PROPOSED PUBLIC VERSION

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

In the Matter of: **Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)**	**Docket No. 14-CRB-0001-WR (2016-2020)**

IHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S SUPPLEMENTAL REHEARING PETITION

SoundExchange again has failed to meet the standard for rehearing. Rehearing is not, as SoundExchange appears to believe, a negotiation with the Judges. *E.g.*, Supp. Pet. at 4 ("if the Judges still wish to revise these provisions, the Judges should adopt SoundExchange's proposed language"). The Services did not file rehearing petitions on issues they lost because the statute limits rehearing to "exceptional cases." 17 U.S.C. § 803(c)(2)(A). If SoundExchange's grab bag of quibbles were treated as an exceptional case, the Judges should expect many more rehearing petitions in future proceedings.

All of SoundExchange's arguments fail on the merits. We respond to two:

I. The Judges modified § 380.6(d) to require underpayments to be "agreed upon" and to be remitted on "mutually agreed terms." These modifications are reasonable and supported by substantial record evidence, and therefore not clear error. Permitting licensees to dispute the results of an audit is consistent with current regulations, which require SoundExchange's auditor to consult with the audited licensee "to remedy any factual errors and clarify any issues relating to the audit." 37 C.F.R. § 380.6(f). The requirement that underpayments be "agreed-upon" is also consistent with the iHeartMedia-Warner agreement,

which [redacted]. SX Ex. 33, at 18. SoundExchange's own auditing expert, Professor Lys, testified that it "would be unreasonable" to say that "whatever the auditor determines is the final word." Hearing Tr. 1507:3–1508:5.

Furthermore, requiring that agreed-upon underpayments be remitted "according to mutually agreed terms" was not clear error. Authorizing the parties to agree on terms for remitting underpayments which "may, but need not, include installment payments with interest" is consistent with the statutory standard (willing buyer–willing seller) and is supported by similar terms included in marketplace agreements. For example, the agreements that SoundExchange moved into the record provide for audit terms, such as the identity of the auditor and the scope of the audit, to be "mutually agreed" upon. *See* [redacted]. It was therefore not clear error for the Judges to require "mutually agreed terms" for remitting underpayments in the context of an audit.

II. SoundExchange also seeks (at 3) rehearing of the Judges' decision regarding the disclosure of confidential information. The regulations the Judges adopted are reasonable and supported by substantial record evidence, and therefore not clear error.[1] *First*, requiring confidentiality agreements to be in writing is supported by multiple licensing agreements in the record, which require written agreements in connection with handling confidential information. *See, e.g.*, [redacted]

[1] SoundExchange is mistaken in asserting that evidence of "problems or controversy" is needed to modify the Judges' regulations. *See* Supp. Pet. at 3. "An agency need not suffer the flood before building the levee." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009).

[redacted].[2] *Second,* limiting disclosure of confidential information to those performing activities "related directly" to the collection and distribution of royalty payments is also consistent with the iHeartMedia-Warner agreement, which [redacted]. *See* SX Ex. 33, at 30 (iHeartMedia-Warner agreement).

Respectfully submitted,

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[2] SoundExchange points to no evidence to support its claim (at 3) that using written agreements would "increase administrative burdens."