

**Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

Docket No. 16-CRB-0009-CD (2014-2017)

**SETTLING DEVOTIONAL CLAIMANTS' NOTICE OF INTENT TO PROCEED
WITH MOTION TO COMPEL DISCOVERY AGAINST PUBLIC TELEVISION AND
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN SUPPORT**

Pursuant to the Joint Motion for Extension of Time to File a Response to the Settling Devotional Claimants' Motion to Compel Discovery, the SDC have reviewed PTV's supplemental production and have conferred extensively with PTV's counsel to try to resolve remaining issues. Unfortunately, the parties were unable to reach agreement on an acceptable scope of production. Therefore, the SDC hereby give notice that they intend to proceed with their motion to compel, and they request that PTV respond within ten business days, as agreed in the parties' joint motion.

The SDC further move for leave to file the attached supplemental brief and supporting exhibits in support of their motion to compel. The purpose of the supplemental brief is to present new evidence that has come to light in PTV's supplemental production on August 29, 2022, subsequent to the filing of the SDC's motion to compel on August 19, 2022, further supporting the relief requested in the SDC's motion to compel and demonstrating that PTV's previous discovery responses were inaccurate or incomplete. The Judges have discretion to grant a motion to supplement based on material new evidence that was not available at the time of the filing of the motion. *See, e.g., Order Granting SDC Motion to De-Designate and Denying Worldwide Subsidy Group LLC's Motion for Sanctions*, No. 14-CRB-0010-CD/SD

SDC's Motion to File Supplemental Brief 1

PUBLIC REDACTED VERSION

(2010-13) (June 12, 2020) at 11 (“The amended bankruptcy petition is evidence that did not exist at the time the SDC filed its Motion to De-Designate. ... The Motion to Supplement appropriately brings this evidence to the Judges’ attention and explains how it bears on the resolution of the Motion to De-Designate. The Judges GRANT the Motion to Supplement on that basis”). PTV has not yet opposed the SDC’s motion, and it will not be prejudiced by the filing of a supplemental brief. To grant the SDC’s motion to supplement its pending motion to compel would be more efficient and more conducive to judicial economy than requiring the SDC to file a new motion to compel seeking the same relief based on new evidence.

Background and Argument

In the SDC’s motion to compel, filed on August 19, 2022, the SDC pointed out that PTV’s counsel had informed the SDC that PTV had already produced “any regression specifications or regression results reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17” *See* SDC Motion at 5 (citing Ex. 6, Email chain between M. MacLean and D. Cho (Aug. 8-16, 2022)). Because it was clear to the SDC that PTV’s expert and his team had tested more models than they had disclosed, the SDC suspected that PTV’s statement was either inaccurate or based on an unreasonably narrow construction of the words “reviewed” or “considered.” PTV’s supplemental production on August 29, 2022, demonstrates that the SDC’s suspicions were well-founded.

On the evening of August 29, 2022, as part of an effort to resolve issues presented in the SDC’s motion to compel, PTV produced 517 separate files, consisting of three PowerPoint presentations and 514 code files, written in STATA, containing regression

PUBLIC REDACTED VERSION

specifications tested by PTV's expert witness, Dr. John H. Johnson, IV, and his team. None of these PowerPoint presentations or code files had been produced prior to the SDC's motion to compel. The code files contained approximately 403 unique regression specifications for the calculation of coefficients for minutes of all program categories at issue in this proceeding, apparently for the purpose of calculating implied shares for the years at issue. Many of these regression specifications were applied to multiple different regression datasets or subsets of regression data.

The regression specifications applied many different combinations of independent variables, fixed effects, and functional forms. They even show experimentation with as many as 42 different dependent variables (on the left side of the regression equation), including log transformations.

Except for a small number of results presented in a single PowerPoint presentation (Ex. A, PTV015812), addressed below, PTV produced no regression results or implied shares for the hundreds of tests performed. *See* Ex. B, Email chain between M. MacLean, D. Cho, and R. Dove (Aug. 29-Sep. 15, 2022), at M. MacLean email of Aug. 30, 2022. Nor did PTV produce the regression datasets that were called upon by most of the code files to calculate regression results. *Id.* at M. MacLean emails of Sep. 14, 2022. Nor did PTV produce any information showing how implied shares were calculated from the regression results. *Id.* at M. MacLean email of Aug. 30, 2022. Finally, metadata from all the code files was stripped, so that it was impossible to tell when or in what order the tests were performed, thereby rendering it impossible to see how Dr. Johnson's final specification evolved over time and how it may have been influenced by the test results. *Id.*

PUBLIC REDACTED VERSION

We know that PTV’s expert and his team calculated regression results and implied shares using the specifications in the code files, because PTV produced a PowerPoint presentation, dated February 23, 2022, containing the regression results and implied shares from approximately seventeen regression models (plus two additional models calculated based only on 3.75% fund royalties, therefore excluding PTV). *See* Ex. A. None of these models were the same as the models presented in Dr. Johnson’s written testimony, and some were very different, including different functional forms, independent variables, and dependent variables. It appears based on the PowerPoint presentation that Dr. Johnson’s team was then testing a “baseline” model that used a dependent variable that was different from the model in his final testimony, suggesting a significant change of approach at some point after the preparation of the PowerPoint presentation. *Id.* at 4 (PTV015815).

We also know that the tests returned wide ranges of implied shares. Among the seventeen models presented in the PowerPoint presentation, average shares over the four years show the following ranges:

- PTV: [REDACTED] (varying by a factor of 1.3)
- JSC: [REDACTED] (varying by a factor of 3.3)
- SDC: [REDACTED] (varying by a factor of 5.0)
- CCG: [REDACTED] (varying by a factor of 10.3)
- CTV: [REDACTED] (varying by a factor of 2.6)
- PS: [REDACTED] (varying by a factor of 1.4)

Id. at 3-18. Only one of the models tested by Dr. Johnson and his team resulted in an average PTV share that was (slightly) higher than the average PTV share of 48.5% in Dr. Johnson’s final model. But that model (described as [REDACTED])

PUBLIC REDACTED VERSION

[REDACTED]) resulted in statistically insignificant coefficients for the CCG share, which may explain why Dr. Johnson rejected the model. *Id.* at 10.¹ Because PTV's shares are consistently the highest and most stable across these seventeen models, and considering that they are all higher than some of the PTV shares that SDC's expert witnesses found in their sensitivity tests (some of which were very similar to regression specifications that Dr. Johnson's team tried) (*see* SDC Amended Written Direct Statement, Testimony of Erkan Erdem, Ph.D. (Sep. 2, 2022), at Exs. 3-6), the SDC have cause to suspect that the models in PTV's PowerPoint presentation were at least partially pre-selected from among the hundreds that were tried, so that we are probably only seeing the results of models that gave PTV high implied shares.

PTV's supplemental production demonstrates the inaccuracy and incompleteness of PTV's earlier representation that it had produced "any regression specifications or regression results reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17" SDC Motion at 5 (citing Ex. 6, Email chain between M. MacLean and D. Cho (Aug. 8-16, 2022)). The notion that Dr. Johnson did not "review" or "consider" these hundreds of specifications and their results, or at least the PowerPoint presentation, is absurd, to say the least. (Or if he didn't review or consider the process by which his model was selected, it

¹ PTV failed to mark the PowerPoint presentation as Restricted under the Protective Order, but PTV indicated its intent in an email to designate its entire production as Restricted. The SDC do not agree that the PowerPoint presentation or code files in PTV's supplemental production, none of which contain any underlying data or third-party information, are properly designated as Restricted. Nevertheless, the SDC will treat the information as Restricted until these issues can be more fully addressed.

PUBLIC REDACTED VERSION

would mean he is presenting someone else's work as his own, which would be highly relevant for the Judges to know.)

The SDC met and conferred with PTV's counsel regarding the completeness of the supplemental production. After PTV's counsel indicated that they might not have all of the information requested, but that they were willing to produce some of it, the SDC requested, at a minimum, that PTV produce:

- *Every* document that sets forth any results of any tests or models performed, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If the results were ever set forth in any summaries, tables, menus, or other format for review, those documents also must be produced. If analysts made notes or highlighting on the results (like the red and yellow highlighting that Professor Crawford's team applied to shares and coefficients that they did not like), those must be included. ...
- For all tests or models in which implied shares were calculated, we also need the codes and other documents showing how the implied shares were calculated. ...
- Metadata or other information sufficient to show when the tests were run. If you have dates in the metadata for either the code files or the output files, that would be great. If you don't have that metadata for some reason, then you may have to look elsewhere. ...

Ex. B, at M. MacLean emails of Sep. 8 and 14, 2022. After further review, and in response to PTV's counsel's inaccurate suggestion that the SDC's experts could run the 517 code files themselves to get the results (which would have revealed, at most, only the regression coefficients, but not the implied shares, which would require further calculations based on assumptions about how Dr. Johnson might have interpreted the coefficients), the SDC noted that "a majority of the regression specifications use regression datasets that have not been produced," and they requested all of the:

- ... underlying regression datasets. ...

PUBLIC REDACTED VERSION

Id. at M. MacLean emails of Sep. 14, 2022. The SDC even provided a list of the file names of the regression datasets needed to run the codes. *Id.*

PTV's counsel offered at various points to provide vaguely defined subsets of the categories of information the SDC requested, but only if the SDC would agree, prior to seeing the productions and without assurances that no responsive documents were being withheld, to withdraw their motion to compel. PTV's counsel refused to agree to produce some of the requested categories of information, and they refused to confirm that they would provide all of the requested information in whatever form it was kept, suggesting that they would not produce regression results or implied shares presented in "any summaries, tables, menus, or other format for review," thereby allowing the SDC to see what Dr. Johnson and his team were able to see. *Id.* at D. Cho email of Sep. 14, 2022, and R. Dove email of Sep. 15, 2022.

Thus, following conferences and PTV's supplemental production, the SDC are left with the certain knowledge that specific documents have been withheld, including documents that PTV's counsel have identified as available to produce but that are being withheld (including regression results, implied shares, date information, and the underlying regression datasets to run the codes that have been produced). The SDC are also have evidence that even more documents are responsive to their requests but are being withheld without being identified by PTV's counsel, such as additional summaries, tables, or menus of results (like the ones in the February 23, 2022, PowerPoint presentation that was produced, but which contains only a small number of the hundreds of tests that were tried), as well as codes and other documents showing how implied shares were calculated. And, of course, there may be emails and other communications, some of which PTV might claim (incorrectly) to be

PUBLIC REDACTED VERSION

privileged, that may explain what Dr. Johnson and his team were looking for when they ran these previously undisclosed tests.

The SDC take to heart the Judges’ admonition from the 2010-13 cable proceeding: “If the SDC were concerned that CTV was interpreting their follow-up request too narrowly, it could have clarified the request with CTV’s counsel or, if the SDC suspected that CTV had responsive documents that it was not providing, the SDC could have filed a motion to compel.” *Order Denying SDC Motion to Strike Testimony of Gregory S. Crawford*, No. 14-CRB-0010-CD (2010-13) (Apr. 16, 2018). The SDC are so concerned, and they do so suspect. The SDC therefore have no choice but to proceed with their motion, including all relief sought.

Conclusion

For these reasons, the SDC were unable to resolve the discovery dispute, and they therefore must proceed with all relief sought in their motion to compel. The SDC request the Judges to grant them leave to file the attached supplemental brief, bringing these newly-discovered facts to the Judges’ attention in support of the SDC’s motion to compel.

Date: September 15, 2022

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

/s/ Matthew J. MacLean

Arnold P. Lutzker, Esq. (D.C. Bar No. 101806)

arnie@lutzker.com

Benjamin Sternberg (D.C. Bar No. 1016576)

ben@lutzker.com

LUTZKER & LUTZKER LLP

1233 20th Street, NW, Suite 703

Washington, D.C. 20036

Telephone: 202-408-7600

Fax: 202-408-7677

PUBLIC REDACTED VERSION

Matthew J. MacLean (D.C. Bar No. 479257)

matthew.macleam@pillsburylaw.com

Michael A. Warley (D.C. Bar 1028686)

michael.warley@pillsburylaw.com

Jessica T. Nyman (D.C. Bar No. 1030613)

jessica.nyman@pillsburylaw.com

Caroline Block

caroline.block@pillsburylaw.com

PILLSBURY WINTHROP SHAW PITTMAN

LLP

1200 Seventeenth Street, NW

Washington, D.C. 20036

Telephone: 202-663-8525

Fax: 202-663-8007

Counsel for Settling Devotional Claimants

**Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

Docket No. 16-CRB-0009-CD (2014-2017)

**SETTLING DEVOTIONAL CLAIMANTS' SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTION TO COMPEL**

The SDC submit their supplemental brief and supporting exhibits in support of their motion to compel. The purpose of the supplemental brief is to present new evidence that has come to light in PTV's supplemental production on August 29, 2022, subsequent to the filing of the SDC's motion to compel on August 19, 2022, further supporting the relief requested in the SDC's motion to compel and demonstrating that PTV's previous discovery responses were inaccurate or incomplete. The Judges have discretion to grant a motion to supplement based on material new evidence that was not available at the time of the filing of the motion. *See, e.g., Order Granting SDC Motion to De-Designate and Denying Worldwide Subsidy Group LLC's Motion for Sanctions*, No. 14-CRB-0010-CD/SD (2010-13) (June 12, 2020) at 11 ("The amended bankruptcy petition is evidence that did not exist at the time the SDC filed its Motion to De-Designate. ... The Motion to Supplement appropriately brings this evidence to the Judges' attention and explains how it bears on the resolution of the Motion to De-Designate. The Judges GRANT the Motion to Supplement on that basis").

Background and Argument

In the SDC's motion to compel, filed on August 19, 2022, the SDC pointed out that PTV's counsel had informed the SDC that PTV had already produced "any regression specifications or regression results reviewed or considered by Dr. Johnson in the course of

PUBLIC REDACTED VERSION

conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17” *See* SDC Motion at 5 (citing Ex. 6, Email chain between M. MacLean and D. Cho (Aug. 8-16, 2022)). Because it was clear to the SDC that PTV’s expert and his team had tested more models than they had disclosed, the SDC suspected that PTV’s statement was either inaccurate or based on an unreasonably narrow construction of the words “reviewed” or “considered.” PTV’s supplemental production on August 29, 2022, demonstrates that the SDC’s suspicions were well-founded.

On the evening of August 29, 2022, as part of an effort to resolve issues presented in the SDC’s motion to compel, PTV produced 517 separate files, consisting of three PowerPoint presentations and 514 code files, written in STATA, containing regression specifications tested by PTV’s expert witness, Dr. John H. Johnson, IV, and his team. None of these PowerPoint presentations or code files had been produced prior to the SDC’s motion to compel. The code files contained approximately 403 unique regression specifications for the calculation of coefficients for minutes of all program categories at issue in this proceeding, apparently for the purpose of calculating implied shares for the years at issue. Many of these regression specifications were applied to multiple different regression datasets or subsets of regression data.

The regression specifications applied many different combinations of independent variables, fixed effects, and functional forms. They even show experimentation with as many as 42 different dependent variables (on the left side of the regression equation), including log transformations.

Except for a small number of results presented in a single PowerPoint presentation (Ex. A, PTV015812), addressed below, PTV produced no regression results or implied shares

PUBLIC REDACTED VERSION

for the hundreds of tests performed. *See* Ex. B, Email chain between M. MacLean, D. Cho, and R. Dove (Aug. 29-Sep. 15, 2022), at M. MacLean email of Aug. 30, 2022. Nor did PTV produce the regression datasets that were called upon by most of the code files to calculate regression results. *Id.* at M. MacLean emails of Sep. 14, 2022. Nor did PTV produce any information showing how implied shares were calculated from the regression results. *Id.* at M. MacLean email of Aug. 30, 2022. Finally, metadata from all the code files was stripped, so that it was impossible to tell when or in what order the tests were performed, thereby rendering it impossible to see how Dr. Johnson’s final specification evolved over time and how it may have been influenced by the test results. *Id.*

We know that PTV’s expert and his team calculated regression results and implied shares using the specifications in the code files, because PTV produced a PowerPoint presentation, dated February 23, 2022, containing the regression results and implied shares from approximately seventeen regression models (plus two additional models calculated based only on 3.75% fund royalties, therefore excluding PTV). *See* Ex. A. None of these models were the same as the models presented in Dr. Johnson’s written testimony, and some were very different, including different functional forms, independent variables, and dependent variables. It appears based on the PowerPoint presentation that Dr. Johnson’s team was then testing a “baseline” model that used a dependent variable that was different from the model in his final testimony, suggesting a significant change of approach at some point after the preparation of the PowerPoint presentation. *Id.* at 4 (PTV015815).

We also know that the tests returned wide ranges of implied shares. Among the seventeen models presented in the PowerPoint presentation, average shares over the four years show the following ranges:

PUBLIC REDACTED VERSION

- PTV: [REDACTED] (varying by a factor of 1.3)
- JSC: [REDACTED] (varying by a factor of 3.3)
- SDC: [REDACTED] (varying by a factor of 5.0)
- CCG: [REDACTED] (varying by a factor of 10.3)
- CTV: [REDACTED] (varying by a factor of 2.6)
- PS: [REDACTED] (varying by a factor of 1.4)

Id. at 3-18. Only one of the models tested by Dr. Johnson and his team resulted in an average PTV share that was (slightly) higher than the average PTV share of 48.5% in Dr. Johnson's final model. But that model (described as [REDACTED] [REDACTED]) resulted in statistically insignificant coefficients for the CCG share, which may explain why Dr. Johnson rejected the model. *Id.* at 10.¹ Because PTV's shares are consistently the highest and most stable across these seventeen models, and considering that they are all higher than some of the PTV shares that SDC's expert witnesses found in their sensitivity tests (some of which were very similar to regression specifications that Dr. Johnson's team tried) (*see* SDC Amended Written Direct Statement, Testimony of Erkan Erdem, Ph.D. (Sep. 2, 2022), at Exs. 3-6), the SDC have cause to suspect that the models in PTV's PowerPoint presentation were at least partially pre-selected from among the hundreds that were tried, so that we are probably only seeing the results of models that gave PTV high implied shares.

¹ PTV failed to mark the PowerPoint presentation as Restricted under the Protective Order, but PTV indicated its intent in an email to designate its entire production as Restricted. The SDC do not agree that the PowerPoint presentation or code files in PTV's supplemental production, none of which contain any underlying data or third-party information, are properly designated as Restricted. Nevertheless, the SDC will treat the information as Restricted until these issues can be more fully addressed.

PUBLIC REDACTED VERSION

PTV's supplemental production demonstrates the inaccuracy and incompleteness of PTV's earlier representation that it had produced "any regression specifications or regression results reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17" SDC Motion at 5 (citing Ex. 6, Email chain between M. MacLean and D. Cho (Aug. 8-16, 2022)). The notion that Dr. Johnson did not "review" or "consider" these hundreds of specifications and their results, or at least the PowerPoint presentation, is absurd, to say the least. (Or if he didn't review or consider the process by which his model was selected, it would mean he is presenting someone else's work as his own, which would be highly relevant for the Judges to know.)

The SDC met and conferred with PTV's counsel regarding the completeness of the supplemental production. After PTV's counsel indicated that they might not have all of the information requested, but that they were willing to produce some of it, the SDC requested, at a minimum, that PTV produce:

- *Every* document that sets forth any results of any tests or models performed, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If the results were ever set forth in any summaries, tables, menus, or other format for review, those documents also must be produced. If analysts made notes or highlighting on the results (like the red and yellow highlighting that Professor Crawford's team applied to shares and coefficients that they did not like), those must be included. ...
- For all tests or models in which implied shares were calculated, we also need the codes and other documents showing how the implied shares were calculated. ...
- Metadata or other information sufficient to show when the tests were run. If you have dates in the metadata for either the code files or the output files, that would be great. If you don't have that metadata for some reason, then you may have to look elsewhere. ...

PUBLIC REDACTED VERSION

Ex. B, at M. MacLean emails of Sep. 8 and 14, 2022. After further review, and in response to PTV's counsel's inaccurate suggestion that the SDC's experts could run the 517 code files themselves to get the results (which would have revealed, at most, only the regression coefficients, but not the implied shares, which would require further calculations based on assumptions about how Dr. Johnson might have interpreted the coefficients), the SDC noted that "a majority of the regression specifications use regression datasets that have not been produced," and they requested all of the:

- ... underlying regression datasets. ...

Id. at M. MacLean emails of Sep. 14, 2022. The SDC even provided a list of the file names of the regression datasets needed to run the codes. *Id.*

PTV's counsel offered at various points to provide vaguely defined subsets of the categories of information the SDC requested, but only if the SDC would agree, prior to seeing the productions and without assurances that no responsive documents were being withheld, to withdraw their motion to compel. PTV's counsel refused to agree to produce some of the requested categories of information, and they refused to confirm that they would provide all of the requested information in whatever form it was kept, suggesting that they would not produce regression results or implied shares presented in "any summaries, tables, menus, or other format for review," thereby allowing the SDC to see what Dr. Johnson and his team were able to see. *Id.* at D. Cho email of Sep. 14, 2022, and R. Dove email of Sep. 15, 2022.

Thus, following conferences and PTV's supplemental production, the SDC are left with the certain knowledge that specific documents have been withheld, including documents that PTV's counsel have identified as available to produce but that are being withheld (including regression results, implied shares, date information, and the underlying regression

PUBLIC REDACTED VERSION

datasets to run the codes that have been produced). The SDC are also have evidence that even more documents are responsive to their requests but are being withheld without being identified by PTV’s counsel, such as additional summaries, tables, or menus of results (like the ones in the February 23, 2022, PowerPoint presentation that was produced, but which contains only a small number of the hundreds of tests that were tried), as well as codes and other documents showing how implied shares were calculated. And, of course, there may be emails and other communications, some of which PTV might claim (incorrectly) to be privileged, that may explain what Dr. Johnson and his team were looking for when they ran these previously undisclosed tests.

The SDC take to heart the Judges’ admonition from the 2010-13 cable proceeding: “If the SDC were concerned that CTV was interpreting their follow-up request too narrowly, it could have clarified the request with CTV’s counsel or, if the SDC suspected that CTV had responsive documents that it was not providing, the SDC could have filed a motion to compel.” *Order Denying SDC Motion to Strike Testimony of Gregory S. Crawford*, No. 14-CRB-0010-CD (2010-13) (Apr. 16, 2018). The SDC are so concerned, and they do so suspect. The SDC therefore have no choice but to proceed with their motion, including all relief sought.

Conclusion

For these reasons, the SDC request the Judges to grant in full the relief requested in the SDC’s motion to compel.

Date: September 15, 2022

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

/s/ Matthew J. MacLean

Arnold P. Lutzker, Esq. (D.C. Bar No. 101806)

arnie@lutzker.com

Benjamin Sternberg (D.C. Bar No. 1016576)

ben@lutzker.com

LUTZKER & LUTZKER LLP

1233 20th Street, NW, Suite 703

Washington, D.C. 20036

Telephone: 202-408-7600

Fax: 202-408-7677

Matthew J. MacLean (D.C. Bar No. 479257)

matthew.macleam@pillsburylaw.com

Michael A. Warley (D.C. Bar 1028686)

michael.warley@pillsburylaw.com

Jessica T. Nyman (D.C. Bar No. 1030613)

jessica.nyman@pillsburylaw.com

Caroline Block

caroline.block@pillsburylaw.com

PILLSBURY WINTHROP SHAW PITTMAN

LLP

1200 Seventeenth Street, NW

Washington, D.C. 20036

Telephone: 202-663-8525

Fax: 202-663-8007

Counsel for Settling Devotional Claimants

**Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

Docket No. 16-CRB-0009-CD (2014-2017)

DECLARATION OF MATTHEW J. MACLEAN

I, Matthew J. MacLean, hereby state and declare as follows:

1. I am a litigation partner in the law firm Pillsbury Winthrop Shaw Pittman LLP. I represent the Settling Devotional Claimants (“SDC”) in this matter.
2. As set forth in the SDC’s motion to compel, filed on August 19, 2022, the SDC pointed out that PTV’s counsel had informed the SDC that PTV had already produced “any regression specifications or regression results reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17 ...” *See* SDC Motion at 5 (citing Ex. 6, Email chain between M. MacLean and D. Cho (Aug. 8-16, 2022)). Because it was clear to the SDC that PTV’s expert and his team had tested more models than they had disclosed, the SDC suspected that PTV’s statement was either inaccurate or based on an unreasonably narrow construction of the words “reviewed” or “considered.”
3. On the evening of August 29, 2022, as part of an effort to resolve issues presented in the SDC’s motion to compel, PTV produced 517 separate files, consisting of three PowerPoint presentations and 514 code files, written in STATA, containing regression specifications tested by PTV’s expert witness, Dr. John H. Johnson, IV, and his team. None

Public Redacted Version

of these PowerPoint presentations or code files had been produced prior to the SDC's motion to compel.

4. I have personally reviewed each of the 514 code files produced by PTV in its supplemental production. The code files are written in STATA, an integrated statistical software package that uses an English-based computer programming code language. From my years of work in copyright royalty proceedings involving data analysis using STATA, aided by my pre-law background as a data analyst and computer programmer in other English-based computer programming code languages for an engineering firm, I am able proficiently to read and understand regression specifications and other operations in STATA.

5. The code files produced contained approximately 403 syntactically unique regression specifications for the calculation of coefficients for minutes of all program categories at issue in this proceeding, apparently for the purpose of calculating implied shares for the years at issue. Many of these regression specifications were applied to multiple different regression datasets or subsets of regression data. (Some syntactically unique specifications may have been functionally identical. For example, if different variable names were used to refer to the same underlying data, that would be difficult to detect without review of the regression datasets that were used.)

6. The regression specifications applied many different combinations of independent variables, fixed effects, and functional forms. They even show experimentation with as many as 42 different dependent variables (on the left side of the regression equation), including log transformations.

7. Except for a small number of results presented in a single PowerPoint presentation (a true and correct copy of which is attached as Ex. A), addressed below, PTV produced no

Public Redacted Version

regression results or implied shares for the hundreds of tests performed. *See* Ex. B, which is a true and correct copy of an email chain between me and PTV’s counsel (Aug. 29-Sep. 15, 2022), at M. MacLean email of Aug. 30, 2022. Nor did PTV produce the regression datasets that were called upon by most of the code files to calculate regression results. *Id.* at M. MacLean emails of Sep. 14, 2022. Nor did PTV produce any information showing how implied shares were calculated from the regression results. *Id.* at M. MacLean email of Aug. 30, 2022. Finally, metadata from all the code files was stripped, so that it was impossible to tell when or in what order the tests were performed, thereby rendering it impossible to see how Dr. Johnson’s final specification evolved over time and how it may have been influenced by the test results. *Id.*

8. We know that PTV’s expert and his team calculated regression results and implied shares using the specifications in the code files, because PTV produced a PowerPoint presentation, dated February 23, 2022, containing the regression results and implied shares from approximately seventeen regression models (plus two additional models calculated based only on 3.75% fund royalties, therefore excluding PTV). *See* Ex. A. None of these models were the same as the models presented in Dr. Johnson’s written testimony, and some were very different, including different functional forms, independent variables, and dependent variables. It appears based on the PowerPoint presentation that Dr. Johnson’s team was then testing a “baseline” model that used a dependent variable that was different from the model in his final testimony, suggesting a significant change of approach at some point after the preparation of the PowerPoint presentation. *Id.* at 4 (PTV015815).

Public Redacted Version

9. We also know that the tests returned wide ranges of implied shares. Among the seventeen models presented in the PowerPoint presentation, average shares over the four years show the following ranges:

- PTV: [REDACTED] (varying by a factor of 1.3)
- JSC: [REDACTED] (varying by a factor of 3.3)
- SDC: [REDACTED] (varying by a factor of 5.0)
- CCG: [REDACTED] (varying by a factor of 10.3)
- CTV: [REDACTED] (varying by a factor of 2.6)
- PS: [REDACTED] (varying by a factor of 1.4)

Id. at 3-18. Only one of the models tested by Dr. Johnson and his team resulted in an average PTV share that was (slightly) higher than the average PTV share of 48.5% in Dr. Johnson's final model. But that model (described as [REDACTED]
[REDACTED]) resulted in statistically insignificant coefficients for the CCG share, which may explain why Dr. Johnson rejected the model. *Id.* at 10.¹ Because PTV's shares are consistently the highest and most stable across these seventeen models, and considering that they are all higher than some of the PTV shares that SDC's expert witnesses found in their sensitivity tests (some of which were very similar to regression specifications that Dr. Johnson's team tried) (*see* SDC Amended Written Direct Statement, Testimony of Erkan Erdem, Ph.D. (Sep. 2, 2022), at Exs. 3-6), I suspect that the models in PTV's PowerPoint

¹ PTV failed to mark the PowerPoint presentation as Restricted under the Protective Order, but PTV indicated its intent in an email to designate its entire production as Restricted. The SDC do not agree that the PowerPoint presentation or code files in PTV's supplemental production, none of which contain any underlying data or third-party information, are properly designated as Restricted. Nevertheless, the SDC will treat the information as Restricted until these issues can be more fully addressed.

Public Redacted Version

presentation were at least partially pre-selected from among the hundreds that were tried, so that we are probably only seeing the results of models that gave PTV high implied shares.

10. Along with SDC's counsel Arnold Lutzker, Michael Warley, and Jessica Nyman, I met and conferred with PTV's counsel, Ronald Dove and Dustin Cho, regarding the completeness of the supplemental production. After PTV's counsel indicated that they might not have all of the information requested, but that they were willing to produce some of it, I requested, at a minimum, that PTV produce:

- *Every* document that sets forth any results of any tests or models performed, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If the results were ever set forth in any summaries, tables, menus, or other format for review, those documents also must be produced. If analysts made notes or highlighting on the results (like the red and yellow highlighting that Professor Crawford's team applied to shares and coefficients that they did not like), those must be included. ...
- For all tests or models in which implied shares were calculated, we also need the codes and other documents showing how the implied shares were calculated. ...
- Metadata or other information sufficient to show when the tests were run. If you have dates in the metadata for either the code files or the output files, that would be great. If you don't have that metadata for some reason, then you may have to look elsewhere. ...

Ex. B, at M. MacLean emails of Sep. 8 and 14, 2022. After further review, and in response to PTV's counsel's inaccurate suggestion that the SDC's experts could run the 517 code files themselves to get the results (which would have revealed, at most, only the regression coefficients, but not the implied shares, which would require further calculations based on assumptions about how Dr. Johnson might have interpreted the coefficients), I noted that "a majority of the regression specifications use regression datasets that have not been produced," and I requested all of the:

- ... underlying regression datasets. ...

Public Redacted Version

Id. at M. MacLean emails of Sep. 14, 2022. I provided a list of the file names of the regression datasets needed to run the codes. *Id.*

11. PTV’s counsel offered at various points to provide vaguely defined subsets of the categories of information that I requested, but only if the SDC would agree, prior to seeing the productions and without assurances that no responsive documents were being withheld, to withdraw their motion to compel. PTV’s counsel refused to agree to produce some of the requested categories of information, and they refused to confirm that they would provide all of the requested information in whatever form it was kept, suggesting that they would not produce regression results or implied shares presented in “any summaries, tables, menus, or other format for review,” thereby allowing the SDC to see what Dr. Johnson and his team were able to see. *Id.* at D. Cho email of Sep. 14, 2022, and R. Dove email of Sep. 15, 2022.

12. The redacted portions of paragraph 9 above in the public version of this declaration, the redacted portions of the SDC’s Notice of Intent to Proceed with Motion to Compel Discovery Against Public Television and Motion for Leave to File Supplemental Brief in Support, the redacted portions of the SDC’s Supplemental Brief in Support of their Motion to Compel, and the entirety of Exhibit A are submitted as Restricted – Subject to Protective Orders in Docket Nos. 16-CRB-0009-CD and 16-CRB-0010-SD (2014-17) solely because they contain or may be argued to contain information that has been designated as Restricted by PTV.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed September 15, 2022, in McLean, Virginia.

 /s/ Matthew J. MacLean
Matthew J. MacLean

EXHIBIT A

PTV PowerPoint Presentation

[Omitted in Public Redacted Version]

EXHIBIT B

Email Chain between SDC and PTV Counsel (Aug. 29-Sep. 15, 2022)

MacLean, Matthew J.

From: MacLean, Matthew J.
Sent: Thursday, September 15, 2022 12:40 PM
To: Dove, Ronald; Cho, Dustin
Cc: Hill, Phil; Bentley, Jennifer; Ryu, Shinji; Warley, Michael A.; Nyman, Jessica T.; Block, Caroline M.; Arnold Lutzker; Ben Sternberg
Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Ron,

Yes, we are serious about resolving this discovery dispute without motion practice, and we have been trying mightily to do so. No, we do not accept this offer. "Regression results" and "implied shares" constitute only one of the three categories of information referenced in my email of August 30, 2022. You are assiduously avoiding the others. (Although you previously offered to produce "all of that date information that exists," that offer is apparently no longer on the table, as it is not included either in your email today or in Dustin's email yesterday. So who's moving goalposts?)

And although you claim to use my "precise language," with respect to "regression results" and "implied shares" (you don't use my precise language), you are seemingly unable to confirm that you mean, as I obviously meant, *all* of the "regression results" and "implied shares," in whatever form they are kept, which is all I asked you to confirm. Since it would be easy enough for you to say, "yes, that's what we mean," and thereby avoid any further motions practice, I have to assume that you mean something else. See *Order Denying SDC Motion to Strike Testimony of Gregory S. Crawford*, No. 14-CRB-0010-CD (2010-13) (Apr. 16, 2018) ("If the SDC were concerned that CTV was interpreting their follow-up request too narrowly, it could have clarified the request with CTV's counsel or, if the SDC suspected that CTV had responsive documents that it was not providing, the SDC could have filed a motion to compel.").

Your response regarding our request for consent to file a supplemental brief is a little dizzying to me. We asked to file a supplemental brief, not an amended brief, and PTV's clock to file an opposition has not even begun to run (assuming your consent motion for an extension is granted, as I assume it will be) so there is nothing to reset. We will go ahead and file a motion for leave to file a short supplemental brief. When you see it, you can decide whether to consent to it or oppose it, and whether to request more time.

Thank you for your efforts to resolve this matter. I really thought we were close, and I'm sorry we couldn't bridge the gap.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.macleam@pillsburylaw.com | website bio

From: Dove, Ronald <rdove@cov.com>

Sent: Thursday, September 15, 2022 12:00 PM

To: MacLean, Matthew J. <matthew.macleam@pillsburylaw.com>; Cho, Dustin <dcho@cov.com>

Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M.

<caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>; Dove, Ronald <rdove@cov.com>

Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Matt,

Your email confirms our suspicion that you were never really serious about resolving this discovery dispute without additional motion practice. Indeed, now you seek our consent for additional briefing beyond the 18 pages you have already filed – before Public Television even has a chance to respond.

We have told you clearly and unequivocally that Public Television will produce the “regression results” and “implied shares” you requested in your August 30, 2022, email – indeed, we used your precise language in making that offer. Not wanting to take “yes” for an answer, you’ve come back to us with additional demands, all of which fall even further outside what is required by the rules. Public Television will not accede to these tactics. We will, however, keep our original offer open through this Friday, provided that SDC confirms it will withdraw its motion and end its discovery disputes regarding Public Television’s productions.

If SDC instead wishes to amend and refile its opening brief to address the supplemental productions and offers we have made, Public Television will consent to that, provided that such filing is within the required page limits and resets the clock for Public Television’s opposition. Given that we understand you will be out this Friday, we would consent to your filing such a brief next week, provided that we would have ten business days to respond from that date, as contemplated in our extension motion.

Finally, we will produce tomorrow all existing versions of the datasets identified in the email you sent yesterday at 4:15 p.m.

With best regards,

Ron

Ronald G. Dove, Jr.

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5685 | rdove@cov.com
www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

From: MacLean, Matthew J. <matthew.macleam@pillsburylaw.com>

Sent: Wednesday, September 14, 2022 5:50 PM

To: Cho, Dustin <dcho@cov.com>; Dove, Ronald <rdove@cov.com>

Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael

A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

EXTERNAL

Dustin,

How does this offer differ from my response? In response to your offer, I clarified that we need:

- *Every* document that sets forth any results of any tests or models performed, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If the results were ever set forth in any summaries, tables, menus, or other format for review, those documents also must be produced. If analysts made notes or highlighting on the results (like the red and yellow highlighting that Professor Crawford's team applied to shares and coefficients that they did not like), those must be included. ...
- For all tests or models in which implied shares were calculated, we also need the codes and other documents showing how the implied shares were calculated. ...
- Metadata or other information sufficient to show when the tests were run. If you have dates in the metadata for either the code files or the output files, that would be great. If you don't have that metadata for some reason, then you may have to look elsewhere. ...

If we are saying the same thing, say so. If we are saying something different, point me to the differences.

- You say you are willing to provide "the available results and implied shares." You put no qualifications on this offer. Are there results or implied shares set forth in any "summaries, tables, menus, or other format for review" that you are *not* willing to provide? If not, what are you objecting to? If so, why didn't you make that clear in your offer?
- Although not addressed in your email below, you previously offered to produce "all of that date information that exists." Have I asked for anything more than that, or were you not planning on looking?
- Although you have not addressed my request for information about how implied shares are calculated, it was most certainly included in my email of August 30 and in prior requests, and I have explained why it is needed. You have offered to produce implied shares. Are you really objecting to production of information showing how the implied shares were calculated?
- You appear willing to produce underlying regression datasets. This also is not a new request, but whatever. It was you (or Ron, I can't remember) who told me on September 7 that we don't need the results because we can calculate them ourselves. It turns out that this is not accurate – you have not produced sufficient information for us to calculate even the regression results, much less the implied share results.

I've told you we will withdraw our motion if you provide this. Are you providing it or not? Let me know today, because we will probably file something tomorrow if we don't have agreement. (I will be out on Friday.) I'm not going to assume we are speaking the same language if you are not willing to say so. I'm not moving any goalposts. I'm holding them firmly where they are.

If we do not have an agreement on the scope of a supplemental production, we plan to supplement our motion to include information about the supplemental production that you made. Please let me know if you would consent to a motion to file a supplemental brief. We can probably file it tomorrow or Friday.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street NW | Washington, DC 20036-3006
t +1.202.663.8183 | m +1.703.470.9276
matthew.maclean@pillsburylaw.com | website bio

From: Cho, Dustin <dcho@cov.com>
Sent: Wednesday, September 14, 2022 5:08 PM
To: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Dove, Ronald <rdove@cov.com>
Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>
Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Matt,

Your email of September 8, 2022, further proves our point. We offered to produce the available results and implied shares you requested in your August 30, 2022, email. As soon as Public Television made that offer, you apparently were no longer interested in accepting. Instead, you added all sorts of additional qualifications and demands. That is "moving the goalposts." Hopefully you can understand why one might reasonably question whether you are sincerely interested in resolving this dispute without motion practice.

We believe Public Television has produced everything required under the rules (and more). You've said you disagree. We've engaged in this dialogue hoping that despite our differing views we could nevertheless reach a compromise and move on to preparing our rebuttal cases without expending further time and resources on unnecessary motion practice. It appears that despite Public Television's best efforts – including one supplemental production and an offer of a second – SDC's objective is to proceed with its motion regardless of what Public Television provides.

If we are mistaken, then Public Television remains willing to produce by the end of this week the available results and implied shares that we offered in my September 8, 2022, email, provided that SDC confirms it will withdraw its motion and end its discovery disputes regarding Public Television's productions. Otherwise, we will oppose your motion in due course.

With respect to your new request today, we are willing to include in our proposal described in the previous paragraph that Public Television also would produce the datasets you have identified in the email you sent at 4:15 p.m. today, to the extent such documents exist (including all extant versions).

Best,
Dustin

Dustin Cho

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5458 | dcho@cov.com
www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

From: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>
Sent: Wednesday, September 14, 2022 4:15 PM
To: Cho, Dustin <dcho@cov.com>; Dove, Ronald <rdove@cov.com>
Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>
Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

EXTERNAL

Dustin,

Following up on my email below, here is a list of the regression datasets that would be required to run the regression specifications produced, along with the number of regressions that use each dataset. We have received only CDC_2014_2017_distant_wh_minutes.dta.

File Name	Number of Regressions
CDC Only Regression Base	60
CDC_2014_2017_distant	1
CDC_2014_2017_distant_wh_minutes	250
CDC_2014_2017_distant_wh_minutes_pPTVfill	23
Claimant Minutes Bundle Regression Base	10
Claimant Minutes No 375 Regression Base	26
Claimant Minutes Regression Base	122
Claimant Minutes Signal Regression Base	19
Claimant Minutes Stripped Regression Base	2
Crawford Claimant Minutes Regression Base	1
Grand Total	514

As you see, a majority of the regression specifications use regression datasets that have not been produced.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclean@pillsburylaw.com | website bio

From: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>
Sent: Wednesday, September 14, 2022 9:34 AM
To: Cho, Dustin <dcho@cov.com>; Dove, Ronald <rdove@cov.com>
Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>
Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Dustin,

I was informed yesterday that our analysts are unable to run most of the regression codes that PTV produced because the codes call on sets of regression data that PTV has not produced. Nor has PTV produced the codes that would be needed to reproduce the regression datasets using the underlying data. I will provide you a list of regression datasets later today. In addition to the items referenced below, please produce all regression datasets referenced by the regression code files.

Judging from Phil's email to JSC today, it appears you no longer contend (if you ever so contended) that documents reviewed by people advising or assisting the expert are out of bounds for discovery. To whatever extent we have had a disagreement over the proper scope of discovery, I believe this puts it to rest and places all of our document requests firmly within the scope. We remain willing to agree on the compromise discussed in this email chain, but I believe it is clear that we would be entitled to all of the documents responsive to our document requests if we are forced to proceed with our motion.

I need a response today, since we owe you notice by Friday if we intend to proceed with our motion to compel.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclean@pillsburylaw.com | website bio

From: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>

Sent: Tuesday, September 13, 2022 9:06 AM

To: Cho, Dustin <dcho@cov.com>; Dove, Ronald <rdove@cov.com>

Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Dustin,

Can you please respond as to whether we have an agreement on scope, and when you can have the production to us? We will need time to review before Friday, when our notice as to whether we will proceed with our motion is due.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclean@pillsburylaw.com | website bio

From: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>

Sent: Thursday, September 8, 2022 4:42 PM

To: Cho, Dustin <dcho@cov.com>; Dove, Ronald <rdove@cov.com>

Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael

A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Dustin,

It is absolutely untrue that my "latest requests" extend beyond what we have previously discussed. Your insistence on this point, even after I addressed it quite forcefully on our call yesterday when you said I was "moving the goalposts," gives me a lot of concern, and I'm not going to let that kind of distortion pass without comment. At every stage, I have made perfectly clear that we are seeking all results and implied shares. PTV, on the other hand, has withheld documents that obviously should have been produced, hiding behind vague, incomplete, or inaccurate descriptions of the scope that it has been willing to produce. Here is the history:

- My letter of July 11, 2022, requested, among other things, "[a]ll documents underlying, relating to, or supporting any regression specifications or *regression results* ..." (emphasis added) and other similar requests. PTV did not object to these requests and did not give any hint that it would withhold the results of regression tests that were performed, including implied shares.
- Mike Warley's letter of July 28, 2022, contained the same requests and added other requests including, "All 'preliminary and tentative steps and analyses undertaken by [Johnson or persons assisting or advising Johnson], and *regression results* he later rejected or discarded" We also requested documents relating to any other statistical tests or models, which obviously would include the results of any such tests or models. PTV objected to these requests, but also said that it would produce "[a]ll documents or data related to regression analyses that Dr. Johnson considered" PTV never suggested or implied that this response was intended to exclude regression results, implied shares from regression models, or the results of any other tests or models. I don't think there is a reasonable reading of this response that would have put us on notice that PTV intended to withhold results.
- My email of August 9, 2022, following our initial meet and confer, sought confirmation that PTV had produced "all documents relating to any regression specifications and other tests and methodologies that were ever tried, performed, or reviewed, including any specifications in Dr. Johnson's 'iterative' process" The email made it clear that we considered "results" to be a part of the scope we were seeking, and why we feel production of results is important: "After we won our motion to compel, CTV was forced to produce, for the first time, *regression results* that its expert's team had performed using 2010 - 13 satellite data. CTV continued to insist, however, that its expert witness, Dr. Heeb, never 'considered' the *regression results*, because Dr. Heeb claimed that he had separately concluded without reference to the *results* (which were unfavorable to CTV) that regression results using satellite data would not be informative." (emphasis added).
- Your response on August 12, 2022, showed your understanding that results were part of the scope that was requested, and you specifically said that PTV had already produced "any regression specifications or *regression results* reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17" (emphasis added). Obviously, as is clearly shown in your supplemental production on August 29, 2022, this assertion was in error, giving us significant concerns about how forthright Dr. Johnson and his team have been with you. It gives us pause about accepting representations about the scope of documents that have been or will be produced.
- Our motion to compel, filed on August 19, 2022, repeatedly makes clear that "results," including implied shares, were among the documents we were seeking, and we made clear why. There are entire pages of the motion devoted to explaining the importance of the results of Professor Crawford's tests that CTV was ultimately forced to produce, and what they show about the trustworthiness of Professor Crawford's chosen model:

The analysts working with Professor Crawford set the *results* out in long menus to choose from. Id. at ¶¶ 10-11. The *shares implied* by the various models resulted in wide ranges of implied shares for all claimant groups. Id. ¶ 11. Every category had a 0% share (generally indicating a negative regression coefficient) in at least some models. Id. In some models, low shares or coefficients for CTV were highlighted in red font, and low shares or coefficients for JSC were highlighted in yellow font. Id. at ¶ 13. Over time, Professor Crawford's team discarded aspects of models that produced shares that were implausible, shares that were inconsistent with the results of the earlier study by Dr. Joel Waldfogel that Professor Crawford's team used as a starting point, or shares that were unfavorable to interests of the party that had retained Professor Crawford. Id. at ¶¶ 53-60. Contrary to the requirement of 37 C.F.R. § 351.10(e), requiring expert witnesses to disclose "any alternative courses of action considered," Professor Crawford did not disclose in written testimony that he had considered the *results* of hundreds of alternative regression models before selecting the two models that he presented to the Judges.

(Emphasis added.)

- After we filed our motion to compel, Ron requested another meet and confer, to try to resolve issues. You and Ron were not precise as to what you intended to produce, but neither you nor Ron said or suggested that results would be excluded from the supplemental production. I never would have considered agreeing to a limited production that did not include results. At any rate, I only agreed that we would review your supplemental production and consider whether it was sufficient. I never agreed to any scope limitation. This is reflected in Ron's follow-up email, in which both parties agreed to an extension "[t]o enable SDC to review the production and for PTV and SDC to confirm that the production sufficiently addresses SDC's concerns raised in its motion to compel" It should be obvious that any supplemental production that does not include results could not possibly "sufficiently address[] SDC's concerns raised in its motion to compel." The fact that it was not obvious to you makes me wonder whether you fully understand or appreciate what it is that we are looking for, and why.

In short, the claim that you did not understand that we were expecting production of the results of regression models, including implied shares, is ludicrous.

In view of this history, and in light of your baffling insistence that this is a new request, it really makes me wonder how you are interpreting our requests or how I am supposed to construe your responses. Clearly, I cannot simply apply a plain English reading to your responses, because you are not applying a plain English reading to my requests. Therefore, I have to be very reluctant to agree to any framing of any limited scope of production until after we see the production and can be persuaded that what you have given us is finally complete.

That being said, in the interest of resolving the motion to compel, we will withdraw the motion if you will provide us – in a reasonably reviewable format (*i.e.*, as kept in the regular course of business, including preservation of file names and folder structure, or otherwise organized in a way that is intended to make it at least as easily reviewable, including some way to map results to code files, as you suggested on yesterday's call):

- *Every* document that sets forth any results of any tests or models performed, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If the results were ever set forth in any summaries, tables, menus, or other format for review, those documents also must be produced. If analysts made notes or highlighting on the results (like the red and yellow highlighting that Professor Crawford's team applied to shares and coefficients that they did not like), those must be included. We should be able to see exactly what the expert and his team were able to see. We should not be forced to generate reviewable results ourselves or to make assumptions about how the results were generated or reviewed. Give us the cake, not just the flour and sugar.
- For all tests or models in which implied shares were calculated, we also need the codes and other documents showing how the implied shares were calculated. As I said in my email below, we might assume that all implied

shares were calculated from coefficients in the way that is presented in Dr. Johnson's final model, but it would only be an assumption. Many of the regression specifications tried are so different from the final model presented that we have to contemplate the possibility that Dr. Johnson and his team would have used a different method or would have experimented with different methods to calculate implied shares.

- Metadata or other information sufficient to show when the tests were run. If you have dates in the metadata for either the code files or the output files, that would be great. If you don't have that metadata for some reason, then you may have to look elsewhere. For example, you might be able to provide us with dates from transmittal emails or other contemporaneous records. When we addressed the same issue with CTV, they produced a folder structure with folder names showing the dates that Professor Crawford's team reviewed the results. That was a good solution to the problem of establishing when the tests were performed. I can't ask for anything you don't have. But I can and do ask for you to dig deeper if the information is not in the first place you look.

If you will do this, then we will withdraw our motion.

Do not suggest that any of this is new. This is the substance of what we have been seeking from the beginning and that we have discussed ad nauseam.

To be clear, if we withdraw our motion, it will be in reliance on all of your representations about what you have produced. We will expect, at that point, that PTV will have produced *all* of the documents described above and *all* of the documents that you previously said were produced, including:

- "All documents or data related to regression analyses that Dr. Johnson considered" (See PTV's Objections and Responses to SDC's Follow-up Requests (Aug. 4, 2022));
- "[A]ny regression specifications or regression results reviewed or considered by Dr. Johnson in the course of conducting any study or analysis concerning the allocation of cable television copyright royalties for 2014-17" (See your email of Aug. 12, 2022); and
- "[D]ocuments sufficient to show all regression specifications, sensitivities, and tests considered, reviewed, or performed by persons who assisted or advised Dr. Johnson in preparing his testimony." (See Ron's letter of Aug. 29, 2022).

If we later learn on cross-examination or otherwise that these representations are not accurate or that you gave these representations an unreasonably narrow or quibbling construction, we will seek an appropriate remedy.

I am sorry to be like this, but you have to understand how seriously we take the threat of another Crawford-like fraud. Despite your prior statement that PTV had produced all "regression specifications or regression results reviewed or considered by Dr. Johnson," you disclosed for the first time on August 29, 2022 - as a direct result of our motion to compel - approximately 400 additional unique regression specifications. All of these specifications were different - and some were extremely different - from anything described in testimony or previously produced. You also produced a detailed PowerPoint presentation setting forth and comparing the results of some of the models that were run. The notion that Dr. Johnson did not "review" or "consider" these specifications and results, or at least the PowerPoint presentation, is absurd, to say the least. (And if he didn't review or consider them, so much the worse for him. It would mean he is presenting someone else's work as his own.) I want to emphasize that I do not doubt your good faith - just as I never doubted the good faith of CTV's counsel, despite Professor Crawford's demonstrated perjury. But I am becoming increasingly concerned about whether you are receiving accurate information from your expert team, and whether your very carefully worded responses may be a hedge against the possibility that you might not have the full story on how Dr. Johnson selected his model.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclean@pillsburylaw.com | website bio

From: Cho, Dustin <dcho@cov.com>

Sent: Thursday, September 8, 2022 12:55 PM

To: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Dove, Ronald <rdove@cov.com>

Cc: Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: RE: 2014-17 Cable Distribution - PTV Supplemental Production

Matt,

Thanks for speaking with us yesterday. As we discussed, from our perspective your latest requests extend beyond what we discussed when we last met and conferred, and seek information to which SDC is not entitled. That said, in the interest of efficiently resolving our dispute, we would be willing to agree to produce the available results and implied shares you requested in your August 30, 2022 email, if you confirm that would end SDC's discovery disputes regarding Public Television's productions. As we said on yesterday's call, we understand that results and implied shares files exist for the vast majority of the regression specifications, and that certain date information exists within some of those files but not others; we would agree to produce all of those results and implied shares that exist, and all of that date information that exists. Please confirm that SDC agrees to this proposal.

Best,
Dustin

Dustin Cho

Covington & Burling LLP

One CityCenter, 850 Tenth Street, NW

Washington, DC 20001-4956

T +1 202 662 5458 | dcho@cov.com

www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

From: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>

Sent: Tuesday, September 06, 2022 1:42 PM

To: Dove, Ronald <rdove@cov.com>

Cc: Cho, Dustin <dcho@cov.com>; Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: Re: 2014-17 Cable Distribution - PTV Supplemental Production

[EXTERNAL]

Ron,

Yes, tomorrow at 5:00 pm would be fine. We can use this conference line:

Call: [877-211-3621](tel:877-211-3621)

[Passcode: 6033303704](https://www.pillsburylaw.com/join-meeting/6033303704)

Matt

Sent from my iPhone

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclea@pillsburylaw.com | [website bio](#)

On Sep 6, 2022, at 1:37 PM, Dove, Ronald <rdove@cov.com> wrote:

Matt,

I hope you had a nice holiday weekend as well. Yes, now that we are back from the holiday, we would like to set a time to discuss your latest follow-up requests. Does tomorrow (Wednesday) at 5 work for you?

Please advise. Thanks.

Ron

Ronald G. Dove, Jr.

Covington & Burling LLP

One CityCenter, 850 Tenth Street, NW

Washington, DC 20001-4956

T +1 202 662 5685 | rdove@cov.com

www.cov.com

COVINGTON

From: MacLean, Matthew J. <matthew.maclea@pillsburylaw.com>

Sent: Tuesday, September 06, 2022 11:48 AM

To: Dove, Ronald <rdove@cov.com>; Cho, Dustin <dcho@cov.com>; Hill, Phil <PAHill@cov.com>;

Bentley, Jennifer <JBentley@cov.com>; Ryu, Shinji <SRyu@cov.com>; Warley, Michael A.

<michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block,

Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <ben@lutzker.com>

Subject: Re: 2014-17 Cable Distribution - PTV Supplemental Production

[EXTERNAL]

Ron, Dustin, and Shinji,

I hope you had a good holiday weekend. Do you have a response to my inquiry below?

Matt

Sent from my iPhone

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t +1.202.663.8183 | m +1.703.470.9276

matthew.maclean@pillsburylaw.com | [website bio](#)

On Aug 30, 2022, at 3:35 PM, MacLean, Matthew J.
<matthew.maclean@pillsburylaw.com> wrote:

Ron, Dustin, and Shinji,

Thank you for this supplemental production. While it is a step in the right direction, it is still far short of what we expected. You have produced hundreds of code files showing at least dozens, and possibly hundreds, of regression specifications that were tried (I don't yet know how many are unique), including multiple different combinations of functional forms, independent variables, and fixed effects, and even experimenting with different dependent variables.

However, you have not produced any of the results of these tests, including the regression results (regression statistics, coefficients, standard errors, adjusted-r-squared, etc.) or the implied shares based on the results. If there were any alternative methods tested for converting coefficients to implied shares (which might be suggested by some of the changes that were tested in the specifications), those have not been produced either.

Both the regression results and implied shares must have been calculated for all or most of these tests, because some of the results from a selected smattering of the tests are included in the PowerPoint presentation of Feb. 23, 2022 (PTV015812).

The only reason to run a specification would be for the expert or an analyst to be able to review the results. And it is clear that at least some of the results were thought to be important or illuminative enough to include (in truncated form) in the PowerPoint presentation. I believe we are entitled to all the results, as well as the specifications.

Additionally, because part of the purpose of the examination into Dr. Johnson's model selection process involves the evolution of the model over time, it is important that we have the dates on which these various specifications were run. However, the method of

production of the files seems to have destroyed the metadata showing when they were last modified. Can you reproduce the code files and make any further productions with metadata intact?

I'm happy to discuss if that would help.

Matt

From: Ryu, Shinji <SRyu@cov.com>
Sent: Monday, August 29, 2022 10:14 PM
To: 'Victor Cosentino' <victor.cosentino@larsongaston.com>; LK Satterfield <lksatterfield@satterfield-pllc.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Cantor, Daniel A. <Daniel.Cantor@arnoldporter.com>; Olaniran, Greg <goo@msk.com>; Plovnick, Lucy <lhp@msk.com>; Ervin, David <DErvin@crowell.com>; Chakrabarti, Preetha <PChakrabarti@crowell.com>; MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>; Block, Caroline M. <caroline.block@pillsburylaw.com>; Arnold Lutzker <arnie@lutzker.com>; Ben Sternberg <Ben@lutzker.com>
Cc: Dove, Ronald <rdove@cov.com>; Cho, Dustin <dcho@cov.com>; Hill, Phil <PAHill@cov.com>; Bentley, Jennifer <JBentley@cov.com>
Subject: 2014-17 Cable Distribution - PTV Supplemental Production

Counsel,

Please find attached Public Television's cover letter for its supplemental production, which includes a declaration pursuant to the Judges' Protective Order and the index of documents in the production. PTV's production is available at this link: <https://covington.kiteworks.com/w/f-47d135e7-3612-4603-9bf3-6ca37cfd2boa>.

Best,
Shinji

Shinji Ryu

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5459 | sryu@cov.com
www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Service Desk at Tel: 800-477-0770, Option 1, immediately by telephone and delete this message, along with any attachments, from your computer. Nothing in this message may be construed as a digital or electronic signature of any employee of Pillsbury Winthrop Shaw Pittman. Thank you.

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Service Desk at Tel: 800-477-0770, Option 1, immediately by telephone and delete this message, along with any attachments, from your computer. Nothing in this message may be construed as a digital or electronic signature of any employee of Pillsbury Winthrop Shaw Pittman. Thank you.

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Service Desk at Tel: 800-477-0770, Option 1, immediately by telephone and delete this message, along with any attachments, from your computer. Nothing in this message may be construed as a digital or electronic signature of any employee of Pillsbury Winthrop Shaw Pittman. Thank you.

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Service Desk at Tel: 800-477-0770, Option 1, immediately by telephone and delete this message, along with any attachments, from your computer. Nothing in this message may be construed as a digital or electronic signature of any employee of Pillsbury Winthrop Shaw Pittman. Thank you.

Proof of Delivery

I hereby certify that on Thursday, September 15, 2022, I provided a true and correct copy of the Settling Devotional Claimants' Notice of Intent to Proceed with Motion to Compel Discovery against Public Television and Motion for Leave to File Supplemental Brief in Support - Public Redacted Version to the following:

Program Suppliers, represented by Lucy H Plovnick, served via E-Service at lhp@msk.com

SESAC Performing Rights, LLC, represented by Timothy L Warnock, served via E-Service at twarnock@loeb.com

Public Television Claimants, represented by Ronald G. Dove Jr., served via E-Service at rdove@cov.com

Canadian Claimants, represented by Lawrence K Satterfield, served via E-Service at lksatterfield@satterfield-pllc.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via E-Service at ted@copyrightroyalties.com

Commercial Television Claimants / National Association of Broadcasters, represented by David J Ervin, served via E-Service at dervin@crowell.com

Global Music Rights, LLC, represented by Scott A Zebrak, served via E-Service at scott@oandzlaw.com

Multigroup Claimants, represented by Brian D Boydston, served via E-Service at brianb@ix.netcom.com

ASCAP, represented by Sam Mosenkis, served via E-Service at smosenkis@ascap.com

National Public Radio, represented by Amanda Huetinck, served via E-Service at ahuetinck@npr.org

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via E-Service at jennifer.criss@dbr.com

Joint Sports Claimants, represented by Michael E Kientzle, served via E-Service at michael.kientzle@arnoldporter.com

Signed: /s/ Matthew J MacLean