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

In re **Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (*Web V*)**	**Docket No. 19-CRB-0005-WR (2021-2025)**

SOUNDEXCHANGE'S REPLIES TO NAB'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

October 28, 2020

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SoundExchange respectfully submits the following reply to NAB's proposed findings of fact and conclusions of law.

I. BACKGROUND

A. Radio's Role in the Marketplace

Response to ¶¶ 1-3. No response.

Response to ¶ 4. If simulcasting is viewed as part of the larger broadcast business, there is no basis to believe that a broadcaster is in any way at a disadvantage compared to custom webcasters. To the contrary, "simulcasters enjoy cost savings and synergies based on the fact that a simulcast stream is substantially the same as the radio station's broadcast signal" and "costs associated with the creation of the broadcast signal are sunk by the time the broadcaster makes the decision to simulcast the broadcast signal." Ex. 5603 ¶ 38 (Orszag WRT). The Judges recognized this in the *Web III Remand*, observing that the business models of terrestrial broadcasters who simulcast "afford them the *synergy* to expand horizontally across the landscape of differentiated sound recording sub-markets" as compared to other "webcasters with a more costly and less synergistic business model." *In re Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23112 (Apr. 25, 2014).

Response to ¶ 5. SoundExchange incorporates its Reply to JPFFCL ¶¶ 1, 7-11.

Response to ¶ 6. Testimony from NAB witnesses about the alleged importance of the public interest requirement to radio broadcasters is irrelevant. *See* SoundExchange's Proposed Findings of Fact and Conclusions of Law ("SX PFFCL") ¶ 1135. NAB raised this same argument in *Web IV*. There, the Judges found that "NAB did not present any persuasive evidence that the public interest requirement would in any way affect the royalty rates that willing buyers and sellers would agree to in the hypothetical market." *In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg.

26316, 26321 (2016) (hereinafter "*Web IV*"). "To the extent the NAB's argument is that, as a matter of public policy, radio broadcasters' public interest requirement justifies lower royalty rates for simulcasting," the Judges rightly concluded that the "argument is without any basis in § 114." *Id.* Here too, NAB has produced no persuasive evidence in this case that should dictate a conclusion different from what the Judges have reached previously. *See* SX PFFCL ¶¶ 1135-36.

Testimony from NAB witnesses that radio broadcasters focus on their local markets is likewise irrelevant, and was also rejected in *Web IV*, where the Judges found "neither record evidence nor an articulated rationale to support a lower royalty rate for simulcasters based on the purported local focus of radio broadcasters." 81 Fed. Reg. at 26321. Here, there is also neither compelling evidence nor a rationale for a lower rate because of local focus. NAB provides no reason why the Judges should deviate from their previous ruling. *See* SX PFFCL ¶¶ 1137-40.

That radio broadcasters also provide sports, political, religious, traffic, weather, and other community-oriented content is not relevant to the royalty rate they should pay for the music content that they stream over the internet on their simulcasts. The nature of a per-performance royalty rate means that simulcasters do not pay statutory royalties for this content. As the Judges explained in *Web IV*, "[b]y including non-music content in their transmissions, simulcasters reduce the number of performances of recorded music, thus reducing their royalty obligation under a per-performance rate structure." 81 Fed. Reg. at 26321. As a result, the Judges concluded that "the relative amount of non-music content transmitted by simulcasters versus the amount transmitted by other commercial webcasters does not support a reduced royalty rate for simulcasters." *Id.* The Judges found no "evidence that the value of non-music content is not fully accounted for in this reduction of royalties." *Id.*

The evidence cited by NAB also suggests that its claims about the importance of non-music content are overblown. For example, Exhibit 2103 shows that [ ]. Ex. 2103 at 108. [ ]. Ex. 2103 at 108; Ex. 2089 at 8 (same). [ ]. Ex. 2103 at 108. And Exhibit 2088, a [ ]. Ex. 2088 at 43, 44. [ ]. Ex. 2088 at 43, 44. [ ] Ex. 2088 at 58.

NAB's claims about the reach of broadcast radio are irrelevant to the rates to be set. Simulcasting does not have the audience of broadcast radio. For example, [ ]. Ex. 2005 at 10, 53; *see also infra* Resp. to ¶ 155.

Response to ¶ 7. Both simulcast and other webcasting provide users a measure of control over what they hear. *See* SX PFFCL ¶¶ 1133-34; *infra* Resp. to ¶¶ 8-9. As Mr. Orszag explained,

"simulcasts are streams from radio stations that are defined in part by genre (top hits, country, R&B, etc.)." Ex. 5603 ¶ 35 (Orszag WRT). Dr. Leonard acknowledged that users of custom radio "can influence custom radio's choice of songs by, e.g., suggesting a genre." Ex. 2150 ¶ 49 (Leonard CWDT). Given that users can choose to listen to a particular genre of music on both simulcast stations and custom radio, the user experience is not materially different. Ex. 5603 ¶ 35 (Orszag WRT).

Response to ¶ 8. NAB's argument that simulcast is less interactive than custom webcasting and thus deserves a lower rate is one that the Judges rejected in *Web IV*. *See* 81 Fed. Reg. at 26322; SX PFFCL ¶¶ 1131-32; *infra* Resp. to ¶¶ 149-153. NAB virtually ignores the fact that there are noninteractive webcasters relying on the statutory license that neither are simulcasters nor offering custom radio products. NAB relegates mention of these other webcasters to a footnote, implying that they should be ignored because they "were not represented in this proceeding" and "few such services exist in the current marketplace." NAB PFFCL ¶ 8 n.4.

That such services did not participate in this proceeding is of no moment as the statutory rate will nonetheless apply to them. Nor has NAB identified any evidence showing that few such services exist in the current marketplace. *See infra* Resp. to ¶ 24. In fact, some of these services engage in substantially more webcasting than some of the simulcasters that did participate. For example, one such service, AccuRadio had [[redacted]]. Ex. 3030 (Tab "[[redacted]]"). By contrast, [[redacted]]. *Id.* [[redacted]]. *Id.* ([[redacted]]).

Response to ¶ 9. While on-demand services allow a user to select the exact song that he or she wants to hear, subscribers increasingly use the noninteractive "lean back" functionality of those services. SX PFFCL ¶¶ 78-85. And NAB leaves out a crucial portion of Mr. Harrison's testimony [ ]. 9/3/20 Tr. 4692:5-14 (Harrison). Similarly, in the cited testimony, Mr. Orszag defined lean-back functionality as including radio stations, service-generated playlists, and simulcasts. 8/12/20 Tr. 1517:17-1518:9 (Orszag).

B. NAB's Proposal

1. Rate Proposal and Statutory Definition of "Simulcast"

Response to ¶ 10. The proposed differentiated rate structure, definition, and rates are neither necessary nor appropriate. *See* SX PFFCL ¶¶ 1062-1291; *infra* Resp. to ¶¶ 20-208.

Response to ¶ 11. SoundExchange incorporates its Response to ¶ 10, *infra*.

Response to ¶ 12. The Judges in *Web IV* rejected NAB's proposal for a number of different reasons. *See* SX PFFCL ¶¶ 1062-64, 1116, 1132, 1136, 1138, 1141-42, 1148; *infra* Resp. to ¶¶ 19-28, 149, 153. NAB has not cured these deficiencies here. *See* SX PFFCL ¶¶ 1062-1291.

2. Terms Proposal

Response to ¶ 13. NAB has failed to come forward with sufficient evidence justifying its proposals to (1) slash the late fee applicable to late payments discovered in audits, and (2) provide a credit if an audit reveals a net overpayment (which has never happened). *See* SX PFFCL ¶¶ 1591-1618, 1656-1660; SX Reply to Services' JPFFCL ¶¶ 328-38. The cable compulsory license audit regulation at 37 C.F.R. § 201.16(j)(2) is not relevant given the very different flow of royalties under Section 111. SX Reply to Services' JPFFCL ¶ 335. The Judges should instead adopt

SoundExchange's proposal to continue the current language of Section 380.6(g) with minor changes to conform to the PSS/SDARS regulations. SoundExchange Proposed Rates and Terms at 7-20; *see* SX PFFCL ¶¶ 1579-83.

Response to ¶ 14. SoundExchange does not object to confirming that when current Section 380.6(h) provides for audit fee shifting in the event of a 10% underpayment, it means a *net* underpayment. NAB also proposes to address as a "terms" issue a significant change to the royalty rate structure—eliminating the inflation adjustment mechanism the Judges adopted in *Web IV* at the suggestion of Professor Shapiro. *Web IV*, 81 Fed. Reg. at 26404. All the other Services propose retaining that feature of the statutory rate structure. *See infra* Resp. to ¶ 207. NAB has not met its burden of coming forward with sufficient evidence to support its proposed significant change in the statutory rate structure. *See infra* Resp. to ¶¶ 207-08.

II. LEGAL FRAMEWORK

A. The Willing-Buyer/Willing-Seller Standard and Relevant Evidence

Response to ¶ 15. SoundExchange incorporates its Reply to JPFFCL ¶¶ 1-18.

Response to ¶ 16. No response.

B. The Statute Does Not Require Distinct Rates for Simulcasters

Response to ¶ 17. SoundExchange does not dispute that the statute requires the Judges to distinguish among the different types of services in operation. 17 U.S.C. § 114(f)(1)(B). However, the statute also requires "such differences to be based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers." *Id.* Moreover, the Judges must establish "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." *Id.*

Response to ¶ 18. SoundExchange incorporates its response to ¶ 17, *supra*. Moreover, in determining whether to distinguish between simulcast and custom webcast, the Judges must follow what the statute actually says and not NAB's gloss. Contrary to NAB's position, the statute does not require distinct rates if "the programming of two types of services differ in economically meaningful ways." *Compare* NAB PFFCL ¶ 18, *with* 17 U.S.C. § 114(f)(1)(B). The statute also does not require distinct rates if the Judges determine that one service is either materially more promotional or less substitutional than other services. *Id.* Under the clear terms of the statute, neither one of these criteria is dispositive. Moreover, the phrasing of the statute makes clear that they are but two of the criteria—among others—that the Judges should consider to determine if two services should have distinct rates, not elements either of which mandate distinct rates. 17 U.S.C. § 114(f)(1)(B) ("differences to be based on criteria *including*" the two listed) (emphasis added). Ultimately, the statute mandates that distinct rates be set only where those "rates and terms . . . most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B).

Response to ¶ 19. SoundExchange incorporates its responses to ¶¶ 17-18, *supra*. The statute requires distinct rates and terms only if the record in this proceeding demonstrates that distinct rates and terms would "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B). NAB's characterization of the setting of distinct ad-supported and subscription rates in *Web IV* omits important details. That distinction was made pursuant to then-section 114(f)(2)(A), which expressly directed the Judges to "distinguish among the different types of eligible nonsubscription transmission services and new subscription services." *SoundExchange*, 904 F.3d at 57. The D.C. Circuit explained that "the express grant of authority to draw distinctions

between 'nonsubscription transmission services' and 'new subscription services,' 17 U.S.C. § 114(f)(2)(A), necessarily means the Board can distinguish between nonsubscription services, on one hand, and subscription services, on the other." *SoundExchange*, 904 F.3d at 57-58. The Court noted that in setting these distinct rates, the Judges relied on "overwhelming" evidence that users of ad-supported services and subscription services had different willingness to pay. *Id.* at 58.

The Court also observed that rate differentiation was appropriate "when the services occupied 'distinct segment[s] of the noninteractive webcasting market,'" or where "one service instead 'operate[d] in a submarket separate from and noncompetitive with' the other." *Id.* at 58 (citing *Web II*, 72 Fed. Reg. at 24095, 24097). Relevant factors to consider include where "the services compete with each other for listeners." *Id.* at 58. In *Web IV*, the Judges held that because NAB is "the proponent of a rate structure that treats simulcasters as a separate class of webcasters, the NAB bears the burden of demonstrating not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." 81 Fed. Reg. at 26320. Noting that "[n]o prior rate determinations treated simulcasters differently from other webcasters," the Judges found that NAB had not met its burden and rejected essentially the same arguments NAB makes in this case. *Id.* NAB has not cured the deficiencies in the *Web IV* record. In fact, it offers a more limited version of the same evidence. *See infra* Resp. to ¶ 23. This is a far cry from the "overwhelming" evidence needed to support the Judges' differentiation of ad-supported and subscription services. *SoundExchange*, 904 F.3d at 58; *see* SX PFFCL ¶¶ 1062-1291.

III. NAB HAS NOT MET ITS EVIDENTIARY BURDEN TO ESTABLISH A DIFFERENTIATED RATE FOR SIMULCASTS

Response to ¶ 20. SoundExchange agrees that the Judges have consistently (and appropriately) declined to set differentiated rate for simulcasts. The record here makes clear that the Judges should again decline to do so. *See* SX PFFCLL ¶¶ 1062-1291 (Part IX).

Response to ¶ 21. SoundExchange incorporates its responses to ¶ 17-19, *supra*. SoundExchange does not dispute that the Judges' determination should be based on the written record of this proceeding. However, SoundExchange does not agree with NAB's implication that the Judges should completely disregard prior CRB precedent that simulcasting does not warrant a distinct rate. *See* 17 U.S.C. § 803(a)(1) (referring to the "written record" and "prior determinations"). The Judges' past decisions are informative—particularly where, as here, NAB relies on the same arguments and the same type and quantum of evidence that the Judges considered and rejected in *Web IV*. *See* SX PFFCL ¶¶ 1062-64, 1116, 1132, 1136, 1138, 1140-41, 1148. The same deficiencies in NAB's case remain. As a result, the Judges' reasoning in *Web IV* applies directly to determining whether NAB has met its burden here.

Response to ¶ 22. SoundExchange agrees that NAB has the burden to demonstrate that simulcasts have unique characteristics that "would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV,* 81 Fed. Reg. at 26323. But NAB omits from its quotation of *Web IV* the key part of the Judges' holding. The Judges explained that, with respect to NAB's qualitative evidence, "NAB ably demonstrated a distinction between simulcasting and other webcasting, *but failed to articulate why that distinction supports differential royalty rates for simulcasters*." *Web IV,* 81 Fed. Reg. at 26321 (emphasis added). As NAB concedes, the qualitative evidence that NAB produced here is "similar to that offered in *Web IV*." NAB PFFCL ¶ 22. Once again, NAB has "failed to articulate" why that evidence suggests a

"distinction [that] supports differential royalty rates for simulcasters." *Web IV,* 81 Fed. Reg. at 26321; *see infra* Resp. to ¶¶ 146-73.

Response to ¶ 23. NAB has not produced new evidence sufficient to show that any differences of simulcasting "would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV,* 81 Fed. Reg. at 26323. Much of this supposed "new" evidence is the same kind of qualitative evidence presented in *Web IV*, and it does not cure the deficiencies in NAB's case from that proceeding. *See infra* Resp. to ¶¶ 29-111, 147-173.

The core of NAB's benchmarking evidence is not new. NAB offers a subset of the iHeart-Indie Agreements that were proposed—and rejected—as a benchmark in *Web IV*. 81 Fed. Reg. at 26320; SX PFFCL ¶ 1148. At that time, that benchmark consisted of 27 direct licenses. 81 Fed. Reg. at 26320; SX PFFCL ¶ 1148. Now, only 15 remain. SX PFFCL ¶ 1158. NAB flatly misconstrues the Judges' decision in *Web IV* in implying that the only reason the Judges rejected this benchmark was because NAB had not supplied "additional data (e.g., iHeart's net simulcasting revenues and the number of simulcast performances of recorded music)" to convert the percentage-of-revenue rate under those agreements into a per-play rate. NAB PFFCL ¶ 23 n.9 (citing *Web IV*, 81 Fed. Reg. at 26320). In *Web IV*, the Judges also rejected the benchmark because "there is insufficient evidence and economic analysis in the record for the Judges to determine whether the headline rate for simulcasting in the iHeart-Indie agreements fully accounts for the economic value of the licenses to the parties." 81 Fed. Reg. at 26320.

The Judges pointed out that the iHeart-Indie Agreements "include payments that are characterized as royalties for performances of recorded music by means of [ ]." *Id.* at 26320 n.34. They went on to note that, "[s]ince U.S. copyright law confers no exclusive right of public performance by means of terrestrial radio transmissions for sound

recording copyright owners, the Judges would need further evidence to determine whether, as an economic matter, these payments should be treated, at least in part, as compensation for other uses (such as [[redacted]]) covered by the agreements that do require a license under copyright law." *Id.* The inclusion of the [[redacted]] remains one of the key reasons why the iHeart-Indie Agreements do not provide adequate evidentiary support for the NAB's proposed differential rate. *See infra* Resp. to ¶¶ 64-71; *see also* SX PFFCL ¶¶ 1190-96.

Response to ¶ 24. SoundExchange incorporates its responses to ¶¶ 22-23, *supra*. Moreover, NAB's description of the Judges' holding in *Web IV* is not accurate. Nowhere in the cited portion of *Web IV* do the Judges recognize, as NAB claims, that there are a number of factors that the statute requires them to consider that may overtake the inherent differentiation in the per-play rate structure. *Compare* NAB PFFCL ¶ 24, *with* 17 U.S.C. § 114(f)(1)(B). Instead, the Judges recognized that "[b]y including non-music content in their transmissions, simulcasters reduce the number of performances of recorded music, thus reducing their royalty obligation under a per-performance rate structure. The NAB failed to present any evidence that the value of non-music content is not fully accounted for in this reduction of royalties." *Web IV*, 81 Fed. Reg. at 26321. The Judges went on to hold that, "[w]ere the Judges to adopt a percentage-of-revenue rate structure, an appropriate adjustment would be necessary to reflect the lower percentage of recorded music as compared with an Internet music service. As the Judges do not adopt a percentage-of-revenue rate structure in this proceeding, however, no adjustment is needed." *Web IV*, 81 Fed. Reg. at 26321 n.36. Here too NAB has produced no evidence, empirical or otherwise, to prove its assertion that the value of non-music content is not fully accounted for in this reduction of royalties by way of a per-play rate. *See infra* Resp. to ¶¶ 165-73.

NAB asserts, without evidentiary support, that non-custom, non-simulcast noninteractive services should be disregarded because they are a "relatively tiny segment of the market that did not participate in this proceeding." NAB PFFCL ¶ 24 n.11. NAB relies entirely on Dr. Leonard's testimony, who asserted—also without support—[ ]. 8/24/20 Tr. 3355:4-10 (Leonard). But Dr. Leonard cannot speak to this because [ ] 8/24/20 Tr. 3355:4-10 (Leonard). Nor is the existence of such services "theoretical." NAB PFFCL ¶ 24 n.11. In reality, a great number of these services do in fact exist. *See* Ex. 3030. Some of them [ ]. *See supra* Resp. to ¶ 8.

Response to ¶ 25. SoundExchange incorporates its responses to ¶¶ 29-111, *infra*, which demonstrate that NAB does not propose viable benchmarks and that NAB's proposed benchmarks are not sufficient to carry NAB's burden to show that the Judges should adopt a differentiated rate for simulcast and custom radio. *See also* SX PFFCL ¶¶ 1081-1100, 1148-1203. Additionally, this benchmark is not new. As NAB itself acknowledged, the iHeart-Indie Agreements were offered—and rejected—as a benchmark in *Web IV*. NAB PFFCL ¶ 23 n.9.

Response to ¶ 26. SoundExchange incorporates its responses to ¶¶ 112-45, *infra*. *See also* SX PFFCL ¶¶ 1205-91.

Response to ¶ 27. SoundExchange incorporates its response to ¶¶ 22-23, *supra*. NAB has not demonstrated that the alleged interactivity, promotional value, or non-music content on simulcast "would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV,* 81 Fed. Reg. at 26323; *see also infra* Resp. to ¶¶ 146-73.

Response to ¶ 28. SoundExchange incorporates its responses to ¶¶ 17-24, *supra*. As explained throughout these responses, NAB has not met its burden, as "the proponent of a rate structure that treats simulcasters as a separate class of webcasters," of demonstrating "not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV*, 81 Fed. Reg. at 26320; *see* SX PFFCL ¶¶ 1062-1291.

A. Benchmark Evidence Does Not Support NAB's Differentiated Rate Proposal

Response to ¶ 29. SoundExchange agrees that the Judges are permitted to consider benchmarks, but NAB does not propose a viable benchmark. *See infra* Resp. to ¶¶ 32-86.

Response to ¶ 30. The iHeart-Indie Agreements do not provide a useful benchmark. Resp. to ¶¶ 32-86, *infra*; SX PFFCL ¶¶ 1081-89, 1148-1203. These same licenses were offered and rejected as benchmarks in *Web IV*. 81 Fed. Reg. at 26320; *see also* SX PFFCL ¶ 1151. Since that time, this universe of direct licenses has diminished in size, as a number of indies chose not to renew their direct licenses with iHeart. *See* SX PFFCL ¶ ¶ 1148, 1158.

Response to ¶ 31. The PRO agreements do not provide useful information, and despite the claim that the agreements cover the "overwhelming majority" of music publishing rights, in reality the NAB's analysis turns on just two agreements with Pandora that are not in the record, that Dr. Leonard has not seen, and the terms of which have been rejected by other buyers in the market such as iHeart. *See* Resp. to ¶¶ 87-106, *infra*; SX PFFCL ¶¶ 1090-1101.

1. The iHeart-Indie Benchmarks Do Not Support NAB's Differentiated Rate Proposal and Rates

Response to ¶ 32. NAB omits key language from *Web IV*. In the quoted text, the Judges held "if the party that seeks to increase (or decrease) an otherwise effective benchmark rate to account for other items of potential value cannot or has not provided evidence of such value, when

it was in its self-interest to do so, the Judges cannot arbitrarily adjust or ignore that otherwise proper and reasonable benchmark." 81 Fed. Reg. at 26387. In any event, SoundExchange is not asking the Judges to ignore a proper and reasonable benchmark. SoundExchange contends that the iHeart-Indie Agreements are not a proper and reasonable benchmark. Indeed, in *Web IV*, the Judges rejected the use of these very agreements as benchmarks, and in *SDARS III*, the Judges rejected a similar benchmark of direct licenses procured by Sirius XM. *Web IV*, 81 Fed. Reg. at 26320; S*DARS III*, 83 Fed. Reg. at 65249. *See* SX PFFCL ¶¶ 1148-52.

Response to ¶ 33. The iHeart-Indie Agreements do not cover the exact same package of rights at issue under the section 114/112 license. While the iHeart-Indie Agreements cover simulcast, custom radio and non-custom radio transmissions, crucially, they also include [ ]. SX PFFCL ¶¶ 1190; Ex. 5603 ¶ 65 (Orszag WRT); 8/24/20 Tr. 3451:8-18 (Leonard). [ ]. Ex. 5603 ¶ 65 (Orszag WRT); 8/24/20 Tr. 3363:22-3364:3 (Leonard). [ ]. *See* SX PFFCL ¶¶ 1190-96; Ex. 5603 ¶¶ 65-66 (Orszag WRT); Resp. to ¶ 64, *infra*.

Moreover, the iHeart-Indie Agreements do not represent the entire universe of willing-buyer, willing-seller agreements between simulcasters and record companies. As discussed in SoundExchange's initial findings, Dr. Leonard failed to consider: (1) agreements between iHeart and indies that did not renew; (2) agreements between [ ]; and (3) an agreement between [

[redacted]]. SX PFFCL ¶¶ 1162-69; Ex. 5603 ¶¶ 55-56 (Orszag WRT). Dr. Leonard decided not to consider these other agreements, presumably because [[redacted]]. SX PFFCL ¶¶ 1167-68; Ex. 5603 ¶ 55 (Orszag WRT) (calculating that the [[redacted]]).

Response to ¶ 34. Dr. Leonard did not consistently apply his approach of focusing on renewal agreements. He excluded from his analysis two deals that *did* renew: [[redacted]]. SX PFFCL ¶¶ 1167-68; Ex. 5603 ¶ 56 n.121 (Orszag WRT); 8/31/20 Tr. 4617:3-4618:12 (Williams). Both these direct licenses had [[redacted]]. Ex. 5603 ¶ 55 (Orszag WRT); Ex. 2154 ¶¶ 28-29 (Williams CWDT). Moreover, in offering the iHeart-Indie Agreements as representative of the market, Dr. Leonard chose to ignore all of the indies that rejected the license. SX PFFCL ¶ 1157.

Contrary to NAB's claim, Dr. Leonard has offered no evidence that the indies who renewed understood the *effective* per-pay rates of the initial deals. NAB cites only to two paragraphs of Dr. Leonard's Corrected Written Direct Testimony, neither of which support this proposition or speak to what the indies would have understood. In fact, [[redacted]]. 8/24/20 Tr. 3489:23-3490:12, 3491:10-25 (Leonard); SX PFFCL ¶¶ 1159, 1186.

Response to ¶ 35. SoundExchange incorporates its response to ¶ 34, *supra*.

Response to ¶ 36. No response.

Response to ¶ 37. Dr. Leonard's interpretation of these agreements is flawed. As discussed above, the iHeart-Indie Agreements also include [ ]. *See* Resp. to ¶ 33, *supra*; SX PFFCL ¶¶ 1190-96; Ex. 5603 ¶¶ 65-66 (Orszag WRT). Both NAB and SoundExchange witnesses testified that [ ]. SX PFFCL ¶¶ 1190-96; 8/31/20 Tr. 4606:18-4607:6 (Williams) ([ ]). Thus, the iHeart-Indie Agreements only provide insight into how willing buyers and willing sellers would license simulcast and custom radio rights when accompanied by [ ].

Contrary to NAB's representation, the cited paragraph of Dr. Leonard's Corrected Written Direct Testimony says nothing about the relative promotional and substitutional considerations associated with licensing iHeart's simulcast and custom radio services. Dr. Leonard just asserted, without any evidence, that iHeart might play more of an indie's sound recordings, which in turn *could* result in greater promotional effects. *See* Ex. 2150 ¶ 75 (Leonard CWDT). This unsupported statement should be disregarded.

NAB's assertion that the iHeart-Indie Agreements [ ] ignores important evidence. NAB has acknowledged that the important timeframe is [ ]. NAB PFFCL ¶ 44; *see also id.* ¶ 34; 8/24/20 Tr. 3357:9-3358:2 (Leonard). [

[redacted]]. SX PFFCL ¶¶ 1082-89; Resp. to ¶¶ 79-82, *infra*.

Response to ¶ 37 n.14. This analysis of nonrenewal indies appears nowhere in Dr. Leonard's written testimony. At trial Dr. Leonard asserted, without providing any support or calculations to back up his claim, that many of the nonrenewed iHeart-Indie Agreements reflected [[redacted]]. 8/24/20 Tr. 3366:17-3367:6 (Leonard). Dr. Leonard tacitly acknowledges that [[redacted]]. Without any of the supporting data, it cannot be determined whether or not [[redacted]].

NAB's claim that Dr. Leonard excluded only un-renewed agreements is incorrect. The [[redacted]] both [[redacted]] at the time he submitted his Written Direct Testimony. SX PFFCL ¶ 1167 (citing Ex. 5603 ¶¶ 55-56 (Orszag WRT); Ex. 2070 ¶ 3). The agreement between [[redacted]] had effective rates of [[redacted]]. Ex. 5603 ¶ 55 (Orszag WRT). According to a conversation Mr. Orszag had with an executive at [[redacted]]. *Id.* ¶ 56 n.121. A declaration provided by an executive at Beasley confirmed that [[redacted]]). Ex. 2070 ¶ 3. Dr. Leonard's disregard of this license is directly at odds with how he and NAB treated other direct licenses that were [[redacted]]. *See* Ex. 2150, App. A5 (Leonard

CWDT) ([ ]); NAB PFFCL ¶ 58 (arguing that "it was entirely appropriate for Dr. Leonard to include the BMG as a renewal indie in his benchmarking analysis" because of [ ]).

Similarly, [ ]. 8/31/20 Tr. 4617:3-7 (Williams). That license [ ]. *Id.* at 4617:20-4618:3 (Williams). [ ]. *Id.* at 4617:24-4618:12 (Williams). *See* SX PFFCL ¶¶ 1168-69.

Dr. Leonard's exclusion of unrenewed direct licenses likewise is indefensible. *See* SX PFFCL ¶¶ 1162-69. Some of these licenses [ ] than the direct licenses used by Dr. Leonard; rates that were [ ]. Ex. 5603 ¶ 55 (Orszag WRT); Ex. 5625 ¶ 83 (Ploeger WRT). For example, the agreement between [ ] had effective royalty rates of [ ]; the agreement between [ ] had effective royalty rates of [ ]; and the agreement between [ ] had effective rates of [ ]. SX PFFCL ¶ 1163 (citing Ex. 5603 ¶ 55 & n.118 (Orszag WRT); Ex. 5625 ¶ 83 & App. F (Ploeger WRT)). As Mr. Orszag explained, broadcasters will not renew a direct license if the direct license rate turns out to be higher than the statutory rate, and as a result, looking only at renewed licenses

has the effect of ignoring all rates that would have been higher than the statutory rate, if no statutory rate existed. Ex. 5603 ¶¶ 55-56 (Orszag WRT).

NAB mischaracterizes SoundExchange's position when it claims that SoundExchange conceded that these [ ] are not a viable benchmark. SoundExchange has detailed at length why the iHeart-Indie Agreements are not a viable benchmark. *See* SX PFFCL ¶¶ 1081-89, 1148-1203. One of the reasons they are not a viable benchmark is because Dr. Leonard's benchmark is incomplete and excludes these agreements. *Id.* ¶¶ 1162-69. For many of these excluded agreements, [ ]. *Id.* ¶¶ 1163, 1167-68. Thus, by excluding these agreements from his benchmark, Dr. Leonard's biased selection of benchmark agreements artificially depressed his benchmark rate. *Id.* ¶¶ 1165-66, 1169. SoundExchange's position is that none of these agreements should be used as benchmarks, but if Dr. Leonard's benchmark is to be considered, these other agreements are just as viable and should not be ignored.

Finally, NAB criticizes Mr. Ploeger's testimony about the effective rates under the [ ]. NAB PFFCL ¶ 37 n.14. NAB did not contend that Mr. Ploeger's effective rate calculations were incorrect. Instead, it argued that Mr. Ploeger's testimony should be disregarded because "he did not know anything about those broadcasters' expectations at the time they entered into the agreements, their willingness to pay the effective royalty rates under those deals on an industry-wide basis, or how they would have valued non-rate components." *Id.* But this exact criticism applies equally to Dr. Leonard, who did not speak to any indies and admitted that he did not know what they thought about the iHeart-Indie Agreements. SX PFFCL ¶ 1186; 8/24/20 Tr. 3489:23-3490:12, 3491:10-3492:19 (Leonard).

Response to ¶ 38. NAB entirely failed to demonstrate that the renewal indies were motivated by steering. *First*, NAB ignores the fact that indies had other reasons to renew. [ ]. *See* Resp. to ¶ 37, *supra*. For some if not all indies, [ ]. Resp. to ¶ 64, *infra*; SX PFFCL ¶¶ 1190-96; 8/31/20 Tr. 4606:18-4607:6 (Williams). For at least one indie ([ ]), and perhaps others, there was a benefit to the label that flowed from receiving the artist share. *See* SX PFFCL ¶ 1200. SoundExchange's administrative fee and [ ] under the direct licenses also were factors. *Id.* ¶¶ 1198, 1201.

Second, although Dr. Leonard asserted that indies were motivated to enter direct licenses by steering, NAB produced no evidence that this was in fact that case. *Id.* ¶¶ 1185-86. Dr. Leonard testified that [ ]. 8/24/20 Tr. 3489:23-3490:12 (Leonard). And Dr. Leonard [ ]. *Id.* at 3491:10-25 (Leonard).

Third, the record shows that [ ], SX PFFCL ¶ 1171, and [ ]. *Id.* ¶ 1177. Moreover, while the iHeart programming team is ultimately responsible for the content played on iHeart's terrestrial broadcast and accompanying simulcast, no review process existed to confirm that the programmers were engaging in any steering process. 8/31/20 Tr. 4539:16-4540:3

(Williams). And programmers almost certainly did not steer because until September 2019, [ ] Ex. 5494 at 1.

Fourth, iHeart had little incentive to steer. According to Dr. Leonard, the content on a simulcast stream is in most circumstances identical to the broadcast transmission, Ex. 2150 ¶ 32 (Leonard CWDT), and simulcast represents only a small percentage of the combined broadcast/simulcast listening hours, *id.* at ¶ 53. Choosing which music to play based on price—rather than selecting the mix of sound recordings that will best attract listeners and therefore advertisers—may degrade the broadcast that represents most of the listening time, while the savings will be realized only on the simulcast streams that represent a very small portion of the listening time. SX PFFCL ¶¶ 1173-74. Dr. Leonard acknowledged [ ]. 8/24/20 Tr. 3503:9-14 (Leonard). He further agreed that [ ]. *Id.* at 3522:1-21 (Leonard). This is why, [ ]. 8/31/20 Tr. 4596:15-21; 4598:4-17 (Williams); *Id.* at 4597:20-25 (Williams) ([ ]). To the extent that iHeart [ ] so that it [ ]. *Id.* at 4598:7-17 (Williams); SX PFFCL ¶ 1174.

Indeed, iHeart had an affirmative incentive *not* to steer, [ ]. SX PFFCL ¶

1175. Dr. Leonard agreed that [ ]. 8/24/20 Tr. 3461:2-11; 3462:12-21; 3463:11-18; 3472:18-3473:13 (Leonard). For example, in 2016 iHeart paid Big Machine [ ]. Ex. 2178 at 4. Dr. Leonard acknowledged that [ ]. 8/24/20 Tr. 3460:15-3461:1; 3461:21-3462:2; 3472:8-11 (Leonard).

In the end, iHeart's steering claim comes down to the notion that direct-licensed indies [ ]. SX PFFCL ¶¶ 1177-80. The evidence and other testimony in the record shows otherwise. NAB produced no evidence that any direct license indie has in fact [ ]. [ ]. *See* Ex. 2152 (Pittman WDT). There are no emails in the record [ ]. In fact, [ ]. Ex. 5489 at 2 ([ ]).

[ ].

The fact of the matter is, [ ].

Response to ¶ 39. *First*, the [ ] was not meaningful. SX PFFCL ¶¶ 1177-84. iHeart [ ]. *Id.* ¶ 1177; 8/31/20 Tr. 4593:19-25 (Williams); 8/24/20 Tr. 3495:4-3496:25 (Leonard); Ex. 5463 at 7. Consequently, at the time when iHeart renewed its direct licenses, [ ]. 8/24/20 Tr. 3497:1-3498:15 (Leonard). [ ]. 8/31/20 Tr. 4595:9-14 (Williams).

[ ]. SX PFFCL ¶1181; Ex. 5603 ¶ 59 (Orszag WRT); Ex. 5273 at 9. [ ]. SX PFFCL ¶ 1182; Ex. 5603 ¶ 59 (Orszag WRT); 8/11/20 Tr. 1429:10-16 (Orszag). According to iHeart documents, [ ]. Ex. 5489 at 2. [ ]. *See, e.g.*, Ex. 2013 at 3 § 1(o); SX PFFCL ¶ 1182. [ ] Ex. 5603 ¶ 60 (Orszag WRT).

Mr. Williams acknowledged that [ ], 8/31/20 Tr. 4599:5-10 (Williams), but iHeart emails

demonstrate that [ ]. SX PFFCL ¶¶ 1183-84. For example, [ ]. Ex. 5489 at 2; Ex. 5603 ¶ 61 (Orszag WRT). In fact, [ ]. Ex. 5489 at 2; 8/31/20 Tr. 4603:23-4604:19, 4606:8-16 (Williams).

Second, NAB is incorrect to state [ ]. SX PFFCL ¶¶ 1171-72. [ ]. *Id.* ¶ 1172; Ex. 5603 ¶ 59 (Orszag WRT); 8/31/20 Tr. 4551:7-10 (Williams); 8/24/20 Tr. 3492:20-3493:7 (Leonard); Ex. 2013 at 20. Moreover, Ex. 2086 [ ]. Ex. 2086. [ ]. [ ]. *Id.* [ ]. This one email is hardly evidence of steering in light of the approximately 1000 emails per week from record labels received by iHeart's head of programming. 8/27/20 Tr. 4415:10-25 (Poleman); Resp. to ¶ 38.

Finally, NAB is flatly wrong when it states in a footnote that "the more salient point is that, *notwithstanding those limitations*, indies chose to renew their agreements; indeed, all of the

renewal indies did so [ ]." NAB PFFCL ¶ 39 n.15. The truth is that [ ]. SX PFFL ¶¶ 1177, 1183; 8/31/20 Tr. 4595:9-14, 4603:23-4604:19 (Williams). This proves one of two things—[ ]. NAB PFFCL ¶ 39 n.15. The conclusion that iHeart draws—[ ]. *See* SX PFFCL ¶¶ 1187-1203.

Response to ¶ 40. [ ] is irrelevant and misleading. As a practical matter, [ ]. *See* SX PFFCL ¶¶ 1193-95; Ex. 2178.

Response to ¶ 41. Any difference in how record companies view the iHeart-Indie Agreements is explained by the fact that they [ ]. Resp. to ¶ 37; SX PFFCL ¶¶ 1190-96; Ex. 5603 ¶¶ 65-66 (Orszag WRT). This makes iHeart's direct licenses unique because record companies [ ] Resp. to ¶ 37; SX PFFCL ¶¶ 1190-96. The iHeart-Indie Agreements do not reflect a preference to license simulcasts at a lower effective per-play rate than custom radio, because viewed properly, [ ]. SX PFFCL¶¶ 1082-89; *see infra* Resp. to ¶¶ 79-82.

i. Dr. Leonard's Calculation of His Benchmark Rate is Flawed

Response to ¶ 42. Dr. Leonard used royalty statements and play data to calculate his effective per-play royalty rates, but did so incorrectly by failing to properly allocate the terrestrial-based royalty. *See* SX PFFCL¶¶ 1082-89; *infra* Resp. to ¶¶ 79-82.

Response to ¶ 43. No response.

Response to ¶ 44. SoundExchange does not dispute NAB's description of how Dr. Leonard calculated the per-play rates but does dispute Dr. Leonard's method of allocating the terrestrial-based royalty payment. *See* SX PFFCL ¶¶ 1082-89; *infra* Resp. to ¶¶ 79-82.

Response to ¶ 45. NAB has not sufficiently addressed the deficiencies identified in *Web IV* with Mr. Williams' and Dr. Leonard's testimony. *See supra* Resp. to ¶¶ 33, 37; *infra* Resp. to ¶ 64. In particular, [[redacted]]. *See supra* Resp. to ¶¶ 33, 37; *infra* Resp. to ¶ 64; SX PFFCL ¶¶ 1190-96.

Response to ¶ 46. As discussed below, not all of the direct licenses accomplished the goal of reducing iHeart's royalty payments. *See infra* Resp. to ¶¶ 79-82; SX PFFCL ¶¶ 1082-89. SoundExchange disputes NAB's description of the value proposition for the indie record labels, for all of the reasons described in SoundExchange's opening filing ([[redacted]]). SX PFFCL ¶¶ 1170-1203.

NAB offers up a striking admission in note 16. Dr. Leonard claimed that it made sense for him to ignore certain agreements involving Entercom and Beasley because they had not been renewed due to a "change in market conditions." Ex. 2150 ¶ 92 (Leonard CWDT). Mr. Orszag pointed out in his rebuttal testimony that the obvious change in "market conditions" was the *Web IV* rates, which were lower than what the broadcasters had previously agreed to pay. Ex. 5603 ¶ 56

(Orszag WRT). NAB now admits that Mr. Orszag was correct, acknowledging that Entercom and Beasley [ ]. NAB PFFCL ¶ 46 n. 16. As SoundExchange has explained, this fact demonstrates the effect of the statutory rate in eliminating agreements that would otherwise have existed at rates higher than the statutory rate. *See* SX PFFCL ¶¶ 1163-66.

Response to ¶ 47. [ ]. Ex. 2013. [ ]. Exs. 2014-2021, 2024. [ ]. *See* SX PFFCL ¶ 1202 (calculating that just [ ] comprise [ ]). Thus, [ ].

Response to ¶ 48. SoundExchange does not dispute that Dr. Leonard made alternate calculations [ ], but contends that the relevant issue is not the value of the terrestrial-based royalty to iHeart, but rather the value of that royalty to the record companies and how they viewed the appropriate allocation. *See id.* ¶¶ 1082-89; *infra* Resp. to ¶¶ 79-82.

Response to ¶ 49. That Dr. Leonard's [ ] was addressed on cross-examination rather than through the testimony of SoundExchange's expert witnesses is a fact of no consequence. In any event, Mr. Orszag explained the extensive flaws in Dr. Leonard's benchmark, approach, and analyses. SX PFFCL ¶¶ 1158-1203. Because the iHeart-Indie Agreements are not a viable benchmark, [ ].

Response to ¶ 50. No response.

Response to ¶ 51. As explained below, [ ]. *See* SX PFFCL ¶¶ 1082-89; *infra* Resp. to ¶¶ 79-82. As NAB has repeatedly emphasized, simulcast should be considered as a part of the terrestrial broadcast that it mirrors. *See* SX PFFCL ¶¶ 1083-86; *infra* Resp. to ¶ 80. Accordingly, to be consistent with NAB's position throughout these proceedings, and [ ].

NAB provides no support for its assertion that the calculated average per-play rate from his self-described "most conservative" benchmark is "evidence of an absolute ceiling for a simulcast per-play rate." NAB PFFCL ¶ 51 n.18.

ii. SoundExchange's Critiques of NAB's Benchmarks

a. The iHeart-Indie Agreements Are Not Representative

Response to ¶ 52. No response.

Response to ¶ 53. According to its interrogatory response, [ ]

[redacted].[1] Ex. 5278 at 12-14; Ex. 5603 ¶ 54 (Orszag WRT); 8/24/20 Tr. 3474:22-25 (Leonard). Of those [redacted], only 27 initially agreed to the terms of the proposed direct license. *Web IV*, 81 Fed. Reg. at 26320; *cf.* 8/24/20 Tr. 3476:12-18 (Leonard) (recalling 28). Dr. Leonard acknowledged that [redacted]. 8/24/20 Tr. 3480:2-25 (Leonard). A substantial number of the initial licenses did not renew. *See* SX PFFCL ¶¶ 1157-58.

Response to ¶ 54. The fact that iHeart [redacted] does not blunt Mr. Orszag's criticism. If anything, the fact that [redacted]. *Cf.* SX PFFCL ¶¶ 1156-58.

Response to ¶ 55. By NAB's admission, this alleged "campaign" by SoundExchange happened *after* the [redacted] declined to negotiate a direct license with iHeart. [redacted]. 8/31/20 Tr. 4553:21-4554:6 (Williams); 8/24/20 Tr. 3478:15-3479:7 (Leonard). [redacted]. SX PFFCL ¶¶ 1157, 1160. NAB asserts that [redacted] NAB PFFCL ¶ 54 (citing 8/31/20 Tr. 4553:21-4554:6

[1] At the time Mr. Orszag submitted his Written Rebuttal Testimony, NAB and Dr. Leonard had identified 15 indie direct licenses that had renewed. Dr. Leonard later amended his testimony to identify another indie who had renewed its expired license on a month-to-month basis through email traffic that was not produced to SoundExchange until after Dr. Leonard amended his testimony. In the meantime, [redacted]. Ex. 2150, App. A5 (Leonard CWDT) ([redacted]); Ex. 2082 at 1 [redacted].

(Williams)). And yet NAB argues that SoundExchange's "campaign" took place *after Web IV*. NAB PFFCL ¶ 55. Thus, this alleged "campaign" could not have affected rights holders' decisions to enter a direct license with iHeart.

In any event, the alleged "campaign" consists of two documents that NAB mischaracterizes. Ex. 2182 expressly discusses the upcoming *SDARS III* proceeding. Ex. 2182 at 7-8. It says nothing about any other CRB proceeding, and does not discuss direct licenses other than those offered by Sirius XM. In no way do the SoundExchange website posts that NAB identifies amount to a campaign to pressure record companies to not sign direct licenses. These documents include lengthy explanations by SoundExchange of how CRB rate-setting proceedings work. *Id.*; Ex. 2113 at 2. In both documents, SoundExchange goes out of its way to make clear that SoundExchange itself *is not opposed* to record companies signing direct licenses. For example, after the portion of the document NAB cites, the document states:

> Even though we administer statutory licenses, SoundExchange recognizes that direct licenses are happening in the marketplace, and we certainly won't treat anyone less favorably if they enter into such licenses. In fact, in the event that labels choose to make direct deals, SoundExchange is willing to administer those negotiated licenses (and actually does so for over a dozen current deals) as long as the relevant artists receive 50 percent of the royalties directly from SoundExchange.

Ex. 2182 at 8. The document goes on to conclude, "Whether to enter into a direct license with Sirius XM is entirely your decision. SoundExchange does not advise record companies about what is best for their businesses. Nor are we privy to the terms and conditions of direct deals." *Id.*

Nor does Exhibit 2113, which dates to 2015, support NAB's contention. Exhibit 2113 shows that SoundExchange explained the basic economics of direct licenses with Sirius XM and stated that as compared to the SDARS rate, the direct licenses "might be attractive to some labels." Ex. 2113 at 2. Although the document acknowledges that direct licenses might be used against artists and record companies as evidence in the *SDARS III* rate-setting proceeding, it expressly

states that SoundExchange "is not opposed to direct licenses," that "[w]hether to enter into a direct license with Sirius XM is entirely your decision," and that SoundExchange "does not advise record companies about what is best for their individual businesses." *Id.*

Again, however, since both Exhibits 2113 and 2182 date to 2015 and 2016, they cannot explain [[redacted]]. *See* 8/24/20 Tr. 3478:15-3479:7 (Leonard) ([[redacted]]). Nor is there any reason to think that these documents were on anyone's mind in 2017 when most of the direct licenses renewed—a year or more after Exhibits 2113 and 2182 were created. SX PFFCL ¶ 1160. [[redacted]]. 8/24/20 Tr. 3527:17-3528:15 (Leonard).

Response to ¶ 56. NAB is correct that the Judges in *SDARS III* found that the coverage of the Sirius XM-Indie direct licenses was insufficient to make them a useful benchmark. 83 Fed. Reg. 65249-50. There is no reason why Mr. Orszag should disregard this holding based on the alleged pressure campaign by SoundExchange. Again, the timing simply does not work for NAB. The two documents on which NAB relies were created after *Web IV* (and therefore after iHeart ceased its direct license outreach) but before *SDARS III.* Presumably these documents would have been (and may have been) brought to the attention of the Judges in *SDARS III* if they were of any probative value. In any event, Mr. Orszag's lack of knowledge about the phantom "campaign" that consists of two even-handed web-postings at times not at all relevant to this case is of no moment.

Response to ¶ 57. NAB leaves out key details in its recitation of the renewal of the BMG direct license. SX PFFCL ¶ 1155. In his written direct testimony, Dr. Leonard identified [[redacted]

[redacted] as three of his renewal indies. Ex. 2150, App. A5 (Leonard CWDT); *see* 8/24/20 Tr. 3486:23-3487:11 (Leonard). However, [redacted]. Ex. 2154 ¶ 22 (Williams CWDT). [redacted]. Ex. 2082 at 1 ([redacted]); 8/24/20 Tr. 3484:11-16 (Leonard). [redacted]. *Id.* at 3485:6-20 (Leonard). Dr. Leonard acknowledged that [redacted]. *Id.* at 3486:11-22 (Leonard).

NAB also [redacted] it cites. *See* Ex. 2036. [redacted]

[redacted].

Ex. 2036 at 1.

[redacted]

[redacted]].

[[redacted]].

Response to ¶ 58. There is no [[redacted]]; the BMG renewal agreement expressly states that it [[redacted]]. Ex. 2082 at 1; SX PFFCL ¶ 1155; *supra* Resp. to ¶ 57. Mr. Williams' cited testimony is not to the contrary, [[redacted]

[redacted]]. *See* 8/31/20 Tr. 4571:10-25 (Williams). [[redacted]].

Response to ¶ 59. SoundExchange incorporates its response to ¶ 57 *supra*.

Response to ¶ 60. While Dr. Leonard is correct that the overhang of the statutory rate has an effect on iHeart's direct license negations, he is wrong about the direction of that effect. SX PFFCL ¶¶ 1165-66. Higher direct licensed rates existed, until the new statutory rate likely caused licensees to decline to renew them. Ex. 5603 ¶ 57 (Orszag WRT).

While Dr. Leonard did testify that he believed major record companies were less likely than indies to enter direct licenses because they were concerned about the precedential impact, this ignores the fact that a major label *did* sign a direct deal with iHeart, and that agreement, between iHeart and Warner, [[redacted]]. *See* SX PFFCL ¶ 1168. SoundExchange has not engaged in a campaign to discourage rights holders from entering direct licenses with iHeart or anyone, and iHeart's own campaign to sign up record companies to direct licenses ended before SoundExchange's "campaign" allegedly began. *See supra* Resp. to ¶ 55.

Response to ¶ 61. Dr. Leonard's decision to exclude the major labels from his coverage percentage makes no sense. Given that iHeart *did* enter a direct license with a major record company, there is no need to remove major labels from the equation when determining the market coverage of Dr. Leonard's proposed benchmark on the theory that major record companies will never enter direct licenses due to SoundExchange's alleged (but non-existent) admonition to not enter into direct license with iHeart. *See supra* Resp. to ¶ 60; SX PFFCL ¶ 1168. The alleged

market power of the major record companies is not relevant to the question of whether the iHeart-Indie direct licenses are representative, especially when it has already been established that the majors are willing to enter direct licenses with iHeart for its noninteractive services.

Dr. Leonard's benchmark market coverage rates are nowhere near that of the Merlin agreements used by Mr. Orszag in his benchmarking analysis. As NAB acknowledged, [ ]. 8/13/20 Tr. 1860:11-1864:22, 2074:13-2076:11 (Orszag). By contrast, Dr. Leonard's benchmark covered only [ ] of all simulcast performances on iHeart and [ ] of indie performances on iHeart, [ ]. As Mr. Orszag testified, [ ]. *Id.* at 1861:13-14 (Orszag). Additionally, Mr. Orszag explained that [ ]. *Id.* 1861:16-24 (Orszag). [ ]. *Id.* In contrast, the indie licenses, the market share coverage of which is at issue, represent Dr. Leonard's entire benchmark.

Response to ¶ 62. Mr. Orszag [ ]. 8/13/20 Tr. 1862:6-1863:8 (Orszag). As Mr. Orszag explained, [ ]. 8/13/20 Tr. 1862:23-1863:4 (Orszag). NAB's attempt to claim Mr. Orszag abandoned this argument takes Mr. Orszag's testimony entirely out of context. Mr. Orszag explained that [ ]. 8/13/20 Tr. 1864:12-16 (Orszag); 8/13/20 Tr. 1862:20-1863:4 (Orszag) ([

[redacted]). But as Mr. Orszag repeatedly explained, the crux of this coverage criticism is that Dr. Leonard's sample *is not representative*. 8/13/20 Tr. 1864:12-16 (Orszag); SX PFFCL ¶¶ 1082, 1150, 1154-61; 8/13/20 Tr. 1864:18-22 (Orszag) ([redacted]).

NAB completely misunderstands Mr. Orszag's quote [redacted]. NAB PFFCL ¶ 62 (citing 8/13/20 Tr. 1863:1-4 (Orszag)). The remainder of the sentence makes clear that [redacted]. *See* 8/13/20 Tr. 1863:1-4 (Orszag) ([redacted] (emphasis added)); *see also* Ex. 5603 ¶¶ 64-68 (Orszag WRT); *id.* ¶ 67 ("These labels' unique motivations, as well as the varied benefits different labels received, are key differentiators between direct license agreements and the statutory environment. Taking royalty rates from direct licenses at face value would distort the estimate of overall market rates."); *id.* ¶ 68 ("This means that Dr. Leonard's 'market coverage'

numbers are substantially overstated, since a significant share of the 'renewal indies' who entered into direct licenses with iHeart did so for reasons other than steering.").

Response to ¶ 63. This paragraph again stems from NAB's misreading of Mr. Orszag's testimony and addresses a criticism Mr. Orszag did not make. Resp. to ¶ 62 *supra*. SoundExchange does not argue that indies as a category offer music that is less valuable than the majors. It was incumbent on NAB to show that this particular, [[redacted]] group of indies is representative of the larger market. *See supra* Resp. to ¶¶ 61-62. In *SDARS III*, the Judges rejected a direct license benchmark in part because the licenses were not representative of the broader market. 83 Fed. Reg. at 65249. As just one example, Mr. Orszag noted that [[redacted]]. Ex. 5603 ¶ 64 (Orszag). Dr. Leonard [[redacted]]. 8/24/20 Tr. 3384:16-22 (Leonard).

And the record presented by NAB says nothing about the other direct license indies aside from [[redacted]]. SX PFFCL¶¶ 1082-89, 1188-95; *infra* Resp. to ¶¶ 79-82. [[redacted]]. *See* 8/24/20 Tr. 3522:22-3523:5 (Leonard). As a result, [[redacted]], Dr. Leonard's market coverage numbers are substantially reduced. [[redacted]], from Dr. Leonard's market coverage numbers, the remaining licenses represent only [[redacted]] of custom webcasts and [[redacted]] of simulcasts. SX PFFCL ¶ 1202; Ex. 5603 ¶ 68 (Orszag WRT). NAB has presented no evidence about those indies or the music they offer. In short, NAB is pointing the finger in the wrong direction—it failed to meet its burden with respect to the 15 indies that renewed licenses. *Cf.* SX PFFCL ¶¶ 1062-63.

b. The iHeart-Indie Benchmarks Are Unreliable due to Idiosyncratic Label Motivations and Non-Rate Benefits

Response to ¶ 64. Mr. Orszag explained that [ ] *Id.* ¶¶ 1187-1203; Ex. 5603 ¶¶ 62-65 (Orszag WRT). One of the [ ]. SX PFFCL ¶ 1190. One aspect of the [ ]. SX PFFCL ¶ 1191 (citing Ex. 5603 at ¶ 65 (Orszag WRT); 8/31/20 Tr. 4606:18-4607:6 (Williams)).

[ ]. *Id.* ¶¶ 1192-95 (citing Ex. 5603 ¶ 66 (Orszag WRT)). Because a record company whose catalog performs better on terrestrial radio than it does on simulcasting or custom webcasting [ ]. *Id.* ¶ 1193 (citing Ex. 5603 ¶ 66 (Orszag WRT)). By way of example, [ ]. *Id.* ¶ 1195; Ex. 2178 at 4; 8/24/20 Tr. 3519:17-3520:10 (Leonard). [ ]. Ex. 2178; 8/24/20 Tr. 3520:11-14 (Leonard). As a result, [

[redacted]]. SX PFFCL ¶ 1195. [[redacted]]. *See id.* ¶ 1196; Ex. 5603 ¶ 66 & n.139 (Orszag WRT).

Another benefit that indies received included avoiding the statutory 50/50 split of royalties between the record company and artists. SX PFFCL ¶¶ 1199-1200 (citing Ex. 5603 ¶¶ 63-64 (Orszag WRT)). Mr. Orszag identified [[redacted]] as one such record company that was motivated by this benefit. *Id.* ¶ 1200 (citing Ex. 5603 ¶ 64 (Orszag WRT)). Other benefits include [[redacted]] and avoiding the SoundExchange administrative fee. *Id.* ¶¶ 1198, 1201. Notably, these are some of the same benefits that the Judges identified in rejecting a similar direct license benchmark in *SDARS III* because as a result "[t]here [wa]s no basis for the Judges to segregate consideration in these licenses that is properly attributed to elements that are unavailable under the compulsory license." 83 Fed. Reg. at 65249-50 & n.159.

Response to ¶ 65. SoundExchange explained above and in its initial findings how the terrestrial-based royalty was an important [[redacted]] to some of the indies when entering their direct licenses. *See supra* Resp. to ¶¶ 33, 37, 64; SX PFFCL ¶¶ 1190-96. NAB insinuates that Mr. Orszag's testimony in this regard is suspect, complaining, among other things, that he cited no negotiating documents for this proposition and relied only on a phone call with a Big Machine executive. *But NAB's own witness, Mr. Williams confirmed this testimony*. 8/31/20 Tr. 4606:18-4607:6 (Williams) (acknowledging that [[redacted]]); *supra* Resp. to ¶¶ 33, 37, 64. Nor is there any gainsaying the importance of this benefit. [[redacted]

[redacted]. SX PFFCL ¶ 1191.

Response to ¶ 66. The relevant question is, what motivated the indies to sign direct licenses? If the indies were motivated by non-statutory benefits, the agreements are an inappropriate benchmark. Why iHeart agreed is beside the point.

In any event, neither Mr. Orszag nor Dr. Leonard attempted to quantify the value of [redacted]. Inasmuch as it was Dr. Leonard, not Mr. Orszag, who had access to iHeart witnesses and data when the experts prepared their testimony, one would expect Dr. Leonard (and NAB) to quantify this benefit were it important to do so. But neither party did, and where neither party has quantified the non-statutory benefits included in direct licenses, the Judges have rejected the use of those licenses as a benchmark. *SDARS III,* 83 Fed. Reg. 65249-50.

Moreover, Mr. Williams' testimony about the alleged importance of the terrestrial-based royalty to iHeart [redacted]. *See supra* Resp. to ¶ 47. Further, even if all the direct licensed indies had agreed not to lobby for a terrestrial performance right, that would still leave approximately 95% of the record company market, plus all of the industry trade associations, free to lobby Congress. The idea that iHeart obtained any real value from a limitation on advocacy by a handful of the smaller direct licensed indies who represent a tiny fraction of the recording industry as a whole (and none of the industry participants who would lead a lobbying effort) is far-fetched to say the least. Dr. Leonard's position that this minimal-to-nonexistent benefit to iHeart [redacted] the benefit the indies receive in the form of [redacted]

[redacted] is entirely lacking in logical or evidentiary support. *Cf. supra* Resp. to ¶¶ 33, 37, 64; SX PFFCL ¶¶ 1190-96.

Response to ¶ 67. Dr. Leonard's [redacted] is flawed. *See infra* Resp. to ¶¶ 79-84; SX PFFCL¶¶ 1082-89. Moreover, allocating the royalty dollars does not account in any way for the additional ideological value that direct-licensed Indies saw [redacted]. 8/31/20 Tr. 4606:18-4607:6 (Williams).

Further, for Big Machine, [redacted]. For each year from the beginning of the license agreement period in 2013 through the end of 2016 [redacted] to the per-play royalty set by the *Web IV* determination. The per-play rate set by the Judges in *Web IV* was $.0017 for advertising supported services, *see* 81 Fed. Reg. 26405, and [redacted]. Under these circumstances, [redacted]. Ex. 5603 ¶ 65 (Orszag WRT).

Finally, NAB's citation to *Web IV* is inapposite. The question here is not how one might adjust "an otherwise proper and reasonable benchmark." 81 Fed. Reg. 26387. The question here

[2] Dr. Leonard acknowledged [redacted]. 8/24/20 Tr. 3521:2-16 (Leonard).
[3] The math is straightforward. [redacted].

is whether the direct licenses are, in fact, a "proper and reasonable benchmark" in light of the fact the NAB has given the Judges no way to "segregate consideration in these licenses that is properly attributed to elements that are unavailable under the compulsory license." *SDARS III*, 83 Fed. Reg. 65250.

Response to ¶ 68. SoundExchange incorporates its response to ¶ 64 *supra*.

Response to ¶ 69. Steering would not explain why an indie would perform better on broadcast radio and simulcast, compared to custom webcasting, since the alleged "bat phone" presumably would give access to both. If anything, one would expect less steering on the broadcast and simulcast transmissions, given iHeart's sensitivity to the potential that it could lower the ratings for its broadcast stations if it played a less than optimal mix of music. *See* 8/31/20 Tr. 4596:15-21, 4598:4-17 (Williams). In any case, [ ], Ex. 5489 at 2, which certainly cannot account for the over-indexing effect. Resp. to ¶¶ 38-39; SX PFFCL ¶¶ 1177-84.

Response to ¶ 70. Because the [ ], SX PFFCL ¶¶ 1193-94, [ ]. By definition this is a zero-sum game, so if some labels [ ]. *Id.* ¶¶ 1193-96; Ex. 5603 ¶ 66 (Orszag WRT). They have an economic incentive to take a lower rate for royalties on digital streams, which is less valuable to them, [ ]. This incentive is magnified by the dynamics of the marketplace where indies would

otherwise receive [[redacted]], where their catalog performs best. SX PFFCL ¶ 1083; 17 U.S.C. §§ 106(6), 114(d)(1)(A).

As SoundExchange demonstrated at trial and as can be seen from the only royalty statement that NAB entered into evidence, [[redacted]]. *See* SX PFFCL ¶¶ 1082-89; *infra* Resp. to ¶¶ 79-84. Mr. Orszag [[redacted]]. *See supra* Resp. to ¶ 64; SX PFFCL ¶¶ 1192-96.

What matters is that, *ex ante*, [[redacted]]. SX PFFCL ¶¶ 1193-96; Ex. 5603 ¶ 66 (Orszag WRT). As Mr. Orszag testified, removing these indies that were likely motivated by the prospect of over-indexing from Dr. Leonard's sample, reduces the market share of his benchmark indies to only [[redacted]] of custom webcasts and [[redacted]] of simulcasts. SX PFFCL ¶ 1202; Ex. 5603 ¶ 68 (Orszag WRT).

Response to ¶ 71. As SoundExchange demonstrated at trial, examining the only royalty statement data that NAB entered into evidence demonstrates the falsity of Dr. Leonard's statement at trial that [[redacted]]. 8/24/20 Tr. 3381:11-16 (Leonard). In fact, [[redacted]]

[redacted]. *See supra* Resp. to ¶ 67; *infra* Resp. to ¶¶ 79-84. [redacted]. 8/24/20 Tr. 3520:23-3521:1 (Leonard) ([redacted]). But it was NAB, and not SoundExchange, that [redacted]. Dr. Leonard uses the [redacted] as an example throughout his testimony. *See* Ex. 2150 ¶ 64 (Leonard CWDT); 8/24/20 Tr.3362:19-3365:21 (Leonard). [redacted]. *Cf.* Ex. 2178; 8/24/20 Tr. 3362:19-3365:21 (Leonard).

The argument NAB makes in this paragraph also ignores the fact that a direct licensed indie might receive more from a direct license than it would under the statutory license because it obtains 100% of the royalties instead of just the 50% record company share. *See infra* Resp. to ¶ 74.

Response to ¶ 72. Mr. Orszag explained that [redacted]. SX PFFCL ¶ 1159. [redacted]. 8/13/20 Tr. 1851:7-13 (Orszag). Using these direct licenses as benchmarks for the entire market without taking into account these additional values understates the value of the direct licenses to the indies. In *Web IV*, the Judges rejected the benchmark in part because "there is insufficient evidence and economic analysis in the record for the Judges to determine whether the headline rate for simulcasting in the iHeart-Indie agreements

fully accounts for the economic value of the licenses to the parties." 81 Fed. Reg. at 26320. Here too, the contractual headline rates for simulcasting and custom webcasting in the direct license agreements do not fully account for the economic value of the licenses to the parties, and Dr. Leonard fails to account for the non-statutory benefits that the indies receive, which results in understated per-play rates. Ex. 5603 ¶ 6 (Orszag WRT).

Response to ¶ 73. SoundExchange incorporates its response to ¶ 64 *supra*. *See also* SX PFFCL ¶¶ 1198, 1201. Dr. Leonard misses the point of Mr. Orszag's critique. It is not that avoiding the administrative fee on its own is the sole reason that indies chose to enter direct licenses. Instead, the potential savings in avoiding the administrative fee is one factor to be taken together with the other unique reasons that may have motivated indies to enter a direct license to demonstrate that Dr. Leonard's effective rate calculations under the iHeart-Indie Agreements do not reflect how indies actually valued the direct license, and cannot be extrapolated as a viable benchmark. *See supra* Resp. to ¶ 64; *SDARS III*, 83 Fed. Reg. at 65249-50 & n.159.

Response to ¶ 74. SoundExchange incorporates its response to ¶ 64 *supra*. *See also* SX PFFCL ¶¶ 1199-1200 (citing Ex. 5603 ¶¶ 63-64 (Orszag WRT)).

Response to ¶ 75. Mr. Orszag's opinion on this point was also based on his examination of the relevant testimony about the artist-label split from *SDARS III*. *See supra* Resp. to ¶ 64; SX PFFCL ¶¶ 1199-1200; Ex. 5603 ¶¶ 62-64 n.134, 137 (Orszag WRT). NAB is also mistaken about [[redacted]]. Mr. Orszag interviewed [[redacted]]. Ex. 5603 ¶¶ 64-68 (Orszag WRT); Ex. 2168. [[redacted]]. Ex. 5603 ¶¶ 64-68 (Orszag WRT); Ex. 2168; Ex. 2022. [[redacted]

[redacted]]. Ex. 2022 at 28. Thus, there is no reason to believe that [redacted].

SoundExchange agrees with Dr. Leonard that [redacted]). 8/24/20 Tr. 3384:16-22 (Leonard). That is the entire point. [redacted] and other direct licensed indies have unique features making them unrepresentative of the broader market. SX PFFCL ¶¶ 1187-1203. [redacted] What NAB cannot prove—indeed, it has not tried—is that the remaining small number of direct licensed indies are not also motivated by concerns not shared by the broader market. For example, NAB claims that [redacted] is not representative of other indies that signed direct licenses. But NAB does not have any evidentiary basis to make that claim, and it cites nothing in support. NAB has presented no evidence from any of the other indies about their artists' contracts or how they split direct license royalties with their artists. In fact, other than limited information about [redacted], NAB has provided no evidence about the business structure or catalogs of any of the other indie direct licenses. Thus, NAB cannot assume that [redacted] is the only indie who might benefit from controlling the distribution of the artist's share.

c. iHeart Did Not Meaningfully Steer, or Promise to Steer, Toward Direct License Indies

Response to ¶ 76. SoundExchange incorporates its responses to ¶¶ 38 & 39 *supra*. *See also* SX PFFCL ¶¶ 1170-86.

Response to ¶ 77. iHeart's own actions make clear that the indies were not motivated by the promise of steering to agree to effective per play rates. Resp. to ¶¶ 38 & 39; SX PFFCL ¶¶ 1170-86. iHeart [redacted]. *See supra* Resp. to

¶ 39; *cf.* Ex. 2150, App A5 (Leonard CWDT). Yet [ ]. 8/31/20 Tr. 4595:9-14 (Williams). And [ ]. Ex. 5489 at 2; SX PFFCL ¶¶ 1181-83.

[ ]. Resp. to ¶ 38. NAB, for example, cites testimony by Dr. Leonard to support this claim. But Dr. Leonard has no idea what motivated indies to sign direct licenses. [ ]. 8/24/20 Tr. 3491:10-3492:19 (Leonard). Dr. Leonard is simply and dutifully parroting the company line, with no basis to do so. [ ].

Response to ¶ 78. [ ], *see supra* Resp. to ¶¶ 38-39; SX PFFCL ¶¶ 1170-86, iHeart's argument that the structure of the direct licenses created an economic incentive for iHeart to steer and take advantage of lower royalties on its digital services falls flat. The core of iHeart's business, [ ]. *See supra* Resp. to ¶¶ 38-39. Thus, [ ]. *Id.*; SX PFFCL ¶¶ 1177-80.

This can be seen in examining [ ]

[redacted]]. Ex. 2159 at 24, Tr. 7243:3-18 (Des. WDT of Cutler, *Web IV*). Yet [redacted]]. Ex. 2154 ¶¶ 28-29 (Williams WDT). [redacted]].

Moreover, a portion of the testimony to which NAB cites, 8/24/20 Tr. 3493:14-3494:5 (Leonard), was stricken from the record, *see* 8/24/20 Tr. 3494:6-17 (Leonard). What is more relevant, in any event, is Dr. Leonard's subsequent testimony when confronted with the fact that the direct license with [redacted]]. Striving to explain why this might not be so, Dr. Leonard blurted out the truth: financial incentives notwithstanding, [redacted]] 8/24/20 Tr. 3521:17-3522:6 (Leonard); *see also* 8/24/20 Tr. 3522:7-16 (Leonard) ([redacted]]). In short, as noted at the beginning of this paragraph, for its broadcast radio business iHeart has a strong incentive to play the content best suited to its audience and most likely to boost its ratings.

Response to ¶ 78 n.23. NAB has not explained how iHeart's "long-term incentive" of being "a good partner to its direct licensors," NAB PFFCL ¶ 78 n.23, who by Dr. Leonard's own calculation cover only [redacted]] of iHeart's total simulcast, custom radio, and webcast performances, respectively, Ex. 2150 ¶ 72 & App. A4 (Leonard CWDT), would create a serious economic incentive for iHeart to make adjustments to its terrestrial programming that could negatively affect its terrestrial broadcast business. *See supra* Resp. to ¶¶ 38-39, 78. If by this

argument iHeart means to suggest that it would sacrifice its own financial interests to support its licensees, iHeart has offered no plausible reason—and certainly no evidence—for this proposition.

NAB asserts, without providing a citation, that increased terrestrial plays might affect the number of plays on iHeart's custom radio product. Again, iHeart offers no evidence, nor even any argument, why the two are linked. NAB then accuses SoundExchange of performing no analysis on this point. But neither has NAB has performed any such analysis, despite being the party in possession of whatever information would be necessary.

d. Dr. Leonard's [ ]

Response to ¶ 79. There is no reason why SoundExchange's experts needed to testify on this point, because NAB's own evidence (including its repeated assertions that the simulcast and broadcast transmissions "mirror" each other), Dr. Leonard's cross-examination, and simple logic provide all the necessary support.

Response to ¶ 80. Dr. Leonard agreed that [ ]. 8/24/20 Tr. 3468:9-18 (Leonard). That is precisely what counsel for SoundExchange did during the cross-examination of Dr. Leonard. *See* 8/24/20 Tr. 3467:9-3470:4 (Leonard).

Response to ¶ 81. According to Dr. Leonard's trial and written testimony, there is no skips adjustment to be made for simulcasting and terrestrial broadcasts. NAB itself states that on simulcasts "listeners cannot skip songs." NAB PFFCL ¶ 7. During the trial, Dr. Leonard at first suggested "it's possible that something could meet that definition [of a skip] on simulcast," but he could not recall what data he may have had, if any. 8/24/20 Tr. 3531:5-9 (Leonard). Pressed on

the subject, he finally admitted that "if the skips were on custom, as it may have been, I would have to—I can go look at that, then they would have been assigned strictly to custom." 8/24/20 Tr. 3532:5-11 (Leonard). Turning to Dr. Leonard's written testimony, it indeed appears to be the case that he made a skips adjustment only for custom radio and not for simulcasting. *See* Ex. 2150, App. A1 at 2 (Leonard CWDT) ("Effective royalty rates were calculated inclusive of *skipped custom radio performances* (performances between 0 and 15 second in duration).") (emphasis added). As it appears that Dr. Leonard himself made no adjustment for any stray simulcast performances that could be considered skips, there is no reason why SoundExchange should do so. To the extent that a skips adjustment should be made, it would only be on custom radio, and would have the effect of lowering the custom radio rate. That result, in turn, reinforces SoundExchange's point that, when [ ] are properly allocated, the simulcast rate is in fact higher than the custom radio rate. Nor is there any reason to believe that an allocation of DAIP/AIP royalties would change that outcome, as presumably those royalties would be allocated to both broadcast/simulcast plays and custom radio plays.

When it comes to assessing what the direct license indies would have thought about the rates, no indie would have evaluated its performance under the direct license at the time it was contemplating renewal by taking into account skips and DAIP/AIP payments. There is no evidence in the record that iHeart communicated to the indies the [ ]. That data is not found in iHeart's royalty statements. *See generally* Ex. 2178. Without this data, an indie could not take into account [ ] when comparing its performance under the direct license to the statutory license. The same is true for DAIP/AIP. Mr. Williams testified that [

[redacted]]. Ex. 2154 ¶ 26 (Williams CWDT). Thus, [redacted]]. There is no evidence that the indies were aware that [redacted]]. Data on [redacted] is not found in iHeart's royalty statements. *See generally* Ex. 2178. As a result, [redacted].

Response to ¶ 82. *See supra* Resp. to ¶ 81.

Response to ¶ 83. NAB and its witnesses have repeatedly stressed throughout this proceeding that simulcasting and terrestrial broadcasting are the same product. *See, e.g.*, Ex. 2150 ¶ 8 (Leonard CWDT) ("A simulcast is a by-product of the terrestrial radio broadcast that it mirrors, and the simulcast audience is much smaller than the broadcast audience. A custom radio service, in contrast, is its own standalone product."); Ex. 2160 ¶ 44 (Leonard CWRT) ("Because the simulcast stream is identical to the over-the-air broadcast . . . ."); 8/27/20 Tr. 4451:12-25 (Newberry) (describing simulcast as "just 100 percent replication of what is occurring over-the-air"); Ex. 2154 ¶ 14 (Williams CWDT); 9/1/20 Tr. 5062:6-9 (Wheeler). Dr. Leonard even agreed that [redacted]]. 8/24/20 Tr. 3452:18-21; 3453:4-20 (Leonard).

NAB has made this same point throughout its findings. *See* NAB PFFCL ¶ 3 ("[S]imulcasts are simply a by-product of the terrestrial radio broadcast that they mirror; simulcast is an 'add-on' service that would not exist absent the underlying terrestrial radio broadcast."); *id.* ¶ 4 ("[S]imulcasting is simply another way that radio broadcasters can get the *exact same*

programming to listeners."); *id.* ¶ 7 ("[S]imulcasts are tethered to a corresponding radio broadcast[.]"); *id.* ¶ 39 n.15 (describing "iHeart's true simulcasting activity" as "the mirror of its over-the-air broadcast"); *id.* ¶ 55 n.19 (stating that for "iHeart's simulcasts, the content of which is dictated by iHeart's over-the-air broadcasts"); *id.* ¶ 152 ("That is because simulcasts are, by definition, identical to the over-the-air radio broadcast."); *id.* ¶ 157 ("This is proof that over-the-air broadcasts and internet simulcasts are viewed as one and the same."); *id.* ¶ 163 ("[A] "simulcast" is simply the same content as the over-the-air radio broadcast, but delivered over a digital transmission medium rather than an analog one."); *see also id.* ¶¶ 12, 77, 164. NAB cannot plausibly assert that *in this one instance* the terrestrial broadcast should be considered separate and apart from its mirrored simulcast when the connection between the two has been the crux of NAB's entire case. And although NAB argues in this paragraph that "the terrestrial and simulcast royalty components are not bundled at all," in its interrogatory responses NAB sings a different tune, characterizing simulcasting and broadcasting as a "bundle." Ex. 5463 at 8.

Moreover, it is logical that the indies would view the [ ] where the broadcaster is using a sound recording over the air and transmitting the same programming over the Internet. After all, [ ]. 8/24/20 Tr. 3454:7-3455:25 (Leonard). Dr. Leonard acknowledged that [ ]. 8/24/20 Tr. 3456:24-3457:8 (Leonard). [ ]. 8/24/20 Tr. 3456:24-3457:8 (Leonard); SX PFFCL ¶¶ 1085-86.

NAB's argument that [ ], given the substantial evidence detailing the important role simulcast plays in protecting broadcasters' business. SX PFFCL ¶¶ 1074-80. *Cf.* 8/27/20 Tr. 4415:1-5 (Poleman) (iHeart simulcasts all 850 of its broadcast stations).

Finally, as SoundExchange demonstrated at trial, NAB's claim that the [ ] is self-defeating. [ ]. Such a view would in theory create an economic disincentive to program direct licensed indie sound recordings on terrestrial broadcasts. 8/24/20 Tr. 3463:11-18 (Leonard).

Response to ¶ 84. NAB misunderstands the point of this more logical allocation process. SX PFFCL¶¶ 1082-89; *see supra* Resp. to ¶ 80. SoundExchange certainly is not arguing that simulcasting rates should be higher than webcasting rates. SoundExchange is simply demonstrating that the iHeart-Indie Agreements do not prove what NAB wants them to prove—that simulcast rates should be different and lower than custom radio rates.

Nor is it as nonsensical, as Dr. Leonard claims, that simulcast rates might in some instances be higher than webcasting rates. A record label such as [ ], would benefit from negotiating higher rates for broadcast/simulcast and accepting relatively lower rates for webcasting. SX PFFCL ¶¶ 1192-95 (citing Ex. 5603 ¶ 66 (Orszag WRT)). But again, this is not to suggest that under the statutory license applicable to all buyers and sellers, simulcast rates should be higher than webcasting rates. Rather, it shows that

the iHeart-Indie agreements are not useful benchmarks and the indies that signed such agreements are not representative of the broader market. *Cf. id.* ¶¶ 1082-89; *see supra* Resp. to ¶¶ 79-81.

Response to ¶ 85. Although NAB attempted to rehabilitate its benchmark from this criticism through the self-serving testimony of Mr. Williams, that testimony did not stand up to cross-examination. *See* 8/31/20 Tr. 4610:12-4611:9 (Williams) ([ ]); *cf.* SX PFFCL ¶¶ 1084-87. And in his Written Direct Testimony, Mr. Williams grouped the terrestrial and simulcast plays together when describing iHeart's direct license campaign: "iHeart's direct-licensing campaign was designed to seek mutually beneficial agreements with record companies that reflected the historical symbiosis between radio and the sound recording industry and recognized the different economics associated with (i) the inclusion of sound recordings in iHeart's simulcasts (and, as a logical predicate, on iHeart's over-the-air broadcasts) and (ii) pure webcasting activities such as iHeart's custom-radio product." Ex. 2154 ¶ 14 (Williams CWDT).

Response to ¶ 86. *See supra* Resp. to ¶¶ 79-85.

2. NAB's PRO Benchmarks Are Uninformative

Response to ¶ 87. SoundExchange's critiques of Dr. Leonard's PRO "benchmark" can be found in its initial findings. *See* SX PFFCL ¶¶ 1090-1100. Although NAB refers to the PRO agreements as benchmarks, Dr. Leonard does not use them as such, but only as purported evidence that simulcasters should pay lower rates than webcasters. *See* Leonard Ex. 2150 ¶ 83 (Leonard CWDT) ("These PRO agreements are not benchmarks for the purposes of determining the appropriate royalty rate under the Section 114 statutory license at issue here"). Even for the limited work Dr. Leonard wants the PRO agreements to do, they are not up to the task.

To be clear, although NAB continually refers to PRO agreements that purportedly represent over 90% of the market, in reality Dr. Leonard's analysis depends entirely on agreements entered into by a single buyer, Pandora—agreements that are not in the record and that Dr. Leonard has not seen. SX PFFCL ¶ 1096; 8/24/20 Tr. 3541:3-17, 3542:17-25 (Leonard).

Response to ¶ 88. It is not informative that custom webcasting is generally licensed separately and at a higher rate. This is explained by the fact that licensees pay the PROs on a percentage of revenue basis. 8/24/20 Tr. 3534:23-3535:2 (Leonard). As Dr. Leonard points out, radio broadcasters typically play less music per hour than custom webcasters. *See, e.g.*, Ex. 2150 ¶ 39 & App. C2-C18 (Leonard CWDT); *see also* 8/24/20 Tr. 3535:11-22 (Leonard); Ex. 5603 ¶ 48 (Orszag WRT); Ex. 5625 ¶¶ 34 n.21, 40 n.31 (Ploeger WRT). As a result, one would expect the percentage-of-revenue rates paid to the PROs by simulcasters to be lower than the rates paid to the PROs by custom webcasters, reflecting the lower intensity of music use by the broadcasters. Ex. 5603 ¶ 48 (Orszag WRT); *see also* 8/24/20 Tr. 3535:25-3536:15 (Leonard).

None of this suggests that a different rate for simulcasting and custom webcasting is appropriate where rates are set on a *per-performance* basis. Ex. 5603 ¶ 51 (Orszag WRT); SX PFFCL ¶¶ 1096-97. For rates set on a per-performance basis, the music/non-music split and the difference in intensity of sound recording use is not an issue, because the broadcaster only pays for music that it plays. Ex. 5603 ¶ 50 (Orszag WRT). As the Judges held in *Web IV*, "[b]y including non-music content in their transmissions, simulcasters reduce the number of performances of recorded music, thus reducing their royalty obligation under a per-performance rate structure." 81 Fed. Reg. at 26321 & n.36. Different intensities of music use explain the different effective percentage of revenue rates in PRO agreements for simulcast and custom radio.

Response to ¶ 89. NAB has not actually submitted into the record any operative agreement between any PRO and any webcaster that covers custom radio. While NAB claims that it has evidence about what "custom radio" pays, in truth it has some evidence from unseen agreements between Pandora and two PROs, allowing inferences about what one webcaster pays. SX PFFCL ¶¶ 1096-97; 8/24/20 Tr. 3541:3-17, 3542:17-25 (Leonard). Dr. Leonard has offered no reason to believe that the terms of Pandora's agreements are replicated in the agreements of other custom webcasters. SX PFFCL ¶ 1097. Importantly, the only other custom webcaster able to offer relevant information is iHeart, and [ ]. *Id.* [ ]. 8/24/20 Tr. 3556:8-3557:20, 3558:8-16 (Leonard); Ex. 2031. [ ]. 8/31/20 Tr. 4578:24-4579:7 (Williams).

i. The Evidence NAB Produced Does Not Show a Sea Change in Rates for Custom Radio Services after *Web IV*

Response to ¶ 90. No response.

Response to ¶ 91. The *BMI* rate court also observed that broadcasters were able sell more ads than Pandora, implying that a lower percentage-of-revenue rate for broadcasters would nevertheless yield total royalties as high or higher than a higher percentage-of-revenue rate paid by Pandora. *See BMI v. Pandora*, 140 F. Supp. 3d 267, 274 (S.D.N.Y. 2015).

NAB also omits information unhelpful to its position from its extensive quoting from this decision. For example, in a portion of the decision NAB replaced by an ellipsis, the court recognized that a Pandora 10-K stated: "Our direct competitors, however, include iHeartRadio, iTunes Radio, LastFM, Google, Songza and other companies in the traditional broadcast and

internet radio market. We also compete directly with the non-interactive, Internet radio offerings such as Spotify and Slacker." *Id.* at 289. And before concluding that Pandora was not similarly situated to iHeart, the court observed that iHeart "operates hundreds of terrestrial radio stations in addition to its iHeartRadio service. Further, when the RMLC license agreement was negotiated in 2012, the internet portion of iHeartRadio represented a miniscule part of iHeartMedia's overall music use." *Id.* at 289.

Response to ¶ 92. SoundExchange incorporates its responses to ¶¶ 88 & 89 *supra*.

Response to ¶ 93. Again, while we know that Pandora reported that it entered new agreements with ASCAP and BMI in late 2015, we do not know the terms because Dr. Leonard do not have access to those agreements, has not reviewed those agreements, and the agreements are not in evidence. Resp. to ¶ 89; PFFCL ¶ 1096; 8/24/20 Tr. 3541:3-17, 3542:17-25 (Leonard).

Dr. Leonard's reliance on agreements that he has not seen is problematic. *See supra* Resp. to ¶¶ 88 & 89. Because Dr. Leonard has not seen the ASCAP/Pandora agreement, he cannot say whether the rate he calculates for custom webcasting may reflect potential tradeoffs on other terms. For example, [ ]. Ex. 2042 at 15; 8/24/20 Tr. 3548:14-24 (Leonard). Thus, Dr. Leonard acknowledged that [ ]. 8/24/20 Tr. 3549:9-16 (Leonard). [ ]. *Id.* at 3550:6-13 (Leonard). [ ]. *Id.* at 3550:14-18 (Leonard). Dr. Leonard acknowledged that [

[redacted]. *Id.* at 3550:23-3551:1 (Leonard). Dr. Leonard admitted that because he had not actually seen the agreements, he did not know if there were such tradeoffs or how they were negotiated. *Id.* at 3542:17-25, 3551:2-10 (Leonard).

Response to ¶ 94. SoundExchange incorporates its response to ¶¶ 88-93 *supra*. Moreover, as Mr. Orszag recognized, Dr. Leonard's calculations and the estimates in Pandora's content costs deck constitute a substantial increase from what Pandora was paying under the terms of the decision entered by the rate courts in 2015. Ex. 5603 ¶ 52 (Orszag WRT). But instead of continuing under the terms set by the rate court, Pandora dropped its appeal of the BMI decision, and according to Dr. Leonard, agreed to substantially higher terms for its ad-supported PRO royalties. *See* 2177 at 10-11. These terms are also [redacted]. *See supra* Resp. to ¶ 93.

Dr. Leonard offers no explanation for why Pandora would agree to a rate that is [redacted] what it was able to litigate in rate court in 2015. There is no reason to think (and NAB does not argue) that ASCAP suddenly had increased market power. If anything, ASCAP's market power would have decreased since the emergence of GMR in 2013 and its effort to compile a catalog that services "cannot 'comfortably exist without.'" *RMLC, Inc. v. GMR, LLC*, No. CV 16-6076, 2019 WL 1437981, at *2 (E.D. Pa. Mar. 29, 2019). More importantly, if faced with a demand by ASCAP for a [redacted] of its rates, Pandora could have gone back to the rate court. But it did not do so. This raises a red flag. There must have been some reason—and perhaps some tradeoffs—for Pandora's decision to come to an agreement with ASCAP. It makes no economic sense that Pandora would voluntarily choose to drastically increase its ad-supported PRO royalty rates without getting something in return. But without reviewing the agreement, it is not possible to know what that might be. *See supra* Resp. to ¶¶ 88-89, 93. Given the drastic increase in rates

and apparent [ ], there is good reason to think that there are other material terms in the agreement that would bear on its utility in this case. *See supra* Resp. to ¶¶ 88-89; PFFCL ¶¶ 1097-98.

Response to ¶ 95. SoundExchange incorporates its responses to ¶¶ 88-89, 93-94 *supra*.

ii. NAB Has Not Proven Post-*Web IV* Differentiation of Rates by PROs

Response to ¶ 96. SoundExchange does not dispute that the percentage of revenue rates paid by simulcasters are accurately reported by NAB here. However, the rates broadcasters/ simulcasters pay to PROs are generally negotiated by the RMLC, whose members "comprise over ninety percent of the United States terrestrial radio industry." *GMR, LLC* v. RMLC, *Inc.*, No. 16-cv-9051-BRO(ASx), 2017 WL 3449606, at *2 (C.D. Cal. Apr. 7, 2017). As a result, the percentage-of-revenue rates paid by broadcasters/simulcasters to PROs may be artificially low if the RMLC is using its market power to suppress rates. *Id.* One PRO, GMR, has filed a suit against the RMLC alleging just that. *Id.* GMR has alleged that the RMLC has engaged in a price-fixing conspiracy that has "destroy[ed] the free market for music licensing rights." *Id.* Notably, the United States entered an appearance in that case pursuant to 28 U.S.C. § 517 to explain that the alleged buyers' cartel "can be equally destructive of competition as a sellers' cartel." *Statement of Interest of United States*, No. 16-cv-9051-TJH(ASx), Dkt. 111 at 6 (C.D. Cal., filed Dec. 5, 2019).

SoundExchange incorporates its response to ¶¶ 88-94, *supra*. Additionally, broadcasters pay these percentage-of-rates for their over-the-air broadcast and simulcast combined. Because broadcast and simulcast content is the same, it makes sense they would pay the same rate. Ex. 5603 ¶ 50 (Orszag WRT). The licenses discussed by Dr. Leonard in his testimony actually *require* that [ ]. Ex. 2150 ¶¶ 85, 89, 91 (Leonard CWDT); 8/24/20 Tr. 3390:2-4 (Leonard); 8/31/20 Tr. 4575:17-23, 4582:1-8 (Williams).

Response to ¶ 97. That iHeart has resisted ASCAP's demands that iHeart [ ] demonstrates that the ASCAP-Pandora rate does not reflect a marketplace reality. *See supra* Resp. to ¶ 89; SX PFFCL ¶ 1097.

Response to ¶ 98. SoundExchange incorporates its response to ¶ 88 *supra*.

Response to ¶ 99. SoundExchange incorporates its response to ¶¶ 88-89 *supra*.

Response to ¶ 100. SoundExchange incorporates its response to ¶¶ 88-89 *supra*.

iii. PRO Rates Are Uninformative About Whether Differentiated Rates Are Required as a Matter of Law

Response to ¶ 101. No response.

Response to ¶ 102. The definition of "similarly situated" in the ASCAP consent decree follows in full:

> "Similarly situated" means music users or licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency; factors relevant to determining whether music users or licensees are similarly situated include, but are not limited to, the nature and frequency of musical performances, ASCAP's cost of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users' revenue;

United States v. ASCAP, No. 41-1395(WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

Similarly, the BMI consent decree states on this topic, in full:

> Defendant shall not enter into, recognize as valid or perform any performing rights license agreement which shall result in discriminating in rates or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different rates or terms shall not be considered discrimination within the meaning of this section; and provided further that nothing contained in this section shall prevent changes in rates or terms from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

United States v. BMI, No. 64-cv-3787, 1966 U.S. Dist. LEXIS 10449 at *7 (S.D.N.Y. Dec. 29, 1966).

Response to ¶ 103. NAB is wrong to say that the business factors enumerated in the consent decrees mirror 17 U.S.C. § 114(f)(1)(B). There is a notable difference between the consent decrees and the statute that explains why PROs treat custom radio differently from broadcast/simulcast. The ASCAP consent decree expressly identifies as a factor to identify whether services are similarly situated, "the nature and frequency of musical performances," and states that similarly situated services "use music in similar ways and with similar frequency." *ASCAP*, 2001 WL 1589999, at *3.

It stands to reason that PROs treat custom webcast differently from broadcast/simulcast because broadcast/simulcast do *not* use music "with similar frequency." *Id.*; *see supra* Resp. to ¶ 88. Dr. Leonard repeatedly emphasized this difference between custom radio and broadcast/simulcast. Ex. 2150 ¶ 39 & App. C2-C18 (Leonard CWDT); *see also* 8/24/20 Tr. 3535:11-22 (Leonard); *cf.* Ex. 5603 ¶ 48 (Orszag WRT); Ex. 5625 ¶¶ 34 n.21, 40 n.31 (Ploeger WRT). Differences in frequency of music use matter because licensees pay the PROs on a percentage of revenue basis, so lower rates for broadcasters/simulcasters than for custom webcasters reflect the lower intensity of music used by the broadcasters/simulcasters. *See supra* Resp. to ¶ 88; 8/24/20 Tr. 3534:23-3535:2 (Leonard). But this does not suggest that a different rate for simulcasting and custom webcasting is appropriate where rates are set on a *per-play* basis. *See supra* Resp. to ¶ 88; Ex. 5603 ¶¶ 50-51 (Orszag WRT); SX PFFCL ¶¶ 1096-97.

Response to ¶ 104. SoundExchange incorporates its responses to ¶¶ 88-96, 103, *supra*.

Response to ¶ 105. SoundExchange incorporates its responses to ¶¶ 88-96, 103, *supra*.

iv. The PRO Agreements Prove Nothing about Orszag's Application of Ratio Equivalency

Response to ¶ 106. SoundExchange incorporates its responses to ¶¶ 88-96, 103, *supra*. Dr. Leonard provided no reasoned explanation for how his comparison of the percentage of revenue

rates broadcasters/simulcasters pay to PROs with the rate Pandora allegedly pays for its ad-supported service is in any way comparable to Mr. Orszag's application of ratio equivalency between noninteractive and interactive services. In fact, these PRO rates provide no useful information about Mr. Orszag's application of ratio equivalency, given the numerous problems with the PRO rates as calculated by Dr. Leonard. Resp. to ¶¶ 88-96, 103; SX PFFCL ¶¶ 1090-98.

Dr. Leonard's assertion about the relative importance of non-music versus music content to broadcasters/simulcasters is addressed elsewhere. *See* SX PFFCL ¶¶ 1115-40; *supra* Resp. to ¶ 88; *infra* Resp. to ¶¶ 165-73.

Response to ¶ 107. SoundExchange incorporates its response to ¶ 106, *supra*.

v. SoundExchange Offered Extensive Evidence Undermining NAB's PRO Benchmarks

Response to ¶ 108. SoundExchange's critiques of Dr. Leonard's PRO benchmark can be found elsewhere. *See* SX PFFCL ¶¶ 1090-1100; *supra* Resp. to ¶¶ 87-105.

Response to ¶ 109. SoundExchange incorporates its response to ¶ 108, *supra*.

Response to ¶ 110. SoundExchange incorporates its response to ¶ 108, *supra*. Dr. Leonard's utilization of Pandora's 10-Ks is discussed in response to ¶¶ 93-94 *supra*.

Response to ¶ 111. SoundExchange incorporates its responses to ¶¶ 29-109 *supra*, which demonstrate that NAB does not propose viable benchmarks, and that NAB's proposed benchmarks are not sufficient to carry NAB's burden to show that the Judges should adopt a differentiated rate for simulcast and custom radio. SoundExchange's critiques of these benchmarks are articulated in its initial findings. SX PFFCL ¶¶ 1081-1100, 1148-1203.

B. Simulcasters Should Not Receive a Lower Rate Than Other Webcasters

Response to ¶ 112. Professor Hauser's survey is not reliable. As discussed in SoundExchange's findings of fact and below, the Hauser Survey suffers from numerous flaws,

including Professor Hauser's inappropriate use of a consider-one-then-choose-many structure, his reliance on an overly complicated "attention check" question which excluded over a third of respondents, his long and confusing survey instrument, and his attempts to nudge respondents toward no- and low-royalty-bearing options. These flaws render his survey unusable for any purpose. Both Professor Hauser's testimony and his survey stand in striking contrast to all other surveys conducted in connection with this proceeding. SoundExchange incorporates SX PFFCL ¶¶ 1210-69 and its responses to ¶¶ 113-26, *infra* (discussing flaws in the Hauser Survey).

1. The Hauser Survey Does Not Provide A Basis to Compare the Behavior of Simulcast Versus Webcast Listeners

Response to ¶ 113. SoundExchange does not dispute that the Hauser Survey is the only survey that broke out simulcast listeners as a separate group from webcasting listeners more generally. But Professor Hauser's survey is badly flawed and cannot reliably measure the behavior of simulcast listeners. *See* ¶¶ 114-26 infra; SX PFFCL ¶¶ 1210-69.

Contrary to NAB's suggestion, the surveys conducted by Professors Zauberman, Hanssens, and Simonson *did* measure the behavior of simulcast listeners, as a subgroup within their broader survey populations. Resp. to ¶¶ 192-93, *infra*; 8/6/20 Tr. 622:9-625:24 (Willig). This focus is entirely appropriate in light of the current rate structure and NAB's failure to present evidence that its members deserve a special, reduced royalty rate. *See id.*; SX PFFCL ¶¶ 1062-63 (NAB has not met its burden of showing that a separate simulcaster rate is warranted).

Response to ¶ 114. SoundExchange incorporates SX PFFCL ¶¶ 1242-61, which discusses Professor Hauser's misstatement of the research on two-stage decision-making and his lack of basis for using a problematic consider-then-choose structure that does not match consumer reality. SoundExchange further notes that, while NAB refers to "supporting literature" in Professor Hauser's written direct testimony, these sources (1) are not in evidence, and (2) do not support the

(incorrect) proposition that consider-then-choose structures are appropriate in all consumer contexts or for the one at hand. *See* Ex. 2151 ¶ 102 n.111 (Hauser WDT); *id.* at ¶ 85 (conceding that it is "not uncommon for individuals to have subscriptions to multiple services, even within the same service type"); 8/27/20 Tr. 4213:3-4214:15 (Zauberman); Ex. 5608 ¶ 112 (Simonson CWRT) (real-world consumers can and do use multiple sources of music). NAB's misleading references to documents that it did not even attempt to move into the record should be stricken.

Response to ¶ 115. As before, no record evidence supports Professor Hauser's argument that all other surveys suffer from a "cheap talk problem" but—because he allowed respondents to choose multiple response options—his survey is somehow immune. NAB's citation to "evidence of cheap talk" is just more smoke and mirrors. The passage of Professor Hauser's testimony that NAB claims contains such "evidence" references only one source: an article that was never offered into evidence and was discussed for the first time in Professor Hauser's trial demonstrative. SX PFFCL ¶ 1260 (discussing inapplicability of Miller article). The remainder of Professor Hauser's testimony on this subject reverts to the same baseless critiques he has levied elsewhere. *See* 8/27/20 Tr. 4349:17-4352:1 (Hauser) (claiming that zero time allocation and choice of multiple response options indicates "cheap talk" in the Zauberman, Hanssens and Simonson surveys, and drawing conclusions contrary to all other survey experts that, based on his judgement, these numbers are too high). In addition, SoundExchange incorporates its response to ¶ 114 *supra*, SX Reply to JPFFCL ¶¶ 291-94, and SX PFFCL ¶¶ 1259-61 (discussing weakness of these critiques with respect to the Zauberman Survey).

Response to ¶ 116. The Hauser Survey does not provide a reliable estimate of "how much consumers listen to simulcasts." NAB PFFCL ¶ 116; *see* Ex. 5601 ¶¶ 16, 103-07 (Willig WRT); Ex. 5607 ¶ 57-59 (Zauberman WRT); Ex. 5608 ¶ 114 (Simonson CWRT); SX PFFCL ¶¶ 1208-

70. Professor Hauser's use of a three-day time period arises from his insistence that respondents can remember their behavior for approximately that length of time and no more. *See* Ex. 2151 ¶ 28 (Hauser WDT) (arguing that pretesting showed that 7 days was too long); *see also* SX PFFCL ¶¶ 1266 (explaining that pretesting cannot reliably establish time parameters and should not be used this way). This position is particularly odd, given that Professor Hauser and other NAB witnesses elsewhere argue that Professor Zauberman's 30-day time frame is too short. *See* SX PFFCL ¶ 777 (rebutting Hauser and Leonard's argument that Zauberman Survey overstates new purchases because respondents are only asked about behavior in the 30 days). SoundExchange respectfully refers the Judges to SX PFFCL ¶¶ 1250-52, 1262-67, which further addresses Professor Hauser's use of a three-day period.

i. The Hauser Survey's Data on Diversion Is Unreliable

Response to ¶ 117. As discussed throughout this section and in SX PFFCL ¶ 209, no reliable conclusions can be drawn from the Hauser Survey. *See also* Ex. 5601 ¶¶ 16, 103-07 (Willig WRT); Ex. 5607 ¶ 57-59 (Zauberman WRT); Ex. 5608 ¶ 114 (Simonson CWRT). Dr. Leonard's assertions about what "makes sense" and is "obvious[]" are not supported by any evidence and should be accorded no weight. Were it truly obvious what consumers would do in a hypothetical future scenario, the survey and experimental evidence in this proceeding would be wholly unnecessary. Moreover, the connection that Dr. Leonard draws between simulcasts and broadcast radio focuses on only on similarities in content and ignores the variety of other reasons that a listener might choose to listen to a simulcast in the first place. For instance, for someone who listens to simulcasts at her desk at work or on her cell phone, or for a person whose local AM/FM reception is spotty, replacing simulcasts with an internet-based service like Pandora (rather than broadcast radio) might be the more obvious choice.

Response to ¶ 118. NAB incorrectly treats all television and video options as alternatives with no music content. In reality, the 11.8% of respondents included in that umbrella category includes several subgroups, including those who said they "would listen to music channels through [their] existing cable or satellite television subscription (e.g., Music Choice)." Ex. 2151, App. R (Hauser WDT). This group, which accounts for 2.0% of all respondents, plainly selected a music alternative. *Id.* SoundExchange also disputes NAB's characterization of the examples provided, which include options that as few of 2.8% of respondents selected, as reflective of behavior of "many simulcast listeners." *See* NAB PFFCL ¶ 118; Ex. 2151, App. R (Hauser WDT).

Response to ¶ 119. SoundExchange does not contest that the reported numbers appear in Professor Hauser's written testimony, *see* Ex. 2151, App. R (Hauser WDT), but takes no position on NAB's characterization of these reported numbers as "relatively low." NAB does not answer the question "relative to what," and a 6.8% diversion to ad-supported noninteractive services is plainly *higher* than a 2.8% diversion to non-music digital content. NAB PFFCL ¶ 119. In any case, no reliable conclusions regarding diversion ratios, competition, or substitution can be drawn from Professor Hauser's flawed survey. *See, e.g.*, SX PFFCL ¶ 209.

Response to ¶ 120. SoundExchange incorporates its responses to ¶¶ 118-19 *supra* and SX PFFCL ¶¶ 1064-80. As discussed therein, a mountain of record evidence—including internal documents from NAB's members and other webcasters—shows that simulcasters compete for listeners with other commercial webcasters. *See, e.g.*, Ex. 5194 at 11 ([ ]); Ex. 3042 at 8 (Cumulus Media: "we compete with various digital platforms and services, including streaming music and other entertainment services for both listeners and advertisers"); Ex. 4001 at 2 ([ ]).

ii. The Hauser Survey Is Riddled with Flaws

Response to ¶ 121. NAB mischaracterizes SoundExchange's criticism of Professor Hauser's two-stage structure, falsely claiming without any cited support that SoundExchange's experts testified this heuristic "applies only to high-risk, high-expense situations like buying a car." *See* NAB PFFCL ¶ 121. As Professors Zauberman and Simonson testified, the appropriateness of a consider-many-then-choose-one structure like Professor Hauser employs depends on a variety of context-specific factors. Ex. 5607 ¶ 73 (Zauberman WRT); Ex. 5608 ¶ 109 (Simonson CWRT); 8/27/20 Tr. 4210:18-4211:23, 4213:3-4214:15 (Zauberman); SX PFFCL ¶¶ 1246-47. Among the most glaring problems with Professor Hauser's application of this heuristic is that he artificially imposes a "choose one" constraint that is counter to reality. SX PFFCL ¶¶ 1246-47; *see also* 8/6/20 Tr. 623:11-21, 624:13-625:8 (Willig). Although consumers may well "choose one" when shopping for deodorant (or a car), consumers frequently do rely on multiple sources of music. *See, e.g.*, SX PFFCL ¶¶ 1244; 8/6/20 Tr. 624:13-625:8 (Willig).

Professor Hauser's citation to his own article—which is not in the record and is far from undisputed in the academic literature—should be accorded zero weight. *See* NAB PFFCL ¶ 121. NAB did not attempt to move into evidence either this article or any of the related research Professor Hauser references in his testimony. *See* SX PFFCL ¶ 1247. For this reason, and because the cited articles do not stand for the proposition that Professor Hauser now advances, the last two sentences of NAB's paragraph 121 should be stricken.

SoundExchange otherwise incorporates its responses to ¶¶ 122-126 *infra* and SX PFFCL ¶¶ 1241-61 (discussing errors in Hauser Survey, including use of consider-then-choose structure).

Response to ¶ 122. SoundExchange respectfully refers the Judges to SX PFFCL ¶¶ 1212-14, 1220-70, which discuss flaws in Hauser Survey switching questions and resulting data. *See also* Resp. to ¶ 175, *infra*, and SX PFFCL ¶¶ 1064-81. NAB's attempt to bolster Professor Hauser's

authority by reference to his previous testimony is unpersuasive. If anything, Professor Hauser's testimony in *SDARS III* and other cases undercuts his credibility. First, Professor Hauser's testimony in *SDARS III* contradicts to the position he now endorses. Rebutting the testimony of survey expert Ravi Dhar, Professor Hauser argued that the Dhar Survey inappropriately limited respondents to one switching option, even though there would be no such limitation in the real world. *Cf. SDARS III*, 83 Fed. Reg. at 65233-34. This argument could just as easily be levied against Professor Hauser's survey in this proceeding, in which he biases his results by forcing respondents to "select one" switching option. *See* Ex. 2151 ¶ 13, App. D at p. 125 (Q5) (Hauser WDT); *see also SDARS III*, 83 Fed. Reg. at 65235 (noting that reliance on Hauser's data "should not be understood as a finding that Professor Hauser's Modified Dhar Survey is without defects").

Additionally, recent district court decisions rejecting Professor Hauser's surveys have cast doubt on the reliability of his work. *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 232 (2018) ("[C]ross-examination and real-world evidence alike revealed that [Professor Hauser's] survey was inherently unreliable and produced inflated results!"); *id.* (Professor Hauser's survey "was drawn in a biased and misleading way, with the effect of overstating" results, and "the survey's centerpiece, the intent-to-switch scale, was confusing and skewed"); *Apple v. Samsung Elecs. Co.*, 2014 WL 976898, at *12 (N.D. Cal. Mar. 6, 2014) (Dr. Hauser's survey provided respondents with an artificially restrictive set of options, such that consumers responses regarding their willingness to pay were "devoid of sufficient context"); *id.* at *14 ("using various attention-drawing graphic effects" to nudge respondents toward particular response options).

Response to ¶ 123. NAB is wrong that SoundExchange "failed to recognize" Professor Hauser's claim that his sampling technique somehow remedied the mismatch between the Hauser Survey (which allowed respondents to switch to only one replacement option) and the real world

(in which consumers can and do choose to use multiple sources of music). In fact, SoundExchange's proposed findings of fact detail why Professor Hauser's use of a "choose one" limitation is problematic and creates a structural error that cannot be remedied through sampling or reanalysis. SX PFFCL ¶¶ 1252-57 (discussing winner-take-all problem and providing examples). SoundExchange respectfully refers that Judges to that discussion.

Response to ¶ 124. SoundExchange incorporates its response to ¶ 123 and SX PFFCL ¶¶ 1252-57. NAB's response seems to willfully misunderstand Professor Zauberman's winner-take-all critique. The example NAB provides highlights the difference between Professor Zauberman's correct use of sampling and Professor Hauser's incorrect use. In his carefully constructed time allocation questions (Q3/3A), Professor Zauberman asked respondents to focus on a specific day in the future and respond as to their behavior on that day. Ex. 5606 ¶¶ 59-65 & App. D (Zauberman WDT). Importantly, the Zauberman Survey does not impose an unnecessary and unrealistic limitation on the options available to respondents. *See id.*; 8/27/20 Tr. 4209:12-4212:14 (Zauberman) (criticizing Hauser and explaining why heterogeneity of responses does not cure winner-take-all problem in Hauser Survey). In this context, sampling across all days of the week allowed for precisely the type of random distribution that NAB's proposed finding describes. Ex. 5606 ¶ 64 (Zauberman WDT).

This technique cannot be applied to the Hauser Survey. SX PFFCL ¶¶ 1253-55. First, while Professor Zauberman's questions made clear that respondents were to provide responses as to their music listening on *one specific day*, *id.* at ¶¶ 727-30, 785; Ex. 5606 ¶¶ 60-61 & App. D (Zauberman WDT), Professor Hauser's Q5 was not similarly clear. Instead, Professor Hauser ambiguously

asked respondents to consider "the most recent time you listened" *and* "similar situations during the next five years."[4] Ex. 2151 ¶ 13 & n.8, App. D (Hauser WDT); *see* SX PFFCL ¶¶ 1250-51.

Second, the example Professor Willig provided shows why the sort of sampling used by Professor Zauberman does not work in the context of the Hauser Survey and would not yield the balanced result that NAB promises. Professor Willig begins with a premise nearly identical to NAB's: he supposes that "ten survey respondents would each replace their simulcast listening time by spending 60% of that time listening to broadcast AM/FM radio and 40% of that time listening to a new on-demand subscription." Ex. 5601 ¶¶ 105-06 (Willig WRT). In this circumstance:

> [T]he Hauser Survey is constructed to elicit a result where six respondents say they would switch to broadcast AM/FM radio and only four (rather than all ten) respondents say they would acquire a new on-demand subscription service. The application of these survey data in Dr. Leonard's opportunity cost analysis thus fails to measure any opportunity cost associated with new on-demand subscriptions for six of the ten respondents. That is, he assigns his estimate of [[redacted]] per month of royalties for new on-demand subscriptions to four of the ten respondents, when it should actually be applied to all ten.

Id. The "choose one" limitation Professor Hauser imposes biases his results downward, and makes his survey resistant to the sampling technique Professor Zauberman employs.

Response to ¶ 125. Professor Hauser's suggestion that his switching question was never intended to apply to the entire five-year rate-setting period is contrary to his own description of the survey's purpose: "to determine what consumers would do in place of listening to Internet simulcasts of terrestrial commercial radio if such simulcasts were not available *for the next five*

[4] Question 5 asks in full: "Continue to suppose that live AM/FM radio broadcasts **from commercial radio stations over the Internet** were not available for the next five years. Assume that everything else would be available for the next five years as it is now. Now think about the **most recent** time you listened to live AM/FM radio broadcasts **from commercial radio stations over the Internet**. Please consider situations similar to that time and the content you listened to at that time. Which one of the following would you do **in place of** listening to **such broadcasts over the Internet** in similar situations during the next five years? The prices below are examples and do not include promotional discounts, taxes, or fees. If you are unable to say which particular activity you would do, please indicate this by choosing the "Don't know/Unsure" option. It is important that you do not guess. *(Select one only)*." Ex. 2151, App. D at p. 125 (Hauser WDT).

years." Ex. 2151 ¶ 6 (Hauser WDT) (emphasis added); *see id.* at App. D at D-11 to D-17 (focusing respondents on "the next five years" six times in Q4 and Q5 alone); SX PFFCL ¶¶ 1210-14; *see also id.* at ¶¶ 1252-57.

Response to ¶ 126. SoundExchange incorporates SX PFFCL ¶¶ 1262-65. The Judges should not credit Professor Hauser's trial testimony, in which he claims that—after making unspecified adjustments to account for people who do not listen to simulcasts—his data "lines up pretty well" with the Infinite Dial data. Not only does this testimony depend on new analysis presented for the first time at trial, but Professor Hauser fails to even explain how such analysis would be conducted. This omission makes it impossible to test or assess his calculations.

2. NAB's Opportunity Cost Analysis

Response to ¶ 127. Because the Hauser Survey is unreliable, *see supra* Resp. to ¶¶ 112-26, Dr. Leonard's effort to build on the diversion ratios from that survey to compute opportunity cost is unreliable as well. Moreover, even taken at face value, Dr. Leonard's opportunity cost calculation does not satisfy the limited purpose for which it apparently has been offered—as a "check" on Dr. Leonard's benchmark analysis. *See* SX PFFCL ¶ 1204 (citing, *inter alia*, 8/6/20 Tr. 685:8-25 (Willig)); *infra* Resp. to ¶¶ 134-35.

Response to ¶ 128. In addition to relying on flawed and unreliable diversion ratios, *see* Resp. to ¶ 127 supra, Dr. Leonard improperly computes the royalties associated with outside distribution sources. *See* Ex. 5601 ¶¶ 108-117 (Willig WRT). Specifically, (1) in the course of computing royalties associated with new subscription services, Dr. Leonard improperly estimated the number of plays-per-month for simulcast listeners; (2) Dr. Leonard improperly assumed that current statutory rates will apply for noninteractive services, instead of solving for those rates endogenously; (3) Dr. Leonard inconsistently assumes that record companies would earn zero royalties from diversion to existing subscriptions to noninteractive services, even though such

royalties are assessed on a per-play basis under the current statutory regime; and (4) Dr. Leonard relies on outdated estimates of physical and digital royalties. *Id*. These problems are compounded by Dr. Leonard's ad hoc attempt to apply a steering adjustment to his opportunity cost. *Id.* ¶ 118.

i. Dr. Leonard's Opportunity Cost Analysis is Flawed and Does Not Support the Results of His Benchmark Analysis

Response to ¶ 129. SoundExchange incorporates its responses to ¶¶ 127-28 *supra*.

Response to ¶ 130. Dr. Leonard's analysis importantly takes as a given that major record companies are must have for simulcasters. Ex. 2150 ¶ 72 n.99 (Leonard CWDT). SoundExchange agrees and notes that this is consistent with Professor Willig's baseline "loss rate" specification in his Shapley Value model. *See* Ex. 5601 ¶¶ 36-42 (Willig WRT). As discussed elsewhere, neither NAB nor any of the other Services has presented any logical, economic, or evidentiary basis to support the conclusion that [ ]. 8/5/20 Tr. 436:20-24 (Willig).

Dr. Leonard's proposed "downward adjustment" to account for the major record companies' "resulting complementary oligopoly power" is economically unsupported. Ex. 5601 ¶ 118 (Willig WRT); 8/6/20 Tr. 682:1-3, 682:20-683:3 (Willig). There is no dispute that [ ] 8/6/20 Tr. 683:23-25 (Willig); 8/20/20 Tr. 3126:22-3127:8 (Shapiro). Attempting to determine a royalty rate *below* record company opportunity cost is totally inconsistent with the Judges' mandate to set a rate that a willing seller would accept. 17 U.S.C. § 114(f)(1)(B).

Moreover, Dr. Leonard makes no genuine effort to explain why it is logical or appropriate to alter record company opportunity cost using a steering factor (a) that the Judges determined four years ago, (b) on the basis of an even older (and totally different) evidentiary record, and (c) which the Judges utilized to alter one of the parties' proposed benchmarks, but (d) which the Judges never

remotely suggested was an appropriate tool to adjust opportunity cost, let alone set a royalty rate below record company opportunity cost. *See* Ex. 2150 ¶ 115 (Leonard CWDT); *Web IV*, 81 Fed. Reg. at 26367-68, 26404-05. The most Dr. Leonard could muster at trial is that this steering adjustment was "not that long ago," that "it seemed to me that that was a useful number and probably conservative because it does strike me as a little bit small," and that it is "smaller, really, than, for instance, the difference between the rates and the benchmark agreements I looked at." 8/24/20 Tr. 3410:6-24 (Leonard). This so-called explanation makes clear that Dr. Leonard's steering adjustment is totally ad hoc: He does not analyze whether the adjustment is valid despite changing market conditions since *Web IV* (a proposition on which NAB's case otherwise depends, *see, e.g.*, NAB PFFCL ¶ 21), his say-so that this is a "useful number" and "a little bit small" is a transparent ipse dixit, and his relation of the adjustment to his benchmarking analysis lays bare the incoherence of simply slapping this adjustment on top of his opportunity cost computation, an approach the Judges have never endorsed. In short, grafting this adjustment from one context to another seems significant enough that it should entail some explanation or justification, yet Dr. Leonard offers neither. Nor does he present any economic connection whatsoever [ ] 8/6/20 Tr. 683:6-7, 19-25, 685:25-686:6 (Willig).

Response to ¶ 131. SoundExchange incorporates its response to ¶ 130 supra.

Response to ¶ 132. While Dr. Leonard suggested in his written testimony that the Judges apply a promotional offset to his opportunity cost analysis, he acknowledged that promotional effects are "difficult to quantify," made no attempt to quantify them, and proposed no adjustment to his opportunity cost analysis on that basis. Ex. 2150 ¶¶ 108-13 (Leonard CWDT); Ex. 5615 ¶ 4 n.7 (Ford WRT); *accord* 8/25/20 Tr. 3604:5-21 (Leonard). NAB offers no empirical analysis of

the promotional effect of simulcasting or of any other noninteractive service. SX PFFCL ¶ 513; 8/25/20 Tr. 3604:5-19 (Leonard) (acknowledging that he conducted no empirical analysis of the impact of simulcasting on sales of CDs, sales of downloads, or sales of subscriptions to services like Sirius XM satellite radio). While NAB offers some qualitative, anecdotal evidence of promotion, this evidence does not show the relative promotional power of simulcasting compared to other noninteractive services nor the relative promotional power of noninteractive services compared to other distribution modes such as ad-supported on-demand services. Resp. to ¶¶ 154-64, *infra*; SX PFFCL ¶¶ 510, 518-23, 1141-47. In previous proceedings, the Judges have rejected efforts to support a promotional adjustment based on this type of evidence. *See SDARS III*, 83 Fed. Reg. at 65253; *Web IV*, 81 Fed. Reg. at 26322 n.41 & 26323; *SDARS II*, 78 Fed. Reg. at 23066-67; *SDARS I*, 73 Fed. Reg. at 4094-95; SX PFFCL ¶¶ 507-08.

Response to ¶ 133. The Judges should disregard NAB's attempt to offer a brand-new theory of "opportunity benefit" that appeared nowhere in Dr. Leonard's written testimony. As the trial testimony cited by NAB in this paragraph makes plain, Dr. Leonard undertook absolutely no empirical analysis to evaluate whether "opportunity benefit" is a real phenomenon, or the magnitude of any such effect. *See* 8/24/20 Tr. 3403:21-3406:18 (Leonard).

Even a simple illustration demonstrates why this concept is of zero relevance absent the kind of empirical and quantitative work that Dr. Leonard simply did not undertake. Consider a situation where the royalty rate for simulcasters is set at $0.01 per play, and there are 10 plays per month on simulcasting and 50 plays per month on terrestrial radio. Now suppose the rate were to fall dramatically, to $0.001 per play. And suppose NAB is right that this causes some listeners to migrate from AM/FM broadcast to simulcast—an additional 40 listeners. In this example, there would be migration of listeners but there would be *no* "opportunity benefit" to the record

companies—whose royalties would fall from $0.10 (=$0.01 x 10 plays) to $0.05 (=$0.001 x 50 plays). Indeed, this simple example does not consider additional effects that could cause a further suppression of record company royalties. For instance, if a lower royalty rate encourages simulcasters to play more music (as NAB posits would happen) this may not only draw listeners away from AM/FM radio, it may draw additional listeners away from distribution sources that pay higher royalties—for instance, Sirius XM satellite radio or digital downloads. Plainly, the numbers matter. Dr. Leonard's naked supposition that there would "quite likely" be some sort of opportunity cost offset is too ungrounded from any empirical analysis to be entitled to any weight—even supposing the Judges permit NAB to lob in this new argument at the eleventh hour.

ii. SoundExchange's Criticisms of Dr. Leonard's Opportunity Cost Analysis Are Well Founded

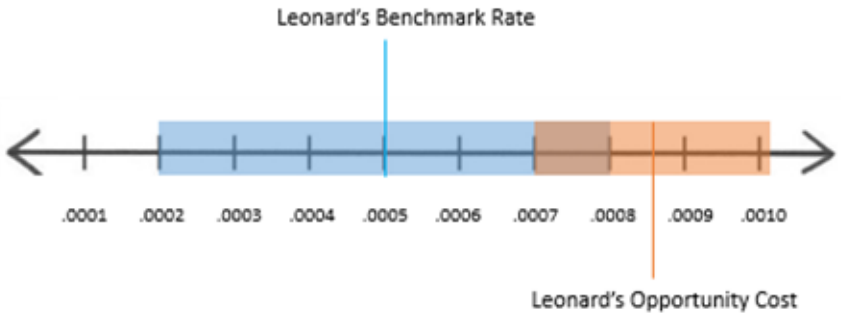
Response to ¶ 134. NAB is correct to concede that Dr. Leonard's opportunity cost analysis cannot and does not "estimate rates that would prevail in the marketplace." As Professor Willig has explained, and as Professor Shapiro agreed, [ ]. 8/20/20 Tr. 3126:22-3127:8 (Shapiro). [ ]. 8/6/20 Tr. 681:17-22 (Willig). NAB does not dispute that Dr. Leonard failed to undertake any bargaining model whatsoever to approximate what this surplus would be, how it would be distributed, and to what extent it would raise the royalty rate above opportunity cost. Dr. Leonard failed to do any of these things even though it is apparent that many simulcasters' willingness to pay exceeds the purported opportunity cost floor derived by Dr. Leonard, given that they willingly pay the current statutory rate to perform sound recordings. 8/24/20 Tr. 3564:12-25 (Leonard); *compare* 37 C.F.R. § 380.10(a)(1), *with* Ex. 2150 ¶ 115 (Leonard CWDT). NAB says Dr. Leonard's opportunity cost calculation is just meant

as an "independent check" on his benchmarking approach. However, as discussed below, his calculation does not corroborate and in fact contradicts his benchmark-derived rate. *See* SX PFFCL ¶ 1204 (citing, inter alia, 8/6/20 Tr. 685:8-25 (Willig)); *infra* Resp. to ¶ 135.

Response to ¶ 135. [ ]. *See, e.g.*, 8/20/20 Tr. 3126:22-3127:8 (Shapiro). Nonetheless, Dr. Leonard's benchmark purports to indicate a royalty rate of [ ]. Ex. 2150 at ¶ 8 (Leonard CWDT); 8/6/20 Tr. 685:8-25 (Willig) ([ ]); SX PFFCL ¶ 1204. This inconsistency is not resolved by NAB's untethered and unsupported claim that Dr. Leonard's failure to account for the "promotional effect of simulcast" is "conservative[]." NAB PFFCL ¶ 135. As discussed above, there is no reason to think (and certainly no record evidence to support) that a promotional adjustment would lower rather than *raise* record company opportunity cost. *See supra* Resp. to ¶ 132. Nor does NAB cite any evidence corroborating the idea that Dr. Leonard's otherwise-invalid steering adjustment is "conservatively low," NAB PFFCL ¶ 135, other than Dr. Leonard's empirically-ungrounded testimony that "it does strike me as a little bit small for our circumstances." *Id.* (citing 8/24/20 Tr. 3410:14-24); *see* Resp. to ¶ 130 (rebutting validity of adjustment). Atmospheric impressions of this sort are not valid expert testimony and should be accorded no weight by the Judges.

Finally, NAB falsely claims that Dr. Leonard's "benchmark-derived rate is well above the lower bound" of his opportunity cost range. That ignores the fact that Dr. Leonard computed a range of benchmark-derived rates, most of which falls well *below* the lower bound opportunity cost that he computed. *Compare* Ex. 2150 ¶ 8 (Leonard CWDT) ([

[redacted]), *with id.* at ¶ 115 (opportunity cost range of [redacted]). In any event, a more appropriate comparison is to the midpoint of each range, which demonstrates the inconsistency.



Response to ¶ 136 (body). For the reasons noted above, Dr. Leonard's effort to make a downward adjustment to opportunity cost, using a benchmark-based steering adjustment from a different case, is thoroughly illogical. *See supra* Resp. ¶ 130. It is therefore no surprise that [redacted]. 8/6/20 685:5-6 (Willig) ([redacted]). In any event, Professor Willig made clear that [redacted]. 8/6/20 Tr. 683:4-25 (Willig). As such, Dr. Leonard's adjustment is also unnecessary. *See supra* Resp. to ¶ 130.

Response to ¶ 136 (footnote). For the first time at *any* point in this proceeding, NAB offers a lengthy argument against the "fork in the road" analysis offered by Professor Willig and endorsed by the Judges in *SDARS III*. *See* 83 Fed. Reg. at 65238. This is completely inappropriate argumentation that, despite being offered as a "finding of fact," is tellingly bereft of even a single supportive citation to the record in this case. *See* NAB PFFCL p.1 n.1. Notably, both Dr. Leonard and Professor Shapiro made explicit at trial that they were *not* challenging this concept. 8/24/20 Tr. 3413:5-7 (Leonard) ("I didn't try to change his fork-in-the-road assumption. I am really doing

something else."); 8/20/20 Tr. 3164:7-17 (Shapiro) ("I did not take issue with that."). The Judges should strike this footnote.

Response to ¶ 137. SoundExchange incorporates its response to ¶¶ 130 and 136 *supra*, as well as SX Reply to JPFFCL ¶ 184.

Response to ¶ 138. Dr. Leonard uses the existing statutory rate for subscription webcasters to compute record company opportunity cost for ad-supported webcasters—and then turns around and uses the statutory rate for ad-supported webcasters to compute opportunity cost for subscription webcasters. Ex. 2150, App. B1 n.4 & n.5 (Leonard CWDT). This is indefensibly circular. *See* Ex. 5601 ¶¶ 53, 115 (Willig WRT); 8/5/20 Tr. 511:7-9 (Willig); 8/6/20 Tr. 656:23-659:1 (Willig). Moreover, NAB's response that this illogical maneuver is "conservative"—because using NAB's proposed rates would lead to even lower results—is equally circular. The idea seems to be that NAB could use its benchmark-derived royalty rate as an input to computing opportunity cost, even though Dr. Leonard's opportunity cost calculation is supposedly offered as "an independent check on his benchmarking analysis." NAB PFFCL ¶ 134. This is head-spinning. The proper approach, as Professor Willig explained, was to build a bargaining model capable of solving for both rates simultaneously. Professor Willig did that. Ex. 5600, App. C (Willig CWDT); 8/6/20 Tr. 657:14-16 (Willig). Dr. Leonard did not. Ex. 5601 ¶¶ 53, 115 (Willig WRT); 8/6/20 Tr. 656:23-659:1 (Willig).

Response to ¶ 139. Dr. Leonard presents no reason why it is logical to adjust Sirius XM plays-per-month by a ratio comprised of terrestrial radio and Pandora plays-per-month. Ex. 5601 ¶ 110 (Willig WRT); SX PFFCL ¶¶ 1271-80. Sirius XM is a subscription service, while simulcasting is ad-supported. Dr. Leonard acknowledged that there is a "pretty big difference in the number of plays per-user per-month" on subscription as compared to ad-supported services.

8/24/20 Tr. 3582:11-15 (Leonard). He agreed that for a service like Pandora there is a "way higher average listening for the subscription service than there is for the ad-supported service." *Id.* at 3584:12-21 (Leonard). Indeed, unlike on simulcasts or ad-supported Pandora, Sirius XM channels are free of ads. SXM PFFCL ¶¶ 40, 44, 51. Sirius XM subscribers thus spend less time listening to ads, and as a result more time listening to music, than listeners on ad-supporter services.

Dr. Leonard testified that part of the reason he used Sirius XM as a proxy was because, like simulcast and unlike other ad-supported services, it features non-music content; he believes that non-music content has a higher level of listener engagement and therefore generates more listening time. 8/24/20 Tr. 3582:15-3583:16 (Leonard). Dr. Leonard makes no effort to justify his assumption that the mix of music and non-music content on simulcasts is comparable to the mix of music and non-music content on Sirius XM. SX PFFCL ¶ 1274; *cf.* Ex. 2157 ¶ 13 (Wheeler CWDT) (describing the "mix of news, entertainment, and music" on his broadcast and simulcast stations). That is dubious, given that Sirius XM differentiates its channels between music and non-music content, rather than commingling the two within the same channel. *See* SX PFFCL ¶ 1274 (citing Ex. 4000 at 2-3; Ex. 4092 ¶¶ 23-27 (Witz WDT)); *see also* SXM PFFCL ¶¶ 36, 39. As Prof. Willig put it, Dr. Leonard's assumption "makes no sense," Ex. 5601 ¶ 110 (Willig WRT).

Response to ¶ 140. There is "no sound basis" for Dr. Leonard's assumption that people who listen to simulcasts do so for the same amount of time per month as people who listen to Sirius XM on satellite receivers. Ex. 5601 ¶ 110 (Willig WRT). As Professor Willig explained, Sirius XM listening on satellite receivers primarily occurs in the car whereas simulcasting primarily is experienced on a computer or mobile device—reason enough to find this assumption completely unreliable. *Id.*; *see also* 8/6/20 Tr. 647:22-25 (Willig) ([[redacted]

[redacted]); 8/24/20 Tr. 3584:22-24 (Leonard). Dr. Leonard did not look for any data or statistics about the degree to which simulcast is used in the car, despite being aware that Sirius XM is mostly used in the car. 8/24/20 Tr. 3584:22-3485:3, 3585:23-3586:2 (Leonard). And he agreed that listening patterns in the car differ from listening elsewhere. *Id.* at 3585:6-22 (Leonard).

NAB asserts without a shred of evidence that Professor Willig made this same assumption in *SDARS III*. In his written testimony, Dr. Leonard asserted—again without citation—that, "[t]his calculation adopts the 601 plays per month used by Robert Willig in the *SDARS III* matter for satellite, ad-supported interactive, ad-supported non-interactive, and ad-supported video services." Ex. 2150 at App. B1 (Leonard CWDT). But an examination of Professor Willig's testimony in *SDARS III* reveals that Dr. Leonard's assertion is false. In *SDARS III*, Professor Willig ran separate calculations for different music distribution modes, including for Sirius XM—which used this 601 number—and for non-interactive-paid, non-interactive-ad-supported (webcasting)—which did not. Thus, in *SDARS III*, Professor Willig *did not* make the same assumption that Dr. Leonard does here. Dr. Leonard's methodology relies on a complete—and, perhaps, willful—misunderstanding of Professor Willig's *SDARS III* calculations.

Moreover, Dr. Leonard failed to consider the average number of plays per month consumed by Pandora Free users. Ex. 5601 ¶ 114 (Willig WRT); SX PFFCL ¶ 1280. Pandora Free is a better proxy than Sirius XM satellite radio for the number of plays per month per simulcast user—as it is a noninteractive ad-supported service that is primarily listened to on a computer or mobile device. *Id*. Professor Willig examined Pandora data which indicated that the average Pandora Free user currently listens to approximately [redacted] plays per month. Ex. 5601 ¶ 114 & App. E at Fig. E-1 (Willig WRT). Applying Dr. Leonard's 11/15 plays per hour adjustment ratio (which uses Pandora plays as the denominator) yields an estimate of [redacted] simulcast plays per user per month.

Id. at ¶ 114. This is [[redacted]] of Dr. Leonard's estimate of 441 plays. *Id.* Using this data would [[redacted]] Dr. Leonard's estimate of the per-play royalties that record companies earn from diversion of simulcast listening to new subscriptions to on-demand streaming or Sirius XM satellite radio. *Id.* at ¶ 114 & nn.191-92. In addition to this data, Professor Willig analyzed iHeart data from Dr. Leonard's own appendices and data produced from simulcaster [[redacted]], to show that listeners to these simulcast stations listened to between [[redacted]] plays per month and an average of [[redacted]] plays per month, respectively. SX PFFCL ¶¶ 1278-79.

Response to ¶ 141. SoundExchange incorporates its Response to ¶ 140, *supra*. NAB again misstates Professor Willig's assumptions. NAB does not (and could not) cite to Professor Willig's testimony. This is unsurprising, because NAB's assertion is incorrect. In his Share of Ear analysis, Professor Willig used the 601 Sirius XM plays per subscriber per month number from *SDARS III* to calculate an outside royalty rate for Sirius XM. Professor Willig did not apply this rate to all noninteractive services. He did not assume that listeners to "noninteractive, nonsubscription services who would have switched to satellite radio services" had 601 plays per month on their noninteractive service. NAB PFFCL ¶ 141. Instead, NAB relies on Dr. Leonard's unsupported assertion that Professor Willig assumed in his Share of Ear analysis that users who switched to satellite from non-interactive, non-subscription services would have "601 plays of satellite." 8/24/20 Tr. 3417:5-14 (Leonard). Notably, Dr. Leonard testified about the number Professor Willig used for plays on satellite; he did not claim, as NAB asserts, that Professor Willig used the 601 plays number as the assumption for the number of "plays per month on the noninteractive, nonsubscription services." *Compare* NAB PFFCL ¶ 141, *with* 8/24/20 Tr. 3417:5-14 (Leonard).

Response to ¶ 142. For this purported confirmatory calculation, Dr. Leonard relies on data from the Hauser Survey, Ex. 2150 ¶ 107 n.134 (Leonard CWDT), which indicate that respondents listened on average to 5.3 hours of simulcasts in the previous three days. Ex. 2151 ¶ 11 (Hauser WDT). But Dr. Leonard does not appear to have provided specific calculations anywhere in his testimony. *See* Ex. 5601 ¶ 111 (Willig WRT) (attempting to back into Dr. Leonard's calculation and coming up with 591 plays per month). Moreover, Dr. Leonard acknowledged that a problem with his estimate is that the Hauser Survey respondent population is biased, as it included only people that listened to simulcasts in the last three days, who are "heavier users of simulcast than the average user who listens to simulcast within a month." Ex. 2150 ¶ 107 n.134 (Leonard CWDT). Dr. Leonard did not adjust for this problem. Ex. 5601 ¶ 111 (Willig WRT).

Response to ¶ 143. Dr. Leonard asserted at trial that the Triton data on which he relied measures IP addresses rather than individual users, and that as a result Professor Willig double-counted listeners because users may have connected to listen from multiple devices separate IP addresses, such as a PC and a mobile phone. 8/24/20 Tr. 3418:22-3420:6 (Leonard). However, Dr. Leonard provided no basis for that assertion. Neither Dr. Leonard nor NAB have presented any evidence of the number of listeners (if any) that actually connect to a station's simulcast on multiple devices that have different IP addresses. Moreover, NAB's argument that Triton data measures listening to a single station is of no moment, because Professor Willig analyzed data from more than one station. Professor Willig analyzed the same iHeart data that Dr. Leonard utilized that identify listening hours and unique listeners on seven different iHeart-owned stations. *See* Ex. 5601 ¶ 112 & Fig. 17 (Willig WRT); SX PFFCL ¶ 1278. In his analysis of [[redacted]] data, Professor looked at data from all of [[redacted]] stations that simulcast. Ex. 5601 ¶ 113 (Willig WRT); SX PFFCL ¶ 1279. Finally, Dr. Leonard testified only about Triton data, not TuneIn data.

See 8/24/20 Tr. 3418:22-3420:6 (Leonard) (asking about "the iHeart Triton data that you produced as part of your backup"). NAB's attempt to extend this testimony to Professor Willig's analysis of TuneIn data is improper and unsupported by any evidence in the record.

Response to ¶ 144. As discussed in SoundExchange's proposed findings and above, Professor Hauser's survey is critically flawed in numerous ways, including but not limited to his inexplicable instruction that respondents could choose only one music or non-music entertainment option for the next five years. SX PFFCL ¶¶ 1210-69. SoundExchange incorporates these findings, as well as Resp. to ¶ 115, *supra*, and SX PFFCL ¶¶ 1259-60, both of which discuss why Professor Hauser's "cheap talk" critique is both too late and inapplicable.

Response to ¶ 145. SoundExchange incorporates SX PFFCL ¶¶ 1101-47.

C. Qualitative Evidence Does Not Support NAB's Proposal

Response to ¶ 146. SoundExchange incorporates its Responses to ¶¶ 147-73, *infra*.

1. Simulcast's Relative Level of Interactivity Has No Bearing on the Rates to Which Willing Sellers Would Agree

Response to ¶ 147. SoundExchange incorporates its Responses to ¶¶ 17-19, *supra*.

Response to ¶ 148. Legislative history is irrelevant to the Judges' work in this proceeding, because their statutory mandate is unambiguous: they are to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B); *see, e.g.*, *Milner v. Dept. of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

In any event, NAB misconstrues the legislative history of Section 114. NAB cites to legislative history of the Digital Performance Right in Sound Recordings Act of 1995

("DPRSRA") and language in a part of the decision in *Arista Records, LLC v. Launch Media, Inc.* summarizing the legislative history of the sound recording copyright from the Sound Recording Amendment of 1971 to the DPRSRA to the Digital Millennium Copyright Act of 1998 ("DMCA"). 578 F.3d 148, 157 (2d Cir. 2009). However, pre-DMCA legislation is largely inapposite to the statutory license for webcasting, which was not adopted until the DMCA in 1998. Legislative history written in 1995 could not explain details of statutory text that was not written until 1998. When Congress enacted the provisions of the DMCA restructuring Section 114 to subject ad-supported services to the sound recording performance right and extend statutory licensing to them, it made clear that its twin purposes were "to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms." H.R. Conf. Rep. No. 105-796, at 79-80 (1998).

Finally, NAB cites a U.S. Copyright Office publication which is not in evidence, is not a source of legislative history, is not a legal determination, and contains inadmissible hearsay that NAB offers for the truth of the matter asserted therein. The Judges should disregard the NAB's attempt to belatedly expand the record and strike the last sentence of this paragraph and the accompanying citation.

Response to ¶ 149. NAB strangely attributes Dr. Leonard's statements about interactivity to Congress. NAB PFFCL ¶ 148 (citing only Dr. Leonard's testimony). But nowhere in the cited testimony does Dr. Leonard cite a single legislative source. Dr. Leonard is not Congress and he does not purport to have legislative expertise. Congress has never recognized that a statutory service's degree of interactivity is a relevant factor in determining substitution or interference with other streams of revenue. Dr. Leonard's testimony cannot change that.

Instead, NAB cites to the portion of Dr. Leonard's testimony discussing the levels of interactivity of services that are *not* covered by the statutory license, such as directly licensed mid-tier and interactive services. Ex. 2160 ¶¶ 27, 41-49 (Leonard WRT) (citing Ex. 2039 and comparting ad-supported noninteractive services to subscription interactive services). NAB conflates evidence and testimony about services with extra-statutory levels of interactivity, with the various "statutorily permissible levels of interactivity" among noninteractive services covered by the statutory license. *Web IV*, 81 Fed. Reg. at 26322. The Judges rejected this very same argument in *Web IV*, holding that there—as here—NAB "has not established (or attempted to establish) that simulcasting as a rule is materially less interactive than any other form of non-custom, noninteractive webcasting, all of which would be subject to the general commercial webcasting rates." 81 Fed. Reg. at 26322. Recognizing that "[t]he statutory license is available to services that offer a continuum of features, including various levels of interactivity," the Judges declined "to cobble together a customized rate structure among categories of commercial webcasters based solely on statutorily permissible levels of interactivity." *Id.*; SX PFFCL ¶¶ 1131-34; *see also* Resp. to ¶¶ 8, 24, *supra* (discussing NAB's failure to present evidence about the differences between simulcast and other non-custom radio statutory services).

Recognizing its failure to plug the evidentiary hole left in *Web IV*, NAB attempts to cite hearsay from a Copyright Office publication that is not in the record. The Judges should disregard this effort and strike the last sentence of this paragraph and the accompanying citation. *See supra* Resp. to ¶ 148. The evidence that *is* in the record undermines NAB's point. *See* SX PFFCL ¶¶ 1064-80. This evidence—much of which comes from simulcasters themselves—establishes substantial competition (and thus potential substitution) between simulcasters and other webcasters. *See id.*; Ex. 5472 at 4 (2018 NAB comments filed with the FCC stating "Any

contention that radio broadcasters today compete for audiences and advertisers only with other broadcasters—and not with any other audio outlets and content providers—is untenable."); *see also, e.g.*, Ex. 5353 (broadcaster FCC comments); Exs. 3042, 5387, 5483 (broadcaster Form 10-Ks); Exs. 2041, 2083, 2088-89, 4001, 5056, 5059, 5144, 5194, 5196-97, 5229, 5309; 8/31/20 Tr. 4633:18-4634:19, 4635:15-4636:13, 4637:15-21, 4639:19-22 (Phillips); 9/1/20 Tr. 5062:4-9, 5067:20-5068:14 (Wheeler); 8/31/20 Tr. 4507:9-25 (Witz); *see* SX PFFCL ¶¶ 1072-78.

Response to ¶ 150. NAB again conflates testimony about extra-statutory interactivity with its argument concerning different levels of interactivity among noninteractive services. *See* Resp. to ¶ 149, *supra*. Mr. Harrison's cited testimony specifically distinguishes between statutory services and directly licensed, non-statutory noninteractive and interactive services. *See* Ex. 5609 ¶ 7 (Harrison WDT).

Response to ¶ 151. SoundExchange incorporates its response to ¶ 150, *supra*. *See also* 8/12/20 Tr. 1505:3-9, 1505:25-1506:6 (Orszag). Mr. Harrison's cited testimony [ ]. 9/3/20 Tr. 5690:14-5691:23 (Harrison) ([ ]). [ ] 9/3/20 Tr. 5691:17-23 (Harrison).

Response to ¶ 152. SoundExchange incorporates its Responses to ¶¶ 7-9, 149-51, *supra*. NAB leaves out a crucial portion of Mr. Harrison's testimony [

[redacted]

[redacted] 9/3/20 Tr. 4692:5-14 (Harrison). In *Web IV*, as here, NAB "has not established (or attempted to establish) that simulcasting as a rule is materially less interactive than any other form of non-custom, noninteractive webcasting, all of which would be subject to the general commercial webcasting rates." 81 Fed. Reg. at 26322. Contrary to NAB's assertions, the Hauser survey provides no useful information on this point, given its numerous flaws. *See supra* Resp. to ¶¶ 113-26; SX PFFCL ¶¶ 1208-69.

Response to ¶ 153. As NAB concedes, its qualitative evidence is similar to the evidence the Judges found insufficient in *Web IV*. Moreover, NAB entirely misrepresents the Judges' holding in *Web IV*. *See supra* Resp. to ¶ 149. It omits the following key language, which applies in equal measure to Mr. Harrison's testimony in this proceeding:

> The probative value of [Mr. Harrison's] evidence in determining whether a differential rate is justified for simulcasters is limited, however. First, Mr. Harrison was responding to a question posed in the abstract, rather than identifying specific transactions that he had witnessed or in which he had participated. Second, Mr. Harrison stated that he was aware of no empirical data on the subject, and was merely testifying as to his "perception from being in the industry." *Id.* at 1102. In sum, testimony regarding the perceptions of an industry participant carries considerably less weight than actual examples of marketplace behavior. . . . Mr. Harrison's testimony provides little support for the NAB's assertion that simulcasters generally should be entitled to pay lower royalty rates than other commercial webcasters.

Web IV, 81 Fed. Reg. at 26322. Contrary to NAB's claims, the Judges did not suggest that all that was missing was empirical data. Moreover, NAB's cited empirical data here does not address the pertinent question: the relative interactivity of simulcast compared to other noninteractive services.

2. There Is Insufficient Evidence that Simulcast Is More Promotional than Other Noninteractive Webcasting Services

Response to ¶ 154. In *Web IV*, the Judges held that "[w]hether or not simulcasting is as promotional as terrestrial radio simply is not the relevant question. The relevant questions are (1) whether simulcasting is *more* promotional *than other forms of commercial webcasting* and, if so, (2) whether such heightened promotional impact justifies a discounted rate for simulcasters." 81 Fed. Reg. at 26323. There is no evidence that simulcasting is more promotional than other forms of commercial webcasting. *Id*. at 26322-23; SX PFFCL ¶¶ 1146-47. None of the testimony NAB cites in this paragraph demonstrate that there is *more* competition for airplay on broadcast/simulcast than on other types of noninteractive services. Mr. Harrison offered no comparative assessment. In fact, Sirius XM and Pandora have also offered testimony suggesting that their services are highly promotional. SXM PFFCL ¶¶ 43-45; Ex. 4093 ¶¶ 5, 10-12 (Blatter WDT). But there is no quantitative evidence in the record indicating that whatever promotional effect that might exist (setting aside that none has been shown, SX PFFCL ¶¶ 514-51) is different as between these two types of noninteractive services. Ex. 2150 ¶ 113 (Leonard CWDT) (admitting that promotional effects are "difficult to quantify"). And at trial, Dr. Leonard admitted that he has seen no evidence that simulcasting promotes the sale of new subscriptions to interactive services—nor the sale of digital downloads, CDs, or new subscriptions to Sirius XM satellite radio. 8/24/20 Tr. 3577:22-3578:4 (Leonard); 8/25/20 Tr. 3604:9-21 (Leonard).

Response to ¶ 155. "Whether or not simulcasting is as promotional as terrestrial radio simply is not the relevant question." *Web IV*, 81 Fed. Reg. at 26323. None of the testimony cited in this paragraph concerns the promotional value of simulcast specifically. Mr. Poleman acknowledged that what was important was "the reach of broadcast," 8/27/20 Tr. 4417:24-4418:6 (Poleman), and that record company representatives "never, ever" ask him whether a recording is

going to be played on simulcast in addition to broadcast. 8/27/20 Tr. 4419:2-9 (Poleman). The flaw in NAB's position is its assumption, unsupported by evidence, that simulcasting has the same promotional value as over-the-air broadcasting. SX PFFCL ¶¶ 1141-43. The Judges in *Web IV* rejected NAB's "tautological" argument that simulcasting is the same as terrestrial radio because it is a transmission of the same content as radio, so "it must also have the same promotional impact as terrestrial radio." 81 Fed. Reg. at 26322.

The Judges in *Web IV* found that this argument was unsupported by the record because "[t]here are a number of differences between terrestrial radio and simulcasting." *Id.* Those differences were that: (1) "terrestrial radio broadcasts are (as the NAB stresses) locally-focused; simulcasts, by contrast, can be accessed throughout the country or even overseas"; (2) "[t]he choices available to radio listeners are more limited than those available to simulcast listeners;" and (3) "[t]hrough aggregation sites, such as iHeartRadio and TuneIn, simulcasting offers listeners greater functionality (*e.g.,* the ability to search, pause, rewind and record) than radio does." *Id.* As the Judges observed, "[t]hese differences may affect listening habits in a way that diminishes the promotional effect of simulcasting." *Id*. In reaching this conclusion, the Judges looked at evidence from the record companies that they "do not view simulcasting as having the same promotional impact as terrestrial radio." *Id.* While simulcast and broadcast are the same in certain respects, they differ in one respect critical to the record companies—audience size and reach. SX PFFCL ¶ 1143. Dr. Leonard agreed that terrestrial radio may be regarded as promotional due to its audience size and reach, and that simulcasting does not share this feature with terrestrial radio. 8/24/20 Tr. 3574:23-3575:23 (Leonard). Moreover, record company executives testified that [

] *See, e.g.*, Ex. 5610 ¶ 20 (Harrison WRT). Testimony from Sirius XM reinforces

the fact that any promotional impact of terrestrial radio is likely tied to its size and reach. *See* SXM PFFCL ¶ 44 (citing Ex. 4093 ¶ 10 (Blatter WDT)).

Response to ¶ 156. Mr. Poleman acknowledged that he neither has exhaustive knowledge of nor discussed in his testimony everything that record companies do to promote sound recordings that are included in the On The Verge program. For example, he does not know whether record companies promote these tracks directly to streaming services or on social media channels. 8/27/20 Tr. 4436:5-4437:9 (Poleman). Mr. Poleman was forced to acknowledge that he cannot attribute the success of sound recordings to their inclusion in On The Verge: He could not be certain that all movement on the charts of was attributable to On The Verge, or that reported sales and streams are solely attributable to On The Verge. 8/27/20 Tr. 4438:11-22 (Poleman). On The Verge plays on radio and simulcast, and Mr. Poleman admitted that he is "never, ever" asked by record companies whether a recording is also going to be played on simulcast. *Id.* 4419:2-9 (Poleman).

Response to ¶ 157. A song's inclusion in the AIP/DAIP consists of a 30-second clip that includes a portion of the song accompanied by brief comments from the artist about the song, including an express plea to go listen to the song on an on-demand service. 8/27/20 Tr. 4421:17-21 (Poleman). As Dr. Ford explained, this is an example of a mutually agreed upon promotional event, and is thus irrelevant to this proceeding. Ex. 5615 ¶¶ 14-15 (Ford WRT). It does not follow that a normal play of the song without this messaging from the artist would have the same promotional effect, despite Mr. Poleman's unsupported insistence to the contrary. *Id.*; 8/27/20 Tr. 4423:22-4424:23 (Poleman). At the hearing, Mr. Poleman explained that DAIP clips (which run only on iHeart's digital service) can last for three minutes instead of 30 seconds. 8/27/20 Tr. 4425:2-4426:20 (Poleman). Despite running for *six* times the length, Mr. Poleman claimed that DAIP plays have the same promotional impact as AIP plays. 8/27/20 Tr. 4425:2-4426:20

(Poleman). Thus, if anything, Mr. Poleman's testimony suggests that an over-the-air broadcast may have six times the promotional impact of a simulcast, rather than the two being equivalent.

Response to ¶ 158. Mr. Poleman's anecdotal evidence about record company outreach about plays on radio is uninformative of whether *simulcasting* is more promotional than other forms of webcasting. Mr. Poleman admitted that record company representatives never ask him whether a recording is going to be played on simulcast in addition to broadcast. 8/27/20 Tr. 4419:2-9 (Poleman); *see also* Resp. to ¶¶ 154-55, *supra*.

Response to ¶ 159. SoundExchange incorporates its Response to ¶ 155, *supra*. [ ].

Response to ¶ 160. SoundExchange incorporates its Response to ¶¶ 154-59, *supra*. NAB's claim that simulcasting is promotional of record sales falls flat. *See* Ex. 5615 ¶ 8 (Ford WRT). First, simulcasting does not offer the form of promotion that is most important to the record companies—promotion of streaming subscriptions. 8/24/20 Tr. 3577:4-10 (Leonard). Promotion of music service subscriptions is critical because music industry revenues now primarily come from streaming services instead of from the sales of digital downloads and physical products. Ex. 5604, App. 1 (Tucker WDT). At trial, Dr. Leonard admitted that he has seen no evidence that simulcasting promotes the sale of new subscriptions to interactive services. 8/24/20 Tr. 3577:22-3578:4, 3604:9-21 (Leonard); *see* Resp. to ¶ 154, *supra*.

Second, the fact that record companies spend money on terrestrial radio does not mean that terrestrial radio is net promotional. *See* SX PFFCL ¶¶ 531-34. While SoundExchange agrees that terrestrial radio is one of the many things that can help popularize a recording, it is impossible to trace the source of any given recording's success to terrestrial radio in particular (or to any other

channel of distribution). *Id.* Even if this could be done, it would not reveal whether radio (much less simulcast) is net promotional. *Id.* at ¶¶ 531-42. Finally, even if terrestrial radio were net promotional, that does not necessarily mean that simulcasting is. *Id.* at ¶¶ 535-42.

Moreover, the cited evidence does not support NAB's point. In the cited testimony, Professor Willig addressed the only quantitative evidence concerning promotional effects that he is aware of, and indeed that any economist has presented in this proceeding. 8/10/20 Tr. 1060:11-25 (Willig); *see* SX PFFCL ¶¶ 518-21. The lack of quantitative evidence in the record concerning the supposed promotional impacts of simulcast is due to NAB's failure to satisfy its burden, not to any failings with Professor Willig's approach. 8/10/20 Tr. 1063:4-1065:24 (Willig); *cf.* SX PFFCL ¶¶ 518-23; *Web IV*, 81 Fed. Reg. at 26320. Similarly, in the cited testimony from Professor Tucker, she acknowledged that upselling is *an example* of how services might promote record companies' other streams of revenue; she was not asked to provide other examples or discuss other types of promotional impact. 8/18/20 Tr. 2443:8-13 (Tucker). Finally, the cited Warner deck [ ]. Ex. 2078. In short, it has been incumbent on NAB all along to show that "the promotional value inquiry" can yield any credible, never mind quantitative, evidence that simulcast is uniquely promotional. NAB has failed to do so.

Response to ¶ 161. SoundExchange incorporates its Response to ¶¶ 154-60, *supra*.

Response to ¶ 162. SoundExchange incorporates its Response to ¶¶ 154-60, *supra*. NAB quotes Mr. Orszag's comments about simulcasts from his discussion of the role simulcasting plays in radio broadcasters' business model, including protecting broadcasters from digital streaming competitors and his rebuttal of NAB's witnesses' claims that simulcasting royalties are an exorbitant expense for broadcasters. Ex. 5603 ¶¶ 37-38, 46 (Orszag WRT). Mr. Orszag offered no testimony about the promotional effect of simulcast. NAB PFFCL ¶ 162. That simulcast content

mirrors the broadcast content does not mean simulcast has the same promotional impact as terrestrial radio, as the Judges explained in *Web IV*. 81 Fed. Reg. at 26322-23. The Judges in *Web IV* also found that this argument was unsupported by the record because "[t]here are a number of differences between terrestrial radio and simulcasting," which might "diminish[] the promotional effect of simulcasting." *Id.* at 26322; *see* Resp. to ¶ 155. NAB has offered no evidence or argument addressing the differences between terrestrial radio and simulcasting identified in *Web IV*. SX PFFCL ¶¶ 1141-47. Nor has NAB has offered any evidence or argument addressing the biggest difference between the terrestrial broadcast and simulcast: that the over-the-air broadcast has a much larger audience size. *See* Resp. to ¶ 155, *supra*; 8/24/20 Tr. 3574:23-3575:23 (Leonard).

Response to ¶ 163. SoundExchange incorporates its Response to ¶¶ 154-62, *supra*. The fact that the simulcast plays the same sound recordings as the terrestrial broadcast does not address the differences the Judges articulated in *Web IV*. SX PFFCL ¶¶ 1141-47.

Response to ¶ 164. SoundExchange incorporates its Response to ¶¶ 154-63, *supra*, as well as ¶¶ 1141-47 of is proposed findings. NAB misrepresents Mr. Harrison's testimony. Mr. Harrison did not testify, and [[redacted]]. 9/3/20 Tr. 5735:11-21 (Harrison). [[redacted]]. 9/3/20 Tr. 5735:11-21 (Harrison). NAB also misrepresents how Nielsen ratings work. While one method Nielsen uses to track ratings, Total Line Reporting, bundles simulcast and terrestrial broadcast, Nielsen has other methods for reporting ratings that do not. Ex. 2156 ¶ 25 (Gille WDT).

Nor is there support for NAB's assumption that labels care equally about both components of the broadcast/simulcast bundle. 9/1/20 Tr. 5062:4-9 (Wheeler) ([[redacted]]); *accord* 8/27/20 Tr. 4451:12-25 (Newberry); *cf.*

Ex. 4092 ¶¶ 40-44 (Witz WDT) (explaining the difficulty of unpacking its bundled satellite radio and internet simulcast products). [ ]. *See, e.g.*, Ex. 2157 ¶ 38 (Wheeler CWDT) ("Record labels do not distinguish between terrestrial radio and simulcast streams in these communications."); *accord* 8/27/20 Tr. 4419:2-9 (Poleman); *see also* Ex. 5610 ¶ 20 (Harrison WRT) (testifying that [ ]).

3. Simulcast's Use of Non-Music Content Has No Bearing on the Rates to Which Willing Sellers Would Agree

Response to ¶ 165. SoundExchange incorporates its Responses to ¶¶ 6, 24, *supra*, and ¶¶ 166-73, *infra*. *See also* SX PFFCL ¶¶ 1131-40.

Response to ¶ 166. SoundExchange incorporates its Response to ¶ 6, *supra*. The testimony from NAB witnesses about the alleged importance of non-music content to radio broadcasters, including local content and on-air personalities, is irrelevant. *See* SX PFFCL ¶¶ 1135-40. Here, as in *Web IV*, "neither record evidence nor an articulated rationale . . . support a lower royalty rate for simulcasters based on the purported local focus of radio broadcasters." 81 Fed. Reg. at 26321.

Response to ¶ 167. NAB has presented no evidence explaining why broadcasters should pay a lower per-performance rate due to the fact that they choose to use a more limited number of sound recordings than other services. "By including non-music content in their transmissions, simulcasters reduce the number of performances of recorded music, thus reducing their royalty obligation under a per-performance rate structure." *Web IV*, 81 Fed. Reg. at 26321 & n.36. A per-performance rate structure resolves any differences in the number of sound recordings used by simulcasters.

Response to ¶ 168. SoundExchange incorporates its Response to ¶ 6, *supra*, which demonstrates that the record does not contain the evidence the Judges found lacking in *Web IV*. Neither the iHeart-Indie Agreements not the PRO Agreements say anything about the per-minute value of non-music content as opposed to music content. And Dr. Leonard's analysis of radio station ad revenue and dayparts is flawed in its conception and execution. *See* SX PFFCL ¶¶ 1125-30; Ex. 5603 ¶¶ 31-33 (Orszag WRT).

Response to ¶ 169. SoundExchange incorporates its Response to ¶ 6, *supra*. *See also* SX PFFCL ¶¶ 1121-30; Ex. 5603 ¶¶ 31-33 (Orszag WRT).

Response to ¶ 170. Music is valuable to simulcasters. One needs look no further than the way simulcasters promote their stations to see this demonstrated clearly. *See* SX PFFXL ¶¶ 1129-30. In addition, Mr. Orszag has proven this point empirically. *See* SX PFFCL ¶¶ 1121-30. Music-format and talk-format stations both have non-music content, but in many cases, music content is *only* available on music-content stations. Ex. 5625 ¶¶ 79-82 (Ploeger WRT). Thus, a comparison of the revenues derived from each format enables one to determine the value brought to the table by music content. SX PFFCL ¶¶ 1122-27.

Response to ¶ 171. The Hauser survey does not support NAB's theory about the alleged value of non-music content. First, NAB's claims to the contrary, the Hauser survey shows that simulcast users greatly value music content, more so than they do non-music content. *See* SX PFFCL ¶¶ 1117-20; Ex. 2150 ¶ 48 (Leonard CWDT); Ex. 2151 ¶¶ 97, 100 Tables 1 & 2, & Apps. O & P (Hauser WDT) (only 5% of respondents identified music as "not important"). Second, critical flaws in the Hauser survey render unreliable Dr. Leonard's diversion ratios. SX PFFCL ¶¶ 1208-69; *supra* Resp. to ¶¶ 113-26. Finally, NAB provides no citation or support for the

proposition that "if simulcast listeners valued music and non-music equally, you would expect them to spend their time on wall-to-wall music services with fewer ads." NAB PFFCL ¶ 171.

Response to ¶ 172. Dr. Leonard's analysis is flawed and uninformative for the many reasons set forth in SoundExchange's Response to ¶ 6, *supra*; SX PFFCL ¶¶ 1121-30; and Ex. 5603 ¶¶ 31-33 (Orszag WRT). That some stations play a smaller amount of music at certain times of day is uninformative of the value of music to simulcasters. Indeed, some sense of the value of music to simulcasters can be gleaned from the way they promote their stations, often highlighting their music content. SX PFFCL ¶¶ 1129-30. For example, screenshots of Wheeler stations' simulcast players, that were taken during the morning drive time hours, prominently display "now playing" and "recently played" music with album art—and make no mention of news, sports, talk or any other non-music content. *See* Ex. 5259. As the Judges concluded in *Web IV*, "the relative amount of non-music content transmitted by simulcasters versus the amount transmitted by other commercial webcasters does not support a reduced royalty rate for simulcasters." 81 Fed. Reg. at 26321. The Judges found no "evidence that the value of non-music content is not fully accounted for" by a per-performance rate structure. *Id.*

Response to ¶ 173. NAB and Dr. Leonard are wrong both as a matter of economics and on what the record demonstrates. SX PFFCL ¶¶ 1065-67, 1101-14; Ex. 5603 ¶ 43 (Orszag WRT). Mr. Orszag testified that it "is not necessary for the diversion ratio between simulcast and custom radio to be 'near one' (that is, if 100 listeners left a simulcast service, nearly all 100 would switch to a custom radio service)." Ex. 5603 ¶ 45 (Orszag WRT). Mr. Orszag explained that under Federal Trade Commission and Department of Justice Guidelines, "significantly lower diversion ratios (than 100 percent or one) are indicative of economically relevant substitution." Ex. 5603 ¶ 45 (Orszag WRT). Here, NAB has presented no reliable evidence that any differences in the diversion

ratio between simulcast and custom radio justify separate rates because, just as in *Web IV*, the uncontroverted evidence demonstrates that simulcasters compete with other webcasters for listeners and revenue streams. *See, e.g.*, Exs. 2041, 2083, 2088-89, 3042, 4001, 5056, 5059, 5144, 5194, 5196-97, 5229, 5309, 5353, 5387, 5472, 5483; SX PFFCL ¶¶ 1064-80. "Simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others." *Web IV*, 81 Fed. Reg. at 26323. NAB's qualitative evidence is insufficient to sustain NAB's burden or to cure the deficiencies identified by the Judges in *Web IV*. Resp. to ¶¶ 147-72, *supra*.

IV. NAB HAS NOT MET ITS BURDEN TO SUSTAIN ITS DIFFERENTIATED RATE PROPOSAL

Response to ¶ 174. NAB has the burden, as "the proponent of a rate structure that treats simulcasters as a separate class of webcasters," of demonstrating "not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV*, 81 Fed. Reg. at 26320; 17 U.S.C. § 114(f)(1)(B); Resp. to ¶¶ 17-19, 22, 24. NAB has not come close to carrying its burden. Its deficient benchmarks, flawed survey evidence, and incomplete and irrelevant qualitative evidence do not demonstrate that willing sellers and willing buyers would agree to separate rates for simulcast and custom webcast. Resp. to ¶¶ 23, 29-109, 112-45, 134-73; SX PFFCL ¶¶ 1062-1291. Indeed, NAB largely offers an alternate version of the same inadequate record that failed to support a differentiated rate for simulcasters in *Web IV*.

A major reason why willing sellers would not agree to a lower rate for simulcasting is because simulcast directly competes with other noninteractive webcasters and interactive on-demand services for music listeners and revenue streams. *See* SX PFFCL ¶¶ 1064-81. The

evidence to this effect is voluminous. *See* Exs. 2041, 2083, 2088, 2089, 3042, 4001, 5056, 5059, 5144, 5194, 5196, 5197, 5229, 5309, 5353, 5387, 5472, 5483. There is simply no basis for the Judges to depart from their holding in *Web IV* that "simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate," or that "[g]ranting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others." 81 Fed. Reg. at 26323.

NAB's claim that broadcasters' discussion of competition in their public filings is limited to broad statements about competition for "eyes and ears" with other forms of entertainment media is incorrect. NAB PFFCL ¶ 174 n.39. Broadcasters specifically detail their competition with other noninteractive webcasters and interactive on-demand services. SX PFFCL ¶¶ 1064-69. For example, NAB said in comments filed with the FCC in 2018: "Any contention that radio broadcasters today compete for audiences and advertisers only with other broadcasters—and not with any other audio outlets and content providers—is untenable." Ex. 5472 at 4. Another set of broadcaster FCC comments plainly states that "radio faces competition for listeners that has vastly increased since the 1996 adoption of the current ownership rules. For many listeners, the amount of time previously spent listening to broadcast radio has been redistributed to a number of different listening services. And there are many new services that now vie for listeners including those that provide on-demand or interactive audio, non-interactive digital audio or internet radio, and satellite radio." Ex. 5353 at 10; SX PFFCL ¶ 1068. iHeart's Form 10-K expressly identifies "Internet-based streaming music service," among other digital technologies, noting that "[t]hese technologies and alternative media platforms, including those used by us, compete with our broadcast radio stations for audience share and advertising revenues." Ex. 5387 at 27; *see also* SX PFFCL ¶ 1069.

Response to ¶ 175. SoundExchange incorporates its Response to ¶ 174, *supra*.

A. SoundExchange's Benchmarking Analysis Applies to Simulcasters

Response to ¶ 176. Mr. Orszag did not propose a separate adjustment for simulcast because there is no basis for distinguishing between simulcasters and other webcasters. *See* SX PFFCL ¶¶ 1062-1291. Moreover, "NAB bears the burden of demonstrating not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV*, 81 Fed. Reg. at 26320. The many reasons simulcasters are not sufficiently distinct from other commercial webcasters are detailed in response to ¶¶ 20-173 *supra*. *See also* SX PFFCL ¶¶ 1062-1204. Thus, Mr. Orszag considered simulcasters as part of the overall non-interactive market that he analyzed. 8/12/20 Tr. 1767:6-15 (Orszag).

Additionally, Mr. Orszag explained that he had no reason to consider simulcasters separately as a subcategory of the market because, in his experience, "simulcasters and custom radio compete so vigorously for share . . . that it would not make sense to separate them out in two separate markets." 8/12/20 Tr. 1767:16-1768:2 (Orszag); *accord* 8/12/20 Tr. 1773:13-18 (Orszag); 8/12/20 Tr. 1774:1-4 (Orszag); *see also* 8/12/20 Tr. 1768:3-15 (Orszag) (noting that "significant convergence" between the custom radio and simulcast also counsels against separate consideration). Mr. Orszag's opinion is based on his considerable experience with broadcast radio. *See* 8/12/20 Tr. 1768:3-1769:15 (Orszag) (noting experience analyzing radio markets, working for simulcasters, and working on industry mergers). It finds substantial support in the record. *Supra* Resp. to ¶ 174; SX PFFCL ¶¶ 1064-80. It is also consistent with the Judges' determination in *Web IV*, where the Judges concluded that "simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others." *Web IV*, 81 Fed. Reg. at 26323. In fact, Mr. Orszag's approach

finds support in several past rate proceedings. *See id*. at 26320-23; *Web II*, 72 Fed. Reg. at 24095; *Web I*¸ 67 Fed. Reg. at 45252.

Response to ¶ 177. Mr. Orszag's benchmarking analysis is not flawed, as explained in SoundExchange responses to JPFFCL Sections II.A-B.

Response to ¶ 178. This discussion of functional convergence misses the point. *See* SX Reply to JPFFCL ¶ 33. No one suggests, nor would it make any sense to suggest, that interactive services and noninteractive services offer the same functionality. As Mr. Orszag explained, that is precisely why he adjusts his benchmark rates for the value of interactivity. 8/12/20 Tr. 1552:5-13 (Orszag); 8/13/20 Tr. 1936:20-1937:7 (Orszag). That the type of lean-back listening associated with ad-supported services also is a large component of usage for consumers who subscribe to interactive services, *see* SX PFFCL ¶¶ 78-85, is relevant because it corroborates the conclusion that willingness to pay is converging. NAB's remaining arguments and citations have no merit. *See supra* Resp. to ¶ 176 (explaining that simulcast is not sufficiently distinct to warrant separate consideration); Resp. to ¶¶ 147-53 (explaining that evidence Dr. Leonard relied on in analyzing relative interactivity of simulcast is irrelevant, flawed, and unreliable); Resp. to ¶ 9 (explaining that NAB misrepresents Mr. Harrison's testimony).

Response to ¶ 179. SoundExchange incorporates its Response to ¶¶ 176, 178 *supra*, and notes that Spotify's convergence toward noninteractive services is detailed elsewhere. *See* SX Reply to JPPFCL ¶¶ 30, 33, 105-08; SX PFFCL ¶¶ 78-85. Moreover, Mr. Pittman testified about iHeart's recent emphasis on the use of artificial intelligence—which makes the sequencing and programming of sound recordings on simulcast look increasingly like that on a pure-play streaming service. *See* 9/9/20 Tr. 6020:12-24 (Pittman) ("[W]e've got so many inputs that it's hard for a human being to digest them to decide should we play this song or this song, which song should we

play next to which song, how often should they be sequenced . . . . [O]ur programming folks have been working with our—our IT people for a while to build an artificial intelligence that can take over a lot of that work and can also eventually schedule the music.”).

Response to ¶ 180. NAB is incorrect for reasons outlined in SoundExchange’s Responses to ¶¶ 176, 178-79, incorporated here. *See* SX Reply to JPPFCL ¶¶ 30, 33, 105-08; SX PFFCL ¶¶ 78-85. Moreover, NAB mischaracterizes Mr. Orszag’s testimony. Mr. Orszag testified that on one end, lean-back listening includes “radio stations, service-generated playlists, simulcasts,” where “somebody else is making the choice of the songs that are on the playlist and then delivering those.” 8/11/20 Tr. 1417:17-25 (Orszag). Plainly this definition includes noninteractive services as well as some features of interactive services such as Spotify. On the other, lean-forward listening is when “I go in and I say I want to listen to the following 25 songs in a row.” *Id.* 1418:1-5 (Orszag).

Response to ¶ 181. None of NAB’s critiques have merit, for reasons explained elsewhere and incorporated here. *See* SX Reply to JPFFCL ¶ 29 (explaining why reliance on Pandora revenues is entirely appropriate); ¶ 31 (explaining basis for opinion that elasticities of demand are similar); ¶¶ 25-43 (explaining why critique of Mr. Orszag’s application of ratio equivalency has no merit); *supra* Resp. to ¶¶ 106-07 (explaining that PRO rates provide no useful information about Mr. Orszag’s application of ratio equivalency); Resp. to ¶ 176 (explaining that simulcast is not sufficiently distinct to warrant separate consideration).

Response to ¶ 182. The proposed finding has no merit for many reasons. *First,* substitution between services is just one fact that an economist should consider in evaluating elasticity. 8/13/20 Tr. 1943:20-1944:17 (Orszag). Even if NAB had reliable evidence about substitution patterns for simulcast listeners (it does not), that evidence would not establish whether relative elasticities are sufficiently similar to warrant application of ratio equivalency. *Id.* As Mr. Orszag rightly

concluded, his methodology satisfies the criteria for application of ration equivalency in applying the subscription benchmark to ad-supported services. *See* SX Reply to JPFFCL ¶¶ 25-43; *see also* Ex. 5603 ¶ 45 (Orszag WRT) (explaining that it "is not necessary for the diversion ratio between simulcast and custom radio to be 'near one' (that is, if 100 listeners left a simulcast service, nearly all 100 would switch to a custom radio service).")

Second, NAB offers no reliable evidence of substitution for simulcast listeners. As detailed elsewhere, at great length, Professor Hauser's survey is deeply flawed and unreliable. *Supra* Resp. to ¶¶ 112-26; SX PFFCL ¶¶ 1209-1269. Moreover, the record demonstrates considerable competition between simulcasters and other streaming services, including both other noninteractive and interactive services. *Supra* Resp. to ¶ 174; SX PFFCL ¶¶ 1064-80.

Third, and even if Professor Hauser's survey provided any reliable evidence (it does not), NAB grossly misrepresents estimated diversion by comparing all users who would switch to noncommercial simulcasts and broadcasts with only those users that would purchase new on-demand subscriptions. NAB PFFCL ¶ 182. Professor Hauser's survey in fact found that **18.4%** of respondents would divert to on-demand music streaming options, when including all of these options such as already owned subscriptions, ad-supported on-demand services, and ad-supported YouTube. Ex. 2151 at App. R (Hauser WDT).

Finally, the NPR settlement is not an appropriate benchmark for any broadcaster, let alone a commercial one. SoundExchange has explained why elsewhere, at length, and incorporates those explanations here. *See* SX PFFCL ¶¶ 1482-1505; SX Reply to NRBNMLC PFFCL ¶¶ 119-150.

Response to ¶ 183. SoundExchange incorporates its responses to ¶¶ 176-83 *supra*. Mr. Orszag's proposed benchmark involves a comparable service under comparable circumstances, and his application of the subscription interactive benchmark for ad-supported services is

appropriate. *See* SX PFFCL ¶¶ 65-87; SX Reply to JPFFCL ¶¶ 19-56. Moreover, it was appropriate for Mr. Orszag to apply his benchmarking analysis to the ad-supported noninteractive market as a whole because NAB has not met its burden to show that simulcast "differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV*, 81 Fed. Reg. at 26320; *see also id.* at 26353; *Web III Remand*, 79 Fed. Reg. at 23115; *Web II*, 72 Fed. Reg. at 24092; *supra* Resp. to ¶¶ 20-173. Finally, the iHeart-Indie Agreements are not viable benchmarks and do not show that willing buyers and willing sellers would agree to distinct rates for simulcast and custom webcast. *See* Resp. to ¶¶ 29-86 *supra*.

B. SoundExchange's Other Experts Engaged with NAB's Rate Proposal

Response to ¶ 184. This proposed finding should be stricken because it does not cite to the hearing record. *See Order* at 1; 37 C.F.R. § 351.14(c). In any event, it is not and never has been SoundExchange's burden to disprove NAB's differentiated rate proposal. "As the proponent of a rate structure that treats simulcasters as a separate class of webcasters, the NAB bears the burden of demonstrating not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *Web IV*, 81 Fed. Reg. at 26320.

1. Professor Willig's Modeling is Informative of the Rate that Should be Set for Simulcasters

Response to ¶ 185. There is no dispute that Professor Willig did not separately break out a simulcasting service in his modeling. At trial, he explained that there was no impetus for him to disaggregate simulcasters and non-simulcasters within the ad-supported category, as he had seen no evidence that persuaded him to deviate from the approach the Judges had taken in *Web IV*. 8/10/20 Tr. 1107:13-1108:1 (Willig); *see also* 8/5/20 Tr. 403:21-404:11 (Willig); SX PFFCL

¶ 842. But this is not to say that Professor Willig's modeling has no bearing on the appropriate royalty rate that should be set for simulcasters. Far from it. Professor Willig explained how simulcasters were considered as part of the category of ad-supported noninteractive services, "in my modeling and in the surveys on which I rely and in my Shapley Value and in my opportunity cost." 8/6/20 Tr. 625:15-20 (Willig); *see also* 8/10/20 936:23-25, 937:21-938:4 (Willig) ([redacted]).

Response to ¶ 186. NAB mischaracterizes the cited portion of Professor Willig's trial testimony. Professor Willig made clear that he made a conscious decision not to separately break out simulcasters not only "because of [his] understanding of . . . the decisions of the Judges on that score" but *also* because of "the absence of any knowledge that I had about why or if that would change." 8/10/20 Tr. 1053:2-11 (Willig); *see also id.* 1107:18-19 ("I have been shown no reasons that really move me, persuade me, to take an alternative view").

Response to ¶ 187. In its proposed findings, NAB attempts to impeach Professor Willig's testimony that he made a conscious decision not to separately break out simulcasting in his modeling. NAB PFFCL ¶ 187. That impeachment failed at trial and fails here. The question posed to Professor Willig at his deposition was: "If you were modeling a hypothetical negotiation over simulcast rates, would you want your model to incorporate the total audience of the simulcaster, including the audience of the over-the-air broadcast?" 8/10/20 Tr. 1053:17-21 (Willig). In response to that very specific modeling question, Professor Willig testified that, "I really haven't thought about that" and "[t]hat's a more intriguing question I don't know the answer to." 8/10/20 Tr. 1054:2-6 (Willig).

Similarly, NAB takes out of context Professor Willig's testimony that he would "have to change a number of inputs" to calculate a simulcaster-specific opportunity cost. Professor Willig was asked: "All else equal, if you plugged in Dr. Leonard's opportunity cost number for simulcast into your Shapley Value model, it would result in a lower royalty rate per play, wouldn't it?" 8/10/20 Tr. 1059:7-10 (Willig). In response, Professor Willig forcefully rejected this idea, noting that "these models . . . really do rely on a confluence of factors, one of which is plainly opportunity cost, but the opportunity cost appears in the same framework as willingness to pay and . . . royalty rates and lots of other elements of the model. And so to say that, oh, just one of them changes in isolation, mathematically one can do that, I suppose, but it's not necessarily meaningful in terms of the economic interpretation of the bargaining model because some alteration in one element . . . would be going along with alterations in other elements of the same model." 8/10/20 Tr. 1059:11-1060:1 (Willig). It is in *this* context—rejecting NAB's suggestion that an opportunity cost figure for simulcasting could simply be "plugged in" to his existing model—that Professor Willig observed that other inputs would have to change as well. 8/10/20 Tr. 1060:2-6 (Willig).

Response to ¶ 188. The NAB cites no evidence or testimony in support of its claim that Professor Willig's Shapley model is "not a useful tool for analyzing the appropriateness of NAB's differentiated rate proposal." SoundExchange does not dispute that Professor Willig's Shapley Value model by design generated a single royalty rate for all ad-supported noninteractive services. That is a virtue, not a shortcoming, of his approach. 8/10/20 Tr. 1107:13-1108:1 (Willig).

SoundExchange also does not dispute that Professor Willig used Pandora's financial information as a proxy for all ad-supported noninteractive services in his model. [[redacted]]. *See* 8/5/20 Tr. 530:12-17 (Willig); 8/25/20 Tr. 3783:21-3784:1 (Peterson). It is an appropriate modeling choice, given that Pandora accounts for more than

[[redacted]] of the total plays in the noninteractive market. Ex. 5600 ¶ 49 & App. D, Ex. D.4 (Willig CWDT). Notably, the Services have not proposed a single alternative to using Pandora financials to assess distributor willingness to pay. *See, e.g.*, 8/25/20 Tr. 3736:18-3737:14 (Peterson) (suggesting "you could use something like the average" but acknowledging that he "didn't request data to do it, and I haven't done it"); SX PFFCL ¶¶ 652-56. Nor have the Services presented any data proving that the "relative profitability of simulcasters" is materially different than Pandora—or that it is different on a per-play basis, such that it would actually make any difference to the modeling. NAB PFFCL ¶ 188; *see* 8/10/20 Tr. 1137:18-23 (Willig) (explaining that using a less profitable service as a proxy "wouldn't have any effect on what's important for the analysis," if the service's lower profits "went along with smaller audience [and] fewer plays.").

Response to ¶ 189. Again, there is no dispute that Professor Willig did not run a simulcaster-specific bargaining model, or attempt to calculate simulcaster-specific diversion ratios or opportunity cost. But that fact does not support NAB's conclusion that his "Shapley model tells the Judges little to nothing about what a willing buyer and seller might agree to in a hypothetical negotiation over the cost of licensing sound recordings to simulcasters." NAB PFFCL ¶ 189. That would only be true if there was evidence establishing that simulcasters should be treated differently from other ad-supported noninteractive webcasters. It is NAB's burden to present such evidence and they have failed to do so. *See Web IV*, 81 Fed. Reg. at 26320.

NAB concludes this section of its findings with a bizarre non sequitur, claiming that, "taken at face value," Professor Willig's model "only highlights that simulcasters should receive a fundamentally lower per-play rate." NAB PFFCL ¶ 189. NAB offers no citations in support of this statement. And it makes no sense on its own terms—if Professor Willig's model "tells the Judges little to nothing" about a simulcaster-specific rate, how can it also "highlight[] that simulcasters

should receive a fundamentally lower per-play rate"? NAB PFFCL ¶ 189. The Judges should disregard this proposed finding as untethered to the evidentiary record.

2. The Zauberman Survey Reflects the Scope of the Statutory License and Does Not Exclude Simulcast Listeners

Response to ¶ 190-91. SoundExchange incorporates its responses to JPFFCL ¶¶ 288-90.

Response to ¶ 192. NAB's suggestion that that the Zauberman Survey did not study the behavior of simulcast listeners is incorrect. While the Zauberman Survey reflects the current rate structure, which does not distinguish simulcasters from other non-interactive webcasters, the survey in no way excluded simulcast listeners from its population. *See* SX PFFCL ¶¶ 841-42. As Professor Willig explained, [[redacted]]). 8/10/20 Tr. 936:23-25, 937:21-938:4 (Willig); *see also* 8/6/20 Tr. 625:15-21 (Willig) (explaining that his modeling—like the Hanssens, Zauberman and Simonson surveys—"include[s] simulcasting as part of the category of ad-supported non-interactive services").

Lacking evidence that Professor Zauberman neglected simulcast listeners, NAB selectively quotes and also misrepresents his trial testimony. *See* 8/27/20 Tr. 4224:7-4225:11 (Zauberman). The part of Professor Zauberman's testimony that NAB purports to quote states:

> Q. It's -- here is the question: It is possible that your survey respondents did not listen to any Internet simulcasts of AM/FM commercial radio, right?
>
> A. I heard respondents, which tells me that you're talking about the set. I start with 17,000 people. If I cannot pick them up in this context, any of them, that is extremely unlikely.

Id. at 4225:4-11 (Zauberman); *Id.* at 4222:21-4224:22; 4227:14-25 (Zauberman). This testimony is not "speculat[ion]," as NAB contends. Rather, Professor Zauberman's conclusion was based on his considerable experience with survey design, as well as his sample, which was large and

random. NAB offers no basis in fact or principles of survey design to support its conjecture that a random sample of 17,000 people somehow excluded *all* respondents who listen to simulcasts.

Response to ¶ 193. SoundExchange incorporates its response to ¶ 192 *supra*. Moreover, SoundExchange agrees that the Zauberman Survey treated free internet radio as one category covering simulcast and other noninteractive webcasts. *See* Ex. 5606 ¶¶ 12-13 (Zauberman WDT) (discussing scope of assignment); *see also* SX PFFCL ¶¶ 841-42 (scope of survey matches statutory structure); 8/26/20 Tr. 4097:24-4098:7 (Hanssens) (explaining that non-music options were only included for "completeness" and that results were *not* used "because that is not the focus of [the] work here").

Notably, the Hauser Survey also provides no basis for distinguishing between simulcast and other comparable forms of free internet radio. Although he could have done so, Professor Hauser did not run his survey on an additional cell of respondents who listen to free streaming radio services, but not simulcasts. *See* Ex. 2151 ¶ 22, App. D (QS10 programming instructions to continue survey "only for respondents who select option 10" (listened to AM/FM broadcasts over the internet)). Rather than undertake this exercise, he attempts to compare his results with Professor Zauberman's through post-hoc statistical gymnastics that do not and cannot prove his point. Ex. 2161 ¶¶ 59-66 (Hauser WRT) (incorrectly claiming that he can rescale and adjust the Zauberman data to make it comparable to his own). As Professor Zauberman testified at trial, this sleight of hand is methodologically and scientifically indefensible. A comparison between Professor Zauberman's survey and Professor Hauser's "is beyond apples to oranges. This is like fruit to something else." 8/27/20 Tr. 4212:14-4213:2 (Zauberman) (Hauser's ad hoc attempt to make such a comparison is like "taking two vectors, throwing them into a blender, and showing

you can get similar shapes. . . . you just can't do that"); *see also* 8/6/20 Tr. 622:9-625:24 (Willig) (discussing non-comparability of Hauser and Zauberman surveys).

Response to ¶ 194. SoundExchange incorporates its response to ¶¶ 192-93 *supra*.

Response to ¶ 195. SoundExchange incorporates its response to ¶ 193. Just as Professor Hauser has no basis for comparing the switching behavior of simulcast and non-simulcast listeners, he does not have any basis to compare the relative value that these groups place on non-music content. *See* NAB PFFCL ¶ 195 (providing survey responses re value of non-music content only for simulcast users, not for other free streaming radio listeners). Moreover, Professor Hauser's claim that the variance between diversion ratios derived from his survey versus all other surveys in this proceeding somehow proves his point (that simulcast and non-simulcast listeners exhibit different switching behavior) is meritless. If this type of broad comparison tells us anything at all, it indicates the serious flaws in the Hauser Survey. *See generally* SX PFFCL ¶¶ 1208-69. Finally, NAB's characterization of all other surveys as "focused primarily on Pandora" is not correct. *See* Ex. 5606, App. D (Zauberman WDT) (focusing on free and paid streaming radio services; providing Pandora as one of multiple examples); Ex. 4095, App. 6 (Hanssens CWDT) (same).

3. The Simonson and Hanssens Surveys Do Not Exclude Simulcast Listeners and Instead Reflect the Scope of the Statutory License

Response to ¶ 196. SoundExchange incorporates its responses to ¶¶ 192-93, *supra*, and notes that Professor Hanssens explained precisely why it is appropriate to treat simulcast and custom radio as a single category: The formats share key attributes. 8/26/20 Tr. 4123:16-21 (Hanssens). Indeed, Professor Hanssens was cognizant of differences between simulcast and custom radio. 8/26/20 Tr. 4124:4-8 (Hanssens); 8/26/20 Tr. 4124:14-4125:8 (Hanssens). Nevertheless, he concluded that the formats are very comparable and appropriately tested under the umbrella of free internet radio. 8/26/20 Tr. 4124:21-4125:8 (Hanssens). Notably, during pre-

testing, no respondent expressed substantive issues with the categories of music streaming as Professor Hanssens defined them. 8/26/20 Tr. 4120:23-4121:6 (Hanssens). For example, not one of the respondents who participated in pre-testing suggested the definition of free internet radio was too broad. 8/26/20 Tr. 4121:7-11 (Hanssens). Accordingly, Professor Hanssens concluded that the pretest provided no reason to break out simulcasting and forms of custom radio. 8/26/20 Tr. 4121:20-23 (Hanssens). In fact, the pre-testers expressed an understanding that free streams of AM or FM radio stations available over the internet and Pandora both fell within the category of free internet radio services, as Professor Hanssens defined that category. 8/26/20 Tr. 4121:24-4122:4 (Hanssens); *accord* 8/26/20 Tr. 4117:19-23 (Hanssens) (testifying that goal in drafting definitions was to define categories in manner understandable to consumers).

Response to ¶ 197. SoundExchange incorporates its responses to ¶¶ 192-93, and notes the proposed finding should be disregarded for two reasons. *First*, NAB seeks improperly to shift its burden. The Judges have never concluded that there is a basis to differentiate between forms of free internet radio. Professors Hanssens, Simonson, and Zauberman designed surveys grounded in those conclusions, consistent with the statutory scheme, and consistent with consumer perception. *See* Ex. 4095 ¶ 17 (Hanssens CWDT); Ex. 5606 ¶¶ 12-13 (Zauberman WDT); Ex. 5608 ¶¶ 88-89 (Simonson WRT); Resp. to ¶ 196; *see also* SX PFF ¶¶ 841-42 (scope of survey matches current statutory structure). It is telling that NAB renews the claim that simulcasting and its listeners are materially different, while foregoing any effort to conduct a survey that could test their claim. Resp. to ¶ 193 *supra*. *Second*, NAB mischaracterizes Professor Simonson's testimony. It is true that Professor Simonson recognized that there are differences between simulcast and custom radio. 8/27/20 Tr. 4321:7-4322:10 (Simonson). But Professor Simonson did not testify that those differences are material, *id.*, and the record demonstrates that they are not. Resp. to ¶ 196 *supra*.

Response to ¶ 198. SoundExchange incorporates its responses to ¶¶ 192-93 *supra*. As NAB appears to recognize (despite its bluster), neither the Hanssens Surveys nor the Simonson Surveys excluded all simulcast listeners. Rather simulcast listeners who otherwise qualified for these surveys were included in the samples.

Response to ¶ 199. The Zauberman, Hanssens, and Simonson survey samples all included simulcast listeners. *See* Resp. to ¶¶ 192-93, 198 *supra*. Each of these instruments is more reliable than the fatally flawed Hauser Survey, which should be disregarded. *See* SX PFFCL ¶¶ 1208-69.

4. Professor Tucker Neither Misunderstood nor Misapplied the Law

Response to ¶ 200. Professor Tucker explained how due to evolving digital trends, iHeart and Pandora are well-positioned to pay higher royalties. *See* SX PFFCL ¶¶ 1310-39. This is neither flawed nor unhelpful. Nor is it predicated on anything approaching a misunderstanding of the law.

Response to ¶ 201. Professor Tucker is well aware that the statute permits differential rates. *See* 8/17/20 Tr. 2131:18-21 (Tucker) (Q: "In your understanding, are the Judges permitted to set different rates for different types of services?" A: "Yes, of course."). Indeed, she discusses differential rates for commercial and noncommercial services in her testimony. *Id.* at 2131:18-25 (Tucker). NAB's misreading of paragraph 84 of Professor Tucker's written testimony is disingenuous and appears to be willful. *See also* 8/4/20 Tr. 213:21-214:17 (NAB Opening). Professor Tucker made clear at trial that this paragraph concerns the funneling and customer acquisition capabilities of *individual* services. *See* 8/17/20 Tr. 2131:12-25 (Tucker); Ex. 5604 ¶¶ 81-85 (Tucker WDT). Specifically, because the rate set in this proceeding will be available to *any* noninteractive webcaster that is eligible for the statutory license, it cannot account for significant differences in funneling capabilities *between* specific noninteractive webcasting services, such as whether a firm offers a premium tier, whether it has introduced initiatives designed to upsell, to what extent these efforts have proved effective, and how noninteractive

webcasting figures into the firm's overall business strategy. *See id.* ¶ 84; 8/17/20 Tr. 2131:11-17 (Tucker) ([ ]). [ ]. *Id.* at 2127:3-19 (Tucker).

Response to ¶ 202. SoundExchange incorporates its Response to ¶ 201, *supra*. Because Professor Tucker did not misunderstand the statutory requirements, NAB's Hail Mary attempt to discredit Professor Tucker's testimony falls flat, just as it did at trial.

5. Dr. Ford Thoroughly Rebutted NAB's Qualitative Evidence Attempting to Show the Promotional Value of Simulcast

Response to ¶ 203. SoundExchange proffered Dr. Ford to provide a conceptual framework for analyzing evidence of promotion and to evaluate "the alleged benefits of participant services in promoting the consumption of particular sound recordings on other services." Ex. 5615 ¶ 4 (Ford WRT). Dr. Ford did so, and concluded that evidence regarding the promotion of particular sound recordings could not support a promotional adjustment. *See generally* Ex. 5615 (Ford WRT). It is telling that NAB does not even attempt to rebut Dr. Ford's opinion in this portion of their findings, the only one in which they take Dr. Ford on directly. NAB PFFCL ¶ 203-06; *cf.* Ex. 2150 ¶¶ 108-13 (Leonard CWDT) (acknowledging that promotional effects are difficult to quantify and making no attempt to quantify them or propose an adjustment on this basis); NAB PFFCL ¶ 132 (same). Although NAB attempts elsewhere to salvage evidence of promotion of particular sound recordings, those efforts are ineffectual and should be disregarded. *See supra* Resp. to ¶¶ 154-64.

Response to ¶ 204. Dr. Ford testified that, as a general matter, negotiating participants take promotion *and* substitution into account when negotiating fees. 8/18/20 Tr. 2577:15-25 (Ford); *accord* Ex. 5615 ¶¶ 19-20 (Ford WRT). Dr. Ford likewise explained that the critical question,

when evaluating how promotional effects bear on the rate setting process, is relative promotion. Although NAB acknowledges this and attempts to demonstrate that simulcasters are more promotional that other forms of noninteractive webcasting, those attempts are predicated on qualitative, misleading, and otherwise insufficient evidence, and have no merit. *See supra* Resp. to ¶¶ 154-64. NAB's attempts to salvage that sort of evidence are ineffectual.

Response to ¶ 205. NAB's benchmarks do not demonstrate that simulcasting is relatively more promotional than custom radio. *See supra* Resp. to ¶ 37, 41; *see also supra* Resp. to ¶¶ 29-36, 38-40, 42-111; SX PFFCL ¶¶ 1141-47. Moreover, nothing in the iHeart-Indie Agreements ties the simulcast rate (or any other specific rate therein) to the promotional effect of simulcast.

Response to ¶ 206. Evidence regarding the cost of radio promotion is irrelevant for several reasons. *First,* the cost of promoting particular recordings says nothing about whether any subsequent radio airplay has an absolute promotional effect or a relative promotional effect. *Supra* Resp. to ¶¶ 159-60; *accord* SX PFFCL ¶¶ 515, 544; Ex. 5615 ¶ 16 (Ford WRT). *Second*, record companies may have a variety of motivations for incurring the cost of radio promotion. Just by way of example, and as Dr. Ford testified, the cost of radio promotion may reflect a prisoner's dilemma.[5] 8/18/20 Tr. 2550:17-2551:25 (Ford) (testifying that record companies would be better off *not* competing for radio play, if all of them decided not to compete). In that regard, radio promotion may not generate promotional effects for the recorded must industry. 8/18/20 Tr.

[5] In footnote 48 to paragraph 206, NAB tries to recast Dr. Ford's testimony regarding the prisoners dilemma as a description of competition for "scarce 'shelf space' on a net promotional platform." There are two problems with this attempt to reimagine the testimony: there is no evidence radio is a net promotional platform and no evidence record companies would want to have their recordings played on radio without payment, if they had a choice. Although NAB would have record companies "cede the platform," they neglect to mention that Congress has prohibited the record companies from doing so. Because radio stations and simulcasters are entitled to use sound recordings without a license, "ceding" the platform would do nothing but deprive label personnel of any ability to align radio and simulcasting usage with broader promotional efforts, [ ]. 9/9/20 Tr. 5944:5-9 (Sherwood); Ex. 5620 ¶ 28 n.7; Ex. 2078 at 19.

2550:17-2551:25 (Ford). In fact, it may not even generate promotional effects across a particular record company's catalogue, but may generate promotional effects for particular recordings and, consequently, induce spending intended to (1) protect market share and (2) ensure that record companies are not adversely affected in the fierce competition to sign and retain talented artists. *E.g.*, SX PFFCL ¶ 319. *Third*, confounding variables can affect the cost associated with a particular form of promotion, an issue NAB does not mention or analyze. *Fourth*, even if the cost of radio promotion were a suitable proxy for promotional effects (which it is not), NAB does not show record companies would spend a cent promoting to standalone simulcasters. *Supra* Resp. to ¶¶ 154-55, 162-64.

V. THE JUDGES SHOULD NOT ELIMINATE INFLATION ADJUSTMENTS TO THE PER-PERFORMANCE ROYALTY RATES

Response to ¶ 207. NAB proposes eliminating the annual inflation adjustments that the Judges adopted in *Web IV* at the suggestion of Professor Shapiro. *Web IV*, 81 Fed. Reg. at 26404. All the other Services in this proceeding propose retaining that feature of the statutory rate structure. Sirius XM and Pandora Second Amended Proposed Rates and Terms at 1; Google Proposed Rates and Terms at 4; NRBNMLC Amended Proposed Rates and Terms Ex. A at 9 (Alternative 1).

As an initial matter, this is a rate proposal, not a terms proposal. It relates directly to the amount of royalties to be paid. *See* 17 U.S.C. § 114(g)(2), (3) (referring to "receipts from the licensing of transmissions"); 37 C.F.R. § 380.10 (addressing inflation adjustment in section captioned "Royalty fees"). By contrast, terms are matters such as "how payments are to be made, when, and other accounting matters." S. Rep. No. 104-128, at 30 (1995).

NAB has not met its burden of coming forward with sufficient evidence to support its proposed significant change in the statutory rate structure. *See Web IV*, 81 Fed. Reg. at 26320.

NAB relies solely on a brief discussion in Dr. Leonard's written direct testimony suggesting that there "*may*" be a low correlation between the general CPI and prices in the music industry. Ex. 2150 ¶ 118 (Leonard CWDT) (emphasis added). Dr. Leonard rests that hypothesis on two arbitrary data points.

First, Dr. Leonard cites subscription prices for interactive services. However, the rest of his testimony is solely focused on setting rates for ad-supported simulcasting. *E.g.*, Ex. 2150 ¶¶ 8, 36-37, 99-100 (Leonard CWDT). Because the economics of ad-supported simulcasting do not depend on payment of subscription fees, trends in retail pricing of subscription services are immaterial to the question of wholesale pricing of rights for such services. Advertising prices are a more relevant metric, and they have tended to increase faster than the CPI. *See* SX PFFCL ¶ 503 (citing, *inter alia*, Ex. 5603 ¶ 137 (Orszag WRT)). Specifically, Sirius XM and Pandora reported increases in the average price per ad sold over the 2015 to 2018 period, as did Spotify. *Id.*

Second, Dr. Leonard cites his perception of the 2018-2019 trajectory of effective per-play royalty rates for sound recording rights for ad-supported Spotify. Ex. 2150 ¶¶ 78, 118-19 (Leonard CWDT). But two measurements a year apart does little to establish a trend when the Judges must set rates for a five-year period. 17 U.S.C. § 114(f)(1)(A). Further, Dr. Leonard's observation seems to reflect nothing more than his failure to include in his calculations the adjustments that led to Professor Shapiro's higher estimate of effective rates for Spotify's ad-supported service, including [ ] at the time Dr. Leonard performed his analysis. *Compare* Ex. 2150 ¶ 78 (Leonard CWDT), *with* Ex. 4094 at 36, 63-64 (Shapiro 2nd CWDT); *see also* SX PFFCL ¶ 1285. This is not persuasive evidence. *See also* SX PFFCL ¶¶ 501-04.

Response to ¶ 208. Economists other than Dr. Leonard agreed that the inflation adjustment should remain part of the rate structure. Ex. 4094 at 4 (Shapiro 2nd CWDT) ("These ranges should be adjusted . . . by indexing them to inflation, using 2019 as the base year."); Ex. 5603 at ¶ 138 (Orszag WRT) ("I find that an inflation adjustment based on the CPI continues to be appropriate, consistent with the Judges determination in *Web IV*."); *see also* Ex. 1103 ¶ 14 (Peterson AWDT) ("The recommended per play rate could be escalated for inflation as measured by the consumer price index (CPI)."); Ex. 5600 ¶ 55 (Willig CWDT) (deriving average rates for five-year period, then using discount rate equal to rate of inflation to compute 2021 rate). For his part, Mr. Orszag based his opinion that "a CPI adjustment is conservative" on increases in ad pricing for Sirius XM, Pandora, Spotify, and Google AdWords. Ex. 5603 ¶ 138 & n.276 (Orszag WRT); *see also* 8/12/20 Tr. 1764:7-1765:5 (explaining that the trial testimony quoted by NAB pertains only to one footnote in his written direct testimony). Congress has even specified that an inflation adjustment is to be made when it is necessary to extend the duration of a settlement to cover a full statutory rate period. 17 U.S.C. § 805.

Moreover, there is no basis for singling out simulcasters for a special analysis of inflationary trends. *See also* SX PFFCL ¶¶ 1062-1147. It is NAB's burden to demonstrate that they are entitled to a differentiated rate. *Web IV*, 81 Fed. Reg. at 26320. NAB has failed to present any evidence whatsoever that the inflation rate for advertising prices on simulcasting will be any different than for advertising prices on services such as Pandora.

VI. CONCLUSION

Response to ¶ 209. For the foregoing reasons, the Judges should reject the royalty rates and terms proposed by NAB and instead adopt the royalty rates and terms proposed by SoundExchange.

Dated: October 28, 2020

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Friday, October 30, 2020, I provided a true and correct copy of the SoundExchange's Replies to NAB's Joint Proposed Findings of Fact and Conclusions of Law to the following:

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

Sirius XM Radio Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

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Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

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Signed: /s/ David A. Handzo