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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2000, 2001, 2002 And 2003 Cable Royalty Funds	))	Docket No. 2008-2 CRB CD 2000-2003 (Phase II) (Remand)
______________________________	)	

INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT

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March 9, 2018

INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT

Before the
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In the Matter of	)	
	)	
Distribution of 2000, 2001, 2002	)	Docket No. 2008-2 CRB CD
And 2003 Cable Royalty Funds	)	2000-2003 (Phase II) (Remand)
________________________________	)	

INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its *Memorandum of Law In Response to Settling Devotional Claimants' Written Rebuttal Statement*.

IPG will present one witness:

1. Raul Galaz, a consultant to IPG.

IPG maintains that it is entitled to percentages of the Phase II royalties allocated to the Devotional Programming category, as more specifically set forth in the IPG *Written Direct Statement* (filed April 15, 2016), as modified

by its *Notice of Revised Claim to 2001 Cable Royalties (Devotional)* (filed May 10, 2017), but reserves its right to revise its claim in light of evidence presented in this proceeding.

Respectfully submitted,

Dated: March 9, 2018

________/s/______________

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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	Docket No. 2008-2 CRB CD
2000-2003	)	2000-2003 (Phase 2)
Cable Royalty Funds	)	(REMAND)

TESTIMONY OF RAUL GALAZ

INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT

March 9, 2018

INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT

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TESTIMONY OF RAUL GALAZ
IN SUPPORT OF INDEPENDENT PRODUCERS GROUP'S
MEMORANDUM OF LAW IN RESPONSE TO
SETTLING DEVOTIONAL CLAIMANTS'
WRITTEN REBUTTAL STATEMENT

PROCEDURAL HISTORY

On October 30, 2013, the Judges had published in the Federal Register, *Distribution of 2000, 2001, 2002 and 2003 Cable Royalty Funds*. 78 Fed. Reg. 64984 (Oct. 30, 2013). Therein, the Judges found that IPG presented a distribution methodology that the Judges found to be lacking in merit. Id. at 64999-65003. The Judges further found that the Settling Devotional Claimants ("SDC") failed to present a distribution methodology at all in their direct case. Id. at 65003-04.

On October 6, 2015, the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") issued a mandate making final its decision in *Settling Devotional Claimants v. Copyright Royalty Board*, No. 13-1276 (August 14, 2015). The DC Circuit vacated the portion of the Judges' determination in the captioned matter that apportioned royalties among claimants in the devotional programming category, and remanded the matter to the Judges.

Following the Judges' *Order for Proceedings on Remand and Scheduling Order*, issued on January 14, 2016, IPG and the SDC submitted their respective Remand Direct Statements addressing the issue of the appropriate allocation of cable retransmission royalties payable for the years 2000 to 2003, inclusive, between and among the copyright owners represented by IPG and those represented by the SDC. Pursuant to the Judges' *Scheduling Order and Notice of Conclusion of Proceeding as Paper Proceeding*, issued October 6, 2017, the parties filed their respective Written Rebuttal Statements. Pursuant to the same order, the parties were allowed to file a memorandum of law responding to such Written Rebuttal Statements.

ARGUMENT

A. THE DISTRIBUTION METHODOLOGY SUBMITTED BY IPG ON REMAND ADDRESSES *ALL* OF THE CRITICISMS DETAILED BY THE JUDGES TO IPG'S INITIAL METHODOLOGY, WITH ONE EXCEPTION.

As noted, the Judges previously detailed the specific criticisms they had of the distribution methodology proposed by IPG in the initial round of these proceedings. Those criticisms appear at *Distribution of 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64999-65003 (Oct. 30, 2013).

IPG therefore modified its methodology in order to address the criticisms *specifically* articulated by the Judges in their prior distribution ruling, and produced additional evidence *specifically* articulated by the Judges as lacking.[1] Despite such efforts, SDC witness Mr. John Sanders has dismissed those efforts as inconsequential. According to Mr. Sanders:

> "In short, IPG has done nothing to address any of the numerous criticisms previously raised by the Judges in response to Mr. Galaz's methodology, other than to remove the "Time Period Weight Factor" and have the methodology "considered" by Dr. Cowan."

SDC Rebuttal, Sanders test. at 9.

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[1] The IPG methodology was substantially similar to a methodology proposed by IPG in the 1997 cable proceedings. The sitting CARP found merit to such methodology subject to certain cited adjustments. Order of April 16, 2001, Docket no. 2000-2 CARP CD 93-97. On review the Librarian of Congress altogether rejected the results based on the identical criticisms (rather than just imposing adjustments), and remanded the matter back to the CARP for further proceedings. See 66 Fed. Reg. 66433, *Distribution of 1993, 1994, 1995, 1996, 1997 Cable Royalty Funds* (Dec. 26, 2001). Prior to remand, the proceeding was settled.

The methodology IPG proposed in the initial round of these proceedings remedied the criticisms posed in the 1997 proceedings, such as by utilizing a much more specific Time Period Weight Factor. Ironically, however, the standing panel altogether rejected *any* use of a Time Period Weight Factor – despite the prior panel's acceptance of such conceptual use. 78 Fed. Reg. at 65001-65002.

Mr. Sanders is incorrect and is aware of such fact. Despite Mr. Sanders' comprehensive statement regarding IPG's alleged failure to address all but a few of the Judges' criticisms, IPG's *Remand Direct Statement* has addressed *each and all* of the Judges' criticisms, bar one criticism that IPG argues *should not* be remedied for concern that it will affect the validity of the IPG methodology as applied to the devotional programming category.

A simple comparison of IPG's previously submitted methodology (filed May 25, 2012; the "Initial Direct Statement") with its current methodology (filed April 16, 2016; the "Remand Direct Statement") reveals these differences, including IPG's express comment in its *Remand Direct Statement* that it was excluding a previously included weighting factor *because* of the Judges' criticism thereof,[2] [3] and IPG's designation of the

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[2] IPG'S *Remand Direct Statement* references the Judges' prior criticism of a particular weighting factor and IPG's removal of such factor, i.e., a methodological change:

> "Notwithstanding, while IPG believed that implementation of a Time Period Weight Factor was reasonable, the CRB has since criticized IPG's use of such factors. . . . Consequently, *IPG's Time Period Weight Factor that was introduced in the initial round of these proceedings has now been excised from any IPG analysis*."

Remand Direct Statement at pp. 23-24 (emphasis added).

testimony of several witnesses from multiple prior proceedings whose testimony had never been previously offered in these proceedings.[4] See *Remand Direct Statement* at pp. 23-24. Further, in response to the Judges' criticism that the methodology was being presented by Raul Galaz, "an individual with no relevant training or experience in economics or econometrics, a financial stake in the outcome, and a prior history of fraud", IPG engaged Dr. Charles Cowan to review, verify, and critique IPG's methodology. As set forth in Dr. Cowan's report, which was submitted as

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[3] The Judges also criticized that IPG's Time Period Weight Factor, while being applied to 2000-2003 data, was derived from time period viewership from 1997. See 78 Fed. Reg. 64999, at 65001 (Oct. 30, 2013). Although IPG had additionally submitted Nielsen data reflecting that time period viewership had not changed over *decades*, thereby establishing that 1997 data could be applied to 2000-2003 for such limited purpose, the Judges' criticism is mooted by IPG excising the Time Period Weight Factor from IPG's revised analysis appearing in the *Remand Direct Statement*.

[4] The Judges criticized "[IPG's contention that] a CSO may prefer a program with a smaller level of viewership if that viewership represents *new* subscribers, instead of a show with a large audience that consists only of *existing* subscribers. IPG has not, however, proffered any evidence applying such a marginal analysis." See *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64999 (Oct. 30, 2013). IPG's *Remand Direct Statement* responded by designating the unrefuted testimony of six witnesses from multiple prior proceedings, who unanimously maintain that CSOs do not consider ratings data, *ever*. *Remand Direct Statement*, at Designation of Prior Records.

part of IPG's *Remand Direct Statement*, Dr. Cowan engaged in such analysis, came to the identical results, and ultimately endorsed IPG's methodology, thereby disposing of most of the express criticisms of the Judges. See *Remand Direct Statement*, Exh. IPG-7. Additional criticisms of the prior IPG methodology were also made, and are addressed later in this pleading.

1. **IPG's Response to the Judges' First Category of Criticisms – Evaluation of the IPG Methodology.**

As an initial matter, the Judges acknowledged the accuracy of IPG's position that a CSO's motivation is different than that of an exhibitor such as a broadcast station. 78 Fed. Reg. at 64999. Notwithstanding, and despite agreeing with IPG's general premise, the Judges failed to adopt IPG's rejection of a viewer-based methodology in order to articulate three sub-criticisms under the heading "Evaluation of IPG Methodology". Id. at 6499-65003.

Indeed, the evidence and testimony before the Judges, and all predecessors of the CRB, is *unanimous* that CSOs do not subscribe to or even review broadcaster ratings information. To that end, IPG's *Remand Direct Statement* differs from IPG's prior direct statement because it

designated the prior testimony of numerous witnesses from prior proceedings, all which resulted in the prior determination that any viewership-based methodology "measured the wrong thing".[5] Moreover, *additional* designated expert testimony taken in the consolidated 2004-2009 cable and 1999-2009 satellite proceedings, repeatedly reaffirmed that CSOs do not subscribe to or even review broadcaster ratings information.[6]

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5 In the 1998-1999 Phase I proceedings, the Librarian adopted in full the determinations of the CARP, holding:

> "The devaluation of the Nielsen study is a result of the Panel's consideration of the hypothetical marketplace. . . . [E]vidence that demonstrated how cable operators valued each program category was, in the Panel's view, the best evidence of marketplace value. . . . The Nielsen study was not useful *because it measured the wrong thing*."

69 Fed.Reg. 3606, 3613 (Jan. 26, 2004), Docket No. 2001-8 CARP CD 98-99 (emphasis added).

Such determination cited the Direct and Rebuttal testimony of John Fuller, James Trautman, Michael Egan, Judith Allen, and Gregory Rosston, Docket No. 2001–8 CARP CD 98–99 (Phase I), *Distribution of 1998 and 1999 Cable Royalty Funds*. All of the cited testimony was designated by IPG in the current proceeding.

6 Testimony of Michael Egan at pp. 105-211 (April 15, 2015), Docket No. 2012-6 CRB CD 2004-2009 (Phase II), consolidated with Docket No. 2012-7 CRB SD 1999-2009 (Phase II), *Distribution of 2004-2009 Cable Royalty Funds, and 999-2009 Satellite Royalty Funds*.

The foregoing designated testimony, which is all-embracing, was not before the Judges in the initial round of this proceeding. Had it been, then the pre-ordained result *should* have been for the Judges to adopt such unrefuted testimony and resulting determination of the Librarian, rather than assert the three criticisms of the IPG methodology that were articulated. In the absence of such testimony, the Judges implicitly rejected the concepts reflected in the foregoing observations and rulings about *actual* CSO proclivities, and held that the *hypothetical* CSO would utilize viewership principally as a heuristic to estimate how the addition of any given program might change the CSO's subscriber revenue. 78 Fed. Reg. at 64993. There was, in fact, no evidence or testimony to support this conclusion, which even prompted the Judges to state:

> "Dismayingly, none of the parties proffered admissible testimony (written or oral) of a witness with knowledge of CSO programming."

78 Fed. Reg. at fn. 28. The Judges now have before them unrefuted testimony regarding the fact that CSOs do not consider broadcast ratings when selecting which programming they will retransmit.

Conspicuously, Mr. Sanders makes no reference to the testimony designated in the IPG *Remand Direct Statement*. This is curious for the

evident fact that IPG already alerted the SDC to the significance of such designated testimony in a prior pleading.[7] By all appearances, Mr. Sanders simply attempted to gloss over the existence of such evidence by ignoring it.

Notwithstanding the foregoing, certain observations should be made regarding the three sub-criticisms articulated by the Judges during the first round of proceedings. According to the Judges:

> "First, the maximization of subscriber revenues or levels is not divorced from viewership levels. Rather, a CSO would attract subscribers on a distantly retransmitted station only to the extent that the programs it offered were demanded by consumers who intended to view the programs. Indeed, even IPG's expert witness, Dr. Robinson, acknowledged that, in her professional experience, viewership was a factor in determining the value of a retransmitted television program. 6/6/13 Tr. at 1219–21 (Robinson)."

As an initial matter, the Judges' statement fails to clarify which "viewership levels" to which it is referring, i.e., whether the Judges are referring to the *broadcaster* viewership levels or the *CSO* viewership levels.

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[7] The SDC previously moved to strike IPG's *Remand Direct Statement*, asserting no change in the methodology submitted by IPG in the initial round of proceedings. In response thereto, IPG identified the means by which such *Remand Direct Statement* varied from the written direct statement in the initial round of proceedings, including the significance of the designated testimony. See *IPG Opposition to SDC Motion to Strike Written Direct Statement*, at 2-3 (filed April 20, 2017).

In fact, and as noted above, all evidence and testimony demonstrates that subscriber revenues or levels ***is*** divorced from *broadcaster* viewership levels. To the extent that the Judges intended such reference to mean the viewership of programming vis-à-vis the CSO delivery, there isn't even any evidence that such measurements exist for retransmitted programming, much less that CSOs subscribe to such data or even desire such data in a hypothetical environment. In fact, the mere fact that the MPAA has engaged Nielsen Media Research to create such "special studies" attempting to obtain such viewership information in certain proceedings reflects that such information is not freely available, and not generally generated.

Second, as an apparent attempt to assert an admission against interest, the Judges attributed IPG witness Dr. Laura Robinson with the position that "viewership was a factor in determining the value of a retransmitted television program", citing a portion of her testimony. In fact, such statement distorts Dr. Robinson's testimony. At the identified passage, Dr. Robinson was articulating how her prior professional analysis as to the value of the "America's Got Talent" television show considered various factors, including viewership. *Of course*, the popularity and viewership of a television show relates to its value to broadcasters and advertisers for

broadcast; such fact has never been an issue. However, at no time did Dr. Robinson assert that her analysis of retransmission fees for the television program consider the program's viewership. So, while "America's Got Talent" is a "retransmitted program", and while "viewership" is a factor affecting the program's value, nothing in Dr. Robinson's testimony suggests that she previously considered viewership as a factor (correlative or otherwise) affecting the program's retransmission fees.[8]

As a second sub-criticism, the Judges again agreed with an IPG-asserted concept, one that was raised by IPG as a conceptual critique of viewer-based methodologies:

> "[S]ince a CSO is concerned about which programs the marginal subscriber might prefer, a CSO may prefer a program with a smaller level of viewership if that viewership represents new subscribers, instead of a show with a large audience that consists only of existing subscribers."

78 Fed. Reg. at 64999. Notwithstanding their agreement with IPG's conceptual critique, the Judges then *criticized* that IPG had not "proffered any evidence applying such a marginal analysis in the present proceeding". Id. At such time, this criticism appeared misplaced for the evident reason

[8] Testimony of Dr. Robinson at 1219-1221 (June 6, 2013).

that the Judges simultaneously cited two expert witnesses for the proposition that such an analysis may not even be possible, including the testimony of a non-IPG expert witness whom had free access to viewership data yet nonetheless testified that such an approach would require a ‘‘more sophisticated’’ analysis *than the parties’ evidence permitted in this proceeding*. Id. *citing* Test. of Jeffrey Gray, at 547 (June 4, 2013).

While the criticism appeared misplaced at the time because of unrefuted testimony of experts that was cited by the Judges, at this point in time it would be *further* misplaced because IPG’s newly-designated testimony affirms this concept.

Consequently, the Judges utilized a concept that has been affirmed in prior distribution proceedings as a *criticism* of viewership-based methodologies, i.e., that viewership is not synonymous with CSO subscribership, to critique IPG’s non-viewership-based methodology, even though the only party retaining viewership data acknowledged that insufficient data exists to perform such analysis. Moreover, and regardless of whether IPG could somehow quantify such matters, the newly designated testimony nonetheless affirms the validity of such criticism with specific

examples, regardless of whether the overall effect of such concept could be capable of quantification.[9]

Finally, as a third sub-criticism, the Judges maintained that the IPG methodology "is not true to its own critique of a viewership-based analysis", presumably because of IPG's utilization of a "Time Period Weight Factor". 75 Fed. Reg. at 65000. Regardless of the merits of such criticism,[10] it is moot because IPG excised the Time Period Weight Factor from its analysis in this remand proceeding.

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[9] For example, Michael Egan, a multi-decade veteran of the cable television industry, repeatedly confirmed that viewership ratings are not considered:

> "I'm not aware of a single cable television MSO programming group, very sophisticated, who want to subscribe to Nielsen ratings."

Testimony of Michael Egan at 151 (April 15, 2015), Docket No. 2012-6 CRB CD 2004-2009 (Phase II), consolidated with Docket No. 2012-7 CRB SD 1999-2009 (Phase II).

Mr. Egan also confirmed the prevalence of programming that garnished abysmally low ratings, but was included on a CSO's lineup of retransmitted programming because of the marginal value it created, such as state legislature proceedings and foreign language programming. Id. at pp. 125 *et seq.*, 152 *et seq.*

[10] As noted previously, in the 1997 cable proceedings (Phase II), the only criticism of the Time Period Weight Factor either by IPG's adversary (the MPAA) or the CARP, was that it was not sufficiently specific as to time period, not that such factor should not be utilized.

In sum, and contrary to the comprehensive statement of Mr. Sanders, IPG responded to the initial category of criticisms levied by the Judges with modifications to the IPG methodology, and the submission of evidence vis-à-vis designated testimony.

2. IPG's Response to the Judges' Second Category of Criticisms – The Testimony of Mr. Galaz.

For reasons set forth in the Judges' ruling in the initial round of proceedings, they concluded that Mr. Raul Galaz is "an imperfect messenger" to convey the IPG methodology. Cited issues include a 2002 criminal conviction, relatives that are owners of IPG, and that he is not an expert on econometrics. According to the Judges, they gave "serious consideration" to bar Mr. Galaz' testimony, but instead opted to allow the testimony but give it no weight. Finally, the Judges noted that Mr. Galaz had not indicated that he had any experience working for or on behalf of a CSO. 78 Fed. Reg. at 65000.

It is currently 2018. The circumstances regarding Mr. Galaz' 2002 criminal conviction have been vetted extensively before the Judges, including in response to regulations unilaterally proposed by the Judges that

could preclude participation by Mr. Galaz in these proceedings, or any entity that employed him.[11] They need not be repeated at this juncture, except to note that the conviction is so old that the Federal Rules of Evidence already generally bar its consideration.[12] Nor has there ever been confusion during

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[11] See *Comments of Worldwide Subsidy Group LLC to Proposed Rule Regarding Violation of Standards of Conduct* and *Comments of Worldwide Subsidy Group LLC to Proposed Rule Regarding Violation of Standards of Conduct*, Docket no. 17-CRB-0013 RM (filed May 22, 2017).

[12] Federal Rule of Evidence 609(a) generally permits an attack on a witness's character for truthfulness by evidence of a criminal conviction. However, when the conviction is more than 10 years old, Rule 609(b) prohibits its use for impeachment unless "(1) its probative value, supported by specific facts and circumstances, substantially outweighs it prejudicial effect," and (2) the proponent of its use gives "advance written notice its intent to use such evidence so that the other party has a fair opportunity to contest such use".

As a result, "[e]vidence of convictions over 10 years old generally is **presumed to be inadmissible**, and the proponent of the evidence **bears the burden of showing its admissibility**." 81 Am.Jur.2d Witnesses § 880 (2009), footnotes omitted; *see also* United States v. Browne, 829 F.2d 760, 763 (9th Cir. 1987) (proponent of evidence of old convictions bears burden of showing that the evidence's probative value substantially outweighs is prejudicial effect). *See also* Fed.R.Evid. 609 (b), Advisory Committee Notes ("after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminish[es] to a point where it should no longer be admissible[;]" "**[i]t is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances**"). [emphasis added]

the pendency of proceedings that IPG was a family-owned business.[13] Nor has there ever been a requirement that a distribution methodology must be submitted by an expert in econometrics. Multiple distribution methodologies have been submitted in these distribution proceedings by non-experts in econometrics and, in fact, the only competing methodology in this remand proceeding is submitted by an individual, Mr. Sanders, who is not an expert in econometrics.[14] Finally, and similarly, there has never been a requirement that a distribution methodology must be submitted by an individual whom has worked for or on behalf of a CSO. No regulation of such sort has ever existed, multiple distribution methodologies have been submitted in distribution proceedings by persons that have never worked for or on behalf of a CSO, and again, the only competing methodologies in this

[13] The Judges' suggestion that Mr. Galaz' testimony should be disregarded because "he clearly has a self-interest" (78 Fed. Reg. at 65000) is belied by the fact that absolutely no evidence was elicited, or exists, to suggest that a self-interest exists. That is, it was pure conjecture on the part of the Judges that, if had been alleged during the proceedings, could have been appropriately addressed. It was not, however. Further, and more importantly, such criticism failed to identify any area where Mr. Galaz' testimony was ostensibly influenced by a supposed "self-interest".

[14] As discussed herein, IPG's methodology has nonetheless been validated by an expert in econometrics, Dr. Charles Cowan, whose expert report is attached as Exhibit IPG-7 to IPG's *Remand Direct Statement*.

proceeding (including during the initial stage) have been submitted by individuals who have never worked for or on behalf of a CSO for the purpose of evaluating retransmitted signals.

Despite these rather obvious comparisons between Mr. Galaz and other witnesses appearing in the initial round, and now remand, of this proceeding, no comparable criticism was made of such individuals in the Judges' published determination following the initial round of proceedings. More importantly, while the Judges' prior ruling makes abundantly clear that the Judges were generally inclined to disregard *all* of Mr. Galaz' testimony, and then actually did disregard *all* such testimony, one notable omission existed in the Judges' opinion.

Specifically omitted was that fact that **at no point was the truthfulness of any statement by Mr. Galaz challenged in the initial proceeding by any IPG adversary.** All data relied on by Mr. Galaz was produced to and vetted by IPG's adversaries, and in the single instance where a mistake was identified, Mr. Galaz explained the basis of such mistake and modified the results of the IPG study accordingly. This monumental fact seems to have been overlooked by the Judges, and while a

great deal of explanation was provided by the Judges in their initial determination to rationalize *why* they should challenge the credibility of Mr. Galaz and disregard *all* of his testimony, no explanation was provided as to what testimony should be found lacking in credibility, or what testimony (if lacking in credibility) would affect the IPG methodological results.

Notwithstanding, in order to address the Judges' stated concerns from the initial proceeding, in the current remand proceeding IPG engaged an econometrics expert to review the IPG methodology and confirm its results. Specifically, IPG engaged Dr. Charles Cowan to review, verify, and critique IPG's methodology. As set forth in Dr. Cowan's report, which was submitted as part of IPG's *Remand Direct Statement*, Dr. Cowan engaged in such analysis, came to the identical results, and ultimately endorsed IPG's methodology.

Notably, although Dr. Cowan was not the designer of the IPG methodology, in significant manner his endorsement thereof stands no different than prior endorsements of methodology that were not designed by the endorser, including the endorsements by Mr. John Sanders in the 1998-1999 cable proceedings (Phase II), 1999-2009 satellite proceedings (Phase II), and 2004-2009 cable proceedings (Phase II) of methodologies.

Nonetheless, Dr. Cowan's endorsement is distinctive to the extent that Dr. Cowan is actually an expert in econometrics (unlike Mr. Sanders), was able to communicate with the methodology designer, and was able to manipulate the methodology as he saw fit, unlike certain of Mr. Sanders' prior endorsements.[15]

Nonetheless, Mr. Sanders, who is neither an econometrics expert, nor has any experience with CSO decision-making, nor experience with cable/satellite retransmission in general (see infra), incredulously asserts that IPG's reliance on Dr. Cowan's report "falls short". Sanders test. at 7. The

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[15] In the 1998-1999 cable proceedings (Phase II), the SDC presented the results of a study that was not presented by its designer (who remains *unknown*), but was endorsed by the SDC expert (Mr. John Sanders) a decade after its making, without any opportunity for revision or manipulation, and only after the study results (not the complete analysis) were taken from an inoperable hard drive found in the basement of a computer programmer previously employed by the MPAA. See generally, *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014), Docket No. 2008-1 CRB CD 1998-1999 (Phase II).

In the 1999-2009 satellite and 2004-2009 cable proceedings (Phase II), Mr. Sanders endorsed methodologies presented by Dr. Erkan Erdem. See *Amended Written Direct Statement of Settling Devotional Claimants* (filed July 8, 2014), Docket no. 2012-7 CRB SD 1999-2009 (Phase II), and *Amended Written Direct Statement of Settling Devotional Claimants* (filed July 8, 2014), Docket no. 2012-6 CRB CD 2004-2009 (Phase II).

one area of which Mr. Sanders was capable of testifying – IPG's mathematical computations – was botched by the SDC and Mr. Sanders. See infra. Nevertheless, Mr. Sanders disregards that mere verification of the IPG methodological results disposes of all criticisms regarding the accuracy of Mr. Galaz' computations, which were nonetheless already subject to verification by the SDC.

Further, Mr. Sanders purposely misrepresents Dr. Cowan's stated engagement. At page 8 of his report, Mr. Sanders asserts that Dr. Cowan's engagement was merely "to consider the computations that IPG has performed in the past and provide the results of these computations in this case". Sanders test. at 8. Conveniently, Mr. Sanders omits the opening phrase of such portion of Dr. Cowan's testimony, wherein Dr. Cowan testifies, "***As part of my assignment***, I was asked to consider the computations that IPG has performed in the past and provide the results of these computations in this case". IPG *Remand Direct Statement*, Test. of Cowan at para. 30 (emphasis added).

As was obvious, Dr. Cowan's engagement was significantly broader than verification of computations. After indicating the impossibility of performing a Shapley analysis with data available for 2000-2003, Dr. Cowan

states "As a *viable alternative*, I present in this report a set of estimates that relies on a calculation that the Judges have previously accepted."[16] *Remand Direct Statement*, Cowan Report at p. 2 (emphasis added). Notably, Dr. Cowan submits the results as were submitted as part of IPG's revised analysis, making clear that the "viable alternative" that is being submitted is IPG's revised analysis. Notably, no challenge to Dr. Cowan's qualifications for his expert opinions was asserted by the SDC.

In sum, and contrary to the comprehensive statement of Mr. Sanders, IPG responded to the second category of criticisms levied by the Judges by seeking and securing review, verification, and critique of the IPG methodology by an econometrics expert, who ultimately endorsed IPG's methodology. Although IPG disputes the validity of the Judges' second category of criticisms, IPG's response thereto obviously disposes of such issues.

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[16] Mr. Sanders purposely misrepresents Dr. Cowan's statement to suggest that Dr. Cowan was under the impression that IPG's prior methodological version was "accepted" by the Judges. Sanders test. at para. 7. Obviously, that was not Dr. Cowan's statement or meaning, and several references in Dr. Cowan's testimony makes that clear. Dr. Cowan's reference, as it clearly states, was to the calculations that IPG had previously submitted, for which there was no issue with accuracy.

3. **<u>IPG's Response to the Judges' Third Category of Criticisms – Additional Problems with the IPG Methodology</u>.**

Finally, the Judges' determination in the initial round of these proceedings identified seven sub-criticisms of the IPG methodology. As the following reflects, IPG responded to those sub-criticisms.

<u>IPG's concept that all retransmitted programs be compensated</u>.

The Judges' first sub-criticism is to take issue with the IPG concept that all retransmitted programs require compensation, even if there is no evidence of viewership. 78 Fed. Reg. at 65000. According to the Judges:

> "Even if viewership as a metric for determining royalties may be subject to some adjustment in light of the economic incentives facing a CSO, there is certainly no basis to allow for compensation in the absence of any evidence of viewership."

Id. Further to IPG's concept, the Judges rejected the notion that failure to compensate a retransmitted program was constitutionally impermissible, citing other instances in which there are outright exceptions to a copyright owner's exclusive rights. Id. at fn. 59.

Several observations can be made regarding the foregoing criticism. First, the Judges draw comparison to circumstances in which there are defined exceptions to a copyright owner's exclusive rights. That is not the

circumstance here. Section 111 of the Copyright Act provides a compulsory license to cable system operators, *already* acknowledging that a defined right exists. That is, nothing in Section 111 suggests that the failure of a copyright owner to prove viewership of their retransmitted work denies such owner any entitlement to retransmission royalties. In fact, and distinguishable from the examples mentioned in which "outright exceptions" exist to a copyright owner's rights, a compulsory license denies the copyright owner the entitlement to negotiate a license directly with the CSO. As such, allowing a CSO to retransmit a program, then denying a copyright owner any portion of the retransmission royalties already derived therefrom, is the equivalent of obtaining groceries at a store, then not paying for them because they were not ultimately used. No differently than the groceries example, the value of the copyrighted programming is diminished, the copyright owner's ability to license the work to the CSO is interrupted, and yet the copyright owner is not compensated.

In fact, fair comparison can be made to the compulsory license afforded by Section 115 of the Copyright Act for nondramatic musical works. Therein, a compulsory license fee is paid for all phonorecords "distributed" by the licensee that embody the licensed musical composition.

A phonorecord is considered “distributed” if the person exercising the compulsory license has “voluntarily and permanently parted with its possession.” Id. at Section 115(c)(2). That is, no requirement exists that the phonorecord must actually be played, *or even paid for*. Rather, it is enough that the phonorecord has merely been “distributed”. No differently, the provisions of Section 111 do not impose a requirement of viewing, but unlike phonorecords embodying musical compositions that are subject to a compulsory license, the copyrighted goods have already been paid for pursuant to a compulsory license. A fair comparison of the compulsory license afforded to CSOs and entities obtaining a compulsory license under Section 115 of the Copyright Act warrants that no “viewership” prerequisite be imposed by the Judges as a condition of compensation under Section 111 of the Copyright Act.

Moreover, certain practical observations can be made to the Judges' criticism. The criticism seemingly forgets that the only “evidence” of viewership available is Nielsen data. The Nielsen data with which parties in the initial and remand proceedings are working have repeatedly demonstrated there to be “zero viewing” issues, where programs and broadcasts are regularly attributed no viewers, despite common sense to the

contrary. In connection with Nielsen data utilized by the MPAA in the initial round of these proceedings, "zero viewing" approximated 76%-82% during the years 2000-2003, and a wopping 66% for WGN Chicago, despite that station having 32.7 Million distant cable subscribers.[17] The "local" Nielsen data utilized by the SDC in this remand proceeding fares no better, and IPG's rebuttal statement in this proceeding goes into significant detail and analysis as to the shortcomings of the "local" Nielsen data relied on by the SDC.[18]

The point, as explained extensively in the aforementioned rebuttal testimony, is that whatever problems exist with "zero viewing" are exacerbated when applied to smaller and smaller categories, such as the devotional programming category, or even singular programs. If the Judges are apt to impose a "proven viewership" prerequisite that appears nowhere in the Section 111 provisions, and the only data that can establish viewing is

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[17] See *IPG Rebuttal to the Written Direct Statement of the MPAA-Represented Program Suppliers, Testimony of Raul Galaz* at pp. 18-19, (May 15, 2013).

[18] See *Testimony of Raul Galaz* in support of *Independent Producer Group Rebuttal to the Written Direct Statement of the Settling Devotional Claimants*, at 20-30 (Jan. 8, 2018).

Nielsen data that largely fails to attribute viewership even when common sense demonstrates its existence, many programs that should equitably be entitled royalties will be denied such royalties.[19]

Second, and equally compelling, the Judges now have before them unrefuted designated testimony of six witnesses from multiple prior proceedings, who unanimously maintain that CSOs do not consider ratings data, *ever*, and affirming that CSOs do not consider broadcast ratings when selecting which programming they will retransmit. *Remand Direct Statement*, at Designation of Prior Records. That is, the evidence and testimony *currently* before the Judges, and all predecessors of the CRB, is *unanimous* that CSOs do not subscribe to or even review broadcaster ratings information. See supra. As such, the Judges' criticism that viewership figures can equate to relative market value, subject only to "some adjustment" appeared to be significantly misplaced, particularly in light of the Judges' simultaneous observation that "none of the parties proffered

[19] Of course, this also begs the question why devotional programmers, who typically purchase airtime, would bother doing so if that programming is not generally viewed.

admissible testimony (written or oral) of a witness with knowledge of CSO programming."

<u>IPG's selection of sample stations</u>. The Judges' second sub-criticism was that IPG's ''sample'' of stations was not selected in a statistically random manner. 78 Fed. Reg. at 6500.

No differently than in the initial round of these proceedings, IPG's *Remand Direct Statement* reports the results of IPG's sample of the top 200-231 retransmitted stations during 2000-2003, ranked according to their number of distant cable subscribers. *Remand Direct Statement* at 18 *et seq*. Consequently, while the Judges could surmise to levy the same criticism against the IPG methodology in this remand proceeding, such criticism would be ill-placed for a few reasons.

First, it cannot be overlooked that the Judges accepted without adjustment a far less penetrating sample of stations in the initial round of proceedings. Specifically, the expert witness for the Motion Picture Association of America ("MPAA"), Dr. Jeffrey Gray, utilized a *random sample* of 71 stations taken from a *non-random sample* of the approximately 120 top stations from 2000-2003, ranked according some unclear

combination of distant cable subscribers and distant fees generated selected by non-expert Marsha Kessler.

Obviously, a random sample taken from a non-random sample still generates a non-random sample. Notwithstanding, in the initial round of proceedings the Judges persisted in characterizing Dr. Gray's sample as a "random sample", and relied on the results of Dr. Gray's sample without adjustment for the benefit of IPG, despite acknowledging that there was no means to determine whether such 71 stations (which were comprised overwhelmingly of network-affiliated stations owned by MPAA member companies) disproportionately benefited the MPAA.[20] As such, and despite these obvious concerns, the Judges accepted without adjustment the results of a non-random sample of stations that was one-third the size of the non-random sample relied on by IPG.

No allegation was made that IPG engaged in any sample bias in its station selection, which was based solely on information reported by Cable Data Corporation as to the most significantly cable retransmitted stations. No allegation was made that any different results would have followed had

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[20] See discussion, 78 Fed. Reg. at 64996.

IPG engaged in a random sample of 1,000+ stations.[21] No evidence was presented by any witness (econometric expert or otherwise) to suggest that IPG's sample was misrepresentative of the aggregate potential sample.

IPG's response to the issue, as it is now, was that its non-random station selection was intended and is superior because IPG's methodology is looking at the exposure of programs to the CSOs that are generating the retransmission fees. Because the top 200 stations account for the vast amount of fees generated, alternatively utilizing a random sample that potentially incorporates information from an additional 500-800 stations with *de minimus* retransmission would only reduce the significance of the sample. In fact, IPG defends its analysis on the grounds that it is **a census of stations generating 94%-96% of the retransmission fees**, and no evidence has been presented or exists to suggest that the last 4%-6% of generated fees would affect IPG or SDC disproportionately.

Quite evidently, IPG's station sample was criticized despite there being no evidence of disproportionate effect on any party, while a

[21] As has been previously noted by IPG, at a certain point the cost for obtaining station programming data actually exceeds the entirety of retransmission royalties generated by the station.

dramatically smaller sample utilizing admittedly unacceptable sampling procedures was accepted, without adjustment. On such basis alone, it was inequitable to criticize IPG sampling process, much less discard it as unreliable.

In any event, given the fact that the remand proceeding now addresses only devotional programming, which constitutes a markedly smaller percentage of the overall retransmitted programming than the program suppliers category, the omission of a single station could have dramatic consequences to the allocation of royalties between IPG and the SDC. Certain stations have disproportionately higher amounts of devotional programming, and there is little confidence that such stations equally exhibit IPG versus SDC programming. For this reason, the exclusion of a station that has a disproportionately high percentage of IPG or SDC programming will, predictably, disproportionately affect the attributed value to the group of IPG or SDC programming. As such, IPG contends that, in the absence of there being any demonstrable difference between the IPG-sampled stations generating 94%-96% of the cable retransmission fees, and the non-sampled stations generating 4%-6% of the cable retransmission fees, IPG's station sample selection is amply acceptable.

In sum, IPG's station sample selection should be deemed sufficiently acceptable, no differently than Dr. Gray's station sample, and acknowledged as sufficiently representative of the stations generating 2000-2003 cable retransmission royalties.

IPG's use of a Station Weight Factor. The Judges' third sub-criticism appears to be yet another criticism of the ultimate issue in the initial round of proceedings, i.e., the relevance of viewership data, contending that IPG "grossly ignores viewership". The Judges observed that under the IPG methodology, programs appearing at the same time and on the same station, may have dramatically different viewership, yet are weighted the same.

It is curious how the IPG methodology could be found to "grossly ignore viewership", when its expressly stated methodological predicate (taken from the testimony and determinations of CRB predecessors) was that viewership-based methodologies "measure the wrong thing", so that broadcast-by-broadcast viewership data would not be considered. No different than the Judges' focus on the Station Weight Factor as "ignoring viewership", the Judges could just have easily criticized all other factors that contribute to form the IPG methodology, such as the Length of a particular

broadcast, the Time Period Weight Factor, or the number of retransmitted broadcasts of a retransmitted program, none of which consider broadcast-by-broadcast viewership. IPG does not, nor ever has, included broadcast-by-broadcast viewership data as part of its methodology, has explained the theoretical issue with doing so, and explained that prior testimony and determinations of expert witnesses have *unanimously* rejected viewership data as a factor affecting CSO decision-making. As such, it appears misplaced to criticize as "grossly ignoring" a factor that is theoretically at odds with a proposed methodology, and expressly asserted to be as such.

It is undisputed that programming appearing at the same time and on the same station could have dramatically different viewership, and extreme examples will always exist. The issue, of course, is why such fact would matter if viewership is unanimously rejected by all experts who have ever testified as to CSO proclivities, and even if it did matter, why it would matter when comparing only two programs when thousands of comparisons can be made that are advantageous to either IPG or to an adverse party.

Notably, while the Judges accepted the MPAA-proffered argument, they did not ask the MPAA the *obvious* question, i.e., whether an analysis was conducted to determine if such effect worked disproportionately to

IPG's benefit.[22] Presumably, it did not, or the MPAA would have volunteered such information. Moreover, even accepting the relevance of viewership (to which all evidence reflects the contrary) the examples that were utilized were not valid, as they failed to make comparison of programming that was proximately broadcast, or even programming appearing on the same day of week. Such example would have been more relevant, to reflecting whether there was consistency in the viewership figures reported by Nielsen and Dr. Gray.

But again, the sub-criticism is addressed and refuted by IPG's designated testimony of multiple witnesses, whom dismiss any significance to viewership factors. See supra. On such basis, the criticism that IPG "grossly ignored viewership" is mis-placed. Moreover, as regards the

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[22] A poignant example arose following the 1997 cable proceeding (Phase II). The initial decision of the CARP found certain issues with the methodology presented by IPG. The MPAA had attacked the IPG methodology, but engaged in no analysis as to the quantifiable effect of the criticisms, despite having the data to do so. The CARP discounted IPG's share on the presumption that such analytical issues worked to IPG's advantage. Order of April 16, 2001, Docket no. 2000-2 CARP CD 93-97. However, after IPG recalculated its figures in order to address the criticisms, IPG's percentage claim *increased*. Coincidentally, the identical effect has occurred following IPG's excise of its Time Period Weight Factor from its analysis.

criticism's application to the remand proceeding, a significant distinction must further be made even if the criticism were not refuted. In the initial round of these proceedings, the comparison utilized as part of the criticism was between the IPG-ascribed values, the Nielsen distant viewership figures derived from CSO exhibition, and Dr. Gray's distant viewership figures. No such comparison has been presented by Mr. Sanders, nor could he do so, as the SDC is dealing solely with "local" Nielsen viewership figures.

In sum, and contrary to the comprehensive statement of Mr. Sanders, IPG responded to the Judges' sub-criticism by the submission of evidence vis-à-vis its designated testimony.

IPG's use of a Time Period Weight Factor. Similar to above, the Judges' fourth and fifth sub-criticisms challenged IPG's application of a Time Period Weight Factor, both as ignoring viewership and for its application of 1997 daypart data to 2000-2003 broadcasts. As noted above, IPG's prior use of such a factor was critiqued in the 1997 cable proceeding (Phase II) only for its generality, yet in the current proceedings the standing panel altogether rejected *any* use of a Time Period Weight Factor. 78 Fed. Reg. at 65001.

As even Mr. Sanders appears to have acknowledged, IPG has excised the Time Period Weight Factor in response to the Judges' prior criticisms thereof. Ironically, the critique of IPG's Time Period Weight Factor in the initial proceedings came without any assessment by IPG's adversaries as to the effect of removing such factor. As the recalculated results of the IPG methodology demonstrate, doing so has actually *increased* the percentages to which IPG is entitled in the devotional programming category.

Obviously, IPG's excise of the Time Period Weight Factor should moot the Judges' fourth and fifth sub-criticism, as the factor no longer exists to be criticized. Nevertheless, not happy about these results, Mr. Sanders, a non-expert in econometrics, now attempts to characterize the various elements comprising the IPG methodology as independent "untenable" factors. Sanders test. at para. 6. In order to bolster his criticism, Mr. Sanders cites the Judges' criticism of a methodology designed by Dr. Robinson in the 1998-1999 cable proceeding (Phase II) wherein different *independent* factors were compared with each other side-by-side (Id. at fn. 23), demonstrably different than with the IPG methodology wherein different factors are factored against each other to produce an ultimate

result.[23] Given Mr. Sanders' evident misunderstanding of the significance of such distinction, or the methodology that was designed by Dr. Robinson that was being addressed, such criticism is meaningless and should be given no weight.

IPG's erred application of daypart data in its Time Period Weight Factor. As its sixth sub-criticism, the Judges noted that the reported results of the IPG methodology in the initial round of proceedings did not utilize the daypart data described by Mr. Galaz in his testimony, but rather the daypart data utilized by IPG from the prior 1997 cable proceedings (Phase II). According to the Judges, "the Judges cannot state with any confidence that

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[23] Similarly, the SDC designate in their rebuttal prior written testimony of Erkan Erdem, requesting that the Judges pay particular attention to pages 5-7 and 10-11 thereof. As set forth therein, Dr. Erdem criticizes the use of "program length", "number of subscribers" and "fees generated" as measures of "relative market value".

As has been stated *ad nauseum* in response, such criticism might be warranted if the IPG methodology viewed *any* of these factors independently. The IPG methodology presented in this remand proceeding *does not*. Dr. Erdem's designated testimony was originally provided in response to Dr. Laura Robinson's proposed methodology in the 1998-1999 cable proceeding (Phase II), which did consider such factors independently. As such, whatever significance the Judges may attribute to the SDC's designated testimony, including the criticism appearing at fn. 23 to Mr. Sander's testimony, is irrelevant. It should further be observed that the IPG

these rather significant errors—all of which would have substantially inflated IPG's allocation and were left uncorrected until they were disclosed in Dr. Gray's Written Rebuttal Testimony—were not the product of design rather than inadvertence.

Initially, the fact that the Time Period Weight Factor has been excised from IPG's *Remand Direct Statement* already moots the criticism. Nonetheless, there was literally no evidence to suggest that the use of the daypart data from the prior proceedings was anything more than an inadvertent error. Appreciating how such factors get integrated in complex computer programs, the error was as simple as selecting integration of a file that was labeled substantially similar to the intended file.

More to the point, errors occur, particularly when dealing with complex databases. In fact, in the current 2010-2013 cable proceedings (allocation phase) and even in this distribution proceeding, multiple significant calculation errors have been discovered on the part of expert witnesses, resulting in a plethora of filings amending prior calculations. In total, more than a half-dozen amended direct statements have been filed by

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methodology submitted in this remand proceeding does not even consider "fees generated", in *any* capacity.

parties other than IPG during the last year. To suggest that IPG's single misapplication was by design rather than inadvertence, even though all data underlying the IPG was openly produced and expected to be scrutinized, was clearly conjecture by the Judges.

IPG's alleged *de facto* reliance on viewership as a value factor. Finally, as its seventh sub-criticism, the Judges asserted that the IPG methodology, while eschewing viewership as a factor, is *de facto* based on viewership. Specifically, the Judges cite IPG's use of program "Length" as one of its factors and IPG's use of its Time Period Weight Factor.

With all due respect to the Judges, this criticism severely mischaracterizes the IPG methodology, and ignores both written and oral testimony relating to the purpose for IPG's use of these factors. From the outset, IPG has articulated that its intent was to replicate the decision-making of CSOs. According to precedent, CSO decision-making is paramount to the issue of relative market value for cable retransmission

royalties.[24] As such, the IPG methodology only utilizes information that is available to CSOs, or reflects the decisions made by CSOs.

According to the Judges, "Length" (duration of a program) is actually an indicia of value because, presumably, the longer a program is broadcast/retransmitted, the more viewers there must be. The obvious error of this presumption aside, "Length" was selected by IPG because it reflects a quantifiable volume of programming that has been secured by a CSO pursuant to the Section 111 compulsory license. Regardless of whether one person or one thousand persons were to actually view a retransmitted program, the IPG methodology would not change its valuation of a particular retransmission.

In fact, the Judges' third, fourth and fifth sub-criticisms specifically criticize the IPG methodology for this precise fact, i.e., that IPG factors do *not* embrace viewership. It is therefore ironic that the Judges previously criticized the IPG methodology for not embracing viewership as a factor, but now criticize the IPG methodology for ostensibly doing so.

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[24] See generally, *Distribution of 1998-1999 Cable royalties*, 69 Fed.Reg. 3606, 3613 (Jan. 26, 2004), Docket No. 2001-8 CARP CD 98-99 (emphasis added).

As regards IPG's Time Period Weight Factor, it did rely on viewership data. However, such viewership data did not, as the Judges suggest, utilize broadcast-by-broadcast viewership data. Rather, it was a daypart viewership data, attributing a particular value to each half-hour of programming based on its daypart placement. IPG expressed on multiple occasions in written and oral testimony that the logic of such factor was to utilize the only viewership data that could be available to a CSO prior to its election to retransmit a program, and was therefore a reflection of the potential subscribers. Regardless, IPG's excise of the Time Period Weight Factor nullifies such criticism.

B. SDC WITNESS JOHN SANDERS ASSERTS IRRELEVANT POINTS THAT DISPLAY HIS MISUNDERSTANDING OF THE RETRANSMISSION SCHEMATIC.

As his final argument, Mr. Sanders challenges as "half-truths" the statements set forth in IPG's *Remand Direct Statement*, which referenced the deficiencies in the SDC's use of *Nielsen's Report on Devotional Programs* ("RODP"). Sanders test. at para. 10. Although IPG could respond at length, such arguments are already set forth in full in IPG's *Rebuttal Statement*, at pages 20-33, and need not be repeated here. No "half-truths" exist.

Notwithstanding, one item of note must be made here. Mr. Sanders attempts to challenge IPG's observation that CSOs cannot predict what broadcast-by-broadcast viewership will occur prior to selecting a station for retransmission. IPG has contended that CSOs could predict viewership only on the most general level, e.g., according to historical daypart ratings. Nevertheless, Mr. Sanders defends the SDC's use of the RODP "local" ratings data, and therefore its use as a tool for predicting devotional program ratings, with statements that, remarkably, again display his lack of familiarity with the cable/satellite retransmission schematic. Sanders test. at para. 10.

Specifically, Mr. Sanders cites to his prior testimony that "ratings tend to be generally stable over time, meaning that predictions in one royalty period can be reasonably based on prior performance", and "that participants in the television industry are accustomed to the use of "true-up" or "make-good" retrospective adjustments in fees based on actual ratings performance."

As to his first point, no specificity is provided. Does Mr. Sanders suggest that the day part timeslot will be most significant in predicting the viewership, or that the program is more significant? Either assertion would

be easily disproven, as common sense tells us that "The Joy of Painting" and "America's Got Talent" would garner dramatically different results even on the same television station if both were broadcast at 8:00 p.m., i.e., the same day part time slot. Similarly, common sense tells us that "America's Got Talent" will garner significantly greater viewership at 8:00 p.m. than 2:00 a.m.

In sum, Mr. Sanders is just stating the obvious, that the same program, broadcast at the same time, *broadcast against the same competing programming* – will likely generate stable levels of viewership. This is not groundbreaking information, and does nothing to address the fact that even with broadcast stations, program schedules constantly change, and viewership ratings in response thereto are not predictable. Such fact is why Nielsen Media Research remains in business. More importantly, and what displays Mr. Sanders' misunderstanding of the retransmission schematic, is that broadcast ratings reflect the viewership to a single program being measured against programs offered by other broadcasters, but when the program is retransmitted it is being exhibited against an entirely different lineup of programming, making such broadcast ratings inapplicable. As such, broadcast ratings are irrelevant to a CSO, for the obvious reason that

they will not predict the ratings against an entirely different lineup of programming. Had Mr. Sanders bothered to review IPG's designated testimony, perhaps this fact would have been digested.

No differently, Mr. Sanders' second statement suggests that a "true-up", even if such mechanism existed in 100% of situations (which it does not), somehow rationalizes use of broadcast ratings to allocate retransmission royalties. "True ups", however, have no bearing on the income to a CSO or the viewership to a particular program after it has been retransmitted. There is simply no relevance of such fact to the retransmission schematic.

C. SDC WITNESS JOHN SANDERS ADMITTEDLY FAILED TO REVIEW ALL RELEVANT FILINGS MADE BY INDEPENDENT PRODUCERS GROUP.

Mr. Sanders' testimony, submitted as part of the SDC *Rebuttal Statement*, prefaces itself by identifying the materials ostensibly considered by Mr. Sanders. Sanders testimony at 2. As is clear, the representations therein are remiss and inaccurate.

As has now been admitted by the SDC, Mr. Sanders failed to incorporate the substance of IPG's *Notice of Revised Claim to 2001 Cable Royalties (Devotional)* (filed May 10, 2017). This fact was revealed by the

SDC's *Errata to Written Direct Statement of Settling Devotional Claimants* (filed January 16, 2018), which oddly did not have Mr. Sanders amend his written testimony, but rather admitted the error and *unilaterally* withdrew paragraph 9 of Mr. Sanders' testimony. The inappropriateness of a party unilaterally attempting to revise the testimony of a witness aside, it is unknown whether Mr. Sanders had IPG's *Notice of Revised Claim to 2001 Cable Royalties (Devotional)* in his possession and simply chose to disregard it, or whether it was never provided to him by the SDC to begin with. While neither act can be countenanced, the answer to such question goes toward either the credibility and competency of Mr. Sanders, or the SDC's candor in sharing information with its witnesses, both of which are at issue in this proceeding.[25]

As the Judges are aware, the SDC's *Errata to Written Direct Statement of Settling Devotional Claimants* prompted IPG to file its *Motion for Admonition and Sanctions*, which remains pending. Notwithstanding, further issues exist regarding what IPG materials have been considered by

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[25] See IPG *Rebuttal Statement*, Galaz test. at Section B, "The Testimony of SDC Witness John Sanders was Straitjacketed." It would be curious to know whether Mr. Sanders is even aware that the SDC has attempted to amend his testimony.

Mr. Sanders, and whether they were even provided to Mr. Sanders by the SDC.

Mr. Sanders' testimony asserts that he reviewed, *inter alia*, IPG's *Remand Direct Statement*, and IPG's *Opposition to SDC Motion to Strike Written Direct Statement* (filed April 20, 2017), and the Judges' *Order Denying SDC Motion to Strike IPG's Written Direct Statement* (Oct. 6, 2017). Despite the obvious and evident references to the designated testimony in these documents, including a description as to the significance and relevance of such designated testimony to the specific issues raised by the Judges during the initial round of these proceedings, Mr. Sanders conspicuously provides zero acknowledgment thereof in his testimony. Pause must therefore be taken to ask whether Mr. Sanders requested the designated testimony, or was even provided the designated testimony.

By all accounts, Mr. Sanders has not reviewed the designated testimony identified in IPG's *Remand Direct Statement*. All such testimony was of expert witnesses expressly cited in precedential opinions, including an expert witness that appeared in the same proceeding as Mr. Sanders (Michael Egan). Each of the witnesses were extensively involved in CSO activities vis-à-vis employment and ownership of CSO systems. All of these

witnesses *uniformly* disagree with the position that CSOs rely on the viewership ratings garnered by the broadcast stations, an issue prominently raised as a criticism against the IPG methodology in the Judges' final determination in connection with the initial round of these proceedings. See 78 Fed. Reg. 64984, 64999-65003 (Oct. 30, 2013).

IPG's *Rebuttal Statement* noted that it was unclear whether this lack of scrutiny as part of his direct statement testimony was the product of Mr. Sanders' apathy, or the SDC's "straitjacket" method of limiting Mr. Sanders' resources for consideration. The answer appears to have been answered by Mr. Sanders' testimony within the SDC *Rebuttal Statement*.

As is evident, despite the presence of designated testimony in IPG's *Remand Direct Statement* (filed April 15, 2016), Mr. Sanders *still* did not review such testimony.[26] Despite the citation to such testimony in IPG's *Opposition to SDC Motion to Strike Written Direct Statement* (filed April 20, 2017), Mr. Sanders *still* did not review such testimony. These pleadings were filed twenty-one months and nine months, respectively, prior to Mr.

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[26] See IPG Designated Testimony, citing Docket nos. 2001-8 CARP CD 98-99 (Phase I), Docket nos. 2012-6 CRB CD 2004-2009 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II), Testimony of John Fuller, James Trautman, Michael Egan, Judith Allen, and Gregory Rosston.

Sanders' testimony in rebuttal to IPG's *Remand Direct Statement*, providing Mr. Sanders with more than ample opportunity to review. Notwithstanding, Mr. Sanders fails to make a single acknowledgment of the designated testimony, fails to address how it relates to the Judges' prior criticisms, yet expressly cites the other means by which evidence submitted as part of IPG's *Remand Direct* Statement differs from the evidence submitted by IPG in the initial round of proceedings. Sanders test. at 9.

At a certain point, one is left scratching one's head as to what Mr. Sanders' believed was the scope of his engagement – to actually review IPG's filings and supporting evidence, or to parrot the conclusions sought by the SDC. What is clear, however, is that Mr. Sanders failed to consider extensive newly-submitted evidence that directly addresses the criticisms previously levied by the Judges against the IPG methodology.

D. SDC WITNESS JOHN SANDERS RETAINS NO PARTICULAR QUALIFICATIONS TO CRITIQUE A METHODOLOGY ASSESSING THE VALUE TO CABLE SYSTEM OPERATORS OF RETRANSMITTED PROGRAMMING.

IPG's *Rebuttal Statement* to the SDC's *Written Direct Statement* detailed the facts concluding that SDC witness John Sanders retains no

particular qualifications to *construct* a methodology assessing the value to CSOs of retransmitted programming. By the same token, Mr. Sanders retains no particular qualification to *critique* such a methodology, other than to observe any alleged mathematical or comparable failures on IPG's part. As noted above, the one instance in which Mr. Sanders did make such an allegation, i.e., IPG's alleged failure to remove 2001 broadcasts of Salem Baptist Church and Jack Van Impe Ministries from its analysis, it was incorrect. Consequently, such false allegation resulted in the SDC filing an *Errata to Written Direct Statement of Settling Devotional Claimants*, and IPG filing a *Motion for Admonition and Sanctions*, which remains pending. See supra.

As was revealed on examination by the Judges, Mr. Sanders had literally zero experience in the subject for which he was requested to opine. Neither he nor anyone at his firm had ever been involved in the assessment of cable or satellite retransmissions, *ever*. Mr. Sanders had never spoken to a CSO representative. As noted above, he has failed to review the designated testimony of expert witnesses expressly cited in precedential opinions, including an expert witness that even appeared in the same proceeding as Mr. Sanders (Michael Egan).

What is clear is that Mr. Sanders has no qualifications to make any econometric analysis (or critique), and painfully lacks any background in CSO proclivities or cable and satellite retransmission valuation. To that extent, the bulk of his testimony must be either disregarded or provided little weight.[27]

CONCLUSION

In sum, and contrary to the comprehensive statement of Mr. Sanders, IPG responded to each and every one of the criticisms levied by the Judges, with modifications to the IPG methodology, the submission of evidence vis-à-vis designated testimony, and the engagement of an econometric expert to validate and endorse the IPG methodology and its results. Moreover, to the

[27] It is therefore ironic that Mr. Sanders has criticized Mr. Galaz as being unqualified to present a distribution methodology. As a basis of comparison, Mr. Galaz has been involved in retransmission royalty distribution proceedings for more than twenty years, has developed methodologies, has critiqued methodologies, has developed software programs for the valuation of programs, and has personally reviewed the data of third parties and developed programs that discovered errors that prior panels have found significant. See *Distribution of 1993, 1994, 1995, 1996, 1997 Cable Royalty Funds* (Dec. 26, 2001), 66 Fed. Reg. 66433, at 66499 *et seq*. ("Zero Viewing hours" . . ."). To the extent that Mr. Galaz has ever presented a distribution methodology, it has been premised on integrating data that reflects CSO decisionmaking, per prior rulings of the CRB and its predecessors. Mr. Sanders, by comparison, has never developed a methodology, but *only* endorsed the work of others.

extent that Mr. Sanders attempts to assert econometric criticisms to the IPG methodology, such criticisms should be disregarded as beyond the scope of his expertise.

Respectfully submitted,

By_______/s/______________
Raul C. Galaz

March 9, 2018

DECLARATION OF RAUL GALAZ

I declare under penalty of perjury that the foregoing testimony is true and correct, and of my personal knowledge.

Executed on March 9, 2018 __________/s/_________________
Raul C. Galaz

CERTIFICATE OF SERVICE

I hereby certify that on this March 9, 2018, a copy of the foregoing was electronically filed and served on the following parties via the eCRB system.

___________/s/_________________
Brian D. Boydston

DEVOTIONAL CLAIMANTS:

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Washington, D.C. 20036

Certificate of Service

I hereby certify that on Friday, March 09, 2018 I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP'S MEMORANDUM OF LAW IN RESPONSE TO SETTLING DEVOTIONAL CLAIMANTS' WRITTEN REBUTTAL STATEMENT to the following:

Settling Devotional Claimants (SDC), represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Signed: /s/ Brian D Boydston