17 Tr. 901:6-18 (Crawford). It would be patently unfair to require copyright owners and artists to continue subsidizing Music Choice with below-market rates to compensate Music Choice for changes in the cable industry. Such a subsidy fosters Music Choice's inefficient operation and risks disrupting the market for residential audio services. Trial Ex. 501 at ¶ 84 (Wazzan Corr. WDT).

Response to ¶ 505. As an overall enterprise, Music Choice is currently profitable. 5/18/17 Tr. 4623:21-23 (Del Beccaro). Music Choice has continued to offer its PSS service for thirty years, as part of its profit-maximizing effort. 5/18/17 Tr. 4624:6-20 (Del Beccaro). Further, as discussed in detail in SoundExchange's Findings of Fact, *see* SE FOF at ¶¶ 2152-2159, the evidence shows that [ ] 5/3/17 Tr. 2328:17-22 (Wazzan) [ ]

Response to ¶ 506. In ¶ 506, Music Choice proposes findings of fact that are duplicative of those in ¶¶ 122-125. To avoid repetition, SoundExchange incorporates its responses to ¶¶ 122-125, *supra*.

Response to ¶ 507. [ ] Music Choice enjoys a distinct and unfair advantage over Stingray, Sirius XM, and potential new entrants to the market – the artificially low rates. Trial Ex. 502 at ¶ 81 n.112 (Wazzan Corr. WRT) (noting that Music Choice internal documents [

[]). As set out in further detail in SoundExchange's Findings of Fact, SE FOF at ¶¶ 2146-2151, [.] *See* 5/18/17 Tr. 4532:25-4533:6 (Del Beccaro) (["]). It would be patently unfair to require copyright owners and artists to continue subsidizing Music Choice with below-market rates to compensate Music Choice for changes in the cable industry. Such a subsidy fosters Music Choice's inefficient operation and risks disrupting the market for residential audio services. Trial Ex. 501 at ¶ 84 (Wazzan Corr. WDT).

2. SoundExchange's Proposed Rates Would Not Be Disruptive To The Industries Involved

Response to ¶ 508. Section 801(b)(1)(D) does not speak to disruption of Music Choice or even the "PSS market." It refers to "disruptive impact on the structure of the industries involved and on generally prevailing industry practices." 17 U.S.C. § 801(b)(1)(D). Those words, enacted by Congress in 1976, must be given their ordinary meaning. For example, an "industry" is

> A group of productive or profit-making enterprises or organizations that have a similar technological structure of production and that produce or supply technically substitutable goods, services or sources of income (the automobile *industry*) (the air transportation *industry*) (the poultry *industry*)

Webster's Third New International Dictionary 1155-56 (1986). [

[redacted] 5/3/17 Tr. 2324:24-2325:8 (Wazzan). Dr. Wazzan indicated that the relevant industry might be as broad as the consumption of music. 5/3/17 Tr. 2471:18-2472:4 (Wazzan).

Music Choice's own economist expert agreed that the industry involved is at least as broad as the cable radio industry. 4/25/17 Tr. 902:4-903:1 (Crawford). The two halves of that industry – the PSS and the CABSAT services – offer functionally equivalent services and compete against each other. SE FOF at § XIII.B.2.ii-iv, .vi. And [redacted] 5/18/17 Tr. 4532:25-4533:6 (Del Beccaro) (identifying Stingray as competitor). Finally, Stingray has already successfully replaced Music Choice on the network of one major cable operator – AT&T. 5/18/17 Tr. 4641:25-4642:23 (Del Beccaro) (agreeing that Music Choice faces competition from Stingray, Stingray tries to undercut Music Choice on price; Music Choice lost AT&T to Stingray, and Stingray is trying to replace Music Choice with other cable carriers).

As discussed in detail in SoundExchange's Proposed Findings of Fact, *see* SE FOF at ¶¶ 2152-2159, the evidence shows that [redacted] 5/3/17 Tr. 2328:17-22 (Wazzan) [redacted] According to Music Choice's forecasts that provided the basis for Dr. Crawford's and Dr. Wazzan's calculations, Music Choice would be

profitable as an enterprise at CABSAT rates in 2018 and for the remainder of the coming rate period. SE FOF at ¶ 2153.

Even if it were true that SoundExchange's proposed rates would drive Music Choice from the market – and there is no reason to believe that is true – that would not have much of an effect on the cable radio industry, and even less on some broader digital music services industry. SE FOF § XIII.E.5.ii. At any rate, as Dr. Crawford testified, "there's no requirement for the Judges to set rates to guarantee that the PSS survive." 4/25/17 Tr. 862:20-22 (Crawford).

Response to ¶ 509. To avoid repetition, SoundExchange incorporates its response to ¶ 508, *supra*.

3. Below-Market Rates For PSS Disrupt Other Sound Recording Licensing Markets

Response to ¶ 510. The fact that revenues from the PSS performance license currently makes up only a small percentage of the record labels' revenues is not a sufficient reason to keep the current below-market rates. Music Choice has recognized in internal documents the incredible deal it is getting on the labels' and artists' creative works: [ ] Trial Ex. 418 at MC0002939. If the PSS were paying higher royalties, the record companies and artists would be induced to create more recordings, this maximizing the availability of works to the public.

In addition, as Dr. Wazzan explained, if it really were the case that the royalties paid by Music Choice ([ ] in 2015) were too little to matter, and that its royalties should

therefore be reduced (making its royalties even less significant), that logic would eventually lead to the conclusion that only the handful of statutory licensees paying more statutory royalties than Music Choice should pay royalties, and everyone else should have their statutory royalties reduced to zero. That is not consistent with how markets work or how the Judges have described the Section 801(b)(1) objectives. Trial Ex. 502 at ¶ 81 (Wazzan Corr. WRT).

Response to ¶ 511. It is not necessary for the Judges to adjust SoundExchange's benchmark rate based on this factor. However, if the Judges adopt Music Choice's rate proposal, push forward the current statutory rate, or adopt a similarly low rate, then an upward adjustment would be necessary to minimize the disruptive impact in the market for residential cable audio services.

XIII. WEBCASTING

Response to ¶ 512. Music Choice mischaracterizes SoundExchange's proposal. Under SoundExchange's proposal, the webcasting per-performance royalty would apply only to transmissions in the nature of webcasting, not to "all licensed transmissions . . . as part of a PSS." SoundExchange Amended Proposed Rates and Terms at App. A § 382.11(a)(2) (filed June 14, 2017). For the reasons set out in detail in SoundExchange's Proposed Findings of Fact and Conclusions of Law, the Judges should require a PSS to pay webcasting rates for its webcasting activities. *See* SE FOF at § XIII.C.

A. SoundExchange's Webcasting Proposal Is Based On The Need To Value A Part of Music Choice's Business That Has Recently Become Economically Significant

Response to ¶ 513. Contrary to Music Choice's assertion, in its Proposed Findings of Fact and Conclusions of Law, SoundExchange explained that *Section 114 itself* provides the authority for the Judges to require the PSS to pay for its webcasting activities. *See* SE COL at

¶ 40 (pp.806-07). The Judges were directed by Congress "to determine reasonable rates and terms of royalty payments for subscription transmissions" by a PSS. 17 U.S.C. § 114(f)(1)(A). In doing so, the Judges are to "distinguish among the different types of digital audio transmission services then in operation." 17 U.S.C. § 114(f)(1)(A). The Judges have also made plain that when setting rates under Section 801(b)(1), they seek "to unambiguously relate the [royalty] fee charged for a service . . . to the value of the sound recording performance rights covered by the statutory license." *SDARS II*, 78 FR at 23072. Here, an Internet-based PSS distributed from a website or to mobile apps over the Internet is sufficiently different from the core PSS television-based service that the Judges must consider whether the value of the sound recording usage involved is sufficiently reflected in a rate set with a television-based service in mind, [ ] SE FOF at ¶¶ 2003-2010.

SoundExchange's proposal to set a rate for webcasting by a PSS is complementary with its proposed CABSAT benchmark for the television-based services provided by a PSS. The PSS television based services are functionally equivalent to the CABSAT services, making the CABSAT benchmark the best available benchmark for valuing the use of sound recordings in the PSS television-based services. SE FOF at § XIII.B.2. Because the CABSAT services separately pay for their webcasting at the statutory webcasting rates, asking the PSS to do the same is natural if the Judges rely on the CABSAT benchmark. SE COL at ¶¶ 41-42 (pp. 807-08). However, if the Judges use some other methodology to determine a market royalty rate for the PSS, and that methodology does not clearly incorporate the value of the PSS webcasting, then Section 114(f)(1)(A) still requires the Judges to set a rate for the PSS that appropriately reflects the value of their webcasting in accordance with Section 801(b)(1).

The scope of the CABSAT rate category is not specifically a result of SoundExchange's settlements of CABSAT rates. As described in SoundExchange's Findings, in 2005, Sirius XM commenced a proceeding to set a rates for a "new type of service" that was a television-based cable radio service not qualifying a PSS. SE FOF at ¶ 1850. After a determination by the Register that Sirius XM did not qualify as a PSS, the Judges proceeded with the proceeding for which Sirius XM petitioned, and the first CABSAT rates were set in that proceeding. SE FOF at ¶¶ 1851-1852. Thus, the scope of that proceeding was determined by Sirius XM's petition and the Judges' commencing the proceeding. Because the proceeding was a commenced to set rates for the television-based services now referred to as CABSAT services, it would have been inappropriate for the parties to have proposed a webcasting settlement. *See* 17 U.S.C. § 801(b)(7)(A) (addressing settlements among participants in a proceeding of the rates and terms to be determined in the proceeding).

Response to ¶ 514. In paragraph 514, Music Choice proposes findings of fact that are on their face duplicative of those in paragraphs 220-226. To avoid repetition, SoundExchange incorporates its responses to paragraphs 220-226, *supra*.

Response to ¶ 515. CABSAT services are relevant to valuing webcasting only in the sense that the CABSAT benchmark clearly does not cover webcasting due to the scope of the CABSAT proceedings commenced by the Judges. SE COL at ¶¶ 41-42 (pp. 807-08); Response ¶ 513. As described in paragraph 513 *supra*, the larger point is that webcasting is a fast-growing part of Music Choice's business that can no longer be ignored as the Judges seek "to unambiguously relate the [royalty] fee charged for a service . . . to the value of the sound recording performance rights covered by the statutory license." *SDARS II*, 78 FR at 23072.

[ ] Trial Ex. 29 at 13 (Bender WDT); Trial Ex. 48 at 31 n.14 (Bender WRT). In the case of Stingray, the webcasting is bundled with its CABSAT offering for purposes of the consumer offering (obviously not for statutory royalty purposes). Trial Ex. 927; MC FOF at ¶ 545. Regardless what bundles Sirius XM and Stingray offer, Music Choice webcasts, and the statutory royalty rate for PSS should reflect the value of that activity.

Response to ¶ 516. As a benchmark, the webcasting rates are similar to the CABSAT rates. The Part 380 streaming rates are not a *marketplace* benchmark, because they are regulated rates. However, Dr. Wazzan concluded that reproducing the economic analysis from *Web IV* was unwarranted for an ancillary activity of the PSS, and the Part 380 rates were recently determined by the Judges under the willing buyer/willing seller standard and thus purport to be fair market rates. In the absence of any apparent marketplace benchmark for the value of the use of sound recordings ancillary to a PSS, if one accepts that the CABSAT rates in Part 383 provide the best available approximation of a market based royalty for the core PSS television-based service, it follows that the Part 380 rates that would be paid for Internet streaming ancillary to such a service must provide a reasonable approximation of a market royalty for Internet streaming ancillary to the core PSS television-based service. Trial Ex. 501 at ¶ 73 (Wazzan Corr. WDT).

Obviously, benchmarking is only the first step of the analysis under Section 801(b)(1). One must go on to consider whether any deviations from a market rate are necessary to achieve the Section 801(b)(1) objectives. Dr. Wazzan concluded not as part of an integrated analysis of

both the PSS television-based services and webcasting. Trial Ex. 501 at ¶ 75 (Wazzan Corr. WDT) ("the relevant inquiry is whether the target market (PSS) is different from the benchmark market (CABSAT and webcasting) in ways that require an adjustment"). For the reasons set forth in Section XIII.E of SoundExchange's Findings, no adjustment is required.

Response to ¶ 517. To avoid repetition, SoundExchange incorporates its response to paragraph 516, *supra*.

Response to ¶ 518. The opaque statement that "Music Choice's internet transmission of its residential audio channel is fundamentally different from that of subscription webcasters" is conclusory and not explained in Mr. Del Beccaro's testimony. It certainly is not obvious how Music Choice's webcasting is different from Stingray's, since both providers bundle webcasting with a television-based cable radio service. Response ¶ 515.

Response to ¶ 519. Music Choice fails to explain which webcasters it is talking about or why this observation is relevant. It certainly is not obvious how the cost and demand characteristics of Music Choice's webcasting are different from such characteristics of Stingray's webcasting, since both providers bundle webcasting with a television-based cable radio service distributed through MVPDs. Response ¶ 515. [

] 5/10/17 Tr. 3213:3 (Bender). Evidence suggests that the record companies would not license webcasting by a PSS at less than the statutory royalty rate for webcasting. SE FOF at § XIII.B.3.v.

Internet streaming is a growing part of consumers' music enjoyment generally, and a rapidly growing part of Music Choice's business. The cable industry has pushed for a concept

sometimes referred to as "TV everywhere," which allows subscribers to access cable television programming not only in their homes but everywhere. [.] Trial Ex. 55 at 40 (Del Beccaro WDT); 5/18/17 Tr. 4602:14-19 (Del Beccaro); *see also* 5/3/17 Tr. 2316:7-10 (Wazzan) (webcasting . . . appears to be an increasingly important part of Music Choice's business). There is no evidence that in a free market for sound recordings, such use by PSS would go uncompensated.

Response to ¶ 520. To avoid repetition, SoundExchange incorporates its response to paragraphs 516 and 519, *supra*.

B. It Is Irrelevant That Music Choice Has Been Webcasting For A While

Response to ¶ 521. Music Choice claims to have been webcasting since 1996. Trial Ex. 57 at 25 (Del Beccaro WRT). But it has [ ]. 5/18/17 Tr. 4658:16-4659:1 (Del Beccaro); SE FOF at ¶¶ 2007-2010. Because of Music Choice's low level of webcasting five years ago at the time of *SDARS II*, SoundExchange chose not to ask the Judges to seek to value webcasting by a PSS in *SDARS II*. The purpose of this rate proceeding is to set rates for the 2018-2022 period. Such rates must be determined anew for the coming period. SE FOF at § IX.A. Nothing in the Judges' rules of procedure suggests that SoundExchange's rate request in this proceeding must be circumscribed by its rate request in any predecessor proceeding. 37 C.F.R. § 351.4(b)(3).

Response to ¶ 522. SoundExchange agrees that Music Choice is a subscription service within the meaning of 17 U.S.C. § 114(j)(14).

Response to ¶ 523. Music Choice's view on the importance of its webcasting transmissions is irrelevant. Webcasting is becoming an increasingly important part of its business, and that trend seems certain to continue. SE FOF at § XIII.C.1. Accordingly, it is no longer appropriate to ignore such transmissions in setting a statutory royalty rate for PSS. SE FOF at § XIII.C.1; Response ¶ 513.

Response to ¶ 524. It is not necessary to decide in this proceeding when Music Choice commenced webcasting or whether its webcasts qualify as part of its PSS. SE FOF at ¶ 2004.

Response to ¶ 525. This armchair economics, which relies solely on the testimony of a fact witness with no background in economics, does not change the fact that the Judges were directed by Congress "to determine reasonable rates and terms of royalty payments for subscription transmissions" by a PSS. 17 U.S.C. § 114(f)(1)(A). In doing so, the Judges are to "distinguish among the different types of digital audio transmission services then in operation." 17 U.S.C. § 114(f)(1)(A). The Judges have also made plain that when setting rates under Section 801(b)(1), they seek "to unambiguously relate the [royalty] fee charged for a service . . . to the value of the sound recording performance rights covered by the statutory license." *SDARS II*, 78 FR at 23072.

In addition, as an economic matter, Dr. Wazzan concluded that Music Choice's Internet streaming should be valued separately from its television-based service. 5/3/17 Tr. 2316:21 (Wazzan) ("This is purely an economics point."); *see also* Trial Ex. 501 at ¶ 69 (Wazzan Corr. WDT) ("I do not have an opinion on the legal question whether Music Choice's Internet streaming is properly considered part of its PSS"). Specifically, he found that the most reasonable way to value webcasting by a PSS would be to apply to the PSS the same statutory

rates that would apply to ancillary Internet streaming by the CABSAT services. Trial Ex. 501 at ¶ 12 (Wazzan Corr. WDT).

Response to ¶ 526. Mr. Del Beccaro confirmed that its webcasting has [ ] in the past couple of years. 5/18/17 Tr. 4658:24-4659:1 (Del Beccaro); SE FOF at ¶¶ 2007-2010. Now that its webcasts have reached an economically significant level, the Judges do not have the luxury of ignoring them. Response ¶ 513.

C. When SoundExchange Learned Of Music Choice's Webcasts Is Not Relevant To The Task At Hand

Response to ¶ 527. To avoid repetition, SoundExchange incorporates its response to ¶ 521, *supra*.

Response to ¶ 528. When a participant in a rate proceeding before the Judges learned facts is not a relevant constraint on an otherwise permissible rate request, 37 C.F.R. § 351.4(b)(3), or a relevant consideration under 17 U.S.C. §§ 114(f)(1), 801(b)(1). To avoid repetition, SoundExchange incorporates its response to ¶ 521, *supra*.

Response to ¶ 529. To avoid repetition, SoundExchange incorporates its response to ¶ 528, *supra*.

Response to ¶ 530. To avoid repetition, SoundExchange incorporates its response to ¶ 528, *supra*.

Response to ¶ 531. To avoid repetition, SoundExchange incorporates its response to ¶ 528, *supra*.

D. The Judges Should Set Reasonable Rates For PSS That Reflect The Value of Webcasting By A PSS

Response to ¶ 532. SoundExchange agrees that some Internet activities can fall within the scope of a PSS. There is no need to debate that obvious principle of law. The question is

what to do about it. SoundExchange does not believe it is necessary to decide in this proceeding whether or not some or all of Music Choice's webcasts qualify as part of its PSS under the relevant standard, because the purpose of this proceeding is to set rates for the activities that a PSS is permitted to undertake. Trial Ex. 29 at 30 (Bender WDT); Trial Ex. 48 at 30-31 (Bender WRT). Accordingly, SoundExchange believes the Judges should set rates that properly reflect the value of Music Choice's webcasting. *See* Response ¶ 513.

Response to ¶ 533. Music Choice mischaracterizes Mr. Bender's testimony, but SoundExchange does not believe it is necessary to decide in this proceeding whether or not Music Choice's webcasts qualify as part of its PSS. To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

Response to ¶ 534. To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

Response to ¶ 535. Dr. Wazzan specifically disclaimed opining on legal questions concerning the extent to which webcasting can be considered part of a PSS. Trial Ex. 501 at ¶ 69 (Bender Corr. WDT). Instead, he analyzed webcasting by a PSS as an economic matter. Trial Ex. 501 at ¶ 70 (Bender Corr. WDT).

Response to ¶ 536. Mr. Bender, who is not a lawyer, should not be expected to have opined on legal questions, and Music Choice's vague allegations about "misleading claims" are meaningless without any identification the claims to which it is referring to or why it thinks those claims are misleading. To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

E. SoundExchange Does Not Believe It Is Necessary To Decide In This Proceeding Whether Or Not Some Or All Of Music Choice's Webcasts Qualify As Part Of Its PSS

Response to ¶ 537. No response.

Response to ¶ 538. To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

Response to ¶ 539. Mr. Bender *did* conduct an investigation. He testified that he went to the website where Music Choice offers its video services. 5/10/17 Tr. 3306:2-4 (Bender). To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

Response to ¶ 540. To avoid repetition, SoundExchange incorporates its response to ¶ 532, *supra*.

F. Stingray's Internet Transmissions

Response to ¶ 541. In paragraph number 541, Music Choice proposes findings of fact that are duplicative of those in paragraph 513. To avoid repetition, SoundExchange incorporates its response to paragraph 513, *supra*.

Response to ¶ 542. [ ] Trial Ex. 48 at 31 & n.14 (Bender WRT); Trial Ex. 454. [ ]

In early 2017, Stingray notified SoundExchange that it wished to resume webcasting under the statutory license as of January 2017. Trial Ex. 455. [

]

Trial Ex. 48 at 31 & n.14 (Bender WRT).

Response to ¶ 543. To avoid repetition, SoundExchange incorporates its response to paragraph 542, *supra*.

Response to ¶ 544. To avoid repetition, SoundExchange incorporates its response to paragraph 542, *supra*.

Response to ¶ 545. No response.

Response to ¶ 546. This is irrelevant. If Stingray was webcasting without proper license authority, this proceeding is not a proper forum to resolve the matter, since it is a rate-setting proceeding, and Stingray is not a participant. Dr. Wazzan's task was to try to value webcasting by a PSS. Response ¶ 535. Whether or not Stingray was webcasting without proper license authority for a time does not answer that question when Stingray previously was paying webcasting royalties, and now is doing so again. Response ¶ 542.

G. While Broadcasters Generally Track Performances, SoundExchange Has Proposed An Accommodation for Music Choice

Response to ¶ 547. Music Choice claims that it, alone among webcasters (including broadcasters who simulcast), does not have the reporting tools to track individual performances.

Trial Ex. 57 at 22-23 n.4, 31 (Del Beccaro WRT); 5/18/17 Tr. 4605:23-4606:14 (Del Beccaro). The grounds for that assertion are dubious. SE FOF at ¶ 1773. However, as an accommodation to Music Choice, SoundExchange submitted a modified rate request addressing Music Choice's concerns. SE FOF at ¶ 1774.

Response to ¶ 548. To avoid repetition, SoundExchange incorporates its response to ¶ 547, *supra*.

Response to ¶ 549. To avoid repetition, SoundExchange incorporates its response to ¶ 547, *supra*.

XIV. SECTION 112 EPHEMERAL ROYALTIES

Response to ¶ 550. The PSS "must have both the ephemeral copy right as well as the performance right in order to operate their services." Trial Ex. 51 at 10 (Des. WDT of Ford, *Web III*). SoundExchange has designated the prior testimony of Dr. Ford to support its proposal for ephemerals. This is the same testimony that the Judges have relied on in adopting the same proposal in the prior proceeding. There is no basis to reach a different conclusion here.

Dr. Ford concluded in his testimony that is designated in this proceeding that "ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies." Trial Ex. 51 at 9 (Des. WDT of Ford, *Web III*). Historically, in the marketplace agreements between record companies and music services for non-statutory forms of licenses, "it is typical for ephemeral copy rights to be expressly included among the grant of rights provided" to the services. Trial Ex. 51 at 10 (Des. WDT of Ford, *Web III*).

Response to ¶ 551. Music Choice agrees that "the Section 112 ephemeral license fee be included within the performance royalty rate." Music Choice Amended Rates and Terms at 2 (filed February 17, 2017). And it takes no position on SoundExchange's specific proposal.

But the record in this proceeding unanimously supports SoundExchange's proposal of a bundled rate for both the Section 112(e) and 114 rights, 5% of which shall be allocated as the Section 114 performance royalty. SoundExchange's proposal is consistent with marketplace agreements between record companies and music services for non-statutory forms of licenses, under which royalty rates for ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Sections 112 and 114. Trial Ex. 51 at 9-10 (Des. WDT of Ford, *Web III*).

The current 95% / 5% split was the agreement the participants reached – and the Judges approved – in *SDARS II*. *See SDARS II*, 78 FR at 23055-56. Likewise, in *Web IV*, the "Judges accept[ed] SoundExchange's proposal to continue the current bundling of Section 112 and 114 rates." *Web IV*, 81 FR at 26398. As set out more fully in SoundExchange's Findings of Fact, the record in this proceeding provides every reason to follow the same approach here and no reason to deviate from it. *See* SE FOF at ¶¶ 2369-2380.

XV. PSS REGULATIONS

A. Music Choice's Proposed Changes To The Regulations

Response to ¶ 552. No response.

Response to ¶ 553. SoundExchange agrees that the Judges did not explain their rationale for departing from the stipulated language.

Response to ¶ 554. No response.

Response to ¶ 555. SoundExchange agrees that the Judges did not explain their rationale for departing from the stipulated language.

Response to ¶ 556. SoundExchange notes that the stipulation between the parties in *SDARS II* was a stipulation, not a "settlement." *See* Trial Ex. 930; MC FOF at ¶¶ 554-555. That stipulation is irrelevant here because the parties have not reached any comparable agreement here. As discussed in Section XVI.C of its Findings of Fact, SoundExchange proposes no substantive change to the current minimum fee provision, which tracks the minimum fee provision for SDARS and has a basis in the Copyright Act. SE FOF at ¶¶ 85, 2385-2388; SoundExchange Amended Proposed Rates and Terms, App. A at § 382.11(b) (filed June 14, 2017).

Response to ¶ 557. SoundExchange proposes no substantive change to the current minimum fee provision, which tracks the minimum fee provision for SDARS and has a basis in the Copyright Act. SE FOF at ¶¶ 85, 2385-2388. That provision has been in the Judges' regulations for the last five years, and Music Choice has recouped the minimum fee. For example, its 2015 PSS royalty payment was [[redacted]]. Trial Ex. 29 at 16 (Bender WDT). Five percent of that is [[redacted]], which is well in excess of the minimum fee. At the CABSAT rates, Music Choice would recoup the minimum even more quickly.

Response to ¶ 558. SoundExchange agrees that is Music Choice's proposal.

Response to ¶ 559. SoundExchange agrees that the PSS and SDARS regulations generally should be harmonized and appreciates that Music Choice has come to recognize the virtues of harmonization as well. SE FOF at § XIV.A.

However, SoundExchange proposes achieving such harmonization by requiring both SDARS and PSS to pay audit costs in the event an audit reveals an underpayment in excess of 5%. The justification for this proposal is discussed in Section XIV.C.3 of SoundExchange's Findings of Fact. SE FOF at ¶¶ 2258-2272.

Response to ¶ 560. No response.

B. SoundExchange's Proposed Changes To The Regulations

Response to ¶ 561. SoundExchange agrees that the Judges did not explain their rationale for departing from the stipulated minimum fee language.

Music Choice misrepresents SoundExchange's characterization of its rate proposal. SoundExchange was very clear that it proposed "that the regulations currently set forth in 37 C.F.R. Part 382 be restructured, and the PSS and SDARS regulations be harmonized, generally along the lines of the Copyright Royalty Judges' rewrite in *Web IV* of the regulations in Part 380, with certain conforming and editorial changes." SoundExchange Amended Proposed Rates and Terms, App. A at 8 (filed June 14, 2017). Thus, when SoundExchange referred to "conforming and editorial changes," it was clearly referring to changes to the restructured and harmonized regulations mirroring the Web IV regulations. It was not characterizing all its changes as conforming and editorial, since the Judges made a broader range of changes in *Web IV*.

SoundExchange also disputes the characterization of its proposal as "sweeping." As discussed in its Proposed Findings of Fact, SoundExchange adopted the *Web IV* regulations as the starting point for developing its proposed terms, and then incorporated various provisions that are specific to PSS. SE FOF at ¶¶ 2160-2164, 2167; *see also Web IV*, 81 FR at 26316 n.1, 26400 (revisions were intended to "reduc[e] the amount of repetition in the regulations," and

state the regulations in "plain language," and address various drafting issues in the old regulations).

Response to ¶ 562. SoundExchange disputes Music Choice's unsupported assertion that it did not "clearly identify" its proposed changes to the PSS regulations. As stated above, SoundExchange based its regulatory language on the webcasting regulations in Part 380. Response ¶ 561. In addition to explaining all material aspects of its proposed regulations in its written testimony, SoundExchange included drafting notes in its rate proposal explaining the origins and rationale for any material changes from the *Web IV* language in its proposed regulations. SE FOF at ¶ 2164; *see* Trial Ex. 48 at 1-2 (Bender WRT) (describing material differences in SoundExchange's and Services' proposals); SoundExchange's Amended Proposed Rates and Terms (filed June 14, 2017). SoundExchange further explained that, where not otherwise addressed, its proposal urged the Judges to adopt their *Web IV* changes here. SE FOF at ¶ 2175 (citing Bender WDT).

Response to ¶ 563. As discussed in its Proposed Findings of Fact, SoundExchange adopted the *Web IV* regulations as the starting point for developing its proposed terms, and then incorporated various provisions that are specific to PSS and SDARS. SE FOF at ¶¶ 2160-2164, 2167; *see also Web IV*, 81 FR at 26316 n.1, 26400 (revisions were intended to "reduc[e] the amount of repetition in the regulations," and state the regulations in "plain language," and address various drafting issues in the old regulations). SoundExchange disputes the characterization of its proposal as detrimental to Music Choice. With regard to the claim that the proposed revisions would "introduce uncertainty," SoundExchange states that consistency in the regulations across rate categories promotes accuracy and efficient administration and the Judges

should conform the PSS regulations with the *Web IV* regulations, unless there are valid reasons not to do so. Music Choice has not presented valid reasons to diverge from *Web IV* here. SoundExchange also repeats its Response to ¶ 564 *infra*, and incorporates that response herein. *See also* SE FOF at ¶¶ 2160-2167 (discussing value of consistency among regulations).

Response to ¶ 564. This is a highly speculative concern. As Music Choice appears to concede, to the extent that there is any concern that changes in the regulations will lead to disputes among parties, this concern would apply to "[a]ny change[] to the regulations" (including those that Music Choice itself proposes). Other than Mr. Del Beccaro's speculative testimony, Music Choice offers no evidentiary basis to conclude that the changes that SoundExchange proposes would lead to "wasteful" disputes.

In fact, contrary to Music Choice's position, the Judges have emphasized the importance of creating consistency and found that consistency across statutory license types "promote(s) efficiency and minimize(s) costs in administering the licenses." *SDARS II*, 78 FR at 23073-74; *see also SDARS I*, 73 FR at 4098-99; SE COL at ¶¶ 46-47 (p.860). In *Web IV*, the Judges deemed it appropriate to enact changes like those SoundExchange proposes here to the webcasting regulations, 37 C.F.R. § 380.4(c). Accordingly, the Judges should conform the PSS regulations with the *Web IV* regulations, unless there are valid reasons not to do so. Music Choice has not presented valid reasons to diverge from *Web IV* here. *See* SE COL at ¶¶ 45-47 (p.860), SF FOF at ¶¶ 2160-2193. (discussing advantages of increasing consistency in the regulations).

Additionally, Music Choice's supposition is belied by the fact that SoundExchange's proposed changes harmonize the PSS regulations with those governing other statutory license

types. These other statutory license types provide real-world test cases that disproves Music Choice's argument. Specifically, more than 2500 statutory licensees that webcast are already subject to comparable terms. SE FOF at ¶¶ 2172, 2182 (noting that changes to *Web IV* regulations have not caused a groundswell of questions). And, Music Choice itself has adapted to various changes in regulations regarding both the PSS and business establishment service statutory licenses. SE FOF at ¶¶ 2182-2183.

1. The PSS Regulations Have Undergone Numerous Revisions, And Music Choice Presents No Valid Reason Not To Conform the PSS Regulations To Regulations Governing Other Statutory Licensees

Response to ¶ 565. As discussed in ¶¶ 2180-2181 of SoundExchange's Proposed Findings of Fact, Mr. Beccaro's testimony that the PSS regulations have remained unchanged since the *PSS I* CARP proceeding is demonstrably false. SE FOF at ¶¶ 2180-2081, Appendix A (redline of terms following *PSS I* versus current terms).

Response to ¶ 566. SoundExchange repeats its Response to paragraph 565 and incorporates it herein. Additionally, Music Choice misstates Mr. Bender's testimony, in which he agreed with opposing counsel's assertion that PSS regulations have remained "relatively unchanged" (relative to, e.g., the webcasting regulations). 5/10/17 Tr. at 3314:19-25 (Bender) ("Q: And the PSS regulations have remained relatively unchanged during that time period, right? A. Since about 1998.") Mr. Bender's testimony does not support Music Choice's assertion that the PSS regulations have been "substantive unchanged." To the contrary, many of the changes illustrated in Appendix A to SoundExchange's findings are arguably substantive.

Response to ¶ 567. Music Choice provides no legal basis for its premise that the regulations must remain unchanged unless SoundExchange provides "evidence of problems"

with their application. *See generally* SE COL at ¶¶ 45-47 (p.860) (discussing correct legal standard). As a factual matter, Music Choice is wrong as well. For instance, Appendix A to SoundExchange's Proposed Findings of Fact, which shows the numerous changes that Judges have made to the PSS regulations over the years, is itself evidence that they deemed prior versions of these terms in need of clarification and revision. Additionally SoundExchange refers to ¶¶ 2179-2182 of its Proposed Findings of Fact. SE FOF at ¶¶ 2179-2180; *see also* Trial Ex. 48 at 2-4 (Bender WRT) (discussing need for operational efficiency and consistency, based on front line experience with regulations).

Response to ¶ 568. The Judge's determination in *SDARS II* speaks for itself. To the extent that Music Choice suggests that this decision set forth a legal standard requiring SoundExchange to provide "specific evidentiary justification" for any departure from then-existing regulations, the determination does not do so. To the contrary, the Judges' prior opinions have emphasized the importance of consistency of terms across statutory licenses and have required the parties to justify the need for a variance *from the terms applicable to other license types*. *SDARS I*, 73 FR at 4099 (although terms across statutory licenses may vary, the "burden is upon the parties to demonstrate the need for and the benefits of variance"); *SDARS II*, 78 FR at 23073-74 ("the Judges seek, where possible, consistency across licenses to promote efficiency and minimize costs in administering the licenses"); *SDARS I*, 73 FR at 4098-99 ("Consistency promotes efficiency thereby reducing the overall costs associated with the administration of the licenses."); *see also Web III*, 76 FR at 13042; SE COL at ¶¶ 45-47 (p.860).

Response to ¶ 569. SoundExchange refers to Section XIV of its Proposed Findings of Fact, which details the relevant evidence and arguments as to all material license terms and regulatory language.

Response to ¶ 570. Music Choice misstates Mr. Bender's trial testimony, in which he repeatedly noted the operational inefficiencies and difficulties that implementing multiple sets of regulations presents. *See, e.g.*, 5/10/17 Tr. at 3198:8-13; 3317:9-23 (Bender). This testimony conforms with Mr. Bender's written testimony, Trial Ex. 48 at 2-4 (Bender WRT), and with the Judges' position that consistency in the regulations across rate categories promotes accuracy and efficient administration, SE COL at ¶¶ 45-47 (p.860), SE FOF at ¶¶ 2160-2167 (discussing value of consistency among regulations).

Response to ¶ 571. Despite trying to minimize SoundExchange's role as encompassing "only" five different statutory license type and "only" two companies, Music Choice offers no evidence to support its mischaracterization of SoundExchange's administrative burdens as "trivial."

First, SoundExchange actually collects and distributes statutory royalties for nine distinct categories of services: commercial subscription webcasters (37 C.F.R. § 380.10(a)(1)), commercial nonsubscription webcasters (37 C.F.R. § 380.10(a)(1)), noncommercial webcasters (37 C.F.R. § 380.10(a)(2)), noncommercial educational webcasters (37 C.F.R. § 380.20 *et seq*.), public broadcasting (37 C.F.R. § 380.30 *et seq*.), PSS (37 C.F.R. § 382.1 *et seq*.), SDARS (37 C.F.R. § 382.10 *et seq*.), CABSAT (37 C.F.R. § 383.1 *et seq*.), and business establishment services (37 C.F.R. § 384.1 *et seq*.). [ ] 5/10/17 Tr. 3213:3 (Bender). With so many services and so many categories,

trying whenever possible to achieve consistency and efficiency is important to proper administration of the statutory license. SE FOF at ¶¶ 2168-2170.

As the Chief Operating Office of SoundExchange, Mr. Bender oversees the numerous employees that are on the front lines of implementing the regulations governing the various types of services every day. Trial Ex. 48 at 2-4 (Bender WRT). His testimony based on first-hand experience contradicts Music Choice's speculation about the scope of the burden that variance in the regulations imposes on SoundExchange. *See, e.g.*, 5/10/17 Tr. at 3198:8-13; 3317:9-23 (Bender). Additionally, Music Choice has provided no legal basis for its assertion that Mr. Bender is required to "quantify" to burden of the existing regulations on SoundExchange, and it has provided no legal basis for finding that the relative burdens on the parties should be determinative. *Cf. SDARS II*, 78 FR at 23073 (Judges' "mandate . . . is to adopt terms that are practical and efficient."); SE COL at ¶¶ 45-47 (p.860). Music Choice's reference to ASCAP and BMI improperly cites extra-record evidence and is irrelevant.

2. SoundExchange's Proposed Regulations, Which Are Modeled On The *Web IV* Revisions, Promote Consistency and Efficiency

Response to ¶ 572. As previously explained, in the interest of promoting consistency and efficiency, SoundExchange adopted the revised *Web IV* regulations as the starting point for developing its proposed regulations in this proceeding. SE COL at ¶¶ 45-47 (p.860); SE FOF at ¶¶ 2160-2193; Trial Ex. 48 at 2-4 (Bender WRT). Due to the numerous paragraphs in SoundExchange's proposed regulations that have no drafting notes, or notes indicating only conforming changes such as involving the use of defined terms, it is readily apparent that most of the language SoundExchange proposed comes directly from the *Web IV* regulations with no modification or only the most minor modifications.

SoundExchange does not dispute that its proposed revisions would not result in *identical* terms for PSS and webcasters. *See, e.g.*, Trial Ex. 48 at 4 (Bender WRT) (acknowledging that "some inconsistency may be necessary . . . [a]nd other inconsistency must be tolerated, at least for a time"). Complete consistency would be absurd. Music Choice devoted three paragraphs of its findings (MC FOF at ¶¶ 547-549) to arguing that it cannot count performances even for its webcasting service. Plainly Music Choice does not really think that SoundExchange was unprincipled for omitting from the PSS regulations all of the performance-related provisions from the webcasting regulations. The drafting notes that SoundExchange included in its proposed regulations make the proposed deviations from the *Web IV* regulations abundantly clear.

Music Choice is wrong that SoundExchange has "cherry-picked" only those *Web IV* revisions that inure to its benefit. *See, e.g.*, SE FOF at ¶ 2314 (proposing revision to § 382.5(a) "for the sake of consistency" despite the fact that doing so is "somewhat against SoundExchange's interest"). And again, it is readily apparent from the drafting notes or lack thereof that most of SoundExchange's proposed language came directly from the *Web IV* regulations.

To be sure, there are a handful of disputed terms where SoundExchange did not propose following the *Web IV* regulations, including the audit fee shifting provision mentioned by Music Choice. They were all clearly identified and explained, and there is significant evidence in the record concerning each of them.

Response to ¶ 573. SoundExchange's Amended Rate Proposal added to the definition of "Subscriber" the proviso sought by Music Choice. SoundExchange's Amended Proposed Rates

and Terms at 2, 37 CFR § 382.10 (filed June 14, 2017); *see also* 37 C.F.R. 351.4(b)(3) (allowing parties to revise rate proposals "at any time during the proceeding up to, and including, the filing of proposed findings of fact and conclusions of law"). SoundExchange did not originally appreciate that the proviso would be relevant to Music Choice and clearly identified its omission. SoundExchange Proposed Rates and Terms App. A at § 382.10 (filed October 19, 2016). Once SoundExchange appreciated that it was important to Music Choice, SoundExchange proposed adding it.

Response to ¶ 574. SoundExchange repeats its Response to paragraph 573 *supra*, and incorporates that response herein.

3. SoundExchange's Proposed Changes to Confidentiality Terms Should Be Adopted

Response to ¶ 575. Appendix A to SoundExchange's Findings demonstrates that Music Choice is simply wrong when it asserts that the PSS confidentiality regulations "have been in effect for decades." SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed confidentiality terms. Additionally, SoundExchange repeats its Responses to ¶¶ 561 and 565-567 *supra*, and incorporates those responses herein.

Response to ¶ 576. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. As discussed therein, SoundExchange's proposed confidentiality provisions track the provisions adopted by the Judges in *Web IV* (37 C.F.R. § 380.5) in all material respects. SoundExchange Amended Proposed Rates and Terms at App. A § 382.5 (filed June 14, 2017); Trial Ex. 29 at 38 (Bender WDT); *see also* SE COL at ¶¶ 45-47 (p.860) and SE FOF at ¶¶ 2160-2193 (discussing goal of

consistency). SoundExchange believes that the current reference in the PSS regulations to a confidentiality agreement is unnecessary and confusing. SE FOF at ¶ 2313.

Response to ¶ 577. SoundExchange repeats its Responses to paragraphs 562, 564 and 576 *supra*, and incorporates those responses herein.

Response to ¶ 578. The "entirely new" language referenced in this paragraph merely tracks the regulations adopted by the Judges in *Web IV*. *Compare* SoundExchange Amended Proposed Rates and Terms, App. A at § 382.5(a) (filed June 14, 2017) *with* 37 C.F.R. § 380.5(a). On the merits, SoundExchange understands the Judges' new *Web IV* language to assign to someone claiming that information is confidential the burden of proving that. It seems like that should be more comforting to Music Choice than the absence of such language.

Response to ¶ 579. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. Music Choice has provided no evidentiary basis for its claim that that SoundExchange's proposal would be "extremely damaging." As discussed in Section XIV.D.1 of SoundExchange's Proposed Findings of Fact, this claim is far-fetched. SE FOF at ¶¶ 2308-2315.

The only confidential information SoundExchange receives through PSS royalty reporting are statements of account, and all that appears therein that is confidential is top-line revenue (and of course the result of multiplying that number by the statutory percentage rate). SE FOF at ¶¶ 2310, 2315. The statement of account includes other information that plainly is not confidential, such as the name and address of the licensee. 37 C.F.R. § 382.4(c). Surely the current regulations are not intended to prevent SoundExchange from uttering Music Choice's name or address publicly. SoundExchange understands the language opposed by Music Choice

merely to assign the burden of proving that information such as Music Choice's name and address is nonconfidential to someone making that assertion. It appears that what Music Choice is really concerned about is keeping its revenue numbers away from record companies. However, current Section 382.5(b)(3) permits disclosure of Music Choice's statements of account to record companies whose works have been used, subject to an appropriate confidentiality agreement.

Response to ¶ 580. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. SoundExchange also repeats it Response to paragraph 579, and incorporates that response herein.

Response to ¶ 581. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. As discussed therein, SoundExchange's proposed confidentiality provisions track the provisions adopted by the Judges in *Web IV* (37 C.F.R. § 380.5) in all material respects. SoundExchange Amended Proposed Rates and Terms at App. A § 382.5 (filed June 14, 2017); Trial Ex. 29 at 38 (Bender WDT); *see also* SE COL at ¶¶ 45-47 (p.860) and SE FOF at ¶¶ 2160-2193 (discussing goal of consistency).

Response to ¶ 582. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. Music Choice is incorrect that "the analogous proposed subsection contains no mention of any confidentiality agreement." Consistent with the *Web IV* regulations, access to confidential information under SoundExchange's proposed regulations would be conditioned upon having a confidentiality agreement in place in the case of "employees, agents, consultants, and independent contractors of

the Collective" and "Copyright Owners and Performers, including their designated agents." SoundExchange Amended Proposed Rates and Terms at App. A § 382.5(c)(1), (4) (filed June 14, 2017). SoundExchange does not propose that an auditor or outside counsel be required to sign a nondisclosure agreement. That is largely consistent with the Judges' decision in *Web IV*, although SoundExchange proposes broadening the purposes for which outside counsel can have access without a nondisclosure agreement, since those purposes are currently limited to royalty verification, and SoundExchange may need to seek legal advice concerning other matters. SE FOF at ¶¶ 2307-2311.

Response to ¶ 583. SoundExchange repeats it Response to paragraph 582, and incorporates that response herein.

Response to ¶ 584. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. Specifically, ¶¶ 2307-2311 address SoundExchange's proposal regarding disclosure of confidential information to outside counsel. As discussed therein, the Judges in *Web IV* determined that SoundExchange should be permitted to disclose statements of account to its outside counsel without requiring its counsel to sign a confidentiality agreement, but only for audit purposes. Recognizing that attorneys are subject to professional obligations of confidentiality which obviate the need for non-disclosure agreements, the Judges in *Web IV* revised the regulations to permit disclosure to outside counsel in the context of audit. SoundExchange's proposal is not a "completely new" expansion of the scope of disclosure, but a logical extension of the Judges' reasoning. SE FOF at ¶ 2307 (proposal is intended to correct an apparent drafting error).

Response to ¶ 585. No response.

Response to ¶ 586. No response.

Response to ¶ 587. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. SoundExchange also repeats it Responses to paragraphs 579, 582 and 584, and incorporates those responses herein. Plainly SoundExchange may need legal advice concerning a range of matters in carrying out its royalty collection and distribution functions. Music Choice has provided no evidentiary basis for its claim that it would be "significantly prejudiced" by SoundExchange's proposal.

Response to ¶ 588. SoundExchange refers to its Responses to paragraphs 582, 584 and 587 *supra*, and incorporates those responses herein.

Response to ¶ 589. SoundExchange refers to Section XIV.D of its Proposed Findings of Fact, in which it discusses its proposed revisions to the confidentiality terms. Specifically, paragraphs 2307-2311 address SoundExchange's proposal regarding disclosure of confidential information to outside counsel. To the extent that Music Choice advances Mr. Del Beccaro's lay opinion regarding legal ethics, this opinion contradicts the Judges' finding in *Web IV* and the evidence discussed in SoundExchange's Proposed Findings of Fact. SE FOF at ¶¶ 2307-2311; *Web IV*, 81 FR at 26400-01; 5/10/17 Tr. 3322:17-25 (Bender) (stating that SoundExchange understands it outside counsel's obligation of confidentiality to apply to both parties). Music Choice offers no valid support for its assertion, and does not address the multiple safeguards that discussed in SoundExchange's Findings of Fact. SE FOF at ¶¶ 2307-2315. It also is not apparent how a written confidentiality agreement between SoundExchange and its outside counsel would be different from counsel's professional obligations in the respects identified by Music Choice.

Response to ¶ 590. SoundExchange repeats its Response to paragraph 589 *supra*, and incorporates that response herein. Moreover, Music Choice does provide any reason to believe its purely hypothetical suggestion that SoundExchange's outside counsel might disregard their obligation to protect confidential information. Music Choice's unsupported assertion that the existing revision imposes "no appreciable burden" assumes a legal standard that is at odds with the Judges' past determinations, *see* SE COL at ¶¶ 45-47 (p.860), and ignores the substantial evidence that SoundExchange has presented regarding the need for consistency and efficiency in implementing the regulations governing the statutory license, *see* SE FOF at ¶¶ 2160-2193.

4. SoundExchange's Proposed Changes to Audit-Related Terms Should Be Adopted.

Response to ¶ 591. SoundExchange refers to Section XIV.C of its Proposed Findings of Fact, in which it discusses its proposed revisions to the audit-related terms. As discussed therein, SoundExchange disputes Music Choice's unsupported claim that the changes it proposed would be "extremely detrimental" to Music Choice. *See* SE FOF at ¶¶ 2209-2305.

Response to ¶ 592. No response.

Response to ¶ 593. SoundExchange refers to Section XIV.C of its Proposed Findings of Fact. Paragraph 2297 addresses SoundExchange's proposed changes regarding notices of intent to audit. *See also* SE FOF at ¶¶ 2299-2305 (addressing SoundExchange's proposal with regard to "defensive audits"). SoundExchange's proposal that "the verifying entity must file" a notice of intent to audit merely tracks the regulations adopted by the Judges in *Web IV*. *Compare* SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(c) (filed June 14, 2017) *with* 37 C.F.R. § 380.6(c). Certainly, the Judges are in the best position to interpret the meaning of their revision to the notice of intent requirement, including how it would apply in Music

Choice's hypothetical. Based on the face of the regulations as adopted in *Web IV*, however, § 380.6(c) ("Notice of intent to audit") appears to apply to audits *of* the Collective or a licensee—not audits that a licensee conducts of itself. Assuming that § 380.6 would not require a licensee to file a notice of intent to conduct its own audit, SoundExchange does not propose imposing such a requirement on the PSS. Moreover, consistency in the regulations across rate categories promotes accuracy and efficient administration and the Judges should conform the PSS regulations with the *Web IV* regulations, unless there are valid reasons not to do so. SE COL at ¶¶ 45-47 (p.860); SF FOF at ¶¶ 2160-2193. Music Choice has not presented valid reasons to diverge from *Web IV* here. Its hyperbolic characterization of a notice of intent requirement as a "major substantial change" is unwarranted; it does not provide any evidentiary support for its claim that such a requirement would impose a substantial burden on the PSS.

Response to ¶ 594. SoundExchange refers to Section XIV.C of its Proposed Findings of Fact. Specifically paragraphs 2299-2305 address SoundExchange's proposal with regard to "defensive audits." SoundExchange's proposal on this point merely tracks the regulations adopted by the Judges in *Web IV*. *Compare* SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(d) (filed June 14, 2017) *with* 37 C.F.R. § 380.6(d). Music Choice seems to wish to conduct a "defensive audit" of arbitrarily narrow scope and thereby cut off SoundExchange's audit right entirely. That is not reasonable. SE FOF at ¶¶ 2300-2304.

Response to ¶ 595. SoundExchange refers to its Response to paragraph 595 *supra*, and incorporates that response herein.

Response to ¶ 596. SoundExchange's proposed terms in the *SDARS II* proceeding are irrelevant here. Since that determination, the Judges in *Web IV* revised the webcasting

regulations. SoundExchange's proposed revisions to § 382.6(d) track the regulations adopted by the Judges in *Web IV*. *Compare* SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(d) (filed June 14, 2017) *with* 37 C.F.R. § 380.6(d). Music Choice seems to wish to conduct a "defensive audit" of arbitrarily narrow scope and thereby cut off SoundExchange's audit right entirely. That is not reasonable. SE FOF at ¶¶ 2300-2304.

Response to ¶ 597. SoundExchange disputes the assertion that its proposed revision to § 382.6(d) would serve "only" as an opportunity for dispute. The numerous justifications for SoundExchange's terms proposals are detailed in Section XIV.C of its Proposed Findings of Fact, and summarized *supra*, including in Response to paragraph 594. *See, e.g.*, SE FOF at ¶¶ 2299-2305. As the Judges have explained:

> Audits serve a critical function in the context of a statutory license where a copyright owner cannot easily terminate access to its works. Therefore, it is important that there be a high level of confidence in the results of such audits. It is equally important that the audit be as thorough and accurate as possible.

SDARS I, 73 FR at 4101.

Music Choice's proposal stands in stark contrast to that finding by the Judges. It asks the Judges to permit it to conduct a "defensive audit" of whatever scope it chooses, and no matter how cramped that scope might be, Music Choice's audit should preclude an audit of broader scope by SoundExchange. Allowing licensees to manipulate the audit process to shield the fact of their underpayments from the rightful recipients of statutory royalties does not provide the "high level of confidence" the Judges have said is required. SE FOF at ¶¶ 2300-2305.

Response to ¶ 598. The "entirely new" language referenced in this paragraph merely tracks the regulations adopted by the Judges in *Web IV*. *Compare* SoundExchange Amended

Proposed Rates and Terms, App. A at § 382.6(d) (filed June 14, 2017) *with* 37 C.F.R. § 380.6(d). Consistency in the regulations across rate categories promotes accuracy and efficient administration and the Judges should conform the PSS regulations with the *Web IV* regulations, unless there are valid reasons not to do so. SE COL at ¶¶ 45-47 (p.860); SF FOF at ¶¶ 2160-2193. Music Choice's hypothetical concern about defensive audits that have already been performed is not supported by any legal authority and does not present valid reasons to diverge from *Web IV* here.

Response to ¶ 599. SoundExchange refers to Section XIV.C of its Proposed Findings of Fact. Specifically, paragraphs 2301-2302 describe the relevant changes that have occurred in the 20 years since the first CARP proceeding that justify changes in the treatment of "defensive audits." Among other things, SoundExchange did not exist at the time of that determination. SE FOF at ¶ 2301. Music Choice does not have a "right" to maintaining the status quo, especially when existing regulations have proven plainly insufficient to deal with underpayments by many licensees. SE FOF at ¶ 2303; *see also* Response to ¶¶ 565, 567-68 *supra*. Instead, SoundExchange's proposed change would make the PSS terms consistent with the audit regulations for other license types. That would provide a higher level of confidence in the results of audits, as the Judges have said is important. *SDARS I,* 73 FR at 4101. Consistency in the regulations across rate categories also promotes accuracy and efficient administration and the Judges should conform the PSS regulations with the *Web IV* regulations, unless there are valid reasons not to do so. SE COL at ¶¶ 45-47 (p.860); SF FOF at ¶¶ 2160-2193.

Response to ¶ 600. Music Choice's reference to "repetitive" audits is misplaced in the current regime. It may have been a real concern under the *PSS I* regulations. SE FOF at ¶ 2301.

However, under SoundExchange's proposal, as under the *Web IV* regulations, Music Choice could only be audited by SoundExchange, not by thousands of copyright owners. SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(a) (filed June 14, 2017). Additionally, "[a] verifying entity may not audit records for any calendar year more than once." SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(b) (filed June 14, 2017). SoundExchange repeats its Response to paragraph 599 *supra*, and incorporates that response herein.

Response to ¶ 601. No response.

Response to ¶ 602. Music Choice's voluntary payment of interest on a few occasions is irrelevant to the general rules the Judges should adopt regarding audits of PSS, as is Mr. Del Beccaro's speculation about when late payments would have been discovered in the absence of Music Choice's audits. Contrary to Music Choice's statement, SoundExchange has explained the rationale for its proposed revisions to the audit-related terms at length in Section XIV.C of its Proposed Findings of Fact, as well as in each of its Responses to paragraphs 591-601 *supra.*

XVI. GEO'S PROPOSAL

Response to ¶ 603. No response.

Response to ¶ 604. No response.

Response to ¶ 605. No response.

Response to ¶ 606. No response.

Response to ¶ 607. No response.

Response to ¶ 608. No response.

Respectfully submitted,

By /s/ Jared O. Freedman

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July 7, 2017

CERTIFICATE OF SERVICE

I, Jared O. Freedman, do hereby certify that, on July 7, 2017, copies of the foregoing are being filed via eCRB, sent via electronic mail to all parties at the email addresses listed below, and sent in hard copy by first class mail.

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Dated: July 7, 2017

/s/ Jared O. Freedman
_____
Jared O. Freedman

Certificate of Service

I hereby certify that on Friday, July 07, 2017 I provided a true and correct copy of the Proposed Findings of Fact to the following:

Music Choice, represented by Paul M Fakler served via Electronic Service at paul.fakler@arentfox.com

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

Signed: /s/ Jared O. Freedman