

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

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)
In the Matter of Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III)	Docket No. 17-CRB-0001-BER (2019-2023)

**MOTION OF SOUNDEXCHANGE, INC.
TO REOPEN BUSINESS ESTABLISHMENT SERVICE RATE PROCEEDINGS
FOR THE LIMITED PURPOSE OF INTERPRETING REGULATIONS ON REFERRAL
FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

SoundExchange, Inc. (“SoundExchange”) hereby requests that the Copyright Royalty Judges reopen the above-captioned proceedings to determine statutory royalty rates and terms for business establishment services (“BES”) for the limited purpose of interpreting the royalty provisions adopted in those proceedings as relevant to Music Choice’s practices for reporting “Gross Proceeds.” 37 C.F.R. § 384.3(a).

This request arises in the context of litigation between SoundExchange and Music Choice concerning Music Choice’s payment of royalties for its BES. *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW) (filed Apr. 10, 2019). Specifically, SoundExchange believes and

alleges that when calculating the statutory royalty payments Music Choice has made for its BES, it has been allocating payments it receives in a manner not permitted by 37 C.F.R. § 384.3(a). A copy of the complaint in that action is attached as Exhibit A. On December 20, 2021, the U.S. District Court for the District of Columbia determined that the question of regulatory interpretation raised by that litigation should be referred to the Copyright Royalty Judges pursuant to the doctrine of primary jurisdiction. *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW), 2021 WL 5998382 (Dec. 20, 2021). A copy of that decision is attached as Exhibit B.

When a similar referral was made in 2014 in litigation between SoundExchange and Sirius XM, the Judges determined to reopen the proceeding in which the relevant regulations had been adopted for the limited purpose of interpreting those regulations. *Order Reopening Proceeding for Limited Purpose* in Docket No. 2006-1 CRB DSTRA (Dec. 9, 2014). The Judges then conducted further proceedings to illuminate the issues and in due course rendered their interpretation of the regulations. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56,725 (Nov. 30, 2017). SoundExchange hereby requests that the Judges likewise reopen the above-captioned proceedings for the limited purpose of interpreting 37 C.F.R. § 384.3(a) with reference to the kinds of allocations being made by Music Choice.

BACKGROUND

A. The Statutory License for BES

BES occupy a unique position in the sound recording statutory license system, because noninteractive public performances of sound recordings “to a business establishment for use in the ordinary course of its business” are exempt from the sound recording performance right. 17

U.S.C. § 114(d)(1)(C)(iv). However, service providers making digital transmissions to business establishments need to make reproductions of sound recordings as part of the process of transmitting them, and many BES providers rely on the statutory license in Section 112(e) to cover the copies they reproduce for delivery of transmissions as part of a BES. *See* 17 U.S.C. § 112(e)(1).

A BES provider relying on the Section 112(e) statutory license must pay statutory royalties at rates prescribed by the Judges' regulations. 17 U.S.C. § 112(e)(6). As in the case of other statutory licenses, those regulations are the product of periodic rate-setting proceedings.

The predecessor of Section 384.3(a) was originally devised by a Copyright Arbitration Royalty Panel ("CARP") in the one rate-setting proceeding in which BES royalty rates and terms were fully litigated, the proceeding now generally referred to as *Web I*. There, after reviewing evidence of industry licensing practices, the CARP determined that a BES provider should pay royalties at a statutory rate that was a percentage of "the Licensee's annual gross proceeds derived from the use in such broadcast service of the musical programs which are attributable to copyrighted recordings." Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 at B-7 (Feb. 20, 2002). On review of the CARP's decision by the Register of Copyrights, representatives of copyright owners argued that it was important to clarify that gross proceeds include items such as in-kind consideration and payments received from any source. In response, the Register concluded that the regulations should include a specific definition of gross proceeds "to avoid any confusion on this point." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,268 (July 8, 2002). The definition she recommended is similar to the one in Section 384.3(a)(2) today. *Compare id.* with 37 C.F.R. § 384.3(a)(2).

Subsequently, regulations implementing a 2003 industry settlement relocated the relevant regulations and made some changes in wording. *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 69 Fed. Reg. 5693, 5698 (Feb. 6, 2004). After the Copyright Royalty Distribution and Reform Act transferred jurisdiction over business establishment service rates to the Judges, implementation of a 2007 industry settlement restated the business establishment service rates and terms in a new C.F.R. part with some additional editorial changes. *Determination of Rates and Terms for Business Establishment Services*, 73 Fed. Reg. 16,199, 16,199-200 (Mar. 27, 2008). The Judges extended the regulations with further wording changes in implementing industry settlements in 2012 and 2018. *Determination of Rates and Terms for Business Establishment Services*, 78 Fed. Reg. 66,276, 66,277 (Nov. 5, 2013); *Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III)*, 83 Fed. Reg. 60,362, 60,363 (Nov. 26, 2018). In 2019, the Judges conformed the language of 37 C.F.R. § 384.3(a) to the Hatch-Goodlatte Music Modernization Act. *Copyright Royalty Board Regulations Regarding Procedures for Determination and Allocation of Assessment to Fund Mechanical Licensing Collective and Other Amendments Required by the Hatch-Goodlatte Music Modernization Act*, 84 Fed. Reg. 32,296, 32,313 (July 8, 2019).

B. Music Choice's Payment of BES Royalties

Music Choice provides several different types of digital music services, the best-known of which is a consumer-oriented audio service delivered by cable and satellite television providers, which Music Choice represents should be treated as a “preexisting subscription service” or “PSS.” See 17 U.S.C. § 114(j)(11). Music Choice also offers a BES. Music Choice relies on the Section 112(e) statutory license for the rights it needs to make copies of recordings

for use in providing that service. Accordingly, Music Choice has remitted statutory royalty payments to SoundExchange for its BES.

Pursuant to 37 C.F.R. § 384.6, SoundExchange engaged the independent accounting firm Prager Metis to verify the royalty payments provided by Music Choice to SoundExchange for its BES for the period January 1, 2013 through December 31, 2016. *See Notice of Intent To Audit*, 82 Fed. Reg. 7878 (Jan. 23, 2017); *Notice of SoundExchange's Intent to Audit Music Choice's "Preexisting" Subscription Service and Business Establishment Service for CY 2016*, 82 Fed. Reg. 34,554 (July 25, 2017). Even though Music Choice did not fully cooperate in that process, it did reveal that Music Choice has only reported to SoundExchange a fraction of its Gross Proceeds. Specifically, when Music Choice receives payments for providing its BES, it apparently allocates the vast majority of those payments to channels also included in its PSS. For years, Music Choice has taken the position (without ever informing SoundExchange) that it is not required to pay any BES royalties on such payments. Prager Metis was able to determine that, as a consequence of this interpretation, Music Choice has systematically and grossly underpaid statutory royalties for its BES during the period covered by Prager Metis's verification procedure (2013-2016). SoundExchange has reason to believe that Music Choice engaged in the same conduct both before and after this verification period as well.

SoundExchange's position is straightforward: When a statutory licensee copies valuable recordings protected under the Copyright Act for use in providing a BES, and when it receives payments from providing that service, it must pay BES royalties on the payments it receives. Delivery of the same music channels to different customers as part of a different service does not affect that statutory royalty obligation. The regulations at 37 C.F.R. § 384.3(a) do not permit Music Choice's allocation formula for BES receipts, which Music Choice has constructed from

whole cloth. Rather, the regulations permit an allocation of BES receipts only on the basis of use of recordings that are, or are not, subject to protection under the Copyright Act, and they provide a very specific formula for making such an allocation. That allocation methodology has nothing to do with what Music Choice has done.

C. SoundExchange's Suit in the District Court

Music Choice owes SoundExchange and the recording artists and copyright owners it represents millions of dollars in unpaid BES statutory royalties, late fees, and audit costs. So SoundExchange brought suit against Music Choice in the U.S. District Court for the District of Columbia on April 10, 2019. On February 14, 2020, the Court denied Music Choice's motion to transfer the case out of the District of Columbia. In connection with a subsequent scheduling conference, the Court requested briefing concerning whether the Judges have jurisdiction over the question of regulatory interpretation raised by the case, and whether the Court should refer that question to the Judges under the doctrine of primary jurisdiction.

In due course, the Court concluded that such referral was strongly warranted. The doctrine of primary jurisdiction “comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63–64 (1956). Here, the Court found that the “definition of ‘Gross Proceeds’ in 37 C.F.R. § 384.3(a)(2) is ‘ambiguous and do[es] not, on [its] face, make clear whether [Music Choice’s] approaches were permissible under the regulations.’” Exhibit B at 9 n.2 (quoting *SoundExchange, Inc. v. Sirius XM Radio Inc.*, 65 F. Supp. 3d 150, 155 (D.D.C. 2014)) (alterations in original).

In view of that ambiguity, the Court found that (1) the interpretive dispute between SoundExchange and Music Choice concerning the meaning of 37 C.F.R. § 384.3(a) falls within

the expertise of the Judges, to which the Court owes “particularly strong deference”; (2) obtaining guidance from the Judges concerning interpretation of 37 C.F.R. § 384.3(a) “would mitigate a substantial risk of inconsistent rulings”; and (3) “the balance of factors strongly weigh in favor of the Court exercising its discretion under the primary jurisdiction doctrine to refer this matter to the Board.” Exhibit B at 18-27.

In reaching that decision, the Court concluded that the Judges have continuing jurisdiction to clarify their BES regulations under 17 U.S.C. § 803(c)(4). *Id.* at 8-15. That jurisdictional conclusion is consistent with decisions by the Court, the Register and the Judges in SoundExchange’s prior litigation with Sirius XM. *See* 65 F. Supp. 3d at 156-57; *Scope of the Copyright Royalty Judges’ Continuing Jurisdiction*, 80 Fed. Reg. 25,333, 25,335 (May 4, 2015); *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56,725, 56,727 (Nov. 30, 2017) (“The Judges accept the scope of their ‘continuing jurisdiction’ under 17 U.S.C. 803(c)(4) as described by the Register.”).

SOUNDEXCHANGE’S PROPOSED ORDER

Pursuant to the District Court’s decision, SoundExchange now respectfully requests that the Judges issue SoundExchange’ proposed order reopening the Judges’ past BES proceedings for the limited purpose of construing 37 C.F.R. § 384.3(a) in its various forms adopted by the Judges to clarify whether it permits the kind of allocations being made by Music Choice.

Pursuant to 17 U.S.C. § 801(c), the Judges have general authority “to make any necessary procedural or evidentiary rulings in any proceedings under this chapter.” 17 U.S.C. § 801(c). That authority extends to determining procedures for addressing questions referred by the District Court. 82 Fed. Reg. at 56,727 n.8. Here, SoundExchange respectfully suggests that the Judges should first order a limited period of discovery so that SoundExchange can develop an

evidentiary record concerning Music Choice's actual BES payment allocation practices. SoundExchange has visibility into what Music Choice has been doing only to the extent revealed in the audit process, which is not very much. While in the *Sirius XM* case the Judges concluded that it was not their role to apply their interpretation of the regulations to the facts of the case, it is necessary for SoundExchange and the Judges to understand what Music Choice has been doing to interpret the regulations productively. *See* 82 Fed. Reg. at 56,726-27.

Following such discovery, SoundExchange believes that written submissions in the nature of summary judgment briefing in federal court should be sufficient to enable the Judges to determine under which circumstances 37 C.F.R. § 384.3(a) permits allocations of receipts in the calculation of BES royalties. Because the court's decision included a specific "request from the Court that the Board address the question being referred to it as expeditiously as possible," SoundExchange respectfully asks the Judges to commence such proceedings promptly.

Dated: February 9, 2022

Respectfully submitted,

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SOUNDEXCHANGE, INC.
733 10th Street, NW
10th Floor
Washington, D.C. 20001

Plaintiff,

v.

MUSIC CHOICE
650 Dresher Road, #200
Horsham, PA 19044

Defendant.

Civil Action No. ____

COMPLAINT

JURY TRIAL DEMANDED

PRELIMINARY STATEMENT

1. Plaintiff SoundExchange, Inc. (“SoundExchange”) is a non-profit organization authorized to collect and distribute to performing artists and copyright owners certain statutory royalties owed for the use of sound recordings protected under Title 17 of the U.S. Code (referred to herein as the “Copyright Act”). SoundExchange brings this action to recover all royalties that Defendant Music Choice owes to SoundExchange and has not paid, as well as late fees on the unpaid royalties, SoundExchange’s costs of conducting a verification of Music Choice’s statutory royalty payments, and SoundExchange’s costs and attorneys’ fees for this action.

2. Under the Copyright Act, certain music service providers such as Music Choice can avail themselves of statutory licenses that permit them to use in their services sound recordings protected by federal law without having to negotiate license agreements with the rights owners. Providers like Music Choice can help themselves to a statutory license by filing a Notice of Use in the Copyright Office pursuant to regulations at 37 C.F.R. § 370.2. Thereafter, a statutory

licensee can use sound recordings in its qualifying service to its commercial advantage so long as it complies with the requirements of the statutory license. But the statutory licenses are not free: the Copyright Act requires licensees to pay specified royalties on a timely basis for the use of the valuable works licensed under it.

3. The amount of royalties that a statutory licensee must pay is generally determined in periodic rulemaking proceedings before a U.S. government administrative agency called the Copyright Royalty Board (“CRB”), which consists of three Copyright Royalty Judges appointed pursuant to 17 U.S.C. § 801. The resulting royalty rates, along with terms of royalty payment, are set forth in regulations promulgated by the CRB pursuant to the Copyright Act and the Administrative Procedure Act. 17 U.S.C. § 803(a)(1). Under those CRB regulations, the royalties must be paid to SoundExchange.

4. Music Choice is one of several thousand digital music service providers that rely on the statutory licenses, and it provides several different types of digital music services, including a residential consumer audio service delivered by cable and satellite television providers and an audio service provided to business establishments. The latter is the focus of this action. Music Choice describes its “business establishment service” or “BES” as offering “over 50 channels of CD quality music” to help businesses “create the proper ambiance.”

5. Music Choice relies on the statutory license in Section 112(e) of the Copyright Act, 17 U.S.C. § 112(e), to obtain the rights it needs to use sound recordings in its BES. The statutory royalty rate and payment terms for a BES are set forth in CRB regulations at 37 C.F.R. Part 384. Currently, the basic royalty rate for a BES is 12.5% of the “Licensee’s ‘Gross Proceeds’ derived from the use in such service of musical programs that are attributable to copyrighted recordings.” 37 C.F.R. § 384.3(a)(1).

6. Copyright owners do not have the ability to say “no” to the use of their recordings under the statutory license, and they and SoundExchange have little visibility into the use of sound recordings by digital music services relying on the statutory license, except for the limited reporting that service providers must provide and the opportunity occasionally to have that reporting verified by an independent auditor under the CRB’s regulations.

7. Pursuant to 37 C.F.R. § 384.6, SoundExchange engaged an independent auditor to verify the royalty statements provided by Music Choice to SoundExchange for its BES for the period January 1, 2013 through December 31, 2016. That process, which SoundExchange initiated in 2016, continued into 2018. As a result of that verification procedure, Prager Metis CPAs, LLC (“Prager Metis”) discovered that Music Choice systematically underpaid statutory royalties for its BES during the period covered by that procedure, by consistently making an allocation of the fees and payments it receives for providing its BES in a manner not contemplated by the CRB’s regulations, and as a result, underreporting its “Gross Proceeds” to SoundExchange. On information and belief, Music Choice engaged in the same conduct before and after that period as well. Because Music Choice has failed to make the required payments to SoundExchange by the applicable due dates for those payments, Music Choice is required to pay late fees on the owed payments in addition to paying the amount of the underpayment. 37 C.F.R. § 384.4(e). Music Choice has failed to pay the applicable late fees. Given the magnitude of Music Choice’s underpayment, it is also required to pay SoundExchange’s costs of conducting the verification of Music Choice’s payments. *See* 37 C.F.R. § 384.6(g).

JURISDICTION AND VENUE

8. This is a civil action seeking damages under the Copyright Act, 17 U.S.C. § 101, *et seq.* This Court has original subject matter jurisdiction over this claim pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2). A substantial part of the events giving rise to this suit have occurred in this District, and Music Choice's contacts with the District of Columbia are sufficient to subject it to jurisdiction in this Court.

10. Music Choice has elected to be bound by the statutory license by filing the required Notice of Use of Sound Recordings with the United States Copyright Office in the District of Columbia; it provides music services throughout the country, including in the District of Columbia; and, it sends statements of account and royalty payments – including partial payments for its BES that is the subject of this lawsuit – to SoundExchange's Washington, D.C. office.

PARTIES

11. Plaintiff SoundExchange, Inc. is an independent nonprofit organization organized and existing under the law of the State of Delaware, with its headquarters at 733 10th Street, N.W., 10th Floor, Washington, DC 20001. The CRB has designated SoundExchange as the sole entity in the United States to collect royalties from statutory licensees and distribute those royalties to performing artists and copyright owners, including for BES. 37 C.F.R. §§ 370.4, 384.4. SoundExchange is also charged with enforcing statutory license requirements and as such, has standing to bring this action. *See* 17 U.S.C. § 114(g)(3).

12. Defendant Music Choice is a Pennsylvania general partnership, and has its principal place of business at 650 Dresher Road, Horsham, PA 19044. Music Choice provides various music

channel subscription offerings to businesses and individual subscribers, including what it reports to SoundExchange is a BES as contemplated by 17 U.S.C. §§ 112(e)(1) and 114(d)(1)(C)(iv).

FACTUAL ALLEGATIONS

A. The Statutory Framework and Applicable CRB Regulations

13. Section 106 of the Copyright Act grants the owner of a copyright in a sound recording the exclusive right to reproduce the recording and perform it “publicly by means of a digital audio transmission.” 17 U.S.C. § 106(1), (6); *see also id.* § 1401(a).

14. In the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, Congress amended Section 106 of the Copyright Act to grant the public performance right in Section 106(6), but exempted from that exclusive right public performances of sound recordings delivered by means of “a transmission to a business establishment for use in the ordinary course of its business.” 17 U.S.C. § 114(d)(1)(C)(iv).

15. Services making digital transmissions to business establishments need to make reproductions of sound recordings as part of the process of transmitting them, and the exemption from the new performance right did not provide BES providers a convenient mechanism for acquiring rights to make such reproductions. Congress addressed the need for licensing of such copies in the Digital Millennium Copyright Act, where it added to the Copyright Act a statutory license in Section 112(e) in part to address reproductions made in providing a BES.

16. The Section 112(e) statutory license allows a BES provider to make copies of sound recordings to facilitate the performances it transmits to business establishments under Section 114(d)(1)(C)(iv), if applicable requirements are met. The copies licensed under this license are referred to as “ephemeral” copies, or sometimes “ephemeral recordings,” because they can only be used for transmission purposes during a limited time period. See 17 U.S.C. § 112(e)(1)(C). To

meet the need of BES providers to make numerous copies of the recordings they use, Section 112(e) contemplates that the CRB may issue regulations allowing for the reproduction of multiple ephemeral copies of each recording. *See* 17 U.S.C. § 112(e)(1). The regulations issued by the CRB so allow. *See* 37 C.F.R. § 384.3(a)(1) (specifying royalty rate “[f]or the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service”).

17. In exchange for the privilege of making multiple copies of valuable sound recordings under the statutory license, BES providers must pay statutory royalties at rates prescribed by the CRB’s regulations and also report their usage of recordings to SoundExchange. 17 U.S.C. § 112(e)(6). Since January 1, 2014, the basic statutory royalty rate has been 12.5% of the BES provider’s Gross Proceeds. 37 C.F.R. § 384.3(a)(1); *Determination of Rates and Terms for Business Establishment Services*, 78 Fed. Reg. 66,276 (Nov. 5, 2013). Before that, the royalty rate was 10% of the BES provider’s Gross Proceeds. *Determination of Rates and Terms for Business Establishment Services*, 73 Fed. Reg. 16,199, 16,200 (Mar. 27, 2008). During the period 2020 to 2023, the rate will gradually increase to 13.5% of the BES provider’s Gross Proceeds. 37 C.F.R. § 384.3(a)(1).

18. The CRB’s royalty rate regulations also provide for the payment of late fees by licensees that fail to make the required royalty payments when due. The late fee is currently “1.0% per month, or the highest lawful rate, whichever is lower, if either or both a required payment or statement of account for a required payment is received by the Collective after the due date. Late fees shall accrue from the due date until both the payment and statement of account are received by the Collective.” 37 C.F.R. § 384.4(e). Prior to January 1, 2014, the late fee was 0.75% per month. 73 Fed. Reg. at 16,201.

19. Since shortly after enactment of the statutory license, SoundExchange and its predecessor have been designated by the CRB and its predecessors as the collective tasked with collecting and distributing statutory royalties.

20. The CRB regulations embodying the terms of statutory royalty payments for BES and other types of services using the statutory licenses provide a process that permits SoundExchange to engage an independent auditor to verify the royalty payments made by a statutory licensee. *E.g.*, 37 C.F.R. § 384.6. However, SoundExchange has received statutory royalties for nearly 50 BES in one or more of the years in the 2014-2018 BES statutory rate period, and there are several thousand services of different types that rely on the statutory licenses, so it is not practicable for SoundExchange to verify any particular service provider's payments on other than an episodic basis. When a verification of a BES provider's payments reveals an underpayment of 10% or more, the provider is required to pay SoundExchange's costs of the verification procedure. 37 C.F.R. § 384.6(g).

B. Music Choice's Underpayment of BES Royalties

21. Music Choice provides several different types of digital music services, including a consumer-oriented audio service delivered by cable and satellite television providers as part of the packages of residential television service they offer. For regulatory classification purposes, Music Choice represents that service should be treated as a "preexisting subscription service" or "PSS." *See* 17 U.S.C. § 114(j)(11).

22. According to Music Choice's website, its BES offers over 50 channels of uninterrupted music, with features such as the ability for Music Choice's customer to control use of the service in multiple stores from the customer's headquarters. On information and belief,

Music Choice has provided nearly twice that number of channels of audio programming as part of its BES.

23. On information and belief, Music Choice makes numerous copies of recordings to be able to provide its BES, including copies in a library from which it selects recordings to be played through the service and copies made in the process of delivering the service to business establishments on a day-to-day basis. Music Choice relies on the Section 112(e) statutory license for the rights it needs to make such copies for use in providing its BES. Accordingly, Music Choice has remitted statutory royalty payments to SoundExchange for its BES.

24. Pursuant to 37 C.F.R. § 384.6, SoundExchange engaged Prager Metis to verify the royalty payments provided by Music Choice to SoundExchange for its BES for the period January 1, 2013 through December 31, 2016. Music Choice did not fully cooperate in that process, among other things, by refusing to provide Prager Metis access to any information pertaining to its activities in 2013. As a result of that verification procedure, Prager Metis discovered that Music Choice systematically underpaid statutory royalties for its BES during the period covered by that procedure. Specifically, Prager Metis concluded that SoundExchange was due millions of dollars, including both unpaid royalties based on persistent underreporting of Gross Proceeds and late fees. Pursuant to 37 C.F.R. § 384.6(c), the result of this verification procedure “shall be binding on all parties.” Because the underpayment found by Prager Metis was an underpayment of 10% or more, SoundExchange is entitled to recover its costs of the verification procedure. 37 C.F.R. § 384.6(g).

25. On information and belief, Music Choice engaged in the same conduct before and after the 2013-2016 verification period as well, which would entitle SoundExchange to a further recovery of statutory royalties and late fees in an amount to be determined at trial.

26. Music Choice has argued against Prager Metis's conclusion and attempted to explain this deficit by claiming that it allocates the fees and payments it receives from providing its BES based on the number of channels it provides, and that it is not required to pay BES royalties on fees and payments it receives from providing its BES to the extent that it allocates such fees and payments to channels that are also included in its PSS service offering. According to Prager Metis, Music Choice explained to it that Music Choice offers two BES service packages with a set number of channels, and that it paid royalties on the fraction of its actual BES receipts corresponding to the number of channels of music programming provided as part of Music Choice's BES and not provided as part of its PSS. As a result of this allocation, and Music Choice's reporting to SoundExchange of only the allocated fraction as Gross Proceeds, Music Choice hid from SoundExchange the vast majority of the fees and payments it actually received from the provision of its BES.

27. Music Choice incorrectly interpreted the BES regulations. When a statutory licensee makes copies of valuable recordings protected under the Copyright Act for use in providing a BES, BES royalties are payable on the fees and payments the BES provider receives from providing its BES. Delivery of the same music channels to different customers as part of a different service does not make the use of sound recordings in the BES free of any statutory royalty obligation.

28. Moreover, the CRB's regulations at 37 C.F.R. § 384.3(a) permit an allocation of BES receipts only on the basis of use of recordings that are, or are not, subject to protection under the Copyright Act, and provide a very specific formula for making such an allocation. Music Choice invented its own formula for the allocation of BES receipts, which is not permitted by the CRB's regulations.

29. Finally, even if there were a basis in the CRB's regulations for the allocation formula Music Choice invented (and SoundExchange does not believe that there is), the arithmetic that Music Choice explained to Prager Metis does not conform to available information concerning the number of BES channels Music Choice has provided. Music Choice reportedly paid royalties to SoundExchange using an allocation formula that assumed roughly half the number of BES channels than Music Choice appears to have provided. Thus, under any interpretation of the CRB's regulations, it appears that Music Choice has significantly underpaid the required statutory royalties and applicable late fees.

C. Late Fees and Verification Procedure Costs

30. Because Music Choice has not paid the BES statutory royalties it owes, it must pay late fees on the unpaid amounts. 37 C.F.R. § 384.4(e).

31. Because Music Choice underpaid its BES royalties by 10% or more, it must pay SoundExchange's costs of the verification of Music Choice's payments. 37 C.F.R. § 384.6(g).

COUNT ONE

(Violation of 34 C.F.R. §§ 384.3 & .4 – Recovery of Unpaid Royalties and Late Fees)

32. SoundExchange incorporates by reference paragraphs 1 to 31 as if set forth herein.

33. Section 112(e) of the Copyright Act provides a statutory license for the making of ephemeral copies to facilitate transmissions made as part of a BES. 17 U.S.C. § 112. Because Music Choice has chosen to rely on that statutory license, it must make royalty payments to SoundExchange at the rates and on the terms set forth in the CRB's regulations. 37 C.F.R. §§ 384.3, .4(a); *see also* 17 U.S.C. § 112(e)(6).

34. Music Choice's payments to SoundExchange for its BES must be calculated as a percentage of Music Choice's Gross Proceeds. 37 C.F.R. § 384.3(a).

35. Music Choice has systematically excluded from the Gross Proceeds royalty base used in calculation of its royalty payments and reporting to SoundExchange the vast majority of the fees and payments it receives from providing its BES. That is not permitted by Section 112(e) or the CRB's regulations, and even if the regulations permitted a channel-based allocation of BES receipts (which SoundExchange does not believe they do), Music Choice has provided more BES channels that are not part of its PSS than it has paid royalties for.

36. Music Choice's unauthorized exclusions from Gross Proceeds impermissibly reduced (and continue to reduce) the statutory royalty payments that Music Choice makes to SoundExchange. Accordingly, the unauthorized exclusions, and consequent underpayments, contravened the requirement in the CRB's regulations that a BES "Licensee shall make the royalty payments due under § 384.3" to SoundExchange. 37 C.F.R. § 384.4(a); *see also* 17 U.S.C. § 112(e)(6).

37. Because Music Choice did not pay royalties it owes to SoundExchange on a timely basis, it must pay late fees on the unpaid amounts. 37 C.F.R. § 384.4(e). Music Choice has not paid such late fees to SoundExchange.

38. Music Choice's improper actions have deprived SoundExchange of millions of dollars to which SoundExchange is entitled under the CRB's regulations.

COUNT TWO

(Violation of 37 C.F.R. § 384.6(g) – Recovery of Unpaid Verification Fees)

39. SoundExchange incorporates by reference paragraphs 1 to 38 as if set forth herein.

40. Music Choice's failure to make royalty payments to SoundExchange as required by the CRB's regulations was discovered by SoundExchange when Prager Metis conducted a verification of Music Choice's royalty payments for the period 2013-2016. The extent of the

underpayment substantially exceeded 10% of Music Choice's royalty obligation for the period 2013-2016. Accordingly, Music Choice is obligated to pay SoundExchange's reasonable costs of the verification of Music Choice's payments. 37 C.F.R. § 384.4(g). Music Choice has not paid such costs to SoundExchange.

41. Music Choice's improper actions have deprived SoundExchange of approximately \$35,000 to which SoundExchange is entitled under the CRB's regulations.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, SoundExchange respectfully prays for judgment against Music Choice as follows:

- a. For compensatory damages in such amounts to be determined at trial arising from Music Choice's underpayment of royalties and late fees as required by the statutory license regulations;
- b. For SoundExchange's costs of verifying Music Choice's royalty payments for the period 2013-2016;
- c. For SoundExchange's costs and attorneys' fees in connection with this action pursuant to 17 U.S.C. § 505; and
- d. For any other relief the Court deems just and proper.

Dated: April 10, 2019

Respectfully submitted,

/s/ David A. Handzo

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EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SOUNDEXCHANGE, INC.,)	
)	
)	
Plaintiff,)	
)	Civil Action No. 19-999 (RBW)
v.)	
)	
MUSIC CHOICE,)	
)	
Defendant.)	
)	

MEMORANDUM OPINION

The plaintiff, SoundExchange, Inc. (“SoundExchange” or “the plaintiff”), brings this civil action pursuant to the Copyright Act of 1976 (the “Copyright Act”), 17 U.S.C. § 101, against the defendant, Music Choice, to recover unpaid royalties. See Complaint (“Compl.”) ¶¶ 32–41, ECF No. 1. Currently pending before the Court is the issue of whether the Court should refer the question of regulatory interpretation raised in this case to the Copyright Royalty Board (the “Board”) under the doctrine of primary jurisdiction. See Joint Report Pursuant to Local Rule 16.3 (“Joint Report”) at 14–15, ECF No. 20; Order at 1 (Jun. 8, 2020), ECF No. 22. Upon careful consideration of the parties’ submissions,¹ the Court concludes for the following reasons that referral to the Copyright Royalties Board (the “Board”) is appropriate under the doctrine of primary jurisdiction.

¹ In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) Defendant Music Choice’s Supplemental Brief Regarding Primary Jurisdiction (“Def.’s Suppl. Br.”), ECF No. 24; and (2) SoundExchange’s Supplemental Brief in Favor of Referral to the Copyright Royalty Board (“Pl.’s Suppl. Br.”), ECF No. 25.

I. BACKGROUND

A. Statutory Background

Under the Copyright Act, a Business Establishment Service (“BES”), such as Music Choice’s BES, is “a service making transmissions of sound recordings under the limitation on exclusive rights specified by [the Copyright Act].” 37 C.F.R. § 384.2 (2019). The Copyright Act allows a BES provider to make reproductions of copyrighted sound recordings that the BES provider transmits to business establishments for use in the “ordinary course of [the establishments’] business.” See 17 U.S.C. §§ 112(e)(1)(C), 114(d)(1)(C)(iv); Compl. ¶¶ 14, 16. To make such reproductions, a BES provider must obtain a statutory license from the United States Copyright Office that permits it to use, as part of the services it provides, “sound recordings protected by federal law without having to negotiate license agreements with the rights owners.” Compl. ¶ 2. “Thereafter, a statutory licensee can use sound recordings . . . to its commercial advantage so long as it complies with the requirements of the statutory license.” Id.

BES providers must report their usage of recordings, see id. ¶ 17, and pay statutory royalties at rates prescribed by the Board. See id. ¶ 3. The Board consists of three Copyright Royalty Judges (“CRJs”) appointed pursuant to the Copyright Act. See id. Each CRJ must “be an attorney who has at least [seven] years of legal experience.” 17 U.S.C. § 802(a)(1). Additionally, at least one CRJ must “have significant knowledge of copyright law,” and another CRJ must “have significant knowledge of economics.” Id.

In setting royalty rates, the Board “presides over extensive administrative proceedings, which can involve scores of witnesses and voluminous documents, before issuing its determinations and promulgating regulations.” SoundExchange, Inc. v. Sirius XM Radio Inc. (“Sirius XM”), 65 F. Supp. 3d 150, 152 (D.D.C. 2014) (citing 17 U.S.C. § 803). Specifically,

the Board administers proceedings to “determine royalty rates” and “determine distribution of royalty fees.” 17 U.S.C. § 803(b)(2)(D)(i)–(ii); see also id. § 803(b)(3)(A)(i)–(ii). The Board may also adopt royalty rates and terms as part of a settlement among “some or all of the participants in a proceeding[.]” 17 U.S.C. § 801(b)(7)(A). However, the Board “may decline to adopt the [settlement] agreement as a basis for statutory terms and rates for participants that are not parties to the agreement” “if any participant [in the proceeding] objects to the agreement and the [Board] conclude[s], based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” Id. § 801(b)(7)(A)(ii).

In making its determinations, the Board “may consult with the Register of Copyrights [(the “Register”)] on any matter other than a question of fact.” Id. § 802(f)(1)(A)(i). Additionally, the Board must request a written decision from the Register resolving any “novel material question of substantive law concerning an interpretation” of the Copyright Act. Id. § 802(f)(1)(B)(i).

At the heart of the parties’ dispute in this case is the interpretation of the Board’s regulations, specifically concerning the meaning of “Gross Proceeds.” See Joint Report at 2–3; see Compl. ¶¶ 26–28. The current statutory royalty rate for BES providers is 12.75% of the licensee’s “‘Gross Proceeds’ derived from the use in such service of musical programs that are attributable to [copyrighted] recordings.” Pl.’s Suppl. Br. at 3 (quoting 37 C.F.R. § 384.3(a)(1) (2020)). The original formulation of “Gross Proceeds” was determined by a Copyright Arbitration Royalty Panel (“CARP”) in a 2002 royalty-rate setting proceeding, during which it “determined that the provider of a business establishment service should pay royalties at a statutory rate that was a percentage of ‘the Licensee’s annual gross proceeds derived from the use in such broadcast service of the musical programs which are attributable to copyrighted

recordings.” Id. at 4 (quoting Report of the Copyright Arbitration Royalty Panel in Docket No. 2000–9 (Feb. 20, 2002)). When the Register subsequently reviewed the CARP’s decision, however, it recommended clarification to the definition of “Gross Proceeds.” See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,268 (July 8, 2002) (finding that the CARP’s definition of “Gross Proceeds” was not defined with specificity and suggesting an expanded definition). The Register’s recommendation ultimately led to the following definition which currently defines “Gross Proceeds” as:

[A]ll fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of sound recordings during the License Period pursuant to 17 U.S.C. [§] 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. [§] 114(d)(1)(C)(iv).

37 C.F.R. § 384.3(a)(2); see Pl.’s Suppl. Br. at 5.

Although the definition recommended by the Register “is similar to the one in [s]ection 834.3(a)(2) today[,]” Pl.’s Suppl. Br. at 5; compare 67 Fed. Reg. at 45,268, with 37 C.F.R. § 384.3(a)(2), these regulations have a long history that involves several statutory revisions. After the Register made its recommendation, “regulations implementing a 2003 industry settlement relocated the relevant regulations and made some changes in wording.” Pl.’s Suppl. Br. at 5; see Digital Performance Right in Sound Recordings and Ephemeral Recordings, 69 Fed. Reg. 5693, 5698 (Feb. 6, 2004). Then, in 2004, Congress passed the Copyright Royalty Distribution and Reform Act, which transferred the CARP’s jurisdiction, including its jurisdiction over BES royalty rates and terms, to the Board. See generally Pub. L. No. 108-419, 118 Stat. 2341. With this new responsibility, the Board “implement[ed] [a] 2007 industry settlement [, which] restated the [BES] rates and terms in a new CFR part with some additional

editorial changes.” Pl.’s Suppl. Br. at 5; see Determination of Rates and Terms for Business Establishment Services, 73 Fed. Reg. 16,199, 16,199-200 (Mar. 27, 2008). Thereafter, “[t]he Board extended the regulations with further wording changes in implementing industry settlements in 2012 and 2018.” Pl.’s Suppl. Br. at 5; see Determination of Rates and Terms for Business Establishment Services, 78 Fed. Reg. 66,276, 66,277 (Nov. 5, 2013); Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments, 83 Fed. Reg. 60,362, 60,362–63 (Nov. 26, 2018) (publishing final regulations setting rates and terms for the making of an ephemeral recording of a sound recording by a BES for the period of January 1, 2019, through December 31, 2023).

B. Factual Background

SoundExchange is a “non-profit organization authorized to collect and distribute to performing artists and copyright owners certain statutory royalties owed for the use of sound recordings protected under [the Copyright Act].” Compl. ¶ 1. The Board “has designated SoundExchange as the sole entity in the United States to collect royalties from statutory licensees and distribute these royalties to performing artists and copyright owners[.]” Id. ¶ 11.

Furthermore, SoundExchange has authority to initiate independent audits of music service providers to verify the royalty statements and payments made to it. See id. ¶ 7 (citing 37 C.F.R. § 384.6).

Music Choice is a digital music service provider that uses statutory licenses to “provide[] several different types of digital music services, including a residential consumer audio service delivered by cable and satellite television providers and an audio service provided to business establishments.” Id. ¶ 4. Music Choice’s BES offers “over [fifty] channels of CD[-]quality music” to help businesses “create the proper ambiance.” Id.

In 2016, SoundExchange “engaged an independent auditor to verify the royalty statements provided by Music Choice to SoundExchange for its BES for the period January 1, 2013 through December 31, 2016.” Id. ¶ 7. According to SoundExchange, the independent auditor “discovered that Music Choice systematically underpaid statutory royalties for its BES . . . by consistently making an allocation of the fees and payments it receives for providing its BES in a manner not contemplated by the [Board’s] regulations, and as a result, underreporting its ‘Gross Proceeds’ to SoundExchange.” Id.

SoundExchange initiated this civil action in this Court on April 10, 2019, seeking recovery of unpaid royalties and late fees under 37 C.F.R. § 384.3, 384.4, as well as unpaid verification fees under 37 C.F.R. § 384.6(g). See Compl. ¶¶ 32–41. On June 24, 2019, Music Choice filed its answer, and thereafter moved to transfer this case to the Southern District of New York on venue grounds under 28 U.S.C. § 1404(a) (2020). See generally Def.’s Motion to Transfer Case. On February 14, 2020, this Court denied Music Choice’s motion to transfer. See SoundExchange, Inc. v. Music Choice, 2020 WL 759197, at *1 (D.D.C. Feb. 14, 2020) (Walton, J.).

The Court held an initial scheduling conference in this case on June 5, 2020. See Order at 1 (June 8, 2020), ECF No. 22. During the initial scheduling conference, the parties raised the issue of whether the Court should “refer the question of regulatory interpretation raised by [the] case to the Copyright Royalty Board pursuant to the doctrine of primary jurisdiction.” Joint Report at 14 (citing United States v. W. Pac. R. Co., 352 U.S. 59, 63–64 (1956)). Specifically, the parties indicated that they “dispute how the term ‘Gross Proceeds’ should be interpreted and reported pursuant to the [Board]’s regulations.” Joint Report at 2. Music Choice asserts that “its ‘Gross Proceeds’ are only an allocated portion of its actual proceeds corresponding to music

channels offered solely as part of its BES service.” Id. at 2 (emphasis in original).

SoundExchange, however, contends that “Music Choice must pay BES statutory royalties on fees and payments it receives from providing music channels used in its BES service, even if Music Choice also provides such channels as part of a different service.” Id. at 2–3. Therefore, SoundExchange asserts that “Music Choice has consistently underreported its ‘Gross Proceeds’ based on its incorrect interpretation of the regulations, resulting in a systematic underpayment of BES statutory royalties.” Id. at 3.

On June 8, 2020, the Court ordered the parties to file supplemental briefs addressing (1) whether the Board has jurisdiction over this matter, and (2) whether the Court should refer the question of regulatory interpretation to the Board under the doctrine of primary jurisdiction. See Order at 1 (June 8, 2020), ECF No. 22. These issues and the parties’ corresponding arguments from their supplemental briefs are the subject of this Memorandum Opinion.

II. ANALYSIS

SoundExchange argues that the Court “should refer the question of regulatory interpretation raised by this case to the Board under the doctrine of primary jurisdiction” because “[t]he Board has the expertise and jurisdiction necessary to resolve the parties’ dispute over interpretation of the Board’s royalty rate regulation at 37 C.F.R. § 384.3(a), and it is the tribunal best situated to do so.” Pl.’s Suppl. Br. at 1. In response, Music Choice argues that the Court should not refer the issue to the Board because: (1) the Board “does not have any authority to enforce the statutory license regulations or resolve payment disputes[,]” Def.’s Suppl. Br. at 1 (emphasis in original); and (2) “the questions presented by this case—interpretation of regulations and statutes of that authority to the unique facts of this case—are of the sort that district courts routinely resolve[,]” id. The Court will address the parties’ arguments in turn, first

considering whether the Board has jurisdiction over this matter, and if so, then considering whether referral to the Board is warranted pursuant to the primary jurisdiction doctrine.

A. Whether the Board Has Jurisdiction Over This Matter

SoundExchange argues that the Board has jurisdiction over the regulatory interpretation at issue here because the Board has continuing jurisdiction “to interpret and clarify its regulations in 37 C.F.R. § 384.3(a).” Pl.’s Suppl. Br. at 11 (citing Sirius XM, 65 F. Supp. 3d at 156). In response, Music Choice argues that “[t]he Board’s statutorily limited jurisdiction [] does not extend to this case, which is a private commercial dispute for money damages.” Def.’s Suppl. Br. at 4. Music Choice further argues that “the Board’s continuing jurisdiction to reopen and make corrections to its own prior determinations does not give it continuing jurisdiction over the [BES] license regulations in dispute[.]” because: (1) “[t]hose regulations were drafted and originally by . . . [the CARP,]” and (2) “[t]he Board itself has never presided over a contested [BES] license rate setting proceeding[.]” Id. at 1–2 (emphasis in original).

Pursuant to the Copyright Act and the Administrative Procedure Act, the Board may “make determinations and adjustments of reasonable terms and rates of royalty payments[.]” including those relating to BES licenses. 17 U.S.C. §§ 801(b)(1), 803(a)(1); see id. § 803(d)(3); 5 U.S.C. § 706(2)(A). The Board generally “has no cause to address [] questions . . . outside of the context of the ratemaking and distribution proceedings otherwise within its statutory purview.” Brief for the United States as Amicus Curiae in Support of Neither Party at 11; SoundExchange, Inc. v. Muzak LLC, 854 F.3d 713 (D.C. Cir. 2017) (No. 16-7041). However, the Board “may issue an amendment . . . to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination.”

17 U.S.C. § 803(c)(4). The Board’s “power to ‘correct any technical . . . errors’ in determinations encompasses the power to resolve ambiguity in the meaning of regulations adopted pursuant to those determinations[,]” and “[s]uch a correction is ‘technical’ in the sense that it merely clarifies existing regulations to ensure they are applied in the manner intended by the [Board].” Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. 25,333, 25,335 (May 4, 2015) (footnote omitted); see Sirius XM, 65 F. Supp. 3d at 156 (“[C]larification of the terms [of royalty payment rates] . . . is within the [Board’s] continuing jurisdiction.”). The Board is “in the best position to provide this type of interpretive guidance, given [its] familiarity with the extensive record on which the regulations are based and [its] general ‘technical and policy expertise.’” Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. at 25,335 (quoting Sirius XM, 65 F. Supp. 3d at 155). “This approach is also consistent with the general principles of administrative law, under which courts regularly defer to agencies’ reasonable interpretations of ambiguous regulations.” Id. (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).²

Here, the Court agrees with SoundExchange that the Board has continuing jurisdiction to clarify its BES regulations. See Pl.’s Suppl. Br. at 12–13. As SoundExchange correctly notes, although the CARP originally formulated the regulations at issue here, “[t]here is nothing in [s]ection 803(c)(4) suggesting that the Board’s jurisdiction depends on its having made up a regulation out of whole cloth.” Id. at 12. Given the Board’s explicit continuing jurisdiction over the “clarification of existing regulations,” Scope of the Copyright Royalty Judges’ Continuing

² As a preliminary matter, the Court notes that the Board’s definition of “Gross Proceeds” in 37 C.F.R. § 384.3(a)(2) is “ambiguous and do[es] not, on [its] face, make clear whether [Music Choice’s] approaches were permissible under the regulations.” See Sirius XM, 65 F. Supp. 3d at 155; 37 C.F.R. § 384.3. Therefore, the Court will proceed to assess whether the Board has jurisdiction over this matter, and if so, whether referral to the Board is warranted pursuant to the primary jurisdiction doctrine.

Jurisdiction, 80 Fed. Reg. at 25,335, and the analogous, settled power of agencies to provide reasonable interpretation of ambiguous regulations,” id. (citing Auer, 519 U.S. at 461 (1997)), the Board’s continuing jurisdiction is not affected by the original source of the regulations at issue. Additionally, the Court finds persuasive SoundExchange’s argument that, although the Board’s most recent issuance of these regulations arose out of an industry settlement, see Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments, 83 Fed. Reg. at 60,362–63 (publishing final regulations setting rates and terms for the making of an ephemeral recording of a sound recording by a BES for the period of January 1, 2019, through December 31, 2023), “the regulations are nonetheless a determination of statutory royalty rates and terms by the Board issued at the conclusion of a rate-setting proceeding[.]” Pl.’s Suppl. Br. at 12; see 17 U.S.C. § 801(b)(7)(A) (describing the Board’s adoption of industry agreements “as a basis for statutory terms and rates”). Therefore, the Court concludes that the Board’s regulations arising out of its adoption of industry agreements are similarly situated to other Board rate regulations such that the Board may exercise continuing jurisdiction them pursuant to section 803(c)(4) of the Copyright Act. See 17 U.S.C. § 803(c)(4) (authorizing the Board “to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination”).³

³ Before addressing the question of whether the Board has continuing jurisdiction, Music Choice first argues that “this matter is not within the ratemaking jurisdiction of the Board.” Def.’s Suppl. Br. at 7. Specifically, Music Choice contends that the Board lacks jurisdiction to address the parties’ payment dispute, because “this dispute arises neither as part of, nor in a proceeding related to, any ratemaking over which the Board may preside, and thus does not fall within the Board’s [ratemaking] authority[.]” Id. at 6. SoundExchange does not challenge this point. Rather, SoundExchange only asserts that the Board “has jurisdiction to interpret and clarify its regulations in 37 C.F.R. § 384.3(a)” pursuant to the Board’s continuing jurisdiction. Pl.’s Suppl. Br. at 11; see Sirius XM, 65 F. Supp. 3d at 156 (finding that clarification of the terms of satellite digital audio radio service royalty rates—

(continued . . .)

Music Choice’s arguments against the Board having continuing jurisdiction are unpersuasive for several reasons. First, Music Choice argues that the parties’ dispute does not fall within the Board’s continuing jurisdiction because “SoundExchange is not seeking the correction of a technical error made by the Board or a change to the regulations based upon unforeseen circumstances in this case[.]” Def.’s Suppl. Br. at 7. However, as another member of this Court noted in a similar case, because “[n]either party is asking for a change to rates[.]” but rather, “only a clarification of the terms[.]” this falls squarely “within the [Board’s] continuing jurisdiction.” Sirius XM, 65 F. Supp. 3d at 156; see id. at 156–57 (finding that the issue of “[w]hether [the Board] set the rates intending the types of revenue at issue to be included in or excluded from the gross revenue calculation is a question best posed to the [Board] itself.”).⁴ Indeed, if the Board concludes that Music Choice’s calculations of its gross proceeds are impermissible under the Board’s regulations, nothing precludes SoundExchange from seeking and award for damages in this Court. See id.

Second, Music Choice argues that “[t]he Board’s continuing jurisdiction to reopen its own prior proceedings does not extend to proceedings conducted by other distinct agencies[.]” Def.’s Suppl. Br. at 8–9, and in particular, those proceedings conducted by the CARP, see id. (emphasizing that “unlike the Board, . . . [the CARP] had no continuing jurisdiction over their ratemaking proceedings after the final determination was issued[.]” and “[t]here is nothing in the

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specifically, the term ‘gross revenues’ in the Board’s regulations—was within the Board’s continuing jurisdiction, and referring the royalty underpayment action to the Board). Therefore, the Court will proceed to address Music Choice’s arguments concerning the Board’s continuing jurisdiction.

⁴ In 2013, SoundExchange brought an underpayment royalty action against Sirius XM, there the parties similarly disputed the meaning of terms in the Board’s regulations. See Sirius XM, 65 F. Supp. 3d at 153. But there, SoundExchange took the opposite position “that the Board did not have the power to accept a referral from the [C]ourt under the doctrine of primary jurisdiction.” Pl.’s Suppl. Br. at 11; see Sirius XM, 65 F. Supp. 3d at 156. Here, however, SoundExchange acknowledges that, while it “argued against referral and Board jurisdiction then, its arguments did not prevail[.]” Pl.’s Suppl. Br. at 2, and another member of this Court took the opposition position and “granted Sirius XM’s request for such a referral over SoundExchange’s objection[.]” id. at 3.

continuing jurisdiction provision even hinting that Congress intended to grant the Board jurisdiction to interpret the regulations a different agency crafted—much less retroactive jurisdiction to reopen proceedings conducted before a different agency under a statute withholding continuing jurisdiction from that agency”). However, the CARP is not merely a “different agency” as Music Choice represents, see Def.’s Suppl. Br. at 8, but rather, the CARP is the Board’s predecessor agency, the Copyright Royalty Distribution and Reform Act having transferred jurisdiction over BES royalty rates and terms to the Board as the CARP’s successor agency. See Determination of Rates and Terms for Business Establishment Services, 73 Fed. Reg. at 16,199. Since its inception, the Board has made determinations implementing industry settlements based on these regulations. See Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments, 83 Fed. Reg. at 60,362; Determination of Rates and Terms of Business Establishment Services, 78 Fed. Reg. 66,276, 66,277 (Nov. 5, 2013); Determination of Rates and Terms for Business Establishment Services, 73 Fed. Reg. at 16,199–200. Indeed, it appears that the provision for continuing jurisdiction was adopted in response to perceived failings in the CARP system. See H.R. Rep. 108-408, at 36 (2004) (noting that the Copyright Office and other parties had requested inclusion of continuing jurisdiction powers that were not included under the CARP system on its face). Music Choice’s contrary interpretation would result in the following illogical outcome: although the Board would retain continuing jurisdiction over its own determinations, it would be unable to correct errors or respond to unforeseen circumstances arising out of older determinations made by the CARP. Such an outcome would run contrary to Congress’s intent expressed in § 803(c)(4) of the Copyright Act. See 17 U.S.C. § 803(c)(4) (noting that the Board “may issue an amendment . . . to correct any technical or clerical errors in

the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination.”).

Third and finally, Music Choice asserts that “[t]he Board’s continuing jurisdiction to provide interpretive guidance does not extend to regulations that were not the subject of a contested proceeding before the Board and were neither drafted nor substantively considered by the Board[.]” Def.’s Suppl. Br. at 9. In other words, Music Choice contends that the Board’s continued jurisdiction is predicated upon its “unique familiarity with [the] regulations” at issue, which “exists only as the continuation of a proceeding actually litigated before the Board, and in which a record was developed.” Id. at 10. Music Choice further argues that no such evidentiary record exists here, “in the context of any of the [BES] license proceeding settlements—all of which the Board accepted as submitted . . . without any evidentiary record ever having been created.” Id. at 11–12. According to Music Choice, this case is “fundamentally different” from Sirius XM, which “involved a complex record developed before the Board, including many thousands of pages of conflicting documents, several weeks of live testimony and cross examination, and extensive briefing.” Id. at 12; see Sirius XM, 65 F. Supp. 3d at 152 (determining that referral under primary jurisdiction was appropriate due to the Board’s “technical and policy expertise”).⁵

⁵ As further support for this argument, Music Choice also contends that case is akin to Muzak, in which the District of Columbia Circuit declined to invoke the primary jurisdiction doctrine because the parties’ dispute over the application of the statutory term, “preexisting subscription service,” was “divorced from a rate proceeding.” Muzak, 854 F.3d at 718; see Def.’s Suppl. Br. at 13. However, the Court agrees with SoundExchange that this case is distinguishable from Muzak. As SoundExchange correctly notes, “the Muzak case turned on interpretation of a statutory provision[—]the definition of the term ‘preexisting subscription service’ in 17 U.S.C. § 114(j)(11)[.]” Pl.’s Suppl. Br. at 13 (emphasis in original); see 854 F.3d at 716. Here, however, “[t]his case, like the Sirius XM case, turns on interpretation of the Board’s regulations.” Pl.’s Suppl. Br. at 13; see Sirius XM, 65 F. Supp. 3d at 156 (noting that the “gross revenue exclusions” in the Board’s regulations, 37 C.F.R. § 382.11(3)(vi)(B) were “ambiguous” and referring the matter to the Board under the doctrine of primary jurisdiction). Indeed, as noted

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Music Choice’s arguments here are also unconvincing. Although Music Choice correctly notes that Sirius XM involved a more substantial evidentiary record than exists in this case, see Sirius XM, 65 F. Supp. 3d at 156 (noting that the Board “heard weeks of testimony and reviewed scores of exhibits submitted by these two parties” in two prior proceedings that determined the rates and terms at issue), the Court disagrees with Music Choice’s contention that determinations implementing industry settlements may not form the basis for the Board exercising continuing jurisdiction. As SoundExchange correctly notes, in Sirius XM, after the court in Sirius XM referred that case to the Board, the Register “then opined that the Board has jurisdiction to clarify its regulations,” Pl.’s Suppl. Br. at 2 (citing Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. 25,333 (May 4, 2015)), “and the Board ultimately issued a decision doing so[.]” id. (citing Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 82 Fed. Reg. 56,725 (Nov. 30, 2017)). The Register observed that the case “highlighted a situation in which the Board had previously relied on its continuing jurisdiction under Section 803(c)(4) to modify a determination implementing an industry settlement.” Pl.’s Suppl. Br. at 12. Specifically, the Register explained that, in 2009, the Board modified a determination that implemented a partial industry settlement regarding “royalty payments for making and distributing phonorecords of musical works under 17 U.S.C. [§] 115.” Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. at 25,335 (finding that the Board could codify corrections identified by the Register under its continuing jurisdiction in order to “clarify potential confusion facing users of the license at

(. . . continued)

previously, this case turns on the interpretation of the term “Gross Proceeds” in the Board’s regulations at 37 C.F.R. § 384.3(a)(2), rather than a question of statutory interpretation. Accordingly, the Court concludes that the Sirius XM case is analogous here, and that the issue of whether the Board “intend[ed] the types of revenue at issue to be included in or excluded from the gross [proceeds] calculation is a question best posed to the [Board] itself.” Sirius XM, 65 F. Supp. 3d at 156 (noting that the Board’s “interpretation of its own regulations . . . is owed great deference.”).

issue” and “promote an efficient administration of the applicable license”); see also Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 6,832, 6,833 (Feb. 11, 2009) (holding that continuing jurisdiction was applicable even regarding the participants’ partial agreement, and that clarification would aid users of the license at issue—whether or not they were a party to the partial agreement.). Given this prior authority, the Court sees no compelling reason why the Board should not exercise its continuing jurisdiction in the same manner here.

Accordingly, the Court concludes the Board has continuing jurisdiction to offer interpretive guidance in this case. Having reached this conclusion, the Court must next assess whether it should refer the question of regulatory interpretation raised by this case to the Board under the primary jurisdiction doctrine.

B. Whether the Court Should Refer This Matter to the Board Under the Primary Jurisdiction Doctrine

SoundExchange argues that “this Court should refer the question of regulatory interpretation raised by this case to the Board under the doctrine of primary jurisdiction” because “[t]he Board has the expertise and the jurisdiction necessary to resolve the parties’ dispute over interpretation of the Board’s royalty rate regulation at 37 C.F.R. § 384.3(a), and it is the tribunal best situated to do so.” Pl.’s Suppl. Br. at 1. In response, Music Choice responds that, even if the Board has limited jurisdiction to provide guidance, the Court should not refer the matter to the Board because “[n]one of the relevant factors weigh in favor of” referral, Def.’s Suppl. Br. at 2, and “[f]airness and efficiency weigh in favor of the Court exercising its discretion to simply adjudicate the entire matter now in a single streamlined proceeding, rather than referring any part of it to the Board[,]” id. at 3.

“The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” W. Pac. R.R. Co., 352 U.S. at 63. Primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[,]” id. at 63–64, and “in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views[,]” id. at 64. “The primary jurisdiction doctrine rests on both a concern for uniform outcomes . . . and on the advantages of allowing an agency to apply its expert judgment[.]” Allnet Commc’n Serv., Inc. v. Nat’l Exch. Carrier Ass’n, 965 F.2d 1118, 1120 (D.C. Cir. 1992). “Expertise . . . is not merely technical but extends to the policy judgments needed to implement an agency’s mandate.” Id.

“This doctrine should, however, be invoked sparingly.” APCC Servs., Inc. v. WorldCom, Inc., 305 F. Supp. 2d 1, 13 (D.D.C. 2001) (citing United States v. McDonnell Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984)). “[T]he [C]ourt must always balance the benefits of seeking the agency’s aid with the need to resolve disputes fairly yet as expeditiously as possible.” Id. (quoting Miss. Power & Light Co. v. United Gas Pipeline Co., 532 F.2d 412, 419 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977)). Because referral often results in added expense and delay to the litigants, “when the agency’s position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer.” Miss. Power & Light Co., 532 F.2d at 419. Nevertheless, it is well-established that “the doctrine exists for the proper distribution of power between judicial and administrative parties and not for the convenience of the parties.” Red Lake Band of Chippewa Indians v.

Barlow, 846 F.2d 474, 476 (8th Cir. 1988) (quoting Distrigas of Mass. Corp. v. Boston Gas Co., 693 F.2d 1113, 1117 (1st Cir. 1982)).

“No fixed formula exists for applying the doctrine of primary jurisdiction.” W. Pac. R.R. Co., 352 U.S. at 64. Instead, courts must conduct a case-by-case analysis based on “whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” Id. These purposes include “the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions” and “the expert and specialized knowledge of the agencies involved.” United States v. Philip Morris USA, Inc., 787 F. Supp. 2d 68, 78 (D.D.C. 2011). Courts generally consider four factors in deciding whether to invoke primary jurisdiction:

- (1) whether the question at issue is within the conventional expertise of judges;
- (2) whether the question at issue lies particularly within the agency’s discretion or requires the exercise of agency expertise;
- (3) whether there exists a substantial danger of inconsistent rulings; and
- (4) whether a prior application to the agency has been made.

Id. (quoting Himmelman v. MCI Commc’ns Corp., 104 F. Supp. 2d 1, 4 (D.D.C. 2000)). “If the [C]ourt concludes the doctrine does apply, then the [C]ourt may stay or dismiss without prejudice the proceedings before it while the parties present the issue to the appropriate administrative agency.” Sirius XM, 65 F. Supp. 3d at 154 (citing Reiter v. Cooper, 507 U.S. 258, 268–69 & n.3 (1993)). However, “[w]here no administrative remedy exists, the doctrine of primary jurisdiction does not apply.” Rohr Indus., Inc. v. Wash. Metro. Area Transit Auth., 720 F.2d 1319, 1323 (D.C. Cir. 1983) (quoting United States v. Elrod, 627 F.2d 813, 818 (7th Cir. 1980)); see Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 254 (1951) (“[W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.”).

SoundExchange argues that the Court should refer this matter to the Board based on each of the four primary jurisdiction factors. The Court will address each of these factors in turn.

1. Whether the Question at Issue Is Within the Court’s Conventional Expertise or Requires the Exercise of the Board’s Expertise

SoundExchange argues that “[r]esolving this dispute will require an understanding of digital music services, the technologies they employ, business models and accounting, as well as an exercise of the discretion provided to the Board under the governing statutory royalty rate standard[,]” none of which are matters “within the conventional expertise of judges.” Pl.’s Suppl. Br. at 9 (internal citation omitted). SoundExchange also argues that these issues are clearly “within the [Board’s] discretion or require[] the exercise of [the Board’s] expertise” because “[t]he Board is the agency responsible for setting statutory royalty rates that satisfy particular statutory standards, and the agency that promulgated these regulations.” Id. In other words, SoundExchange asserts that “the present dispute falls squarely within the technical and policy expertise of the Board.” Id.

In response, Music Choice argues that “federal courts are the traditional venue to resolve royalty payment disputes—such as this one—that turn on interpretation of copyright statutes or regulations.” Def.’s Suppl. Br. at 16. Music Choice further asserts that “the Board has no unique knowledge or expertise with respect to the statutory license or disputed regulatory language at issue[]” because it “did not draft the disputed regulatory language; has never presided over a single contested proceeding for the Business Establishment License; and consequently has never heard any testimony or other evidence related to the license, market segment, or regulatory definition at issue.” Id. at 18. Finally, Music Choice argues that “if the mere presence of [] a dispute [regarding statutory or regulatory interpretation] were enough to

warrant invocation of primary jurisdiction, the Board could be overwhelmed with referrals that it was never intended—nor budgeted—to handle.” Id.

The first factor in assessing primary jurisdiction requires the Court to “assess whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise.” Philip Morris, 787 F. Supp. 2d at 78 (internal quotations and citation omitted); see Himmelman, 104 F. Supp. 2d at 4 (emphasizing that “the [C]ourt should defer to the appropriate specialized agency in cases that require administrative expertise and raise ‘issues of fact not within the conventional experience of judges’”) (citing Far East Conference v. United States, 342 U.S. 570, 574 (1952)). “The second factor . . . concerns ‘whether the question at issue is particularly within the agency’s discretion.’” Philip Morris, 787 F. Supp. 2d at 78 (quoting Ellis v. Tribune Television Co., 443 F.3d 71, 83 (2d Cir. 2006)).

Here, while the Court believes it would have the capacity to actively engage the issues presented by this case, the Court ultimately agrees with SoundExchange that the dispute “falls squarely within the technical and policy expertise of the Board[,]” Pl.’s Suppl. Br. at 9, and is not “within the conventional expertise of judges[,]” id.; see Philip Morris, 787 F. Supp. 2d at 78. As the Court previously noted, the Board’s mandate is in part to determine “reasonable rates and terms of royalty payments” for BES statutory licenses, 17 U.S.C. § 114(f), based on the CRJs’ technical expertise in copyright law and economics, see 17 U.S.C. § 802(a)(1). Further, “the expertise relevant to a primary jurisdiction decision ‘is not merely technical but extends to the policy judgments needed to implement an agency’s mandate.’” Sirius XM, 65 F. Supp. 3d at 156 (quoting Allnet, 965 F.2d at 1120)). Courts must be particularly deferential to the Board because

of the “difficult and multifaceted decisions delegated to [its] policy judgement[.]” Id. As the Circuit has noted:

First, the agency is required to estimate the effect of the royalty rate on the future of the music industry, which requires a forecast of the direction in which the future public interest lies based on the expert knowledge of the agency. Second, the agency has legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users. Finally, the statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the agency as part of its mandate to determine reasonable royalty rates.

SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1223–24 (D.C. Cir. 2009) (internal quotation marks, citations, and alterations omitted).

Sirius XM is particularly instructive here. 65 F. Supp. 3d 150. In that case, another member of this Court found that the Board’s use of the phrase “gross revenue exclusions” in a final determination of copyright royalty rates to be paid by satellite digital audio radio services was “ambiguous,” and therefore held that referral under the doctrine of primary jurisdiction was appropriate due to the Board’s “technical and policy expertise[.]” Sirius XM, 65 F. Supp. 3d at 155. Music Choice attempts to distinguish this case from Sirius XM by asserting that here the Board has “no unique knowledge or expertise with respect to the statutory license or disputed regulatory language at issue[.]” because it “did not draft the disputed regulatory language; has never presided over a single contested proceeding for the [BES]; and consequently has never heard any testimony or other evidence related to the license, market segment, or regulatory definition at issue.” Def.’s Suppl. Br. at 17–18. Although the parties in Sirius XM had engaged previously in contested proceedings to determine the relevant royalty rate, see 65 F. Supp. 3d at 152, there is no support for Music Choice’s contention that the Board lacks unique knowledge of expertise merely because it has only made determinations in the context of implementing industry settlements. According to the requirements of the Board, the composition of the three-

member Board at any given time must include one judge with “significant knowledge of copyright law,” and one judge with “significant knowledge of economics,” and the chief judge must have “at least 5 years of experience in adjudications, arbitrations, or court trials.” 17 U.S.C. § 802(a)(1). Most notably, Steven Ruwe, the current judge designated as the Board member with significant knowledge of copyright law has “15 years’ experience in copyright and intellectual property law,” having “served as assistant general counsel in the Copyright Office’s Office of the General Counsel” where he had responsibility for “many issues, including statutory licensing, CRB rate determinations, regulations, policy studies, and appellate litigation.”

Librarian of Congress Names New Copyright Judge, Library of Congress (Oct. 18, 2019), <https://www.loc.gov/item/prn-19-101/librarian-of-congress-names-new-copyright-royalty-judge/2019-10-18/>. Moreover, as SoundExchange correctly notes in response to Music Choice’s argument, while the Board did not initially author the disputed regulatory language, it now has jurisdiction over the regulations as the CARP’s successor agency. See Pl.’s Suppl. Br. at 8; see Determination of Rates and Terms for Business Establishment Services, 73 Fed. Reg. at 16,199. Thus, considering the particularly strong deference the Court must afford the Board’s technical and policy expertise and the complex nature of the Board’s decisions, the Court concludes that the Board possess unique knowledge or expertise regarding the regulatory language at issue in this case—even though it did not originally draft the regulations in question and has never presided over contested proceedings.

Finally, Music Choice contends that “if the mere presence of [] a dispute [regarding statutory or regulatory interpretation] were enough to warrant invocation of primary jurisdiction, the Board could be overwhelmed with referrals that it was never intended—nor budgeted—to handle.” Def.’s Suppl. Br. at 18. This concern is without support. Courts are, and will remain,

cautious in their invocation of primary jurisdiction, and the nature of the dispute in this case is not sufficient reason to deny making the referral to the Board. See Miss. Power & Light Co., 532 F.2d at 418–19 (emphasizing that “courts should be reluctant to invoke the doctrine of primary jurisdiction[,]” and listing factors for the Court to consider before invoking the doctrine). In fact, it is absolutely appropriate for the Court to refer disputes over ambiguous statutory or regulatory interpretation to the Board when in the Court’s discretion the Board is best suited to offer guidance in the first instance due to its expertise. See id.

Accordingly, the Court finds that because the issue of interpretation raised by this case is not “within the conventional experience of judges” and “is particularly within the [Board’s] discretion[,]” Philip Morris, 787 F. Supp. 2d at 78, for the reasons stated above, the first two primary jurisdiction factors weigh in favor of referral. The Court will next assess whether ruling on this issue without referring the matter to the Board would create a substantial danger of inconsistent rulings.

2. Whether There Is a Substantial Danger of Inconsistent Rulings

SoundExchange argues that “referral to the Board would also mitigate any danger of inconsistent rulings” because while “[a] resolution by this Court would bind only the parties to this proceeding[,]” “if the Board provides guidance on the proper interpretation of its regulations, that would offer certainty to SoundExchange and all other [BES] licensees in any future disputes[.]” Pl.’s Suppl. Br. at 9–10 (internal citations omitted). Music Choice responds that “the Court’s adjudication of this case by interpreting and then applying the definition of Gross Proceeds to the specific facts in dispute here would not create any readily apparent risk of inconsistent rulings.” Def.’s Suppl. Br. at 18.

“Among the central purposes of the primary jurisdiction doctrine is to encourage ‘the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions.’” Philip Morris, 787 F. Supp. 2d at 80 (quoting W. Pac. R.R. Co., 352 U.S. at 64). Generally, where there are more parties affected by a given interpretative issue, the concern of inconsistent rulings is greater. Cf. Sirius XM, 65 F. Supp. 3d at 155 (finding that uniformity was not a concern because the parties to the suit were the only parties affected by the rates in question). The danger of inconsistent rulings is also higher where the interpretative issue raises complex and technical questions. Cf. Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 191 (D.D.C. 2001) (finding no substantial danger of inconsistent rulings where resolving a tariff rate dispute required an understanding of the tariff, but no “insurmountable technical or intellectual hurdles.”).

Here, the Court agrees with SoundExchange that referral is appropriate because obtaining guidance from the Board regarding the proper interpretation of the regulations at issue would mitigate a substantial risk of inconsistent rulings. See Pl.’s Suppl. Br. at 9–10. As SoundExchange correctly notes, “Music Choice is not the only [BES] provider that relies on the statutory license.” Id. at 9 (footnote omitted). Indeed, SoundExchange and Music Choice were not the only parties involved when the Board issued its determination implementing the 2007 industry settlement. See Determination of Rates and Terms for Business Establishment Services, 73 Fed. Reg. at 16,199 (listing Sirius Satellite Radio, Inc. and XM Satellite Radio among the parties subject to the final settlement).⁶ Therefore, while a ruling by the Court would only bind the parties to this suit, guidance by the Board would offer guidance to SoundExchange, Music Choice, and any other BES licensees who may have made similar calculations of their gross

⁶ When this proceeding was commenced, Sirius Satellite Radio and XM Satellite Radio were separate entities, but they have since merged. See Sirius XM, 65 F. Supp. 3d at 152 & n.1.

proceeds. Additionally, this case presents “factual inquiries requiring the particular expertise of the [Board,]” cf. Lipton, 135 F. Supp. 2d at 191, as the parties’ dispute goes beyond the mere application of the rates themselves, and involves the more complex question of whether the Board set the BES rates “intending the types of revenue at issue to be included in or excluded from the [G]ross [Proceeds] calculation[.]” Sirius XM, 65 F. Supp. 3d at 156.

The Court finds Music Choice’s contrary arguments unpersuasive. First, Music Choice argues that because the Board “cannot and will not consider the specific facts related to the private dispute, apply its guidance to the individual royalty payment dispute, or even make recommendations to the district court related to the referred case,” the Board’s “ability to provide uniformity among individual cases[]” is “significantly limit[ed.]” Def.’s Suppl. Br. at 19. However, while the Board has no enforcement power, its issuance of interpretive guidance to district courts could alone mitigate the substantial risk of inconsistent rulings, even if it ultimately falls to the courts to enforce the Board’s guidance. See Philip Morris, 787 F. Supp. 2d at 80–81.

Music Choice further contends that because the BES license rates and terms are subject to periodic adjustment proceedings, “[i]n the unlikely event any ruling in this case creates any unforeseeable inconsistencies or other problems, SoundExchange may seek to amend those regulations in the next proceeding before the Board in the ordinary course.” Def.’s Suppl. Br. at 19. But the mere opportunity to amend the regulations to address any future inconsistent rulings does not mitigate the substantial risk of inconsistent rulings that could occur if this Court were to issue a ruling without seeking the Board’s interpretive guidance first. Cf. W. Pac. R. Co., 352 U.S. at 64–65 (“Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally

exercised, by preliminary resort . . . to agencies that are better equipped than courts by specialization[.]” (emphasis added).

Accordingly, because there is substantial danger of inconsistent rulings if the Court were to decide the regulatory interpretation issue in the first instance, the Court concludes that the third primary jurisdiction factor weighs in favor of referral to the Board. The Court will next assess whether there has been a prior application to the Board with respect to this issue.

3. Whether a Prior Application to the Board Has Been Made

Music Choice contends that “no prior application has been made to the Board, as would weigh in favor of invoking primary jurisdiction[.]” and that “SoundExchange chose to bring this case directly in this Court without making any application to the Board[.]” Def.’s Suppl. Br. at 19. SoundExchange does not dispute this point. See generally Pl.’s Suppl. Br.

“If prior application to the agency is present, this factor provides support for the conclusion that the doctrine of primary jurisdiction is appropriate,” but if that is not the case, “this factor may weigh against referral of the matter to the agency on the basis of primary jurisdiction.” Ellis, 443 F.3d at 89 (internal citations omitted) (emphasis added). Because SoundExchange filed its case in this Court without having made a prior application to the Board, this factor weighs against referral, but this alone does not compel denial of referral to the Board. Accordingly, the Court will consider whether judicial economy concerns ought to affect the Court’s assessment.

4. Whether the Court Must Refuse to Refer the Matter to the Board in Light of Judicial Economy Concerns

Beyond the four factors that the Court must assess, Music Choice argues that “[r]eferring any portion of this case to the Board would unduly delay the proceedings—especially as the [B]oard could not issue a ruling on the ultimate merits of the case, or even consider the specific

facts or claims present in this case.” Def.’s Suppl. Br. at 20 (internal citations omitted).

Specifically, Music Choice contends “a referral to the Board would inject several years of delay and considerable added expense into this case and would yield very limited—in scope and utility—general guidance, after which the case would return to the [C]ourt for full discovery and further proceedings to apply that guidance to the unique facts of this case.” Id. at 22. Music Choice further asserts that “[k]eeping the entire case in the district court is more likely to result in a speedy and fair resolution and as such, weighs against referring any part of this case to the [Board] in the first instance.” Id.

Courts “have sometimes refused to recognize a primary jurisdiction claim where a federal agency referral would result in undue delay.” Ellis, 443 F.3d at 90. Where the potential delay is determined to be “too great to justify a straightforward referral,” the Court may “either choose not to refer the matter to the agency, or take such other action as it deems appropriate.” Am. Auto. Mfrs. Ass’n v. Mass. Dept. of Env’tl. Prot., 163 F.3d 74, 81–82 (1st Cir. 1998). The significance of this delay is weighed against any benefit that might be achieved by having [the agency] resolve” the dispute. See Nat’l Commc’ns Ass’n v. Am. Tel. & Tel. Co., 46 F.3d 220, 225 (2d Cir. 1995) (finding that “[s]ince the district court can conclude this matter far more expeditiously, a potential delay of even two years” outweighed the benefits of agency referral).

Again, Music Choice’s argument is unavailing. Music Choice claims that “[p]rior experience shows that invoking primary jurisdiction in this case is likely to result in a very long delay.” Def.’s Suppl. Br. at 21. According to Music Choice, “[i]n Sirius XM, the [C]ourt’s referral to the Board resulted in a more than three-year delay after which, having received the regulatory guidance of the Board, the court still had to adjudicate the payment dispute between the parties.” Id. (first citing Sirius XM, 65 F. Supp. 3d at 157; then citing Determination of

Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 82 Fed. Reg. 56,725, 56,725–56,735 (Nov. 30, 2017)). While SiriusXM is clearly analogous to this case in many respects, the particular length of delay following the referral is not necessarily indicative of any delay resulting from a referral here, because there is no significant evidence to support a finding in the instant case that referral would result in this type of inordinate delay. See Am. Auto. Mfrs. Ass’n, 163 F.3d at 81–82 (stating that “[i]n cases where the potential for delay is found to be too great to justify a straightforward referral,” the Court may exercise discretion not to refer). In any event, the Court has already concluded that the issue raised by this case requires the expertise of the Board and that declining to refer the case to the Board presents substantial risk of inconsistent interpretations. Cf. Nat’l Commc’ns Ass’n, 46 F.3d at 223. Therefore, with a request from the Court that the Board address the question being referred to it as expeditiously as possible, the Court finds that the balance of factors strongly weigh in favor of the Court exercising its discretion under the primary jurisdiction doctrine to refer this matter to the Board, despite the risk of further delay.

III. CONCLUSION

In sum, the balance of all the relevant factors, including judicial economy, weigh in favor of referring the question of regulatory interpretation raised by this case to the Board pursuant to the doctrine of primary jurisdiction. As this Circuit has stated, “[i]n general, when primary jurisdiction lies with an administrative agency, the district court should stay the proceedings in front of it[.]” Am. Ass’n of Cruise Passengers v. Cunard Line, Ltd., 31 F.3d 1184, 1187 (D.C. Cir. 1994). Accordingly, the Court will stay all proceedings in this case, pending a decision by the Board.

SO ORDERED this 20th day of December, 2021.⁷

REGGIE B. WALTON
United States District Judge

⁷ The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

Proof of Delivery

I hereby certify that on Wednesday, February 09, 2022, I provided a true and correct copy of the Motion of SoundExchange, Inc. to Reopen Business Establishment Service Rate Proceedings for the Limited Purpose of Interpreting Regulations on Referral From the U.S. District Court for the District of Columbia to the following:

Sirius XM Radio, Inc., represented by Todd Larson, served via MANUALEEMAIL

Clear Channel Communications, Inc., represented by Bruce Joseph, served via USMAIL

Muzak LLC, represented by Gary R Greenstein, served via ESERVICE at
ggreenstein@wsgr.com

Music Reports, Inc., represented by William Colitre, served via MANUALEEMAIL

Music Choice, represented by Paul Fakler, served via MANUALEEMAIL

DMX, Inc., represented by Gary R Greenstein, served via ESERVICE at
ggreenstein@wsgr.com

Pandora Media, Inc., represented by Milton E. Olin, Jr., served via USMAIL

Signed: /s/ Steven R. Englund