

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

DETERMINATION OF ROYALTY RATES AND TERMS FOR PERFORMANCE OR DISPLAY OF NONDRAMATIC MUSICAL WORKS AND PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS BY PUBLIC BROADCASTING ENTITIES (PB III)

**Docket No. 16-CRB-0002 PBR
(2018-2022)**

**NOTICE OF PARTICIPANTS, COMMENCEMENT OF VOLUNTARY
NEGOTIATION PERIOD, AND CASE SCHEDULING ORDER**

By notice published in the *Federal Register*, the Copyright Royalty Judges (Judges) solicited Petitions to Participate in this proceeding to determine terms and rates for, *inter alia*, the performance or display of nondramatic musical works and pictorial, graphic, and sculptural works by public broadcasting entities.¹ 81 Fed. Reg. 256 (Jan. 5, 2016). Section 118 of the Copyright Act (Act) encourages voluntary negotiation of license agreements between copyright owners and public broadcasting entities. *See* 17 U.S.C. § 118(b).

If the parties in interest do not negotiate license agreements, then the Judges shall conduct a proceeding to establish royalty rates and terms in accordance with chapter 8 of the Act and regulations adopted by the Judges and codified in Chapter III of title 37 of the Code of Federal Regulations (Rules). In previous rate periods for public broadcasting entity licensing, the parties reached agreement, obviating further proceedings. The Judges provide guidance in this Notice and Order in the event the parties require further proceedings for the rate period at issue. This scheduling order details the Judges' expectations regarding compliance with the Act and the Rules in the present rate proceeding. Specific schedule dates are set forth on Exhibit A to this Notice and Order.

Participation in the Proceeding

Participation in this proceeding is limited in the first instance to parties in interest who filed a timely Petition to Participate. Attached to this Notice and Order as "Exhibit B" is a list of participants that filed timely Petitions to Participate and paid the applicable filing fee.²

¹ A "public broadcasting entity" in the Act is a "noncommercial educational broadcast station" as defined in 47 U.S.C. § 397 and any nonprofit institution or organization engaged in "production of a transmission program, reproduction ..., or distribution ... solely for the purpose of transmissions [by public broadcasting entities]." 17 U.S.C. § 118 (c).

² The Judges have not determined whether every responding participant listed on Exhibit B has a "significant interest" in this proceeding entitling it to continued and full participation in the proceeding. Nonetheless, a putative

Voluntary Negotiation Period

All participants shall engage directly or by counsel in good faith settlement negotiations aimed at resolving controversies regarding the terms and rates for payment of royalty fees for performance or display of the covered copyrighted works during the years at issue in this proceeding. The Voluntary Negotiation Period (VNP) commences on the date of this Notice and Order. In addition to all aspects of rates and terms for payment, the negotiations shall address expressly issues relating to categories of licensees, if any, the rate structure, and terms of recordkeeping and reporting.

Five calendar days after the end of the Voluntary Negotiation Period, the participants shall file a Notice of Settlement only if some or all participants have agreed on the applicable royalty rates and terms.³ The Judges will issue an Order for Further Proceedings for all participants not reporting a settlement. Nothing in this Notice and Order or the Order for Further Proceedings limits participants' ability to continue negotiations and reach a settlement of their differences at any time during the course of the proceeding.

Prehearing Procedures

Chapter 8 of the Act prescribes procedural steps and timelines the Judges must follow in every rate proceeding. Chapter 8 also authorizes the Judges to make "any necessary procedural or evidentiary ruling[] in any proceeding" *See* 17 U.S.C. § 801(c). The Judges' experience in both rate and distribution proceedings under this iteration of chapter 8⁴ demonstrates the benefits of a procedural order to augment the current statutory provisions. To encourage meaningful settlement negotiations and to streamline the process of participants' identification of issues, the Judges include in the schedule for this proceeding an initial disclosure and discovery period after the Voluntary Negotiation Period and *before* the deadline to file Written Direct Statements.

During the preliminary disclosure and discovery period, each participant shall provide to all other participants a brief statement of proposed rates and terms. Each participant shall disclose by name, title, and contact information, all fact witnesses upon whom they intend to rely to supply evidence of the business bases of their respective rate proposals. *Cf.* Fed. R. Civ. P 26(a)(1)(A)(i) & (ii). Also during preliminary disclosure and discovery, each participant shall disclose all testifying expert witnesses, providing name, qualifications, contact information, and the substance of each witness's anticipated testimony.

participant must participate fully in the proceeding, unless the participant withdraws its Petition, joins with other participants and shares joint representation, or is the subject of a dismissal order.

³ Participants may notify the Judges of a settlement "in principle," but all participants shall follow the case schedule until all terms of their settlement are documented and presented for publication, comment, and approval.

⁴ Congress overhauled royalty rate-setting and distribution procedures with enactment of the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419 118 Stat, 2341 (November 30, 2004).

On or before the date noted on Exhibit A to this Notice and Order (after concluding preliminary disclosure and discovery) each participant shall file its Written Direct Statement and deliver a copy to *all* other remaining participants, whether or not the participant believes it has a controversy with another given participant. The Judges anticipate that the requirement for preliminary disclosure and the opportunity for discovery before the Written Direct Statements will limit the participants' need, if any, for additional discovery. Further, the Judges anticipate that the opportunity for preliminary discovery should obviate the need for filing Amended Written Direct Statements. Consequently, the Judges shall not schedule a deadline for filing of Amended Written Direct Statements unless a participant files a motion for leave to file stating a need therefor that satisfies the requirements of 37 C.F.R. § 351.4(c).

In the interest of efficiency and procedural continuity, the Judges shall not order the conventional division of the hearing into separate direct and rebuttal hearings. Rather, rebuttal proceedings shall follow the direct proceedings immediately within the same scheduled hearing dates.⁵ Participants shall file Written Rebuttal Statements based upon the participants' stated positions in filings, their mutual discovery responses, and the mandatory settlement conference. *See* 17 U.S.C. § 803(b)(6)(C)(x). The Judges *may* permit additional discovery after the participants file Written Rebuttal Statements, but will do so only on motion of a participant showing a need and purpose for, and the limits of, additional discovery. *See* 17 U.S.C. § 803(b)(6)(C)(iv).

Approximately 30 days prior to the scheduled hearing, the Judges will facilitate a prehearing conference or telephone conference, to discuss, *inter alia*, issues remaining for evidentiary hearing, order of presentation, exhibit numbering and presentation, scheduling concerns, disabilities to accommodate, or any other matter that might affect efficient conduct of the hearing. At the prehearing conference, the Judges shall instruct the participants regarding presentation and formatting of electronic documents. Participants in the prehearing conference shall have knowledge of the issues and of the availability of all counsel and witnesses.

No later than 14 calendar days prior to the commencement of the hearing, all participants shall deliver to all other participants a list of witnesses the participant intends to call and a list of exhibits the participant intends to offer into evidence. The witness list shall include each witness's name, contact information, a brief statement of the substance of the witness's testimony, and an estimate of the time required for direct examination of the witness.

No later than ten calendar days prior to commencement of the hearing, the participants shall confer and eliminate duplicate exhibits. The final exhibit list for the hearing shall include all proposed exhibits and no proposed exhibit more than once. The participants shall prepare a joint exhibit list, which shall include the exhibit's unique number, the title or a description of the exhibit, and whether the exhibit or any part of it is "restricted" under the terms of any protective

⁵ The Act does not mandate separation of the hearing into direct and rebuttal phases. The Rules provide for "rebuttal proceedings" to occur "upon conclusion of the hearing of the direct case" 37 C.F.R. § 351.11. Rule 351.11 provides that "[f]urther proceedings at the rebuttal stage shall follow the schedule ordered by the ... Judges." *Id.* Neither the Act nor the Rules mention a rebuttal *hearing*. The practice of two separate hearings, as well as a separate date for closing arguments, appears to have developed as a convention. The Judges' have found from their experience with this convention that it is inefficient and unhelpful in reaching a determination.

order. Participants shall register on the exhibit list objections, if any, to proposed exhibits, stating the basis of each objection.⁶ Regardless of the exhibit designation, any participant may offer into evidence any exhibit on the final exhibit list *unless* any participant objects to the admissibility of the exhibit. The Judges shall deem all objections to proposed exhibits NOT noted on the exhibit list as waived, *except* objections to relevance. No participant may utilize any unlisted exhibit, *except* as required for impeachment purposes, as rebuttal to unanticipated evidence, or to refresh recollection. The Judges shall determine admissibility of these exceptional exhibits on a case-by-case basis.

No later than seven calendar days prior to commencement of the hearing, the participants shall confer and prepare a joint witness list. The joint witness list shall include estimated time for direct, cross, and re-direct examination of each witness. The Judges may exercise their discretion to permit re-cross and any further examination of each witness.

No later than five calendar days prior to commencement of the hearing, the participants shall deliver to the Judges and to (or as directed by) all other participants copies of all exhibits listed on the final exhibit list tabbed in the same order and with the same number as on the exhibit list. The spines of exhibit binders shall be labeled in a consistent format and shall include the name of the participant that prepared it, the range of exhibit numbers in it, the volume number, the case caption, and the docket number. In the case of exhibits originally listed by more than one participant, only the participant with the lowest denomination exhibit numbers shall include the exhibit in its binder(s).

Evidentiary Hearing

The first day of the hearing shall be devoted, in whole or in part, to the participants' opening statements. Before completion of the hearing, the participants shall present all evidence relating to proposed regulations. The Judges shall confer with the participants to determine details concerning length of opening statements, order of witnesses, time required to address issues relating to proposed regulations, and time for and length of closing arguments.

Order

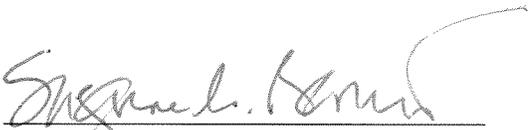
The Judges hereby **ORDER** that all participants adhere to the case schedule attached to this Notice and Order as "Exhibit A" and refer to the foregoing narrative as needed for interpretation of the schedule. At any time, a participant may file a motion stating good cause to vary the schedule, within the dictates of the statute. The Judges will not accept or respond to requests submitted in any form other than a formal motion.⁷ A participant making a motion to vary the schedule shall deliver copies to all other participants to permit an opportunity for response. The Judges may sanction any participant that fails to follow the schedule or, if in doubt, fails to seek clarification of the schedule and its requirements.

⁶ The Judges may rule on each evidentiary objection as and when the participants present and offer each exhibit during the hearing, unless, in their discretion, the Judges defer such rulings or, if, by motion, a participant demonstrates extraordinary circumstances to justify a deferral of a decision on an evidentiary objection.

⁷ In particular, the Judges admonish that they shall not respond to or consider requests of any nature submitted by conventional correspondence, email, or telephone calls to staff.

The Judges **FURTHER ORDER** that, as soon as practicable and at any time up to and including during the course of the hearing, the participants shall notify the Judges if the participants, or any of them, reach an accommodation that obviates the need for further participation in the proceeding.

SO ORDERED.



Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: March 25, 2016.

EXHIBIT A
Rates and Terms Determination Proceeding (PBR-III)

Case event	Date
Commencement of Voluntary Negotiation Period	March 25, 2016
End of Voluntary Negotiation Period	June 27, 2016
Parties' Notice of Settlement	July 1, 2016
IF PARTIES DO NOT SETTLE or if the Judges decline to adopt the settlement	
Order for Further Proceedings	July 8, 2016
Begin Preliminary Disclosure and Discovery	July 8, 2016
End Preliminary Disclosure and Discovery	September 8, 2016
Parties file Written Direct Statements Commencement of Discovery Period	November 7, 2016
End of Discovery Period	December 6, 2016
End Settlement Conference Period	January 12, 2017
Deadline for Joint Settlement Conference Report	January 19, 2017
IF PARTIES DO NOT SETTLE	
Deadline to file Written Rebuttal Statements ⁸	February 10, 2017
Hearing	commencing on April 24, 2017
Deadline to file Proposed Findings and Conclusions	TBD
Issuance of Determination	not later than December 15, 2017

⁸ Additional discovery is at the discretion of the Judges. The Judges may, and likely will, schedule a prehearing conference. *See* 37 C.F.R. § 351.8.

EXHIBIT B

PARTICIPANT LIST
DOCKET NUMBER: 16-CRB-0002-PBR (2018-22)
Determination of Rates and Terms for Public Broadcasting (PB-III)

PARTY	CONTACT	FIRM	ADDRESS	PHONE NUMBER
American Society of Composers, Authors and Publishers (ASCAP)	Samuel Mosenkis Jackson Wagener		1900 Broadway One Lincoln Plaza New York, NY 10023 smosenkis@ascap.com	P: 212-621-6450 F: 212-787-1381
Broadcast Music Inc. (BMI)	Michael Remington Janet Fries Jennifer Criss Joseph Dimona	Drinker Biddle & Reath LLP	1500 K Street N.W., Suite 1100 Washington, DC 20005 Michael.remington@dbr.com Janet.fries@dbr.com Jennifer.criss@dbr.com 7 World Trade Center 250 Greenwich Street New York, NY 10007-0030 jdimona@bmi.com	P: 202-842-8800 F: 202-842-8465 P: 212-220-3149 F: 212-220-4456
Educational Media Foundation (EMF)	David Oxenford	Wilkinson Barker Knauer, LLP	1800 M Street, N.W., Suite 800N Washington, DC 20036 doxenford@wbklaw.com	P: 202-383-3337

PARTY	CONTACT	FIRM	ADDRESS	PHONE NUMBER
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National Music Publishers Association (NMPA)	David Israelite Danielle Aguirre Erich Carey		975 F Street, NW, Suite 375 Washington, DC 20004 disraelite@nmpa.org daquirre@nmpa.org ecarey@nmpa.org	P: 202-393-6672 F: 202-393-6673
National Public Radio (NPR) and Public Broadcasting Service (PBS)	Jonathan Hart Gregory Lewis		1111 North Capitol Street, NE Washington, DC 20002 glewis@npr.org	P: 202-513-2050 F: 202-513-3021
	Craig Sperling		2100 Crystal Drive Arlington, VA 22202	

PARTY	CONTACT	FIRM	ADDRESS	PHONE NUMBER
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