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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **DISTRIBUTION OF CABLE ROYALTY FUNDS**	)))))	**Docket No. 14-CRB-0010-CD (2010-13)**

JOINT SPORTS CLAIMANTS' RESPONSE TO ORDER SOLICITING FURTHER BRIEFING

The Joint Sports Claimants ("JSC") submit the following response to the Copyright Royalty Judges' ("Judges") Order in 2010-2013 Allocation Proceeding Soliciting Further Briefing (June 29, 2018) ("June 29 Order").

INTRODUCTION AND SUMMARY

The Public Television Claimants ("PTV") have argued that their share of the Basic Fund must be adjusted upward to account for the fact that they are not eligible to receive royalties from the 3.75% and Syndex Funds. *See* June 29 Order at 1, *citing* PTV PFF ¶ 43. The Judges have asked for memoranda of law on

> Whether the interrelationship between and among the Basic Fund, the 3.75% Fund, and the Syndex Fund affects the allocations within the Basic Fund, if at all, and, if so, how that affect should be calculated and quantified.

June 29 Order at 1.

As discussed below, PTV is not eligible to receive any 3.75% royalties; the 3.75% Fund should be allocated in the same manner as the Basic Fund after removing PTV's Basic Fund share. PTV is not entitled to any automatic upward adjustment in its Basic Fund allocation to account for the fact that it does not participate in the 3.75% Fund ("nonparticipation adjustment"). The propriety of a nonparticipation adjustment turns on the methodology that the Judges adopt to make their Basic Fund allocations; and any such adjustment should be made, if

at all, only in the results of particular studies advanced by the parties. If the Judges predicate the Basic Fund allocations on the Bortz Surveys, as in the 2004-05 proceeding, PTV should receive a nonparticipation adjustment in its Bortz shares and thus in its Basic Fund allocation. If the Judges adopt a different methodology, PTV should not receive any adjustment in its Basic Fund allocation.[1]

ARGUMENT

I. PTV Is Not Entitled to Receive Any Share of the 3.75% Royalty Fund.

The Copyright Royalty Tribunal ("CRT") adopted the 3.75% royalty rate in 1982 in response to the Federal Communication Commission's ("FCC") decision to repeal its rules limiting the carriage of commercial distant signals (the rules did not limit carriage of noncommercial educational signals). *See* Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52146 (Nov. 19, 1982), *aff'd NCTA v. CRT*, 724 F.2d 176 (D.C. Cir. 1983); 17 U.S.C. § 801(b)(2)(B) (authorizing rate adjustment when changes are made in the FCC signal carriage rules). The 3.75% rate applies to "nonpermitted" distant signals, *i.e.* those commercial distant signals that cable system operators ("CSOs") were not permitted to carry under the former FCC rules. *See* 47 Fed. Reg. at 52158. A "Form 3" CSO must pay 3.75% of its "gross receipts" for each nonpermitted "distant signal equivalent" ("DSE") that it carried during a given accounting period. *See* 37 C.F.R. §§ 201.17(i) & 387.2(c). The basic royalty rates, established in Section 111(d)(1)(B) of the Copyright Act, 17 U.S.C. § 111(d)(1)(B), apply to those signals that CSOs

[1] While this memorandum focuses upon the Basic and 3.75% Funds, the same principles apply to the Syndex Fund (in which JSC and other parties do not participate). *See* Distribution of 2004 and 2005 Cable Royalty Funds, 75 Fed. Reg. 57063, 57079 (Sept. 17, 2010) ("[O]nly Music Claimants and Program Suppliers participate in the Syndex Fund."). The Syndex Fund, however, amounts to less than $10,000 per accounting period. Ex. 4009 at 113 (Martin). Thus, as a practical matter, the nonparticipation of PTV, JSC and other parties in the Syndex Fund does not materially affect their Basic Fund allocations.

were permitted to carry under the former FCC rules. They require a CSO to pay between 1.064% and 0.330% for each permitted DSE. *See* 17 U.S.C. § 111(d)(1)(B); 37 C.F.R. § 387.2(a).

In the first distribution proceeding following adoption of the 3.75% rate, the CRT held that noncommercial educational stations were not entitled to any portion of the 3.75% royalty fund. 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12813 (Apr. 15, 1986) ("1983 CRT Determination"), *aff'd NCTA v. CRT*, 809 F.2d 172, 179 n. 7 (2d Cir. 1986) ("PBS is not eligible for royalties at the new 3.75% rate"). The CRT explained that it would be improper to allocate any 3.75% royalties to PTV because "noncommercial educational stations could be carried on an unlimited basis prior to FCC deregulation, and . . . no cable operator paid the 3.75% rate to carry any noncommercial stations." *Id.*

The Judges and their predecessors have followed this ruling in every subsequent Phase I/Allocation Phase proceeding. *See* 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15303 (Apr. 27, 1992) ("1989 CRT Determination"); 1990-92 Cable Royalty Distribution Proceeding, 61 Fed. Reg. 55653, 55667 (Oct. 28, 1996) ("1990-92 Librarian's Order"); 1998-99 Cable Royalty Distribution Proceeding, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) ("1998-99 Librarian's Order"); Distribution of the 2004 and 2005 Cable Royalty Funds, 75 Fed. Reg. 57063, 57071 (Sept. 17, 2010) ("2004-05 CRB Determination"). PTV itself has acknowledged in this proceeding that it is not entitled to any portion of the 3.75% Fund. *See* PTV PFF ¶ 43 ("Public Television is eligible for an award only from the Basic Fund . . . ."). No party in this proceeding contends otherwise.

In the 2004-05 proceeding, the Judges allocated the 3.75% Fund in the same way they allocated the Basic Fund, except that they adjusted upwards the shares of the parties participating

in the 3.75% Fund to reflect PTV's nonparticipation in that fund. *See* 2004-05 CRB Determination, 75 Fed. Reg. at 57071. The Judges followed essentially the same approach that the Copyright Royalty Arbitration Panel ("CARP") adopted in the 1998-99 proceeding. *See* Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, No. 2001-8 CARP CD 98-99, at 91-92 (Oct. 21, 2003) ("1998-99 CARP Report") ("[T]he 3.75% Fund shall be allocated in accordance with the Basic Fund allocations after making mathematical adjustments to account for the Devotionals stipulated 3.75% Fund award, our determination of Music's net share, PTV's non-participation, and Canadians fee-generated 3.75% award"). The Judges should adopt the same approach in allocating the 2010-13 3.75% Funds.

II. If the Judges Predicate the Basic Fund Allocations on the Bortz Survey Results, As in the 2004-05 Proceeding, PTV's Share of Basic Fund Royalties Should Be Adjusted Upward to Account for PTV's Nonparticipation in the 3.75% Fund.

In prior proceedings, PTV argued that its share in the Bortz surveys should be adjusted upwards to account for the fact that it does not receive 3.75% royalties. The CRT rejected this argument in the 1989 proceeding. *See* 1989 CRT Determination, 57 Fed. Reg. at 15300. The CARP likewise rejected PTV's argument in the 1990-92 proceeding. *See* Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, No. 94-3 CARP CD 90-92, at 124 (May 31, 1996) ("1990-92 CARP Report"). On review, the Librarian noted that the adjustment sought by PTV "might have some validity" had the CARP based PTV's allocation solely on the Bortz results. *See* 1990-92 Librarian's Order, 61 Fed. Reg. at 55668. Although the 1990-92 CARP increased the weight accorded to the Bortz Surveys (and decreased the weight accorded to viewing), the CARP did not tie the PTV or other allocations directly to the Bortz results in the 1990-92 proceeding. Thus, the Librarian affirmed the CARP's rejection of the proposed PTV nonparticipation adjustment. *Id.*

In the 1998-99 proceeding, the CARP adopted the Bortz Surveys as the "best measure of marketplace value." 1998-99 CARP Report, *aff'd* 1998-99 Librarian's Order, 69 Fed. Reg. 3606, 3616-18 (Jan. 26, 2004), *aff'd Program Suppliers v. Librarian,* 409 F.3d 395, 401-04 (D.C. Cir. 2005). The CARP tied the 1998-99 royalty allocations of JSC, Program Suppliers and CTV directly to the results of the 1998-99 Bortz surveys and determined that Bortz provided a "floor" for the PTV allocation. *See* 1998-99 CARP Report at 26-27. The CARP also determined that PTV's Bortz share should be adjusted upward (from 2.9% to 3.2%) to account for PTV's nonparticipation in the 3.75% and Syndex Funds, concluding that the "adjustment makes sense in the context of a CSO survey where the respondents are allocating a fixed budget among the various claimant groups—unless JSC can demonstrate that the respondents already understood that PTV does not participate in the 3.75% Fund." *Id.* at 26 n.10.[2]

In the 2004-05 proceeding, PTV, JSC, Commercial Television Claimants ("CTV") and Music Claimants (collectively, "Settling Parties") urged the Judges to tie the Basic Fund royalty allocations to the Bortz results. Relying upon the CARP's ruling in the 1998-99 proceeding, the Settling Parties also urged the Judges to adjust upwards PTV's Bortz share to account for PTV's nonparticipation in the 3.75% Fund and Syndex Fund. *See* Declaration of Michael Kientzle (Appendix A) ¶ 3, Ex. 1 (Corrected Proposed Findings of Fact and Conclusions of Law of the Settling Parties, No. 2007-3 CRB CD 2004-05 ¶ 317 (Mar. 24, 2010) ("2004-05 Settling Parties' PFOF")). The effect of this adjustment (along with a further adjustment to account for the

[2] The CARP also considered PTV's share of fee generation (approximately 3.9%) and "changed circumstances." *See* 1998-99 CARP Report at 69; 1998-99 Librarian's Order, 61 Fed. Reg. at 3617. Based upon all the evidence, the CARP decided that PTV should receive the same share of 1998-99 royalties as its share of 1990-92 royalties, *i.e.,* 5.49125%, which was slightly higher than the Bortz "floor" for PTV and PTV's fee generation shares. The CARP did not adjust the PTV share of the Basic Fund to account for PTV's nonparticipation in the 3.75% fund—except to the extent that it raised PTV's Bortz share by 0.3%. As this illustrates, the CARP made a "nonparticipation adjustment" in PTV's Bortz share but not in PTV's Basic Fund allocation.

absence of PTV-only systems in the Bortz Surveys (the McLaughlin "augmentation")) was to increase PTV's 2004-05 Bortz share from 3.6% (as reported by Bortz) to 7.2%.[3] *Id*. ¶¶ 126, 317.

The Judges adopted the Settling Parties' adjusted (and augmented) Bortz shares as the "starting point" for their allocation of the 2004-05 Basic Funds. *See* 2004-05 CRB Determination, 75 Fed. Reg. at 57070 (*citing* 2004-05 Settling Parties' PFOF ¶ 317). The Judges further adjusted those shares to account for the effect of non-compensable programming on WGNA (along with a smaller adjustment to the Canadian Claimant Group's share). The net effect of these adjustments was to slightly increase the Basic Fund royalty allocations of JSC, CTV, and PTV over their adjusted and augmented Bortz shares. *See* 75 Fed. Reg. at 57070-71. The Judges made no adjustment in the PTV Basic Fund allocation to account for PTV's nonparticipation in the 3.75% Fund—except to the extent that they adjusted PTV's Bortz share to account for nonparticipation.

JSC have urged the Judges to allocate the 2010-13 cable royalties consistent with the manner in which the cable royalties were allocated in the 2004-05 proceeding. *See* JSC PCOL ¶¶ 16, 29-31; 17 U.S.C. § 803(a)(1). If the Judges follow that precedent, the Judges should adjust upwards PTV's augmented Bortz share to account for PTV's nonparticipation in the 3.75% Fund and should use that share as the starting point in determining the PTV share of the Basic Fund; there should be no further adjustment in the PTV's Basic Fund allocation to account for PTV's nonparticipation in the 3.75% Fund.[4]

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[3] These figures reflect the average of PTV's shares for 2004-05—PTV's unadjusted Bortz share was 3.5% for 2004 and 3.7% for 2005, while PTV's adjusted Bortz share was 7.3% in 2004 and 7.1% in 2005. 2004-05 Settling Parties' PFOF ¶¶ 126, 317.

[4] Consistent with the Judges' approach in the 2004-05 proceeding, the PTV nonparticipation adjustment in the Bortz results requires two basic steps for each royalty year. First, PTV's augmented Bortz share should be divided by the percentage of Form 3 Basic Fund royalties (compared to total Form 3 royalties) to yield PTV's increased share of the Basic Fund. Second,

III. If the Judges Do Not Tie the Basic Fund Allocations to the Bortz Survey Results, As They Did in the 2004-05 Proceeding, PTV's Basic Fund Allocation Should Not Be Adjusted to Account for PTV's Nonparticipation in the 3.75% Fund.

In the 1998-99 proceeding, PTV argued that its Basic Fund allocation should be increased to account for PTV's nonparticipation in the 3.75% Fund regardless of the methodology used to determine that allocation. The CARP correctly rejected that argument, stating:

> [W]e *disagree* with PTV's assertion that it is entitled to such an adjustment *no matter which methodology* is employed. . . . The CRT has ruled that only PS, JSC, NAB, Canadians, and Devotionals may participate in the 3.75% Fund, and that only PS and Music may participate in the Syndex Fund. . . . We view PTV's position that the adjustment should be made for *any* methodology as merely an attempt to circumvent mathematically the legal precedents established by the CRT . . . .

1998-99 CARP Report at 26, n.10 (emphasis in original); *see also id.* at 59, n.29 (rejecting PTV's contention that PTV's share in the Rosston regression analysis should be adjusted upwards in light of PTV's nonparticipation in the 3.75% Fund).

As the above suggests, a PTV nonparticipation adjustment may be made to the results of the Bortz Surveys. But PTV is not automatically entitled to an upward adjustment of its Basic Fund allocation simply because it does not receive 3.75% royalties. The propriety of accounting for PTV's nonparticipation in 3.75% royalties when determining its Basic Fund allocation turns upon the methodology that the Judges adopt in allocating the Basic Fund royalties. Precedent establishes that, if the Judges tie the Basic Fund awards to the Bortz results, as in the 2004-05 proceeding, such an adjustment is appropriate. But there is no precedent, nor is there any record

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the amount by which PTV's augmented Bortz share increases is then subtracted on a proportional basis from each other party's augmented Bortz share to yield those parties' adjusted shares.

evidence, establishing that a nonparticipation adjustment in PTV's Basic Fund share is appropriate if a different methodology were used to determine the Basic Fund allocations.[5]

CONCLUSION

For the reasons discussed above, if the Judges follow the precedent established in the 2004-05 proceeding and tie the parties' Basic Fund allocations to the Bortz results, PTV's Bortz share should be increased to account for PTV's nonparticipation in the 3.75% Fund. And no other nonparticipation adjustment should be made in the PTV Basic Fund allocation. If the Judges depart from that precedent and utilize a different methodology to allocate the Basic Fund royalties, there is no record or precedential basis for adjusting PTV's Basic Fund allocation to account for PTV's nonparticipation in the 3.75% Fund.

[5] As noted above, the Judges' predecessors have relied upon fee generation data in determining the appropriate PTV share of the Basic Fund. The record shows that PTV signals generated approximately 4.6% of the total 2010-13 cable royalties paid by Form 3 cable systems that imported distant signals, and 5.5% of the 2010-13 Basic Fund royalties only (in both cases excluding unallocated minimum fees). *See* Ex. 4009 at pp. 103-04 (Martin). If the Judges use the latter percentage in determining the PTV Basic Fund allocation, there is obviously no need for a nonparticipation adjustment. Furthermore, when PTV originally submitted its written direct statement, PTV sought a Basic Fund allocation based solely upon changes in "distant subscriber instances." *See* Written Direct Statement of Public Television No. 14-CRB-0010-CD (2010-13) (Dec. 22, 2016); Tr. 2494-96 (McLaughlin). Nothing in the record shows whether, or to what extent, those changes implicate 3.75% signals. Thus, to the extent that the Judges rely upon PTV's original study, there is no basis for according PTV a nonparticipation adjustment.

Dated July 16, 2018

Respectfully submitted,

JOINT SPORTS CLAIMANTS

/s/ Michael Kientzle

Robert Alan Garrett (D.C. Bar No. 239681)
Daniel A. Cantor (D.C. Bar No. 457115)
Michael Kientzle (D.C. Bar No. 1008361)
Bryan L. Adkins (D.C. Bar No. 988408)
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
202.942.5000 (voice)
202.942.5999 (facsimile)
Robert.Garrett@apks.com
Daniel.Cantor@apks.com
Michael.Kientzle@apks.com
Bryan.Adkins@apks.com
Counsel for the Office of the Commissioner of Baseball

Philip R. Hochberg (D.C. Bar No. 5942)
LAW OFFICES OF PHILIP R. HOCHBERG
12505 Park Potomac Avenue
Sixth Floor
Potomac, MD 20854
Phochberg@shulmanrogers.com
301-230-6572
Counsel for the National Basketball Association, National Football League, National Hockey League and Women's National Basketball Association

Ritchie T. Thomas (D.C. Bar No. 28936)
SQUIRE PATTON BOGGS (US) LLP
2550 M St., N.W.
Washington, D.C. 200037
202.626.6600 (voice)
202.626.6780 (facsimile)
Ritchie.Thomas@squirepb.com
Counsel for National Collegiate Athletic Association

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2018, a copy of the foregoing Joint Sports Claimants' Response to Order Soliciting Further Briefing was provided to each of the parties listed below via eCRB's electronic filing system or by Federal Express overnight mail where required by 37 C.F.R. § 350.6(h)(1):

MPAA-REPRESENTED PROGRAM SUPPLIERS

Gregory O. Olaniran
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W.
8th Floor
Washington, D.C. 20036
Tel: (202) 355-7817

COMMERCIAL TELEVISION CLAIMANTS
NATIONAL ASSOCIATION OF BROADCASTERS

John I. Stewart, Jr.
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
Telephone: (202) 624-2685

PUBLIC TELEVISION CLAIMANTS
PUBLIC BROADCASTING SERVICE

Ronald G. Dove, Jr.
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20268
Telephone: (202) 662-5685

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450

SESAC, INC.

John C. Beiter
Leavens, Strand & Glover, LLC
1102 17th Avenue South
Suite 306
Nashville, TN 37212
Telephone: (615) 341-3457

Christos P. Badavas
SESAC
152 West 57th Street
57th Floor
New York, NY 10019
Phone: (212) 586-3450

BROADCAST MUSIC, INC.
Joseph J. DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030
Telephone: (212) 220-3149

Brian A. Coleman
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800

CANADIAN CLAIMANTS GROUP

Kendall Satterfield
Satterfield PLLC
1629 K Street, Suite 300
Washington, DC 20006
Telephone: (202) 355-6432

Victor J. Cosentino
Larson & Gaston LLP
200 S. Los Robles Ave., Suite 530
Pasadena, CA 91101
Telephone: (626) 795-6001

ARENA FOOTBALL ONE, LLC
MAJOR LEAGUE SOCCER

Edward S. Hammerman
HAMMERMAN PLLC
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015-2054
Tel: (202)686-2887

PROFESSIONAL BULL RIDERS

Arnold P. Lutzker
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600

DEVOTIONAL CLAIMANTS

Arnold P. Lutzker
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600

Matthew J. MacLean
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
Telephone: (202) 663-8525
Fax: (202) 663-8007

MULTIGROUP CLAIMANTS
SPANISH LANGUAGE PRODUCERS

Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

NATIONAL PUBLIC RADIO

Gregory A. Lewis
NATIONAL PUBLIC RADIO
1111 North Capitol Street, NE
Washington, DC 20002
Tel: (202) 513-2050

/s/ Michael Kientzle
Michael Kientzle

APPENDIX A

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
DISTRIBUTION OF CABLE ROYALTY FUNDS	)	**NO. 14-CRB-0010-CD (2010-13)**

DECLARATION OF MICHAEL KIENTZLE IN SUPPORT OF THE JOINT SPORTS CLAIMANTS' RESPONSE TO ORDER SOLICITING FURTHER BRIEFING

I, Michael Kientzle, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an associate at the law firm Arnold & Porter Kaye Scholer LLP. I submit this declaration in support of the Joint Sports Claimants Response to Order Soliciting Further Briefing.

2. I have personal knowledge of the following facts and if called as a witness and duly sworn I could and would testify competently thereto.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Corrected Proposed Findings of Fact and Conclusions of Law of the Settling Parties, No. 2007-3 CRB CD 2004-05 (Mar. 24, 2010).

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

Executed on the 16th day of July, 2018, at Washington, DC.

/s/ Michael Kientzle
Michael Kientzle

EXHIBIT 1

CORRECTED

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	Docket No. 2007-3 CRB CD 2004-2005
Distribution of the 2004 and 2005 Cable Royalty Funds	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SETTLING PARTIES

March 24, 2010

CORRECTED

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	Docket No. 2007-3 CRB CD 2004-2005
Distribution of the 2004 and 2005 Cable Royalty Funds	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SETTLING PARTIES

Pursuant to Section 351.14 of the rules of the Copyright Royalty Judges ("Judges"), 37 C.F.R. § 351.14, and the Judges' Scheduling Orders of November 16, 2009 and March 5, 2010, the Commercial Television Claimants ("CTV"), Joint Sports Claimants ("JSC"), Music Claimants ("Music") and Public Television Claimants ("PTV") (collectively, "the "Settling Parties") submit the following Proposed Findings of Fact and Conclusions of Law. The first tab of this submission contains the List of Abbreviations. That is followed by the Introduction and Summary, the Proposed Findings of Fact, the Proposed Conclusions of Law and an Appendix that explains the calculations underlying the award that the Settling Parties are requesting. A separate table of contents appears in each section of this submission.

Respectfully Submitted,

JOINT SPORTS CLAIMANTS

Robert Alan Garrett
DC Bar No. 239681
James L. Cooper
DC Bar No. 442475
Stephen K. Marsh
DC Bar No. 470765
Marco A. Palmieri
DC Bar No. 981788
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Fax: (202) 942-5999
robert.garrett@aporter.com
james.cooper@aporter.com
stephen.marsh@aporter.com
marco.palmieri@aporter.com

COMMERCIAL TELEVISION CLAIMANTS

NATIONAL ASSOCIATION OF BROADCASTERS

John I. Stewart, Jr.
DC Bar No. 913905
Jennifer Burdman
DC Bar No. 495555
Ann Mace
DC Bar No. 980845
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
Telephone: (202) 624-2685
Fax: (202) 628-5116
jstewart@crowell.com
jburdman@crowell.com
amace@crowell.com

PUBLIC TELEVISION CLAIMANTS

Ronald G. Dove, Jr.
DC Bar No. 430533
Lindsey L. Tonsager
DC Bar No. 983925
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004-2401
Telephone: (202) 662-5685
Fax: (202) 778-5685
rdove@cov.com
ltonsager@cov.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Joan M. McGivern
NY No. 1985860
Samuel Mosenkis
NY No. 2628915
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450
Fax: (212) 787-1381
smosenkis@ascap.com

Jay Cohen
NY No. 1712462
Lynn B. Bayard
NY No. 2775179
Jayson L. Cohen
NY No. 4419453
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Fax: (212) 757-3990
jaycohen@paulweiss.com
lbayard@paulweiss.com
jlcohen@paulweiss.com

BROADCAST MUSIC, INC.

Marvin L. Berenson
NY No. 1048792
Joseph J. DiMona
DC Bar No. 412159
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019
Telephone: (212)830-2533
Fax: (212) 397-0789
jdimona@bmi.com

Michael J. Remington
DC Bar No. 344127
Jeffrey J. Lopez
DC Bar No. 453052
DRINKER BIDDLE & REATH LLP
1500 K Street, NW -- Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800
Fax: (202) 842-8465
michael.remington@dbr.com
jeffrey.lopez@dbr.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Joan M. McGivern
NY No. 1985860
Samuel Mosenkis
NY No. 2628915
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450
Fax: (212) 787-1381
smosenkis@ascap.com

Jay Cohen
NY No. 1712462
Lynn B. Bayard
NY No. 2775179
Jayson L. Cohen
NY No. 4419453
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Fax: (212) 757-3990
jaycohen@paulweiss.com
lbayard@paulweiss.com
jlcohen@paulweiss.com

BROADCAST MUSIC, INC.

Marvin L. Berenson
NY No. 1048792
Joseph J. DiMona
DC Bar No. 412159
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019
Telephone: (212)830-2533
Fax: (212) 397-0789
jdimona@bmi.com

Michael J. Remington
DC Bar No. 344127
Jeffrey J. Lopez
DC Bar No. 453052
DRINKER BIDDLE & REATH LLP
1500 K Street, NW -- Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800
Fax: (202) 842-8465
michael.remington@dbr.com
jeffrey.lopez@dbr.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Joan M. McGivern
NY No. 1985860
Samuel Mosenkis
NY No. 2628915
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450
Fax: (212) 787-1381
smosenkis@ascap.com

BROADCAST MUSIC, INC.

Marvin L. Berenson
NY No. 1048792
Joseph J. DiMona
DC Bar No. 412159
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019
Telephone: (212)830-2533
Fax: (212) 397-0789
jdimona@bmi.com

Jay Cohen
NY No. 1712462
Lynn B. Bayard
NY No. 2775179
Jayson L. Cohen
NY No. 4419453
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Fax: (212) 757-3990
jaycohen@paulweiss.com
lbayard@paulweiss.com
jlcohen@paulweiss.com

Michael J. Remington
DC Bar No. 344127
Jeffrey J. Lopez
DC Bar No. 453052
DRINKER BIDDLE & REATH LLP
1500 K Street, NW -- Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800
Fax: (202) 842-8465
michael.remington@dbr.com
jeffrey.lopez@dbr.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Joan M. McGivern
NY No. 1985860
Samuel Mosenkis
NY No. 2628915
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450
Fax: (212) 787-1381
smosenkis@ascap.com

Jay Cohen
NY No. 1712462
Lynn B. Bayard
NY No. 2775179
Jayson L. Cohen
NY No. 4419453
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Fax: (212) 757-3990
jaycohen@paulweiss.com
lbayard@paulweiss.com
jlcohen@paulweiss.com

BROADCAST MUSIC, INC.

Marvin L. Berenson
NY No. 1048792
Joseph J. DiMona
DC Bar No. 412159
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019
Telephone: (212)830-2533
Fax: (212) 397-0789
jdimona@bmi.com

Michael J. Remington
DC Bar No. 344127
Jeffrey J. Lopez
DC Bar No. 453052
DRINKER BIDDLE & REATH LLP
1500 K Street, NW -- Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800
Fax: (202) 842-8465
michael.remington@dbr.com
jeffrey.lopez@dbr.com

SESAC, INC.

John C. Beiter
TN Bar No. 12564
ZUMWALT, ALMON & HAYES PLLC
1014 16th Avenue South
Nashville, TN 37212
Telephone: (615) 850-2291
Fax: (615) 256-7106
jbeiter@zahlaw.com

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LIST OF ABBREVIATIONS

BBDO	Batten, Barton, Durstine & Osborn
Bortz	Bortz Media & Sports Group
Canadians	Canadian Claimants Group
CARP	Copyright Arbitration Royalty Panel
CDC	Cable Data Corporation
CRT	Copyright Royalty Tribunal
CTV	Commercial Television Claimants
DBS	Direct Broadcast Satellite
DSE	Distant Signal Equivalent
Ex.	Exhibit
FCC	Federal Communications Commission
JSC	Joint Sports Claimants
MLB	Major League Baseball
MSO	Multiple System Operator
Music	Music Claimants
NAB	National Association of Broadcasters
NBA	National Basketball Association
NCAA	National Collegiate Athletic Association
NCTA	National Cable & Telecommunications Association
NFL	National Football League
PBS	Public Broadcasting Service
PCOL	Proposed Conclusion of Law
PFOF	Proposed Finding of Fact
PS	Program Suppliers
PTV	Public Television Claimants
RSN	Regional Sports Network
Tr.	Transcript
WDT	Written Direct Testimony
WNBA	Women's National Basketball Association
WRT	Written Rebuttal Testimony

Introduction and Summary

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	Docket No. 2007-3 CRB CD 2004-2005
Distribution of the 2004 and 2005 Cable Royalty Funds	)	

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The purpose of this proceeding is to allocate approximately $300 million in 2004-05 Section 111 cable royalties among four claimant groups -- the Settling Parties, Program Suppliers, Canadians and Devotionals. There is no dispute that, as in the prior three Phase I proceedings, the sole distribution criterion is "relative marketplace value." *See* SP PFOF ¶¶52-56. The central issue is whether the studies offered by the Settling Parties, the Program Suppliers or the Canadians (the Devotionals offered no study) provide the best estimates of that value. This issue is virtually identical to the issue that occupied the attention of the CARP in the 1998-99 distribution proceeding and produced a 20,000 page record.

The Settling Parties seek an award based upon the results of (a) the 2004-05 Bortz constant sum surveys of cable operator valuations of distant signal non-network programming, as adjusted to account for issues raised in the 1998-99 CARP Report, and (b) the 2004-05 Zarakas study of the value of music in programming, which also is intended to respond to issues raised by the 1998-99 CARP. The Settling Parties rely upon the 2004-05 Waldfogel regression analysis (and other record evidence) as providing corroboration of the 2004-05 Bortz results in the same manner that the 1998-99 CARP relied upon the comparable Rosston regression analysis to corroborate the 1998-99 Bortz results. The Settling Parties strongly oppose use of fee generation and each of the studies sponsored by Program Suppliers to determine the 2004-05 royalty awards.

For the reasons set forth below, the Settling Parties believe the record in this proceeding and applicable precedent establish that they are entitled to no less than the following 2004-05 royalty shares:[1]

---

[1] *See* 17 U.S.C. § 803(a) (1) (requiring the Judges to act "on the basis" of "a written record" and "prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with [certain decisions of the Register] . . . , and decisions of the court of appeals . . ."); *National Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 772 F.2d 922, 932 (D.C. Cir. 1985) (change in prior award may be supported by evidence showing changed circumstances or evidence tending to show that past conclusions were incorrect).

Settling Parties'
Proposed 2004-05
Cable Royalty Awards

Year	Basic Fund (%)	3.75% Fund (%)	Syndex Fund (%)
2004	**62.5**	**59.7**	**5.2**
2005	**61.7**	**58.8**	**4.6**

The specific calculations underlying the above awards, and proposed awards for other parties, are set forth in the Appendix. The Settling Parties have agreed among themselves on how to divide the royalty shares that the Judges allocate to them. By way of comparison, the individual awards that the Settling Parties received in the 1998-99 proceeding totaled as follows:

Settling Parties'
1998-99 Cable Royalty Awards

Year	Basic Fund (%)	3.75% Fund (%)	Syndex Fund (%)
1998	**59.2**	**57.8**	**4.0**
1999	**60.9**	**59.6**	**4.0**

As this suggests, Settling Parties believe that the record of this proceeding warrants a slight increase from the royalty awards they received in the 1998-99 proceeding.

I. The Bortz Constant Sum Surveys Of Cable Operators Have A Twenty-Five Year Track Record Of Providing Methodologically Sound, Fully Vetted, Reliable, and Valid Estimates Of Relative Marketplace Values.

In its review of the CRT's decision allocating the 1979 cable royalties, the U.S. Court of Appeals for the DC Circuit made clear that it is entirely appropriate to rely upon constant sum surveys of cable operator distant signal program valuations in allocating the Section 111 cable royalties:

> Indeed, given Congress' evident intent to have the [CRT] operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, see House Report at 89, [the Court] find[s] the [CRT's] receptiveness to evidence simulating the commercial attitudes of the "buyers" in this supplanted marketplace to be more than reasonable.

Christian Broad. Network, Inc. v. CRT, 720 F.2d 1295, 1306 (D.C. 1983) ("*CBN v. CRT*") (rejecting Program Suppliers' argument that the CRT in the 1979 distribution proceeding should not have relied upon JSC's constant sum survey of cable operator program valuations). Since that decision, the Judges' predecessors, as well as most of the parties themselves, have increasingly given greater (and, ultimately, determinative) weight to constant sum surveys of cable operators in allocating the Section 111 cable royalties.

A. Bortz Media Has Continuously Refined And Improved Its Constant Sum Cable Operator Surveys Over A Period Of Twenty-Five Years.

Bortz Media & Sports Group ("Bortz Media") is a market research firm with substantial experience involving the cable television and programming industries. JSC initially commissioned Bortz Media to design and execute (with the assistance of several other experts) a constant sum survey of cable operator distant signal program valuations for the year 1983. A principal objective of that survey was to improve upon the constant sum surveys that JSC had sponsored during the first three cable royalty distribution proceedings (1978, 1979 and 1980). CTV also commissioned a constant sum survey of cable operator distant signal program valuations for 1983 with the same objective. The two 1983 cable operator studies were conducted entirely independent of each other and employed slightly different methodologies. Nevertheless, they obtained results that were virtually identical. *See* CRT, *Determination in*

1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12796, 12798 ("1983 CRT Determination"); SP PFOF ¶¶63-71.

Although CTV has not commissioned another cable operator survey, Bortz Media has conducted such surveys for every year since 1986, whether there was a litigated proceeding for that year or not. Over the decades, Bortz Media has continually sought to refine its survey in response to issues raised in the litigated distribution proceedings. *E.g.,* CRT, *Determination in the 1989 Cable Royalty Distribution Proceeding*, 57 Fed. Reg. 15286, 15300 (1992) ("1989 CRT Determination") ("[T]he Bortz survey has taken important steps to improve the validity and reliability of its results. The high standards of procedure that obtained in the 1983 survey were again followed in the 1989 survey. In addition, the Bortz survey made some key improvements"). *See generally* Bortz Study (SP Ex. 2) at 28-41; SP PFOF ¶¶73-85, 131.

For example, Bortz Media added the Canadians and Devotionals to the surveys after the CRT criticized Bortz Media for not including these categories in the 1983 survey. *See* 1983 CRT Determination, 51 Fed. Reg. at 12810; 1989 CRT Determination, 57 Fed. Reg. at 15293. Bortz Media also made changes in the program category definitions in response to CRT concerns -- although, for reasons Bortz Media explained, it resisted the use of the type of program examples that Program Suppliers had demanded (and uses unsuccessfully with their Gruen cable subscriber surveys). *See* Bortz Study (SP Ex. 2) at 30-31; 1989 CRT Determination, 57 Fed. Reg. at 15293. In response to the CRT, Bortz Media asked the respondents to allocate 100% of a fixed program budget rather than an artificial amount of $100, and it interviewed "cable system operators because of their more detailed knowledge of programming at the local level" rather than MSO executives who had been interviewed in the earlier surveys. *See* 1983 CRT Determination, 51 Fed. Reg. at 12795-96 & 12810; 1989 CRT Determination, 57 Fed. Reg. at 15292; Bortz Study (SP Ex. 2) at 29-30.

Notwithstanding these and other changes prompted by the experience of the distribution proceedings, the basic approach of the Bortz survey has remained generally the same -- professional executive interviewers ask randomly-selected samples of knowledgeable cable operators (those who pay the Section 111 royalties at issue) how they themselves would allocate a fixed budget for the non-network distant signal programming categories they actually carried

based upon the relative values of those categories in attracting and retaining subscribers to their cable systems. *See* Bortz Study (SP. Ex. 2) at 1-2; SP PFOF ¶¶86-95, 131. The results of the Bortz surveys over twenty-five years also have remained generally consistent and have repeatedly demonstrated that time-based "tonnage" and "viewing" shares do not equate to relative market value. These results are set forth in the Bortz Study (SP Ex. 2) at 23 and are reprinted in SP PFOF ¶131.

B. The Parties Have Presented A Substantial Amount Of Evidence Over Several Distribution Proceedings In Support Of A Constant Sum Methodology In General, And The Bortz Surveys In Particular, As Providing The Best Approach To Determining Relative Market Value.

JSC and other claimants have presented evidence in the various cable royalty distribution proceedings from numerous survey experts, market researchers, economists, statisticians, valuation experts and cable industry executives concerning the Bortz constant sum surveys of cable operators. That evidence has demonstrated that the constant sum approach is the best available method for determining the relative market values of the different categories of distant signal non-network programming; the Bortz surveys meet the professional standards of reliable and valid survey research; and the Bortz survey results accord with marketplace realities. *See* SP PFOF ¶¶63-85, 96-125.

All the programming claimants (JSC, CTV, PTV, Canadians, Devotionals and Program Suppliers) have thus come to rely upon the constant sum survey approach in the Section 111 distribution proceedings. Even the Program Suppliers, for the first time in this proceeding, now support use of constant sum surveys -- although they have advocated a methodologically-deficient survey of cable subscribers rather than cable operators. All the programming claimants, with the exception of Program Suppliers and Canadians, support the Bortz constant sum surveys of cable operators in this proceeding. While the Canadians use a combination of their constant sum survey results and fee generation, their one survey that followed the Bortz approach (and compared programming on Canadian signals with programming on U.S. signals) led to results consistent with the Bortz results. *See* SP PFOF ¶¶63, 302-03, 482, 650.

C. The CRT and CARPs Increasingly Accorded Greater Weight To The Bortz Constant Sum Survey Results.

In the 1983 proceeding, the CRT listed certain concerns with the Bortz and CTV constant sum surveys that precluded the CRT from according those surveys greater weight than the Nielsen viewing data sponsored by the Program Suppliers. *See* 1983 CRT Determination, 51 Fed. Reg. at 12808-10. JSC and others sought to address those concerns in the 1989 proceeding. Based on the record in the 1989 proceeding, the CRT increased the weight that had been accorded the cable operator surveys (and decreased the weight that had been accorded the Nielsen studies) in prior proceedings. *See* 1989 CRT Determination, 57 Fed. Reg. at 15302 (referring to the "new weight" accorded the Bortz results). The CRT found the "Bortz survey to be valid, and a key part of our determination." *Id.* at 15301. Where the Bortz results were "corroborated" with other evidence, the CRT accorded those results "substantial weight." *Id.* The CRT, however, expressed certain "concerns" with the survey that "affected [its] allocation." *Id.*

In the 1990-92 proceeding, the witnesses presented by JSC and other parties sought to address the 1989 CRT's concerns. After devoting more than forty pages of its report in the 1990-92 proceeding to analyzing the Bortz and Nielsen studies, the CARP agreed that the weight accorded the Bortz surveys should be increased further (and the weight accorded the Nielsen studies should again be decreased) – although the CARP split on how much weight was appropriate.

The CARP majority found that the Bortz study is "well designed" and did not suggest any changes in the survey methodology. Report of the Copyright Arbitration Panel in Docket No. 94-3 CARP CD 90-92 at 66 (May 31, 1996) ("1990-92 CARP Report"). They also found that the Bortz survey "focused more directly than any other evidence to the issue presented: relative market value," *id.* at 65, explaining that:

> The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the

> same categories we are presented here in the form of claimant groups – that is, sports, movies, and the others. That is also what the Panel must do.

Id. at 65. Thus, the CARP majority concluded, the Bortz survey is "highly valuable in determining market value." *Id.* at 66. However, they also said that there were conceptual "limitations" to the survey that "precluded its acceptance in toto." *Id.*

The dissenting CARP member did not share the majority's concerns. He concluded that the Bortz survey is the best tool available for measuring relative values in the relevant marketplace and that it should receive far more weight than it does . . . ." 1990-92 CARP Report at 170 (dissenting opinion). That is because the Bortz survey "focuses correctly on the cable operator as the key player, asks the economically significant question and accurately provides the best estimates of relative value in the marketplace that actually existed." *Id.* He explained that the conceptual "limitations" perceived by the majority do not provide a basis for discounting the Bortz results, noting further that:

> Most of the expert witnesses who testified agreed that the Bortz survey was correctly designed and executed and whatever shortcomings it may have are relatively minor in comparison to its attributes. In response to suggestions and official Tribunal criticism over the years, it has evolved to measure the correct variable and to provide the most accurate results of relative marketplace value.

Id. at 171.

D. The 1998-99 CARP, In The Last Litigated Distribution Proceeding To Address The Issue, Accorded Determinative Weight To The Bortz Survey Results In Setting The PS, JSC and CTV Awards. And It Concluded That Those Results Set A Floor For PTV. The Register, Librarian And Court Of Appeals Affirmed The CARP's Determination.

In the 1998-99 proceeding, JSC and other parties sought to address the "conceptual" limitations that 1990-92 CARP identified regarding the Bortz surveys. After considering that evidence and applicable precedent, the CARP determined that none of those conceptual limitations provides a proper basis for discounting the Bortz results. It concluded that the "Bortz survey is clearly the best measure of relative marketplace value" and it accepted

> the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative market value for PS, JSC and NAB -- for both the Basic Fund and the 3.75% Fund. Indeed, for reasons discussed *infra,* we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups. Bortz also establishes a Basic Fund floor . . . for PTV.

Report of the Copyright Arbitration Royalty Panel in Docket No. 2001-08 CD 98-99 at 52, 31 (Oct. 21, 2003) ("1998-99 CARP Report"), *aff'd* Final Order Issued by Librarian of Congress in Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (January 26, 2004) ("1998-99 Librarian Order"), *aff'd Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 400 (D.C. Cir. 2005) ("*Program Suppliers v. Librarian*"). The CARP noted that its decision to tie the PS, JSC and CTV awards directly to the Bortz results -- and not to rely upon raw or adjusted viewing data in fashioning these awards -- was the "natural evolution of a discernible trend" where "[s]uccessive decision-makers have been according greater and greater weight to Bortz, and concomitantly lesser weight to [the] Nielsen" viewing data that had been the cornerstone of the CRT's early distribution decisions. *Id.* at 53. *See Program Suppliers v. Librarian,* 409 F.3d at 399-400 (referring to "adjudicatory trend" of "increased dependence on Bortz").

Program Suppliers challenged on appeal the decision of the Register and Librarian to affirm the 1998-99 CARP's reliance upon Bortz rather than Nielsen. *See Program Suppliers v. Librarian,* 409 F.3d at 401 ("Program Suppliers are unhappy because the Librarian, in allocating most awards, accepted the CARP's decision to rely solely on the Bortz survey and not at all on the Nielsen study.") The Justice Department defended the decisions of the CARP, Register and Librarian in the 1998-99 proceeding, explaining: "This Court long ago recognized the validity of the panel's view that the Bortz study is superior to the Nielsen study for purposes of cable royalty determinations." Brief for Respondent Librarian of Congress in *Program Suppliers v. Librarian* at 34 (filed Dec. 14, 2004), *citing CBN v. CRT.* The Court of Appeals agreed, finding the Program Suppliers' challenge to the Bortz surveys "meritless." *See Program Suppliers v. Librarian,* 409 F.3d at 401. The Court of Appeals held that the CARP "was free to rely exclusively upon [the Bortz] survey," stating:

> We detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards. Indeed, it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme. . . . Bortz adequately measured the key criterion of relative market value. Moreover, as the CARP put it, Bortz "subsumes *inter alia* all viewing data that a CSO might consider when assessing relative value of programming groups."

Id. at 402 (citation omitted).

II. The Record In This Proceeding Confirms That The 2004-05 Bortz Surveys Provide Reliable And Valid Estimates Of Relative Marketplace Values.

The 1998-99 CARP stated that its decision to rely exclusively upon the Bortz results in setting certain awards was based upon the record before it and recognized that future records could produce different results. *See* 1998-99 CARP Report at 53 ("We certainly do not suggest that in future proceedings Bortz results should necessarily be mechanically adopted to set the awards for PS, JSC and NAB"). The record in this proceeding, however, affords no proper basis for departing from the CARP's conclusion (affirmed by the Register, Librarian and Court of Appeals) that the Bortz surveys provide the best available estimates of the relative market values of JSC, CTV and PS programming (and a floor for PTV programming). To the contrary, the record in this proceeding confirms that the 2004-05 Bortz surveys, like the 1998-99 Bortz surveys, provide reliable and valid estimates of those values. Moreover, aspects of the Bortz surveys presented in this proceeding have resolved the issues that prevented the 1998-99 CARP from relying on the Bortz survey results as a basis for the Canadians' award.

A. The 2004-05 Bortz Surveys Are Methodologically Sound.

The 1998-99 CARP concluded the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy." *Id.* at 52. Indeed, the 1998-99 CARP did not suggest that Bortz should make any changes in the methodology of the surveys -- including the program categories used in those surveys. *See also* 1998-99 CARP Report at 18-19 (noting that the 1990-92 CARP conceded that the survey was "well designed" and did not suggest any specific methodological changes) (citation omitted). Numerous experts in prior distribution proceedings have offered testimony demonstrating that the Bortz surveys are properly designed and executed. *See* SP PFOF ¶¶63-85.

In this proceeding, Mr. Trautman of Bortz Media testified that the 2004-05 Bortz surveys followed the same procedures, and met the same high standards, as the 1998-99 Bortz surveys upon which the 1998-99 CARP relied. Furthermore, Dr. Gregory Duncan of the University of California at Berkeley, a qualified expert in survey research, *see* Tr. 2502 (Duncan), determined that the conclusions of the 1998-99 CARP concerning, and those of various survey experts who have evaluated, the prior Bortz surveys apply equally to the 2004-05 Bortz surveys. Dr. Duncan explained that the 2004-05 surveys are "methodologically sound;" they are "based on sound principles and tested methods" and were "conducted in such a way that [their] results can be deemed reliable." Duncan WDT (SP Ex. 1) at 11. Dr. Duncan's testimony and other record evidence (including the testimony of Mr. Trautman of Bortz Media, who has substantial survey experience involving the cable industry) demonstrate that the 2004-05 Bortz surveys followed the same high professional standards as the 1998-99 surveys to which the 1998-99 CARP accorded determinative weight. *See* SP PFOF ¶¶86-125.

The Program Suppliers did not present any witness to rebut Dr. Duncan's testimony supporting the Bortz survey methodology; nor did they present anyone qualified as a survey expert to testify concerning that methodology. While the Program Suppliers offered the same criticisms of the Bortz methodology that they have offered (and which were rejected) in prior proceedings (such as those relating to program categorization), they failed to provide empirical support for any of those criticisms (as instructed to do by the Register and Librarian in the 1998-99 proceeding). *See infra* pages 20-29 (discussing criticisms); SP PFOF ¶¶267-72.

The Canadians' witnesses offered in this proceeding some of the same criticisms of the Bortz methodology that they offered in prior proceedings. As discussed below, these criticisms also are unsupported by any empirical evidence and are unfounded. While the 1998-99 CARP did not use the Bortz surveys to determine the Canadians' award, the record in this proceeding provides a stronger basis than any prior record for accepting the Bortz methodology (rather than fee generation) to set the Canadians' 2004-05 award. *See* SP PFOF ¶¶297-308, 325-36, 570-671. At the least, however, as the Canadians' witnesses acknowledged, those criticisms do not affect the Bortz results for Program Suppliers, JSC and CTV. *See* SP PFOF ¶¶125, 305.

The Devotionals, who support the Bortz results, offered no criticism of the Bortz methodology.

B. The 2004-05 Bortz Surveys Provide Reliable Estimates Of Relative Marketplace Values In The Relevant Hypothetical Marketplace.

The 1998-99 CARP determined that, in a hypothetical marketplace absent compulsory licensing, negotiations for distant signal programming would most likely occur between individual cable operators (or perhaps MSOs or a collective that they might form), on the one hand, and individual broadcast stations that would act as intermediaries for copyright owners and that would license all the copyrighted programming broadcast by each station, on the other hand. As a result, cable system operators (or MSOs or a collective) would bargain for a fixed quantity, meaning that the supply curve for each type of programming would remain vertical, *i.e.*, the supply of programming would remain the same irrespective of the price. Thus, the "demand side" (the cable operators' perspective) would determine relative values of each type of programming. Under these circumstances, the CARP concluded, the Bortz surveys of cable operator program demand provide the best evidence of relative market value. *See* 1998-99 CARP Report at 11-13.

The Program Suppliers argued that this "description of the hypothetical marketplace is fundamentally flawed, produces absurd results, and must be rejected." The Register and Librarian, however, dismissed the Program Suppliers' argument. *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3614. As the Register and Librarian explained, "While Program Suppliers may disagree with the Panel's consideration of the hypothetical marketplace and in particular its conclusion that it is the perspective of cable operators that best determines how much different categories of programming would be worth, the Panel's actions are based on prior decisions." *Id.* at 3614.

Again, nothing in the record of this proceeding warrants a departure from prior decisions. Rather, the record confirms, consistent with precedent, that in the relevant hypothetical marketplace broadcasters would likely act as intermediaries between copyright owners and cable operators; the supply of programming would be fixed; demand would determine the relative market values of each type of distant signal non-network programming; and thus the relative

values that cable operators attach to the different categories of such programming provide the best evidence of the relative market values of that programming. *See* Crawford WRT (SP Ex. 52) at 12-13; Tr. 2408-16 (Crawford); McLaughlin WDT (SP Ex. 6) at 1; SP PFOF ¶¶57-61, 189, 444-59. Because the Bortz survey results reflect the relative values that cable operators attach to the different categories of distant signal non-network programming, those results provide the best evidence of relative market values of those program categories.

The testimony of Dr. Robert Crandall, a Brookings economist with substantial experience involving the cable and broadcast industries, supports that conclusion:

> The advantage of the constant sum survey is that it attempts to measure the relative value that cable system operators place on various program categories. Since these operators would make the program purchasing decisions in the marketplace that would exist but for the compulsory copyright license, this type of survey provides the best information on the operation of the hypothetical marketplace in the absence of actual data on programming purchases, which do not exist.

Crandall WDT (SP Ex. 3) at 8; *see also* Tr. 228 (Crandall) (Bortz survey is "the best source of information on relative marketplace values"). As Dr. Crandall observed, that conclusion also finds support in the testimony of various economists (and other experts) who in prior proceedings have considered whether the Bortz results provide a reliable and valid estimate of relative market values. Crandall WDT (SP Ex. 3) at 8; *see also* McLaughlin WDT (SP Ex. 6) at 8 ("But for two factors [requiring adjustment], the Bortz survey results would show how the cable operators themselves would have allocated the compulsory licensing royalties they paid to carry that programming"); Calfee WRT (CDN Ex. R-3) at 11 (economist testifying on behalf of the Canadians criticized the Bortz survey insofar as it applies to the Canadians but stated that the survey "appears sound in its treatments of the major program categories . . ."); *id.* at 9 ("Bortz study may be useful for large categories like sports, movies and series, and local commercial television programming"); Tr. 3074-75 (Calfee) ("I cannot rule out the possibility that [Bortz] provides a reasonably accurate relative value for the large categories").

The Program Suppliers' economist, Dr. George Ford, advanced the same arguments that the Program Suppliers advanced in prior proceedings -- *e.g.*, that the Bortz surveys do not reflect

market values and fail to account for the amounts of programming being retransmitted. Dr. Ford also offered his own novel version of the hypothetical marketplace to justify his analysis that ignores cable operator valuations altogether. For the reasons discussed below, neither Dr. Ford's testimony nor anything else in the record of this proceeding provides a proper basis for changing the nature of the hypothetical marketplace or the conclusion that the Bortz results best reflect relative program values in that marketplace. *See infra* pages 24-28; SP PFOF ¶¶416-81.

C. Independent Record Evidence Corroborates The Results Of The 2004-05 Bortz Surveys

In tying the PS, JSC and CTV awards directly to the Bortz results, the 1998-99 CARP noted that the results of the multiple regression analysis offered by CTV witness Dr. Gregory Rosston "when considered within their confidence intervals, generally corroborate the Bortz results." 1998-99 CARP Report at 53. The record in this proceeding provides not only a comparable regression analysis to help corroborate the Bortz results for all parties (other than the Devotionals); it also provides additional evidence confirming those results.

1. Waldfogel Regression Analysis.

Although the 1998-99 CARP did not adopt the Rosston regression analysis as an independent method for determining relative value, in part because of a "lack of any historical bases for assessing reliability," 1998-99 CARP Report at 48, the CARP concluded that

> it is useful as a confirmatory or corroborating study and, if volatility and variability are improved, similar analyses may prove useful for directly measuring relative values in future years.

1998-99 CARP Report. at 50 (footnote omitted); *see also id.* ("Panel takes some comfort in that the Rosston analyses tend to corroborate the results of the Bortz survey . . .") (footnote omitted).

In this proceeding, CTV witness Dr. Joel Waldfogel, an economist at the Wharton School, conducted a regression analysis that is analogous to the Rosston regression analysis, in which he addressed several of the concerns that had been raised about the Rosston study. The Waldfogel regression considers the distant signal purchasing behavior of cable operators in 2004-05. Because of certain arbitrary features of the royalty structure and the fact that distant signal programs are purchased in bundles, it is impossible to observe directly the relative prices

paid for various categories of distant signal programming. But cable operators make economic choices when they choose particular distant signals and pay royalties for them. Dr. Waldfogel's regression analysis, using extensive data showing what programs were actually carried and what royalty fees were actually paid by each Form 3 cable operator, provides useful information about the relative values of different types of distant signal programming to cable operators in 2004-05. SP PFOF ¶¶134-170 The results of Dr. Waldfogel's study of cable operators' economic behavior, after adjustments to allow an apples-to-apples comparison, strongly corroborate the relative value shares measured by the Bortz surveys for all categories (other than the Devotionals) -- as was the case with the Rosston 1998-99 regression analysis. *See* SP PFOF ¶¶171-181; 1998-99 CARP Report at 53.

Dr. Waldfogel's comparison was as follows (SP PFOF ¶179):

Implied Royalty Shares Using All Minutes Compared to Augmented Bortz Shares 2004 – 2005

Claimant Group	Estimated Royalty Shares from Regression [1]	Augmented Bortz Share [2] 2004	Augmented Bortz Share [2] 2005
Program Suppliers	32.15%	35.40%	36.20%
Sports	38.73%	32.40%	35.50%
Commercial TV	20.20%	17.90%	14.20%
Public Broadcasting	6.01%	6.20%	6.05%
Devotional	0.00%	7.60%	6.30%
Canadian	2.92%	0.50%	1.65%

Note:
[1] To be comparable to Bortz shares, royalty shares are calculated using all WGNA minutes but omitting Low Power and Mexican
[2] Bortz shares taken from the 2009 Testimony of Linda McLaughlin. Mid-points of ranges used for Canadian and PTV.
Source: Waldfogel WDT (SP Ex. 18) at 14.

Program Suppliers' witness Dr. George Ford and Devotionals' witness Dr. Michael Salinger presented rebuttal testimony attacking the Waldfogel regression analysis. Both asserted that distant signal royalties are affected by the statutory royalty formula rather than market decisions, and that the regression study's results were imprecise and showed variation when

subgroups of the data were analyzed separately. *See* SP PFOF ¶¶182-188. The 1998-99 CARP considered similar criticisms of the Rosston regression analysis, but nonetheless found it to be "useful as a confirmatory or corroborative study" that supported reliance on the Bortz survey evidence (at least for the major program categories). 1998-99 CARP Report. at 50; *see also id.* at 48 (1998-99 shares for Canadians and Devotionals were zero). The same conclusion should apply here.

2. Homonoff/Trautman Analysis of Cable Network Marketplace.

Program Suppliers' witness Howard Homonoff, a Director in the Entertainment, Media and Communications Practice of PricewaterhouseCoopers LLP, noted that the 1998-99 CARP envisioned the hypothetical marketplace for distant signal programming as operating "'in the same manner as cable networks currently offering programming packages . . . .'" Homonoff WDT (PS Ex. 7) *quoting* 1998-99 CARP Report at 11. According to Mr. Homonoff,

> While the Panel did not go so far as to say that the "hypothetical free market" for distant signals would be identical to the cable network marketplace, the Panel's broader point as to the utility of looking to the cable network marketplace for guidance on a hypothetical distant signal marketplace is consistent with my experience. *A hypothetical marketplace for the acquisition of programming on distant signals is closely analogous to the market for whole cable networks*, which represent a large majority of the programming MSOs provide to their subscribers. Following that lead, I examine that same cable network marketplace as a guide in analyzing the distant signal programming marketplace.

Homonoff WDT (PS Ex. 7) at 5-6 (emphasis added).

Mr. Homonoff provided an analysis of the amount of time (or "tonnage") various program categories occupied on the telecast schedules of certain cable networks. Mr. Homonoff acknowledged that his study was not intended to represent the relative shares of Section 111 royalties that Program Suppliers or any other claimant should receive. *See* Tr. 1760-61 (Homonoff). Nor did he suggest that his analysis either corroborated or called into question the results of any studies offered in this proceeding. He made only the unsupported claim that because there is such a large amount of Program Supplier programming available to cable operators and subscribers in the cable network marketplace, the same programming on distant

signals must be quite valuable. *See* SP PFOF ¶¶554-63. The 1998-99 CARP, however, drew an opposite inference from similar evidence of the growth of cable network programming that it believed was comparable to a particular category of distant signal programming. *See* 1998-99 CARP Report at 67.

JSC witness James Trautman of Bortz Media, who has substantial experience valuing television programming in the marketplace, also examined the cable network marketplace that Mr. Homonoff considered analogous to the distant signal marketplace. In particular, Mr. Trautman compared the license fees that various cable networks actually paid in 2004-05 for JSC and Program Supplier programming with the amount of time occupied, and viewing generated, by that programming. Mr. Trautman's analysis helps corroborate several key findings of the Bortz surveys, *i.e.,* (1) JSC's share of distant signal market value is significantly greater than its share of time or viewing; (2) Program Suppliers' share of distant signal market value is significantly less than its share of time or viewing; and (3) JSC and Program Suppliers' shares of distant signal market value are approximately the same. *See* SP PFOF ¶¶191-200, 475-81.

For example, following its conversion from the most widely-carried distant signal to a cable network, TBS entered into marketplace negotiations with Major League Baseball for the right to televise the games of the Atlanta Braves outside their home territory. The prices that TBS paid for programming following its conversion provide perhaps the clearest indication of the relative market value of at least the JSC and Program Suppliers programming on superstations with nationwide cable carriage (such as WGN).

TBS paid <u>$175 million</u> (or over *24%* of TBS' 2004-05 programming budget) for just the rights to televise the Braves in 2004-05; the remainder of that programming budget went for the production of those Braves' telecasts and rights payments to the Braves, the rights to televise some other JSC (NCAA) events, and Program Suppliers' programming. TBS allocated more than 24% of its programming budget to the Braves telecasts, notwithstanding that those telecasts accounted for only about *2.5%* of TBS' total broadcast hours and about *2.5%* of the viewing minutes generated by all TBS programming. That allocation -- which market-negotiated license fees substantially in excess of time and viewing shares -- is fully consistent with the results of the Bortz surveys. And, of course, it is squarely inconsistent with the results of the Dr. George Ford

study sponsored by Program Suppliers. As Mr. Trautman explained, the Ford formula would have resulted in TBS paying 4.25% in 2004 and 3.51% in 2005 -- rather than the over 24% that it actually paid to televise the Braves games. *See* SP PFOF ¶¶192-94, 477-478.

MLB on TBS Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (Braves)*	2.67%	2.60%	4.25%	24.08%
Program Suppliers/Other	97.33%	97.40%	95.75%	75.92%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (Braves)*	2.47%	2.42%	3.51%	24.65%
Program Suppliers/Other	97.53%	97.58%	96.49%	75.35%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production cost.

Sources: Trautman WRT (SP Ex. 57) at 5.

Likewise, JSC telecasts amounted to only about 0.5% - 0.7% of the 2004-05 telecast hours on the top 25 cable networks examined by Mr. Homonoff, and they generated only about *1.4%-1.7%* of the 2004-05 time that households spent viewing those networks. Yet, the cable networks paid, in marketplace transactions, between *17%* and *20%* of their programming budgets to telecast that JSC programming -- more than ten times the JSC viewing share and more than twenty-five times the JSC tonnage share. Again, that result is fully consistent with the results of the Bortz surveys (and wholly inconsistent with the results of the Ford study which would have predicted a JSC share of only 2.8% in 2004 and 2.05% in 2005). *See* SP PFOF ¶¶196-200, 480-81.

JSC on Top 25 Cable Network Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (MLB, NBA, NFL, NHL)*	0.72%	1.71%	2.80%	20.12%
Program Suppliers/Other	99.28%	98.29%	97.20%	79.88%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (MLB, NBA, NFL, NHL)*	0.55%	1.41%	2.05%	17.35%
Program Suppliers/Other	99.45%	98.59%	97.95%	82.65%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs.

Source: Trautman WRT (SP Ex. 57) at 9.

When the per-telecast hour and per-viewing minute rights fees of these cable networks are applied to the distant signal universe, JSC and Program Suppliers receive essentially equivalent relative value shares, just as they do in the 2004-05 Bortz results. *See* SP PFOF ¶¶196-200.

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Programming Hour Method)

	2004-05	
	JSC	PS
1. Percent of Distant Signal Programming Hours	4.6%	50.1%
2. Cable Network Expenditures Per Programming Hour	$396,703	$32,153
3. Time-Adjusted Expenditures (1*2)	$18,248	$16,109
4. Share of Relative Value	53.1%	46.9%

Source: Trautman WRT (SP Ex. 57) at 11.

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Viewing Minute Method)

	2004-05	
	JSC	PS
1. Number of Distant Signal Viewing Minutes	838,907	8,633,838
2. Cable Network Expenditures Per Viewing Minute	$0.013	$0.001
3. Projected Distant Signal Market Value (1*2)	$10,906	$8,634
4. Share of Relative Value	55.8%	44.2%

*

Source: Trautman WRT (SP Ex. 57) at 14.

3. Changed Circumstances.

CTV witness Dr. Richard Ducey presented information and data showing that despite changes in the cable industry as a whole between 1998-99 and 2004-05, there were no substantial changes in the distant signal marketplace during that time, especially as compared with changes that had occurred leading up to 1998-99. *See* SP PFOF ¶¶202-216. His conclusions regarding his distant signal data analyses were confirmed by the testimony of Judith Meyka (a senior cable programming executive and the only witness in this proceeding who actually worked for an MSO during the years 2004-05) and Mr. Trautman (who has over two decades of experience working with the cable and television programming industries). *See* SP PFOF ¶¶99, 131-33, 201, 230. In light of this testimony, one would expect to see, as the evidence showed, no significant changes in relative values reported by the Bortz results between 1998-99 and 2004-05. *See* SP PFOF ¶¶131-133.

To the extent there were changes in the distant signal marketplace, they are adequately reflected in the Bortz survey results. For example, Ms. McLaughlin demonstrated that the demand for distant PTV programming (as reflected in PTV's share of the number of subscribers receiving distant PTV signals ("subscriber instances")) increased slightly between 1998-99 and

2004-05. Indeed, the relative increase in PTV's share of subscriber instances between 1998-99 and 2004-05 was greater than that experienced by the Canadians between 1998-99 and 2000-03 -- an increase that the Judges found to be a "significant" changed circumstance supporting an increase in the Canadians' 2000-03 award over its 1998-99 award. *See* Distribution Order in Doc. No. 2008-2 CRB CD 2000-2003 at 34 (March 3, 2010) ("2000-03 Distribution Order"). PTV's Bortz share also rose slightly during that time period. Likewise, Dr. Ducey showed that cable systems were importing a relatively greater percentage of nearby distant signals in 2004-05 than in 1998-99 -- a fact that would suggest an increase in the relative value of station-produced programming. CTV's average Bortz share also rose slightly between 1998-99 and 2004-05. *See* SP PFOF ¶¶213-221.

Program Suppliers' witness John Mansell implied that JSC's share in Bortz should have declined because the number of games from some of JSC's members on some of JSC's broadcast stations declined. But Mr. Mansell failed to compare JSC's share of the distant signal marketplace in 1998-99 to its share of that marketplace in 2004-05. Dr. Ducey made that comparison and found that JSC's share was virtually the same (4.9% in 1998-99 and 4.6% in 2004-05) -- while Program Suppliers' time share declined from 60% in 1998-99 to 50% in 2004-05. *See* SP Ex. 8; SP PFOF ¶¶225-227, 232, 564-69. Such tonnage comparisons say nothing about the relative value of JSC programming. *See, e.g.,* Tr. 1701-06 (Mansell) (discussing significant rise in ESPN's rights payment to MLB notwithstanding a decrease in the amount of MLB telecasts over ESPN). Nevertheless, both the average JSC and PS Bortz shares have declined slightly between 1998-99 and 2004-05. *See* Bortz Report (SP Ex. 2) at 23; SP PFOF ¶132. Clearly the Bortz results have been sensitive to the minor change circumstances reflected by the record of this proceeding.

III. None Of The Theoretical Criticisms Of The Bortz Surveys, As Repeated In This Proceeding By Program Suppliers And Canadians, Supports According Less Weight To The 2004-05 Bortz Results Than The CARP Accorded The 1998-99 Bortz Results.

For over twenty-five years, Program Suppliers have been making the same criticisms of the Bortz survey -- that, in effect, the Bortz survey questions should have been written differently; that the Bortz respondents could not have understood or provided meaningful answers to the questions that were asked; and that the Bortz results do not say anything about

relative market value. But Program Suppliers have never once offered anything more than theoretical criticisms unsupported by empirical evidence demonstrating that these criticisms have any factual basis. Program Suppliers have had more than enough time to come forward with hard evidence rather than speculation. None of the Program Suppliers' criticisms of the Bortz surveys (or those of the Canadians) -- all of which repeat criticisms raised and dealt with in prior proceedings -- should be accorded any weight in this proceeding. *See* SP PFOF ¶¶267-308.

A. Program Suppliers Have Failed To Provide Any Empirical Support For Their Unfounded Claim That 2004-05 Bortz Respondents Were Confused As To The Programming They Were Valuing. Nor Have Program Suppliers Demonstrated That, If There Were Any Such Confusion, It Materially Affected The Results Of The 2004-05 Bortz Surveys.

As noted above, the Program Suppliers presented in this proceeding no witness qualified as a survey expert to criticize the Bortz study; nor did they present anyone with experience as a cable operator to suggest that cable operators would not have been able to provide meaningful responses to the Bortz survey or that the Bortz survey results do not make sense. Nevertheless, they raised the same criticism that they have raised in every proceeding going back to 1978, where the first constant sum survey was introduced. Although they phrase it in several different ways, their central criticism is that a Bortz survey respondent may not have understood completely which programming was included in each of the categories the respondent was asked to value -- *e.g.,* that Program Suppliers failed to receive credit for particular programs (such as fishing or bowling telecasts) or that respondents valued ineligible broadcast network or cable network programming (notwithstanding that they were repeatedly told not to do so by the Bortz survey interviewers).[2]

[2] In the 1989 proceeding the CRT summarized certain of the testimony on this same issue as follows: "Dr. Rubin argued that the program categories established by Bortz did not directly comport with the program categories as defined by the Tribunal. . . . Dr. Rubin believed the category labels should have been augmented with descriptions of familiar programs in each category. . . . Program Suppliers argued that the lack of more detailed explanations cost them a number of programs that they believe the typical respondent assigned to other categories, such as . . . wrestling and auto racing (often recorded syndicated series, but probably thought of as 'sports'). . . . However, NAB witness Richard Ducey believed that respondents had a 'dominant impression' of what each category contained, and any misimpressions were likely to be a 'wash.'" 1989 CRT Determination, 57 Fed. Reg. at 15295 (citations omitted).

Neither the Program Suppliers nor any other party in this proceeding or any other distribution proceeding has ever presented evidence that any of the Bortz respondents was in fact confused about what programming falls within each category -- or even more importantly, that if there was any such confusion, it had any material effect upon the survey results or biased them with respect to one party or another. Indeed, the record supports the contrary conclusion. *See* SP PFOF ¶270.

In the 1998-99 proceeding, Program Suppliers also argued that Bortz respondents were confused about what programming comes within each category. They pointed to the testimony of one JSC witness -- a cable operator who supposedly miscategorized two programs when questioned by the CARP -- as "conclusively demonstrating, in Program Suppliers' view, that miscategorization of programs by respondents to Bortz Media surveys is considerable and invalidates the results." 1998-99 Librarian Order, 69 Fed. Reg. at 3615. The Register and Librarian rejected that argument for two reasons that apply equally in this proceeding:

> First, *the Panel was not presented with evidence that demonstrated sufficiently widespread miscategorization of programs by Bortz Media respondents that would likely affect the survey results.* Mr. Egan's responses to Arbitrator Young reflect only how he might respond and were offered by someone who could not recall if he had ever completed a Bortz Media survey. Second, and more importantly, the Bortz Media surveys do not question cable operators as to individual programs, but rather question them as to the value they attach to categories of programs. See Trautman Tr. at 324-25 (Respondent are "not thinking about each and every program that is aired on that signal. They are thinking about the general categories of program."). *If Program Suppliers pointed to evidence that demonstrated that Bortz Media respondents misapprehended entire categories of programs when assigning them value, then the Panel might have been required to address such contentions.* That is not the case here . . . .

Id. at 3615 (emphasis added).

As this makes clear, it is simply not enough for the Program Suppliers to show that, for example, there are other programs that Program Suppliers consider to be "sports" besides those within the JSC claim, such as the *Babe Winkelman Fishing Show* on WGN-TV -- and then argue that Bortz respondents may have been thinking about those programs rather than the Chicago

Cubs, White Sox and Bulls (also broadcast by WGN) when valuing the category "live professional and collegiate team sports." *See* Tr. 3256-58 (Kessler). To have raised an issue that deserved to be addressed by the Judges, Program Suppliers would need to have offered empirical evidence demonstrating that (1) a significant number of Bortz respondents in fact misapprehended which programming was included in the JSC category and (2) had they not done so, the Bortz survey results would have been materially different. Program Suppliers should have also presented evidence that this programming had some value to cable operators in distant markets. Program Suppliers, however, failed to present any such evidence. They simply have not satisfied the burden imposed by the Register and Librarian in the 1998-99 proceeding concerning alleged program miscategorizations.

Wholly apart from the 1998-99 Librarian's Order, the Settling Parties strongly believe the Judges should require the Program Suppliers to come forward (finally) with hard evidence of actual respondent confusion caused by the wording of the Bortz survey questions and hard evidence that any such confusion had a material impact on the survey results. Having decided -- apparently years ago -- to conduct a constant sum survey, Program Suppliers were certainly in a position to determine whether such evidence existed had they directed their efforts to cable operators rather than subscribers. Program Suppliers, however, chose not to do so or, at least, not to present such evidence. The only fair inference is that they recognize that the results of a cable operator study conducted the way they believe it should be conducted would not lead to results materially different than the Bortz results (as reflected in the two independently conducted 1983 cable operator constant sum surveys that provided virtually the same results). Program Suppliers should not be rewarded for persistence in doing no more than finding witnesses to parrot the identical theoretical criticisms over and over without making any effort to factually support those criticisms. This is particularly true given the fact that the decision-makers in the last two proceedings to evaluate the Bortz surveys (the 1990-92 CARP and the 1998-99 CARP) did not suggest that any changes should be made in the wording of the Bortz survey questions to make those questions any clearer.

B. Dr. Ford's Criticisms Of The 2004-05 Bortz Surveys Are Based Upon The Same Theoretical Constructs That Have Been Thoroughly Vetted And Rejected In Prior Proceedings And That Have No Empirical Basis.

Similarly, in rebuttal, Program Suppliers' Dr. George Ford resurrected age-old criticisms of the Bortz surveys -- certain of which focus on whether the Bortz results reflect market value and one of which focuses upon the amounts of programming being valued. None of these criticisms provides a basis for according less weight to the 2004-05 Bortz studies than the CARP accorded the 1998-99 Bortz studies.

1. Market Value/Supply Side.

According to Dr. Ford, the Bortz survey measures only cable operator willingness-to-pay and not the amounts that cable operators would actually pay in a free market. (Of course, his own viewing/advertising cost analysis says absolutely nothing about cable operator valuations of any sort (*see infra pages* 41-50)). In Dr. Ford's view, the Bortz results cannot be translated into market values unless the demand curves for all program types are linear and the demand elasticities are the same at the selected quantities -- a situation he considers "implausible." Dr. Ford further argues that valuations based upon willingness to pay will give way when sellers deal with multiple competing buyers ("Tom, Dick and Harry") and sell exclusively to only one of them (even though the nature of the realities of the cable marketplace are that such programming is not sold exclusively). *See* George Ford WRT (PS Ex. 16) at 10; SP PFOF ¶¶286-96.

Dr. Ford's rebuttal testimony seeks to rekindle a debate about what has been called "supply side" considerations that began in the 1983 proceeding and continued throughout the 1998-99 proceeding. Dr. Ford follows in the footsteps of Dr. Stanley Besen, the only other economist to carry the torch for the Program Suppliers on this issue. Dr. Ford repeats (without developing or advancing) the same theoretical arguments that Dr. Besen first began making twenty-five years ago as a criticism to the original Bortz survey.[3] Several witnesses, testifying

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[3] For example, in the 1989 proceeding, "Dr. Besen disagreed that the Bortz survey bore any relationship to marketplace value. The Bortz survey measures the total value to cable operators of all programs in a given category (the marketplace value plus the consumer surplus). A survey demonstrating the relative total value of seven different program types would not demonstrate the relative marketplace value of those program types except where the demand curves for all program types are linear and the demand elasticities are the same for all program types at the equilibrium prices. . . . Dr. Besen contends that these conditions are stringent and there exists no evidence to

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on behalf of JSC and other parties, have provided responses to Dr. Besen's testimony in the various proceedings. And in the 1998-99 proceeding, it appeared that the CARP had finally resolved the debate. It concluded:

> Clearly, Bortz does not *directly* survey the seller's perspective. But this does not materially undermine the utility of Bortz, and *does not inform us whether any particular claimant group should receive more or less than implied by the Bortz survey.* As previously addressed in some detail, we believe the demand side would more likely determine relative values of programming in an unregulated marketplace than the supply side... *Moreover, it is probable that when responding to the survey, experienced CSO executives have incorporated their understanding of the seller's side of the marketplace.* See Tr. 262-63 (Trautman). For these reasons, we see no need to make the tortuous adjustments to the Bortz results based upon our subjective assessments of the seller's perspective.

1998-99 CARP Report at 22 (emphasis added) (citation omitted).

As this suggests, the 1998-99 CARP resolved the supply-side issue on several grounds -- including the lack of record evidence that factoring supply side considerations into the equation would raise or lower any one claimant's Bortz share. Notwithstanding the CARP's conclusions, the Program Suppliers offer no new evidence on these points. All parties in this proceeding other than Program Suppliers believe that constant sum surveys of cable operators provide reliable and valid estimates of relative market value; only Program Suppliers' Dr. Ford disagrees (although Program Suppliers' other economist, Dr. Gruen, relies upon a constant sum survey to demonstrate the relative value that cable subscribers attach to programming). And both Dr. Waldfogel and Dr. Crawford explained in this proceeding that because of the nature of the cable market and the distant signal market in particular, relative values would be determined by the relative demand for the programming rather than supply-side factors. *See* SP PFOF ¶¶287-93.

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support that these conditions exist." 1989 CRT Determination, 57 Fed. Reg. at 15296 (citations omitted). *See generally* 1983 CRT Determination, 51 Fed. Reg. at 12795; 1989 CRT Determination, 57 Fed. Reg. at 12810; 1990-92 CARP Report at 55; 1998-99 CARP Report at 22 (discussing supply side testimony including responses to Besen based upon economic principles relating to forced sales and all-or-nothing choices).

Neither Dr. Ford nor anyone else has offered any proof that Settling Parties would receive less (and Program Suppliers would receive more) than their Bortz share if supply side considerations were taken into account. For example, there is no showing that, in Dr. Ford's/Besen's terminology, the elasticities of demand for Program Suppliers' programming are different from that of the programming represented by the Settling Parties -- or that if they are different, those differences would result in the Program Suppliers' programming receiving more than their Bortz share in a free market. Having lost the debate in the 1998-99 proceeding on this issue for failure to provide the requisite evidence, it was incumbent upon the Program Suppliers to come up with such evidence (if there was any) -- not simply another economist to say the same thing. They failed to provide the requisite evidence in this proceeding just as they failed to do so in the 1998-99 proceeding.

Moreover, Mr. Trautman, who has overseen the design and execution of the Bortz surveys, has again testified in this proceeding that he believes, based on his experience, that the respondents answer the survey's valuation question with their actual market experience in mind. Thus, as the 1998-99 CARP concluded, the budget they provide represents an expected market outcome and not simply the amount the cable operator is willing to pay. *See* Bortz Report (SP Ex. 2) at 37 ("We believe . . . the survey does reflect the respondents' understanding of the marketplace prices of the different kinds of programming -- which is a reflection of the 'supply side.' The cable system operators surveyed are active in the marketplace for cable programming and are familiar with the rates charged by sellers of various genres of cable networks."). This testimony is fully consistent with the point made by the Court of Appeals that it was reasonable for the 1998-99 CARP to conclude, as it did, that the Bortz respondents took account of cable subscriber viewing in providing their program valuations. *See Program Suppliers v. Librarian,* 409 F.3d at 402. In any event, notwithstanding the longevity of the argument in these proceedings, the Program Suppliers have presented no evidence regarding how the survey respondents understand the Bortz valuation question.

2. Program Quantity.

Dr. Ford also argues that because the interviewer does not tell the respondent cable operator the "quantities" (presumably the aggregate program time) of distant signal program

categories they carried, the respondents may have valued programming they did not carry. Again, this is the same criticism leveled by Dr. Besen at the start of the supply side debate. *See* 1983 CRT Determination, 51 Fed. Reg. at 12795 ("Besen found it critical in ascertaining how much cable operators would pay for different program types to know the amount of supply of different programs and whether the supplier was willing to sell dearly, cheaply, or offer the programs for nothing").

The only basis that Dr. Ford asserts for his program quantity argument in this proceeding is Mr. Trautman's testimony that he could not confirm that two of the over 300 respondents to the 2004-05 surveys actually carried sports on their distant signals because the programming information was not available (although he could confirm that they did carry sports in subsequent years). If these two respondents are removed from the sample pool, the 2004-05 survey results are virtually unchanged. *See* Bortz Report (SP Ex. 2) at 39-40; Tr. 158-62 (Trautman). *See* SP PFOF ¶¶294-96; 502-15.

Dr. Ford and the Program Suppliers had access to all of the data underlying the 2004-05 Bortz surveys as well as the detailed program listings for over six months. They have not come forward with any evidence that any of the Bortz respondents may have valued programming they did not carry -- other than to rely upon the two questionable incidents that were discussed in the Bortz Report. Dr. Ford also fails to present evidence that not providing respondents with an estimate of program category "quantity" results in survey responses that are biased against Program Suppliers. Moreover, as the testimony regarding the use of "program examples" in the Gruen subscriber survey illustrates, the evidence suggests there may be significant response biases associated with providing selected information to survey respondents. *See* SP PFOF ¶¶ 294-96.

In the 1998-99 proceeding, Mr. Trautman testified that he could not confirm that one Bortz respondent who accorded some value to sports actually carried distant signal sports (and that another respondent for which he could not confirm sports carriage valued sports at zero). The 1998-99 CARP concluded that the appropriate remedy in such a situation is simply to remove the valuations of the respondent at issue. *See* 1998-99 CARP Report at 20-21; SP

PFOF ¶¶294-96. As noted above, doing so has no material impact upon the 2004-05 Bortz survey results.

C. The Canadians' Criticisms Of The Bortz Study, Which Are Belied By The Very Constant Sum Surveys The Canadians Themselves Have Conducted, Do Not Overcome The Fact That This Is The Strongest Record Ever On Which To Rely Upon The Bortz Constant Sum Surveys Rather Than Fee Generation To Determine The Canadians' Award.

As noted above, the original Bortz survey did not seek to provide any valuation of the Canadians' (or Devotionals') programming. The CRT criticized Bortz for not including the Canadians (and Devotionals), and Bortz Media responded to that criticism by revising its survey to ask about the programming on Canadian distant signals (as well as Devotional programming). Ever since, the Canadians have criticized the Bortz surveys, while the Devotionals have become strong supporters of those surveys.

In this proceeding the Canadians have again offered the same witnesses to make the same criticisms of the Bortz surveys that they have made in prior proceedings. Dr. Gary Ford, for example, has again complained about the use of a popularity "warm-up" question and a stratified sample based upon the amount of royalties paid. But the Canadians, like the Program Suppliers, have failed to provide any empirical basis for their criticisms, *i.e.*, that conducting a survey without the popularity question and stratified random sampling would produce a higher result for the Canadians. The evidence is, in fact, to the contrary. When the Canadians conducted a 1992 constant sum survey using the Bortz format (comparing U.S. programming to programming on Canadian signals) -- but without the popularity question and random sampling -- the result they obtained for the Canadian category were virtually identical to the Bortz result. *See* Tr. 3017-3018 (Ford) (Gary Ford); *see* SP PFOF ¶303. The Canadians discontinued conducting their survey with that format and instead relied upon fee generation to determine the relative values of Canadian signals versus U.S. signals (while relying upon a constant sum survey to determine the relative values of the programming within Canadian signals).

The Settling Parties explain below why the Canadian criticisms of the 2004-05 Bortz survey should not be accorded any weight. *See* SP PFOF ¶¶297-308. However, as also discussed below, this is the strongest record ever on which to base the Canadians' award on the

Bortz results rather than fee generation. The hypertechnical and wholly unsubstantiated criticisms that the Canadians have once again leveled against the Bortz surveys do not provide a proper basis for using fee generation rather than the Bortz results to determine the Canadians' 2004-05 royalty share in light of the changed record evidence concerning the Bortz surveys ability to estimate that share.

IV. Unlike The Record In The 1998-99 Proceeding, The Record In This Proceeding Provides A Strong Basis For Tying The PTV and Canadian Awards To The 2004-05 Bortz Results. It Also Provides A Strong Basis For Awarding Program Suppliers Significantly Less Than Its Bortz Share To Account For Their Strategic Decision To Deal Increasingly With WGN-TV, The Most Widely-Carried Distant Signal, Outside The Cable Compulsory License.

As noted above, the 1998-99 CARP accepted

> the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative market value for PS, JSC and NAB -- for both the Basic Fund and the 3.75% Fund. Indeed, for reasons discussed *infra,* we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups.

1998-99 CARP Report at 31. It thus accorded Program Suppliers, JSC and CTV the same shares relative to each other) as reflected in the 1998-99 Bortz results. However, the CARP, on the record before it, considered the 1998-99 Bortz results as providing a "floor" for the PTV award (*id.*) and it ultimately determined the PTV share by relying upon other record evidence. Furthermore, it did not rely upon Bortz to set the Canadians' award (or the Devotionals' award since they had agreed to accept their 1990-92 share). As discussed below, the record in this proceeding responds to the concerns that the 1998-99 CARP had in tying the Bortz results to the PTV and Canadian awards and provides a basis for adjusting the Bortz results to establish awards for PTV and the Canadians. *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 73 Fed. Reg. 4080, 4092-93 (2008) (accepting one study as a reasonable estimate of a marketplace rate notwithstanding the need to make an adjustment in the study's results).

A. The 2004-05 Bortz Survey Results Can And Should Be Adjusted To Provide Royalty Shares For PTV And The Canadians.

1. The PTV Award.

After examining all of the evidence in the record, the 1998-99 CARP decided to award PTV its 1990-92 royalty share rather than its Bortz share. The 1998-99 CARP explained its reason not to tie the PTV award to the Bortz results as follows:

> The Panel's primary concern about the Bortz survey turns on [the survey's] treatment of PTV. We find that the Bortz survey results understate the relative value of PTV. The major bias to the detriment of PTV is the Bortz treatment of cable systems that carried only PTV as distant signals. If a cable system carried PTV only as a distant signal, it was removed from the Bortz sample. On the other hand, if the system carried only one or more commercial distant signals, and no PTV distant signals, it was included in the Bortz survey and PTV was automatically assigned a zero.

1998-99 CARP Report at 22-23. The same situation pertains to the Canadians since Bortz Media did not interview any cable systems that carried Canadian signals as their only distant signals.

As Mr. Trautman explained, the intent of the Bortz survey is to provide comparisons of multiple program categories; where a cable system carries only one such category (*i.e.*, only a PTV signal or only a Canadian signal), no such comparison may be made. He recognized, however, that it would be appropriate to adjust the results of the Bortz survey to deal with these PTV-only and Canadian-only systems. *See* Bortz Report (SP Ex. 2) at 8-9 & 40-41; Tr. 108 (Trautman). Indeed, he presented such adjustments in the 1998-99 CARP proceeding (as did other parties), but the CARP did not accept them. *See* 1998-99 CARP Report at 26-29. In this proceeding, PTV has sponsored the testimony of Ms. Linda McLaughlin who provided a new analysis to deal with the PTV- and Canadian-only systems. Her analysis attempts to meet concerns that were expressed with the proposed adjustments in the 1998-99 proceeding. *See* SP PFOF ¶¶309-324, 330.

The Settling Parties believe that the Judges should adopt Ms. McLaughlin's adjustment to the 2004-05 Bortz results -- as well as the further adjustment proposed by Canadian witness Gary Ford to deal with his concern that, as a result of a "clerical error," one large system carrying only

a distant Canadian signal was not included in the Bortz survey. No party has provided any substantive basis for contesting that these adjustments should not be adopted. See SP PFOF ¶¶318-324 With these adjustments (and the one additional adjustment discussed below), the PTV and Canadian 2004-05 royalty shares (like the shares for JSC, CTV and Program Suppliers) should be tied directly to the 2004-05 Bortz results.

2. The Canadians' Award.

The 1998-99 CARP determined that it would not rely upon the 1998-99 Bortz surveys to set the Canadians' 1998-99 award. Instead, "despite our expressed concerns respecting fee generation," it tied the Canadians' award to the "fee generation" of distant Canadian signals, as adjusted by (1) the results of Dr. Ringold's constant sum surveys of cable operators and (2) the awards to other parties. *See* 1998-99 CARP Report at 72-75. The 1998-99 CARP declined to use the Bortz results for the Canadians saying only that the survey was not "designed" to include the Canadians and did not provide "statistically significant results" for the Canadians. *See* 1998-99 CARP Report at 31 n.13. The Panel acknowledged, however, that "fee generation does not reach the level of robustness and reliability of the Bortz study." *Id.* at 64.

In the 2000-03 proceeding, the Judges concluded that the Canadians' fee generation approach had been "sufficiently vetted" in the 1990-92 and 1998-99 proceedings, and should be accorded deference as one method – rather than the sole method or best method – for determining the Canadians' share. 2000-03 Distribution Order at 25-26. The Judges went on to state, however, that:

> It very well may be that there are other methods or other evidence that best represent *the* relative marketplace value of Canadian Claimants' programming as well as the programming of other groups. . . The Judges, therefore, do not opine as to what may be the best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings.

Id. at 18.

The record of this proceeding provides the strongest support ever for using the Bortz survey results (rather than fee generation) to set the Canadians' award. Historically, only an

insignificant percentage of cable systems that carried Canadian distant signal were included in the Bortz surveys. For example, in 1998, only 2 of 66 systems that carried distant Canadian signals were included in the Bortz survey and in 1999 only 3 of 62 systems were included. In stark contrast, in 2004, 11 (18%) of the 61 total Form 3 cable systems that carried distant Canadian signals responded to the Bortz survey; in 2005, the comparable numbers are 13 (25.5%) of 51 systems. With the McLaughlin and Gary Ford adjustments discussed above, the 2004 Bortz survey results are attributable to 13 (21.3%) of the 61 systems with distant Canadian signals; the 2005 results reflect 16 (31.4%) of 51 systems. *See* SP PFOF ¶326.

For the two-year period (2004-05), the Bortz results thus provide the valuations of approximately 29 respondents -- close to the number that the Canadians' own expert (Dr. Ford) considered to be sufficient to support reliable estimates for a given year. *See* Tr. 3030 (Gary Ford) (32 respondents would be a sufficient sample size). The Canadians themselves have urged the Judges to rely upon results where fewer respondents valued Canadian programming than those who valued Canadian programming in the 2004-05 Bortz surveys. *See* SP PFOF ¶327. Furthermore, the results of the 2004-05 Bortz surveys concerning Canadian valuations are consistent with the result of Bortz surveys conducted over 25-years. *See* Bortz Report (SP Ex. 2) at 23; SP PFOF ¶¶131-133. As the Canadians own expert (Dr. Ford) has acknowledged, given all the facts, the Canadians are entitled to only a very small share of royalties. *See* Tr. 3025-3026 (George Ford). The share estimated by the Bortz survey, as adjusted by the PTV and Canadian witnesses, is consistent with the facts surrounding the Canadians and avoids the substantial problems in relying upon fee generation.

Indeed, the Settling Parties believe that the 2004-05 Bortz survey results provide a much better estimate of the relative market value of Canadian signals than is reflected in fee generation -- a method which the Judges recognized may be "rough," "crude" and "wobbly" and which produces awards that, for various reasons, are "*not* representative of *the* relative marketplace value of [Canadian] programming." CRJ 2000-03 Distribution Order at 17, 27; *see also* SP PFOF ¶¶594-649 (summarizing record evidence as to why fee generation does not reflect relative marketplace value). Accordingly, on the basis of this more complete record, the Judges should rely upon the 2004-05 Bortz survey results, rather than fee generation, to determine the Canadians' 2004-05 award.

The 2004-05 Bortz surveys, of course, ask each respondent who carried one or more distant Canadian signals (in addition to U.S. distant signals) to provide a value for all programming on those Canadian signals. As the Canadians acknowledge, certain of the programming on Canadian signals comes within the JSC and Program Suppliers categories. Accordingly, a further adjustment needs to be made to the 2004-05 Bortz results to account for this programming. The Settling Parties, in this proceeding, are willing to accept the results of the 2004-05 Ringold constant sum surveys of cable operators as the best available estimate of the value of the JSC and Program Suppliers' programming on Canadian distant signals. Those surveys show that the several categories of Canadian programming on Canadian distant signals account for approximately 60% of the value in each of the years 2004 and 2005 while the value shares for JSC are 27% in 2004 and 30% in 2005 and 13% and 10% for Program Suppliers, respectively. *See* SP PFOF ¶¶658-659.

B. The 2004-05 Bortz Results Reflect A Ceiling For The Program Suppliers' (And Devotionals') Awards Given Their Increased Licensing Of Programming Outside Section 111 To WGN-TV, The Most Widely Carried Distant Signal.

During 2004-05, WGN was the most widely carried distant signal. Nearly 50% of the Form 3 cable systems that carried a commercial U.S. distant signal in 2004-05 carried WGN as their only distant signal, while approximately 70% of Form 3 systems carried WGN as one of their distant signals. The record shows that a substantial portion of the programming on distant signal WGN in 2004-05 was non-compensable because it was not transmitted simultaneously over both the satellite-delivered version of WGN that was actually carried by cable operators (on a distant signal basis) and the WGN broadcast signal available as a local signal in the Chicago market. The amount of non-compensable programming on WGN in 2004-05 increased to over 70% from about 50% in 1998-99. The vast bulk of this non-compensable programming consisted of programming within the Program Suppliers category (91.4% in 2004 and 92.4% in 2005) and Devotionals category (8% in 2004 and 7.6% in 2005). In 2004-05, over 78% of the Program Suppliers programming and 90% of the Devotional programming on distant signal WGN was non-compensable. *See* SP PFOF ¶224. As this suggests, both Program Suppliers and

Devotionals increasingly made their programming available to WGN outside the Section 111 compulsory license.

As Mr. Trautman testified, it is likely that some portion of the value that the Bortz respondents attached to the Program Suppliers' and Devotionals' categories (in 1998-99 and 2004-05) was attributable to this non-compensable programming. *See* Bortz Report (SP Ex. 2) at 41. Ms. McLaughlin testified to the same effect. *See* McLaughlin WDT (SP Ex. 6) at 9; SP PFOF ¶345. The 1998-99 CARP recognized that it may be conceptually proper to adjust the Bortz results to account for the non-compensable programming on WGN. However, it did not believe that the particular adjustments presented to it were appropriate. It rejected a proposed adjustment that (1) assumed that all the non-compensable programming was in the Program Suppliers category and (2) adjusted shares *pro rata* based solely on the proportion of hours of compensable programming. 1998-99 CARP Report at 26-28.

The detailed studies performed by Dr. Ducey and Dr. Waldfogel in this proceeding provide a new and reliable basis for determining the approximate order of magnitude of an appropriate adjustment in the Bortz share numbers to reflect the non-compensable programming on WGN. Dr. Waldfogel calculated the change that would result from the application of the regression coefficients to all programming as opposed to just the compensable programming on distant signal WGN, in terms of the overall percentage shares resulting from his regression analysis. Because these shares depend on the coefficients for the various program categories, which are essentially the relative implied prices for the different types of programs, the difference between these alternative shares reflects different relative values, not a pure program time measure. Based on Dr. Waldfogel's analysis, the Program Suppliers' relative share declined by *23.2%* when the non-compensable Program Suppliers programs on WGN were eliminated. This information, available for the first time in this proceeding, provides a basis for reducing the Program Suppliers' award by up to 23.2% from their 2004-05 Bortz survey shares.

While the specific awards requested by Settling Parties in Appendix do not reflect a reduction in the Program Suppliers' award for the non-compensable Program Suppliers' programming on WGN, Settling Parties believe that the substantial (and increased) amount of this programming on the most widely-carried distant signal in 2004-05 plainly establishes the

2004-05 Bortz results as a *ceiling* for the Program Suppliers' 2004-05 award; it provides a substantial record basis for reducing the Program Suppliers 2004-05 award below their Bortz share; and it more than offsets any issues that the Program Suppliers have raised about the 2004-05 Bortz survey results. *See* SP PFOF ¶¶342-348.

The Settling Parties recognize that the Waldfogel study does not provide a specific numerical adjustment to the Devotionals' share to account for the amount of programming that they licensed to WGN outside the Section 111 compulsory license. As noted, the Waldfogel regression shows a zero share for Devotionals in both WGN analyses -- with and without compensable WGN programming. Again, the fact that such a substantial portion of the Devotionals' 2004-05 programming on WGN is non-compensable makes clear that their 2004-05 Bortz share represents a sizable ceiling on their 2004-05 award. *See* SP PFOF ¶¶342-347.

V. The Evidence Establishes that the Relative Value of Music Is 5.2% of the 2004 Cable Royalty Fund and 4.6% of the 2005 Cable Royalty Fund

Music is a *program element*, not a *program category*. The Music Claimants, Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC") are performing rights organizations ("PROs") that license the non-dramatic public performances of musical works on behalf of their songwriter, composer. and music publisher members and affiliates. *See* SP PFOF ¶¶14, 349. Music Claimants represent every songwriter, composer, and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming. *See* SP PFOF ¶¶14-17.

The use of music in local television programming is sophisticated and varied, ranging from background music (when the musical work underscores the focus in a program) to feature (when the musical work is the focus of the audience's attention, such as on *American Idol)* to theme music (the signature music identifying the show). *See* SP PFOF ¶¶14. There is substantial qualitative evidence from the leading television and film music supervisor Alexandra Patsavas and from Seth Saltzman that music's contribution to the overall television entertainment experience has increased over the past ten years. *See* SP PFOF ¶¶351-63. There is substantial evidence of more sophisticated use of music in television dramatic series with a resulting increase in viewer impact and entertainment value. *See* SP PFOF ¶¶360-61. With special

reference to the distant signal market, the fact that *American Idol*, a music-intensive program that was among the most highly watched across the nation, appeared as compensable programming in 2004-05 time supports the view that music adds substantial value to the programming at issue in this proceeding. *See* SP PFOF ¶354. American Idol has been the most highly rated non-sports program on television since its inception. *See* SP PFOF ¶¶354.

Because music runs throughout all programming types, it differs in kind from the program categories represented by the other claimant groups in this proceeding. *See* SP PFOF ¶349. Bortz has not designed its surveys to measure the value of the music within the different categories of distant signal non-network programming, and, similarly, none of the methodologies presented by the other claimants to value their respective shares should be used to determine Music's share. Accordingly, it is necessary to look to other record evidence to determine that value. Historically, the Copyright Royalty Judges' predecessors have taken the music share "off the top," adjusting the shares of the program categories proportionately to account for Music's award. 1998-99 CARP Report at 89. The Settling Parties believe that the same approach should be followed here, *i.e.*, each of the claimants' Bortz shares should be reduced proportionally by the Music share.

A. The 2004-05 Zarakas Study, Provides the Best Most Accurate and Reliable Available Evidence of the Relative Value of the Music in the Distant Signal Non-Network Programming that Cable Systems Retransmitted in 2004-05.

In this proceeding, the Music Claimants presented the testimony of Mr. William P. Zarakas, an economist and expert in the valuation of assets and businesses in the communications and media industries. Mr. Zarakas used a market-comparable methodology to analyze the value of music as compared to the value of overall value of the compensable copyrighted programming included in the distant retransmission of over-the-air broadcast signals. *See* SP PFOF ¶¶373-92. Mr. Zarakas' analysis built upon a model considered by the 1998-1999 CARP in which an estimate of the relative value of music was derived through creating a "music ratio" that calculated music license fees in the local over-the-air television market as a percentage of the sum of (a) music license fees and (b) broadcast rights payments. *See* SP PFOF ¶375; 1998-99 CARP Report 85-87.. While accepting this music ratio concept as a "floor" (ultimately adopting an award almost twice the music ratio presented in that proceeding), the 1998-1999 CARP was concerned that the ratio included Big 3 network fees and rights

payments, even though Big 3 network programming is non-compensable under section 111, and that the presence of such data artificially decreased Music's share. *See* SP PFOF ¶¶375-76, 396; 1998-99 CARP Report at 86-87. In addition, the 1998-1999 CARP noted that an unadjusted ratio of music license fees to broadcast rights payments would not reflect the differences between the local and distant signal markets. *See* SP PFOF ¶375; 1998-99 CARP Report at 86-87.

Mr. Zarakas designed his study to meet each of the 1998-1999 CARP's concerns by: (1) obtaining reliable and complete data on market-negotiated blanket music license fees and television broadcast rights payments; (2) calculating music ratios for different categories of television stations, such as Independent stations or network affiliates, in the over-the-air broadcast market; and (3) focusing his analysis on the distant signal market by weighting the music ratios to reflect the relative importance of the stations retransmitted by cable systems in the distant signal market. *See* SP PFOF ¶¶377-90. He concluding that the relative value of music was 5.2% in 2004 and 4.6% in 2005. *See* SP PFOF ¶¶391-92.

Mr. Zarakas' analysis was not only objective and reasonable but also conservative. Where he could not locate broadcast rights payment data for non-Big 3 network programming, Mr. Zarakas used programming expenses data for those networks, which had the effect of decreasing the music ratio. *See* SP PFOF ¶¶385-89. When confronted with a choice to use cash or amortized broadcast rights payments by the local stations, he chose amortized expenses because they included "the value of booked barter arrangements" and yielded "a more conservative calculation of the Music Ratio because it results in a larger denominator than would use of the cash approach." *See* SP PFOF ¶387. To be comprehensive in calculating the music ratio denominator, Mr. Zarakas also included the broadcast expenses that would be paid to the local stations for programs they produce themselves (*i.e.*, the broadcast value of locally produced programming), an item that was not part of 1998-1999 music ratio analysis. *See* SP PFOF ¶390. Moreover, because Mr. Zarakas' estimate of locally-produced programming value scales linearly with the estimate of non-Big 3 network payments, using programming expenses to (over-) estimate network payments necessarily overestimates the locally-produced value as well. *See* SP PFOF ¶390. Finally, without challenge from other record evidence, Mr. Zarakas noted that his music ratio is likely understated because "in the local broadcast market, stations and networks pay premiums for the rights to broadcast programs on an exclusive basis;" however, "exclusivity

premiums likely would not be paid in the distant market where content is transmitted over many cable systems on a non-exclusive basis." *See* SP PFOF ¶¶392.

B. Program Suppliers' Criticisms of the Zarakas Study Are Unfounded.

In response to Mr. Zarakas' study, Program Suppliers presented the rebuttal testimony of Dr. John R. Woodbury, who asserted that Music's share should be set far below any share Music has received since the inception of the cable compulsory license. See SP PFOF ¶393 While Dr. Woodbury conceptually endorsed Mr. Zarakas' music ratio approach, he criticized Mr. Zarakas' use of the blanket license fees to represent the value of music license fees to the local television stations, Mr. Zarakas' weighting of the stations by distant signal subscriber instances, and Mr. Zarakas' treatment of WGN America – a station with no network programming – as an Independent station. *See* SP PFOF ¶¶394, 410-13. None of these criticisms have merit. *See* SP PFOF ¶410

1. Blanket License Fees Are the Proper Measure of the Music Fees that Would Be Paid by the Cable Operators.

Dr. Woodbury's objection to the use of the negotiated blanket fees to represent total music license payments is misplaced. Music Claimants presented unrebutted evidence from Mr. Michael O'Neill, Senior Vice President Licensing at BMI, that without a statutory cable license, each of the performing rights organizations would negotiate a blanket license with cable operators for all music contained in programming on stations retransmitted by distant signal. *See* SP PFOF ¶¶372-381. That type of agreement is consistent with the blanket licenses the PROs have previously negotiated with the cable operators. Moreover, the use of blanket license fees is appropriate because the blanket license offers users a more efficient product at a lower price than a large number of direct licenses would offer to cable operators. *See* SP PFOF ¶382. Thus, the negotiated blanket license fees are the proper measure of music license fees to be included in the music ratio.

Moreover, using blanket fees is superior to Dr. Woodbury's proposal to include only payments by the stations to the PROs, which indefensibly ignores the amounts paid by local television stations for direct licenses that are entered into by stations to reduce ASCAP or BMI license fees under per program licenses. *See* SP PFOF ¶404. Approximately 30% of local stations take per program licenses and reduce their blanket license fee payments through direct

licensing. *See* SP PFOF ¶377. Therefore, using only the PRO receipts in the music ratio to represent total music license fees paid by the stations would considerably undervalue the Music Claimants' share because PRO receipts alone are incomplete without the direct license fees. *See* SP PFOF ¶404. In addition, although no specific evidence of the amount of direct license fee payments is available, the facts that only a minority of stations take a per program license, coupled with the testimony that some stations switch between blanket and per program licenses, and that on occasion some have paid more under the per program license, all suggest any aggregate dollar savings earned by stations from their blanket license fees is not significant enough to offset Mr. Zarakas' otherwise conservative calculation of the music ratio. *See* SP PFOF ¶¶377, 382. Moreover, although Dr. Woodbury suggested that the combined amount of music license payments to the PROs and direct license fees was less than the negotiated blanket fee, he was unable to quantify the amount of any difference and, therefore, he could not offer any opinion as to the total amount of music license fees paid by local television stations. *See* SP PFOF ¶410. Certainly, Dr. Woodbury did no empirical analysis, and could offer no empirical evidence, to show that blanket license fees overstate to any material or measurable degree the total music license fees paid by the local stations. *See* SP PFOF ¶410.

2. Mr. Zarakas's Weighting by Station Type Was Necessary to Create a Music Ratio for the Distant Signal Market.

Dr. Woodbury's criticism of the station-type weighting employed by Mr. Zarakas falls flat for three reasons. First, Mr. Zarakas' weighting scheme specifically addresses the 1998-1999 CARP's concern that any music ratio must reflect the numerous differences between the local television and distant signal markets. *See* SP PFOF ¶376 By weighting the distant signal half-years for stations received by subscribers, Mr. Zarakas accounted for the distant signals that cable systems actually chose to transmit in the 2004-2005 period in a manner that appropriately accounts for differences in subscribership between small and large cable systems. *See* SP PFOF ¶391.

Second, Dr. Woodbury conceded that some type of weighting to adjust the music ratio to the distant signal market is appropriate (although, in his proposed music ratio, he did no weighting). *See* SP PFOF ¶412. He testified without explanation that viewership, rather than subscriber access, would provide a better weighting scheme to apply to the over-the-air music ratios of the individual station groups, but, by his own admission, Dr. Woodbury performed no

viewership analysis to offer alternative weights, despite the fact that Program Suppliers had access to viewership data in the distant market. *See* SP PFOF ¶¶411-12. And Dr. Woodbury also did not explain why a viewership weighting scheme would be applicable to a music ratio approach that uses the relative value of rights payments applicable to a station's programming, when the overwhelming evidence in this proceeding is that the subscription cable market is not driven by viewership data like the local market. *See* SP PFOF ¶412. In fact, Dr. Woodbury did not calculate any weighted music ratio at all. *See* SP PFOF ¶412. By failing to weight at all, Dr. Woodbury repeated the error noted by the CARP in the 1998-1999 proceeding, where the CARP held that the goal of the Section 111 distribution proceeding was to find relative market value in the hypothetical distant signal market, not the local over-the-air market. *See* SP PFOF ¶400; 1998-1999 CARP Report at 10-13, 85.

Third, Dr. Woodbury's complaint that Mr. Zarakas treated WGN America as an Independent station, rather than as a WB affiliate, is unfounded. WGN America, as a national superstation feed, does not contain any WB network programming. *See* SP PFOF ¶413. All WB programming on the local WGN station feed is substituted out and replaced by other programming. *See* SP PFOF ¶¶391, 413-14. WGN America is thus, by definition (including Dr. Woodbury's own definition), an Independent station, and was appropriately classified as such by Mr. Zarakas. *See* SP PFOF ¶391. Moreover, the suggestion that WGN was classified as an Independent station to increase the music ratio is unsupported. Indeed, the music ratio for Independent stations was below the average for all other stations, so, all else equal, the inclusion of WGN America as an Independent had the effect of decreasing the overall music share relative to all the other stations retransmitted as distant signals. *See* SP PFOF ¶412, 392. Indeed, weighting WGN America as a WB affiliate, considering the substantial rights payments made by the WB network for programming that is not carried as a distant signal by WGN America, would artificially decrease the music ratio. *See* SP PFOF ¶391.

C. Program Suppliers' Alternative Study Is Deficient in Design and Execution.

Dr. Woodbury presented an alternative music ratio study that did nothing to address the concerns of the CARP in the 1998-1999 proceeding and skewed the results of the study to drive down the music percentage by: (1) including network fees and rights payments for ABC, NBC, and CBS (the Big 3 networks); (2) failing to make any weighting adjustment to his calculation

based on which television stations were actually retransmitted distantly and in what degree; (3) including the cost of direct music licenses in the denominator of his ratios (added to broadcast rights payments), but failing to include direct music license fees in his numerators; (4) including music license fees and broadcast rights payments for non-commercial stations in his denominators, but failing to include music license fees for those same stations in his numerators; and 5) failing to amend his study results, despite learning that the U.S. Census Bureau survey data he relied upon for his study had been revised and corrected in a manner that would increase the Music Claimants' calculated share. *See* SP PFOF ¶¶401-408. Put simply, Dr. Woodbury's testimony and study — inaccurate, incomplete, and unreliable — should be given no weight by the Judges.

VI. None Of The Studies Offered By Program Suppliers Provides Any Reliable Evidence Of Relative Marketplace Value And None Of These Studies Should Be Used In Determining The Claimants' Awards.

For over twenty years the Program Suppliers argued that their custom Nielsen viewing study (which purported to reflect the relative amount of time that cable households spent watching the different types of distant signal programming) represented the best measure of relative market value. However, after WTBS converted from a distant signal to a cable network in 1998, Program Suppliers' share of distant signal viewing time declined dramatically. Accordingly, Program Suppliers rethought their historical reliance upon Nielsen viewing shares and argued for the first time that an adjusted version of their viewing numbers (adjusted by "avidity" as determined by Dr. Gruen) better reflected relative marketplace values. The 1998-99 CARP disagreed, concluding that the viewing study did not address the "criterion of relevance" – relative market value – and that Dr. Gruen's proposed adjustments suffered from several "fatal flaws" that precluded Program Suppliers' approach from being useful. 1998-99 CARP Report at 38-39, 42-44. The Register, Librarian and Court of Appeals affirmed the CARP's rejection of the Gruen adjusted viewing study. *See* 1998-99 Librarian's Order, 69 Fed. Reg. at 3614, *aff'd Program Suppliers v. Librarian*, 409 F.3d at 395.

In this proceeding, the Program Suppliers have reaffirmed that the raw Nielsen viewing minutes upon which they once relied do not reflect relative marketplace value. That point was echoed by the sponsor of the Nielsen study, Paul Lindstrom of Nielsen. Tr. 1988-89

(Lindstrom); *accord* Tr. 2229, 2230, 2231 (Ford) ("viewership is not value"); *See* SP PFOF ¶539. The Program Suppliers have now presented, through Dr. George Ford, a new study that attempts to adjust the Nielsen viewing minutes by local broadcast advertising rates. And Dr. Gruen has returned with a new study -- a constant sum survey of cable subscribers. Neither of the Program Suppliers' studies provides any reliable evidence of relative marketplace value; it would be clear error to use either of these studies to determine the claimants' 2004-05 awards.

A. The Ford Analysis Of Nielsen Viewing Minutes Is Fatally Flawed In Concept And Execution.

The 1998-99 CARP awarded Program Suppliers slightly less than 40% of the 1998 and 1999 royalty funds, consistent with the 1998-99 Bortz results. Dr. Ford has devised a new study which purports to show that Program Suppliers should receive over 70% of the 2004-05 funds -- about $90 million more than they would receive under the percentage shares adopted by the 1998-99 CARP (or under the 2004-05 Bortz studies). Program Suppliers have never in the thirty-year history of the distribution proceedings received more than their viewing share, as reflected in their custom Nielsen study (and have routinely received significantly less). Nevertheless, Dr. Ford has found a way to accord Program Suppliers 14 percentage points ($21 million) more than their 2004 custom viewing share and 7 percentage points ($10.5 million) more than their 2005 custom viewing share. Ford WDT (PS Ex. 11) at 39 (Table 6 Corrected); *see* SP PFOF ¶¶416-436.

To support his dramatic reworking of royalty shares, Dr. Ford must create a hypothetical marketplace that is quite different from the one that the 1998-99 CARP envisioned. Dr. Ford is uncertain about whether broadcasters or cable operators would purchase the distant signal programming in his hypothetical marketplace and whether it would make any difference. *See* Tr. 2183-84 (Ford) ("[I]t could be the cable operator; it could be the broadcaster"); *id.* at 2181 (same). However, he predicates his study upon the novel theory that each distant signal in this hypothetical marketplace would operate as if it were a new station, such as a low power television station ("LPTV") that had constructed a tower in the cable community; this hypothetical broadcast station would transmit the same programming from that tower that it transmits in the home market where it operates a full-power station; it would transmit those programs on an exclusive basis in the distant cable community; it would derive revenues in that

distant cable community *solely* by selling advertising; and it would compensate copyright owners *solely* in proportion to the ad revenues it received. *See* SP PFOF ¶¶422-428. Dr. Ford contends that the relative amounts copyright owners would receive in this hypothetical marketplace are based on broadcast market advertising revenues, which he derives based not on direct data but through a set of mathematical calculations in which he multiplies each claimant's share of viewing minutes from the Program Suppliers' custom viewing study by theoretical local-market broadcast station advertising rates ("CPM"s) that he calculates separately for each program category based on a series of different assumptions for the different categories. *See* SP PFOF ¶¶429-436.

Under questioning from the Judges, Dr. Ford explained that his reason for proposing an advertising-based approach for determining relative market value in this proceeding was that he "assumed himself into the data flow," meaning that he found a different market – local broadcast advertising – in which data were available, and simply assumed that relative values in the cable distant signal market would be revealed through those data. *See* Tr. 2123, 2192 (Ford); *see* SP PFOF ¶¶422-426.

For several reasons, Dr. Ford's adjusted viewing study cannot be used to allocate the 2004-05 royalties that cable operators paid to retransmit distant signal programming.

1. Dr. Ford's Approach Is Inconsistent With The Congressional Intent Underlying Section 111 And Applicable Judicial Precedent

Dr. Ford's proposed approach is predicated on the untenable premise that cable operators are wholly irrelevant to the question of relative market value. There is absolutely nothing in Dr. Ford's analysis that takes account of how cable operators value the different types of distant signal programming. *See* Tr. 2189 (Ford) ("The cable system is irrelevant to the analysis"); *see* SP PFOF ¶¶422-428. That view is squarely inconsistent with the legislative purpose underlying Section 111 and with applicable precedent.

Congress recognized that cable operators that retransmit distant signal non-network broadcast programming should pay the creators of that programming. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Admin News 5659, 5704. But Congress thought that negotiations between cable systems and copyright owners would be

unduly burdensome. Accordingly, Congress adopted a compulsory license permitting retransmission of distant signal non-network broadcast programming under specified conditions. As part of this system, Congress established the CRT (and ultimately the Judges) to "operate as a substitute for direct negotiations (which were thought to be impractical) among *cable operators* and copyright owners . . . ." *CBN v. CRT,* 720 F.2d at 1306 (emphasis added); *accord NCTA v. CRT,* 724 F.2d 176, 185-186 (D.C. Cir. 1983). Although Congress deferred to the CRT and it successors in deciding how the cable royalties should be allocated, the statute and accompanying legislative history (as the Court of Appeals has recognized) plainly contemplate that the purpose of the endeavor is to determine what *cable operators* would have paid copyright owners for the right to retransmit distant signal programming. Dr. Ford's approach ignores this legislative purpose and adopts a "proxy" market that assumes away the very cable systems that Congress and the Court of Appeals envisioned as the "buyers" in the relevant market.

Unlike Dr. Ford, the 1998-99 CARP properly focused upon how the cable operator values the different types of distant signal non-network programming. *See* 1998-99 CARP Report at 52. That approach is inconsistent with the policy underlying Section 111 and applicable judicial precedent.

2. Dr. Ford's Approach Improperly Relies Upon Advertising Revenues That Neither Cable Operators Nor Broadcasters Receive From Distant Signal Programming.

Dr. Ford's analysis is based on the assumption that the entire economic value of the programming at issue here derives from advertising revenues alone. Tr. 2200 (Ford); *see* SP PFOF ¶¶421, 427-29, 435, 447, 453, 460. But the Section 111 royalties being distributed in this proceeding are derived from cable operator *subscription revenues, not advertising revenues. See* 17 U.S.C. § 111(d)(3) (tying royalty payment to revenues received from "gross receipts" from subscribers not advertising revenues); *Cablevision Systems Development Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 603 (D.C. Cir. 1988) (The Copyright Act "allows the copyright owners of distant non-network programs to receive a portion of the fees paid to the cable systems by subscribers"). Dr. Ford's misguided focus upon advertising revenues, rather than the cable operators' subscription revenues which are the basis of the Section 111 royalties, is contrary to the statutory scheme and unsupportable as a matter of economic logic and marketplace realities.

The Copyright Act prohibits cable operators from inserting advertising into the distant signal non-network programming they retransmit pursuant to the Section 111 compulsory license. 17 U.S.C. § 111(c)(3). Consequently, the relative values that cable operators attach to the different types of distant signal non-network programming they retransmit have nothing to do with advertising revenues. Value relates solely to the ability of that programming to attract and to retain subscribers -- the value measured by the Bortz surveys. As the 1998-99 CARP properly noted, "The value of distant signals to [cable operators] is in attracting and retaining subscribers, and not contributing to supplemental advertising revenue." 1998-99 CARP Report at 38. *See also id.* at 39 ("The principal economic value of distant signal programming to cable operators is instead measured by the extent to which the programming helps attract and retain subscribers and thus maintain or increase subscription revenues") (citations omitted).

Dr. Ford theorizes that in a marketplace absent compulsory licensing, cable operators would be allowed to insert advertising. *See* SP PFOF ¶¶454, 459. That is squarely inconsistent with the conclusion that the 1998-99 CARP reached. *See* 1998-99 CARP Report at 13 n.6 ("We note here that unlike PS . . . the Panel does not assume that, in the hypothetical free market, [cable operators] would insert and sell advertisements on retransmitted distant signals as proscribed under the statutory license. . . . no persuasive evidence suggests that they would."). The record in this proceeding unequivocally supports the conclusion of the 1998-99 CARP. As CTV rebuttal witnesses Dr. Gregory Crawford and Greg Stone explained, there are numerous reasons, based on the ways in which advertising time is sold in both the local broadcast and local cable markets, why the hypothetical distant signal market in the absence of a compulsory license would not depend on advertising sales. These include the facts, confirmed as well by Program Suppliers' Nielsen witness Paul Lindstrom and by Dr. Ford's own underlying data, that the viewing to distant signals within individual cable systems and the viewing to LPTV stations is so limited that it is often not even reported in the local market book ratings that broadcast stations use to sell advertising, and that the purchasers of spot time on local stations have no incentive to split their buys among small stations and cable systems that serve only part of the market they are seeking to reach. *See* SP PFOF ¶¶453-59.

Indeed, nothing in the current law prohibits broadcasters from attempting to gain additional advertising revenue from the retransmission of their signals to distant communities.

As the record in this proceeding demonstrates, broadcasters are simply not able to do so. *See* SP PFOF ¶ 459; Tr. 979, 988-92, 999 (Fritz); Tr. 2123 (Ford); *accord*, 1998-99 CARP Report at 12 ("Broadcasters would be indifferent respecting distant retransmission because distant carriage does not enhance their advertising revenues") (citations omitted); *see* SP PFOF ¶459. Program Suppliers have failed to adduce any evidence to the contrary. To the extent (if at all) any broadcaster were able to enhance its advertising revenues based upon the carriage of its signal into a distant market, such revenues would presumably already be reflected in the license fees program suppliers already receive. Those revenues, however, are wholly distinct from the royalties that must be allocated in this proceeding, which have nothing to do with advertising.

Program Suppliers have presented no persuasive evidence that cable operators would likely derive revenues, much less all of their revenues as Dr. Ford assumes, from inserting advertising on distant signals in the hypothetical marketplace. Moreover, the programming that cable operators actually retransmitted during 2004-05 (and that is the subject of this proceeding) was retransmitted without cable operators being allowed to insert commercials. This proceeding calls upon the Judges to determine the relative value of that programming, not programming where commercials may have been (but plainly were not) inserted. *See* Ford W.R.T. at 8-9 (must value the programming actually retransmitted pursuant to Section 111 even though in a free market a different mix of that programming might have been purchased by cable operators); SP PFOF ¶459. Thus, even if Dr. Ford's assumptions about advertising in the hypothetical market were not incorrect for the reasons described above and in the testimony of expert and knowledgeable witnesses in this proceeding, they would be irrelevant to the question at hand.

3. Dr. Ford Has Analyzed The Wrong Market.

Even if Dr. Ford's reliance on an advertising revenue-based market analysis were not otherwise inconsistent with the structure and intent of the compulsory license and the evidence in this proceeding, his approach, as explained by CTV rebuttal witness Dr. Greg Crawford, is fundamentally flawed from an economics perspective because it uses the wrong market. The profit maximizing market objectives as well as the economic outcomes are fundamentally different in the broadcast and cable markets, and the differences result in different types of programming being valued in the two markets. As Dr. Crawford's independent empirical research has confirmed, the program types that most contribute to profitability in the cable

market are special interest or niche programs as opposed to general interest programs, the opposite of the value proposition in the broadcast advertising market. Hence, Dr. Ford's analysis, which is based on applying "prices" for different program categories that he derives from local broadcast advertising market data, takes the irrelevant viewing numbers and makes them even more misleading as a measure of relative value in the cable distant signal market. *See* SP PFOF ¶¶438-451.

Wholly apart from the fundamental conceptual flaws in his approach, Dr. Ford's "hypothetical market" is flatly inconsistent with the realities of the actual broadcast station marketplace, as explained by both Dr. Crawford and CTV rebuttal witness Gregory Stone, an experienced broadcaster. The purchaser in Dr. Ford's hypothetical market would be either a new limited-signal broadcast station or the cable system itself. Cable operators, of course, are already completely free to engage in the kinds of program-by-program purchases Dr. Ford hypothesizes, but they do not do so, because they prefer to buy channels. And the "new" stations Dr. Ford hypothesizes already exist today, in the form of LPTV stations. As Mr. Stone's testimony shows, LPTV stations serving cable communities cannot and do not command advertising rates or revenues anything like those Dr. Ford assumes, and cannot and do not purchase anything like the kinds of programs the actual distant signals provide. The market evidence thus flatly contradicts Dr. Ford's hypothetical market premise. *See* SP PFOF ¶¶457-459.

4. Dr. Ford's Share Calculations Are Based On Erroneous Data and Assumptions.

Even if Dr. Ford's approach were not inconsistent with the statutory scheme and fundamentally flawed as a matter of economic analysis, his "relative value" share calculations are completely unusable because they use erroneous data and assumptions. First, the viewing minutes share numbers reported in the MPAA custom viewing study presented in this proceeding are erroneous because of a number of data analysis errors made by Nielsen, several of which produced inexplicable and very large increases in the total distant signal viewing and the Program Suppliers' relative viewing share between 2004 and 2005. *See* SP PFOF ¶¶474, 544-551.

Furthermore, Dr. Ford's creation of a set of "prices" for the various program categories is rife with erroneous assumptions. First, he assigns "prices" based on advertising data from the U.S. local commercial television market to three out of six categories for which such data is simply inapplicable. For PTV, which sells no advertising because of its non-commercial nature, he makes assumptions that contributions are like advertising but also that the average CPM, which he applies fully to Program Suppliers programming, should be cut by two-thirds for PTV. For Devotionals, he assigns the average CPM even though Devotional programmers sell no advertising in their programs. And he applies the average CPM to Canadian station programming even though he used no advertising data at all for Canadian broadcast markets. *See* SP PFOF ¶¶432-434.

For the remaining "prices," a key to the increase in the Program Suppliers' share that results from his calculations is that he adjusts the CPM-based "price" for CTV programming downwards, based on a number of assumptions. But the assumptions by which he seeks to justify the manipulations of the CPM rates for CTV, which have the effect of reducing the "price" he assumed for CTV programming and increasing the relative "price" for Program Suppliers programming, were demonstrably false and based on fundamental misunderstandings about how the local broadcast advertising market actually works, as demonstrated both by his own underlying data and by Mr. Stone's expert testimony. His decision not to credit CTV programming with Prime Time CPMs was wrong both because he mistakenly assumed that CTV programming did not air during Prime Time, and because he credited all other categories with those CPMs even though their higher levels are driven by local advertising sales during network programming, which are non-compensable in these proceedings. Contrary to Dr. Ford's apparently uninformed assumptions, the evidence shows that CPMs for station-produced news programs are typically higher, not lower, than the CPMs for entertainment programs. *See* SP PFOF ¶¶429-431, 460-461.

Even if he had managed to derive an appropriate set of advertising-based "prices" for programs in the broadcast advertising marketplace, of course, those prices would not reflect the full value of the programs in the cable market or the advertising marketplace. In rebuttal, JSC witness Mr. Trautman applied Dr. Ford's approach to sports programming carried on various cable networks (TBS, TNT, and the Top 25 cable networks). Using program expenditures for

JSC programming as a guide for the value of such programming, Mr. Trautman determined that sports programming on those networks was six to eight times more valuable than was shown using the Ford model. *See* SP PFOF ¶¶475-481.

Dr. Ford's approach using CPM rates also ignores the substantial additional value that programming may bring to broadcasters and cable networks beyond advertising revenue for a particular program. Sports programs, for example, are often used as "hooks" to sell packages of advertising on multiple programs, and reliance on CPM rates for a particular event ignores the fact that the sports program may have been the reason why an advertiser for a non-sports program agreed to pay the CPM for that non-sports program. And because of the value of sports programming, which Dr. Ford recognized was different than most other programs (Tr. 2231 (Ford)), sports programming is often used as a "tent pole" by programmers to attract viewers and cycle them to other programs. Dr. Ford's analysis ignores these real-world elements of value and relies instead on an artificial measurement that specifically understates the value of sports programming. *See* SP PFOF ¶¶462-474.

5. Nothing In The Record Corroborates Dr. Ford's Results Or Demonstrates That His Study Is Reliable. To The Contrary, The Record Establishes That Dr. Ford's Approach Is Wholly Inconsistent With Marketplace Evidence.

The only witness in these proceedings to support use of the Ford approach is Dr. Ford himself. Every other witness who addressed the issue concluded that Ford study does not provide any useful information on relative marketplace value. *See* Tr. 229-30, 255-56 (Crandall); Tr. 2344-45 (Crawford); Tr. 2786-88 (Salinger); Tr. 3060-61 (Calfee); Tr. 2700-01 (Trautman); Tr. 2607-09 (Desser); *see* SP PFOF ¶¶438-481.

Furthermore, Program Suppliers are offering the Ford approach for the first time in these proceedings, and Ford's study examines only the two years involved in this proceeding. There is simply no historical basis for comparing the results that Ford reaches for 2004-05 with any other time period to determine whether the results are reliable. That fact alone militates against reliance upon the Ford study as a distribution methodology. *See* 1998-99 CARP Report at 50, 48 (refusing to adopt the Rosston regression analysis as a "methodology for independently determining relative value" in part because "the lack of any historical bases for assessing

reliability is of concern"); *id.* at 88 ("Unlike the Bortz survey, the Schinck approach is not time-tested. Similar approaches have not been adopted, or even presented for litigation scrutiny, for over 20 years. Unlike reliance on 'tried and true' methodologies such as the Bortz survey, this Panel is loath to slash drastically an award based upon such untested methodologies"). The concern over reliability is particularly significant here given that, as Dr. Ford acknowledged (Tr. 2286 (Ford)), there is a "significant difference" in his results for the years 2004 and 2005. *See* SP PFOF ¶¶474, 547-550.

In addition, Program Suppliers have not presented any evidence to corroborate the results of the Ford study. Indeed, the Gruen cable subscriber study reflects a valuation for Program Suppliers that is more than 20 percentage points lower than the valuation for Program Suppliers in the Ford study (even if one improperly credits Program Suppliers with the full value of their "other sports" category). No Program Suppliers' witness (other than Dr. Ford) even references the Ford study.

B. The Gruen Cable Subscriber Surveys Are Methodologically Deficient And Do Not Show How The Section 111 Royalties Would Be Allocated In A Free Market Absent Compulsory Licensing.

Dr. Gruen's testimony makes clear that his cable subscriber surveys do not reflect relative market value. As noted above, he offered an adjusted viewing study in the 1998-99 proceeding to show how the "Section 111 copyright payments would be distributed among the different programming categories if the respective values of the different programming categories were established in a marketplace setting." Tr. 1841 (Gruen). But he repeatedly disavowed the suggestion that his subscriber study was intended to serve the same purpose in this proceeding. *See* Tr. 1840-47 (Gruen); *accord* Tr. 2294 (Ford) (Gruen survey does not reflect "market valuation"). Gruen would say only that, if surveys are to be used, the Judges should use a survey of cable subscribers rather than operators. *See* Tr. 1836-37 (Gruen).

Dr. Gruen, however, has it backwards. While a cable operator's valuations of programming may be derived from subscriber valuations, in the final analysis it is the cable operator's valuation (and not the subscriber's) that determines the relative amounts that program owners receive. As Dr. Crawford explained, even if a subscriber survey collected the appropriate information about subscriber preferences (which he explains Dr. Gruen's survey did

not), a profit maximizing cable operator would extract greater value from programming which subscriber preferences were "negatively correlated" with the system's other program offerings than from programming for which a subscriber survey simply reported the highest average preference. *See* SP PFOF ¶¶452, 532-34. And thus it is the operator survey, and not the subscriber survey, that should be used to determine relative market value.

In any event, the 2004-05 Gruen subscriber surveys are seriously flawed and afford no proper basis for determining any claimant's royalty share in this proceeding. JSC presented the testimony of two witnesses (Jeffrey Berman of C&R Research and Dr. Gregory Duncan of Berkeley), both of whom were qualified as experts in survey research, to discuss these flaws; the Canadians presented a third survey research expert (Dr. Ratchford) to do the same. Their testimony demonstrates that the Gruen surveys do not comport with the relevant professional standards, including those set forth in the Federal Judicial Center's *Reference Guide on Survey Research.* But rather than simply provide expert opinion criticizing the Gruen surveys, JSC also commissioned a pilot study from C&R Research (which has conducted numerous cable subscriber surveys for the cable industry) to assess whether those criticisms have any empirical basis. That pilot study demonstrates that the Settling Parties' criticisms of the Program Suppliers' cable subscriber surveys have a sound factual underpinning -- unlike Program Suppliers' criticisms of the Bortz cable operators surveys which are based on pure speculation and conjecture. Among other things, the pilot study confirms that the Gruen surveys obtained meaningless responses on program valuations because they provided their respondents with examples of programs that were not televised by the distant signals that the respondents received. Indeed, over half of the respondents to the pilot study identified such program examples (those not televised by their distant signals) as the programming they were valuing -- which is precisely why Bortz has resisted using such examples despite Program Suppliers' repeated insistence over many years that it do so. *See* SP PFOF ¶¶482-530.

One additional point should be emphasized. The Gruen surveys are not the first cable subscriber surveys to be offered in the distribution proceedings. In the 1983 distribution proceeding, CTV sponsored a constant sum cable subscriber study that was challenged by various parties including Program Suppliers. The CRT expressed concerns about the study because of its low response rate (under 33%) and overrepresentation of females (60%) who

accorded significantly lower valuations to sports than did males (20% vs 33%). *See* 1983 CRT Determination, 51 Fed. Reg. at 12810 & 12799. Incredibly, and contrary to all basic tenets of survey research, Dr. Gruen did not provide the Judges with any information about the response rate of his cable subscriber surveys, instead offering a meaningless "cooperation" rate. Furthermore, while he collected a variety of demographic information about the respondents, he did not obtain or provide any information about the gender of the survey respondents. *See* SP PFOF ¶¶492-501.

The lack of this basic information (response rate and gender of respondents) -- which is routinely included in reports of professionally-conducted consumer surveys -- precludes the parties and the Judges from determining whether the Program Suppliers' surveys have responded to the basic concerns raised about the last cable subscriber survey introduced in the cable royalty distribution proceedings. Furthermore, Dr. Duncan and Mr. Berman both emphasized the importance of collecting this information in order to determine the representativeness of a survey sample, and neither Dr. Duncan or Mr. Berman could ever recall a consumer survey where such information was not provided. Consequently, the Program Suppliers have failed to show that the respondents to the Gruen Survey are representative of the cable universe. On this basis alone, the Judges should not accord any weight to the Gruen subscriber surveys. *See* SP PFOF ¶¶492-501.

Even if the survey had been properly implemented, however, it should not be used as a direct measure of relative market value, for the reasons Dr. Crawford explained. From the perspective of the economic principles that drive the profitability of a cable system that sells bundled programming, the greatest value is in niche programming for which preferences are negatively correlated with the system's other program offerings. Dr. Gruen's survey failed to ask a qualifying question about whether the respondent valued distant signal programming at all, and thus failed to collect fundamentally meaningful information about the respondents' relative preferences. But it also failed to collect information about the respondents' relative preferences for their systems' other program offerings, which would have been necessary in order to derive meaningful information about the relative value of the distant signal program types to cable operators in terms of maximizing their profits through attracting and retaining subscribers with the programming bundles they offer. *See* SP PFOF ¶¶452, 516-22.

VII. The Devotional Claimants Have Provided No Persuasive Evidence To Justify A Change In Their Prior Litigated Award, And Other Evidence Supports The Continuation Of That Award.

In the 1998-99 proceeding, the CARP reviewed all the record evidence to determine whether particular claimants' awards should be lower or higher than their Bortz shares. Based upon that review, the JSC, CTV and Program Suppliers' shares were set slightly below their Bortz shares (but at the same relative level as Bortz) while PTV and the Canadians received more than their Bortz shares. The 1998-99 CARP did not consider how the Devotionals' share should relate to the 1998-99 Bortz results because the Devotionals chose not to participate in that proceeding and thus they made no showing as to how their award should relate to their Bortz share. Instead, they agreed to accept their 1990-92 litigated award, which was set below their 1990-92 litigated Bortz share, and to sit on the sidelines while others litigated over the significance of the 1998-99 Bortz results.

In the 1990-92 proceeding, the Devotionals had sought an award equal to their 1990-92 Bortz share. The 1990-1992 CARP, however, found that the Devotionals' evidence in support of their claim was "anecdotal or individual opinions, not quantified and/or not related to the Devotionals' proportionate share of the royalty fund," and that there had been no change in circumstances since the previous cable distribution proceeding determination. 1990-92 CARP Report at 130. The CARP made an award to the Devotional Claimants of 1.25% of Basic Fund royalties per year, notwithstanding that their Bortz survey shares were 3.6%, 4.3%, and 3.9% for the respective years. 1990-92 CARP Report at 50. The Devotionals' shares were adjusted to accommodate other awards, so that their final 1990-92 awards were 1.19375% of the Basic Fund (1.19385% for 1990) and 0.90725% of the 3.75 Fund (0.9080532% for 1990). *1990-92 Librarian Decision,* 61 Fed. Reg. 55653, 55661-62 (Oct. 28, 1996). The Devotional Claimants argued on appeal that the CARP had ignored its evidence corroborating the Bortz share numbers and treated its evidence differently from that of other claimant categories, but the Librarian and the Court of Appeals affirmed the CARP's conclusions. *See 1990-92 Librarian Decision,* 61 Fed. Reg. 55653, 55666 (Oct. 28, 1996), *aff'd, NAB v. Librarian of Co*ngress, 146 F.3d 907, 928-29 (D.C. Cir. 1998).

In this proceeding, the Devotionals have offered no study of their own to support any award. Instead, they have sought to free-ride on the 2004-05 Bortz study and to attack the Waldfogel regression analysis that confirms the 2004-05 Bortz results for all parties except the Devotionals, claiming they are entitled to an award that is five to six percentage points (over $15 million) more than their last litigated award. To be sure, the Devotionals' Bortz share is higher in 2004-05 than in 1990-92. However, the evidence in this proceeding also shows that 90% of the Devotional programming on WGN, the most widely distributed distant signal and the subject of the relative program valuations by a majority of the Bortz survey respondents, was non-compensable. *See* SP PFOF ¶¶223-224, 228-235, 686. The Bortz results thus provide at best a ceiling for Devotionals. Given that virtually all (90%) of the distant signal Devotional programming on WGN was non-compensable, it was incumbent upon the Devotionals to come forward with compelling evidence demonstrating that the Bortz survey should nonetheless serve as a proper basis for the significant increase they are seeking. They have failed to do so. *See* SP PFOF ¶¶674-88.

In short, the Devotionals have failed to provide credible evidence of changed circumstances since 1990-92 or any credible evidence tending to show that the 1990-92 CARP's prior determination of their award at a level below their Bortz survey share was incorrect. Under the standard set forth by the Court of Appeals in *NAB v. CRT*, *supra* note 1, the Devotionals have failed to establish that they should receive an award higher than their 1990-92 award.

Proposed Findings of Fact

Before the
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Washington, D.C.

In the Matter of	)	
	)	**Docket No. 2007-3 CRB CD 2004-2005**
Distribution of the	)	
2004 and 2005 Cable Royalty Funds	)	
	)	

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I. The Parties

A. Definition of Phase I Parties and Program Categories

1. In its 1979 Cable Royalty Distribution Determination, the CRT announced, after having heard the comments of the parties to the proceeding,[1] that it would conduct the royalty distribution in two phases.[2] In Phase I it would determine what percentages of the 1979 royalty fund to award to seven categories, which it identified as follows: "(a) motion picture and syndicated program suppliers; (b) sports, professional and collegiate; (c) public television; (d) music; (e) commercial television; (f) commercial radio;[3] and (g) public radio."

2. A separate award was made to the Canadian Claimants in the 1979 Proceeding,[4] and in the 1980 Proceeding, the CRT formally identified it as a separate Phase I category, along with a newly determined Phase I category for Devotional Claimants.[5] Since 1980, although the descriptive names of the categories have varied somewhat, the same categories have been used by the parties and the CARPs in Phase I proceedings.[6] The parties represented in this hearing are currently known as: Program Suppliers, Joint Sports Claimants, Public Television Claimants, Music Claimants, Commercial Television Claimants, Devotional Claimants, and Canadian Claimants.[7]

3. During the course of several early Phase I and Phase II proceedings, it occasionally became necessary for the CRT to issue rulings determining more specifically the definitions of the programs that fell within the respective Phase I categories, in order to maintain

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1 1979 CRT Determination, 46 Fed. Reg. at 24619.

2 1979 CRT Determination, 47 Fed. Reg. at 9879.

3 No royalties were awarded for Commercial Radio, and, ultimately, Phase I claims were no longer presented for that category. *See 1990-92 Librarian Decision,* 61 Fed. Reg. at 55654.

4 1979 CRT Determination, 47 Fed. Reg. at 9879, 9894.

5 1980 CRT Determination, 47 Fed. Reg. at 24768.

6 *See, e.g.*, 1989 CRT Determination, 57 Fed. Reg. at 15287; 1990-92 Librarian Decision, 61 Fed. Reg. at 55654.; 1998-99 Librarian Order, 69 Fed. Reg. at 3607.

7 Joint Motion of the Phase I Parties to Adopt Stipulation as to Claimant Group Categorization and Scope of Claims, filed October 2, 2009.

the mutually exclusive scope of those categories.[8] When the first distribution proceeding was commenced after the CARP system replaced the CRT, the parties provided a stipulation setting forth the CRT's historical Phase I category designations and category definitions, which were adopted by the CARP.[9]

4. Again for the 2004-05 Cable Royalty Distribution Proceeding, counsel for all Phase I categories participating in the proceeding[10] presented a stipulation agreeing on the following category definitions to be used in this Phase I proceeding, which repeat those previously determined by the CRT:[11]

> Program Suppliers. Syndicated series, specials and movies, other than Devotional Claimants programs as defined below.
>
> Syndicated Series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. Commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.
>
> Joint Sports Claimants. Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.
>
> Commercial Television Claimants. Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within

---

8 *See, e.g.*, 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408, 8416 (Phase II) (March 17, 1987); Advisory Opinion, Docket No. CRT 85-4-84 CD (May 16, 1986).

9 1990-1992 CARP Report at 11-12; *see* Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims, Docket No. 94-5, CARP CD 90-92, filed February 23, 1996.

10 The parties had previously entered a settlement agreement with NPR on behalf of Non-Commercial Radio, which is not participating in this Phase I Proceeding.

11 Joint Motion of the Phase I Parties to Adopt Stipulation as to claimant Group Categorization and Scope of Claims, filed October 2, 2009.

the exception described in subpart 3) of the "Program Suppliers" definition.

Public Television Claimants. All programs broadcast on U.S. noncommercial educational television stations.

Devotional Claimants. Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

Canadian Claimants. All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners.

Music Claimants. Musical works performed during the course of programs that are themselves separately represented as parts of the preceding categories.

B. Settling Parties

1. Joint Sports Claimants

5. JSC are comprised of Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, the National Hockey League and the Women's National Basketball Association. JSC represent over 200 clubs, colleges and athletic conferences that are eligible to receive royalties attributable to the cable retransmission of broadcasts of professional and collegiate sports events. JSC programming is and for many years has been televised over superstation WGN, which broadcasts the Chicago Cubs, the Chicago White Sox, and the Chicago Bulls. During the years 2004-05, WGN was the most widely carried distant signal among Form 3 cable systems; nearly half of all cable systems that carried a distant signal carried WGN as their only distant signal while approximately 70% of all systems carried WGN as at least one of their distant signals.[12] WGN televised more JSC events than any other broadcast station during 2004-05.[13]

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[12] Trautman WRT (SP Ex. 57) at 15.

[13] Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 1-2.

6. During the years 2004-05 cable systems also retransmitted JSC programming regionally through the carriage of independent stations and network affiliates; much of that carriage was done in geographic areas relatively close to the cities where the teams played.[14] JSC programming is distinguishable from all the other programming represented in this proceeding in that all of the JSC programming is live and first run.[15] Moreover, each sporting event is unique in that no game can be substituted for another. And sporting events are generally exclusive to the station televising the event - if a cable subscriber does not have the station carrying a game available to him, there usually is no alternative means of viewing it.

7. JSC programming appeared on cable systems throughout the country. In addition to regular season games, cable systems retransmitted on a distant basis during the relevant years post-season telecasts of MLB and the NFL, including the MLB World Series and the NFL's Super Bowl.[16]

2. Commercial Television Claimants

8. The Commercial Television Claimants represent and are making a Phase I royalty claim for all programs produced by or for approximately 600 U.S. commercial television stations that were broadcast exclusively on those stations and retransmitted by distant cable systems during 2004 and 2005.[17] These programs generally included station-produced newscasts and public affairs shows.[18] In addition, they included news magazine and interview shows, specials, and a variety of other programs such as children's shows, sports-related programs and

---

14 Ducey WDT (SP Ex. 8) at 7-8; SP Ex. 17; Tr. 580-581.

15 Tr. 1704 (Mansell).

16 Trautman WRT (SP Ex. 57) at 17.

17 Program Category Definitions (SP Ex. 13); *See* Fritz WDT (SP Ex. 19) at 2.

18 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

entertainment programs.[19] By definition, the Commercial Television claim includes only works that were available exclusively on the originating station.[20]

9. Commercial TV programs constituted about 15.5% of all distant signal programming purchased by Form 3 cable operators in 2004-2005, in terms of the amount of distant signal program time actually made available to subscribers.[21] Live station-produced newscasts represented the great majority of this Commercial TV programming.[22] But the programs in the Commercial TV category also included a variety of other programs, including sports-related programs such as coaches' shows, pre- and post-game shows, and specials about home teams, morning shows on many stations, which mix news with interviews and informational segments, and local weather coverage.[23] The category also included public affairs shows, documentaries, and specials.[24]

10. All of the programs in the Commercial TV category share one attribute: not one of the programs was available in the cable community through any station except the distant signal being imported.[25] By contrast, syndicated programs and movies are licensed into multiple markets, and such programs carried on distant signals may already be available to cable subscribers via their local stations.[26]

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19 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

20 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23); 1990-1992 CARP Report at 12-13.

21 Subscriber Weighted Claimant Shares (SP Ex. 15); Distant Signal Program Time Comparison (SP Ex. 16); Tr. 565-569, 573-575 (Ducey).

22 Fritz WDT (SP Ex. 19) at 2; Station Produced Program Examples (SP Ex. 21, 23).

23 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

24 Fritz WDT (SP Ex. 19) at 2; Station Produced Program Examples (SP Ex. 21, 23).

25 By definition, programs in the Commercial TV category were broadcast only on the originating distant signal. If a program were distributed by a station to any other station, it would become a syndicated program for copyright royalty purposes. SP Ex. 13; Tr. 552-560 (Ducey); Fritz WDT (SP Ex. 19) at 2.

26 Tr. 552-560 (Ducey); Program Category Definitions (SP Ex. 13).

3. Public Television Claimants

11. The Public Television Claimants ("PTV") include more than 340 PBS member stations as well as all other copyright owners who have made claims for programming carried on public television stations and retransmitted by cable operators during the years 2004 and 2005.[27]

12. Public television stations operate in communities throughout the United States and its territories.[28] There is tremendous diversity among these stations in terms of their ownership, their mission, and their programming content.[29]

13. In 2004 and 2005, PTV stations retransmitted as distant signals offered cable operators a rich diversity of unique and high-quality programming, including children's programming, such as SESAME STREET, ARTHUR, and CAILLOU; science programming, like NOVA and NATURE; dramatic programming, like MASTERPIECE THEATRE and MYSTERY!; performing arts programming, including GREAT PERFORMANCES and LIVE FROM LINCOLN CENTER; and news and public affairs programming, such as FRONTLINE and THE NEWSHOUR WITH JIM LEHRER.[30]

4. Music Claimants

14. Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC") are performing rights organizations ("PROs") that license the non-dramatic public performances of musical works on behalf of their songwriter and composer and music publisher members and affiliates.[31] As Mr. Seth Saltzman, ASCAP Senior Vice President of Member Management in the Performing Rights Group, testified, the Music Claimants collectively license the public performance rights of millions of copyrighted musical compositions, including virtually all of the copyrighted music that is used in television programming, ranging from background music (when the musical work underscores

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27 Wilson WDT (SP Ex. 5) at 5 n.2, PTV 04-05 Ex. 3.

28 Wilson WDT (SP Ex. 5) at 4–6, PTV 04-05 Ex. 1.

29 Wilson WDT (SP Ex. 5) at 4–6, PTV 04-05 Ex. 1.

30 Wilson WDT (SP Ex. 5) at 2, 7–15, 16–18, PTV 04-05 Ex. 2, PTV 04-05 Ex. 8.

31 Saltzman WDT (SP Ex. 25) at 1; 17 U.S.C. § 101.

the focus in a program) to feature (when the musical work is the focus of the audience's attention, such as on *American Idol)* to theme music (the signature music identifying the show).[32]

15. The Music Claimants together represent the combined public performing rights of over 725,000 songwriters and music publishers and over 20 million musical works.[33] The three U.S. PROs have entered into reciprocal licensing agreements with dozens of foreign performing rights societies throughout the world, pursuant to which the Music Claimants also represent the owners of virtually all of the rest of the world's copyrighted music in this section 111 cable distribution proceeding.[34]

16. The Music Claimants represent award-winning songwriters in all genres of music, from Bruce Springsteen and Ella Fitzgerald to Willie Nelson and Shania Twain to Bob Dylan and Neil Diamond.[35] But the vast majority of songwriters and composers represented by the Music Claimants are not famous, do not win awards, and earn very modest amounts of royalties for the use of their musical works.[36] The typical songwriter receives a modest income from his or her creative efforts at writing music that is publicly performed by others.[37] These songwriters' livelihoods can depend to a large degree on the royalties distributed by their respective performing rights organization.[38]

17. Music Claimants represent every songwriter, composer, and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming.[39]

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32 O'Neill WDT (SP Ex. 26) at 2; Saltzman WDT (SP Ex. 25) at 10-17.

33 O'Neill WDT (SP Ex. 26) at 1.

34 Saltzman WDT (SP Ex. 25) at 4.

35 *See* Saltzman WDT (SP Ex. 25) at 4-5, App. A; O'Neill WDT (SP Ex. 26) at App. A.

36 Saltzman WDT (SP Ex. 25) at 5.

37 Saltzman WDT (SP Ex. 25) at 5.

38 Saltzman WDT (SP Ex. 25) at 5.

39 Copyright Office Final Regulations, 59 Fed. Reg. 63,025, 63,029 (Dec. 11, 1994); 1990-1992 Decision, 61 Fed. Reg. at 55655 (Oct. 28, 1996); *see also* Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed. Reg. 20,428, 20,429 (Apr. 24, 1998).

C. Program Suppliers

18. The Program Suppliers are comprised of the Motion Picture Association of America ("MPAA"), its member companies and other producers and distributors of syndicated movies, series and specials broadcast by television stations.[40] Beginning with the first royalty distribution proceeding addressing the allocation of 1978 cable royalties, MPAA has been the *de facto* Phase I representative of all Program Supplier claimants.[41]

D. Devotional Claimants

19. The Devotional Claimants are comprised of owners of syndicated programming that has "a religious theme."[42] Such programming includes telecasts of traditional church services but may include news and information programming containing a "religious perspective."[43] It is important to note that Devotional Claimant programmers generally pay to be placed on TV stations[44] and that devotional cable networks generally offer their programming to cable operators for no direct license fee.

E. Canadian Claimants

20. The Canadians are comprised of the Canadian Broadcasting Corporation, private Canadian broadcasters, and affiliated broadcast stations as well as Canadian film and television producers and distributors.[45] Canadians license their programming to other countries including the United States.[46] It is important to note that Canadian signals may only be retransmitted within the compulsory zone, a specific geographic region limited to only where the community served by the cable system is located within 150 miles from the US-Canadian border and is north

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40 Program Supplier Written Direct Case Cover Memorandum, at 1.

41 Kessler WDT (PS Ex. 5) at 3.

42 *See* Stanley (WDT) (DC Ex. 1) at 1.

43 *See* Stanley (WDT) (DC Ex. 1) at 2 (noting that "The Christian Broadcasting Network's ministry, news and information programming brings its religious perspective to political matters and world affairs.").

44 *See* 1990-92 CARP Report at 129.

45 deFreitas WDT (CDN Ex. 1) at 4.

46 *Id.*

of the 42nd parallel of latitude.[47] Moreover, Phase I claims of Canadians encompass only programming originating from Canadian television signals and does not include programming claimed by U.S. claimants.[48] A significant portion of programming that originates from Canadian signals is traditionally associated with Program Suppliers and JSC programming.[49]

II. Section 111 Compulsory License

A. Scope of License

21. Section 111 of the Copyright Act, 17 U.S.C. § 111, provides a "statutory" or "compulsory" license that allows cable systems to retransmit broadcast signals to their subscribers without having to negotiate with copyright owners of the programming and other copyrighted works on those stations. Section 111 requires cable operators to pay statutorily-prescribed royalty fees as a condition of availing themselves of the compulsory license. *Id.* § 111(d)(1). Eligible copyright owners of the programs and other works retransmitted pursuant to the Section 111 compulsory license may agree among themselves as to the allocation of those royalties. *Id.* § 111(d)(4)(A). If the copyright owners are unable to agree on such an allocation, the Judges have the authority to determine the appropriate allocations. *Id.* §§ 111(d)(4)(B), 801(b)(3)(B).

22. As long as a cable operator complies with Section 111 and applicable rules of the Federal Communications Commission, it may retransmit "local" and "distant" over-the-air broadcast stations. 17 U.S.C. § 111(c)(1). A station (or signal) is "distant" in those communities located outside the station's local market. *See id.* at § 111(f). The area of the station's "local market" is determined by reference to the FCC's cable rules, and principally comprises the signal's Designated Market Area, which is a non-overlapping geographic market consisting of all the counties in which the stations from that market's communities are viewed more than signals from other communities.[50]

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47 deFreitas WDT (CDN Ex. 1) at 3, CDN Ex. 1-A.

48 deFreitas WDT (CDN Ex. 1) at 2.

49 *See* deFreitas WDT (CDN Ex. 1) at 7-8 (noting that Canadian programming includes sports programs such as soccer and coverage of the 2004 Olympic Games as well as "special programming events" that include dramatic series).

50 Tr. 1545–46, 1548 (Kessler); Kessler WDT (PS Ex. 5) at 7, 14.

23. Canadian signals may be retransmitted under the statutory license only by cable systems operating within a specified geographic zone. *See* 17 U.S.C. § 111(c)(4)(A). The cable system must be located north of the forty-second parallel of latitude or within 150 miles of the U.S. – Canadian border. *See id.* The rules for determining whether a Canadian station is local or distant are generally the same as those for U.S. signals. *See* 17 U.S.C. § 111(c)(4).

24. Cable systems are not required to pay royalties for the retransmission of local signals. *See* 17 U.S.C. § 111(d)(1)(A). If the cable system serves subscribers located in communities both inside and outside a station's local market, the station is called "partially distant," and the cable operator pays royalties based only on revenues it receives from subscribers that are located outside the station's local market.[51]

25. The copyright owners of programs retransmitted on the distant signals may receive a share of the Section 111 royalty funds collected from cable operators. *See* 17 U.S.C. § 111(d)(3). Not all programs carried on distant signals, however, are "compensable" (i.e., eligible for royalty distributions); in order to be compensable under Section 111, a program must meet three criteria: (a) a broadcast station licensed by the FCC or by the Canadian or Mexican government transmitted that program within its local market; (b) a cable system retransmitted that program outside the station's local market; and (c) the program is a "non-network program" (i.e., was not part of the program schedule transmitted by the ABC, CBS, or NBC networks via their broadcast affiliates). *Id.*

B. The Statement of Account

26. Section 111(d) of the Copyright Act, 17 U.S.C. § 111(d), and implementing Copyright Office rules, 37 C.F.R. § 350 et seq., require cable systems to file either a "Form 1-2" SOA or a "Form 3" SOA twice yearly with the Licensing Division of the Copyright Office. The required form depends upon the size of the system's "gross receipts," which are the monthly fees cable systems collect from subscribers for tiers of service that contain broadcast signals.[52] For 2004-1 through 2005-1, systems with semiannual gross receipts of $379,600 or more filed on

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51 Kessler WDT (PS Ex. 5) at 21–22, MEK-4.

52 Kessler WDT (PS Ex. 5) at 10–13.

SOA Form 3.[53] As of July 1, 2005, the gross receipts limits and the rates increased, so that in 2005-2, systems with semiannual gross receipts of $527,600 or more filed on SOA Form 3.[54] Form 3 systems comprised approximately 22 percent of all cable systems in 2004-2005.[55] Over this same period, however, Form 3 systems paid the vast majority of the royalties — approximately 97 percent of the royalties paid by all cable systems.[56]

27. The SOA form guides cable systems through a number of steps to calculate the royalties they owe for retransmitting broadcast signals under the statutory license.[57] For systems filing Form 1/2 SOAs, there is no requirement to designate the signals they carry as local or distant.[58] Systems filing Form 3 SOAs calculate their royalties by taking into account all distant stations carried and all "gross receipts" received for tiers of service that include broadcast stations.[59]

28. Cable systems typically have at least two tiers of service that include broadcast stations — the "basic service tier" and the "expanded basic" tier.[60] The basic service tier must

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53 Kessler WDT (PS Ex. 5) at 12.

54 Kessler WDT (PS Ex. 5) at 12.

55 Kessler WDT (PS Ex. 5) at Appendix B.

56 Kessler WDT (PS Ex. 5) at Appendix B.

57 Kessler WDT (PS Ex. 5) at 8–10, MEK-3, MEK-4.

58 Kessler WDT (PS Ex. 5) at MEK-3.

59 Kessler WDT (PS Ex. 5) at 12, MEK-4; see also *Cablevision Systems Development Co. v. MPAA*, 836 F.2d 599 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988); Final Rule and Termination of Proceeding in Docket Nos. 89-2 and 89-2A, 62 Fed. Reg. 23360–61 (1997) (noting that the Copyright Office has consistently interpreted Section 111 to require each cable system to apply the combined distant signal equivalents ("DSE") against the combined gross receipts to determine the royalties due); Notice of Inquiry in Doc. No. RM 89-2, 54 Fed. Reg. 38390–91 (1989) (explaining that, under existing regulation, a cable system must apply its "combined" DSEs against its "combined" gross receipts); Advance Notice of Proposed Regulations in Docket RM 79-4, 44 Fed. Reg. 73123–24 (1979) (noting that the full DSE count of each distant signal carried by a cable system must be applied against the total "gross receipts" of that system, even though "one part of [the] cable system receives more distant secondary transmissions than other parts of the system").

60 Kessler WDT (PS Ex. 5) at 10; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, p. 5.

include local broadcast stations, and may also include distant signals and other channels.[61] The expanded basic tier may include distant signals and digital broadcast stations plus basic cable networks.[62] A cable subscriber must buy the basic tier in order to receive the expanded basic tier.[63] The majority of subscribers purchase these two tiers — basic and expanded basic — as a bundle which the cable operator offers for a single combined price.[64]

29. The Form 3 SOA contains information about the communities served by the cable system, the categories of service offered, the number of subscribers, the rates charged to subscribers, the broadcast signals retransmitted, the system's gross receipts, the royalty fee calculation, and other information.[65]

30. In Section G of the Form 3 SOA, a cable operator lists all the signals that it carried during the accounting period and identifies which of those signals it carried on a distant basis.[66] Each broadcast station carried as a distant signal is identified by its over-the-air call sign, for example, WJLA in Washington, D.C.[67] The first letter of the call sign generally identifies its location: call signs of stations licensed to communities in the Eastern part of the U.S. generally begin with "W," in the Western part of the U.S. they generally begin with "K," and in Canada, stations' call signs begin with "C."[68]

31. Cable Data Corporation ("CDC") is an independent company that collects and analyzes information contained in the Statements of Account that cable systems file with the Licensing Division of the Copyright Office.[69] CDC prepares a set of "standard" reports of SOA

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61 Kessler WDT (PS Ex. 5) at 10; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, p. 5.

62 Kessler WDT (PS Ex. 5) at 10; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 5–6.

63 Kessler WDT (PS Ex. 5) at 11; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, p. 5.

64 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 8–9.

65 Kessler WDT (PS Ex. 5) at MEK-4; Tr. 2914 (Martin).

66 Kessler WDT (PS Ex. 5) at MEK-4.

67 Kessler WDT (PS Ex. 5) at 6.

68 Kessler WDT (PS Ex. 5) at 6; de Freitas WDT (CDN Ex. 1) at CDN-1-Q.

69 Martin WDT (PS Ex. 2) at 2.

information as well as customized reports sought by its clients.[70] CDC is the only company that does this work.[71] Many of the parties in this proceeding rely upon CDC's data collection and reports.[72]

C. Royalty Calculation

32. For 2004-1 through 2005-1, the smallest systems (known as "Form 1" systems, which had gross receipts of $98,600 or less for each six-month period) paid a flat fee of $37 every six months for the right to carry distant signals, regardless of how many signals they carried.[73] For 2005-2, a cable system was deemed a Form 1 system if it had gross receipts of $137,100 or less for each six-month period, and these systems paid a flat fee of $52 every six months for the right to carry distant signals, regardless of how many signals they carried.

33. For 2004-1 through 2005-1, mid-size systems (known as "Form 2" systems, which had more than $98,600 and less than $379,600 in gross receipts), paid royalties of 0.5 percent of the first $189,800 in gross receipts for each six month period and 1.0 percent of gross receipts above $189,800.[74] For 2005-2, a cable system was deemed a Form 2 system if it had gross receipts greater than $137,100 and less than $527,6000, and Form 2 systems paid royalties of 0.5 percent of the first $189,800 in gross receipts for each six month period and 1.0 percent of gross receipts above $189,800.[75]

34. The largest systems, those with gross receipts of $379,600 or more in 2004-1 through 2005-1 or $527,600 or more in 2005-2, are referred to as "Form 3" systems.[76] Form 3 systems calculate their royalty fees based on their gross receipts and the number and types of distant signals carried.[77]

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70 Martin WDT (PS Ex. 2) at 3–4.

71 Martin WDT (PS Ex. 2) at 2.

72 Martin WDT (PS Ex. 2) at 2; Martin WDT (SP Ex. 7) at 2.

73 Kessler WDT (PS Ex. 5) at 12.

74 Kessler WDT (PS Ex. 5) at 12.

75 Kessler WDT (PS Ex. 5) at 12–13.

76 Kessler WDT (PS Ex. 5) at 12.

77 Kessler WDT (PS Ex. 5) at 15.

35. There are several types of royalty payments for Form 3 systems, each calculated separately. They are: the Minimum Fee, Base Rate Fees, 3.75% Fees, and Syndex Fees.[78]

36. Each signal listed as distant in Section G of the Form 3 SOA counts as either a 1.0 "distant signal equivalent" (DSE) or a 0.25 DSE, depending upon its type:

> 1.0 DSE for each independent station (for example, Fox, UPN, WB, PAX, and Canadian signals)
>
> 0.25 DSE for each network affiliate (stations affiliated with ABC, CBS, or NBC) and each educational station (PBS stations)[79]
>
> The cable operator records this information in Section 2 of the Form 3 SOA, as shown below.[80]

2

Computation of DSEs for Category "O" Stations

INSTRUCTIONS:
In the column headed "Call Sign": list the call signs of all distant stations identified by the letter "O" in column 5 of space G (page 3)
In the column headed "DSE": for each independent station, give the DSE as "1.0"; for each network or noncommer-cial educational station, give the DSE as ".25."

CATEGORY "O" STATIONS, DSEs

CALL SIGN	DSE	CALL SIGN	DSE	CALL SIGN	DSE

SUM OF DSEs OF CATEGORY "O" STATIONS:
• Add the DSEs of each station.
Enter the sum here and in line 1 of part 5 of this schedule. ▶

a. Minimum Fee

37. The first of the potential royalty payments that the cable operator calculates is the Minimum Fee.[81] All Form 3 systems pay the Minimum Fee, regardless of whether they carried any distant stations.[82] They pay the Minimum Fee "for the privilege" of retransmitting distant signals.[83] The Minimum Fee equals the amount that must be paid under the Base Rate Fee,

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78 Kessler WDT (PS Ex. 5) at 16–22, MEK-4.

79 Kessler WDT (PS Ex. 5) at 15–16.

80 Kessler WDT (PS Ex. 5) at MEK-4, pg. 11.

81 Kessler WDT (PS Ex. 5) at MEK-4, pg. 7.

82 CDN Ex. R-5 at 696 (McLaughlin).

83 *See* 17 U.S.C. § 111(d)(1)(B)(i); Martin WDT (SP Ex. 7) at Appendix A, pg. 5.

described below, for the first DSE.[84] A cable system must pay the Minimum Fee whether they import no distant signals, only a fractional DSE, or 1.0 DSE.[85]

Block 1	**MINIMUM FEE:** All cable systems with semiannual gross receipts of $527,600 or more are required to pay at least the minimum fee, regardless of whether they carried any distant stations. This fee is 1.013 percent of the system's gross receipts for the accounting period. Line 1. Enter the amount of gross receipts from space K ..... Line 2. Multiply the amount in line 1 by .01013 Enter the result here. This is your minimum fee. ..... $ .....

38. If the system carries one or more full DSEs worth of distant signals, the Minimum Fee is applied against whatever is due as Basic Rate Fees or 3.75% Fees.[86]

39. At the end of 1997, only 40 Form 3 systems reported no distant signals.[87] In 1998, the Minimum Fee amounts paid by systems with no distant signal carriage became a much more significant component of the cable royalty fund; the number of systems carrying no distant signals increased from 40 to 459, or about 20 percent of all Form 3 systems.[88] The number of systems with no distant signals has declined since 1998-1 but is still an order of magnitude greater than in 1997-2 or earlier.[89]

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84 Kessler WDT (PS Ex. 5) at 18; CDN Ex. R-5 at 696 (McLaughlin).

85 Kessler WDT (PS Ex. 5) at 18, MEK-4, pg. 7; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7. For example, if a Form 3 cable system carries a single Canadian station on a distant basis and no other distant signals, that cable operator pays the Minimum Fee. Likewise, if, on a distant basis, a Form 3 system carries just one Educational (assigned 0.25 DSE under the compulsory licensing scheme) and one Network signal (also 0.25 DSE), the system has a total of 0.50 DSEs of distant signals, and it must pay the Minimum Fee as if it were carrying a full DSE of distant signals. Kessler WDT (PS Ex. 5) at 16, 18 (calling the Minimum Fee the base rate fee); Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

86 17 U.S.C. § 111(d)(1)(B)(i) (specifying that the Minimum Fee is "to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv)"); 37 CFR § 256.2(a)(1)(c) (clarifying that both the Base Rate Fee and the 3.75% Fee are applied against the Minimum Fee); *Cable Compulsory Licenses: Application of the 3.75% Rate*, 63 Fed. Reg. 39738, at 39739 (July 24, 1998).

87 Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

88 CDN Ex. R-5 at 701 (McLaughlin) ("it was unusual, before the conversion of TBS, for there to be stations that paid only the minimum fee"); Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

89 de Freitas WDT (CDN Ex. 1) at CDN-1-O.

40. The change in payment of the Minimum Fee in 1998 was due in large part to the conversion of WTBS from a broadcast signal to a cable network in 1998.[90] Removing WTBS as a distant signal left many systems with no distant signals, resulting in a sharp increase in the payment of the Minimum Fee.[91]

b. Base Rate Fee

41. If a cable system carries signals that add up to more than 1.0 DSE, it must calculate its Base Rate Fees in Block 8 of the SOA.[92] The Base Rate Fee is calculated according to a sliding scale of percentages based on the total number of DSEs the system carried.[93] The cumulative percentage increases as the cable system carries more distant signals, although the statutory rate for each signal decreases.[94] The rate schedules in effect during 2004 to 2005 were:[95]

Base Rate Fee Schedule

Accounting Period	Percentage of Gross Receipts for 1.0 DSE	Percentage of Gross Receipts for 2.0 – 4.0 DSE	Percentage of Gross Receipts for > 4.0 DSE
2004-1 to 2005-1	.956%	.630%	.296%
2005-2	1.013 %	.668%	.314%

42. An example of a base rate calculation for a cable system with gross receipts of $1,300,000 and 3.0 DSEs is:[96]

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90 Martin WDT (SP Ex. 7) at Appendix A, pgs. 5–6 (explaining that the WTBS conversion caused minimum fee payments to increase from $330,000 to $11,900,000).

91 de Freitas WDT (CDN Ex. 1) at CDN-1-O.

92 Kessler WDT (PS Ex. 5) at MEK-4, pg. 17.

93 Kessler WDT (PS Ex. 5) at 16–18.

94 Kessler WDT (PS Ex. 5) at 17–18.

95 Kessler WDT (PS Ex. 5) at 17.

96 Kessler WDT (PS Ex. 5) at 17.

1st DSE at 0.956%:	($1,300,000 x .00956 x 1)	=	$12,428
2nd-3rd DSE at 0.630%:	($1,300,000 x .00630 x 2)	=	$16,380
			$28,808

c. 3.75% Fee

43. The 3.75% Fee refers to the royalty paid for the carriage of signals that a cable system could not have carried prior to June 24, 1981 — the date on which the FCC eliminated its rules restricting the number of distant signals cable systems located in different sized markets were permitted to retransmit.[97]

44. One of the FCC's distant signal rules had specified the maximum number of distant stations of a particular type that were permitted to be carried, depending on the cable system's market size.[98] If an operator is located in a market that was permitted to carry only one distant independent station and carries two independent signals (for example, a U.S. independent station and a Canadian station), then it would be required to pay the 3.75% Fee for one non-permitted signal.[99] In such cases, either signal could be identified as the permitted signal or the non-permitted signal for purposes of calculating the total royalties for the cable system.[100]

45. To calculate whether 3.75% Fees are owed, a cable system first identifies in Block 6 the "permitted" signals.[101]

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97 Kessler WDT (PS Ex. 5) at 19.

98 Kessler WDT (PS Ex. 5) at 19–20.

99 Kessler WDT (PS Ex. 5) at 19–20.

100 Kessler WDT (PS Ex. 5) at 20.

101 Kessler WDT (PS Ex. 5) at MEK-4, pg. 13.

BLOCK B: CARRIAGE OF PERMITTED DSEs

Column 1: CALL SIGN — List the call signs of distant stations listed in part 2, 3, and 4 of this schedule that your system was permitted to carry under FCC rules and regulations prior to June 25, 1981. (Note: for further explanation of permitted station see instructions for the DSE schedule.)

Column 2: BASIS OF PERMITTED CARRIAGE — Enter the appropriate letter indicating the basis on which you carried a permitted station. (Note the FCC rules and regulations cited below pertain to those in effect on June 24, 1981.)

- A Stations carried pursuant to the FCC market quota rules (76.57, 76.59(b), 76.61(b)(c), 76.63(a) referring to 76.61(b)(c))
- B Specialty station as defined in 76.5(kk) (76.59(d)(1), 76.61(e)(1), 76.63(a) referring to 76.61(e)(1)
- C Noncommerical educational station (76.59(c), 76.61(d), 76.63(a) referring to 76.61(d))
- D Grandfathered station (76.65) (see paragraph regarding substitution of grandfathered stations in the instructions for DSE schedule).
- E Carried pursuant to individual waiver of FCC rules (76.7)
- *F A station previously carried on a part-time or substitute basis prior to June 25, 1981
- G Commercial UHF station within grade-B contour (76.59(d)(5), 76.61(e)(5), 76.63(a) referring to 76.61(e)(5))

Column 3: List the DSE for each distant station listed in parts 2, 3, and 4 of the schedule. *(Note: For those stations identified by the letter "F" in column 2, you must complete the worksheet on page 14 of this schedule to determine the DSE.)

1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE

* SUM OF PERMITTED DSEs—add the DSEs of each station ▶

46. Cable systems do not pay 3.75% Fees for permitted stations, as is evident from lines 1-3 below:[102]

[102] Kessler WDT (PS Ex. 5) at MEK-4, pg. 13.

BLOCK C: COMPUTATION OF 3.75 FEE

Line 1: Enter the total number of DSEs from part 5 of this schedule . . . . . ▶ _____

Line 2: Enter the sum of permitted DSEs from block B above . . . . . ▶ _____

Line 3: Subtract line 2 from line 1. This is the total number of DSEs subject to the 3.75 rate.
(If zero, leave lines 4–7 blank and proceed to part 7 of this schedule) . . . . . ▶ _____

Line 4: Enter gross receipts from space K (page 7) . . . . . ▶ $ _____ x .0375

Line 5: Multiply line 4 by .0375 and enter sum here . . . . . ▶ $ _____ x

Line 6: Enter total number of DSEs from line 3 . . . . . ▶ _____

Line 7: Multiply line 6 by line 5 and enter here and on line 2, block 3, space L (page 7) . . . . . ▶ $

47. For example, if a cable system had $700,000 in gross receipts and 1.25 DSEs of unpermitted signals, its 3.75% Fee would be:

$$\$700{,}000 \times .0375 \times 1.25 = \$32,\ 813$$ [103]

48. If a cable system pays 3.75% Fees for a particular distant signal, it pays no other royalty for that signal.[104]

49. If the cable system serves communities where the application of the 3.75% Fee rules differs (for example, if the system serves a community in a Top 50 market and also serves communities outside all television markets), the operator may prorate the 3.75% Fee.[105]

d. Syndicated Exclusivity Surcharge ("Syndex Surcharge")

50. Some cable systems also pay a royalty called the Syndicated Exclusivity ("Syndex") Surcharge.[106] The Syndex Surcharge applies in cable communities in the top 100 markets where the FCC's rules do not permit local stations who have licensed exclusive rights to a program to prevent the importation of that same program on a distant signal.[107] The

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103 Kessler WDT (PS Ex. 5) at 19.

104 Kessler WDT (PS Ex. 5) at 19.

105 Kessler WDT (PS Ex. 5) at 20.

106 Kessler WDT (PS Ex. 5) at 20.

107 Kessler WDT (PS Ex. 5) at 20.

circumstances that require a cable system to pay the Syndex Surcharge occur infrequently and generate a small amount of royalties.[108]

e. Payment of Royalties for Partially-Distant Signals

51. For Base Rate Fees, 3.75% Fees, and Syndex Surcharge Fees, cable operators may prorate their payments if they retransmit a signal that is distant to some communities but local to other communities served by the same cable system.[109] These signals are known as "partially distant."[110] Cable operators pay royalties only on the portion of gross receipts attributable to the subgroups of subscribers located in the communities where the signal is distant.[111]

III. Distribution Standard

A. Relative Market Value

52. After reviewing the Copyright Act, its legislative history, applicable precedent and the record, the 1990-92 CARP concluded that "'market value' is the only logical and legal touchtone."[112] It explained:

> Conceptually, the factual question we must resolve is, what would the cable system have had to pay and be willing to spend for the broadcast station programming if, in fact, it had been required to negotiate with the broadcast station in an open market.
>
> . . .
>
> Ultimately, the question is, what would the cable system operators have had to pay [on a relative basis] in an open market for the sports, movies and other categories of programming that existed in the years 1990 through 1992.[113]

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108 Kessler WDT (PS Ex. 5) at 21.

109 Kessler WDT (PS Ex. 5) at 21.

110 Kessler WDT (PS Ex. 5) at 21–22.

111 Kessler WDT (PS Ex. 5) at 22.

112 1990-92 CARP Report at 23.

113 1990-92 CARP at 23-24.

53. The Register and Librarian affirmed the 1990-92 CARP's decision to "emphasize[] the marketplace value criteria."[114]

54. The 1998-99 CARP agreed with the 1990-92 CARP as to the appropriate distribution standard. It concluded that: "Only one distribution criterion appears to have stood the 'test of time' and has served as the principal basis for allocating cable copyright royalties – 'relative marketplace value.'"[115] Noting that "every party to this proceeding appears to accept 'relative marketplace value' as the sole relevant criterion that should be applied by the Panel,"[116] the 1998-99 CARP accepted the 1990-92 CARP's determination that "'market value is the only logical and legal touchstone'" and that its "primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed."[117] The Register and the Librarian affirmed the 1998-99 CARP's decision to rely upon a relative marketplace value standard as the standard for distributing cable royalties.[118] The Court of Appeals did the same, stating that "[w]e detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards."[119] The Court of Appeals further stated: "While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard, the CARP made no such change. Like the 1990-92 CARP, it relied on relative market value."[120]

55. In the recent order distributing the 2000-03 cable royalty funds, the Judges observed that the 1998-99 CARP "refined the approach" taken by the 1990-92 CARP and

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114 1990-92 Librarian Determination, 61 Fed. Reg. at 55658, *aff'd Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 927-28 n.18 (D.C. Cir. 1998); *see also* Librarian's Phase II Final Determination in Doc. No. 2000-02 CARP CD 93-97, 66 Fed. Reg. 66,433, 66,445 (Dec. 26, 2001) ("The established distribution criteria, as modified, must be applied in an effort to simulate a marketplace for these programs where one does not exist because of section 111.").

115 1990-92 CARP Report at 9.

116 1990-92 CARP Report at 10 (emphasis in original) (citations omitted).

117 1998-99 CARP Report at 10 (citations omitted).

118 *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3608 *aff'd Program Suppliers v. Librarian of Congress*, 409 F.3d at 401.

119 *Program Suppliers v. Librarian of Congress*, 409 F.3d at 401.

120 *Id.* (citations omitted).

"announced that its primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed."[121] The Judges further observed that "the Librarian upheld this conclusion as well, and the Court of Appeals once again affirmed."[122]

56. Witnesses for each of the claimants have recognized that relative market value is the appropriate standard for distribution in this proceeding.[123]

B. Nature of the Hypothetical Marketplace

57. Longstanding precedent describes the task of the decision maker in cable royalty distribution proceedings as being "to simulate [relative] market valuation" in the absence of a compulsory license.[124] The 1998-99 CARP, based on evidence including opinions of expert economists, determined in detail for the first time the attributes of the "hypothetical marketplace" whose outcomes are to be simulated.[125]

58. The 1998-99 CARP held that negotiations in the hypothetical marketplace would most likely occur between individual cable operators or multiple system operators on the one hand and individual broadcast stations, as intermediaries, for the rights to retransmit entire broadcast signals.[126] In the 2004-05 proceeding, CTV rebuttal witness Dr. Gregory Crawford, an economist with extensive experience and expertise in econometric analyses of the cable television industry, agreed, explaining the industry conditions that made it likely the "seller" would be an intermediary representing an entire channel of programming.[127] He went on to explain that, given the economic incentives and based on observations of current marketplace

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121 *See* CRJ 2000-03 Distribution Order at 15.

122 *See* CRJ 2000-03 Distribution Order at 15 (citing *Program Suppliers v. Librarian of Congress,* 409 F.3d at 401 (D.C. Cir. 2005)).

123 *See* Crandall WDT (SP Ex. 3); Tr. 635 (Ducey); Tr. 734 (Waldfogel); McLaughlin WDT (SP Ex. 6) at 2; Zarakas WDT (SP Ex. 27) at 3; Tr. 2819 (Salinger); Calfee WRT (CDN Ex. R-3) at 4; Tr. 2119 (Ford); Tr. 2344-2345 (Crawford).

124 1998-99 CARP Report at 8-10.

125 1998-99 CARP Report at 10-13; 1998-99 Librarian Order 69 Fed. Reg. at 3614.

126 1998-99 CARP Report at 11, 12.

127 Crawford WRT (SP Ex. 52) at 13.

behavior, the intermediary would likely be the distant signal itself rather than a new entity compiling the same channel of programming.[128]

59. The 1998-99 CARP also concluded that programming decisions in the hypothetical marketplace would continue to be made by broadcasters considering their own local market economics, and that cable operators would thus face a "fixed configuration and quantity" of distant signal programming.[129] In the 2004-05 proceeding, expert economist Joel Waldfogel confirmed, based on his prior experience and expertise, that the distant signal market is a secondary market, in which supply is fixed, as a byproduct of the prior programming decisions of the television stations.[130] Indeed, in the 2000-03 cable distribution proceedings, Linda McLaughlin, who testifies again in these proceedings on behalf of PTV, testified that the cable distant signal marketplace is a "secondary market" where "the only thing that's important is demand, not the supply. The supply already exists, so the cost of the programming is -- isn't relevant, only the demand for the programming, in this case, the demand by the cable operators."[131]

60. The 1998-99 CARP went on to conclude that, in the hypothetical marketplace, relative market value would be determined by the demand from the potential purchasers, the cable system operators.[132] In this proceeding as well, Dr. Waldfogel confirmed that "what matters in thinking about [distant signal] value" is cable operator demand.[133] Dr. Crawford explained, in response to cross-examination questions from Program Suppliers counsel, that the "relative market value of interest" would be determined in the hypothetical market by the value of distant signal programming to the cable operators in terms of attracting subscribers.[134] Indeed, testifying in support of his subscriber survey, Dr. Arthur Gruen, sponsored by the Program

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128 Crawford WRT (SP Ex. 52) at 13-14.

129 1998-99 CARP Report at 12.

130 Waldfogel WDT (SP Ex. 18) at 1-2; Tr. 750 (Waldfogel).

131 2000-03 Tr. 670, 672 (McLaughlin) (Ex. CDN-R-5).

132 1998-99 CARP Report at 12-13; 1998-99 Librarian Order at 3614.

133 Tr. 750 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 1-2; *Accord*, McLaughlin WDT (SP Ex. 6) at 1.

134 Tr. 2405-06 (Crawford).

Suppliers, testified that "the measure of value in these proceedings has been the ability [of programming] to attract and retain subscribers."[135]

61. In this context, because the relative market value inquiry must produce an allocation of the royalties actually paid, among the owners of the programs actually carried, the simulation of the hypothetical market is constrained by the actual distant signal marketplace behavior of the cable operators.[136]

IV. Settling Parties' Approach

62. The Settling Parties seek an award based upon the results of (a) the 2004-05 Bortz constant sum surveys of cable operator valuations of distant signal non-network programming, as adjusted to account for issues addressed in the 1998-99 CARP Report, and (b) the 2004-05 Zarakas study of the value of music in programming, which also is intended to respond to issues raised by the 1998-99 CARP. The Settling Parties rely upon the 2004-05 Waldfogel regression analysis (and other record evidence) as providing corroboration of the 2004-05 Bortz results in the same manner that the 1998-99 CARP relied upon the comparable Rosston regression analysis to corroborate the 1998-99 Bortz results.

A. Bortz Constant Sum Survey of Cable Operators

1. History of Constant Sum Surveys in Distribution Proceedings

63. JSC submitted constant sum surveys of cable operators in each of the 1978, 1979, 1980, 1983, 1989, 1990-92, 1998-99 and 2004-05 cable royalty distribution proceedings. CTV and PTV submitted constant sum surveys of cable operators in the 1983 proceeding. CTV also submitted a constant sum survey of cable subscribers in the 1983 proceeding. The Canadians have submitted constant sum surveys in the 1990-92, 1998-99, 2000-03 and 2004-05 proceedings.[137]

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135 *See* Gruen WDT (PS Ex.8) at 28.

136 *See* Tr. 2199 (Ford).

137 Claimants also have submitted cable operator surveys employing other methodologies in various distribution proceedings. *See* 1980 CRT Determination, 48 Fed. Reg. at 9556; 1983 CRT Determination, 51 Fed. Reg. at 12802-03.

a. 1978-80 Proceedings

64. In the 1978, 1979 and 1980 distribution proceedings, JSC sponsored cable operator surveys performed by Batten, Barton, Durstine & Osborn, Inc. ("BBDO surveys"), one of the nation's largest advertising agencies.[138] BBDO surveyed the executives of multiple-system operators ("MSO") for each of these proceedings; it also conducted a survey of cable system managers for the 1979 proceeding. The results of the 1979 MSO and managers surveys were similar.[139] The CRT in the 1979 proceeding stated:

> The Joint Sports Claimants introduced a study by BBDO in order to demonstrate that the views held by the cable operators who testified were also shared by others in the industry. To correct the deficiencies that were pointed out in connection with a similar study presented by Sports in the 1978 proceeding, the survey in this proceeding was careful to distinguish between distant signal programming and "made for cable" programming and between network an nonnetwork sports; the study also focused only on distant signal programming that was actually imported. Interviews were conducted by telephone and embraced 31 of the nation's 50 largest MSO's and 53 of 108 randomly selected Form 3 cable system managers. The results were that sports and movies were considered by far the most valuable distant signal programming, with syndicated programming considered much less important. The method of the study was to ask each respondent what dollar value, out of $100, he would place upon each type of programming.[140]

65. In the 1980 proceeding the CRT stated that: "The Tribunal attaches importance to the fact that this is the third year in which the BBD&O survey has been presented and in which the results have remained generally the same. This year, as in the past, the expression of preference as to various categories of programming cannot be directly converted into a royalty share allocation."[141]

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138 *See* Bortz Report (SP Ex. 2) at 23;1978 CRT Determination at 63029; 1979 CRT Determination, 47 Fed. Reg. at 9882; 1980 CRT Determination, 48 Fed. Reg. at 9555.

139 *See* Bortz Report (SP Ex. 2) at 23; 1979 CRT Determination, 47 Fed. Reg. at 9882.

140 1979 CRT Determination, 47 Fed. Reg. at 9882.

141 1980 CRT Determination, 48 Fed. Reg. at 9565.

b. 1983 Proceeding

(i) JSC Survey

66. In the 1983 proceeding, JSC retained Browne, Bortz & Coddington ("BBC") (the predecessor to Bortz Media) to conduct a cable operator survey.[142] With the assistance of Drs. Michael Wirth (Professor and Chairperson of the Department of Mass Communications) and George Bardwell (Professor of Mathematics and Statistics) at the University of Denver, BBC designed a study employing a constant sum technique. In developing the study, BBC sought to improve upon the earlier BBDO constant sum surveys and to respond to concerns expressed in the 1978-80 distribution proceedings concerning the BBDO surveys.[143]

67. The CRT noted that there were several changes in the methodology implemented by BBC. For example, "[i]nstead of MSO executives, BBC interviewed cable system operators because of their more detailed knowledge of programming value at the local level."[144] The BBC survey used, for the first time, a stratified random sampling approach.[145] BBC asked cable operators to allocate 100% of a fixed budget rather than a hypothetical $100 of distant signal "value."[146] Further, in contrast to the BBDO surveys, the cable operators were informed of the particular distant signals carried by their cable system in 1983.[147] The 1983 BBC survey did not ask the respondents to value devotional programming or the programming on Canadian signals carried by the cable operators.[148] Systems not carrying a PTV station as a distant signal basis in 1983 were not asked to value PTV programming.[149] The BBC survey was conducted in 1985 and asked respondents how they valued the programming in 1983.[150]

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142 *See* 1983 CRT Determination, 51 Fed. Reg. at 12795-96.

143 *See* Bortz Report (SP Ex. 2) at 25.

144 *See* 1983 CRT Determination, 51 Fed. Reg. at 12796; *see also* Bortz Report (SP Ex. 2) at 29.

145 *See* 1983 CRT Determination, 51 Fed. Reg. at 12796.

146 *See id.*

147 *See id.*

148 *See id.*

149 *See id.*

150 *See* 1983 CRT Determination, 51 Fed. Reg. at 12796.

68. The CRT stated that the BBC survey was "adequate in design and methodology" and could be "accorded some weight" but it contained "some flaws."[151] The CRT noted that BBC properly designed the survey so that: (1) the interviewer and interviewee were unaware for whom the survey was being conducted; (2) the proper individual was surveyed; and (3) the cable operator was asked specifically about the value of the program in terms of subscriber attraction and retention; and (4) no confusion existed as to which distant signals they were being asked about, because the distant signals were identified for the respondents.[152] However, the CRT criticized the BBC survey for failing to include Devotional programming and Canadian programming.[153] The CRT also criticized the survey for having been conducted in 1985 – more than a year after the end of 1983.[154] The CRT found that this created a "recall problem" for respondents.[155] It also criticized the BBC survey for placing an automatic zero on the PTV category where no PTV distant signal was carried "whereas operators who did carry PBS were not accorded any automatic percentages."[156] The CRT also accepted criticisms advanced by PS witness Dr. Stanley Besen that the BBC surveys did not ask cable operators "to take into account the limit on the supply of major league and college games."[157]

(ii) CTV Surveys

69. CTV sponsored two constant sum surveys performed by the ELRA Group: (1) a survey of cable operators; and (2) a survey of cable subscribers. CTV urged the CRT to give greater weight to the operator survey because it is "the cable operator's selection of distant signals which is the relevant marketplace."[158] Like the BBC survey, the ELRA constant sum surveys were conducted in 1985 and asked cable operators and subscribers about the value of

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151 *Id.* at 12810.

152 *See* 1983 CRT Determination, 51 Fed. Reg. at 12810.

153 *See id.*

154 *See id.* at 12808-09.

155 *Id.* at 12808.

156 *Id.* at 12810.

157 *Id.* at 12811.

158 *See id.* at 12798.

distant signal programming in 1983.[159] Also similar to the BBC survey, the ELRA cable operator survey selected a sample of cable systems and attempted to interview cable system management rather than MSO executives. The respondents were read a list of the distant signals carried by their system in 1983, and then were asked to value the various types of programming broadcast by those signals in 1983.[160]

70. The results of the ELRA cable operator survey resembled those of the BBC cable operator survey very closely.[161] Indeed, with the exception of the "Movies" category, no individual category studied in both cable operator surveys differed by more than three percentage points from one survey to the other.[162] For example, the allocation to the sports category was 36.1% in the BBC survey while it was $35.66 in the ELRA cable operator survey.[163]

71. The CRT concluded that the ELRA surveys were "adequate in design and methodology, and can be accorded some weight;" however, "they contain some flaws which limit their use, and contain the conceptual drawbacks observed by the Program Suppliers witnesses."[164] The CRT referred to the "recall" issue, "confusion" over "program categorization" and assignment of an automatic zero to PTV where no distant PTV signal was carried.[165] It also criticized the surveys for asking respondents to divide $100.[166] With regard to the subscriber surveys, the CRT expressed specific reservations about the response rate and the ratio of male/female respondents.[167]

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159 *See id.*

160 *See id.* at 12798-99.

161 *See* 1983 CRT Determination, 51 Fed. Reg. at 12796; *see also* Bortz Report (SP Ex. 2) at 23 (Table III-1).

162 Bortz Report (SP Ex. 2) at 23 (Table III-1).

163 *See id.*

164 1983 CRT Determination, 51 Fed. Reg. at 12809.

165 *Id.*

166 *Id.*

167 *Id.* at 12810.

(iii) PTV Survey

72. The PTV constant sum survey differed from the BBC and ELRA cable operator surveys, particularly in that it focused on the value of public television signals versus commercial television signals. As the CRT described it, "the most significant question of the survey asked cable operators to allocate $100 between distant signal commercial television and distant signal public television."[168] Moreover, respondents were not asked about the value of non-commercial signals "in their business," but were asked to value the "worth" of programming on non-commercial signals.[169]

c. 1989 Proceeding

73. JSC submitted a constant sum survey in the 1989 cable royalty distribution proceeding. CTV, PTV and the Devotional Claimants supported that survey.[170]

74. JSC again retained the principals of BBC – who had formed Bortz & Company – to develop a constant sum cable operator survey for both 1986 and 1989.[171] Results of the 1989 study were presented to the CRT in the 1989 proceeding. These results were comparable to those obtained in all of the prior constant sum studies.[172] In addition to consulting Drs. Wirth and Bardwell, Bortz & Company also consulted Dr. Leonard Reid, Professor and Chair of the Department of Advertising at the University of Georgia, to aid it in the survey and sample design.[173] JSC presented testimony from Dr. Reid and others in support of the Bortz survey and to respond to issues raised about the survey in prior proceedings; CTV, PTV and Devotionals did the same.[174]

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168 *See id.* at 12797.

169 *See id.* at 12809.

170 *See* Bortz Report (SP Ex. 2) at 26.

171 *See id.* The 1986 case was settled and therefore the results of this study were not presented in the 1986 proceeding. Results for 1986, which were subsequently presented to the CRT in the 1989 proceeding, were similar to those of the 1983 BBC and ELRA surveys. *See* Bortz Report (SP Ex. 2) at 23 (Table III-1).

172 *See* Bortz Report (SP Ex. 2) at 23 (Table III-1).

173 *See* Bortz Report (SP Ex. 2) at 26.

174 1989 CRT Final Determination, 57 Fed. Reg. at 15293, 15295-97; 15300, 15302 (discussing testimony of Drs. Reid, Crandall, Book, Ducey, Robinson and Woolridge).

75. The CRT recognized that Bortz & Company had taken "important steps to improve the validity and reliability" of the results of the cable operator survey and noted that "[t]he high standards of procedure that were obtained in the 1983 survey were again followed in the 1989 survey."[175] To address the concern of the CRT that the survey was conducted too long after the end of the year for which the cable operators were being surveyed, 60% of the 1989 survey was conducted 1989 and 40% in the first 10 weeks of 1990.[176] The 1989 survey also reflected a change in the key constant sum question; it asked the cable operator to allocate 100% of a fixed budget for distant signals among program types.[177] This change was made to tailor the constant sum question more closely to the function that the cable operator performs.[178] Finally, the 1989 survey included the Devotional and Canadian programming categories.[179]

76. The CRT, however, noted that "certain questions concerning the reliability of the results remain."[180] It referred to issues of program categorization, recall, respondent qualifications and the brief nature of the interview as causing the most concern.[181] However, it also referred to Dr. Besen's testimony concerning supply side considerations. The CRT said it was not "prepared to fully embrace the result of the Bortz survey" but would give those results greater weight where there was corroborating evidence.[182]

d. 1990-92 Proceeding

(i) JSC Surveys

77. In the 1990-92 distribution proceeding before the CARP, the JSC once again submitted a constant sum cable operator survey conducted by Bortz & Company. Once again, the JSC was joined by the CTV, PTV and the Devotional Claimants in supporting the

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175 *Id.* at 15300.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* at 15300-01.

182 1989 CRT Determination, 57 Fed. Reg. at 15301-02.

methodology and results of the Bortz survey.[183] The parties also presented the testimony of several experts who supported the Bortz surveys and responded to issues that had been raised previously.[184]

78. Because the 1990 and 1991 surveys were conducted prior to the release of the CRT's 1989 decision, those surveys employed essentially the same methodology as the 1989 survey.[185] Following the release of the 1989 CRT decision, however, Bortz & Company made several modifications to the survey for 1992.[186] Bortz & Company again consulted with Drs. Wirth and Bardwell of the University of Denver, along with Dr. Samuel Book, the President of MTA Marketing, who had testified in the 1989 proceeding.[187] Mr. Trautman has explained that "the 1992 survey reflected the culmination of a decade of improvements and refinements intended to enhance the accuracy and applicability of the Bortz cable operator survey for the purpose of assessing the relative value of distant signal programming."[188] The 1990-92 CARP described the changes as follows:

> The 1992 Bortz study attempted to improve its methodology in response to the Tribunal's comments. The Tribunal expressed concern regarding the qualifications of approximately 11% of the 1989 survey respondents and indicated uncertainty with respect to the involvement of the respondents in the program budgeting process. In response to these concerns, the 1992 Bortz survey modified the initial respondent qualifying question to ensure that the respondent was the person "most responsible for programming decisions at the cable system."' The Tribunal also expressed a desire for enhanced programming definitions. The 1992 Bortz survey modified the category definitions to conform more closely to the Tribunal's definitions and to attempt to further aid the respondents in distinguishing among the categories. In response to the Tribunal's concern regarding the short time period allowed for

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183 *See* 1990-92 CARP Report at 26.

184 *See* 1990-92 CARP Report at 52-54 (describing testimony of Drs. Axelrod, Wildman, Scheffman, Salinger and Much).

185 *See* Bortz Report (SP Ex. 2) at 27. The 1990 and 1991 Bortz survey results were similar to the results of all prior surveys. *See* Bortz Report (SP Ex. 2) at 23 (Table III-1).

186 *See id.*

187 *See id.*

188 *See id.*

> the respondents to consider their allocations, the 1992 question was modified to attempt to ensure that respondents considered the question in a more formal manner by writing down the programming categories, and then think about their relative value and their estimates. Bortz also testified that he believes responses to the survey "reflect dominant impressions of programming value formed by respondents in their ongoing decision making processes . . . ."[189]

79. The 1990-92 CARP characterized the Bortz survey as "highly valuable in determining market value."[190] The CARP also found that the Bortz survey was "focused more directly than any other evidence to the issue presented: relative market value."[191] The CARP explained:

> The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the types of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the same categories we are presented here in the form of claimant groups – that is, sports, movies and the others. That is also what the Panel must do.[192]

80. The CARP did not suggest any changes in the methodology of the Bortz survey. However, the CARP found three limitations to the Bortz survey that "precluded its acceptance in toto:" (1) its execution; (2) it studies attitudes rather than behavior; and (3) it did not take into account the "supply side" of the "supply and demand equation."[193]

81. The dissenting CARP member did not share the majority's concerns. He concluded that the Bortz survey is the best tool available for measuring relative values in the relevant marketplace and that it should receive far more weight than it does . . . ."[194] That is because the Bortz survey "focuses correctly on the cable operator as the key player, asks the

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189 1990-92 CARP Report at 46-47.

190 1990-92 CARP Report at 66.

191 *Id.* at 65.

192 *Id.*

193 *Id.*

194 1990-92 CARP Report at 170 (dissenting opinion).

economically significant question and accurately provides the best estimates of relative value in the marketplace that actually existed."[195] He explained that the conceptual "limitations" perceived by the majority do not provide a basis for discounting the Bortz results, noting further that:

> Most of the expert witnesses who testified agreed that the Bortz survey was correctly designed and executed and whatever shortcomings it may have are relatively minor in comparison to its attributes. In response to suggestions and official Tribunal criticism over the years, it has evolved to measure the correct variable and to provide the most accurate results of relative marketplace value.[196]

(ii) Canadian Surveys

82. The Canadian Claimants offered their own cable operator survey, sponsored by Drs. Ford and Ringold, in the 1990-92 proceeding.[197] While the Canadian survey also used the constant sum methodology, it surveyed only the cable systems that carried Canadian distant signals. In contrast to the Bortz survey, each respondent was asked to value the programming on a particular Canadian signal.[198] In addition to these questions, the Canadian survey asked a "Bortz-like" question – that is, the respondent was asked to allocate a budget among all of the categories of distant signal programming that they carried.[199] The results that were obtained for Canadian programming on this "Bortz-type" question were virtually identical to the results that the Bortz survey obtained in the same years from those cable operators who carried Canadian distant signals.[200]

e. The 1998-99 Proceeding

83. In the 1998-99 proceeding, JSC and other parties presented testimony and other evidence addressing the "conceptual" limitations that 1990-92 CARP identified regarding the

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195 *Id.*

196 *Id.* at 171.

197 *See* 1990-92 CARP Report at 134.

198 *See id.* at 135.

199 *See* Tr. 3012 (Gary Ford).

200 *See* Tr. 3018 (Gary Ford).

Bortz surveys. The CARP determined that none of those conceptual limitations provided a proper basis for discounting the Bortz results.[201] The 1998-99 CARP also concluded that the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy;"[202] the 1998-99 CARP did not suggest that Bortz should make any changes in the methodology of the surveys. The 1998-99 CARP concluded that the "Bortz survey is clearly the best measure of relative marketplace value" and it accepted

> the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative market value for PS, JSC and NAB – for both the Basic Fund and the 3.75% Fund. Indeed, for reasons discussed *infra,* we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups. Bortz also establishes a Basic Fund floor . . . for PTV.[203]

84. The CARP noted that its decision to tie the PS, JSC and CTV awards directly to the Bortz results – and not to rely upon raw or adjusted viewing data in fashioning these awards – was the "natural evolution of a discernible trend" where "[s]uccessive decision-makers have been according greater and greater weight to Bortz, and concomitantly lesser weight to [the] Nielsen" viewing data that had been the cornerstone of the CRT's early distribution decisions.[204]

85. The Canadians also presented constant sum surveys of cable operators in the 1998-99 proceedings. Those surveys sought to compare the value of the different types of programming on Canadian signals only. The 1998-99 CARP gave full weight to the Canadian surveys in determining the Canadian awards.[205] The Canadians relied upon the same type of constant sum cable operator surveys in the 2000-03 proceeding.[206]

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201 1998-99 CARP Report at 27-28.

202 *Id.* at 31.

203 *Id.* at 52, 31.

204 *Id.* at 53.

205 *Id.* at 71.

206 *See* 2000-03 Distribution Order at 8-9.

2. Methodology of the 2004-05 Bortz Study

86. In each of the years 2004 and 2005, Bortz conducted a constant sum survey of "Form 3" cable systems to determine the relative values they placed on seven different categories of distant signal non-network programming they actually carried during those years.[207]

a. Sample Selection

87. Bortz uses a "stratified" random sampling approach to select the systems to be surveyed, with the stratification based on copyright royalty payments.[208] Thus, in 2004 for example, the Form 3 cable systems were broken down into four strata: (1) systems paying $0-$20,628 in royalties; (2) systems paying $20,629-$59,628 in royalties; (3) systems paying $59,629-$207,129 in royalties; and (4) systems paying $207,130 or more in royalties.[209] The stratification statistics for the 2004 and 2005 Bortz Surveys are noted below:[210]

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207 *See* Bortz Report (SP Ex. 2) at 11-14. Only Form 3 systems are eligible for inclusion in the Bortz Survey samples. "Form 3" cable systems account for approximately 97% of the cable royalty payments. See Kessler WDT (PS Ex. 5) at Appendix B. The remaining cable systems, the "Form 1" and "Form 2" systems, file short form statements of account that do not identify the distant signals they carry. *See* Bortz Report (SP Ex. 2) at 31-32. The lack of information about distant signal carriage restricts Bortz's ability to question those systems about the signals they actually carried. *Id.*

208 *See* Bortz Report (SP Ex. 2) at 11, 45.

209 *See id.* at 46 (Table A-2).

210 *See* Bortz Report (SP Ex. 2) at 46 (Table A-2).

Stratification Statistics for 2004 and 2005 Surveys*

Royalty Stratum	Number of Systems	Mean Royalty	Percent of Total Royalties	Royalty Standard Deviation	Original Sample Size**	Final Eligible Sample
			2004			
$0 - 20,628	936	$10,104	14.4%	$4,772	65	53
$20,629 - 59,628	432	35,897	23.5	10,873	68	54
$59,629 - 207,129	234	103,077	36.6	37,199	129	109
$207,130 or more	45	373,148	25.5	253,603	45	35
Total/Average	1,647		100.0%		307	251
			2005			
$0 - 23,844	755	$12,269	14.3%	$5,150	58	46
$23,845 - 65,344	378	39,639	23.1	11,372	64	56
$65,345 - 239,844	210	114,824	37.2	44,527	140	118
$239,845 or more	39	420,366	25.3	202,246	39	31
Total/Average	1,382		100.0%		301	251

*Stratification statistics are based on the first reporting period of each year.

**Includes all sampled systems. In 2004, 43 systems not carrying distant signals, nine systems carrying only PBS signals, and one carrying only Canadian signals were discarded. In addition, two systems could not be located at the Copyright Office and one system was determined to be a duplicate. In 2005, 39 systems not carrying distant signals, seven carrying only PBS signals, two carrying only PBS and Canadian signals, and one carrying only Canadian signals were discarded. In addition, one system could not be located at the Copyright Office.

88. The sampling plans were constructed so that proportionately more systems with large royalty payments were sampled relative to systems with small royalty payments.[211] This approach is intended to ensure that responses to the survey would provide a statistically valid predictor for allocation of royalty payments.[212] Furthermore, all of the systems paying the most in royalties – *i.e.*, those paying more than $207,130 in 2004 and $239,845 in 2005 - were selected for the survey, whereas approximately one in fifteen (15) systems were included in the strata for smallest systems.[213] From this original sample, Bortz identifies those systems that according to statements of account filed with the Copyright Office both carried a distant signal and had more than one type of distant signal programming for inclusion in its eligible sample.

b. Survey Interviews

89. Once the eligible samples for 2004 and 2005 were determined, Bortz retained a "leading" market research firm to conduct the cable operator surveys in both years.[214] Only

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211 *See* Bortz Report (SP Ex. 2) at 45.

212 *See id.* at 11.

213 *See* Bortz Report (SP Ex. 2) at 46 (Table A-2).

214 *See* Bortz Report (SP Ex. 2) at 12.

interviewers who specialize in surveying professional and managerial personnel were utilized."[215] Interviewers were not told the name of the client or given any information regarding the nature of the study.[216] The research firm achieved response rates of 65% and 68% among the sampled systems for the key constant sum question in 2004 and 2005, respectively.[217] A comparison of the response rates to the 1998-99 Bortz surveys, and the 2004-05 Bortz surveys is set forth below[218]:

Response Rates to 1998-99 & 2004-05 Bortz Surveys

Year	Response Rate to Constant Sum Question
1998	57%
1999	67%
2004	65%
2005	68%

c. Survey Questionnaires

90. Bortz designed the questionnaires for the 2004 and 2005 studies "so that respondents had the qualifications and information necessary to address the key constant sum valuation question."[219] The initial survey question "screened" potential respondents for their involvement in making decisions related to the carriage of distant signals.[220] The result of this "screening" process was "a respondent group that overwhelmingly consisted of general

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215 *Id.*

216 *Id.*

217 *Id..*

218 Bortz Report (SP Ex. 2) at 12, 48.

219 *See* Bortz Report (SP Ex. 2) at 12.

220 *See id.* at 12, 42.

managers, marketing directors or managers and programming directors or managers."[221] These results are reflected in the table set forth below:[222]

Persons Most Responsible for Programming Decisions, By Job Title, 2004 and 2005

	2004		2005	
Job Title	Number of Respondents	Percent of Total	Number of Respondents	Percent of Total
SVP, Regl. VP or VP Marketing/Marketing Director	62	38.3%	47	27.5%
General Manager/Manager/Area VP or Director/Regional VP or SVP	40	24.7	71	41.5
Marketing Manager/Marketing Operations Dir./Marketing Coordinator/Regl. Mktg. Mgr.	17	10.5	17	9.9
VP or Dir. Sales & Marketing/Regl. Dir. Sales & Marketing	17	10.5	11	6.4
VP, Director or Manager Operations/Regl. VP or Director Operations	10	6.2	5	2.9
Product or Programming Director or Manager	9	5.6	7	4.1
VP or SVP	5	3.1	7	4.1
Other	2	1.2	6	3.5
Total*	162	100.1%	171	100.1%

*Does not equal 100.0 percent due to rounding.

91. These "[r]espondents were (on multiple occasions) read a list of the distant signals actually carried by [their] systems" and "were specifically instructed to consider only the non-network programming on those distant signals."[223]

92. Before being asked the key constant sum question, respondents were asked preparatory questions about the popularity and advertising usage of distant signal non-network programming.[224] These preliminary questions "were intended to focus the respondent on the

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221 *See id.* at 12.

222 *See* Bortz Report (SP Ex. 2) at 49.

223 *See* Bortz Report (SP Ex. 2) at 12; *see id.* at Appendix B (Question 2a, 2b & 4a).

224 *See* Bortz Report (SP Ex. 2) at 12.

value of various programming types in terms of attracting and retaining subscribers."[225] The first preliminary question (the second survey question overall) asks the respondent which categories of distant signal programming on the distant signals the cable system carried were most popular among subscribers.[226] The third survey question asks the respondent to identify the types of distant signal programming (if any) used by the operator in advertising and promotion.[227]

93. Finally, the respondents were asked the key constant sum question which, in 2004, read as follows:[228]

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225 *See id.*

226 *See id.* at 42.

227 *See id.* at 42-43.

228 *See id.* at Appendix B (Question 4a-4b).

4a. Now, I would like you to estimate the relative value to your cable system of each type of programming actually broadcast by the stations I mentioned during 2004, other than any national network programming from ABC, CBS and NBC. That is, how much do you think each such type of programming was worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers. We are only interested in U.S. commercial station(s) _____, U.S. non commercial station(s) ., and Canadian station(s) _____.

I'll read all the program types that were broadcast by these stations to give you a chance to think about them; please write the categories down as I am reading them. (READ PROGRAM TYPES IN ORDER OF RANDOM SEQUE NCE NUMBER.) Assume you had a fixed dollar amount to spend in order to acquire all the programming actually broadcast during 2004 by the stations I listed. What percentage, if any, of the fixed dollar amount would you spend for each type of programming? Please write down your estimates, and make sure they add to 100 percent.

What percentage, if any, of the fixed dollar amount would you spend on (READ FIRST PROGRAM TYPE)? And what percentage, if any, would you spend on (READ NEXT PROGRAM TYPE)? (COMPLETE LIST IN THIS MANNER.)

Random Sequence		Percent
( )	Movies broadcast during 2004 by the U.S. commercial stations I listed.	_____
( )	Live professional and college team sports broadcast during 2004 by the U.S. commercial stations I listed.	_____
( )	Syndicated shows, series and specials distributed to more than one television station and broadcast during 2004 by the U.S. commercial stations I listed.	_____
( )	News and public affairs programs produced by or for any of the U.S. commercial stations I listed, for broadcast during 2004 only by that station.	_____
( )	PBS and all other programming broadcast during 2004 by U.S. noncommercial station _____.	_____
( )	Devotional and religious programming broadcast during 2004 by the U.S. commercial stations I listed.	_____
( )	All programming broadcast during 2004 by Canadian station _____.	_____
TOTAL	.....	_____

PERCENTAGES MUST ADD TO 100 PERCENT; PROMPT RESPONDENT IF THEY DO NOT.

4b. Now I'm going to read back the categories and your estimates. (REREAD CATEGORIES AND RESPONSES IN RANDOM SEQUENCE ORDER TO ALLOW RESPONDENT TO REVIEW THE ESTIMATES.)

Are there any changes you would like to make? (RECORD ANY CHANGES BY CROSSING OUT ORIGINAL RESPONSE AND WRITING IN REVISED RESPONSE NEXT TO IT. PERCENTAGES MUST STILL ADD TO 100 PERCENT; PROMPT RESPONDENT IF THEY DO NOT.)

94. As noted above, cable operators were asked to "assume [they] had a fixed dollar amount to spend in order to acquire all the programming actually broadcast during [the particular year] by the stations" that cable system actually carried.[229] Respondents were first instructed to write down the programming categories and to think about their relative value.[230] They were then asked to write down their estimates for each category.[231] Subsequently, the interviewer reviewed the estimates for each category with the respondent to allow for any changes upon reconsideration.[232]

95. Moreover, the 2005 Bortz survey was identical to the 2004 survey described above.[233] Furthermore, in order to focus the respondents answers, Bortz tailored each questionnaire to the actual distant signals carried by the respondent cable systems and explained to the respondents that network programming should not be factored into their answers.[234]

3. Reliability And Validity of the 2004-05 Bortz Surveys

96. For more than twenty-five years, JSC (as well as other claimants) have been presenting evidence in the various cable royalty distribution proceedings from survey experts, market researchers, economists, statisticians, valuation experts and cable industry executives concerning the reliability and validity of the Bortz constant sum surveys of cable operators.[235] Based upon that evidence, the CRT and CARPs increasingly gave greater weight to the results of the Bortz surveys.[236]

97. In the last litigated proceeding to address the issue, the 1998-99 CARP determined that the Bortz survey is "an extremely robust (powerfully and reliably predictive)

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229 Bortz Report (SP Ex. 2) at Appendix B (Question 4a); *See also* Bortz Report (SP Ex. 2) at 12, 43-44.

230 *See* Bortz Report (SP Ex. 2) at 44.

231 *See id.* at 44-45.

232 *See id.* at 45.

233 *See* Bortz Report (SP Ex. 2) at 41-45.

234 *See* Bortz Report (SP Ex. 2) at 12.

235 *See* SP PFOF ¶¶ 99-125.

236 *See* History of Constant Sums Surveys, *supra*, ¶¶ 63- 85.

model for determining relative value" and that the Bortz survey is "more reliable than any other methodology presented" for determining the relative value of Program Suppliers, JSC, and CTV.[237] The 1998-99 CARP did not suggest that any changes should be made in the Bortz surveys, concluding that Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy;"[238] it echoed the prior CARP's determination that the survey is "well designed" and answers the relevant question.[239] The Register and Librarian affirmed the CARP's reliance upon Bortz,[240] as did the Court of Appeals, which noted that it "makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme" and that "Bortz adequately measured the key criterion of relative market value."[241]

98. The 2004-05 Bortz surveys follow the same methodology as did the 1998-99 Bortz surveys.[242] In this proceeding, several witnesses from different disciplines testified and offered other evidence in support of the 2004-05 Bortz surveys. These witnesses offer their different perspectives as survey experts, market researchers with extensive cable industry experience, economists with such experience and an MSO programming executive. Their testimony demonstrates that the conclusions the 1998-99 CARP reached concerning the reliability and validity of the Bortz Surveys apply equally to the 2004-05 Bortz surveys.

a. James Trautman

99. James Trautman, whose testimony was sponsored by JSC, has advised cable television system operators, cable programming networks, owners of programming content and rights, and other entities with interests in the cable television industry for more than 25 years.[243] In this capacity, he has directed market research assignments addressing a wide range of issues

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237 *See* 1998-99 CARP Report at 31.

238 *Id.* at 52.

239 *Id.* at 23.

240 *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3608 *aff'd Program Suppliers v. Librarian of Congress*, 409 F.3d at 401.

241 *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402, (D.C. Cir. 2005).

242 *See* Bortz Report (SP Ex. 2) at 28.

243 Trautman WDT (SP Ex. 2) at 1; Tr. 39-43 (Trautman)

affecting the cable industry including pricing, packaging, subscriber interest and subscription demand-related studies.[244] Mr. Trautman's market research ranges from business feasibility analysis to survey research at both the business-to-business level and consumer research level.[245] Furthermore, Mr. Trautman oversees survey research for his commercial clients who include both small and large cable companies, major industry associations and broadcasters such as CBS and ABC.[246] Mr. Trautman has been professionally involved in approximately 50 surveys excluding those related to this proceeding.[247]

100. Mr. Trautman has also testified and been qualified as an expert witness in prior cable royalty distribution proceedings - having submitted testimony in both the 1990-92 and 1998-99 proceedings.[248] Mr. Trautman was qualified in these proceedings as "an expert in market research, including survey research and valuation in the cable, broadcast and television programming industry."[249]

101. As a result of his experience, Mr. Trautman has extensive knowledge of the considerations cable programming executives give to particular programming decisions, the forces that drive value behind those decisions and the thought processes that cable operators undertake in selecting television programming. He testified:

> I've certainly had many discussions with cable system personnel and cable programming executives over the years in the context of other assignments that relate to why it is that they carry particular programming, how they make programming decisions, et cetera. And I can tell you, from -- from those discussions, it's certainly my sense that they make these types of decisions based on what we've referred to in the past as a dominant impression of value and of programming on a particular program network, whether it's a cable network or a distant signal. And the whole notion of a dominant impression, to me, tends to be driven by what -- what we refer to in the industry as "signature programming." So there's certain

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244 Trautman WDT (SP Ex. 2) at 1; Tr. 43 (Trautman).

245 Tr. 39-40 (Trautman).

246 Tr. 40-43 (Trautman).

247 Tr. 43-44 (Trautman).

248 Tr. 44 (Trautman).

249 Tr. 53-54 (Trautman).

> programs or certain collections of -- of programming that -- that every cable network offers. It's typically what you would see in prime time or -- or something that it's particularly noted for. And -- and those tend to be the things -- that signature programming tends to be kind of the starting point for driving value.[250]

102. Based upon this experience, Mr. Trautman opines that the Bortz survey results "provide a valid and reliable estimate of how cable operators valued the different types of non-network programming categories on the distant signals they actually carried in 2004 and 2005."[251]

103. Accordingly, Mr. Trautman concludes that the Bortz survey provides the:

> [B]est approximation of how the cable operators themselves would have allocated the compulsory licensing royalties they paid to carry that programming.[252]

104. Mr. Trautman also testified regarding the use of the constant sum technique in surveys:

> Q. And are you familiar with a survey research technique referred to as 'constant sum survey'?
>
> A. Yes, I am.
>
> Q. And is that technique well accepted in the survey research field?
>
> A. Yes, I think it's very well accepted and commonly used, particularly in situations similar to the one that has been applied here, where you're looking for a relative value allocation.[253]

105. Mr. Trautman emphasizes the validity of the constant sum methodology, particularly with regard to these proceedings, in his written direct testimony. He states:

> The constant sum approach used in the surveys conducted by JSC, the CTV and the Canadians is a well-recognized market research tool that is used in a variety of contexts when a comparative value measure is being sought...this tool allows respondents to address

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250 Tr. 85-86 (Trautman); *see also id.* at 90-91 (Trautman).

251 *Id.* at 8.

252 See Bortz Report (SP Ex. 2) at 8.

253 *See* Tr. 50 (Trautman).

> the same task that has confronted first the Copyright Royalty Tribunal, more recently the Copyright Arbitration Royalty Panel and now the Copyright Royalty Board – that is, the task of allocating a fixed amount among several program categories based upon the relative value of those categories.[254]

106. Mr. Trautman also analyzed consistencies within the marketplace and determined that the Bortz results are reliable due to their consistency with how cable operators value various television programming. He concludes:

> Q. We were talking about other dimensions apart from just the historical consistency, and you, I think, mentioned some internal consistency reviews that you've done. I just want to make sure that the record is clear. Have you considered other -- have you looked at other types of consistencies with respect to the survey in terms of its reliability?
>
> A. Yes, similar to the examples that I mentioned.
>
> Q. And --
>
> A. Well -- I'm sorry. I should say, as well, that one of the major elements of consistency that we look for is consistency also with our marketplace -- with our own experience, as well as consistency with marketplace transactions that are out there.
>
> Q. And could you briefly just give an example of what you mean by that?
>
> A. Well, we have looked at the survey results in the context of our own understanding in the marketplace, how cable operators go about valuing programming and making decisions about which signals to carry and which types of programming to carry. And we've also considered the results in the context of license fees that are paid by cable networks relative to other cable networks that might mirror, in some sense, the categories that we're considering here. And we've looked at consistency in the context of programming expenditures historically that have been made for those types of -- those -- for various types of programming in the cable network marketplace.

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[254] Bortz Report (SP Ex. 2) at 10.

> Q. And in terms of the reliability of your survey, what is your conclusion when you consider those -- those experiences?
>
> A. Well, our conclusion is that -- that the survey results are consistent with what we find in terms of the marketplace, both from an experiential and from an analytical point of view. And that gives us confidence that the survey results are reliable.[255]

b. Dr. Gregory Duncan

107. Dr. Gregory Duncan, an expert in survey design and validation, provided testimony about the validity and reliability of the Bortz survey.[256] Dr. Duncan has a Ph.D. in Economics and a Master's degree in Statistics.[257] His academic research is and has been in econometrics, specifically, methods for surveys and analyzing survey data.[258] He has experience designing and analyzing surveys as an industrial economist with GTE and as a consultant with Huron Consulting.[259] He has worked on hundreds of surveys, and his survey work has included survey design, sample construction, and data analysis.[260] Dr. Duncan has taught college courses on survey design and market research.[261] He currently teaches econometrics at the University of California, Berkeley, and that course includes a section on surveys.[262] He also teaches a graduate course on survey methods.[263]

108. In his written direct testimony, Dr. Duncan provides several reasons to support his conclusion that "the Bortz survey was based on sound principles and test methods and that it was conducted in such a way that its results can be deemed reliable.[264] Those reasons include:

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255 Tr. 113-15 (Trautman).

256 Tr. 2502 (Duncan); Duncan WRT (SP Ex. 54) at 9-11.

257 Duncan WRT (SP Ex. 54) at 3.

258 Duncan WRT (SP Ex. 54) at 3-4.

259 Tr. 2498-2502 (Duncan).

260 *Id.*

261 *Id.*

262 Tr. 2502 (Duncan).

263 *Id.*

264 Duncan WDT (SP Ex. 1) at 11.

* The composition of the Bortz study is appropriate because it samples "the cable operators and, specifically, the programming decision-makers" who "are the relevant group to be sampled."[265]

* The Bortz study uses an optimal stratified sampling which satisfies the requirement that every member of the population have a known and positive probability and gives reasonable assurance that the boundaries of the strata sufficiently reduce the sample error.[266]

* The standard errors in the Bortz study are roughly 1 percentage point for the allocations to the most categories which indicates the sample size was adequate.[267]

* In the Bortz studies, response rates ranging from 65 to 68 percent, which are much higher than survey researchers often achieve, were obtained for the key constant sum question in 2004 and 2005. This indicates nonresponse bias was minimized in the Bortz survey results.[268]

* Regarding the design of the survey instrument, Dr. Duncan states the questions in the Bortz survey are phrased adequately to obtain reliable results, particularly because the respondents make the type of decisions posed by the questions in the survey on a regular basis as part of their professional responsibilities.[269]

109. Dr. Duncan also concludes that the "constant sum methodology is appropriate to determine the relative market value of the distant signal programming categories carried by cable operators."[270] In support of his conclusion, Dr. Duncan notes, *inter alia*, the following:

* The constant sum methodology is particularly useful in situations where an analyst wishes to evaluate the impact of specific factors on resource allocation.[271]

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265 *See id.* at 6-7.

266 *See id.* at 7.

267 *See id.* at 8-9.

268 *See id.* at 9.

269 *See* Duncan WDT (SP Ex. 1) at 11

270 Duncan WDT (SP Ex. 1) at 1.

271 Duncan WDT (SP Ex. 1) at 4 (examples include: "Product managers allocating total marketing budget among advertising, sales promotion, and trade promotion"; "Sales

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* The Bortz survey is very similar to these resource allocation decisions. In particular, the Bortz survey measures relative value with explicit reference to a budget for distant signal non-network programming.[272]

* [The constant sum questions] elicit the respondents' relative market valuations of the different program types, that is, the relative amount the respondent would be willing to pay for each program category if required to negotiate for that category.[273]

* From a market research standpoint, one of the chief benefits of using a constant sum survey is that it mimics the process used by purchasers, who make decisions.[274]

* Constant sum surveys reduce the number of alternatives as a way of deciding which attributes actually matter and help eliminate carryover from one attribute to the next.[275]

110. Dr. Duncan also explained that his testimony concerning the reliability and validity of the 2004-05 Bortz surveys is consistent with testimony provided by other witnesses who testified in prior distribution proceedings and addressed specific criticisms leveled against the Bortz surveys, including:

* Professor Leonard Reid of the University of Georgia testified in the 1989 proceeding that not only is the constant sum technique "a valid and well-accepted research tool . . . . used in marketing research," "but also that the methodology is simple; it allows the use of sophisticated statistical procedures; it reveals comparative judgments; it eliminates consistent positive, negative, or neutral response patterns; and it provides information predictive of behavioral tendencies."[276]

Footnote continued from previous page

managers dividing total compensation package for salespeople among straight salary, commission, and non-monetary incentives"; and "Financial investors allocating their investment dollars among stocks, bonds, and various other financial instruments.").

272 *Id.*

273 *Id.*

274 *Id.* at 4-5.

275 *Id.* at 5.

276 Duncan WDT (SP Ex. 1) at 6.

* Dr. Joel Axelrod, who conducted the seminal study validating the constant sum methodology as a predictor of behavior, testified in the 1990-92 proceeding that the constant sum scale parallels the decision process used by decision makers. He stated, "Constant Sum questions are particularly appropriate when . . . one seeks information about relative values."[277]

* Dr. Samuel Book, testified that he "[does] not believe there would have been any better way of determining how cable operators would have allocated their programming budgets" than by using the constant sum methodology.[278]

111. Dr. Duncan agreed "with the conclusions of the most recent CARP Report and the other experts that the Bortz survey is designed to produce results that reasonably emulate the payments cable operators would have made had they acquired programs through open negotiations."[279]

c. Dr. Robert Crandall

112. Dr. Robert Crandall is a senior fellow in economic studies at the Brookings Institute.[280] Dr. Crandall has experience in the cable television industry dating back to 1978 when he served as a consultant to the FCC on the deregulation of signal carriage rules for cable television.[281] He has written widely on telecommunications policy, the economics of broadcasting, and the economics of cable television.[282] In addition to serving as a consultant to government agencies,[283] Dr. Crandall has also consulted with commercial clients with respect to television or broadcasting networks over the years including the National Cable Television Association and major television broadcast networks.[284]

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277 *Id.*

278 *Id.*

279 Duncan WDT (SP Ex. 1) at 11.

280 Crandall WDT (SP Ex. 3) at 1.

281 Crandall WDT (SP Ex. 3) at 2.

282 Crandall WDT (SP Ex. 3) at 1.

283 Crandall WDT (SP Ex. 3) at 1.

284 Tr. 214 (Crandall); Crandall (SP Ex. 3) at 2.

113. Dr. Crandall has testified before the CRT and the CARP in the 1989, 1990-92 and 1998-99 cable distribution proceedings.[285] He was qualified in these proceedings as an expert in the economics of the broadcast and cable television industries.[286]

114. In prior cable distribution proceedings, Dr. Crandall testified on relative marketplace value, the economic criticisms leveled by Program Suppliers against Bortz surveys, and compared the Bortz surveys with other types of evidence presented in those proceedings. For example, in the 1989 proceeding, Dr. Crandall explained the economic theory underlying assessments of relative market value and concluded that "the [Bortz survey] was the best evidence of those values."[287] In the 1998-99 proceeding, Dr. Crandall "explained again the value of the Bortz survey data in showing relative market value and discussed why earlier criticisms of the survey were not well-founded."[288] Dr. Crandall's statements in support of using the 2004-05 Bortz surveys to measure relative marketplace value in the current proceedings are consistent with his testimony in earlier cable royalty proceedings.[289]

115. Dr. Crandall testified that the Bortz survey is "the best tool to answer the question presented in this proceeding."[290]

116. He further testified:

> The best evidence on how the marketplace would have allocated these royalties [absent compulsory licensing] is to be found in constant sum surveys of cable system executives who are asked how they would have allocated a fixed budget for imported distant broadcast signals.[291]

117. He explained that "[s]ince these operators would make the program purchasing decisions in the marketplace that would exist but for the compulsory copyright license, this type

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285 Tr. 215 (Crandall).

286 Tr. 215-16 (Crandall).

287 Crandall WDT (SP Ex. 3) at 7.

288 Crandall WDT (SP Ex. 3) at 7.

289 *See id.*

290 Crandall WDT (SP Ex. 3) at 7; *see also* Tr. 225-29 (Crandall).

291 Crandall WDT (SP Ex. 3) at 3.

of survey provides the best information on the operation of the hypothetical marketplace in the absence of actual data on programming purchases, which do not exist."[292]

118. Discussing the constant sum methodology, Dr. Crandall also testifies:

> The advantage of the constant sum survey is that it attempts to measure the relative value that cable system operators place on various program categories. . . this type of survey provides the best information on the operation of the hypothetical marketplace in the absence of actual data on programming purchases, which do not exist.[293]

119. Dr. Crandall further describes the Bortz survey as "a robust and reliable instrument with a significant track record."[294]

120. Dr. Crandall is not the only economist to previously testify in support of using the results of the Bortz survey to measure the relative marketplace value of distant cable television programming. Other economists have testified in previous cable royalties proceedings and addressed criticisms of the Bortz survey and issues raised by the CRTs and CARPs. Dr. Crandall's testimony is consistent with these economists who include Vanderbilt University economist Dr. David Scheffman and valuation expert Paul Much who both testified in support of the Bortz survey in the 1990-92 proceeding.[295]

d. Judith Meyka

121. Ms. Judith Meyka has over 15 years of experience in the cable television industry, including experience as an executive responsible for the valuation and acquisition of television programming for major cable MSOs.[296] Moreover, Ms. Meyka was the only witnesses presented in these proceedings who actually worked in the cable industry during the years at issue (2004-

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292 *See* Crandall WDT (SP Ex.3) at 8.

293 Crandall WDT (SP Ex. 3) at 8.

294 Crandall WDT (SP Ex. 3) at 8.

295 *See* Crandall WDT (SP Ex. 3) at 8 (noting, *inter alia*, that the 1989 CRT, 1990-92 CARP and 1998-99 CARP reports discuss the various witnesses who have supported the Bortz survey during those proceedings (*citing* 1989 CRT Determination at 15,292-95; 1990-92 CARP Report at 45-54; and 1998-99 CARP Report at 19-31, respectively)).

296 Meyka WDT (SP Ex. 4) at 1.

05). Ms. Meyka, who was admitted in these proceedings as an expert in the programming carriage decision making process by cable operators,[297] testified that the results of the Bortz survey are consistent with marketplace realities:

> Each cable operator, given the particular circumstances of its system, is likely to value the various categories of programming differently. Based on my experience in the cable television industry, however, I believe the Bortz survey results provide an accurate assessment of how the cable industry as a whole would have allocated its distant signal royalty payments for the years 2004 and 2005.[298]

122. Ms. Meyka noted that, according to the Bortz survey results, cable operators valued live sports programming more than any other category of distant signal programming.[299] She also notes that other witnesses with substantial cable industry experience have appeared in prior cable royalty distribution proceedings to explain why the cable industry, and consequently, the results reflected in the Bortz survey, values sports programming so highly. Some of those witnesses include:[300]

- June Travis, the former Executive Vice President, Chief Operating Officer and Board member of the National Cable and Telecommunications Association ("NCTA"), an executive at what had been the nation's largest MSO and Chief Operating Officer of a medium-sized MSO.
- Judith Allen, a marketing and programming executive with a major cable network and two large MSOs.
- Michael Egan, co-owner of a small MSO and programming executive at a large MSO.
- Jerry Maglio, a marketing and programming executive with a small MSO and what was at the time the third largest MSO.
- Trygve Myhren, President of a small MSO and former Chairman and CEO of a mid-sized MSO.

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297 Tr. 273 (Meyka).

298 Meyka WDT (SP Ex. 4) at 6.

299 Meyka WDT (SP Ex. 4) at 7.

300 *See* Meyka WDT (SP Ex. 4) at 7.

- James P. Mooney, President and CEO of the NCTA.
- Robert Wussler, the former CEO of Superstation WTBS.
- Roger Werner, the former CEO of ESPN, Inc.

123. Ms. Meyka stated that "I agree with the statements made by these witnesses concerning the value of live sports programming to the cable operator. I also believe that the reasons given by these witnesses as to why live sports programming is valued so highly by cable operators are still relevant and equally applicable to the period 2004-2005."[301]

e. Other Expert Testimony

124. The testimony of expert witnesses, in addition to those who appeared on behalf of JSC, also support the conclusions reached by the 1998-99 CARP and witnesses who testified in prior proceedings concerning the reliability and validity of the Bortz surveys.[302]

125. The Canadians presented witnesses who generally questioned whether the Bortz results could apply to a small category like the Canadians (or Devotionals). However, they expressed no concerns about whether the Bortz results could apply to the major categories (JSC, PS and CTV).[303] Moreover, as noted above, the Canadians determined (as did Bortz) that a constant sum methodology provided a proper means to determine relative marketplace values.[304] Dr. Debra Ringold, another survey research expert who testified on behalf of the Canadians Claimants, stated that the "constant sum scaling method" is "a pretty standard technique," "utilized and evaluated and found to be a very appropriate method for economic valuation problems, " and "fairly efficient in that it's [ ] not confusing."[305] Dr. Ringold further testified in support of the constant sum methodology, stating it is "found to be predictive in some circumstances of actual purchase decisions and reflective of past purchase decisions" and "considered to be very well suited to this kind of task and very robust across contexts and has

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301 *See id.* at 8.

302 *See e.g.*, Tr. 642, 685 (Ducey); Tr. 734-35 (Waldfogel); McLaughlin WDT (SP Ex. 6) at 6-8.

303 Tr. 3074-75 (Calfee); Calfee WRT (CDN Ex. R-3) at 9.

304 *See* Tr. 3008 (Ford).

305 Tr. 1299 (Ringold).

been around for 55 years or more."[306] Given these qualities, Dr. Ringold (along with Dr. Gary Ford) decided to use the constant sum methodology to determine the relative market values of different programming on Canadian distant signals.

4. Results of 2004-05 Bortz Surveys

126. The following table shows the point estimates for the results of the Bortz constant sum surveys for 2004-05:[307]

Distant Signal Programming Valuation Studies, 2004-05

	2004	2005
Live professional and college team sports	33.5%	36.9%
Movies	17.8	19.2
Syndicated shows, series and specials	18.7	18.4
News and public affairs programs	18.4	14.8
Devotional and religious programming	7.8	6.6
PBS and all other programming on non-commercial signals	3.5	3.7
All programming on Canadian signals	0.2	0.3
Total*	100.0%	100.0%

*Columns may not add to total due to rounding.

306 Tr. 1300 (Ringold).

307 Bortz Report (SP Ex. 2) at 3 (Table I-1).

127. The absolute confidence intervals of the above estimates are reflected in the below table:[308]

Absolute Confidence Intervals		
Category	**2004**	**2005**
Live professional and college team sports	±2.3	±2.5
Movies	1.3	1.8
Syndicated shows, series and specials	2.2	2.1
News and public affairs	1.7	1.7
Devotional and religious	0.7	0.8
PBS and all other non-commercial	0.9	0.9
Canadian	0.2	0.2

128. The table below shows the results of the Bortz constant sum surveys for 2004-05, factoring in the confidence intervals associated with the estimate for each programming category in each year.[309]

Distant Signal Programming Valuation Studies, 2004-05*

	2004	2005
Live professional and college team sports	31.2% - 35.8%	34.4% - 39.4%
Movies	16.5 - 19.1	17.4 - 21.0
Syndicated shows, series and specials	16.5 - 20.9	16.3 - 20.5
News and public affairs programs	16.7 - 20.1	13.1 - 16.5
Devotional and religious programming	7.1 - 8.5	5.8 - 7.4
PBS and all other programming on non-commercial signals	2.6 - 4.4	2.8 - 4.6
All programming on Canadian signals	0.0 - 0.4	0.1 - 0.5

*Range reflects potential values for each year based on 95% confidence interval.

129. In each of the 2004 and 2005 studies, cable operators allocated the largest percentage of their distant signal non-network programming budget to live professional and

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308 Bortz Report (SP Ex. 2) at 52, 54 (2004 & 2005 Absolute Confidence Intervals).

309 Bortz Report (SP Ex. 2) at 24 (Table III-2). Confidence intervals reflect the uncertainty surrounding a point estimate of value obtained using a sample-based survey methodology. *See* Bortz Report (SP Ex. 2) at 6, n. 8.

college team sports.[310] That category was accorded 33.5 percent of the value in 2004 and 36.9 percent in 2005.[311] The two categories represented by Program Suppliers in this proceeding, movies and syndicated shows, series and specials, ranked between second and fourth in each of the two surveys.[312] The total allocation to these two categories was 36.5 percent in 2004 and 37.6 percent in 2005, or approximately the same as the sports allocation.[313]

130. Respondents to the Bortz surveys were asked to allocate value to programming on educational stations and Canadian stations only where their systems carried such stations as distant signals.[314] Respondents at systems that carried public television distant signals allocated an average value of 11.3% to public television programming in 2005 and 10.6% in 2005.[315] For systems that carried Canadian distant signals, the average value attributed to the programming on these signals was 3.0% in 2004 and 3.8% in 2005.[316]

5. Comparison of 2004-05 Bortz Results and Results of Prior Surveys

131. This section compares the results of the 2004 and 2005 cable operator surveys to the results of surveys conducted for prior years, focusing on the surveys addressing the years 1998 and 1999 that were submitted in the most recent CARP cable proceedings. The table below demonstrates that, notwithstanding a number of changes in methodologies over the years, many in response to issues raised by the CRT, CARP, or other parties, the results have been relatively

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310 *See* Bortz Report (SP Ex. 2) at 3 (Table I-1).

311 *Id.* at 13.

312 *Id.*

313 *Id.*

314 *See* Bortz Report (SP Ex. 2) at 15.

315 Bortz Report (SP Ex. 2) at 16 (Table II-2); Bortz Report (SP Ex. 2) at 16. In 2004, 59 of the 162 responding systems carried one or more public television distant signals and were therefore asked to assign a value to distant signal public television programming. *See* Bortz Report (SP Ex. 2) at 15. In 2005, 68 of the 171 responding systems carried one or more public television distant signals. *See id.*

316 Bortz Report (SP Ex. 2) at 16In 2004, 11 of the 162 responding systems carried one or more Canadian distant signals and were therefore asked to assign a value to distant signal Canadian programming. *Id.* In 2005, 13 of the 171 responding systems carried one or more Canadian distant signals. *See id.* It should be noted that the comparable numbers in 1998 and 1999 were 2 of 138 and 3 of 132, respectively. *Id.*

consistent.[317] For example, since 1983, JSC programming has consistently received the highest value by cable system operators in the constant sum surveys.[318]

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317 *See* Bortz Report (SP Ex. 2) at 21.

318 The early (1978-1980) cable operator surveys showed movies as the most highly valued programming. Bortz Report (SP Ex. 2) at 21. The 1978 survey placed a particularly high value on movies, but it was rightly criticized for not properly informing the respondents that they were valuing the programming shown on distant signals, as opposed to cable programming services including premium movies services such as HBO and Showtime. *See id.*

Table III-1.
Summary of Cable Operator Distant Signal Programming Value Allocations, 1978-2005

	Year	Live Professional & College Team Sports	Movies	Syndicated Shows, Series and Specials	News and Public Affairs	Devotional	PBS and All Other Non-Comm.	Canadian	Total*
	1978	$27	66	5	2	NA	NA	NA	$100
BBDO	1979 -- MSOs	$35.00	38.00	10.57	9.40	NA	7.03	NA	$100.00
	1979 -- Managers	$33.98	42.98	10.62	6.21	NA	6.21	NA	$100.00
	1980	$32.95	37.76	11.76	12.62	NA	4.91	NA	$100.00
ELRA	1983	$35.66	25.02	15.84	13.33	7.24	2.51	0.40	$100.00
BBC	1983	36.1%	30.2	18.6	12.1	NA	3.1	NA	100.0%
Bortz & Company	1986	38.5%	25.1	17.5	11.3	3.5	4.1	0.1	100.0%
	1989	34.2%	31.2	16.9	11.8	4.3	1.3	0.2	100.0%
Burke	1990	37.2%	30.1	14.5	11.9	3.6	2.7	--	100.0%
	1991	36.3%	25.7	15.6	14.8	4.3	2.9	0.5	100.0%
	1992	38.8%	25.6	16.0	12.4	3.9	3.0	0.3	100.0%
	1993	43.4%	23.4	14.4	12.6	4.0	2.0	0.2	100.0%
Bortz & Company	1994	39.7%	26.3	16.4	11.2	3.7	2.1	0.5	100.0%
	1995	41.4%	25.8	16.3	10.8	2.1	3.4	0.3	100.0%
	1996	36.9%	22.3	16.8	16.4	4.5	2.8	0.4	100.0%
	1997	42.5%	20.7	15.8	14.3	2.3	3.7	0.6	100.0%
	1998	37.0%	21.9	17.8	14.8	5.3	2.9	0.4	100.0%
	1999	38.8%	22.0	15.8	14.7	5.7	2.9	0.2	100.0%
	2000	35.4%	23.6	16.2	15.6	6.6	2.6	--	100.0%
	2001	35.4%	20.1	18.6	16.5	6.2	2.9	0.3	100.0%
Bortz Media &	2002	36.2%	20.6	16.8	16.3	6.4	3.9	--	100.0%
Sports Group	2003	37.8%	20.1	15.6	17.3	6.1	3.0	0.2	100.0%
	2004	33.5%	17.8	18.7	18.4	7.8	3.5	0.2	100.0%
	2005	36.9%	19.2	18.4	14.8	6.6	3.7	0.3	100.0%

*Rows may not add to total due to rounding.

NOTE: Prior to 1992, category definitions, the number of categories addressed and the research methodology of individual surveys summarized above varied, in some cases significantly.

132. Focusing on how the 2004-05 Bortz Survey results compare to those from 1998-99, the below table summarizes the value ranges by programming category in 1998-99 and 2004-05, factoring in the confidence intervals associated with the estimate for each programming category in each year.[319]

Comparison of Distant Signal Programming Valuation Studies, 1998-2005*

	1998	1999	2004	2005
Live professional and college team sports	34.3% - 39.7%	35.9% - 41.9%	31.2% - 35.8%	34.4% - 39.4%
Movies	20.3 - 23.5	20.1 - 24.1	16.5 - 19.1	17.4 - 21.0
Syndicated shows, series and specials	16.2 - 19.4	14.0 - 17.2	16.5 - 20.9	16.3 - 20.5
News and public affairs programs	13.0 - 16.6	12.4 - 16.8	16.7 - 20.1	13.1 - 16.5
Devotional and religious programming	4.5 - 6.1	4.7 - 6.9	7.1 - 8.5	5.8 - 7.4
PBS and all other programming on non-commercial signals	1.9 - 3.9	1.6 - 4.2	2.6 - 4.4	2.8 - 4.6
All programming on Canadian signals	0.0 - 0.9	0.0 - 0.4	0.0 - 0.4	0.1 - 0.5

*Range reflects potential values for each year based on 95% confidence interval.

133. Confidence intervals reflect the uncertainty surrounding a point estimate of value obtained using a sample-based survey methodology.[320] The range presented therefore illustrates the range of possible "true values" that would have been obtained (in this case, with 95% confidence) if all Form III systems that carried distant signals in 2004-05 had been surveyed.[321] Moreover, the Bortz Survey is not designed as a "tracking study."[322] Rather, a unique and different sample of potential respondents is selected from the Form 3 universe each year.[323] Consequently, some variability in results from year-to-year is to be expected, based in part on

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319 Bortz Report (SP Ex. 2) at 24 (Table III-2); *see also* Bortz Report (SP Ex. 2) at 50-53 (describing the mathematical and statistical basis for the valuation estimates obtained for the key constant sum question).

320 *See* Bortz Report (SP Ex. 2) at 24.

321 *See id.*

322 In a tracking study, the same group of respondents is asked the same questions over a period of time in order to monitor changes in attitudes or behavior during that time period. *See* Bortz Report (SP Ex. 2) at 21-22, n. 14.

323 *See* Bortz Report (SP Ex. 2) at 21-22.

differences in samples and also on the variability in results inherent in any individual survey.[324] However, as discussed, such variability is considered in the confidence intervals associated with the specific results or point estimates for each year.[325] Thus, while there are some differences in the value estimates for the various program categories over the four years shown above, the variations are generally minor.[326] Furthermore, most of the value estimates for 2004-2005 are within the confidence intervals surrounding the 1998 and the 1999 point estimates.[327]

B. Corroboration of Bortz Results

1. Waldfogel Regression Analysis

134. As part of the Settling Parties' case, Dr. Joel Waldfogel, an economist and professor at the University of Pennsylvania, testified on behalf of the Commercial Television Claimants.[328] Dr. Waldfogel's research and publications include topics relating to the economics of media markets, including television.[329] His research largely focuses on empirical analysis - the application and analysis of data to answer economic questions.[330]

135. Dr. Waldfogel explained his view that the Bortz survey provides "useful direct evidence" about the question at hand, which is to allocate the royalties under a relative marketplace value criterion.[331] He was asked to analyze economic data on royalty payments and distant signal programming to "shed light, using empirical analysis[,] on the same question."[332]

136. Using a widely accepted method for analyzing data empirically, a multiple regression analysis, Dr. Waldfogel determined relative values for the programming actually carried on distant signals in 2004-2005 (except for Music).[333]

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324 *See id.*

325 *See* Bortz Report (SP Ex. 2) at 6.

326 *See id.*

327 *See* Bortz Report (SP Ex. 2) at 24 (Table III-2).

328 Tr. 730 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 1.

329 Tr. 731 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 1.

330 Tr. 730-731 (Waldfogel).

331 Tr. 734-35 (Waldfogel).

332 Tr. 735 (Waldfogel).

333 Tr. 735, 762 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 9.

137. A regression analysis helps reveal the relationship between variables.[334] In a simple or linear regression, there are two variables: a dependent and independent variable.[335] Simple regressions determine the relationship between two variables, for example, crop growth and fertilizer use.[336] The regression analysis begins by plotting observations of fertilizer use (horizontal axis) and resulting crop growth (vertical axis) on a graph, which generates a cloud of data points.[337] A regression analysis provides the best fit line through the cloud of data points.[338] The line's slope, called the "coefficient" in the regression analysis, reveals the relationship between variables.[339] In this example, the slope/coefficient shows the units of additional crop output for each additional unit of fertilizer used.[340]

138. A multiple regression analysis includes more than one explanatory variable.[341] A person might want to understand how square footage, number of bedrooms, number of bathrooms, location, or other features individually factor into a home's sales price.[342] With data from numerous transactions, a regression analysis could show how a house's sales price varies with each variation in features.[343] For example, the calculated coefficient on the number of bedrooms shows the incremental contribution to sales price of an additional bedroom, holding all other features (like square footage and location) constant.[344]

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334 Tr. 759 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 7.

335 Waldfogel WDT (SP Ex. 18) at 7; Tr. 759 (Waldfogel).

336 Tr. 759 (Waldfogel).

337 Waldfogel WDT (SP Ex. 18) at 7; Tr. 759-60 (Waldfogel).

338 Waldfogel WDT (SP Ex. 18) at 7; Tr. 760 (Waldfogel).

339 Tr. 760 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 8.

340 Tr. 760 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 8.

341 Tr. 761 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 8.

342 Waldfogel WDT (SP Ex. 18) at 8.

343 Waldfogel WDT (SP Ex. 18) at 8.

344 Waldfogel WDT (SP Ex. 18) at 8.

a. Rationale for Regression Analysis

139. In the cable distant signal marketplace, there is little direct market information for determining the relative market value of different types of programming.[345] For example, there is no available data that provides the individual price paid for each of the retransmitted programs.[346]

140. Cable systems, however, do choose which and how many distant signals to carry in exchange for making the required royalty payments, and file Statements of Account with the Licensing Division of the Copyright Office.[347] These statements report the total royalty amount paid by the cable systems, the signals the cable systems chose to retransmit on a distant basis, and other data about the cable system.[348]

141. The information in a cable system's Statement of Account reflects marketplace decisions: what distant signals the cable system chose and how much it paid for that bundle of programming.[349] Although the statutory royalty formula applies to all Form 3 cable operators, the amount of royalties they actually pay differs across cable systems in light of their different marketplace circumstances.[350]

142. When considering whether to carry a distant signal, a cable operator seeks to maximize profits.[351] Cable systems do not earn advertising revenue from the distant signals.[352] Instead, cable systems generate revenue by attracting and retaining subscribers.[353] Distant signals increase a cable system's revenue to the extent their program helps attract or retain subscribers, who pay monthly subscriber fees to cable systems.[354] A cable operator will

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345 Waldfogel WDT (SP Ex. 18) at 5.

346 Tr. 754 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5-6.

347 Martin WDT (SP Ex. 7) at 2; Tr. 757, 831 (Waldfogel).

348 Tr. 754-55 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5, (Appendix 2) at 1.

349 Tr. 757 (Waldfogel).

350 Tr. 757 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 6.

351 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

352 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

353 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

354 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

retransmit a distant signal only if the value of the signal, in terms of profit maximization, outweighs its cost.[355]

143. Because cable systems make carriage decisions based on profit maximization, data that show what choices they made and how much they paid allows us to learn something about the value of the distant signals.[356]

144. This is true because cable operators have freedom to make different choices about distant signals, which correlate to the royalties they pay.[357] Dr. Waldfogel testified that cable operators make "a conscious choice about what bundle of signals to bring in."[358] The cable operator cannot choose exactly how many minutes of each programming type it wants but it can pick from among the existing distant signals and their different mixes of programs.[359] There are three potential sets of economic value circumstances under the "minimum fee" feature of the royalty structure for systems that choose to carry a distant signal.[360] First, systems that attach the lowest value to distant signals pay the minimum fee and carry distant signals totaling less than 1.0 DSE.[361] Second, systems that value distant signals more highly will pay the minimum fee and carry exactly one DSE.[362] Finally, systems attaching higher value still will carry more than one DSE and make a royalty payment that is above the minimum fee.[363]

145. Although the royalty payments do not directly reveal the relative value of individual stations or programs, a multiple regression analysis, using data about actual choices made in the marketplace, can provide information about the relative values of the programming on the distant signals.[364] Because the royalty payment for a bundle of distant signals is the

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355 Tr. 756-57 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3, and 6.

356 Waldfogel WDT (SP Ex. 18) at 6; Tr. 757, 765 (Waldfogel).

357 Waldfogel WDT (SP Ex. 18) at 6; Tr. 831 (Waldfogel).

358 Tr. 831 (Waldfogel); *see* Tr. 2885 (Salinger).

359 Tr. 842 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5-6; *see* Tr. 2885 (Salinger).

360 Waldfogel WDT (SP Ex. 18) at 6.

361 Waldfogel WDT (SP Ex. 18) at 6.

362 Waldfogel WDT (SP Ex. 18) at 6.

363 Waldfogel WDT (SP Ex. 18) at 6.

364 Waldfogel WDT (SP Ex. 18) at 8-9; Tr. 765-66 (Waldfogel).

product of a percentage rate (determined by the number of DSEs carried and other factors) and the system's gross receipts for service tiers that include broadcast stations, variation across cable systems' distant signal royalty payments are affected by the number and type of distant signals chosen and system gross receipts.[365]

146. Distant signals which provide different programming from that already available from local sources would be expected to be more beneficial to a cable system.[366] Cable carriage data for 2005-2, shown in the table below, confirms that hypothesis.[367] The chart makes clear the general trend that as the markets get smaller and the number of local signals decreases, the number of distant signals imported increases.[368]

Market	Average Number of Local Stations	Average Number of Distant Signals
Top 50	16.2	1.8
Second 50	9.6	2.6
Smaller Markets	8.8	3.3
Outside All TV Markets	8.3	3.0

147. One component of the value of a distant signal is not in providing more national programming options but in providing "nearly-local" program options, such as local news from an adjacent DMA that provides locally relevant information.[369]

b. Performance of the Regression Analysis

148. The basic regression analysis seeks to measure the relative value of each program type from the relationship between the payment for the bundle and the mix of programming in the bundle.[370] The amounts of programming purchased by cable operators in each of the

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365 Waldfogel WDT (SP Ex. 18) at 6; Tr. 757, 768 (Waldfogel).

366 Waldfogel WDT (SP Ex. 18) at 4-5; Tr. 865-66 (Waldfogel).

367 Waldfogel WDT (SP Ex. 18) at 5.

368 Waldfogel WDT (SP Ex. 18) at 5.

369 Waldfogel WDT (SP Ex. 18) at 4-5; Fritz WDT (SP Ex. 19) at 3-5.

370 Waldfogel WDT (SP Ex. 18) at 6, 8; Tr. 765 (Waldfogel).

program categories are the core independent variables, because the ultimate central question in this proceeding is the relative value of those distant signal program categories.[371]

149. Dr. Waldfogel used data for royalty payment, cable system characteristics, and minutes of programming for 4,954 cable system/accounting period observations in his regression analysis.[372]

150. Cable Data Corporation provided two types of reports for each of the four accounting periods at issue.[373] Those reports provided information about (1) the royalty paid by the cable system, (2) whether the system paid any royalties at the 3.75% royalty rate, (3) which distant signals each system carried and whether the signal was partially of fully distant, (4) the number of subscribers, (5) the number of local channels carried, (6) the total number of activated channels, and (7) which distant signals were carried by each system in each accounting period.[374]

151. Tribune Media Service's TVData Co. provided information about the programming for the 84 randomly selected days (21 days in each 6 month accounting period) that were studied.[375] The sample was a stratified random sample designed to provide equal representation of programming on different days of the week and in different months of the year, two features that affect television stations' program schedules.[376] TV Data's report included the program name, schedule, duration, and dozens of other fields of data. [377]

152. CTV expert witness Dr. Richard Ducey working with Cornerstone Research used the raw TVData information to calculate total minutes associated with each of the Phase I categories (except Music) represented in this proceeding.[378] Dr. Ducey and Cornerstone used the

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371 Tr. 734, 765-66 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 6.

372 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

373 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

374 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

375 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

376 Ducey WDT (SP Ex. 8) at 6; Tr. 551 (Ducey).

377 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

378 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

definitions of categories stipulated to[379] by the Phase I parties represented in this proceeding and employed a rules-based approach, followed by a manual check by Dr. Ducey to categorize the programming minutes.[380] Every station carried as a distant signal in each of the four accounting periods for 2004-2005 was analyzed – roughly 900 to over 1,000 stations in each accounting period for a total of 1.5 million hours of programming.[381]

153. Additionally, Dr. Ducey and Cornerstone analyzed the schedule on WGN to determine which programs were not eligible for receiving royalties through this proceeding.[382] Dr. Ducey identified these as "non-compensable" programs.[383]

154. Dr. Waldfogel approached the question of which variables to include in the regression based on his knowledge about the cable marketplace and as an economist from a common-sense perspective:

> The major way to select variables for an analysis is to. . . appeal to theory and/or common sense. What are the things that ought to be allowed to have a say empirically? What are the things that might affect it? So. . . one can restrict attention among the infinite possible things to the things that – that make sense to try to include. . . [384]

155. In addition, Dr. Waldfogel referred to the prior study presented by Dr. Rosston in the 1998-99 proceeding, consistent with the established social science approach of starting with a review of prior work on the same subject:

> I should also add that, you know, in many areas of social science, there's . . . a body of precedent in previous work and so one also tends to look at that as well. . .[385]

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379 Joint Motion of the Phase I Parties to Adopt Stipulation as to Claimant Group Categorization and Scope of Claims, filed October 2, 2009. *See also* SP Ex. 13.

380 Ducey WDT (SP Ex. 8) at 6.

381 Ducey WDT (SP Ex. 8) at 6.

382 Ducey WDT (SP Ex. 8) at 6; Waldfogel WDT (SP Ex. 18) at Appendix 2, 2-3.

383 Ducey WDT (SP Ex. 8) at 6; Waldfogel WDT (SP Ex. 18) at Appendix 2, 2-3.

384 Tr. 762 (Waldfogel).

385 Tr. 762 (Waldfogel).

156. Dr. Waldfogel's regression analysis contained the following variables, which are described in Appendix 2 of SP Exhibit 18[386]:

- Eight separate variables for Minutes of Programming for the following eight categories: Program Suppliers, Sports, Commercial TV, Public Television, Devotional, Canadian, Low Power, and Mexican
- Number of Subscribers (Previous Accounting Period)
- Indicator for Minimum Payment & DSE < 1
- Indicator for Minimum Payment & DSE <= 1
- Number of Activated Channels
- Average Household Income in Designated Marketing Area
- Count of Local Channels
- Indicator for Special 3.75% Royalty Rate
- Indicator for Carriage of Partially Distant Signal
- Total Royalty Fee Paid by Cable System in Accounting Period
- Number of Observations

157. The inclusion of total minutes of the eight programming categories is an essential variable to the regression, reflecting both what type and how much programming was purchased, and shows how an additional minute of programming in each of the categories is valued.[387]

158. Number of subscribers is an important variable that reflects the size of the system.[388] The size of the system is important because the dependent variable in the regression, royalty payment, is determined in part by the cable operator's revenue which in turn correlates to the number of subscribers in the cable system.[389]

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386 Waldfogel WDT (SP Ex. 18) at 9, Appendix 2.

387 Tr. 765 (Waldfogel).

388 Tr. 768 (Waldfogel).

389 Tr. 768 (Waldfogel).

159. Another variable, number of activated channels, represents the number of active channels provided by the cable system with programming available to watch.[390] As Dr. Waldfogel explained, including this variable allows for a further investigation of the relationship between what is available on the cable system and the appetite for distant signals.[391]

160. Dr. Waldfogel included Average Household Income in Designated Market Area as a variable to allow for the possibility that income would affect either the monthly subscription price or the number of subscribers.[392]

161. The next variable, Count of Local Channels, is the number of channels originating locally.[393] This variable's inclusion allows for the possibility that the number of locally available channels affects the appetite for distant signals.[394]

162. The remaining variables are Indicators or dummy variables which are switched on or off depending upon whether or not they apply to the data point.[395] For example, the indicator for 3.75% Fees would be turned on for systems that pay any 3.75% Fees.[396] Including this Indicator allows for a different relationship between the dependent variable and the independent variables in situations where the indicator is true.[397]

163. Dr. Waldfogel also included Carriage of Partially Distant Signal as an Indicator.[398] This allows for the possibility that systems that have partially distant signals may have a different royalty payment given all the other observable variables in the regression.[399]

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390 Tr. 768-69 (Waldfogel).

391 Tr. 768-69 (Waldfogel).

392 Tr. 769 (Waldfogel).

393 Tr. 770 (Waldfogel).

394 Tr. 770 (Waldfogel).

395 Tr. 770-71 (Waldfogel).

396 Tr. 770-71 (Waldfogel).

397 Tr. 771 (Waldfogel).

398 Tr. 772 (Waldfogel).

399 Tr. 772 (Waldfogel).

164. Two additional Indicators, Minimum Payment & DSE < 1 and Minimum Payment & DSE <= 1, allow for the possibility of a different relationship in the regression for systems that import one or fewer DSEs.[400]

165. In this case, the question of interest is how the value of the distant signal bundles varies with additional minutes of each type of programming, holding everything else constant.[401] To answer this question, Dr. Waldfogel regressed observed royalty payments for the programming bundle on the numbers of minutes in each programming category, along with determinants of system revenue (number of local subscribers, local median income, etc.) and other determinants of the value of distant signals (the number of local channels, etc.).[402]

166. Dr. Waldfogel considered criticisms made about the Commercial Television Claimants' previous regression analysis, performed in the 1998-99 proceeding by Dr. Rosston, and improved on the previous approach.[403]

167. Dr. Waldfogel addressed previous concerns about the robustness of regression analyses - whether the results change if you make small changes in the model - by conducting a common robustness test.[404] That test involved starting with the basic regression specification and then subtracting control variables one at a time to see how the royalty shares changed.[405] Dr. Waldfogel concluded that the results were robust to changes in the model.[406]

168. Dr. Waldfogel also addressed criticisms about the regression's stability across years and determined using statistical tests that the parameter estimates did not vary in a statistically significant way across years.[407] The outcome of the test was affected by the

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400 Tr. 772-73 (Waldfogel).

401 Waldfogel WDT (SP Ex. 18) at 9; Tr. 765 (Waldfogel).

402 Waldfogel WDT (SP Ex. 18) at 9.

403 Waldfogel WDT (SP Ex. 18) at 11 (footnote note 10), 13, and Appendix 3, p.1; Tr. 803-805, 807-808 (Waldfogel).

404 Tr. 782-83, 803-805 (Waldfogel); Waldfogel WDT (SP Ex. 18) at Appendix 3.

405 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.1; Tr. 783 (Waldfogel).

406 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.1; Tr. 783 (Waldfogel).

407 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.3.

relatively wide confidence intervals around the coefficients resulting from the regression analysis.[408]

169. He also considered and addressed the previous criticism that the royalty share for Public TV was too high because of the effect of systems that pay 3.75% royalties.[409] To control for this, Dr. Waldfogel included an indicator variable for cable systems with a 3.75% station in their bundle.[410] This allowed for the coefficients to be determined by variation within the "no 3.75% group" and the "3.75% inclusive" group.[411]

170. Additionally, Dr. Waldfogel included an indicator for minimum payment/DSEs instead of running two different regressions as had been done in Dr. Rosston's regression.[412] This change was made by Dr. Waldfogel because of the principle that it is preferable in a regression to use as much of the available data as possible while still accounting for different circumstances.[413]

c. Results of Regression

171. The coefficients that result from Dr. Waldfogel's regression, along with their corresponding standard errors, are[414]:

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408 *See* Waldfogel WDT (SP Ex. 18) at 11, Table 2.

409 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.3.

410 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.3; Tr. 771 (Waldfogel).

411 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.3.

412 Tr. 774 (Waldfogel); Waldfogel WDT (SP Ex. 8) at 11, footnote 10.

413 Tr. 774 (Waldfogel); Waldfogel WDT (SP Ex. 8) at 11, footnote 10.

414 Waldfogel WDT (SP Ex. 18), Table 3, at 13.

Baseline Regression Results
Form 3 Cable Systems with Positive DSE
2004 – 2005

Dependent Variable: Total Royalty Fee Paid by System

Explanatory Variables	Coefficient (Standard Error) [1]	
Minutes of Program Suppliers Programming	0.075	**
	(0.037)	
Minutes of Sports Programming	2.770	**
	(0.989)	
Minutes of Commercial TV Programming	0.256	*
	(0.141)	
Minutes of Public Broadcasting Programming	0.042	
	(0.043)	
Minutes of Devotional Programming	-0.067	
	(0.123)	
Minutes of Canadian Programming	0.282	**
	(0.124)	
Minutes of Low Power Programming	-0.115	
	(0.334)	
Minutes of Mexican Programming	0.886	**
	(0.413)	
Number of Subscribers	0.864	**
(Previous Accounting Period)	(0.029)	
Indicator for Minimum Payment & DSE < 1	3737	*
	(1941)	
Indicator for Minimum Payment & DSE ? 1	-14741	**
	(2068)	
Number of Activated Channels	2.97	
(Previous Accounting Period)	(5.95)	
Average Household Income in	-0.174	**
Designated Marketing Area	(0.071)	
Count of Local Channels	448	**
	(165)	
Indicator for Special 3.75%	21068	**
Royalty Rate	(2553)	
Indicator for Carriage of	-9269	**
Partially Distant Signal	(1874)	
Constant	7557	**
	(3046)	
Indicators for Accounting Periods	YES	
R-Squared	0.753	
Number of Observations	4954	

Note:
[1] Heteroscedasticity corrected standard errors are reported in parentheses.
* and ** indicate results are significant at the 90 and 95 percent confidence levels, respectively.

Source: TVData; Cable Data Corporation; The Lifestyle Market Analyst

172. The coefficients provided in this table show the effect on the royalty amount the cable operator pays resulting from an additional minute of programming of the particular type.[415]

173. Programming in different categories makes different contributions.[416] As the chart above shows, of the Phase I Claimants represented here, Sports, Commercial Television, and Canadians have the highest coefficients.[417]

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415 Tr. 765 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 9.

416 Tr. 775, 780-82 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 13, Table 3.

417 Waldfogel WDT (SP Ex. 18), Table 3, at 13.

174. For example, the Program Supplier and Sports coefficients of 0.075 and 2.77 mean that the cable operator's royalties tend to increase by $0.075 more for each additional minute of Program Supplier programming and $2.77 for each additional Sport minute.[418]

175. Using the coefficients and compensable minutes, Dr. Waldfogel calculated relative value shares for each category.[419] The coefficients are equivalent to the price per minute, and multiplying them by the numbers of minutes in each category and then converting to percentages provides an overall share for each category that reflects both the different relative values of each program category on a per-unit basis and the different amounts actually purchased.[420] The relative value shares and their calculation are shown in the table below:[421]

Royalty Share Allocation Using Compensable Minutes
Form 3 Cable Systems with Positive DSE
2004 – 2005

Claimant Group	Value of an Additional Minute (Coeff. From Table 2)	System-Weighted Compensable Minutes	Value of Minutes	Implied Share of Royalties	Implied Share of Royalties Excluding Mexican and Low Power
[A]	[B]	[C]	[D] = [B] * [C]	[E] = [D] / (45,845,188)	[F] = [D] / (45,820,423)
Program Suppliers	0.075 **	150,844,365	11,309,074	24.67%	24.68%
Sports	2.770 **	7,008,250	19,411,362	42.34%	42.36%
Commercial TV	0.256 *	40,878,351	10,473,058	22.84%	22.86%
Public Broadcasting	0.042	74,844,256	3,113,222	6.79%	6.79%
Devotional	-0.067	11,864,814	0	0.00%	0.00%
Canadian	0.282 **	5,373,581	1,513,708	3.30%	3.30%
Low Power	-0.115	790,231	0	0.00%	0.00%
Mexican	0.886 **	27,960	24,765	0.05%	0.00%
Total		291,631,808	45,845,188	100.00%	100.00%
Excluding Mexican & Low Power		290,813,617	45,820,423		

Note: * and ** indicate results are significant at the 90 and 95 percent confidence levels, respectively.
Source: TVData; Cable Data Corporation; The Lifestyle Market Analyst

176. The Devotional coefficient is negative but there is a 29% probability that it is positive and small.[422] Dr. Waldfogel also compared the implied royalty shares that resulted when all of the programming minutes on WGN were used in the share calculations rather than

418 Tr. 775 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 12.

419 Waldfogel WDT (SP Ex. 18) at 12-13; Tr. 776-78 (Waldfogel).

420 Tr. 780-81 (Waldfogel).

421 Waldfogel WDT (SP Ex. 18) at 12-13; Tr. 776-78 (Waldfogel).

422 Tr. 781 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 12.

just the compensable programs.[423] As the Table below demonstrates, the relative share for Program Suppliers that reflects only compensable program minutes is 23.2% less than the Program Suppliers relative value share that reflects all of the programs on WGN (i.e., (32.15%-24.68%)/32.15% = 0.232).

Table 5
Royalty Share Allocation
Form 3 Cable Systems with Positive DSE
2004 – 2005

	Implied Share of Royalties	
Claimant Group	**Using All WGNA Minutes**	**Using Compensable Minutes**
Program Suppliers	32.15%	24.68%
Sports	38.73%	42.36%
Commercial TV	20.20%	22.86%
Public Broadcasting	6.01%	6.79%
Devotional	0.00%	0.00%
Canadian	2.92%	3.30%
Total	100.00%	100.00%

Source: TVData; Cable Data Corporation; The Lifestyle Market Analyst

d. Comparison of Regression Results With Bortz Survey Results

177. Dr. Waldfogel then compared the results of the regression analysis to the Bortz cable operator survey results.[424]

178. Dr. Waldfogel could not, however, directly compare the results in Table 3 of his report to the Bortz cable operator survey results.[425] Dr. Waldfogel's royalty shares were the result of using only compensable minutes of programming in the equation, while the cable operators answering the Bortz survey were not instructed to limit their relative value only to compensable non-network programming.[426] In order to make his regression results an apples-to-

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423 Waldfogel WDT (SP Ex. 18) at 15; *See also* Ducey WDT (SP Ex. 8) at 6.

424 Waldfogel WDT (SP Ex. 18) at Appendix 3, p.4.

425 Waldfogel WDT (SP Ex. 18) at 13.

426 Waldfogel WDT (SP Ex. 18) at 13.

apples comparison to what was included within the Bortz survey results, he calculated relative regression shares using *total* minutes on WGN instead of only compensable minutes.[427] A second adjustment, relating to Public Television and Canadians, was also needed to make the regression shares comparable to what was included within the Bortz survey results.[428] This adjustment is needed because the cable operator survey omitted cable systems in the sample that carried only a Public Television and/or a Canadian signal, but the data Waldfogel used covered all Form 3 systems, including PTV-only and Canadian-only systems.[429] The augmentation of the Bortz survey results to incorporate value measures for the omitted systems was calculated by Public Television's economist witness, Ms. McLaughlin.[430]

179. The final result of this comparison is shown in the table below:[431]

Implied Royalty Shares Using All Minutes Compared to BORTZ Shares 2004 – 2005

Claimant Group	Estimated Royalty Shares from Regression [1]	Augmented Bortz Share [2] 2004	Augmented Bortz Share [2] 2005
Program Suppliers	32.15%	35.40%	36.20%
Sports	38.73%	32.40%	35.50%
Commercial TV	20.20%	17.90%	14.20%
Public Broadcasting	6.01%	6.20%	6.05%
Devotional	0.00%	7.60%	6.30%
Canadian	2.92%	0.50%	1.65%

Note:
[1] To be comparable to Bortz shares, royalty shares are calculated using all WGNA minutes but omitting Low Power and Mexican
[2] Bortz shares taken from the 2009 Testimony of Linda McLaughlin. Mid-points of ranges used for Canadian and PTV.
Source: TV Data; Cable Data Corporation; The Lifestyle Market Analyst

427 Waldfogel WDT (SP Ex. 18) at 13.

428 Waldfogel WDT (SP Ex. 18) at 13-14.

429 Waldfogel WDT (SP Ex. 18) at 13-14.

430 Waldfogel WDT (SP Ex. 18) at 13-14.

431 Waldfogel WDT (SP Ex. 18) at 14.

180. Later, in the rebuttal phase of the case, Dr. Gary Ford proposed an additional adjustment to Ms. McLaughlin's adjusted Bortz share for Canadians to account for an additional cable system that was omitted from the Bortz sample.[432] That adjustment resulted in a Canadian share of 1.9% for 2004.[433] Dr. Waldfogel did not consider the Ford adjustment because it was not presented until after Dr. Waldfogel's written and oral testimony, but if the Ford adjusted share for Canadians is substituted for the Augmented Bortz share that Dr. Waldfogel used in his comparison, it makes the two studies' shares even more similar.[434]

181. As Dr. Waldfogel testified, the Bortz and Waldfogel studies "are approaches that are entirely independent. . . And so coming from these very different perspectives at trying to answer this question, these are quite similar." [435] Statistical tests using the respective confidence intervals around each of the share estimates proves that the hypotheses that the regression estimated shares equal the cable operator shares.[436] The only exception is the Devotional category, for which the econometric approach of the regression analysis showed a relative value share that was significantly lower than that shown in the Bortz survey results.[437]

e. Attempts to Discredit Dr. Waldfogel's Regression Analysis Failed

182. The Devotional Claimants presented Dr. Michael Salinger, an Economics Professor at Boston University, as a rebuttal witness to address the regression study.[438] Dr. Salinger attacked the study, even though Dr. Waldfogel testified that it corroborated the Bortz survey results, which he supported,[439] because the results of the regression showed a negative or very low value for Devotional programming.[440] Dr. Salinger sought to infer from the results of

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432 Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

433 Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

434 *See* Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

435 Tr. 787 (Waldfogel).

436 Tr. 788 (Waldfogel).

437 Waldfogel WDT (SP Ex. 18) at 14; Tr. 788 (Waldfogel).

438 Salinger WRT (Devo Ex. 4), at 1.

439 Tr. 2905-06 (Salinger).

440 *See* Tr. 2822-23 (Salinger).

the regression study, including the low value of Devotional programming, that it was invalid.[441] He did not seek to present evidence of what a proper regression coefficient for Devotional programming might be, or evidence or explanation as to why a very small or even negative coefficient for Devotional programming was somehow impossible or inconceivable, but instead characterized Dr. Waldfogel's comment that a negative but statistically insignificant Devotional coefficient was "implausible but not inconceivable" as "Ivy League snobbery."[442]

183. Dr. Waldfogel's regression was specified consistent with the premise that cable operators seek to maximize profits, and when choosing which and how many distant signals to carry consider both whether the programs on those signals will help them attract and retain subscribers and how much the royalty cost will be to add the signal.[443] Dr. Salinger, by contrast, was not even aware that Form 3 cable operators' royalties change depending on how many and what kind of distant signals they carry.[444]

184. Dr. Waldfogel used all of the data about royalty costs and detailed data about all of the stations carried as distant signals in his regression.[445] The relative value of the various subcategories of distant signal programs is difficult to ascertain, given that the average cable system carries less than 1.5 distant signals and more than 180 other channels on various tiers as part of its bundled offering.[446] However, given the number of different signal bundles cable operators choose to carry and the differences in the amounts of royalties paid by different systems, there is substantial variation, which is what can permit a regression to work to find the quantitative relationships in the data.[447] It is not surprising that regression coefficients calculated for the distant signal program categories, representing such a small part of the overall cable

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441 Salinger WRT (Devo Ex. 4) at 6-32.

442 Tr. 2823 (Salinger).

443 Tr. 755-57 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 6; Tr. 2889-94 (Salinger).

444 Tr. 2887 (Salinger).

445 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1; Tr. 2894-95 (Salinger).

446 Waldfogel WDT (SP Ex. 18) at 2-3, 10 Table 1; Tr. 2874-75 (Salinger).

447 Tr. 739-40, 752 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 7-8; Tr. 2893 (Salinger).

marketplace, would be relatively imprecise and volatile, and Dr. Waldfogel straightforwardly reported the rather wide standard errors around his estimates in his original testimony.[448]

185. Dr. Salinger criticizes the imprecision of Dr. Waldfogel's regression results by running the analysis separately on subsets of Dr. Waldfogel's data, which unsurprisingly produces even larger standard errors.[449] As Dr. Salinger acknowledges, splitting a sample rather than pooling all available data for a regression will ordinarily increase the imprecision of the estimates.[450] Dr. Salinger next compares a regression in which he simply specifies as independent variables the components of the statutory royalty calculation formula, from which he derives unsurprisingly precise and significant coefficients.[451] And finally he complains that Dr. Waldfogel's regression may have omitted important variables.[452]

186. As Dr. Salinger conceded, an omitted variable criticism may always be raised, since there are an infinite number of potential variables that may be included, no matter how nonsensical.[453] Dr. Waldfogel included a host of independent variables in addition to the program categories, each of which he explained from the perspective of the effect it might be expected to have on the dependent variable, including variables that represented the number of other program offerings the cable operator provided.[454] By contrast, Dr. Salinger had not thought about which other variables might be important and had not tested any other variables.[455] He suggested that the regression should have considered whether a cable operator carried ESPN, which he said might affect the operator's valuation of distant signal sports programs, but it could have either a negative or a positive effect on that valuation, and he could not interpret its practical relevance in the context of a particular example.[456] As he continued to develop his idea,

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448 Waldfogel WDT (SP Ex. 18) at 11 Table 2; *see* Tr. 912-917 (Waldfogel).

449 Salinger WRT (Devo Ex. 4) at 10.

450 Salinger WRT (Devo Ex. 4) at 13 n.10; *see* Tr. 739-40, 752 (Waldfogel).

451 Salinger WRT (Devo Ex. 4) at 21 Table 3.

452 Salinger WRT (Devo Ex. 4) at 32-35.

453 Tr. 2873 (Salinger).

454 Tr. 768-69, 917-18 (Waldfogel).

455 Tr. 2876, 2883-84 (Salinger).

456 Tr. 2876-79 (Salinger).

he suggested that one might add independent variables just about the "more significant" cable networks, but those are the most widely carried networks, and would not provide the additional variability across systems that would improve the regression results, and selecting them could also introduce new bias.[457]

187. Dr. Salinger believes that the Bortz survey is the best economic measure of relative value of distant signal programs, but does not acknowledge the fact that the Waldfogel regression analysis, when adjusted for an apples-to-apples comparison, directly and strikingly corroborates all of the Bortz relative value shares except for the Devotionals' share.[458]

188. Program Suppliers rebuttal witness Dr. Ford made similar criticisms based on the variability and imprecision of the data when it was analyzed in even smaller subgroups than Dr. Salinger used.[459] He further argues that in order to determine whether the regression results corroborate the Bortz survey results, it was improper to make the adjustments Dr. Waldfogel made to enable an "apples to apples" comparison.[460] Consistent with his approach in the direct phase of the proceeding, in which he uses data from one market without making any adjustments to reflect differences between it and his target market,[461] Dr.Ford argues here that Dr. Waldfogel was required to compare non-comparable versions of the regression analysis and the Bortz survey in order to determine whether the two studies corroborate each other.[462] In fact, the significantly lower Program Suppliers share in the regression study that Dr. Ford identifies is a reflection of the extent of non-compensable Program Suppliers programming included in the Bortz share, and justifies a further reduction in the Program Suppliers award.[463]

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457 Tr. 2900-05 (Salinger); Tr. 910 (Waldfogel)(additional channel variable could only provide useful additional information to the extent carriage differed across systems).

458 Waldfogel WDT (SP Ex. 18) at 15 Table 5; Tr. 2895-96 (Salinger).

459 Ford WRT (PS Ex. 16) at 18.

460 Ford WRT (PS Ex. 16) at 26.

461 Tr. 2186-88 (Ford).

462 Ford WRT (PS Ex. 16) at 26.

463 *See* Waldfogel WDT (SP Ex. 18) at 13

2. Analysis of Cable Network Marketplace

189. Program Suppliers' witness Howard Homonoff, a Director in the Entertainment, Media and Communications Practice of PricewaterhouseCoopers LLP, noted that the 1998-99 CARP envisioned the hypothetical marketplace for distant signal programming as operating "'in the same manner as cable networks currently offering programming packages . . . .'"[464] According to Mr. Homonoff,

> While the Panel did not go so far as to say that the "hypothetical free market" for distant signals would be identical to the cable network marketplace, the Panel's broader point as to the utility of looking to the cable network marketplace for guidance on a hypothetical distant signal marketplace is consistent with my experience. A hypothetical marketplace for the acquisition of programming on distant signals is closely analogous to the market for whole cable networks, which represent a large majority of the programming MSOs provide to their subscribers. Following that lead, I examine that same cable network marketplace as a guide in analyzing the distant signal programming marketplace.[465]

190. Mr. Homonoff provided an analysis of the amount of time (or "tonnage") various program categories occupied on the telecast schedules of certain cable networks. Mr. Homonoff acknowledged that his study was not intended to represent the relative shares of Section 111 royalties that Program Suppliers or any other claimant should receive.[466] Nor did he suggest that his analysis either corroborated or called into question the results of any studies offered in this proceeding. He made only the unsupported claim that because there is such a large amount of Program Supplier programming available to cable operators and subscribers in the cable network marketplace, the same programming on distant signals must be quite valuable.[467] The 1998-99 CARP, however, drew an opposite inference from similar evidence of the growth of cable network programming that it believed was comparable to a particular category of distant signal programming.[468]

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464 Homonoff WDT (PS Ex. 7) at 11 (*quoting* 1998-99 CARP Report).

465 Homonoff WDT (PS Ex. 7) at 5-6.

466 Tr. 1760-61 (Homonoff).

467 Homonoff WDT (PS Ex. 7) at 8.

468 1998-99 CARP Report at 94.

191. JSC witness James Trautman of Bortz Media, who has substantial experience valuing television programming and was qualified as an expert in that area, also examined the cable network marketplace that Mr. Homonoff considered analogous to the distant signal marketplace. In particular, Mr. Trautman compared the license fees that various cable networks actually paid in 2004-05 for JSC and Program Supplier programming with the amount of time occupied, and viewing generated, by that programming.

192. Mr. Trautman's analysis helps corroborate several key findings of the Bortz surveys: (1) JSC's share of distant signal market value is significantly greater than its share of time or viewing; (2) Program Suppliers' share of distant signal market value is significantly less than its share of time or viewing; and (3) JSC and Program Suppliers' shares of distant signal market value are approximately the same.[469]

193. For example, following its conversion from the most widely-carried distant signal to a cable network, TBS entered into marketplace negotiations with Major League Baseball for the right to televise the games of the Atlanta Braves outside their home territory.[470] The prices that TBS paid for programming following its conversion provide perhaps the best example of the relative market value of at least the JSC and Program Suppliers programming on superstations with nationwide cable carriage (such as WGN).[471]

194. TBS paid $175 million (or over *24%* of TBS' 2004-05 programming budget) for the rights to televise the Braves in 2004-05; the remainder of that programming budget went for the production of those Braves' telecasts, the rights to televise some other JSC (NCAA) events, and Program Suppliers' programming.[472] TBS allocated more than 24% of its programming budget to the Braves telecasts, notwithstanding that those telecasts accounted for only about *2.5%* of TBS's total broadcast hours and about *2.5%* of the viewing minutes generated by all TBS programming.[473] That allocation is fully consistent with the results of the Bortz surveys.

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469 *See infra, ¶¶* 99-130.

470 Trautman WRT (SP Ex. 57) at 3.

471 Trautman WRT (SP Ex. 57) at 3.

472 As a result, the total listed by Mr. Trautman represents the floor for JSC programming expenditures on TBS. Trautman WRT (SP Ex. 57) at 20.

473 Trautman WRT (SP Ex. 57) at 4-5.

And, of course, it is squarely inconsistent with the results of the Dr. George Ford study sponsored by Program Suppliers (*see infra* ¶¶ 286-96). As Mr. Trautman explained, the Ford formula would have resulted in MLB receiving only 4.25% in 2004 and 3.51% in 2005 (see table below).[474]

NBA on TNT Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (NBA)*	2.74%	5.37%	8.60%	46.15%
Program Suppliers/Other	97.26%	94.63%	91.40%	53.85%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (NBA)*	2.80%	4.86%	6.96%	45.06%
Program Suppliers	97.20%	95.14%	93.04%	54.94%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

195. Mr. Trautman conducted a similar analysis of TNT. In 2004-05, TNT paid the NBA approximately $600 million for the right to broadcast NBA basketball games.[475] TNT allocated approximately 45-56% of its programming budget for NBA telecasts even though those telecasts represented approximately 2.7-2.8% of TNT's total broadcast hours and about 4.86% of the viewing minutes generated by all TNT programming.[476] As with TBS, that allocation is entirely consistent with the results of the Bortz surveys and inconsistent with the results of Dr. Ford's study (cf. PFOF 416-437). The results of Mr. Trautman's analysis, provided in the table

474 Trautman WRT (SP Ex. 57) at 4-5.

475 Trautman WRT (SP Ex. 57) at 22.

476 Trautman WRT (SP Ex. 57) at 6-7.

below, show that the Ford formula would have resulted in the NBA receiving only 8.60% in 2004 and 6.96% in 2005.[477]

MLB on TBS Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (Braves)*	2.67%	2.60%	4.25%	24.08%
Program Suppliers/Other	97.33%	97.40%	95.75%	75.92%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (Braves)*	2.47%	2.42%	3.51%	24.65%
Program Suppliers/Other	97.53%	97.58%	96.49%	75.35%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

Sources: Testimony of George S. Ford; Testimony of Howard Homonoff; SNL Kagan, *Cable Program Investor*, April 17, 2007; SNL Kagan, *Media Sports Business*, various issues; and Major League Baseball.

196. Likewise, JSC telecasts amounted to only about 0.5% - 0.7% of the 2004-05 telecast hours on the top 25 cable networks examined by Mr. Homonoff, and they generated only about *1.4%-1.7%* of the 2004-05 time that households spent viewing those networks.[478] Yet, the cable networks paid, in marketplace transactions, between *17%* and *20%* of their programming budgets to telecast that JSC programming -- more than ten times the JSC viewing share and more than twenty-five times the JSC tonnage share.[479] Again, that result is fully consistent with the results of the Bortz surveys (and wholly inconsistent with the results of the Ford study which would have predicted a JSC share of only 2.8% in 2004 and 2.05% in 2005 (see table below).[480]

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477 Trautman WRT (SP Ex. 57) at 6-7.

478 Trautman WRT (SP Ex. 57) at 8-9.

479 Trautman WRT (SP Ex. 57) at 8-9.

480 Trautman WRT (SP Ex. 57) at 8-9.

JSC on Top 25 Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (MLB, NBA, NFL, NHL)*	0.72%	1.71%	2.80%	20.12%
Program Suppliers/Other	99.28%	98.29%	97.20%	79.88%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (MLB, NBA, NFL, NHL)*	0.55%	1.41%	2.05%	17.35%
Program Suppliers/Other	99.45%	98.59%	97.95%	82.65%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs.

197. Mr. Trautman next looked to see whether any of the data from cable marketplace, if applied to the distant signal marketplace, could provide insight about the relative value of the programming in the distant signal universe.[481] In so doing, he noted his agreement with the statement by Mr. Homonoff that "the relative program value seen in the cable network marketplace is a very helpful guidepost for a hypothetical relative program value in the broadcast distant signal marketplace."[482] Mr. Trautman then conducted both a time-based and viewing-based analysis of the distant signal marketplace using the relative program values deduced from cable marketplace transactions.[483]

198. Mr. Trautman first computed the relative value of JSC and Program Supplier programming on Top 25 cable networks by looking at the program expenditures for each hour of

481 Trautman WRT (SP Ex.57) at 10.

482 Trautman WRT (SP Ex. 57) at 10 (quoting Homonoff WDT (PS Ex. 7) at 14.

483 Trautman WRT (SP Ex. 57) at 10-13.

programming for those categories.[484] According to the pricing data he relied on, those Top 25 networks spent approximately $400,000 per hour for JSC programming and about $32,000 per hour for Program Supplier programming.[485] JSC programming thus cost approximately twelve times more than each hour of Program Supplier programming.[486] Mr. Trautman then applied this per hour pricing data for the two program types to the distant signal marketplace. When the per-hour rights fees of these cable networks are applied to the distant signal universe, JSC and Program Suppliers receive essentially equivalent relative value shares, just as they do in the 2004-05 Bortz results (see table below).[487]

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Programming Hour Method)

	2004-05	
	JSC	PS
1. Percent of Distant Signal Programming Hours	4.6%	50.1%
2. Cable Network Expenditures Per Programming Hour	$396,703	$32,153
3. Time-Adjusted Expenditures (1*2)	$18,248	$16,109
4. Share of Relative Value	53.1%	46.9%

199. Mr. Trautman then computed the relative value of JSC and Program Supplier programming on Top 25 cable networks by looking at the program expenditures for each share of viewing minutes for those two categories.[488] Relying again on the program expenditures for each network and information about the viewing on those networks, Mr. Trautman concluded that the Top 25 networks spent approximately $.77 per hour (or $.013 per minute) that

484 Trautman WRT (SP Ex. 57) at 11.

485 Trautman WRT (SP Ex. 57) at 11.

486 Trautman WRT (SP Ex. 57) at 11.

487 Trautman WRT (SP Ex. 57) at 11.

488 Trautman WRT (SP Ex. 57) at 12.

households spent viewing JSC programming.[489] In contrast, the Top 25 cable networks spent approximately $.056 for each hour (or $.001 per each minute) that households spent viewing Program Suppliers programming on those networks.[490] According to Mr. Trautman, each viewing minute of JSC programming on the Mr. Homonoff's Top 25 cable networks cost on average 13 times more than each viewing minute of Program Suppliers' programming.[491]

200. Mr. Trautman then applied the price per-viewing minute in the cable marketplace to the viewing minutes attributed to JSC and Program Suppliers' programming on distant signals in 2004-05. The result was that JSC programming on distant signals had approximately the same value as Program Suppliers' programming even though cable subscribers spent substantially more time viewing Program Suppliers' programming than JSC programming on distant signals (see table below).[492]

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Viewing Minute Method)

	2004-05	
	JSC	PS
1. Number of Distant Signal Viewing Minutes	838,907	8,633,838
2. Cable Network Expenditures Per Viewing Minute	$0.013	$0.001
3. Projected Distant Signal Market Value (1*2)	$10,906	$8,634
4. Share of Relative Value	55.8%	44.2%

489 Trautman WRT (SP Ex. 57) at 12.

490 Trautman WRT (SP Ex. 57) at 12.

491 Trautman WRT (SP Ex. 57) at 12-13.

492 Trautman WRT (SP Ex. 57) at 13-14.

3. Changed Circumstances

a. Cable Market Analyses

(i) Changes in the cable industry and the distant signal market.

201. Ms. Meyka notes that elements of the cable industry changed including increased consolidation and the advancement of new distribution technologies.[493] However, Ms. Meyka further explains that "[t]hese innovations were of great importance to the overall growth of the cable industry, but they did not, in my opinion, significantly affect the *relative* values that the industry as a whole ascribed to the different categories of non-network programming on distant signals."[494] Furthermore, after comparing the results of the Bortz survey between 1998-99 and 2004-05, Ms. Meyka stated the following:

> [T]he general consistency between the 1998-1999 and 2004-2005 survey results accurately reflects the fact that there were no changes in the marketplace during this period that would have significantly affected the relative values of the different categories of programming on distant signals.[495]

202. The Settling Parties presented the testimony of Richard V. Ducey, an expert in research and analysis of the cable and broadcast television industries, to analyze certain trends in the cable industry and in distant signal programming between 1992 and 2005.[496] Dr. Ducey is currently the Chief Strategy Officer for BIA Advisory Services ("BAS"), which advises media and technology companies with their business planning, technology strategies, sales strategies, market research, and assessment and financial valuation.[497] Dr. Ducey has taught media research and spent seven years at the National Association of Broadcasters, where he was responsible for industry and policy research.[498]

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493 *Id.* at 6-7.

494 *Id.* at 7 (emphasis in original).

495 Meyka WDT (SP Ex. 4) at 6.

496 Ducey WDT (SP Ex. 8); Tr. 530-537 (Ducey).

497 Ducey WDT (SP Ex. 8) at 1; Tr. 530-531 (Ducey).

498 Ducey WDT (SP Ex. 8) at 1 and App. 1; Tr. 531-533 (Ducey).

203. Dr. Ducey performed a comparison of the cable industry between 1999 and 2005 which demonstrated that despite significant changes in the industry, the overall distant signal market did not change significantly.[499] Dr. Ducey's analysis showed that these changes appear to have had very little, if any, effect on the cable operators' offerings of television station distant signals to their subscribers.[500] The lack of significant change in the marketplace between 1999 and 2005 is in contrast to the substantial changes in the cable distant signal marketplace that occurred between the 1990-92 and 1998-99 proceedings.

204. The distant signal marketplace remained relatively constant notwithstanding the significant developments that were occurring in the multichannel video market during the 1999-2005 period.[501] For example, satellite and telephone companies grew their video subscriber levels at the expense of cable, and streaming video via the Internet grew and began to challenge cable's core video programming service business model.[502] In response, cable systems increased their channel capacity, and expanded their offerings of digital cable and video on demand.[503] Digital video recorder penetration also grew.[504]

205. The number of cable network services also increased from 1999-2005, accommodated both by the cable systems' increased capacity and their roll-out of digital infrastructure.[505] During 1999-2005, the cable industry underwent a major infrastructure upgrade, spending a total of $92.7 billion in capital projects (rising from $5.6 billion in 1998 to $10.6 billion in 2005), principally related to expanding bandwidth capacity.[506] Existing cable networks began offering not only their analog services but also digital high definition versions of the same content.[507] As an example, ESPN launched its ESPN HD service in 2003.[508]

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499 Ducey WDT (SP Ex. 8); Tr. 530-581 (Ducey).

500 Ducey WDT (SP Ex. 8) at 2; SP Ex. 9-12; Tr. 539-546 (Ducey).

501 Ducey WDT (SP Ex. 8) at 2, 3.

502 Ducey WDT (SP Ex. 8) at 2, 3.

503 Ducey WDT (SP Ex. 8) at 2, 3.

504 Ducey WDT (SP Ex. 8) at 2, 3.

505 Ducey WDT (SP Ex. 8) at 3.

506 Ducey WDT (SP Ex. 8) at 3.

507 Ducey WDT (SP Ex. 8) at 3.

206. Consolidation of cable systems also increased from 1999-2005, with the total number of cable systems steadily declining from 10,400 in 1999 to 7,900 by 2005.[509] In 2001, for example, Comcast took over AT&T's cable systems, making it the largest MSO, with over 22 million subscribers.[510] These acquisitions were often made for the purpose of increasing efficiencies by consolidating previously separately owned systems serving contiguous communities.[511]

207. Notwithstanding the changes and competitive challenges confronting the cable industry between 1999 and 2005, the data regarding distant signal royalties and average numbers of distant signals show only incremental changes in the marketplace and in cable operator behaviors during that period.[512] The graphs entered into evidence as SP Exhibits 9-12 depict cable royalty and distant signal carriage data to illustrate the relative magnitude of changes occurring in the distant signal marketplace between 1990 and 2005.[513]

(a) Revenues Increased

208. Cable industry revenues from the sale of residential video services to subscribers rose 57 percent, from $27.6 billion in 1998 to $43.8 billion in 2005, while total revenue from all sources grew from $33.8 billion in 1998 to $65.7 billion in 2005.[514]

209. The increase in cable's revenue from 1999-2005 occurred in spite of the fact that basic subscriber numbers, after growing continuously for decades, took a slight downturn, ending up at 65.4 million in 2005 compared with 65.9 million in 1999.[515] However, the

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Footnote continued from previous page

508 Ducey WDT (SP Ex. 8) at 2-3.

509 Ducey WDT (SP Ex. 8) at 3.

510 Ducey WDT (SP Ex. 8) at 3.

511 Ducey WDT (SP Ex. 8) at 3.

512 Ducey WDT (SP Ex. 8) at 4-5.

513 Ducey WDT (SP Ex. 8) at 3; SP Ex. 9-12; Tr. 539-546 (Ducey).

514 Ducey WDT (SP Ex. 8) at 3.

515 Ducey WDT (SP Ex. 8) at 3.

changing mix of cable services from 1999-2005 drove the contribution of basic tier video service revenues down from 65% of overall revenues in 1998 to about 50% by 2005.[516]

210. In addition to cable system consolidation, resulting in a substantial reduction in the number of separate systems,[517] rate adjustments that became effective in 2000-2 and 2005-2 raised the gross receipts threshold for being required to file the Form 3 Statement of Account, allowing systems that had previously reported on Form 3 instead to report using the Form 2 Statement of Account and decrease their royalty payments.[518]

(b) Average Distant Signal Carriage Increased

211. The average number of distant signal incidents carried by Form 3 systems declined drastically between 1992 and 1998, but no similar decline was observed between 1999 and 2005.[519] Instead, the distant signal carriage patterns remained essentially stable, growing incrementally across the period.[520]

212. More specifically, the total number of Form 3 systems declined from 2,296 in 1999-2 to 1,265 in 2005-2.[521] The total number of distant signal incidents declined correspondingly, from 4288 to 3141, but a comparison of the average number of distant signals per Form 3 system shows that distant signal carriage actually increased incrementally over that period, from about 1.9 distant signals per Form 3 system in 1999-2 to 2.5 in 2005-2.[522]

(c) Clustering Increased

213. A distance analysis of the mileage distances between the city of license of each distant signal reported by a cable system in its statement of account and the "prime city" of the cable system provides information about the "clustering" of distant signal carriage – that is, the

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516 Ducey WDT (SP Ex. 8) at 3.

517 One effect of the cable system consolidation was to contribute to a reduction in the number of systems filing separate Statements of Account with the Copyright Office. Ducey WDT (SP Ex. 8) at 3.

518 Ducey WDT (SP Ex. 8) at 4.

519 Ducey WDT (SP Ex. 8) at 4; SP Ex. 10; Tr. 541-542 (Ducey).

520 Ducey WDT (SP Ex. 8) at 4; SP Ex. 10; Tr. 540-542 (Ducey).

521 Ducey WDT (SP Ex. 8) at 4.

522 Ducey WDT (SP Ex. 8) at 4.

percentage of distant signal incidents falling within certain distance ranges from the cable systems that carried them.[523]

214. In an extension of the distant analysis studies presented by Mr. Laurence DeFranco in the 1989, 1990-1992, and 1998-1999 proceedings, Dr. Ducey presented an analysis of the distances over which non-superstation distant signals were carried in 2004 and 2005. Dr. Ducey analyzed data from Cable Data Corporation that reported the mileage distance between each station carried as a distant signal by a Form 3 cable system and the city or other area identified by the cable system as its community.[524] To make the analysis comparable to prior years' analyses, Dr. Ducey omitted five superstations (WTBS, WGN, WWOR, WPIX, and WSBK).[525]

215. The results of Dr. Ducey's distance analysis showed a continuing increase in the "clustering" effect.[526] The percentage of distant signal incidents on Form 3 systems located within 150 miles of the station being carried was 93.3% in 2004-2 and 93.7% in 2005-2.[527] The comparable percentages for the prior proceeding's studies were 86.5% in 1989, 87.6% in 1992, and 89.2% in 1999

216. This increase in the degree of "clustering" of distant signal carriage is relevant to the value of CTV programming in the distant signal marketplace in particular because it highlights that the kinds of programming produced by commercial television stations have greater potential appeal to cable operators and subscribers within the relatively nearby region in which they are actually carried as distant signals.[528] The actual patterns of distant carriage by cable operators, as demonstrated by the distance analyses, help provide real-world context corroborating the results of the Bortz studies showing significant marketplace value shares for CTV programming.[529]

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523 Ducey WDT (SP Ex. 8) at 7-8; SP Ex. 17; Tr. 580-581.

524 Ducey WDT (SP Ex. 8) at 7-8.

525 Ducey WDT (SP Ex. 8) at 7.

526 Ducey WDT (SP Ex. 8) at 8; Frequency Distribution Chart (SP Ex. 17).

527 Ducey WDT (SP Ex. 8) at 8; Frequency Distribution Chart (SP Ex. 17).

528 Ducey WDT (SP Ex. 8) at 8; Fritz WDT (SP Ex. 19) at 3-6.

529 Ducey WDT (SP Ex. 8) at 8.

(d) Changed Circumstances Affecting PTV

217. With regard to PTV, Ms. McLaughlin concluded that there was no decrease in demand for imported PTV programming between 1998-99 and 2004-05, and that, if anything, there was a slight increase in such demand.[530] PTV's percentage of distant subscriber instances of carriage increased from 10.2 percent in 1998-99 to 12.1 percent in 2004-05, and its raw unadjusted Bortz share increased from 2.9 percent to 3.6 percent during that same time period.[531]

218. As shown in the table below, the percentage increase in PTV's distant subscriber instances between 1998-99 and 2004-05 (24% on average) was greater than the percentage increase in the Canadian's distant subscriber instances between 1998-99 and 2000-03 (17% on average)[532] -- an increase that the Judges found was "significant" and relevant to their holding that the Canadian Claimants had "sustain[ed] their burden of demonstrating changed circumstances" in the 2000-03 proceeding.[533]

Change in Subscriber Instances

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	PTV Signals	Canadian Signals	PTV Signals
1998-1999 Annual Average	*4,865,128*	*13,769,962*		
2000	5,254,398	--	8%	--
2001	5,566,783	--	14%	--
2002	5,743,710	--	18%	--
2003	6,184,495	--	27%	--
2004	--	17,172,483	--	25%
2005	--	17,023,244	--	24%

530 McLaughlin WDT (SP Ex. 6) at 2–7; Tr. 409 (McLaughlin).

531 McLaughlin WDT (SP Ex. 6) at 2–7; Tr. 412–13 (McLaughlin).

532 de Freitas WDT (CDN Ex. 1) at CDN-1-R, p. 2.

533 2000-2003 Distribution Order at 34.

219. Dr. Richard Ducey provided evidence demonstrating that from 1998-99 to 2004-05, PTV signals increased from approximately .25 to .4 average incidents of carriage on Form 3 cable systems.[534]

220. Dr. Ducey's evidence also showed that PTV signals accounted for 14.9 percent of the distant signal program time in 1998-99 and 22.3 percent in 2004-05, representing a 7.4 percent increase.[535] PTV's share of subscriber-weighted compensable minutes was 22.26 percent for 2004-2005.[536]

(e) Basis for Adjustment to Bortz Survey Shares to Reflect Non-Compensable Programming on WGN

221. The trends identified in the general analyses of the distant signal marketplace confirm the results of the Bortz study, which also showed no significant change in relative value of the program categories represented by the claimant groups.[537] Consistent with increases in regional "clustering" and in the overall subscriber incidents for PTV stations, the point estimates in the Bortz survey results for the CTV and PTV categories showed small increases between 1998-99 and 2004-05.[538]

222. In contrast to the substantial changes between 1992 and 1998, overall distant signal carriage was essentially stable between 1998 and 1999, growing only incrementally.[539] While the number of Form 3 systems declined from 2,296 in 1999-2 to 1,265 in 2005-2, WGN, the only superstation throughout the period, was carried by 61.7% of those systems in 2005-2 compared with 59.0% of the Form 3 systems in 1999-2.[540]

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534 Form 3 Distant Signal Incidents By Station Type, 1990-2005 (SP Ex. 10); *see* Martin WDT (SP Ex. 7) at 2-4.

535 Distant Signal Program Time Comparison, 1992, 1998-1999, 2004-2005 (SP Ex. 16).

536 Subscriber Weighted Claimant Shares, 2004-2005 (SP Ex. 15).

537 Bortz Report (SP Ex. 2) at 24 (Table III-2).

538 Bortz Report (SP Ex. 2) at 21 (Table III-1).

539 Ducey WDT (SP Ex. 8) at 4; SP Ex. 10; Tr. 542 (Ducey).

540 Ducey WDT (SP Ex. 8) at 4; SP Ex. 11, 12; Tr. 543-546 (Ducey).

223. Certain programming that is retransmitted by cable systems carrying WGN as a distant signal has been substituted for the programming that originally aired on WGN in Chicago.[541] This results from an effort to make the signal "syndex-proof" by providing only programming that cable operators would not have to black out pursuant to the FCC's syndicated exclusivity rules.[542] But since the carriage of the substitute programs is not subject to the cable statutory license, they are non-compensable in this proceeding.[543]

224. While evidence in the 1998-1999 proceeding showed that about half of the WGN distant signal program time was non-compensable, Dr. Ducey's analysis shows that about 70 percent of the programming was non-compensable in 2004-2005, with the greatest differences in the Program Suppliers (over 78 percent non-compensable[544]) and Devotionals (90 percent non-compensable) programming on the distant signal.[545] For instance, there were approximately 556 movies telecast full signal on WGN in 1998-99. The comparable number in 2004-05 was 252.[546]

(f) Decline in Relative Amount of Program Suppliers Programming Purchased In Distant Signal Marketplace

225. The amounts of programming in each of the claimant categories that were actually broadcast by the distant signals that were carried (*i.e.*, how much of each category of programming was actually retransmitted by cable operators) can be used to analyze the composition of the distant signal programming marketplace in a way that provides a useful point of comparison of the distant signal market between 1998-1999 and 2004-2005.[547]

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541 Ducey WDT (SP Ex. 8) at 6.

542 Those rules could require various individual cable systems to black out different amounts of programming and different programs, since they apply only if a station in the cable system's market has acquired local broadcast rights to the same syndicated program. Ducey WDT (SP Ex. 8) at 6.

543 Ducey WDT (SP Ex. 8) at 6; Tr. 558-559 (Ducey).

544 The non-compensable Program Suppliers programming included numerous movies as well as syndicated series and infomercials. Ducey WDT (SP Ex. 8) at 6 n. 3.

545 Ducey WDT (SP Ex. 8) at 6; SP Ex. 14, 15; Tr. 563-568 (Ducey).

546 SP Ex. 51 at 2.

547 Ducey WDT (SP Ex. 8) at 7.

226. In the 1998-1999 proceeding, Dr. Mark Fratrik of BIA Financial, Inc., prepared an analysis of the amounts of programming in each of the categories that were actually broadcast by the distant signals.[548] For 2004-2005, Dr. Ducey followed essentially the same approach as Dr. Fratik in analyzing the data and calculating the relative amounts of programming in the distant signal marketplace as a way of assessing changes in the distant signal marketplace in 2004-2005 compared with the years covered by prior proceedings.[549] Working with Cornerstone Research, he categorized into the relevant claimant categories all of the programming broadcast during 84 randomly selected days over the four accounting periods in 2004 and 2005 on the 900 to 1,000 television stations that were carried as distant signals during the respective periods.[550] The program time was then weighted by the number of subscribers receiving each of the stations as a distant signal, to produce the relative amount of programming within each of the claimant categories that was actually purchased and retransmitted in the distant signal marketplace.[551]

227. Dr. Ducey explained that "[p]ure time measures cannot be relied upon to determine the relative marketplace value of the program categories."[552] Nonetheless, a comparison of the relative amounts of distant signal programming actually purchased by cable operators across the years covered by the distribution proceedings shows a "steady trend of declines" in the relative amount represented by the Program Suppliers' category and increases in the relative portion of the distant signal programming marketplace represented by programs within the Commercial TV category.[553]

228. Because WGN was by far the most widely carried distant signal in 2004-2005,[554] a significant decline in the amount of compensable programming on the station is also reflected

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548 Ducey WDT (SP Ex. 8) at 6.

549 Ducey WDT (SP Ex. 8) at 7; SP Ex. 16.

550 Ducey WDT (SP Ex. 8) at 5-6.

551 Ducey WDT (SP Ex. 8) at 6-7.

552 Ducey WDT (SP Ex. 8) at 7.

553 Ducey WDT (SP Ex. 8) at 6; Tr. 573-575, 684 (Ducey).

554 WGN was received by over 36 million subscribers in 2005. Ducey WDT (SP Ex. 8) at 7.

in a decline in the relative amount of the affected programming category in the distant signal market as a whole.[555]

229. As can be seen in the chart below, the greatest percentages of non-compensable programming on WGNA in 2004-05 belonged to the Program Suppliers (over 78 percent non-compensable) and Devotionals (90 percent non-compensable) categories.[556]

WGNA Minutes by Claimant Category

Minutes of programming on WGN and WGNA at the same time on the same date

Period	Commercial	Devotional	Program Suppliers	Sport
2004_1	2,354	180	5,926	1,807
2004_2	2,404	180	6,090	1,329
2005_1	2,364	180	5,036	1,014
2005_2	2,836	180	4,320	982
Total	9,958	720	21,372	5,132

All WGNA programs

Period	Commercial	Devotional	Program Suppliers	Sport
2004_1	2,354	1,770	24,309	1,807
2004_2	2,404	1,800	24,467	1,569
2005_1	2,364	1,800	25,062	1,014
2005_2	2,836	1,860	24,562	982
Total	9,958	7,230	98,400	5,372

"Matched" programming as a percentage of all WGNA programming

Period	Commercial	Devotional	Program Suppliers	Sport
2004_1	100.0%	10.2%	24.4%	100.0%
2004_2	100.0%	10.0%	24.9%	84.7%
2005_1	100.0%	10.0%	20.1%	100.0%
2005_2	100.0%	9.7%	17.6%	100.0%

555 Ducey WDT (SP Ex. 8) at 7; SP Ex. 12, 15, 16; Tr. 574-575 (Ducey).

556 Ducey WDT (SP Ex. 8) at 6; SP Ex. 14; Tr. 564-563 (Ducey).

Total	100.0%	10.0%	21.7%	95.5%

Note: Unlisted claimant categories have zero minutes of programming assigned.
Source: TVData; Cable Data Corporation

(ii) Basis for Adjustment to Bortz Survey Shares to Reflect Changed Circumstances Regarding Non-Compensable Programming on WGN

230. The comparison of the amounts of programming actually purchased in the distant signal marketplace over time provides a starting point for more accurately applying the Bortz survey results as relative market value shares to the claimant categories.[557]

231. The Bortz survey did not exclude the non-compensable programming on WGNA from consideration in the survey.[558] Thus, in order to more accurately reflect the relative marketplace values of the compensable programming on distant signals, a downward adjustment should be made for Program Suppliers.[559]

232. As illustrated in Dr. Ducey's analysis of amounts of compensable programming in each of the claimant categories over time, the trend of reductions in Program Suppliers programming continued at a steady pace from 1999-2005, largely as a result of changes in WGN programming.[560] The relative amounts of Program Suppliers programming in the marketplace declined from 77.9% in 1992 to 60.4% in 1998-1999, and then to 50.1% in 2004-2005.[561]

233. By contrast, the proportion of the distant signal marketplace represented by the Commercial TV program category increased from 8.8% in 1992 to 13.0% in 1998-1999 to 15.5% in 2004-2005.[562]

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557 The proposed adjustment reflects not just program time percentages but the relative value measure produced by the Waldfogel regression analysis. *See* Ducey WDT (SP Ex. 8) at 9.

558 Bortz Report (SP Ex. 2) at 8, 41.

559 Ducey WDT (SP Ex. 8) at 9.

560 Ducey WDT (SP Ex. 8) at 7.

561 Ducey WDT (SP Ex. 8) at 7; SP Ex. 15.

562 Ducey WDT (SP Ex. 8) at 7; SP Ex. 15.

234. To the extent the Bortz results should be adjusted to account for the increasing proportion of non-compensable programming on WGN, the adjustment should be made to the relative values assigned to the Program Suppliers and Devotional categories.[563]

235. As part of his analysis of the relative value of distant signal program categories based on a regression against royalty payments, Dr. Waldfogel compared the implied royalty shares that resulted when all of the programming minutes on WGN were used in the share calculations rather than just the compensable programs.[564] His comparison showed that the relative share for Program Suppliers that reflects only compensable program minutes is 23.2% less than the Program Suppliers relative value share that reflects all of the programs on WGN (i.e., (32.15%-24.68%)/32.15% = 0.232).[565] No similar value ratio is possible to measure the effect of the increase in the non-compensable Devotional programming because the share calculation based on the regression analysis produced a zero value for Devotional programming.[566]

4. Other Evidence Corroborating Bortz Survey Results

a. Judith Meyka Testimony

236. As previously stated, Ms. Meyka testified that the results of the Bortz survey were "consistent with my experience."[567] Specifically, Ms. Meyka corroborated the fact that cable operators valued live sports programming more than any other category of distant signal programming.[568] Ms. Meyka also substantiates the Bortz results with regard to the other program categories stating, "these results generally align with my beliefs as to how the cable industry would have allocated its total distant signal programming budget for the years 2004 and 2005."[569]

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563 Ducey WDT (SP Ex. 8) at 7, 9; SP Ex. 14, 15.

564 Waldfogel WDT (SP Ex. 18) at 15; *See also* Ducey WDT (SP Ex. 8) at 6; SP Ex. 14.

565 Waldfogel WDT (SP Ex. 18) at 15 Table 5.

566 Waldfogel WDT (SP Ex. 18) at 13 Table 3, 15 Table 5.

567 *See* Meyka WDT (SP Ex. 4) at 7.

568 *See supra*, ¶¶ 121 - 123; Bortz Report (SP Ex. 2) at 3 (Table I-1).

569 *See* Meyka WDT (SP Ex. 4) at 12.

b. Market realities of distant carriage

237. Jerald N. Fritz, the Senior Vice President for Legal and Strategic Affairs for Allbritton Communications Company, testified about station-produced programming based on his 41 years of work in and around the broadcasting business.[570] Mr. Fritz, an expert in television station operations and programming, currently serves as general counsel for Allbritton's eight ABC-affiliated television stations, four newspapers, cable news channel, and websites and Internet ventures, and he oversees government relations and long-term strategic planning for the group.[571]

238. Mr. Fritz provided the example of KATV, in Little Rock, Arkansas, which in 2005 was the Allbritton station carried most widely as a distant signal.[572] Based on data from Cable Data Corporation, thirteen "Form 3" systems carried KATV as a distant or partially distant signal in the second half of 2005.[573] The distant carriage of KATV by Form 3 cable systems in 2005 was in communities outside the Little Rock market.[574]

239. Mr. Fritz provided a map showing the locations of the systems that reported carrying KATV, identified as a dot showing the first city listed by the cable system in its Statement of Account.[575] In addition, the map shows the respective television markets, defined by The Nielsen Company as Designated Market Areas or "DMAs," in which those cable communities are located, along with the DMAs' ranks, which show the relative size of the television market, with smaller numbers indicating larger markets.[576]

240. As graphically illustrated on the map, the systems that carried KATV as a distant signal serve relatively nearby cable communities, all but the Blytheville, Arkansas, system

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570 Fritz WDT (SP Ex. 19) at 1; Tr. 960 (Fritz).

571 Fritz WDT (SP Ex. 19) at 1; Tr. 960-963 (Fritz).

572 Fritz WDT (SP Ex. 19) at 3.

573 Fritz WDT (SP Ex. 19) at 3.

574 Fritz WDT (SP Ex. 19) at 3-4; SP Ex. 20; Tr. 965-966 (Fritz).

575 Fritz WDT (SP Ex. 19) at 3-4; SP Ex. 20; Tr. 965-966 (Fritz).

576 Fritz WDT (SP Ex. 19) at 3; SP Ex. 20.

within 150 miles of Little Rock (indicated by the dashed-line circle).[577] Most of the systems carrying KATV as a distant signal were in smaller television markets than Little Rock.[578]

241. Mr. Fritz explained that the other five Allbritton stations carried as distant signals in 2005 showed similar patterns of carriage by relatively nearby cable systems in adjacent DMAs, including a number of instances of "partially distant" carriage where the cable system's subscribers were partially within and partially outside the station's home DMA.[579] These other Allbritton stations similarly produced extensive programming of interest to these nearby regions.[580]

242. A comprehensive analysis of cable carriage data shows that more than 90 percent of all carriage of distant signals other than superstations occurred within 150 miles of the home city of the distant signal in 2004-2005.[581]

c. Value of Programs to Nearby Distant Signal Subscribers

243. Mr. Fritz testified that maintaining unique, valued programming is a primary, critical, strategic goal in the television industry.[582] Non-syndicated original programs produced by local television stations are unique, and unavailable from any other sources.[583] That programming is targeted to meet the informational needs of local and regional viewers and is not duplicated by other video programming providers.[584] The availability of a deeper advertising base in larger television markets generally permits stations in those markets to support the resources needed to produce higher quality, more frequent and broader-appeal programming, but even stations in the smallest markets provide news and informational programming available from no other provider.[585]

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577 Fritz WDT (SP Ex. 19) at 3-4; SP Ex. 20; Tr. 965-968 (Fritz).

578 Fritz WDT (SP Ex. 19) at 3-4; SP Ex. 20; Tr. 965-968 (Fritz).

579 Fritz WDT (SP Ex. 19) at 6; SP Ex. 22; Tr. 972-974 (Fritz).

580 Fritz WDT (SP Ex. 19) at 6; SP Ex. 23; Tr. 972-974 (Fritz).

581 Ducey WDT (SP Ex. 8) at 8.

582 Fritz WDT (SP Ex. 19) at 2; Tr. 969, 973-974 (Fritz).

583 Fritz WDT (SP Ex. 19) at 2-3.

584 Fritz WDT (SP Ex. 19) at 2.

585 Fritz WDT (SP Ex. 19) at 2-3; Tr. 968-969 (Fritz).

244. Mr. Fritz testified, based on his decades of experience in the television industry, that station-produced programs within the Commercial Television category include many newscasts, but also sports-related programs such as pre- and post-game shows, special coverage of local teams, and coaches' shows, public affairs and "magazine" shows, human interest specials, local religious services, special coverage of severe weather, and other programs.[586]

245. Mr. Fritz provided lists of the station-produced programs that were broadcast by KATV and other Allbritton stations in 2005.[587] They included a number of daily and weekly newscasts, aired in the morning, at noon, in the early evening and at night.[588] KATV produced, in addition to live telecasts of Arkansas Razorbacks games, some five hours of daily newscasts and news programs, which covered breaking news stories as well as state capital news, state-wide weather, state-wide and regional sports, and state-wide human interest stories.[589]

246. Mr. Fritz explained that in the nearby communities outside of the Little Rock market, regional programming from KATV was particularly valuable.[590] For example, Mr. Fritz explained that news stories covered by a station in a large, regionally important city – such as regional economic and educational issues and public funding questions – are likely to have in impact on others within the same state and the wider region as well.[591]

247. KATV's weather alerts and special weather programming are preeminent throughout the state.[592] KATV's Doppler weather technology permits it to provide customized forecasts and storm tracking of critical importance to residents of central Arkansas, including those in adjacent DMAs.[593] This service is especially crucial since the markets in the state are at

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586 Fritz WDT (SP Ex. 19) at 2; Tr. 969 (Fritz).

587 SP Ex. 21, 23; Tr. 966, 972-974 (Fritz).

588 SP Ex. 21, 23.

589 Fritz WDT (SP Ex. 19) at 4; SP Ex. 21; Tr. 966-967 (Fritz).

590 Fritz WDT (SP Ex. 19) at 3-5; Tr. 965-969 (Fritz).

591 Fritz WDT (SP Ex. 19) at 3-5; Tr. 965-969, 977 (Fritz).

592 Fritz WDT (SP Ex. 19) at 5; Tr. 969 (Fritz).

593 Fritz WDT (SP Ex. 19) at 5.

the confluence of "Tornado Alley" and the "Gulf Hurricane Track," making them susceptible to dangerous weather during a majority of the year.[594]

248. KATV's station-produced news has for many years been ranked as the top rated newscast in all day-parts in the entire State of Arkansas by Nielsen, and is the recipient of numerous awards, including Emmys for Best Newscasts and Edward R. Murrow awards for news coverage and investigative reporting.[595]

249. KATV was also the exclusive licensee of the University of Arkansas football and basketball programming.[596] Under its arrangement with the University, KATV had the television rights to all non-network games, and also produced pre/post game analysis programming, weekly coaches' shows and season preview/wrap-up shows.[597]

250. KATV's sports coverage of the University of Arkansas' Razorbacks was of interest to sports fans in the adjacent markets.[598] For residents of a state with no professional team in any major sport, University of Arkansas games and sports-related programs have an interest almost unmatched in the country.[599] KATV's sports director was the "Voice of the Razorbacks," and KATV's newscasts were seen by viewers throughout the state as having unparalleled access to the University's sports teams.[600]

251. In addition to shows featuring coaches and teams from the University of Arkansas, KATV produced a show featuring the University of Central Arkansas football coach, and a special about a Little Rock native who rose to prominence as the undisputed world middleweight boxing champion.[601]

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594 Fritz WDT (SP Ex. 19) at 5; Tr. 969 (Fritz).

595 Fritz WDT (SP Ex. 19) at 4; Tr. 980 (Fritz).

596 Fritz WDT (SP Ex. 19) at 4; Tr. 969 (Fritz).

597 Fritz WDT (SP Ex. 19) at 4.

598 Fritz WDT (SP Ex. 19) at 4-5; Tr. 969 (Fritz).

599 Fritz WDT (SP Ex. 19) at 4-5; Tr. 969 (Fritz).

600 Fritz WDT (SP Ex. 19) at 4-5; Tr. 969 (Fritz).

601 Fritz WDT (SP Ex. 19) at 4-5; Tr. 969 (Fritz).

252. Mr. Fritz also described, based on his experience, how the subject matter of newscasts produced by a large-market station such as Washington, DC was of interest to people in smaller markets adjacent to the Washington station's home market.[602]

253. Based on his experiences with the Allbritton stations, Mr. Fritz concluded that cable subscribers in nearby smaller markets outside of the stations' own market value having access to the distant stations' locally-produced news and other programs, because of their unique coverage of regional and state-wide news and their coverage of sports teams that have a broad regional following.[603]

d. Clustering and Market Size Patterns

254. The regional appeal of station-produced programs described and illustrated by Mr. Fritz is particularly significant because of the "clustering" phenomenon described by Dr. Ducey.[604] Rather than being carried far from their home markets, the vast majority of non-superstation distant signals are carried relatively close to home.[605]

255. Mr. Fritz's testimony is also consistent with Dr. Waldfogel's testimony regarding the market size patterns of distant signal carriage.[606] Distant signals that provide programs different from those already available from local sources would be expected to be more beneficial to a cable system.[607] Dr. Waldfogel's analysis of carriage data for 2005-2 showed that as the market size in which the cable system is located decreases, and the average number of local signals correspondingly decreases, the average number of distant signals the cable systems retransmit increases.[608]

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602 Tr. 973-974 (Fritz); SP Ex. 23.

603 Fritz WDT (SP Ex. 19) at 3-5; Tr. 974 (Fritz).

604 Ducey WDT (SP Ex. 8) at 8; SP Ex. 17.

605 Fritz WDT (SP Ex. 19) at 6; Ducey WDT (SP Ex. 8) at 8; SP Ex. 17; Tr. 972-974 (Fritz).

606 *See* Fritz WDT (SP Ex. 19) at 3-4.

607 Waldfogel WDT (SP Ex. 18) at 4.

608 Waldfogel WDT (SP Ex. 18) at 5.

e. Further Corroboration of PTV's Adjusted Bortz Share

(i) Testimony of Linda McLaughlin

256. Ms. McLaughlin testified that it is not surprising that distant PTV programming is highly valued by those that carry it.[609] In 2004-05, virtually all cable subscribers in the United States received a local and/or distant PTV signal.[610] A substantial portion of those with a distant PTV signal had no local PTV signal.[611] Specifically, in 2004-05, 27 percent of Form 3 subscribers with a distant PTV station had no local PTV station.[612] For such subscribers, a distant PTV signal was the only way they could receive PTV programming.[613]

257. Responding to a question from Judge Roberts about whether she compared the types of programming available on public television with that available on cable networks, Ms. McLaughlin testified:

> [N]ature programming on the Discovery Channel has moved more toward reality TV. I think the Deadliest Catch was introduced in 2005, and that's one of [the Discovery Channel's] very popular programs, but it's not at all the kind of nature program that would be on public television; . . . on Animal Planet, they introduced, in the early maybe 2002-2003, the show Animal Cops, about people, you know, arresting people for mistreating their pets. And, again, that's not the kind of nature show that would be on public television. So I've noticed this trend on the cable networks, that there's more of a shift to reality-based programming, which is less of the type that's on public television.[614]

(ii) Testimony of John Wilson

258. As part of the Settling Parties' direct case, the Public Broadcasting Service (on behalf of the Public Television Claimants) sponsored testimony from John Wilson. John Wilson is the Senior Vice President and Chief TV Programming Executive at the Public Broadcasting

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609 McLaughlin WDT (SP Ex. 6) at 10 n.19.

610 McLaughlin WDT (SP Ex. 6) at 10 n.19 (citing CDC data).

611 McLaughlin WDT (SP Ex. 6) at 10 n.19 (citing CDC data).

612 McLaughlin WDT (SP Ex. 6) at 10 n.19 (citing CDC data).

613 McLaughlin WDT (SP Ex. 6) at 10 n.19.

614 Tr. 416–17 (McLaughlin).

Service ("PBS").[615] Mr. Wilson oversees all PBS television programming services, and during the period 2004 and 2005, he had direct responsibility for the public television programming that PBS supports and distributes to its member stations.[616] With more than 27 years of involvement with PBS programming, Mr. Wilson has become acutely aware of what programming appeals to viewers and has gained an understanding of the decisions that cable operators must make when choosing what programming to carry and of the factors that influence those decisions.[617]

259. Mr. Wilson testified that cable operators value distant public television signals because public television programming appeals to a wide variety of cable subscribers — ranging from parents to young children to music lovers to subscribers who value high-quality news and educational programs — and because distant public television stations differentiate their programming schedules from local public television stations in order to offer a broader array of programming and scheduling choices.[618]

260. Cable operators add distant public television signals to the channel line-up because of the rich diversity and high-quality programming available on public television stations.[619] In 2004 and 2005, PBS stations continued to offer the best of the best programming in a diverse range of areas, including children's programming, such as SESAME STREET, ARTHUR, and CAILLOU; science programming, like NOVA and NATURE; dramatic programming, like MASTERPIECE THEATRE and MYSTERY!; performing arts programming, including GREAT PERFORMANCES and LIVE FROM LINCOLN CENTER; and news and public affairs programming, such as FRONTLINE and THE NEWSHOUR WITH JIM LEHRER.[620]

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615 Wilson WDT (SP Ex. 5) at 1.

616 Wilson WDT (SP Ex. 5) at 1.

617 Wilson WDT (SP Ex. 5) at 2.

618 Wilson WDT (SP Ex. 5) at 8–20.

619 Wilson WDT (SP Ex. 5) at 18; *see also* Meyka WDT (SP Ex. 4) at 12 ("Live sports programming, local news and public affairs programming and public television programming are particularly important components of the [cable system] offering because they bring unique content that may not be available on other channels in the line-up.").

620 Wilson WDT (SP Ex. 5) at 2, 7–15, 16–18, PTV 04-05 Ex. 2, PTV 04-05 Ex. 8.

261. Cable operators benefited from a number of new programming series and initiatives that were launched in 2004 and 2005, such as the public affairs program FLASHPOINTS USA, children's program MAYA & MIGUEL, and a Health Initiative that funded four important programs to increase awareness of public health issues.[621]

262. In 2004 and 2005, PBS provided its member stations with access to over 3700 hours of original, first-run programming.[622] This programming is explicitly formulated and structured to achieve diversity in terms of content, format and audience.[623]

263. Public television programming received widespread critical acclaim in 2004 and 2005.[624] For its 2004 and 2005 seasons, public television programming won numerous awards, including six duPont-Columbia University awards, 10 Peabody awards, and 50 Emmy awards. Such critical acclaim is highly valued by cable operators.[625]

264. Public television stations have a loyal fan base that made nearly $750 million in voluntary contributions for fiscal years 2004 and 2005.[626] Cable operators that retransmitted distant public television signals during this period capitalized on subscribers' avid interest in public television programming.[627]

(iii) Testimony of Other Witnesses

265. Ms. Judith Meyka, who has experience in the valuation and acquisition of television programming from her years working for major cable operators such as Comcast and Adelphia Communications, presented testimony sponsored by the Joint Sports Claimants.[628] Ms. Meyka testified to the relatively high value of PTV programming:

> [I]t is possible that a cable operator in a system without a local public television programming station might place a higher value

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621 Wilson WDT (SP Ex. 5) at 2–3, 9–10, 12.

622 Wilson WDT (SP Ex. 5) at 7.

623 Wilson WDT (SP Ex. 5) at 7.

624 Wilson WDT (SP Ex. 5) at 20–22, PTV 04-05 Ex. 4, PTV 04-05 Ex. 7.

625 Wilson WDT (SP Ex. 5) at 20, PTV 04-05 Ex. 4.

626 Wilson WDT (SP Ex. 5) at 24.

627 Wilson WDT (SP Ex. 5) at 24.

628 Meyka WDT (SP Ex. 4) at 2–4.

> on that category of programming because of the nature of the content in that it is generally unavailable elsewhere and includes popular programs (such as certain children's shows) that are readily recognized by a subscriber.[629]

Ms. Meyka also testified that:

> I think that public television is one of those things, particularly if you don't have a public television station that is local to your system, that it has kind of that special unique appeal to subscribers, special interest programming that . . . subscribers . . . are aware of, definitely culturally relevant, and, oftentimes, things that are specific to . . . special interests. . . . One thing that always comes to mind with respect to public [television] is — is children's programming and, in particular, Sesame Street, because everybody knows what that is.[630]

266. In response to a question from Judge Roberts asking why PTV programming is not as fungible as movies and syndicated programs, Ms. Meyka explained how PTV programming actually is quite unique from programming available on other cable networks, and from syndicated programming and movies:

> [P]ublic television, by its nature, has really — they strike a chord with subscribers [that have] their own specific favorites on public television. I do think it's a little bit more unique . . . there is a little bit more of a — kind of an identification with the — with the customer and with the subscriber of certain things that public television does . . . I definitely do think that, in general, there are specific programs and shows, things that aren't available elsewhere, that the subscriber does value in making their — their decisions on what to watch. . . . I do think that, potentially, those same people [customers that would not necessarily make a decision on whether or not to be a subscriber or stop being a subscriber based on whether the cable system carries a particular syndicated series] could be making decisions on if you carry some type of public . . . programming, because it is a little bit of a different nature than syndicated series and movies have.[631]

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629 Meyka WDT (SP Ex. 4) at 12.

630 Tr. 284 (Meyka).

631 Tr. 288–92 (Meyka).

C. Response to Criticisms of the Bortz Survey

267. Constant sum surveys, conducted by Bortz Media and its predecessors, have been performed throughout the history of the cable royalty distribution proceedings. Since 1983, the basic approach and methodology have remained essentially the same.[632] Although a variety of criticisms have been leveled against the Bortz surveys (as well as other constant sum surveys) throughout the years, to the extent such criticisms could be addressed consistent with the constant sum methodology employed, Bortz Media has remained responsive to improving the design and execution of the Bortz survey."[633] Where a criticism could not be addressed by the constant sum methodology, or where the designers of the Bortz survey believed that the criticisms were inappropriate, both representatives from Bortz Media and the JSC have put forth testimony as to the reasons why the survey design was not changed to respond to those criticisms.[634] As a result of these modifications, the Bortz survey has been refined to be more closely tailored to the needs of the CRTs, the CARPs, and now the CRJs in making royalty allocations. As. Mr. Trautman states:

> In the more than twenty-five years that have followed, a continual effort to refine and improve the Bortz Media cable operator surveys has been made – giving consideration to issues raised by the CRT and CARP, as well as by other claimants. The surveys completed for 2004 and 2005 reflect the benefit of those efforts. [635]

1. Program Categorization

268. Program Suppliers have raised various criticisms, all of which have been asserted in prior proceedings, about the category descriptions and wording of the Bortz surveys. These criticisms relate to essentially the same claim: that respondents to the Bortz surveys would have

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632 *See* Bortz Report (SP Ex. 2) at 28 ("Beginning in 1983 the basic approach and methodology have remained essentially the same.").

633 *See* Bortz Report (SP Ex. 2) at 28 ("Bortz Media has made a number of refinements over the years to address concerns raised in prior proceedings.").

634 *See generally*, Response to Criticisms of the Bortz Survey, *infra* ¶¶ 267 - 308.

635 *See* Bortz Report (SP Ex. 2) at 28.

been confused by the category descriptions and would not have properly allocated relative values for each claimant category.[636]

a. Historical Criticisms

269. When the cable operator survey was first introduced, concerns were raised about the wording of the descriptions of the various programming categories.[637] In the 1983 study, BBC developed category definitions that improved upon those used in earlier BBDO surveys.[638] These BBC categories were retained in the 1986 through 1991 surveys except that BBC added two new categories in 1986 to 1992 surveys to represent the Devotional and Canadian Claimants.[639] While acknowledging the complexity of the task, the CRT in its 1989 Determination continued to express desire for enhanced programming definitions.[640] In response, the 1992 survey was revised to use category descriptors based on the definitions

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636 Program Suppliers have raised the related criticism that the respondents were valuing broadcast or cable network programming. They first raised that criticism regarding the 1978 BBDO survey. BBDO responded by changing the wording of the question (and there was significant decline between 1978 and 1979 in the movies share). As the CRT noted in the 1979 proceeding, the "survey in this proceeding was careful to distinguish between distant signal programming and 'made for cable' programming and between network and nonnetwork sports; the study also focused only on distant signal programming that was actually imported." 1979 CRT Determination, 47 Fed. Reg. at 9882.

Bortz Media also was careful in the 2004-05 surveys to direct the respondents' attention to those distant signals that the respondents actually imported. For those respondents whose systems system carried distant network stations, the respondents were reminded on three separate occasions that network programming should be excluded. First, the respondents were asked what types of programming on these distant stations, other than "national network programming from ABC, CBS, and NBC," were most popular with subscribers. Then the respondents were asked whether they feature any programming from these distant stations, other than "network programming from ABC, CBS, and NBC,." in their advertising and promotional efforts to attract and retain subscribers. When respondents were finally asked to estimate the relative value of the programming categories on these distant stations, they were expressly asked to provide values for the programming actually broadcast on these stations "other than any national network programming from ABC, CBS, and NBC." Borz Report (SP Ex. 2), App. B, Version H at 2, 3 4.

637 *See* Bortz Report (SP Ex. 2) at 30.

638 *See* Bortz Report (SP Ex. 2) at 30.

639 *See* Bortz Report (SP Ex. 2) at 30.

640 *See* 1989 CRT Determination, 57 Fed. Reg. at 15300.

developed by the CRT itself.[641] As a result of improvements over previous iterations, the 1990-92 CARP made no reference to any concern with the category definitions used in the 1992 Bortz survey, despite criticism of the category definitions by one of the Program Suppliers' witnesses.[642] Indeed, the category definitions used in the 1992 survey have been used in all subsequent surveys including those conducted for 1998, 1999, 2004 and 2005.[643]

270. As Mr. Trautman has explained, the Bortz surveys from 1992 on have provided respondents with program categories that are readily understood in the industry and that come as close as possible to corresponding with the categories established in the distribution proceedings.[644] Mr. Trautman has acknowledged the potential for some programming to be interpreted as belonging to one category when for the purposes of these proceedings it may belong to another; however, he has considered this programming to be "fringe" programming that would not likely affect the Bortz respondents' overall relative program valuations.[645] He also has explained that it would be inappropriate to use program examples in the Bortz surveys because such examples necessarily exclude programming types not included as examples.[646]

271. In the 1998-99 proceeding, Program Suppliers argued that Bortz respondents were confused about what programming comes within each category. They pointed to the testimony of one JSC witness -- a cable operator who supposedly miscategorized two programs when questioned by the CARP -- as "conclusively demonstrating, in Program Suppliers' view, that miscategorization of programs by respondents to Bortz Media surveys is considerable and invalidates the results."[647] The Register and Librarian rejected that argument for two reasons that apply equally in this proceeding:

> First, the Panel was not presented with evidence that demonstrated sufficiently widespread miscategorization of programs by Bortz

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641 *See* Bortz Report (SP Ex. 2) at 30-31.

642 *See* 1990-92 CARP Report at 56-57.

643 *See* Bortz Report (SP Ex. 2) at 31.

644 *See* Bortz Report (SP Ex. 2) at 30; Tr. 85-86, 90-91 (Trautman).

645 *See* Bortz Report (SP Ex. 2) at 30.

646 *See* Bortz Report (SP Ex. 2) at 30.

647 1998-99 Librarian Order, 69 Fed. Reg. at 3615.

> Media respondents that would likely affect the survey results. Mr. Egan's responses to Arbitrator Young reflect only how he might respond and were offered by someone who could not recall if he had ever completed a Bortz Media survey. Second, and more importantly, the Bortz Media surveys do not question cable operators as to individual programs, but rather question them as to the value they attach to categories of programs. See Trautman Tr. at 324-25 (Respondent are "not thinking about each and every program that is aired on that signal. They are thinking about the general categories of program."). If Program Suppliers pointed to evidence that demonstrated that Bortz Media respondents misapprehended entire categories of programs when assigning them value, then the Panel might have been required to address such contentions. That is not the case here . . . .[648]

272. In this proceeding, Program Suppliers have not come forward with the type of evidence that the Register and Librarian contemplated in their 1998-99 order quoted above.

b. Kessler Study

273. In this proceeding, Program Suppliers did not present a survey expert to critique the program categories used in the Bortz surveys or otherwise address the Bortz methodology.[649] And they have not introduced any testimony from cable industry witnesses who offered either anecdotal or empirical evidence to support their claim that there was in fact confusion among the Bortz survey respondents. In earlier proceedings Program suppliers attempted to measure the value of a "minor sports" category by introducing the share of distant signal viewing minutes attributable to that category. [650] Program Suppliers have not presented any such evidence in this proceeding.

274. In rebuttal, Ms. Kessler of MPAA presented a study comparing the number of minutes of JSC programs on stations carried as distant signals in 2004-05 with other "sports" programs. According to Ms. Kessler, these other sports included "golf, ice skating, the Olympics, wrestling, boxing, poker, fishing, hunting, bowling, volleyball, bicycle riding,

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648 *Id.* at 3615 (emphasis added).

649 Professor Rubin discusses program categories but does not compare the categories in the Bortz Survey and offer any conclusions about the categories used there or how they should be modified (if at all).

650 *See, e.g.,* 1979 CRT Final Determination, 47 Fed. Reg. at 9881 (showing that "minor sports" received a 1% share of viewing).

gymnastics, sports talk shows, motorcycle racing, triathlons, tennis, horseracing, diving, high school sports, and the like."[651]

275. Ms. Kessler's tonnage analysis did not attempt to weight the minutes on each station by instances of carriage or subscriber reach.[652] Thus, Ms. Kessler weighed a minute on WGN, the most widely-imported distant signal in 2004-05 (carried by over 70% of the systems and as the only distant signal on about 50% of the systems),[653] the same as a signal carried by a single system.[654] The only program that Ms. Kessler was able to identify in the "non-JSC" category on WGN in 2004 and 2005 was the Babe Winkelman Good Fishing Show, and Ms. Kessler could not say whether that program would have been confused with JSC or sports programming.[655]

276. Ms. Kessler failed to present any empirical evidence about how many of the programs included in the "non-JSC sports" category would have been confused with the programs in the JSC category. Ms. Kessler was unable to provide any estimate about the extent to which survey respondents would have been confused. For instance, she could not say what proportion of the minutes of non-JSC sports programs she identified as "Program Supplier" programming consisted of programs that survey respondents might confuse with JSC programming.[656] And she conceded that there would not be confusion with respect to all of those minutes.[657] Program Suppliers have never, for instance, shown that cable operators would confuse "wrestling" programs with live sporting events that do not involve pre-determined outcomes.[658]

277. Ms. Kessler suggested that there might be confusion given the fact that Tribune Media classifies certain programs in the JSC category as "team sports" (Major League Baseball,

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651 Program Category Definitions (PS Ex. 13) at 3.

652 Tr. 3253 (Kessler).

653 Trautman WRT (SP Ex. 57) at 15.

654 Tr. 3253 (Kessler).

655 Tr. 3260 (Kessler).

656 Tr. 3257 (Kessler).

657 Tr. 3257 (Kessler).

658 Tr. 2396-97 (Crawford).

National Football League, National Basketball League, National Hockey League, etc.) while omitting other sports programs involving some team competitions.[659] However, Tribune Media, which provides programming data to the industry as part of its regular course of business, treats "team sports" programming in the JSC category differently by using separate codes for such programming that do not apply to other sports programs that may involve team competition.[660] Moreover, neither Ms. Kessler nor any other Program Supplier witness presented evidence that there were in fact other team sports telecasts and the extent to which those programs were actually carried in the distant signal universe in 2004-05 We do not know from the record, for instance, what proportion of the minutes of non-JSC sports programs Ms. Kessler identified fell into categories such as "wrestling" as opposed to other types of non-JSC sports programs (such as golf or tennis).

278. With respect to pre-game and post-game shows, she introduced no testimony about how much of this programming was station-produced and therefore belonging to Commercial Television Claimants (one of the Settling Parties).[661] Ms. Kessler did not provide any information as to the amount of time occupied by any of the particular sports programs that she had identified as not coming within the JSC claim. For example, when asked whether she was aware that golf represented less than one percent of the "minutes" of non-JSC sports programs in her analysis, Ms. Kessler was unable to confirm or deny such a possibility.[662]

279. Moreover, with respect to the minutes that were identified, Ms. Kessler did not attempt to value the non-JSC programming falling under the umbrella of "sports" programming. The Program Suppliers did not, for instance, introduce any quantitative testimony from Professor Ford or anyone else about the value of these minutes compared to the JSC programs. Program Suppliers also failed to introduce any information about the non-JSC sports programs they identified that might allow for some inference about the value of such programming. For instance, not only did Program Suppliers fail to show how much golf or tennis was broadcast in the distant signal universe, they presented no evidence about what type of golf and tennis

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659 Tr. 3262-3264 (Ducey).

660 *Id.;* Ducey WDT (SP Ex. 8) at 5-6.

661 Tr. 1604-05 (Kessler).

662 Tr. 3265 (Kessler).

broadcasts were shown. No evidence was presented that any of the men's or women's professional tours in golf or tennis had a single non-network broadcast carried by a distant signal in either 2004 or 2005.

2. Respondent Qualifications

280. The early BBDO surveys were directed at top executives of cable MSOs.[663] Beginning in 1983, BBC redesigned the survey to focus on interviewing management at the system level to obtain responses from those "most familiar with programming carried by the system."[664] The CRT determined that the BBC survey was properly designed in this respect to "ascertain the proper individual."[665] However, in the 1989 proceeding, the CRT expressed concern regarding the qualifications of 11% of the survey respondents and their involvement in the program budgeting process.[666] In light of the concerns expressed by the CRT in the 1989 case, Bortz Media redesigned the questionnaire in the 1992 survey and in subsequent surveys so that responses would be obtained from the person "most responsible for programming decisions at the cable system."[667] This approach has been utilized in all subsequent surveys, and respondents in 2004 and 2005 consisted overwhelmingly of general managers or senior programming and marketing executives.[668]

281. Program Suppliers, however, suggest that the survey respondents are not the proper target group because the system level respondents are not responsible for program acquisitions. Although the Bortz survey seeks the person at each cable system most responsible for programming decisions, Program Suppliers appear to contend that programming decisions are made at the corporate level and that survey respondents may not be capable of providing

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663 *See* Bortz Report (SP Ex. 2) at 29.

664 *See* Bortz Report (SP Ex. 2) at 29.

665 *See* 1983 CRT Determination, 51 Fed. Reg. at 12810.

666 *See* 1989 CRT Determination, 57 Fed. Reg. 15301.

667 *See* Bortz Report (SP Ex. 2) at 30. Although Bortz survey was redesigned for the 1992 proceeding, Bortz Media asserts that the respondents to the 1989 through 1991 surveys were qualified and were likely involved in program budgeting, as they were overwhelmingly individuals with general management, marketing or programming responsibilities. *See* Bortz Report (SP Ex. 2) at 30.

668 *See* Bortz Report (SP Ex. 2) at 47-48.

meaningful answers in response to the survey. One Program Supplier witness, Howard Homonoff, testified that programming decisions are typically driven by corporate executives and not at the individual system level.[669] Mr. Homonoff's testimony focused on the market for cable networks, and he specifically described the negotiation process that takes place between corporate cable executives and large media companies like Disney, Fox, NBC Universal, and Turner Broadcasting.[670]

282. Notably, Mr. Homonoff recognized that even with respect to these cable networks, corporate executives seek input from other "stakeholders," including "general managers and other personnel in the field with local programming responsibilities."[671] Thus, he concedes that there are individuals with programming responsibility at the local level. He does not specifically address where distant signals fall in terms of local or national responsibility, but Ms. Meyka, the only witness in this proceeding who worked for a MSO during 2004-05, was explicit on this point.[672] While corporate executives have final responsibility for distant signal carriage decisions, they rely heavily on the general managers and field personnel and largely defer to their recommendations due to the fact that the local personnel better understand how a particular signal fits the needs of that individual cable system.[673] That is in keeping with the testimony of Rick Ducey, who testified about the regional nature of much of the distant signal carriage.[674]

283. As the 1998-99 CARP found, the Bortz respondents are cable industry executives actively involved in the process of making decisions regarding the selection of programming.[675]

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669 Homonoff WDT (PS Exhibit 7) at 4.

670 *Id.* at 6.

671 *Id.* at 7.

672 Tr. 390-91 (Meyka). Mr. Homonoff, by contrast, has not worked for a MSO since 1996, when he left Continental Cablevision. Tr. 1758 (Homonoff).

673 Tr. 390-91 (Meyka).

674 Ducey WDT (SP Ex. 8) at 8.

675 *See* 1998-99 CARP Report at 19; *see also* Crandall WDT (SP Ex. 3) at 8; Tr. 230-31 (Crandall); Tr. 390-91 (Meyka) (describing the process in which MSOs defer to local system operators for programming decisions); Duncan WDT (SP Ex. 1) at 7

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Indeed, Dr. Crandall testified that in a competitive environment, absent compulsory license statutes:

> [P]rogram director[s] – those people that make programming decisions at the individual cable systems...would be the ones making the purchase decisions from the copyright owners or from brokers or agents representing the copyright owners.[676]

284. The 1998-99 CARP also found that cable operators must constantly assess the value of alternative types of programming – such as news, sports, movies and series – when deciding to carry a new program service or drop an existing service[677] and are aware of the demographics of their systems' markets and the kinds of programming that will increase demand for subscriptions.[678] As Ms. Meyka testified, "the value of any particular programming to a cable operator is derived from the perceived value of such programming to the subscriber."[679] Indeed, the U.S. Court of Appeals for the D.C. Circuit acknowledged the prudence of using the Bortz survey to measure relative value specifically because cable operators consider viewing data in assessing the value of programming options. The Court stated:

> "Nor did the CARP act unreasonably in declining to rely on Nielsen for direct evidence of viewing, as Bortz adequately measured the key criterion of relative market value...Moreover, as the CARP put it, Bortz 'subsumes *inter alia* all viewing data that a

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("Consequently, the cable operators and, specifically, the programming decision-makers (and not, for example, the viewers) are the relevant group to be sampled."

676 *See* Tr. 230-31 (Crandall).

677 *See* 1998-99 CARP Report at 20; *see also* Meyka WDT (SP Ex. 4) at 4 ("Cable operators, therefore, must constantly assess the value of the programming they include within a channel line-up to ensure maximum subscriber satisfaction.").

678 *See* 1998-99 CARP Report at 20; *see also* Meyka WDT (SP Ex. 4) at 4 ("The objective for any distributor is to provide programming options that will result in maximum subscriber growth and minimal loss of existing subscribers."); Tr. 390-91 (Meyka) (stating local system operators know their constituency); Tr. 389 (Meyka) (cable operators will make their "own kind of evaluation" and "build a package that's going to appeal to the widest number of subscribers").

679 *See* Meyka WDT (SP Ex. 4) at 4.

CSO might consider when assessing relative value of programming groups.'"[680]

285. Finally, Mr. Trautman testified that a person must respond affirmatively to the qualifying question in order to participate.[681] The results of the survey indicate that many of the respondents deemed most responsible for programming decisions were regional cable officials (approximately 38% in 2004 and 27.5% in 2005).[682] Thus, where individual system employees do not have programming responsibility, the survey appears to address this by requiring the interviewer to talk with someone who has that responsibility.[683]

3. Criticisms by Dr. George Ford

286. Program Suppliers' Dr. George Ford claims that the Bortz survey results do not reflect market value and fail to incorporate the amount of programming carried.

a. Supply Side/Willingness to Pay

287. Dr. Ford's chief criticism, one that Program Suppliers have raised before, is that the Bortz survey measures only willingness-to-pay and not the amounts that cable operators would actually pay in a free market.[684] In Dr. Ford's view, the Bortz results cannot be translated into market values unless the demand curves for all program types are linear and the demand elasticities are the same at the selected quantities -- a situation he considers "implausible."[685] Dr. Ford further argues that valuations based upon willingness to pay will give way when sellers deal with multiple competing buyers ("Tom, Dick and Harry") and sell exclusively to only one of them.[686]

288. A similar argument was previously asserted by Dr. Stanley Besen on behalf of the Program Suppliers. For instance, in the 1989 proceeding, the CRT observed that:

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680 *Program Suppliers v. Librarian of Congress*, 409 F.3d at 402.

681 Tr. 65-66 (Trautman).

682 Bortz Report (SP Ex. 2) at 49.

683 *Id.*

684 George Ford WRT (PS Ex. 16) at 6-8.

685 George Ford WRT (PS Ex. 16) at 7.

686 George Ford WRT (PS Ex. 16) at 10-11.

> Dr. Besen disagreed that the Bortz survey bore any relationship to marketplace value. The Bortz survey measures the total value to cable operators of all programs in a given category (the marketplace value plus the consumer surplus). A survey demonstrating the relative total value of seven different program types would not demonstrate the relative marketplace value of those program types except where the demand curves for all program types are linear and the demand elasticities are the same for all program types at the equilibrium prices. . . . Dr. Besen contends that these conditions are stringent and there exists no evidence to support that these conditions exist.[687]

Dr. Ford repeats that argument here.[688]

289. Several witnesses, testifying on behalf of JSC and other parties, have provided responses to Dr. Besen's testimony in the various proceedings.[689] In the 1998-99 proceeding, the CARP resolved this issue:

> Clearly, Bortz does not *directly* survey the seller's perspective. But this does not materially undermine the utility of Bortz, and *does not inform us whether any particular claimant group should receive more or less than implied by the Bortz survey.* As previously addressed in some detail, we believe the demand side would more likely determine relative values of programming in an unregulated marketplace than the supply side. . . *Moreover, it is probable that when responding to the survey, experienced CSO executives have incorporated their understanding of the seller's side of the marketplace.* See Tr. 262-63 (Trautman). For these reasons, we see no need to make the tortuous adjustments to the Bortz results based upon our subjective assessments of the seller's perspective.[690]

290. The 1998-99 CARP's decision rested on a number of grounds, including the lack of record evidence that factoring supply side considerations into the equation would raise or

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687 1989 CRT Determination, 57 Fed. Reg. at 15296 (citations omitted).

688 George Ford WRT (PS Ex. 16) at 6-8.

689 *See* 1983 CRT Determination, 51 Fed. Reg. at 12795; 1990-92 CARP Report at 55; 1998-99 CARP Report at 22 (discussing supply side testimony including responses to Besen based upon economic principles relating to forced sales and all-or-nothing choices).

690 1998-99 CARP Report at 22 (emphasis added) (citation omitted).

lower any one claimant's Bortz share.[691] Notwithstanding the CARP's conclusions, the Program Suppliers offer no new evidence on these points.

291. All parties in this proceeding other than Program Suppliers believe that constant sum surveys of cable operators provide reliable and valid estimates of relative market value[692]; only Program Suppliers' Dr. Ford disagrees (although Program Suppliers' other economist, Dr. Gruen, relies upon a constant sum survey to demonstrate the relative value that cable subscribers attach to programming).[693] And both Dr. Waldfogel and Dr. Crawford explained in this proceeding that because of the nature of the cable market and the distant signal market in particular, relative values would be determined by the relative demand for the programming rather than supply-side factors.[694]

292. Neither Dr. Ford nor any other witness testified that Settling Parties would receive less (and Program Suppliers would receive more) than their Bortz share if supply side considerations were taken into account.[695] For example, there is no showing that, in Dr. Ford's/Besen's terminology, the elasticities of demand for Program Suppliers' programming are different from that of the programming represented by the Settling Parties -- or that if they are different, those differences would result in the Program Suppliers' programming receiving more than their Bortz share in a free market.

293. According to Mr. Trautman, the respondents answer the survey's valuation question with their actual market experience in mind.[696] In fact, the 1998-99 CARP concluded that the budget provided by cable operators responding to the Bortz survey represents an expected market outcome and not simply the amount the cable operator is willing to pay.[697]

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691 1998-99 CARP Report at 22 (emphasis added) (citation omitted).

692 Bortz Report (SP Ex.2) at 10; McLaughlin WDT (SP Ex. 6) at 6-8; Tr. 642, 685 (Ducey); Tr. 734-35 (Waldfogel); Tr. 2905-06 (Salinger); Tr. 1299-1300 (Ringold); Tr. 3074-75 (Calfee).

693 Gruen WDT (PS Ex. 8) at 27-28.

694 Tr. 750 (Waldfogel).

695 George Ford WRT (PS Ex. 16) at 11.

696 Bortz Report (SP Ex.2) at 33-34.

697 Bortz Report (SP Ex.2) at 37 ("We believe . . . the survey does reflect the respondents' understanding of the marketplace prices of the different kinds of programming -- which is

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b. Failure to Remind Operators About Quantities of Various Programs

294. Dr. Ford also argues that because the interviewer does not tell the respondent cable operator the "quantities" (presumably the aggregate program time) of distant signal program categories they carried, the respondents may have valued programming they did not carry.[698] Again, this same criticism was leveled by Dr. Besen at the start of the supply side debate.[699] In support of this position, Dr. Ford cites only the fact that, according to Mr. Trautman, Bortz was unable to confirm that two of the over 300 respondents to the 2004-05 surveys actually carried sports on their distant signals because the programming information was not available (although he could confirm that they did carry sports in subsequent years).[700] If these two respondents are removed from the sample pool, the 2004-05 survey results are virtually unchanged.[701]

295. Dr. Ford and the Program Suppliers have not come forward with any evidence that any of the Bortz respondents may have valued programming they did not carry -- other than to rely upon the two questionable incidents that were discussed in the Bortz Report.[702] Dr. Ford also failed to present any evidence that not providing respondents with an estimate of program category "quantity" results in survey responses that are biased against Program Suppliers.[703]

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a reflection of the 'supply side.' The cable system operators surveyed are active in the marketplace for cable programming and are familiar with the rates charged by sellers of various genres of cable networks.").

698 George Ford WRT (PS Ex. 16) at 11.

699 *See* 1983 CRT Determination, 51 Fed. Reg. at 12795 ("Besen found it critical in ascertaining how much cable operators would pay for different program types to know the amount of supply of different programs and whether the supplier was willing to sell dearly, cheaply, or offer the programs for nothing").

700 George Ford WRT (PS Ex. 16) at 9 (sole evidence cited was failure to confirm sports carriage on two signals).

701 *See* Bortz Report (SP Ex. 2) at 39-40; Tr. 158-62 (Trautman).

702 George Ford WRT (PS Ex. 16) at 9 (sole evidence cited was failure to confirm sports carriage on two signals).

703 George Ford WRT (PS Ex. 16) at 10 (testimony detailing this criticism did not rely on any empirical proof of harm).

Moreover, as the testimony regarding the use of "program examples" in the Gruen subscriber survey illustrates, the evidence suggests there may be significant response biases associated with providing selected information to survey respondents. *See* SP PFOF ¶¶ 502-515.

296. In the 1998-99 proceeding, Mr. Trautman testified that he could not confirm that one Bortz respondent who accorded some value to sports actually carried distant signal sports (and that another respondent for which he could not confirm sports carriage valued sports at zero).[704] The 1998-99 CARP concluded that the appropriate remedy in such a situation is simply to remove the valuations of the respondent at issue.[705] As noted above, doing so has no material impact upon the 2004-05 Bortz survey results.[706]

4. Canadian Criticisms

a. Criticisms by Gary Ford

297. In his written rebuttal testimony, Dr. Gary T. Ford states the following:

> The Bortz survey does not provide reliable information regarding the value of programming on Canadian distant signals for two reasons. First the disproportionate stratified sampling plan "undersamples" strata 1 and 2 (the low royalty strata) and "oversamples" strata 3 and 4 (the high royalty strata). Second, the focus of the questionnaire on the unaided recall of "most popular" programming just before the key question on relative value of programming...has the effect of reducing the likelihood that cable operators will think about the value of nice programming to their systems.[707]

298. Dr. Ford further testifies that the "Bortz sampling plan, did not interview a sufficient number of cable system operators who imported French-language distant signals to draw any conclusions about the value of import French-language signals."[708] In contrast, Dr. Ford notes, the 2004 Ford-Ringold survey, for which Canadian claimants presented results, "interviewed 11 of 19 cable system operators who imported a French-language distant signal,

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704 Bortz Report (SP Ex. 2) at 36-37.

705 *See* 1998-99 CARP Report at 20-21.

706 Bortz Report (SP Ex. 2) at 39

707 Ford WRT (CDN Ex. R-2) at 4-5.

708 *See id.* at 13.

and the 2005 survey interviewed 11 of the 19 cable system operators who imported a French-language distant signal."[709]

299. With regard to Dr. Ford's first criticism of the Bortz survey, Bortz Media obtained responses from 11 systems that carried Canadian signals in the 2004 survey.[710] In 2005, Bortz Media obtained responses from 13 comparable signals.[711] The number of Bortz respondents who carried Canadian distant signals increased significantly from the number of similar respondents reported in the 1998-99 proceedings. For example, in 1998, only 2 of 66 systems that carried distant Canadian signals were included in the Bortz survey and in 1999, only 3 of 62 systems were included.[712] In stark contrast, in 2004, 11 (18%) of the 61 total Form 3 cable systems that carried distant Canadian signals responded to the Bortz survey; in 2005, the comparable numbers are 13 (25.5%) of 51 systems.[713] With the McLaughlin and Gary Ford adjustments discussed below, the 2004 Bortz survey results can be attributed to 13 (21.3%) of the 61 systems with distant Canadian signals; the 2005 results reflect values from 16 (31.4%) of 51 systems.[714]

300. Indeed, the number of Bortz respondents that carried distant Canadian signals in 2004 and 2005 was higher than in any of the Bortz surveys.[715] Moreover, Canadian claimants presented results based on a survey of 22 combined total respondents for French-language distant

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709 *See id.* at 13, n. 5.

710 *See* Tr. 3020 (Ford); *see also* Calfee WRT (CDN Ex. R-3) at 4; Bortz Report (SP Ex. 2) at 16, n. 12.

711 *See* Tr. 3020 (Ford); *see also* Calfee WRT (CDN Ex. R-3) at 4.

712 *See* Bortz Report (SP Ex. 2) at 16, n. 12; Calfee WRT (CDN Ex. R-3) at Appendix B, p. 13(noting the number of systems in 1998-99 that carried Canadian signals).

713 *See* Tr. 3020 (Ford); Ford WRT (CDN Ex. R-2) at 10. [table noting number of Bortz respondents].

714 Ford WRT (CDN Ex. R-2) at 19-21 (noting the number of additional Canadian signals added by McLaughlin and Ford). *See also* Tr. 3020 (Ford) (discussing that there were 46 eligible systems for inclusion in the 2004 Bortz survey under the methodology constructed by Bortz Media; there were 37 in 2005. Thus, Bortz Media obtained responses from 24% of the survey eligible systems that carried Canadian signals in 2004 and 35% of the eligible systems in 2005.

715 *See* Tr. 3021 (Ford).

signals for 2004-05; that is less than the combined 24 cable systems represented in the adjusted Bortz universe that Dr. Ford now criticizes for "undersampling."[716]

301. When asked whether the stratification process utilized by Bortz media performance of the Bortz survey was unreasonable, Dr. Ford stated that it was a "reasonable approach."[717] He testifies as follows:

> Q. Okay. I take it that the stratification is not uncommon in survey design, is it?
>
> A. It's very common.
>
> Q. And you understand the purpose for which stratification was undertaken in this case, do you not?
>
> A. There are several purposes, and I think I understand the purpose that Mr. – why Mr. Bortz used it, yes.
>
> Q. He was trying to be certain that those royalty systems – I'm sorry, those cable systems that paid the most in royalties had the greatest chance of being interviewed; is that not correct?
>
> A. He wanted to make sure that the systems that provided the relatively larger share of royalty payments would be included in his final sample.
>
> Q. Was that an unreasonable goal or objective?
>
> A. I'm sorry?
>
> Q. Was that an unreasonable goal or objective?
>
> A. No. As I said earlier when Judge Roberts asked me about it, I think that's a reasonable approach.[718]

302. With regard to Dr. Ford's second criticism, neither Dr. Ford nor Canadian Claimants in general have presented any evidence that the inclusion of a popularity question prior to the constant sum question on the Bortz survey questionnaire had any effect on the values allocated to various programming categories by the cable operator respondents. Indeed, Dr. Ford

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716 Ford WRT (CDN Ex. R-2) at 4-5,13, n. 5;

717 Tr. 3007 (Ford).

718 Tr. 3006-07 (Ford).

has presented evidence in prior cable royalty proceedings that suggests that neither the inclusion of a popularity question nor the stratified sampling plan utilized by Bortz affect the reliability and validity of the Bortz survey results.

303. In the 1990-92 cable royalty proceedings, Dr. Ford and Dr. Ringold co-authored and presented results from a survey that included a "Bortz-like" question.[719] The survey used by Drs. Ford and Ringold did not employ "any type of stratified sampling" and also did not "have any popularity question that preceded [the] Bortz-like question."[720] Dr. Ford testified as follows:

> Q. It had neither of the two deficiencies that you identified in your testimony here this afternoon.
>
> A. It certainly doesn't have the stratification issue, as Mr. Hester said, and it didn't have the lead-in question problem as Mr. Hester went through that list and – yes, it did not.
>
> Q. All right. And the results for the Canadians were essentially identical to the results that were produced by the Bortz survey that year [1990-92]?
>
> A. Yes, that's correct.[721]

b. Calfee Criticisms

304. Dr. Calfee presented evidence of "the minimum percentage of carriage fees that each system could have saved by dropping the Canadian the Canadian signals or signals."[722] Dr. Calfee calculated the minimum percentage savings "by assuming the Canadian signal was the last signal added; an assumption that substantially underestimates the actual savings because there is no reason to think that the Canadian signal is always treated by the system as the last signal to be added."[723]

305. Based upon his calculations, Dr. Calfee concludes that "[a]lthough the Bortz results make sense for most programming categories, they do not make economic sense for

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719 *See* Tr. 3012 (Ford).

720 Tr. 3014 (Ford).

721 Tr. 3017-18 (Ford).

722 Calfee WRT(CDN Ex. R-3) at 7; *see id.* at 6 (Tables 1 and 2).

723 Calfee WRT (CDN Ex. R-3) at 7-8.

Canadian signals."[724] Dr. Calfee based this conclusion, in part, on the fact some (but not all) Bortz respondents valued Canadian programming at a level less than the amounts that he calculated as their potential savings if they dropped the distant signals.[725]

306. Dr. Calfee concedes that the numbers used as the basis of his calculations depend on several assumptions regarding the various formulas in the compulsory license statutes and do not reflect what cable systems would have actually saved in the real world.[726] Dr. Calfee also acknowledges that the calculations reflected in his written rebuttal statement do not represent a fair estimate of relative value of Canadian signals. He testified as follows:

> Q. Do you believe that the numbers that are here in your table 1, the fourth column, the minimum potential savings, represent a fair estimate of the relative value of Canadian signals?
>
> A. No.
>
> Q. Do you think it's too low?
>
> A. I'm not sure that we can infer relative value directly from these numbers.
>
> Q. But the Bortz survey, of course, asked for a relative value.
>
> A. That's right.
>
> Q. And you don't believe that the numbers that you have here in column 4, the minimum potential savings, reflect relative value?
>
> A. That's correct. I don't think you can infer relative value from those numbers, no.[727]

307. Dr. Calfee also acknowledges that his calculations do show the Judges what the Bortz respondents would have saved had they dropped U.S. signals in order to make a complete

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724 Calfee WRT (CDN Ex. R-3) at 5.

725 Calfee WRT (CDN Ex. R-3) at 8.

726 Tr. 3119 (Calfee) ("Q. How is your calculation? A. My calculation is that I would assume that the total fee would decline by $6,300, because I dealt with base rate and 3.75 fees separately. Q. I see. But in fact, that's not what would happen in the real world, is it? A. In fact, it would have saved certainly more than in my calculation, yes.").

727 Tr. 3132 (Calfee).

assessment regarding whether the Bortz respondents' valuations "make economic sense" under his calculations.[728] He testifies as follows:

> Q. Just to kind of summarize here, if I could, Dr. Calfee, is we cannot tell from your table here how much the cable system respondents would have saved had they dropped U.S. signals, correct?
>
> A. That's right.
>
> Q. And you made no effort to do that calculation?
>
> A. That's correct.
>
> Q. All right. And it is your opinion that that information would not be helpful to this body here in assessing whether or not these particular Bortz respondents' valuations make economic sense?
>
> A. It may be too strong a statement to say that we would learn nothing from the calculations that you're talking about. I think it very unlikely, and I don't see why we would alter the basic finding, you know, that I think is self-evident from these numbers. Bearing in mind that, as you've just demonstrated, the money saved by dropping U.S. signals and the money saved by Canadian signals, they don't add up to a hundred percent. It could be less than a hundred percent. In the example you gave, it was more than a hundred percent. It depends a lot upon how many 3.75 signals there are, whether all of those signals are above quota levels as opposed to there being some other reason, and those kinds of things.[729]

308. Under these circumstances, Dr. Calfee's testimony provides no basis for concluding that the results of the Bortz surveys do not make "economic sense."

D. Adjustments to Bortz

1. PTV Adjustment

309. Addressing issues related to public television and Canadian programming, the 1998-99 CARP noted that the Bortz survey understated the value of these programming categories by excluding from the survey any systems that carried only public television and/or

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728 *See* Tr. 3130 - 3132 (Calfee)

729 Tr. 3130 - 3132 (Calfee)

Canadian signals.[730] In the 1998-99 proceeding, JSC proposed an adjustment methodology that combined the Bortz survey results for these two categories of programming with the royalty fees generated by the "PBS-only" and "Canadian-only" cable systems that were excluded from the Bortz survey.[731]

310. The Panel acknowledged that the Bortz survey was valuable in establishing a "floor" for public television's value, but did not accept the Bortz adjustment proposal for valuing either public television or Canadian programming.[732] In making its public television determination, the 1998-99 CARP expressed concern that the Bortz adjustment methodology did not account for the "automatic zero" issue raised by PTV (i.e., the value of public television programming not carried), and also indicated that the proposed adjustments "rel[ied] too heavily on the fee generation methodology."[733]

311. As part of the Settling Parties' direct case, the Public Broadcasting Service (on behalf of the Public Television Claimants) sponsored testimony from Linda McLaughlin that provided an adjustment to the Bortz study for cable systems that carried only PTV and/or Canadian distant signals. Most of Ms. McLaughlin's work over her 35 year career has concentrated on the entertainment and media industries.[734] Ms. McLaughlin was qualified as an expert economist with experience in the economic attributes of entertainment and media markets and the valuation of copyrighted works in those markets.[735] She has previously testified before the CRB, CARP and in federal court regarding the economic attributes of entertainment and

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730 *See* Bortz Report (SP Ex. 2) at 40.

731 *Id.*

732 *See* 1998-99 CARP Report at 22-26, 31.

733 *Id.* at 22-26.

734 McLaughlin WDT (SP Ex. 6) at 1; Tr. 399–404 (McLaughlin); CDN Ex. R-5 at 655–56 (McLaughlin).

735 Tr. 404–05 (McLaughlin); CDN Ex. R-5 at 656–59 (McLaughlin).

media markets and copyright licensing.[736] Ms. McLaughlin also has experience analyzing surveys and putting them into the context of the questions presented.[737]

312. Information available to Ms. McLaughlin allowed her to mathematically compute the values the 2004 and 2005 Bortz surveys likely would have found had they not excluded from the original samples cable operators that carried only distant PTV and/or Canadian signals.[738]

313. Ms. McLaughlin testified that but for two factors, the Bortz survey results would show how the cable operators themselves would have allocated the compulsory licensing royalties they paid to carry distant signal programming.[739] The first factor was the omission of cable operators selected in the sample but deemed ineligible to respond because they imported only PTV or Canadian distant stations.[740] As a result of this omission, Ms. McLaughlin testified that the value given for PTV and Canadian programming was a floor.[741] Had these omitted operators been included, they would have been restricted to dividing the value among only one programming category, PTV or Canadian, and required under the Bortz survey instructions to "make sure [that value] add[ed] to 100."[742] As a result, if these omitted operators had been included in the survey and followed the survey instructions, they would have been required to say 100 percent for PTV programming if that was the only distant signal carried and 100 percent

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736 McLaughlin WDT (SP Ex. 6) at 1; Tr. 399–404 (McLaughlin); CDN Ex. R-5 at 658–60 (McLaughlin).

737 Tr. 403–04 (McLaughlin) (providing several examples).

738 McLaughlin WDT (SP Ex. 6) at 7–12.

739 McLaughlin WDT (SP Ex. 6) at 8–9.

740 McLaughlin WDT (SP Ex. 6) at 8–9; Tr. 420–29 (McLaughlin). The second factor Ms. McLaughlin identified that impacted the Bortz results was the implied inclusion of certain noncompensable programming on WGN, which had the effect of overstating the values that cable operators that imported WGN ascribed to movies, syndicated series and devotional programming. McLaughlin WDT (SP Ex. 6) at 9; Tr. 473-83 (McLaughlin). This factor is discussed in more detail in ¶¶342-348 herein.

741 McLaughlin WDT (SP Ex. 6) at 8–9.

742 McLaughlin WDT (SP Ex. 6) at 8–9 (quoting Bortz survey instructions); Tr. 420–29 (McLaughlin).

for Canadian programming if that was the only distant signal carried.[743] Ms. McLaughlin added these omitted systems back into the Bortz survey.[744]

314. Ms. McLaughlin testified that when the ten omitted systems that carried only PTV and/or Canadian distant signals are added to each year's survey, the estimated values for PTV and Canadian programming increase and the estimated values for the five other categories decrease.[745] The augmented results for 2004-05 for each of the seven programming categories are summarized in the table below.[746]

Augmented Bortz Survey
Relative Value of Distant Signal Programming, By Bortz Category

Programming	2004 Share	2005 Share
Sports	32.4	35.5
News	17.9	14.2
Public Television	6.2	5.9 - 6.2
Syndicated	18.1	17.7
Movies	17.3	18.5
Devotional	7.6	6.3
Canadian	0.5	1.5 - 1.8

743 McLaughlin WDT (SP Ex. 6) at 8–9; Tr. 420–29 (McLaughlin).

744 McLaughlin WDT (SP Ex. 6) at 8–9; Tr. 420–29 (McLaughlin).

745 McLaughlin WDT (SP Ex. 6) at 9–12, Appendix 2; Tr. 429–33, 435 (McLaughlin).

746 McLaughlin WDT (SP Ex. 6) at 11 (Chart 4).

315. The augmented results for 2004-05 for the claimant groups in this proceeding, averaging the 2005 range of results for PTV and Canadian, is shown in the table below.[747]

Augmented Bortz Survey
Relative Value of Distant Signal Programming, By Claimant Group in This Proceeding

Programming	**2004 Share**	**2005 Share**
Sports	32.4	35.5
News	17.9	14.2
Public Television	6.2	6.1
Settling Parties (except Music)	**56.5**	**55.8**
Syndicated	18.1	17.7
Movies	17.3	18.5
Program Suppliers	**35.4**	**36.2**
Devotional	**7.6**	**6.3**
Canadian	**0.5**	**1.7**

316. Ms. McLaughlin testified that the relatively small size of the augmented Bortz result for PTV, like the size of the original PTV result, reflects the fact that only about 30 percent of Form 3 systems and about 25 percent of Form 3 subscribers receive a distant PTV signal.[748] The value given to PTV by respondents to the original 2004 survey for systems that carried PTV was 11 percent, a value higher than those given to Canadian and devotional programming, but less than other programming types.[749] Ms. McLaughlin testified that the augmented survey, if

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747 *See* McLaughlin WDT (SP Ex. 6) at 11 (Chart 4) (Sports, News, and Public Television shares combined into Settling Parties' share, and Syndicated and Movies shares combined into Program Suppliers' share).

748 McLaughlin WDT (SP Ex. 6) at 10 n.19 (citing CDC data).

749 McLaughlin WDT (SP Ex. 6) at 10 n.19 (citing Trautman WDT (SP Ex. 2) at 16, Table II-2.

restricted to those that carried distant PTV stations, would give PTV a value of about 19 percent in 2004, a value in the same range as news, syndicated programming and movies, and greater than the values given to devotional and Canadian programming.[750]

317. Both the unadjusted and augmented Bortz survey results show the percentage value of all royalties -- Basic, 3.75 and Syndex --- paid by the surveyed cable systems that the respondents assign to each programming type. Because PTV receives payments from only the Basic fund, an adjustment to the augmented survey results is needed to produce PTV's share of the Basic fund, as recognized by the CARP in the 1998-99 Proceeding.[751] This adjustment divides the augmented PTV results by the percent of Form 3 royalties in the Basic fund: 85.0 percent in 2004 and 85.9 percent in 2005.[752] The results of this further adjustment are shown in the table below.[753]

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750 McLaughlin WDT (SP Ex. 6) at 10 n.19.

751 *See* 1998-99 CARP Op. at 26 n.10 ("The Panel agrees ... that PTV's Bortz share should be adjusted upward to account for PTV's non-participation in the 3.75% or Syndex funds.").

752 McLaughlin WDT (SP Ex. 6) at 12 (based on data provided by CDC).

753 *See* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5) (Sports, News, and Public Television shares combined into Settling Parties' share, and Syndicated and Movies shares combined into Program Suppliers' share).

Augmented Bortz Survey
Relative Value of Basic Fund Distant Signal Programming,
By Claimant Group in This Proceeding

Programming	**2004 Share**	**2005 Share**
Sports	32.1	35.2
News	17.7	14.1
Public Television	7.3	7.1
Settling Parties (except Music)	**57.1**	**56.4**
Syndicated	17.9	17.5
Movies	17.1	18.3
Program Suppliers	**35.0**	**35.8**
Devotional	**7.5**	**6.3**
Canadian	**0.5**	**1.7**

318. No testimony was sponsored by any of the parties opposing either the need for an adjustment to the Bortz methodology for PTV and Canadian programming or the methodology behind the mathematical adjustments calculated by Linda McLaughlin. The rebuttal testimony submitted to address Ms. McLaughlin's adjustment related only to the Bortz survey generally or to the Bortz data utilized by Ms. McLaughlin.[754]

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[754] *See* Ford WRT (CDN Ex. R-2) at 19–21 (stating that "McLaughlin's argument has some theoretic logic, but the implementation . . . is flawed because it assumes that the Bortz sample is representative. . . . Additionally, due to an apparent clerical error in the Bortz database, McLaughlin underestimated the 'augmented' royalties estimated by her methodology [for the Canadian Claimants in 2004]."); Tr. 2998–3003 (Ford); Tr. 3077–78 (Calfee).

319. Like Ms. McLaughlin, Settling Parties witnesses James Trautman and Joel Waldfogel, Devotional witness Michael Salinger, Canadian witness Gary Ford, and Program Suppliers witness Arthur Gruen all support the need for an adjustment to account for cable systems that were excluded from the constant sum survey at issue because they carried only PTV and/or Canadian distant signals.[755]

320. James Trautman testified that "[a]s we have previously acknowledged, it is appropriate to adjust the Bortz survey results to account for cable operators that carry only PBS and/or only Canadian distant signals (neither of which are included in our survey)."[756]

321. In response to Judge Wisniewski's and Judge Sledge's questions, Dr. Waldfogel testified that:

> [Ms McLaughlin's] augmentation of the Bortz share makes a lot of sense to me, because discarding the information on the — for example, the systems that just import a public [television] signal makes the Bortz numbers not reflective of — of the relevant universe. . . . I do endorse what's done. . . . this is an adjustment that moves us towards . . . describing the full universe.[757]

322. Dr. Salinger testified that "[t]he Bortz Survey acknowledges that PBS (and Canadian) content may be undervalued. Some methodologically sound adjustment for PBS and Canadian content in Bortz results would be appropriate."[758]

323. The Canadian's witness Dr. Gary Ford agreed that an adjustment to the Bortz survey is "necessary" to address "the effect of not sampling the cable systems that only imported a Canadian signal," which would give the Canadian signals 100 percent valuation where they were the only distant signals carried.[759]

324. Program Suppliers' witness Dr. Gruen makes a similar adjustment to Program Suppliers' cable subscriber survey giving PTV programming 100 percent valuation where PTV

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755 *See* Tr. 3010 (Gary Ford); Salinger WRT (DC Ex. 4) at 39 n.24; Trautman WDT (SP Ex. 2) at 8; *see also* Tr. 108, 115–16 (Trautman); Tr. 791–93 (Waldfogel).

756 Trautman WDT (SP Ex. 2) at 8; *see also* Tr. 108, 115–16 (Trautman).

757 Tr. 791–93 (Waldfogel).

758 Salinger WRT (DC Ex. 4) at 39 n.24.

759 Ford WRT (CDN Ex. R-2) at 7 n.3; Tr. 3009–10 (Gary Ford).

signals were the only distant signals carried.[760] Dr. Gruen stated that this adjustment was necessary to make the survey "more accurately reflect actual marketplace conditions."[761]

2. Canadian Adjustment

325. The 1998-99 CARP determined that it would not rely upon the Bortz Survey to set the Canadians' award. While noting its "expressed concerns respecting fee generation," the CARP nevertheless tied the Canadians' award to the "fee generation" of distant Canadian signals, as adjusted by (1) the results of Dr. Ringold's constant sum surveys of cable operators and (2) the awards to other parties.[762] The CARP declined to use the Bortz results for the Canadians, noting that the survey was not designed to include Canadians and did not produce "statistically significant results."[763] The Panel did, however, observe that "fee generation does not reach the level of robustness and reliability of the Bortz study."[764]

326. In contrast to 1998 and 1999, when the Bortz Survey included only 2 and 3 systems respectively that carried distant Canadian signals, the Bortz Survey included 11 (18%) of the 61 total Form 3 systems carrying a distant Canadian signal in 2004 and 13 (25.5%) of those systems carrying a Canadian signal in 2005.[765] When adjusted to include the omitted systems addressed in Ms. McLaughlin's analysis, the 2004 Bortz results can be attributed to 13 (21.3%) of the 61 Canadian systems while the 2005 results can be attributed to 16 (31.4%) of the 51 Canadian systems.[766] These percentages are reflected in the below table[767]:

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760 Gruen WDT (PS Ex. 8) at 21.

761 Gruen WDT (PS Ex. 8) at 20.

762 1998-99 CARP Report at 31 n.13.

763 1998-99 CARP Report at 31 n.13.

764 1998-99 CARP Report at 64.

765 Ford WRT (CDN Ex. R-2) at 11-12; Tr. 3019-23 (Gary Ford); Bortz Report (SP Ex. 2) at 16 n. 12; Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 13 (Table 3).

766 Ford WRT (CDN Ex. R-2) at 20-21; McLaughlin WDT (SP Ex. 6) at 9-10.

767 *See,* Bortz Report (SP Ex. 2) at 16 n. 12 (Noting 11 respondents carried 1 or more Canadian distant signal in 2004 while 13 responding systems carried a Canadian distant signal in 2005. In 1998 and 1999 the comparable numbers were 2 and 3 respectively); Ford WRT (CDN Ex. R-2) at 11-12, 20-21 (Noting 61 Form 3 systems carried distant Canadian signals in 2004 while 51 carried such signals in 2005. Also, Ford notes that applying McLaughlin's analysis would result to adding 2 observations to the 2004

Footnote continued on next page

Percentage of Canadian Signals Captured by Bortz (as adjusted)				
	1998	**1999**	**2004**	**2005**
Form 3 Systems with Canadian Signal	66	62	61	51
Bortz Respondents with Canadian Signals	2	3	11	13
With Adjustments	-	-	13	16
% of Form 3 systems captured by Bortz (as adjusted)	3.0%	4.8%	21.3%	31.4%

327. For the two-year period (2004-05), the Bortz results provide valuations of approximately 29 respondents that carried a Canadian distant signal, which represents the highest number of any of the Bortz surveys.[768] That is close to the number of respondents that the Canadians' expert Dr. Gary Ford, considered to be sufficient to support a reliable estimate.[769] Indeed, the Canadians themselves have asked the Judges to rely on results where fewer respondents valued Canadian programming than those who valued Canadian programming in the 2004-05 Bortz Surveys.[770]

328. Dr. Ford conceded that Canadians are only entitled to a very small share of the royalties.[771] The results of the Bortz Survey in 2004-05 are consistent with the results previously

Footnote continued from previous page

Canadian sample taken by the Bortz Survey and 3 such observations in 2005); Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 13 (Showing Canadian distant signal carriage for 1990-2003); Tr. 3019-23 (Gary Ford) (Noting 11 and 13 respondents with Canadian signals is the highest achieved by Bortz).

768 Tr. 3020-21 (Gary Ford) (Noting 11 Bortz respondents carried Canadian signals in 2004 while 13 carried such signals in 2005).

769 Tr. 3029-3030 (Gary Ford) (Stating that 32 Bortz respondents with Canadian signals would be a sufficient sample size).

770 Gary Ford WDT (CDN Ex. R-2) at 13 n. 5. (Canadian claimants presented results on 22 respondents from the Ford-Ringold survey that carried French-language distant signals).

771 Tr. 3025-3026 (Gary Ford)

obtained over the previous 25 years, in which Canadians have never received a share greater than 0.6%.[772]

329. In addition to the adjustment referenced by Ms. McLaughlin, Settling Parties acknowledge that two additional adjustments to the Canadians' Bortz share should be made in determining the Canadian share here.

a. Gary Ford Adjustment

330. The Canadian Claimants' witness Dr. Gary Ford expanded on Ms. McLaughlin's adjustment to account for one system in 2004, Comcast of Washington IV, that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. Dr. Ford testified that if that system is included, the augmented Canadian percentage under the Bortz survey increases to 1.9% for 2004, using Ms. McLaughlin's methodology.[773]

b. Ringold Study

331. A further adjustment of the Canadian share is necessary to address the fact that the programming on the Canadian signals valued in the Bortz survey includes programming in the JSC and Program Supplier category. The Canadian Claimants, in fact, apply a similar adjustment to account for the same issue as part of their "fee generation" methodology.

332. As discussed in detail in ¶¶ 650-660 below, Canadian Claimants' witnesses Drs. Debra Ringold and Gary Ford conducted a constant sum survey of the eligible population of Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signal in 2004 or 2005.[774]

333. The survey was entitled "The Value of Canadian Programming to Cable Systems in the United States: 2004-2005" ("Ringold Study").[775] The Ringold Study estimates the value

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772 *See* Bortz Report (SP Ex. 2) at 23.

773 Gary Ford WDT(CDN Ex. R-2) at 21; Tr. 3000-01, 3026-27 (Ford).

774 Ringold WDT (CDN Ex. 4-A) at 2; Tr. 1301–04 (Ringold) (explaining how French language stations were handled).

775 Ringold WDT (CDN Ex. 4-A).

of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators.[776]

334. The Ringold Study asked about the value of seven different types of programming carried on a single Canadian signal randomly chosen from those Canadian signals retransmitted by the cable system.[777] The seven types of programming were: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian-produced news, public affairs, religious, and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis, and auto racing; (5) Canadian-produced series, movies, arts and variety shows, and specials; (6) Canadian-produced children's programming; and (7) other programming.[778] This approach allowed a signal-specific determination of the relative value of Canadian-produced programming on Canadian signals compared to programming produced by members of other claimant groups and retransmitted on Canadian signals.[779]

335. The results of the Canadian survey are summarized below:[780]

Summary of Results for Canadian Signals

Programming Category	2004	2005
Canadian-produced programming	59.94%	60.37%
Live professional and college team sports	27.167%	29.91%
U.S. syndicated series and movies	12.75%	9.56%

336. Dr. Ringold reported that her study showed that the average value of Canadian programming on the Canadian distant signals she studied was 60 percent during the 2004-05 time period.[781] In light of that fact, it is necessary to adjust the augmented Canadian Bortz shares downward and the augmented JSC and Program Supplier Bortz shares upward to account for the

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776 Tr. 1287 (Ringold); Ringold WDT (CDN Ex. 4-A) at 2.

777 Ringold WDT (CDN Ex. 4-A) at 2.

778 Ringold WDT (CDN Ex. 4-A) at 2–3; Tr. 1300–01 (Ringold).

779 Ringold WDT (CDN Ex. 4-A) at 3.

780 Ringold WDT (CDN Ex. 4-A) at 3–4, Table 1; Tr. 1310–11 (Ringold).

781 Ringold WDT (CDN Ex. 4-A) at 4.

presence of JSC and Program Supplier programming on Canadian distant signals. This approach is identical to that proposed by the Canadian Claimants and adopted by the 1998-99 CARP, except that the Ringold adjustments are applied to the augmented Canadian Bortz shares rather than the Canadian "fee generation" shares, which do not reflect relative marketplace value for the reasons set forth in ¶¶ 593-649, below. The calculations and results of this adjustment are set forth below in the Appendix.

337. With all of the adjustments shown above (the PTV and Canadian adjustments), the Augmented Bortz Shares are as follows:

Augmented Bortz Survey
Relative Value of Basic Fund Distant Signal Programming,
By Claimant Group in This Proceeding,
After Ford and Ringold Adjustments,
Devotional and Music Excluded
[*see* Appendix]

Programming	2004 Share	2005 Share
Sports	34.7	38.1
News	18.8	15.0
Public Television	7.8	7.5
Settling Parties (except Music)	61.3	60.6
Program Suppliers	37.5	38.3
Canadian	1.2	1.1

3. Further Adjustments

a. Incorporation of Music and Devotional Shares

338. The shares resulting from the Bortz survey must next be adjusted to account for the relative value of Music on distant signal, non-network programming. The shares of the remaining claimant groups (except Devotional as noted below) must be reduced by the 5.2% Music share for 2004 and the 4.6% Music share for 2005, as established by the Zarakas study discussed in Section IV.E.3, ¶¶ 373-392 below.

339. In addition, for the reasons explained in ¶¶ 672-688, the Devotional share from the 1990-92 proceeding (1.19375% of Basic Fund; 0.90725% of 3.75% Fund), which already accounted for Music, must be incorporated in the final share calculations, with the remaining shares (other than Music) being reduced by the same percentage.

b. Comprehensive Share Calculations

340. The final step is to calculate the shares of each claimant group for the three royalty funds, Base, 3.75% and Syndex, and to combine the shares for JSC, CTV, PTV and Music into a "Settling Parties" share. Because PTV is not eligible for the 3.75% fund, its Base share is adjusted upwards,[782] and all shares except Music and Devotional are adjusted downwards to represent 100% of the universe. Conversely, all shares in the 3.75% fund except Music and Devotional are adjusted upwards to account for PTV's non-participation in that fund.[783] Only Program Suppliers and Music are eligible for the Syndex Fund.

341. The final shares for all claimant groups for all three funds are set out in the tables below. The mathematical calculations underlying these results are set out in the Appendix, which is incorporated by reference into these Proposed Findings of Fact.

Final Shares -- Basic Fund

Claimant	2004 Share	2005 Share
Settling Parties	62.5	61.7
Program Suppliers	35.1	36.1
Devotional	1.2	1.2
Canadian	1.2	1.0

782 *See* 1998-99 CARP Op. at 26 n.10 ("The Panel agrees ... that PTV's Bortz share should be adjusted upward to account for PTV's non-participation in the 3.75% or Syndex funds.").

783 *See* 1998-99 CARP Op. at 91-92 ("[T]he 3.75% Fund shall be allocated in accordance with the Basic Fund allocations after making mathematical adjustments to account for the Devotionals stipulated 3.75% Fund award, our determination of Music's net share, PTV's non-participation, and Canadians fee-generated 3.75% award [not applicable here because Canadians proposed award based on adjusted Bortz shares].")

Final Shares -- 3.75% Fund

Claimant	2004 Share	2005 Share
Settling Parties	59.7	58.8
Program Suppliers	38.2	39.2
Devotional	0.9	0.9
Canadian	1.2	1.1

Final Shares -- Syndex Fund

Claimant	2004 Share	2005 Share
Settling Parties	5.2	4.6
Program Suppliers	94.8	95.4

4. WGN Non-Compensable Programming

342. The 1998-99 CARP identified the issue of "WGN Substitution" as an issue potentially affecting the value accorded to program suppliers (i.e., the movies and syndicated series categories).[784] This is due to the fact a substantial portion of the movie and syndicated programming carried by superstation WGN is not compensable – a fact that could not be known by respondents to the Bortz survey.[785] This issue also applies to Devotional programming on WGN – a significant percentage of which is not compensable.[786]

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[784] *See* 1998-99 CARP Report at 26-28

[785] *See* Bortz Report (SP Ex. 2) at 41.

[786] *See* Bortz Report (SP Ex. 2) at 41.

343. WGN was the most widely carried distant signal in 2004-05.[787] Nearly 50% of Form 3 cable systems carrying a commercial U.S. distant signal in 2004-05 carried WGN as their only distant signal, while approximately 70% of Form 3 systems carried WGN as one of their distant signals.[788] A significant percentage of the programming on distant signal WGN in 2004-05 was non-compensable because it was not transmitted simultaneously over both the satellite-delivered version of WGN and the WGN broadcast available as a local signal in the Chicago market.[789] The amount of non-compensable programming on WGN in 2004-05 increased to over 70% from about 50% in 1998-99.[790] Nearly all of this non-compensable programming consisted of programming in the Program Suppliers' category (91.4% in 2004 and 92.4% in 2005) and Devotionals category (8% in 2004 and 7.6% in 2005).[791] In 2004-05, over 78% of the Program Suppliers' programming and 90% of the Devotional programming on distant signal WGN was non-compensable.[792] These percentages are reflected in the tables below.

Percentage of Total Non-Compensable Programming on WGN

	2004	**2005**
Program Suppliers	91.4%	92.4%
Devotional Claimants	8%	7.6%
Total:	99.4%	100%

787 Trautman WRT (SP Ex. 57) at 15; Ducey WDT (SP Ex. 8) at 6.

788 Trautman WRT (SP Ex. 57) at 15, n.14.

789 Ducey WDT (SP Ex. 8) at 6.

790 Ducey WDT (SP Ex. 8) at 6.

791 SP Ex. 14.

792 Ducey WDT (SP Ex. 8) at 6.

Percentage of Program Supplier and Devotional Claimants WGN Programming That Was Non-Compensable	
	2004-05
Program Suppliers	78%
Devotional Claimants	90%

344. Mr. Trautman states in the Bortz Report that in light of this WGN substitution issue, the survey allocations for these categories represent a "ceiling" on the relative value that should be assigned to each when considering the potential impact of substitution.[793]

345. Ms. McLaughlin also agreed that an adjustment is needed.[794] She testified that, in general, two categories of programming contained on some imported signals are not compensable: (1) ABC, CBS and NBC network programming and (2) certain programming, particularly movies, syndicated and devotional programming, not retransmitted from the programming broadcast by the television station WGN but inserted into the satellite-delivered WGN signal.[795] The Bortz survey instructed respondents to ignore the value of the noncompensable network programming but not the value of the noncompensable WGN programming.[796] Ms. McLaughlin testified that, as a result, the values cable operators that imported WGN ascribed to movies, syndicated series and devotional programming likely included both compensable and noncompensable programming, which would overstate the values of the compensable programming in these categories.[797]

346. The 1998-99 CARP recognized the conceptual appropriateness of a WGN adjustment, but it rejected a proposed adjustment that (1) assumed that all non-compensable

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793 *See id.*

794 McLaughlin WDT (SP Ex. 6) at 9.

795 McLaughlin WDT (SP Ex. 6) at 9.

796 McLaughlin WDT (SP Ex. 6) at 9.

797 McLaughlin WDT (SP Ex. 6) at 9; Tr. 473–83 (McLaughlin).

programming was in the Program Suppliers category and (2) adjusted shares *pro rata* based solely on the proportion of hours of compensable programming.[798]

347. Employing the regression analysis discussed above, *see* PFOF ¶¶ 134-188, Dr. Ducey and Dr. Waldfogel have asserted a new proposed adjustment to address the WGN substitution issue. Specifically, Dr. Waldfogel calculated the change that would result from the application of the regression coefficients to all programming as opposed to just the compensable programming on distant signal WGN, in terms of the overall percentage shares resulting from his regression analysis.[799] Because these shares depend on the coefficients for the various program categories, which are essentially the relative implied prices for the different types of programs, the difference between these alternative shares reflects different relative values, not a pure program time measure.[800]

348. Based on Dr. Waldfogel's analysis, the Program Suppliers' relative share declined by *23.2%* when the non-compensable Program Suppliers programs on WGN were eliminated.[801] Based on these results, the Program Suppliers' award should be reduced by up to 23.2% from their 2004-05 Bortz survey shares.[802]

E. Music Share of 2004-05 Royalties

349. Music is a *program element*, not a *program category*.[803] "Virtually every professionally-produced television program employs copyrighted music licensed by the Music Claimants."[804] Music is used in television programming to "set the overall mood, drive the

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798 1998-99 CARP Report at 26-28.

799 *See* PFOF 175; Tr. 780-81 (Waldfogel).

800 *Id.* at 780-81.

801 Waldfogel (SP Ex. 18) at 15.

802 Waldfogel (SP Ex. 18) at 15; *see* PFOF 176. The specific amount of an appropriate reduction in the Program Suppliers' share would depend on how much of the value attributed by Bortz survey respondents to Program Suppliers programming categories was attributable to non-compensable programming on WGN, as to which there is no direct evidence, but it would be reasonable to expect that some portion of that value was attributed to non-compensable Program Suppliers programming.

803 O'Neill WDT (SP Ex. 26) at 2.

804 O'Neill WDT (SP Ex. 26) at 2.

story-telling, stimulate the viewer's emotions, weave the scenes of a television program or film together or serve as the very focal point of the program or movie."[805] Whether music is the basis for a music talent show like *American Idol*, the means for developing the emotion in a dramatic series or motion picture, or as a signature introduction to a news or sports program, "music pervades, enhances and in some cases dominates" television programs.[806] However, because music is an element that runs throughout all programming types, it differs in kind from the program categories represented by the other claimant groups in this proceeding.[807] None of the methodologies presented by the other parties to value their respective shares may also be used to determine Music's share.

350. In determining the Music Claimants' award in the 1998-1999 proceeding, the CARP considered evidence of the relative value of music as expressed in a ratio of total music license fees for commercial television broadcasts, including ABC, NBC, and CBS ("Big 3") network programming, to the sum of (a) such music license fees and (b) the total payments made by the stations and networks in the over-the-air broadcast market for the rights to broadcast the programs aired on such stations (so-called "broadcast rights payments").[808] While accepting the music ratio concept, the CARP recognized that the inclusion of music license fees and expenditures made by the Big 3 networks artificially decreased the music ratio to a level below where it would have been if the Big 3 networks had been excluded, as they should have been.[809] In addition, the CARP noted that the market for distant signal programming by cable system operators is different from the market for programming in the over-the-air broadcast market.[810] Accordingly, the CARP used the 1998-1999 music ratio analysis as a floor of 2.33% for determining Music's share, before ultimately awarding Music a 4.0% share (a slight reduction from the prior benchmark 4.5% award).[811] Adopting a music ratio approach that responded to

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805 Saltzman WDT (SP Ex. 25) at 10.

806 Saltzman WDT (SP Ex. 25) at 9-10.

807 O'Neill WDT (SP Ex. 26) at 2; Zarakas WDT (SP Ex. 27) at 8.

808 Zarakas WDT (SP Ex. 27) at 10.

809 Zarakas WDT (SP Ex. 27) at 10-11.

810 Zarakas WDT (SP Ex. 27) at 10.

811 1998- 99 CARP Report at 85-89; Zarakas WDT (SP Ex. 27) at 10-11.

the CARP's criticisms, Music Claimants presented evidence in this proceeding of a music ratio that excludes Big 3 network fees and expenses and adjusts for the differences between the over-the-air broadcast and distant signal markets. Based on this evidence, Music Claimants are entitled to a 5.2% share for 2004 and a 4.6% share for 2005.[812]

1. The Use of Music in Television Programming

351. Mr. Seth Saltzman, who is Senior Vice President of Member Management in the Performing Rights Group of ASCAP and has many years of experience in supporting the distribution of royalties for music performed on television, testified about the myriad ways in which music is used to enhance television programming.[813] Mr. Saltzman testified about how music is critical "to the sensory effect and story of the movie or television program."[814] Uses of music in television programming primarily include: (1) themes, such as signature tunes that immediately identify programs to viewers; (2) features, wherein musical performances "constitute the primary focus of the audience's attention" (*e.g.*, in programs such as *American Idol*); and (3) background music, which is a musical underscore that sets emotion or moves along action in a scene.[815] In the marketplace these music uses have valuable and increasingly important roles in local station programming.[816]

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[812] Music Claimants' proposed award is consistent with its unbroken history of allocations of at least 4% in every litigated cable distribution proceeding, from 1978 through 1999, the last litigated proceeding. *See* 1978 Cable Royalty Distribution Determination, Docket No. CRT 79-1 (45 Fed. Reg. 63026); 1983 Cable Royalty Distribution Proceeding, Docket No. CRT 84-1-83CD (51 Fed. Reg. 4415); 1990-1992 Distribution Order, Docket No. 94-3 CARP CD-90-92 (61 Fed. Reg. 55653); 1998-1999 CARP Report (Oct. 21, 2003). The shares shown by the music ratio study are also consistent with evidence from an experienced television music placement executive affirming the increased importance of the use of music in television programming in the past ten years. *See generally* Patsavas WDT (SP Ex. 24).

[813] Saltzman WDT (SP Ex. 25) at 1, 10.

[814] Saltzman WDT (SP Ex. 25) at 18.

[815] Saltzman WDT (SP Ex. 25) at 10, 12-13, 15.

[816] Saltzman WDT (SP Ex. 25) at 18.

a. The Use of Theme Music in Television.

352. As Mr. Saltzman explained, "theme music is the signature of the show, identifying it immediately to the viewer" and serving "as a welcome mat and as a fond farewell."[817] Virtually all programs use theme music, and the mere mention of a television show title conjures the sounds of that program's theme: from *I Love Lucy* to *The Andy Griffith Show*; *Bewitched* to *M*A*S*H*; *Happy Days* to *Cheers*, or even *The Simpsons*.[818]

353. However, themes are not limited to series television; other syndicated programs use them.[819] "Highly rated game shows, such as *Jeopardy!* and *Wheel of Fortune*, use famous themes. Cartoons and other children's programming also incorporate recognizable themes. Examples include themes to children's programs."[820] And talk shows such as *Oprah*, *The Ellen DeGeneres Show*, *Divorce Court* and *The People's Court* all have famous themes as well.[821] Likewise, musical themes identify sports programs and news broadcasts, such as "the opening theme to the New York NBC affiliate WNBC's local news, which incorporates the famous 3-note NBC chime."[822]

b. The Use of Feature and Background Music in Television.

354. As Mr. Saltzman testified, "[p]erhaps no other show in television history better epitomizes the power of a feature music performance than FOX's *American Idol*, the musical talent-search show and a ratings juggernaut airing two nights (and sometimes more) a week" that appeared on FOX network affiliates beginning in 2002.[823] The format of *American Idol* "consists almost exclusively of feature music performances of multiple music genres," that is, musical works that constitute the primary focus of the audience's attention.[824] *American Idol* was broadcast on multiple nights (generally Tuesdays and Wednesdays), and both broadcasts

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817 Saltzman WDT (SP Ex. 25) at 10.

818 Saltzman WDT (SP Ex. 25) at 10.

819 Saltzman WDT (SP Ex. 25) at 10.

820 Saltzman WDT (SP Ex. 25) at 10-11.

821 Saltzman WDT (SP Ex. 25) at 11.

822 Saltzman WDT (SP Ex. 25) at 11.

823 Saltzman WDT (SP Ex. 25) at 13.

824 Saltzman WDT (SP Ex. 25) at 13.

were among the top-three highest Nielsen-rated shows in the United States, on average, over the 2003-2004 and 2004-2005 television viewing seasons.[825] Moreover, in addition to its own popularity, the *American Idol* phenomenon "spurred the creation of other similar music-focused reality shows."[826]

355. But the use of music in television extends far beyond shows like *American Idol* and its progeny.[827] Ms. Alexandra Patsavas, the owner and operator of Chop Shop Music Supervision, a music supervision company for television shows and motion pictures, presented specific unrebutted testimony about the feature and background uses of music in television programs and movies in 2004 and 2005.[828] As a music supervisor, Ms. Patsavas develops and creates "the signature sound of a film or television program."[829] Ms. Patsavas testified that over the past ten years, including 2004 and 2005, "popular songs have been increasingly featured in episodic television and film, and some of the most memorable television moments are those scenes that [are] set to a recognized song."[830] This increase is due in part to a new generation of producers creating television programs who view music as an integral part of the characters' lives.[831]

356. Over the past 15 years, Ms. Patsavas has supervised music in hundreds of television episodes and dozens of motion pictures.[832] In that role, Ms. Patsavas collaborates with "all of the other creative people involved in the project, including the film or television editor, the director, and the producer, to select the right songs and to identify places in the film or

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825 Saltzman WDT (SP Ex. 25) at 13.

826 Saltzman WDT (SP Ex. 25) at 13.

827 Saltzman WDT (SP Ex. 25) at 10-18.

828 Patsavas WDT (SP Ex. 24) at 1.

829 Patsavas WDT (SP Ex. 24) at 4.

830 Patsavas WDT (SP Ex. 24) at 10.

831 Patsavas WDT (SP Ex. 24) at 2; *cf.* Saltzman WDT (SP Ex. 25) at 15 ("[C]ertain acclaimed movie directors . . . have thrust the popular music with which they grew up into a pivotal role in their films.").

832 Patsavas WDT (SP Ex. 24) at 1.

television program that benefit from a musical treatment."[833] Ms. Patsavas has worked on dozens of television series, including *The O.C.*, *Gossip Girl*, *Boston Public*, *Mad Men*, *Fastlane*, *Grey's Anatomy*, *Without A Trace*, *Rescue Me*, and *Supernatural*, and numerous feature films such as *Twilight*, the soundtrack of which went double-platinum.[834]

357. Ms. Patsavas testified that "[t]he use of songs in television series and film is widespread."[835] In a one-hour program, which runs approximately 43 minutes without commercials, the music supervisor may have to select 6 to 8 songs, commonly amounting to 12-14 minutes of music inserted in each program, which is in addition to the theme or background music.[836]

358. Music is used to "convey the setting of the scene or the different emotions of the characters" in a television series.[837] As an example, Ms. Patsavas cited her work on the show *Roswell*, which used music from the popular bands Coldplay and Radiohead to highlight the creative direction of the show.[838] The role of the music in *Roswell* expanded as the show began to feature bands performing live on camera.[839] In addition, *Roswell* "was one of the first [shows] to have an online presence devoted exclusively to announcing the music in each episode, a practice that became much more common by 2004 and 2005."[840] Following this trend, many popular television shows including *Grey's Anatomy*, *Boston Public*, *Tru-Calling*, *1-800 Missing*, *Supernatural*, *Gossip Girl*, and *Mad Men* "alert[ed] viewers both during and at the completion of the show as to the names of the songs that have been used and many even feature the artist singing the work."[841]

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833 Patsavas WDT (SP Ex. 24) at 1.

834 Patsavas WDT (SP Ex. 24) at 4.

835 Patsavas WDT (SP Ex. 24) at 6.

836 Patsavas WDT (SP Ex. 24) at 6.

837 Patsavas WDT (SP Ex. 24) at 6.

838 Patsavas WDT (SP Ex. 24) at 6-7.

839 Patsavas WDT (SP Ex. 24) at 7.

840 Patsavas WDT (SP Ex. 24) at 7.

841 Patsavas WDT (SP Ex. 24) at 7.

359. Ms. Patsavas testified in detail about her work on *The O.C.*, a FOX television program which was retransmitted by distant signal in 2004 and 2005 and which highlights the importance of music to series television during that time.[842] As Ms. Patsavas explained, *The O.C.* was "[o]ne of the first shows to fully integrate music into the fabric of the entire show."[843] Music was so important to *The O.C.* that it became "the backdrop to the characters' daily activities and the focus of their parties and the emotional glue to their relationships."[844] Indeed, music was such an intricate part of the show that the creators set many scenes in The Bait Shop, a club where the characters socialized and which featured "a number of live performances by famous recording acts over the seasons, including platinum selling indie rock acts such as Modest Mouse, the Killers and Death Cab for Cutie."[845]

360. Through a series of examples, Ms. Patsavas demonstrated music's ability to "enhance the emotion of a scene" in *The O.C.*[846] Ms. Patsavas referenced three separate scenes – a wedding, a death, and a simple walking scene – as exemplars of scenes that were significantly enhanced by using music.[847] Each scene, as well as the music that was included in it, became memorable.[848] In fact, music became such an important part of *The O.C.* "that websites have been created that are dedicated solely to the music on the program."[849]

361. As Ms. Patsavas documented, *The O.C.* was not the only show in which music played an important role. In fact, the "trend of incorporating pop music as a feature production element of the program has become a production mainstay."[850] Ms. Patsavas also described popular programs such as *Grey's Anatomy* and *Gossip Girl* that prominently feature music.[851]

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842 Patsavas WDT (SP Ex. 24) at 7-10.

843 Patsavas WDT (SP. Ex. 24) at 7.

844 Patsavas WDT (SP Ex. 24) at 8.

845 Patsavas WDT (SP Ex. 24) at 8.

846 Patsavas WDT (SP Ex. 24) at 8.

847 Patsavas WDT (SP Ex. 24) at 9.

848 Patsavas WDT (SP Ex. 24) at 9.

849 Patsavas WDT (SP Ex. 24) at 9-10.

850 Patsavas WDT (SP Ex. 24) at 10.

851 Patsavas WDT (SP Ex. 24) at 10.

Grey's Anatomy "is trend-setting in its use of music because of the length of uninterrupted music it uses," and the music featured in *Gossip Girl* "give[s] the show a real New York edge."[852]

362. In addition to her testimony regarding music in television series, Ms. Patsavas also illustrated the use of music to set the scene in motion pictures by referring to her work on the motion picture *Gun Shy*.[853] As music supervisor for that film, Ms. Patsavas was required to choose music that captured the complex and competing emotions among the characters that "would convey to the audience the comedic nature of events that otherwise on film would appear to be desperate and violent acts by the characters."[854] She separately identified music in that film which "establish[ed] the growing romantic entanglement between the two lead stars."[855] Ms. Patsavas presented the cue sheet, a list of all music used in a particular film or television program, for *Gun Shy*, which demonstrates the breadth of the use of music in film.[856]

363. "Music is valuable because it intensifies the experience for the viewer and may be used to capture the mood of a scene or create a distinct, signature sound for a film or television program."[857] Indeed, Ms. Patsavas' testimony demonstrates that "[m]usic is an essential and important part of all television programming."[858] Moreover, the role of feature music in television and films is important and has been increasing over the past decade, including in 2004 and 2005.[859]

2. Licensing of Music Rights

364. The three performing rights organizations ("PROs") that comprise the Music Claimants in this proceeding serve as clearinghouses for their members and affiliates and the

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852 Patsavas WDT (SP Ex. 24) at 10.

853 Patsavas WDT (SP Ex. 24) at 6.

854 Patsavas WDT (SP Ex. 24) at 6.

855 Patsavas WDT (SP Ex. 24) at 6.

856 Patsavas WDT (SP Ex. 24) at 6, MC 04-05 Ex. 7.

857 Patsavas WDT (SP Ex. 24) at 10.

858 Patsavas WDT (SP Ex. 24) at 10.

859 Patsavas WDT (SP Ex. 24) at 10.

users of copyrighted music in their repertoires, licensing their music repertoires to businesses that use music in a wide variety of venues.[860]

365. PROs make more efficient licensing of music possible.[861] Given the vast number of users and performances, it would be extremely time-consuming and costly for their individual members and affiliates to locate and license performances of all of their works across the entire spectrum of music users by themselves.[862] Similarly, Music Claimants greatly enhance the ability of users of copyrighted music to obtain music performing rights.[863] Without blanket licenses available from PROs, users would have to identify the owners of the music they wish to perform and negotiate licenses with each one of them in advance of the uses.[864]

366. Mr. Michael O'Neill, BMI's Senior Vice President, Licensing, explained that PROs facilitate the myriad uses of music by licensing in bulk.[865] Each PRO separately offers "blanket" licenses to music users.[866] For a negotiated annual fee, the blanket license provides the music user permission to use as much or as little music in the PRO's repertoire, along with the repertoires of works from each of their foreign affiliates, as it wishes.[867] Through the blanket license, the music user is able to limit greatly its transactional licensing costs and is also indemnified by the PRO for infringements.[868]

367. Each of the PROs enters into negotiations and music license agreements with different segments of the over-the-air broadcast television industry, including the Big 3 networks, the local broadcast television stations, and the Univision Spanish language network.[869]

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860 Saltzman WDT (SP Ex. 25) at 5.

861 Saltzman WDT (SP Ex. 25) at 6.

862 Saltzman WDT (SP Ex. 25) at 6.

863 Saltzman WDT (SP Ex. 25) at 6.

864 Saltzman WDT (SP Ex. 25) at 6.

865 O'Neill WDT (SP Ex. 26) at 3; *see also* Saltzman WDT (SP Ex. 25) at 6.

866 O'Neill WDT (SP Ex. 26) at 3.

867 O'Neill WDT (SP Ex. 26) at 3.

868 O'Neill WDT (SP Ex. 26) at 3; Tr. 1086 (O'Neill).

869 Tr. 1084-91 (O'Neill).

The scope of each of these licenses is limited to the music used in a specific subset of television programming.[870]

368. The PROs each negotiate separate blanket music licenses with ABC, NBC, and CBS that cover the musical works contained in the network-supplied programming that is broadcast by Big 3 network affiliates.[871] The Big 3 network licenses do not extend to locally-produced or locally-acquired programming broadcast on network-affiliated stations.[872] As relevant to this proceeding, the Big 3 network licenses cover only music contained in programming whose retransmission on stations carried by distant signal is not compensable under section 111.[873]

369. The PROs each separately negotiate with an industry committee of local television broadcasters known as the Television Music License Committee ("TMLC") to license the public performance of musical works contained in programming broadcast on local television stations (other than the Big 3 network and Univision network programming).[874] The TMLC represents more than 1,300 commercial television stations, including Big 3 network affiliated stations, stations affiliated with other networks, and Independent stations.[875] The TMLC agreed to blanket licenses from the PROs that totaled $195.5 million in 2004 and $186 million in 2005.[876]

370. The BMI industry-wide blanket license fee ($85 million in 2004) for local programming is allocated among each of the more than 1,300 local television stations by a

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870 Tr. 1084-91 (O'Neill).

871 O'Neill WDT (SP Ex. 26) at 6; Tr. 1085 (O'Neill).

872 Tr. 1084-85 (O'Neill).

873 O'Neill WDT (SP Ex. 26) at 6; Zarakas WDT (SP Ex. 27) at 12.

874 O'Neill WDT (SP Ex. 26) at 4. Tr. 1085 (O'Neill). Each of the PROs has a separate blanket license agreement with Univision that covers the musical works on both the Univision network programming as well as any non-network programming carried on Univision affiliates. Tr. 1107-08 (O'Neill), Tr. 1166 (Zarakas).

875 Tr. 1085 (O'Neill).

876 O'Neill WDT (SP Ex. 26) at 5, MC 04-05 Ex. 5; Saltzman WDT (SP Ex. 25 at MC 04-05 Ex. 2). The BMI industry-wide blanket license fee for 2005 is an interim fee set by the BMI Rate Court. O'Neill WDT (SP Ex. 26) at 5.

formula developed by the TMLC.[877] As an option under the industry-wide TMLC-negotiated blanket license agreements, BMI and ASCAP each offer a "per program license" to their respective catalogs.[878] A per program license is also a "blanket license" in the sense that it allows the licensee to use any of the works in a PRO's repertoire.[879] However, unlike the blanket license, under a per program license a television station pays a fee only for the specific programs that include music from the PRO's repertoire.[880] Each station has a per program license fee, which is designed to equal the blanket license fee that station would pay if it were charged on a program-by-program basis, given the typical station's BMI music use profile (with the inclusion of a higher administrative charge).[881]

371. To illustrate, under the BMI per program license, a station is allocated an overall BMI "starting fee" that is considerably higher than its allocated blanket fee, but is payable only for local programs with BMI music.[882] The station ultimately pays BMI a monthly fee for each local program that contains BMI works using a fee formula that calculates the station's revenue from local programs that include BMI music divided by total station local program revenue. This ratio is multiplied by the starting fee.[883] In order to pay BMI lower fees than their allocated blanket license fees, the 300-350 stations that opt for a per program license must separately obtain direct licenses for the BMI musical works contained in some of their local programs.[884] These programs will then not be covered by the per program license payment to BMI. Stations opting for the per program license have increased music use reporting obligations to the PROs.[885] Accordingly, for a per program license to reduce its BMI fee below the blanket level it would

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877 Tr. 1098 (O'Neill).

878 O'Neill WDT (SP Ex. 26) at 5-6.

879 O'Neill WDT (SP Ex. 26) at 5.

880 O'Neill WDT (SP Ex. 26) at 5-6.

881 O'Neill WDT at 5-6.

882 Tr. 1099 (O'Neill).

883 O'Neill WDT (SP Ex. 26) at 5-6; Tr. 1099-1100 (O'Neill).

884 O'Neill WDT (SP Ex. 26) at 6.

885 Tr. 1099-1100 (O'Neill). A direct license is a license signed by the station directly with a publisher; a source license is a license signed by the program producer with a publisher that covers the broadcast of the music by the local broadcast station. Tr. 1087 (O'Neill).

otherwise pay, the licensee must efficiently acquire direct licenses for the BMI music in some or all of the local programming that it carries.[886]

372. In the absence of the compulsory license, the PROs would likely negotiate licenses with cable system operators, and those licenses would likely be blanket licenses (given the high transactional costs a cable operator would face if it wished to license directly the music contained in all retransmitted local broadcast programs carried in distant markets).[887] Indeed, the PROs already enter into blanket license agreements with cable systems for their locally-originated content.[888] BMI and ASCAP negotiate with the cable operators through an industry committee of cable operators formed by the National Cable Television Association ("NCTA").[889] Under the NCTA agreements, cable systems make payments to the PROs on a negotiated price-per-subscriber basis.[890] In 2004 and 2005, the PROs received blanket license fees of $10 million from cable systems for these incidental use licenses.[891]

3. Zarakas Music Ratio Analysis

373. In order to determine Music's relative value in this proceeding, the Music Claimants retained Mr. William P. Zarakas, a Principal in The Brattle Group and an expert in the valuation of assets and businesses in the communications and media industries, to analyze the value of music in the distant signal marketplace.[892] Mr. Zarakas used a market-comparable

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886 Tr. 1105 (O'Neill).

887 Tr. 1090-91, 1093-94 (O'Neill). "Q. Absent the compulsory license, would BMI negotiate licenses for the retransmission – for music contained in the retransmission of distant signals? A: Yes, we would. Q: And who would BMI negotiate those licenses with? A: We'd negotiate probably with the parties paying today, which is the cable operators, that's who we would be negotiating with."

888 Tr. 1089-90 (O'Neill); *see* O'Neill WDT (SP Ex. 26) at MC 04-05 Ex. 6. Locally originated content is any incidental programming not covered by the PROs' network licenses with cable programming services (e.g. TNT, HBO) that cover the cable operator, or by the compulsory license that covers retransmission of local and distant broadcast programming. Tr. 1083-84 (O'Neill).

889 Tr. 1090 (O'Neill).

890 O'Neill WDT (SP Ex. 26) at 7.

891 O'Neill WDT (SP Ex. 26) at 7.

892 Zarakas WDT (SP Ex. 27); Tr. 1136-37 (Zarakas).

methodology to analyze the value of music as compared to the value of other copyrighted materials included in the distant retransmission of over-the-air broadcast signals.[893]

374. As discussed above, Mr. Zarakas' analysis refined a model introduced by the JSC during the rebuttal phase and considered by the CARP in the 1998-1999 cable distribution proceeding as a floor for the value of music. In that proceeding an estimate of the relative value of music in the broadcasting marketplace was derived through creating a "music ratio" of total music license fees to the sum of (a) such music license fees and (b) broadcast rights payments, which consist of the total payments made by the stations and networks in the over-the-air broadcast market for the rights to broadcast the programs aired on such stations.[894] The concept of the music ratio is expressed generally as:[895]

$$\text{music ratio} = \frac{\text{Music License Fees}}{\text{Music License Fees} + \text{Broadcast Rights Payments}}$$

375. The music ratio presented in the 1998-1999 CARP proceeding was not designed specifically to measure music's value in the distant signal market, but rather was based on industry wide television broadcast licensing fees and rights payments in the over-the-air broadcast market.[896] The "Unadjusted Music Ratio" reviewed by the CARP in the 1998-99 proceeding included music license fees and broadcast rights payments by the Big 3 networks even though that programming is not compensable under section 111.[897] In addition, no weighting whatsoever was applied to the 1998-1999 ratio to account for the difference between

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893 Tr. 1139 (Zarakas); Zarakas WDT (SP Ex 27) at 11.

894 Zarakas WDT (SP Ex. 27) at 3, 11. Pursuant to the Copyright Act (at the time), upon completion of a CARP report, the Register of Copyrights advised the Librarian of Congress whether to adopt it, and the Librarian adopted the report unless he found a that a determination was arbitrary and capricious. In the 1998-1999 proceeding, the Librarian adopted the Register's recommendation and adopted the CARP's proposed distribution. 69 Fed. Reg. 3606 (Jan. 26, 2004).

895 Zarakas WDT (SP Ex. 27) at 3; Tr. 1140 (Zarakas).

896 Zarakas WDT (SP Ex. 27) at 10.

897 Zarakas WDT (SP Ex. 27) at 10.

the particular mix of station types retransmitted by distant signals and the stations that generally make up the entire broadcast television market.[898]

376. In this proceeding, Mr. Zarakas testified that a "music ratio" approach is "a reasonable method to calculate the value of music relative to the value of the programming of the other copyright owner claimant groups," provided that the data used for such a calculation "capture comprehensively and accurately the values to be used to calculate the music ratio for distant signals."[899] As a result, in a two step process, Mr. Zarakas sought to address the concerns raised by the 1998-1999 CARP. First, he methodically obtained relevant data inputs and calculated adjusted music ratios for each different category of television stations in the over-the-air local broadcast market, such as Independent stations or network affiliates, but excluded music license fees and broadcast rights payments for Big 3 network programming.[900] Second, he weighted these music ratios using distant signal subscriber instances for each of these different categories of television stations to reflect the relative importance of the various stations actually carried by cable system operators and received by subscribers as distant signals during 2004 and 2005.[901]

a. The Data Used to Create the Music Ratio for This Proceeding

(i) Blanket Music License Fees

377. There are two data sources that provide information concerning local television music license fees for 2004 and 2005 that can be used as the numerator of a music ratio.[902] The first is the local television music blanket license fee data provided by the PROs and utilized by Mr. Zarakas.[903] These data identify the blanket license fees negotiated and agreed to by the TMLC and each PRO for all local stations in the broadcast market for their local (*i.e.*, non-Big 3

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898 Zarakas WDT (SP Ex. 27) at 10.

899 Zarakas WDT (SP Ex. 27) at 3.

900 Zarakas WDT (SP Ex. 27) at 11-25.

901 Zarakas WDT (SP Ex. 27) at 25-31.

902 Zarakas WDT (SP Ex. 27) at 13.

903 Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43 (Zarakas).

network) programming.[904] The blanket license fees are therefore a negotiated benchmark fee valuation by the television stations themselves for blanket license rights to the PROs' entire catalogs, are the most comprehensive, accurate data in the record, and are the only data that values all music use in local broadcast markets.[905] The second set of data (which were provided by the PROs in discovery and used by Dr. Woodbury in his unadjusted study) is comprised of the music license fee expenditures made by the broadcast stations to the PROs.[906] The total license fees paid to PROs are somewhat lower each year than the annual blanket license fees because about 30% of stations opt for the per program licenses from BMI and ASCAP.[907] Under per program licenses, stations can choose to obtain rights to a substantial portion of their music through direct licenses and accordingly lower their fee payments to ASCAP and BMI.[908] These payment data are flawed for purposes of use in this proceeding because they fail to include any amount paid by per program stations (or their program providers) to composers and publishers for direct licenses.[909] There is no publicly available data that identifies the amount paid by local stations for direct licenses.[910] Those fees are not disclosed to the PROs by their members and affiliates.[911]

378. For several reasons, Mr. Zarakas chose to use blanket music license fees in the numerator of a music ratio for this proceeding.[912]

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904 Tr. 1142-43 (Zarakas).

905 Zarakas WDT (SP Ex. 27) at 13-14.

906 Zarakas WDT (SP Ex. 27) at 14; Tr. 3291-95 (Woodbury).

907 O'Neill WDT (SP Ex. 26) at 5-6; Tr. 1104-05 (O'Neill) (indicating that approximately 300 to 350 of the more than 1,300 broadcast stations have a per program licenses).

908 O'Neill WDT (SP Ex. 26) at 5-6; Tr. 1104-05 (O'Neill). SESAC had only a blanket license in 2004 and 2005. Tr. 1107 (O'Neill).

909 Zarakas WDT (SP Ex. 27) at 13.

910 O'Neill WDT (SP Ex. 26) at 6; Tr. 1089, 1106 (O'Neill); Tr. 1143-44, 1160-61 (Zarakas) ("[T]hese are private transactions. . . . There's no . . . public information on them.").

911 Tr. 1089, 1101, 1106 (O'Neill): The PROs "receive notification [from their members or affiliates] if they direct or source license, but they redact the amounts that they . . . pay."

912 Zarakas WDT (SP Ex. 27) at 13.

379. First, blanket license fees represent market-based prices that the Music Claimants negotiated with the local television stations for the right to perform publicly all music in the Music Claimants' repertoires during 2004 and 2005.[913] Because these were arms-length negotiated blanket license fees, they are an accurate and reliable measure of the market price of music licenses in the local over-the-air broadcast market and provide strong evidence of the value of the music licenses to the local broadcast stations.[914]

380. Second, blanket music license fees are the only available measures of total market-based prices.[915] In stark contrast, music license payments by the local broadcast stations to the PROs alone necessarily understate the total amount of music license fees paid by these television stations because they exclude station payments for direct licenses with composers and music publishers.[916] That the direct licenses exist is not in doubt; the PROs receive copies of the direct licenses, but the financial terms are redacted on the copies provided to the PROs.[917]

381. Third, absent the compulsory license, the PROs would negotiate licenses directly with the cable system operators.[918] The cable systems currently license only on a blanket, not a per program basis, and they would be unlikely to enter into direct licensing transactions necessary to take full advantage of a per program license.[919] Therefore, the blanket license fees provide the proper benchmark because the cable system would most likely acquire blanket licenses from the PROs for this music in an open market.[920]

382. Finally, while there is no empirical or quantitative evidence as to the amount paid by the stations in direct license fees, Mr. O'Neill testified that he was aware of instances in

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913 Tr. 1086 (O'Neill); Zarakas WDT (SP Ex. 27) at 13; Tr. 1160 (Zarakas).

914 Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43, 1160 (Zarakas).

915 Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43 (Zarakas).

916 Zarakas WDT (SP Ex. 27) at 14; *see also* Tr. 3295, 3318-19 (Woodbury) ("[M]y numerator, the music rights fees, . . . does not include the direct license fee payments. And to that extent, there will be an underestimate in my ratio.").

917 Tr. 1101 (O'Neill).

918 Tr. 1093-94 (O'Neill).

919 O'Neill WDT (SP Ex. 26) at 9.

920 O'Neill WDT (SP Ex. 26) at 9.

which stations on a per program license paid more to the PROs than their blanket license fee share, and that, in other cases, stations switch back and forth between the blanket and per program license.[921] This anecdotal evidence suggests that the difference between the negotiated blanket fee and the actual license fees paid, including direct fees, is not significant.[922]

383. Mr. Zarakas included local broadcast station blanket PRO licenses of $195.5 million in 2004 and $186 million in 2005 and then added the blanket license fees agreed to (and paid by) the Univision network.[923] In sum, the blanket license fees agreed to by the local television industry and Univision totaled $200.8 million for 2004 and $191.7 million for 2005.[924] These figures, adjusted to exclude payments by stations that went off the air in the relevant year and/or were designated as "Small," constituted the numerators in the music ratio for each year and were also included as one component of the denominator.[925]

384. To calculate music ratios for different station types so that they could be subsequently weighted, Mr. Zarakas allocated fees to each station type consistent with the

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921 Tr. 1127-1128 (O'Neill).

922 Tr. 1128 (O'Neill).

923 Zarakas WDT (SP Ex. 27) at 14-15.

924 Zarakas WDT (SP Ex. 27) at 14-15.

925 Zarakas WDT (SP Ex. 27) at 25.

TMLC allocation protocol.[926] The breakdown of blanket license fees by stations type is as follows from his report:[927]

Table 2
2004 and 2005 Blanket Music License Fees – Numerator

	Blanket Music License Fees ($Millions)	
	2004	2005
Big-3 Networks		
ABC Affiliates	$37.71	**$34.40**
CBS Affiliates	$37.87	**$36.24**
NBC Affiliates	$38.82	**$36.32**
Non Big-3 Networks		
FOX Affiliates	**$34.56**	$34.09
UPN Affiliates	**$13.88**	$11.86
WB Affiliates	**$17.24**	$16.85
Other*	**$14.51**	$15.16
Independents	**$6.22**	$6.81
Total	**$200.8**	$191.7

*Off-air and small stations are included in the "Other" category

Sources: ASCAP, BMI, SESAC

(ii) Calculation of Broadcast Rights Components

385. Total broadcast rights payments, excluding those for Big 3 network programming, were included in the denominator of the music ratio for each category of television station, *e.g.*,

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926 Tr. 1144-45 (Zarakas) ("I've assigned an affiliation, either a network affiliation or an independent designation, for each station, and I've just summed up the allocations that were made by the TMLC."). As Mr. Zarakas further explained: "The TMLC allocates the aggregate blanket license fee among stations in accordance with a methodology it devised to produce each station's annual blanket license fee. For example, in the case of BMI's Local Television Station Music Performance Blanket License, the industry wide blanket music license fee is allocated among television markets based on the three-year average of US television households in that market. The top-25 markets are over-weighted to reflect that a household in a big city has more value than a household in a small town. The portion of the blanket music license fee allocated to a particular market is further allocated among stations in that market based on viewership in 30-minute increments during the hours of 9am to 12pm during the "sweeps" month for the three previous years." This includes an exclusion for prime time viewing audiences for Big 3 network affiliates. Zarakas WDT (SP Ex. 27) at 15, n.22.

927 Zarakas WDT (SP Ex. 27) at 15, Table 2.

ABC affiliate, NBC affiliate, FOX affiliate, Independent.[928] The broadcast rights portion of the music ratio denominator consisted of three components: (1) local television stations broadcast rights payments for non-network programming; (2) an estimate of broadcast rights payments for non-Big 3 network programming, and (3) an estimate of the broadcast rights payments that would be paid to the local stations for programs they produce themselves (*i.e.*, the broadcast value of locally-produced programming).[929]

(a) Broadcast Rights Payments Made by Local Television Stations.

386. The Television Financial Report is published annually by NAB and Broadcast Cable Financial Management Association (the "NAB Survey").[930] The NAB Survey provides data on station "revenues and various expenditures, including how much stations spend for broadcast rights."[931] This data is presented in the form of average expenditures made by each station type, either network affiliate or Independent, on broadcast rights payments.[932] Mr. Zarakas separately sorted the television stations by their affiliation with various networks (including non-Big 3 networks) or as "Independent."[933] He then calculated the total expenditures made by television stations on broadcast rights for 2004 and 2005 by multiplying the average expenditure per station type by the number of commercial television stations in each category.[934]

387. The NAB Survey provides broadcast rights data on both a cash and an amortized accrual basis.[935] Mr. Zarakas chose to use the amortized broadcast rights payments data because it includes the value of booked barter arrangements and yields a more conservative calculation of

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928 Zarakas WDT (SP Ex. 27) at 16.

929 Zarakas WDT (SP Ex. 27) at 16; Tr, 1141-42 (Zarakas).

930 Tr. 1145 (Zarakas).

931 Tr. 1145 (Zarakas).

932 Zarakas WDT (SP Ex. 27) at 16-17.

933 Zarakas WDT (SP Ex. 27) at 16; Tr, 1141-42 (Zarakas).

934 Tr. 1146 (Zarakas) Zarakas WDT (SP Ex. 27) at 17.

935 Zarakas WDT (SP Ex. 27) at 17, n.25.

the music ratio because it results in a larger denominator than under the cash approach.[936] Mr. Zarakas' calculations from Table 3 of his report are set forth below.[937]

Table 3
Total Station Broadcast Rights Payments

		Average Station Broadcast Rights Payments		Number of Stations		Station Broadcast Rights Payments	
		2004 [a]	2005 [b]	2004 [c]	2005 [d]	2004 [e]	2005 [f]
[1]	All	$1,698,272	$1,702,840	1,187	1,192	$2,015,848,864	$2,029,785,280
[2]	ABC Affiliates	$2,100,520	$2,290,689	195	195	$409,601,400	$446,684,355
[3]	CBS Affiliates	$1,222,075	$1,151,584	193	193	$235,860,475	$222,255,712
[4]	NBC Affiliates	$1,128,155	$1,170,914	195	194	$219,990,225	$227,157,316
[5]	FOX Affiliates	$1,519,649	$1,161,136	165	166	$250,742,085	$192,748,576
[6]	UPN Affiliates	$2,094,220	$2,749,883	80	79	$167,537,600	$217,240,757
[7]	WB Affiliates	$5,900,565	$5,633,831	81	83	$477,945,765	$467,607,973
[8]	Independents	$2,178,891	$2,521,584	57	58	$124,196,787	$146,251,872
[9]	Other	$588,120	$490,351	221	224	$129,974,527	$109,838,719

Sources:
[1-8]: [a]: NAB, *2005 Television Financial Report*
[b]: NAB, *2006 Television Financial Report*
[c], [d]: M Street data (provided by BMI)
[e] = [a] x [c]
[f] = [b] x [d]
[9]: [a] = [e]/[c]
[b] = [f]/[d]
[c], [d]: [1] - sum([2] thru [8])
[e],[f] = [1] - sum([2] thru [8])

(b) Broadcast Rights Payments for Non-Big 3 Network Programming.

388. Although the network programming on the Big 3 networks is not compensable under section 111, network programming on FOX, WB, UPN and other networks is

936 Zarakas WDT (SP Ex. 27) at 17, n.25: "Amortized broadcast rights in this case refers to the accounting of payments under a accrual method and also includes the value of booked barter arrangements. Bartered programming is the booked advertising revenue in exchange for syndicated programming. Broadcast rights payments were also reported on a cash basis, which reflects the actual dollar amounts paid for broadcast rights. Cash payments were slightly less than the amortized broadcast rights; in 2004, cash payments were approximately $1.65 million per station on average and such payments were $1.66 million per station on average in 2005."

937 Zarakas WDT (SP Ex. 27) at 17 Table 3.

compensable.[938] Broadcast rights payments for non-Big 3 network programming are not included in the NAB Survey data and they are not otherwise publicly available.[939] As a proxy for these broadcast rights payments, Mr. Zarakas used programming expenses data from SNL Kagan, a recognized source of economic information for the television broadcast industry.[940]

389. By definition, broadcast rights are a subset of programming expenses.[941] According to the NAB Survey, for television stations, broadcast rights constituted approximately 74% and 73 % of program expenses in 2004 and 2005, respectively.[942] However, Mr. Zarakas was unable to confirm whether a similar ratio applied to non-Big 3 networks.[943] Accordingly, to be conservative in his estimate, Mr. Zarakas included all non-Big 3 network programming expenses in the denominator of the music ratio.[944] Dr. John Woodbury agreed that such use of programming expenses is conservative.[945] The following programming expenses for non-Big 3 networks were included in Mr. Zarakas' analysis:[946]

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938 Zarakas WDT (SP Ex. 27) at 8.

939 Zarakas WDT (SP Ex. 27) at 18.

940 Zarakas WDT (SP Ex. 27) at 18; Tr. 1147 (Zarakas).

941 Zarakas WDT (SP Ex. 27) at 18-19.

942 Zarakas WDT (SP Ex. 27) at 19.

943 Zarakas WDT (SP Ex. 27) at 19.

944 Zarakas WDT (SP Ex. 27) at 19.

945 Tr. 3340 (Woodbury).

946 Zarakas WDT (SP Ex. 27) at 18 Table 4.

Table 4
Non-Big 3 Network Programming Expenses
($000s)

Network	2004	2005
Fox	$1,998,284	$2,255,330
UPN	$210,977	$219,417
WB	$543,061	$531,832
Others	$501,867	$543,703
Total Non-Big 3	$3,254,189	$3,550,282

Source: SNL Kagan

(c) Estimate of Value of Locally Produced Programming.

390. In gathering the inputs for the ratio of music licensing fees to broadcast rights expenses, Mr. Zarakas recognized the need to "estimate the value of the broadcast rights in locally produced programming to cable system operators," which is "produced by the local commercial television stations themselves and is broadcast in the over-the-air market."[947] Because this programming is not generally sold, Mr. Zarakas was unable to use market transactions to value it.[948] However, Mr. Zarakas was able to use the 1998-1999 CARP's determination of the various claimants' shares in its distribution of the Basic Fund "to calculate the overall relative value assigned by the CARP to locally produced programming compared to the combined local commercial television station non-network programming and non-Big 3 network programming."[949] As set forth below, in Table 6 from Mr. Zarakas' written direct testimony, Mr. Zarakas used the relative CARP shares to determine the multiplier of approximately 1.185 to account for the estimated value of the broadcast rights for locally-produced programming.[950] But, because Mr. Zarakas' estimate of locally-produced

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947 Zarakas WDT (SP Ex. 27) at 19.

948 Zarakas WDT (SP Ex. 27) at 19-20.

949 Zarakas WDT (SP Ex. 27) at 20 (parentheses omitted); *see also* Tr. 1151-52 (Zarakas).

950 Zarakas WDT (SP Ex. 27) at 20-23.

programming values scales linearly with the estimate of non-Big 3 network payments, his use of programming expenses, which overestimate network payments, necessarily overestimates imputed value of locally-produced programming to third parties as well.[951]

Table 6
Calculation of Broadcast Rights Payment
To Account For Value Of Local Programming

	Basic Funds		
	1998	1999	Average
[1] Program Suppliers + Sports + Devotional	74.77565%	74.82170%	74.79868%
[2] Local Programming	13.96836%	13.77736%	13.87286%
[3] Program Suppliers + Sports + Devotional + Local Programming	88.74401%	88.59906%	88.67154%
[4] Factor	1.187	1.184	1.185

Sources:
[1] Table 5, [1] thru [3]
[2] Table 5, [4]
[3] = [1] + [2]
[4] = [3] / [1]

b. The Calculation and Weighting of the Music Ratio for the Distant Signal Market.

391. After identifying all of the broadcast rights payments and adding them to the music blanket license fees, Mr. Zarakas calculated an Unweighted Music Ratio, which reflected music's relative market value in the over-the-air broadcast market.[952] However, recognizing that "the market for retransmitted distant signals by cable system operators differs from the local broadcast television market in terms of the mix of programming transmitted,"[953] Mr. Zarakas then calculated a weighted music ratio that reflected music's value in the distant signal market based on which stations cable operators had chosen to carry as distant signals in 2004 and 2005 and how many subscribers received those stations.[954] To do this, he first calculated his weights

951 Zarakas WDT (SP Ex. 27) at 24 (including Table 7).

952 Zarakas WDT(SP Ex. 27) at 25; Tr. 1153-54 (Zarakas).

953 Zarakas WDT (SP Ex. 27) at 25.

954 Zarakas WDT (SP Ex. 27) at 26-31; Tr. 1153-55 (Zarakas).

based on distant signal subscriber instances,[955] next calculated un-weighted music ratios for each of the television categories in the local over-the-air broadcast television market, and last applied the distant signal weights to the un-weighted ratios to form an aggregate distant signal ratio.[956] In carrying out this calculation, Mr. Zarakas recognized that, in contrast with the local over-the-air broadcast market, the national distant signal market for subscription cable television is dominated by WGN America, an independent station that does not retransmit any network programming and accounts for approximately half of the distant signal subscriber instances.[957]

392. The result of Mr. Zarakas' calculation is a weighted music ratio of 5.2% for 2004 and 4.6% for 2005 as set forth below, in Table 12 from his written direct testimony.[958]

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955 Zarakas WDT (SP Ex. 27) at 26-29; Tr. 1153-55 (Zarakas).

956 Zarakas WDT (SP Ex. 27) at 29-31.

957 Zarakas WDT (SP Ex. 27) at 28, n.30. As Mr. Zarakas explained, "WGN transmits two types of signals: one for its local market in Chicago (WGN-TV, channel 9, in Chicago, Illinois) and one designated for distant carriage (WGN America, formerly known as Superstation WGN). In 2004 and 2005, WGN was affiliated with WB in its local broadcasts. However, WGN America's transmissions did not (and do not) include programming from WB because the network was (and is) available in most markets around the country."

958 Zarakas WDT (SP Ex. 27) at 31 Table 12. Mr. Zarakas' calculations also likely understate Music's value because "they fail to account for the fact that content retransmitted in the distant signal market is on a non-exclusive basis and thus overstated by broadcast rights payments in the local over-the-air market, which are for the right to exclusive broadcasts." Zarakas WDT (SP Ex. 27) at 31. As Mr. Zarakas noted, "in the local broadcast market, stations and networks pay premiums for the rights to broadcast programs on an exclusive basis;" however, "exclusivity premiums likely would not be paid in the distant market where content is transmitted over many cable systems on a non-exclusive basis." Zarakas WDT (SP Ex. 27) at 31.

Table 12
Calculation of Weighted Ratio

	2004			2005		
	Unweighted Ratio	Weight	Weighted Ratio	Unweighted Ratio	Weight	Weighted Ratio
ABC Affiliates	7.2%	6.8%	0.50%	6.1%	5.9%	0.36%
CBS Affiliates	11.9%	6.6%	0.80%	12.1%	6.0%	0.73%
NBC Affiliates	13.0%	7.5%	1.00%	11.9%	6.7%	0.80%
FOX Affiliates	1.3%	4.2%	0.10%	1.2%	3.5%	0.04%
UPN Affiliates	3.0%	5.3%	0.20%	2.2%	5.0%	0.11%
WB Affiliates	1.4%	6.2%	0.10%	1.4%	5.7%	0.08%
Independents	4.1%	60.8%	2.50%	3.8%	64.9%	2.47%
Other	1.8%	2.5%	0.00%	1.9%	2.3%	0.04%
Weighted Ratio/Total	3.1%	100%	5.2%	2.8%	100%	4.6%

Source: Tables 10 & 11

4. Testimony of Dr. John Woodbury.

a. Flaws in Woodbury Analysis.

393. Program Suppliers presented the rebuttal testimony of Dr. John R. Woodbury, who asserted that Music Claimants' share should be set at 2.04% of the 2004 cable royalty fund and 1.94% of the 2005 cable royalty fund, substantially below the share Music Claimants have received in every litigated proceeding since the inception of the cable compulsory license.[959]

394. Dr. Woodbury endorsed a music ratio approach, opining that music's share should be determined using a method similar to that sponsored by Dr. George Schink in the 1998-1999 cable distribution proceeding.[960] Dr. Woodbury, however, failed to make any adjustment in response to the concerns raised in the 1998-99 CARP Report that Dr. Schink's approach did not account for the differences between the over-the-air and distant signal markets and included Big 3 network payments even though not compensable in this proceeding, which resulted in his music ratio understating music's value in the distant signal market.[961] Moreover, Dr. Woodbury

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959 Woodbury WRT (PS Ex. 14); 1998-99 CARP Report at 89; 1983 CRT Determination, 51 Fed. Reg. at 4415.

960 Tr. 3309 (Woodbury); 1998-99 CARP Report at 89.

961 Tr. 3311-12 (Woodbury).

selected data inputs for his unadjusted ratio that systematically lower the music ratio, even in comparison to Dr. Schink's calculation.[962]

395. Dr. Schink's analysis was derived from the U.S. Census Bureau's 1998 Annual Survey of Communication Services, which separately reported: (1) the amount of music license fees paid by the U.S. commercial television industry, including the Big 3 networks; and (2) the combined amount of these music license fees and the broadcast rights payments for the U.S. commercial television industry. [963] In the 1998-1999 proceeding, Dr. Schink proposed a value for music based on the ratio of these two figures.[964]

396. Dr. Schink's data included music license fees and broadcast rights payments for the Big 3 networks, even though Big 3 network programming is not compensable under section 111.[965] In addition, Dr. Schink did not make any weighting adjustment to his calculation based on which television stations were actually retransmitted as distant signals and in what degree.[966] The 1998-1999 CARP found Dr. Schink's analysis "worthy of some weight in determining the relative weight of Music," but recognized Dr. Schink's analysis only as a *floor* for determining Music's share "in the absence of better measures."[967] As a result, the 1998-1999 CARP awarded Music, 4.0%, substantially more than the 2.33% calculated under the Schink methodology.[968]

397. For 2004 and 2005, the U.S. Census Bureau did not publish comparable data to that used by Dr. Schink in the 1998-1999 proceeding.[969] Specifically, starting in 1999, the U.S. Census Bureau combined the Annual Survey of Communication Services with another survey,

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962 Tr. 3294-95, 3312, 3320-22, 3333 (Woodbury).

963 The music license fee and broadcast rights payment data Dr. Schink used from the Annual Survey of Communication Services was only for "taxable firms." Zarakas WDT (SP Ex. 27) at 10-11, n.13.

964 Tr. 3309-10, 3316-17, 3323 (Woodbury).

965 Tr. 3312 (Woodbury).

966 Tr. 3312, 3347-48 (Woodbury).

967 1998-99 CARP Report at 82-89; Woodbury WRT (PS Ex. 14) at 5; Tr. 3311 (Woodbury); Zarakas WDT (SP Ex. 27) at 10.

968 Tr. 3312 (Woodbury); 1998-99 CARP Report at 89.

969 Zarakas WDT (SP Ex. 27) at 13, n.17; Tr. 1170-72 (Zarakas).

with the merged product being the Service Annual Survey.[970] The Service Annual Survey does not report data in the same manner that the Annual Survey of Communication Services did.[971] As Mr. Zarakas explained: (1) "the Service Annual Survey provides an aggregate number for the sum of music license fees and broadcast rights payments, instead of individual numbers for the two components as was the case in the Annual Survey of Communication Services;" and (2) "the Service Annual Survey also aggregates data for taxable and tax-exempt firms into a single number for all firms."[972]

398. Due to the changes in the Census Bureau's surveys, Dr. Woodbury's data inputs differed significantly from those used by Dr. Schink.[973] First, whereas the 1998 survey provided a single data source for Dr. Schink's music ratio, the 2004 and 2005 surveys did not have separate music license fee data,[974] which resulted in Dr. Woodbury including only the license fees paid by to the PROs in the numerator .[975] Second, the numerator and denominator of the 1998 music ratio both included the same value for the music license fees.[976] In contrast, the numerator of Dr. Woodbury's music ratio included only music license fees paid to the PROs and did not include any value for direct license fees paid for music,[977] while Dr. Woodbury's denominator included all music license fee payments, including direct payments.[978] Third, the denominator of the 1998 music ratio included only commercial broadcast rights payments,[979] but

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970 Zarakas WDT (SP Ex. 27) at 13, n.17. The Service Annual Surveys for 2005 and 2006 report data from 2004 and 2005 respectively. A revised amount for 2004 also appears in the 2006 Service Annual Survey, the one expressly employed by Dr. Woodbury in his testimony to calculate music ratios. Tr. 3292, 3324-25, 3329-30 (Zarakas).

971 Zarakas WDT (SP Ex. 27) at 13, n.17; Tr. 1171-72 (Zarakas).

972 Zarakas WDT (SP Ex. 27) at 13, n.17.

973 Tr. 3324-25 (Woodbury); Zarakas WDT (SP Ex. 27) at 13, n.17.

974 Tr. 1170-71 (Zarakas); *see* PS Ex. 5X (Table 3.3); SP Ex. 63 at 72 (Table 3.6.4).

975 Tr. 3343 (Woodbury).

976 Tr. 1173 (Zarakas); Woodbury WRT (PS Ex. 14) at 5.

977 Tr. 3291, 3295 (Woodbury).

978 Tr. 3335-38 (Woodbury).

979 Zarakas WDT (SP Ex. 27) at 10, 13, n.17; Tr. 1179 (Zarakas).

the denominator of Dr. Woodbury's music ratio included broadcast rights payments for both commercial and non-commercial stations.[980]

399. For his music ratio denominators, Dr. Woodbury used 2004 and 2005 estimates for rights payments provided in the 2006 Service Annual Survey,[981] even though prior to the submission of his written testimony, he knew that the 2007 Service Annual Survey had published a downward revision of the rights payments estimates.[982] This revision necessarily increased any calculated music ratios.[983] Despite being aware that his underlying denominator data had been revised downward, Dr. Woodbury did not update his calculation accordingly, choosing instead to rely on erroneous data that overstated his denominator by approximately $800 million in 2004 and $1.1 billion in $2005, thus understating his music ratio.[984]

(i) The 1998-99 CARP's Concerns with Dr. Schink's Analysis.

400. The 1998-1999 CARP found that Dr. Schink's calculation should only be used as "a floor figure for purposes of determining Music's award."[985] Specifically, the 1998-1999 CARP Report noted two principal factors that prevented it from adopting Dr. Schink's methodology.[986] First, Dr. Schink's methodology did not account for any of the substantial differences between the local market and the distant signal market.[987] Second, Dr. Schink's methodology included data from the Big 3 networks, which the CARP found "may have the effect of somewhat artificially decreasing the percentage of music license fees compared to

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980 Tr. 3344 (Woodbury).

981 Tr. 3292, 3324 (Woodbury); Woodbury WDT (PS Ex. 14) at 6, n.14.

982 Tr. 3326-30 (Woodbury); *see* SP Ex. 63 at 72 (Table 3.6.4).

983 Tr. 3326-30 (Woodbury); *see* SP Ex. 63 at 72 (Table 3.6.4).

984 Tr. 3325, 3330, 3334-35 (Woodbury).

985 1998-1999 CARP Report at 85-87 (emphasis in original).

986 1998-1999 CARP Report at 85-87.

987 1998-1999 CARP Report at 85.

broadcast rights expenses."[988] Dr. Woodbury's calculation fails to address either of the CARP's concerns.[989]

401. First, Dr. Woodbury failed to weight his music ratio calculation in any manner to translate his calculation using over-the-air broadcast market data into a calculation to estimate relative market value in the distant signal market.[990] And although he criticized Mr. Zarakas' weighting scheme (*see infra* ¶391),[991] Dr. Woodbury did not even attempt to apply a different weighting scheme than Mr. Zarakas, even for the music ratios that Mr. Zarakas calculated for the over-the-air broadcast market.[992]

402. Second, Dr. Woodbury testified that inclusion of the Big 3 music license fees and broadcast rights payments understates the music ratio. He admitted that calculating music ratios using data that includes the Big 3 network music license fees and the substantial Big 3 network broadcast rights payments, neither of which are for programming that is compensable in this proceeding, was a criticism of the CARP and understates his music ratios.[993] And, Dr. Woodbury never attempted to justify the inclusion of the Big 3 network rights payments in his calculation.[994] In sum, Dr. Woodbury simply repeated the type of calculations that Dr. Schink made in the 1998-99 proceeding that led the CARP to deem Dr. Schink's calculation a floor.[995]

(ii) Dr. Woodbury Systematically Understates Music's Value

403. Beyond his failure to modify his analysis to respond to the CARP's concerns with Dr. Schink's analysis, Dr. Woodbury's calculation introduced a number of additional fundamental flaws that even further understate Music's award.[996] Namely, Dr. Woodbury

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988 1998-1999 CARP Report at 87.

989 Tr. 3310-12, 3318 (Woodbury).

990 Tr. 3347 (Woodbury); Woodbury WDT (PS Ex. 14) at 8-9.

991 Tr. 3287, 3321, 3349 (Woodbury).

992 Woodbury WDT (PS Ex. 14) at 7-9; Tr. 3347-49 (Woodbury).

993 Woodbury WDT (PS Ex. 14) at 2, n.2; Tr. 3311-12 (Woodbury).

994 Tr. 3312, 3340 (Woodbury).

995 Tr. 3309-10, 3311-12, 3323, 3324, 3345 (Woodbury).

996 Tr. 3294-95, 3312, 3333, 3338 (Woodbury).

cherry-picked data for his calculation that systematically yields an inaccurate and understated music ratio, even compared to Dr. Schink's methodology using the 1998 U.S. Census Bureau survey described above.[997] Indeed, Dr. Woodbury repeatedly admitted that the Music share should be higher than he calculated for numerous reasons.[998]

(a) The Woodbury Numerator Does Not Include Direct License Payments Made by Local Television Stations.

404. In the numerator of his music ratio, Dr. Woodbury used only the license fee payments received by the PROs.[999] Dr. Woodbury conceded that his use of the PRO receipts understates the amounts paid by the local stations for music licenses because the payments to the PROs do not include direct license fee payments that broadcast stations pay for music rights.[1000] Approximately 30% of stations on a per program license[1001] pay direct license fees for the music on programs covered under a per program license in order to reduce their total music license payments to the PROs to an amount below the blanket license fee amounts.[1002] This means they are either paying direct license fees not accounted for by Dr. Woodbury,[1003] or they are not saving money off the blanket license fees.[1004] Dr. Woodbury admitted that by using only payments received by the PROs, he understated his music ratio.[1005]

(b) The Music Fees in the Woodbury Denominator Include Direct License Payments.

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997 Woodbury WDT (PS Ex. 14) at 6; Tr. 3312, 3323-24 (Woodbury); *see infra* ¶¶394-400.

998 Woodbury WRT (PS Ex. 14) at 6; Tr. 3294, 3295, 3333, 3338 (Woodbury).

999 Tr. 3317 (Woodbury); Tr. WDT (PS Ex. 14) at 6.

1000 Tr. 3295 (Woodbury).

1001 Tr. 1104-05 (O'Neill); Tr. 3319-21 (Woodbury); *see infra* ¶ 371.

1002 O'Neill WDT (SP Ex. 26) at 7; Tr. 1086, 1105 (O'Neill).

1003 Tr. 3318 (Woodbury).

1004 Tr. 1127-28 (O'Neill).

1005 Woodbury WRT (PS Ex. 14) at 6; Tr. 3295 (Woodbury).

405. Dr. Woodbury also understates the music ratio because his denominator includes direct license fee payments, even though his numerator does not.[1006] As set forth above, Dr. Woodbury's numerator consists of the music license payments to the PROs only.[1007] In contrast, the U.S. Census Bureau data that Dr. Woodbury uses for his denominator aggregates, in one number reported per year, all music license fee payments by television stations – including direct payments to composers, song writers, and publishers – plus all broadcast rights payments.[1008] As a result, Dr. Woodbury's calculation includes different music license fee data in the numerator and denominator.[1009] Dr. Woodbury admitted that his denominator is not consistent with the numerator with respect to the value of the music license fees in that the denominator includes a larger universe of music license fees.[1010] Thus, for that reason too, Dr. Woodbury has understated his music ratio.[1011]

(c) The Denominator Includes Broadcast Rights Payments for Non-Commercial Stations.

406. The U.S. Census Bureau data used by Dr. Woodbury also does not separate out broadcast rights payments by commercial and non-commercial stations.[1012] As a result, Dr. Woodbury's denominator contains payments by both commercial and non-commercial stations.[1013] The numerator of his calculation, however, only contains music license fees paid by commercial stations.[1014] Dr. Woodbury conceded that he did not use payments from precisely the same set of stations in the numerator as he did in the denominator.[1015] Dr. Woodbury also admitted that by including commercial and non-commercial stations in his denominator and only

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1006 Tr. 3335-38 (Woodbury).

1007 Tr. 3317 (Woodbury).

1008 Zarakas WDT (SP Ex. 27) at 13, n.17.

1009 Tr. 3317, 3323 (Woodbury).

1010 R. 3323, 3324, 3337-38 (Woodbury).

1011 Tr. 3338 (Woodbury).

1012 Zarakas WDT (SP Ex. 27) at 13, n.17.

1013 Tr. 3344 (Woodbury).

1014 Tr. 3344 (Woodbury).

1015 Tr. 3345-46 (Woodbury).

commercial stations in his numerator, he has included a larger universe of music license fee payments in his denominator and, thus, has understated the music ratio for that reason as well.[1016]

(d) The Denominator Does Not Include the Updated Census Figures, Which Were Revised Downward.

407. Dr. Woodbury's denominator consists of "the data for the total rights (*i.e.*, music plus broadcasting rights) payments by broadcast stations and networks . . . reported by the Bureau of the Census."[1017] However, in 2007, the U.S. Census Bureau revised the 2004 and 2005 total rights payments figures downward in comparison to the 2006 survey.[1018] Because the updated total rights payments are less – to the tune of $779 million in 2004 and $1,099 million in 2005 – than the total rights payments in the 2006 survey data used by Dr. Woodbury for his denominators, Dr. Woodbury understated the music ratios. [1019] Use of the correct estimates from the U.S. Census Bureau necessarily raises the 2004 and 2005 music ratios calculated by Dr. Woodbury's method.[1020]

408. Dr. Woodbury was aware of the updated U.S. Census Bureau numbers prior to giving his oral testimony.[1021] However, he did not change his direct rebuttal testimony.[1022] Dr. Woodbury admitted that if the revised numbers had been used, the music ratio would have been higher than his original calculations.[1023]

b. Response to Criticisms of Zarakas Study

409. Dr. Woodbury has no factual support for his criticism of: (1) the "use of the blanket license as a proxy for actual payments made by stations and networks;" (2) the

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1016 Tr. 3337-38, 3343-46 (Woodbury).

1017 Woodbury WRT (PS Ex. 14) at 6.

1018 Tr. 3329 (Woodbury).

1019 Tr. 3330 (Woodbury). *Compare* PS Ex. X5 (U.S. Census Bureau, *Service Annual Survey, 2006*, Table 3.3.3 (reporting $11,710 million for 2004 and $12,036 million for 2005)) *with* SP Ex. 63 at 72 (U.S. Census Bureau, *Service Annual Survey, 2007*, Table 3.6.4 (reporting $10,931 million in 2004, $10,937 million in 2005)).

1020 Woodbury WDT (PS Ex. 14) at 8-9.

1021 Tr. 3328 (Woodbury).

1022 Tr. 3334-35 (Woodbury).

1023 Tr. 3335 (Woodbury).

"justification for using subscriber instances to weigh station types;" and (3) the treatment of "WGN as an independent rather than a WB affiliate for purposes of assigning a percentage music royalty due to the carriage of WGN."[1024]

(i) Lack of Empirical Support for Claims

410. Dr. Woodbury's statement that use of the blanket license fee overestimates the actual payments made by stations and networks is not quantified, cannot be quantified, and is unsupported by any empirical evidence.[1025] Dr. Woodbury also made no independent effort to determine the actual amount of music license fees paid by the stations and, in particular, the actual amount paid for direct licenses, which are not included in his calculation.[1026] Moreover, Dr. Woodbury performed no empirical analysis of the frequency of direct licensing by local television stations during the relevant time frame, despite his speculation that the frequency was low; in contrast, the only factual evidence of record on this point, Mr. O'Neill's testimony, indicates the frequency of direct licensing for stations that are on a per program license is high.[1027] Thus, overall, no empirical evidence of record supports his contention that Mr. Zarakas' use of the blanket license fee overestimates the actual payments made by stations and networks.[1028] Accordingly, Dr. Woodbury acknowledged that he cannot testify as to the "extent of overstatement" and whether it is even "1, 2 or 4 percent,"[1029] highlighting that the record contains absolutely no empirical support for Dr. Woodbury's speculation that the blanket fee for the local stations overestimates the local station music license fees.[1030] Finally, Dr. Woodbury never challenged or attempted to rebut Mr. Zarakas' expert testimony, supported by Mr. O'Neill's factual testimony, that the blanket license fee represents an actual, negotiated market

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1024 Woodbury WRT (PS Ex. 14) 5, 7-8.

1025 Tr. 3286, 3289, 3322-23 (Woodbury); O'Neill WDT (SP Ex. 26) at 6; Tr. 1089, 1101, 1106 (O'Neill); Tr. 1143-44, 1160-61 (Zarakas).

1026 Tr. 3317-3318 (Woodbury).

1027 Tr. 1104-05 (O'Neill); *see also infra* ¶ 371; *cf.* Tr. 3316 (Woodbury) (Q: "[A] per program station typically obtains both a per program license and direct licenses, correct?"; A: "I don't know if that's typically true, but I understand that that may happen frequently.").

1028 Tr. 3319-20, 3323 (Woodbury).

1029 Tr. 3323 (Woodbury).

1030 Tr. 3322-23 (Woodbury).

price for a license to all the music used in programming broadcast by the local and non-Big 3 network stations in over-the-air television markets, just as the Big 3 network and Univision blanket licenses represent the actual, negotiated market price for a license to all the music used in that network programming.[1031]

(ii) Use of Subscriber Instances

411. Dr. Woodbury contends that Mr. Zarakas' use of subscriber information to account for a difference between the local market and the distant signal market is meaningless because "[t]here is absolutely no reason to believe that there is any one-to-one relationship between the actual viewership of distant signals and the number of subscribers having access to those distant signals."[1032] However, Dr. Woodbury admitted that Mr. Zarakas never testified to a relationship between viewership and subscriber access.[1033] In fact, Mr. Zarakas used subscriber instances so that the music ratios "would reflect accurately the mix of programming on stations transmitted in the distant signal market as opposed to the programming on stations aired in the local broadcast market."[1034] Mr. Zarakas' weighting scheme thus asserted that the relative value of music in the distant signal market was calculated using music ratios for stations that cable systems actually chose to transmit as distant signals and to which subscribers actually had access in the relevant 2004-2005 period.[1035]

412. Generally, Dr. Woodbury acknowledges that it is appropriate to weight the music ratio to take into account the differences between the local television market and the distant signal market.[1036] Dr. Woodbury suggested as "an alternative" to Mr. Zarakas' weighting

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1031 Zarakas WDT (SP Ex. 27) at 11-12, 14-15; O'Neill WDT (SP Ex. 26) at 5; Tr. 1142-43, 1160, 1190 (Zarakas) ("[T]he blanket license fee is not a rack rate that you negotiate down from. It is an actual negotiated rate, and it's an indicator of market value in that regard."); Tr. 1086, 1107 (O'Neill).

1032 Woodbury WRT (PS Ex. 14) at 7.

1033 Tr. 3348 (Woodbury).

1034 Zarakas WDT (SP Ex. 27) at 12.

1035 Zarakas WDT (SP Ex. 27) at 12; Woodbury WDT (PS Ex. 14) at 7-8; Tr. 1153-55 (Zarakas); *see infra* ¶ 391.

1036 Tr. 3348 (Woodbury)

scheme one based on viewership.[1037] However, Dr. Woodbury does not provide any details as to how this viewership weighting would be done and admitted that he did not apply any viewership weighting in his own calculations (despite Program Suppliers' unique access to a viewership study of distant signals).[1038] Dr. Woodbury offered no explanation as to why the weighting of music ratio should be dependent on viewership data.[1039] In fact, as discussed above, he made no effort to account for the differences in the local and distant-signal markets or to justify that failure on economic or prudential terms.[1040]

(iii) WGN America

413. For purposes of Mr. Zarakas' weighting scheme, which necessarily characterizes stations by their category in the distant signal market,[1041] Dr. Woodbury has no factual basis to criticize Mr. Zarakas' classification of WGN America "as an independent rather than a WB affiliate for the purposes of assigning a percentage music royalty due to the carriage of WGN."[1042] While Dr. Woodbury expressed the view that this classification "dramatically increased the weight on the percentage music rate of independent stations,"[1043] he does not say to what the increase is in comparison, and in fact Dr. Woodbury's own testimony confirms WGN America's status as an Independent station.[1044]

414. Dr. Woodbury also admitted that "the WB programming from WGN Chicago is stripped out of the WGN America signal."[1045] Dr. Woodbury further conceded that independent stations show no network programming.[1046] Therefore, because WGN America has no network programming, it was appropriately considered as an Independent.

1037 Tr. 3348 (Woodbury).

1038 Tr. 3348 (Woodbury).

1039 Tr. 3299-30 (Woodbury).

1040 Tr. 3312, 3347 (Woodbury).

1041 Zarakas WDT (SP Ex. 27) at 12-13; Tr. 1154-55 (Zarakas).

1042 Woodbury WRT (PS Ex. 14) at 8.

1043 Woodbury WRT (PS Ex. 14) at 8.

1044 Woodbury WRT (PS Ex. 14) at 8; Tr. 3302-03, 3350-51 (Woodbury).

1045 Tr. 3351 (Woodbury).

1046 Tr. 3351 (Woodbury).

415. Indeed, both Mr. Zarakas and Dr. Woodbury define an Independent station as one not affiliated with a network, and WGN America fits that definition.[1047] Thus, Mr. Zarakas treatment of WGN as an Independent is appropriate because WGN America was never a WB affiliate.[1048] And therefore classifying WGN America as an Independent station in the distant signal market is merely saying what WGN America is, as Mr. Zarakas did for all the other stations in the weighting scheme.[1049]

V. Program Suppliers' Approach

A. The Ford Local Broadcast Market Advertising Approach

1. Dr. Ford's Study

416. In the 1998-99 proceeding, Program Suppliers offered an approach for determining royalty shares, presented through Dr. Gruen, that took the results of their custom viewing study and made a series of adjustments that had the effect of increasing their share.[1050] The CARP found that viewing measures do not address the "criterion of relevance" – relative market value – and that Dr. Gruen's proposed adjustments to them suffered from "fatal flaws" that precluded Program Suppliers' approach from being useful.[1051]

417. In the 2004-05 proceeding, Program Suppliers again offer an approach, this time presented through Dr. Ford, that essentially takes the results of their viewing study and makes a series of adjustments that have the effect of increasing their share.[1052] Remarkably, Dr. Ford even presents the very same erroneous "viewing to time" calculation that the CARP rejected when it was offered by Dr. Gruen in the 1998-99 proceeding and the CRT rejected when it was offered by Program Suppliers witness Mr. Cooper in the 1989 proceeding.[1053]

1047 Zarakas WDT (SP Ex. 27) at 5, 28, n.30; Woodbury WDT (PS Ex. 14) at 8; Tr. 3351 (Woodbury).

1048 Zarakas WDT (SP Ex. 27) at 28 n.30; Tr. 1193 (Zarakas).

1049 Zarakas WDT (SP Ex. 27) at 28, 28 n.30.

1050 1998-99 CARP Report at 34-35.

1051 1998-99 CARP Report at 38-39, 42-44.

1052 Tr. 2227-28 (Ford).

1053 Ford WDT (PS Ex. 11) at 20 (Table 1), 39 (Table 6), 42 (Table 7); Tr. 2234-36 (Ford); *See* 1998-99 CARP Report at 43.

418. The quantitative evidence on which Program Suppliers rely in this proceeding to establish a basis for determining relative market value is a study performed and presented by an economist, George S. Ford.[1054]

419. The purpose of Dr. Ford's testimony on behalf of the Program Suppliers "to propose how the Copyright Royalty Judges ('CRJs') should allocate the 2004 and 2005 royalties among the competing Phase I program categories."[1055]

420. Dr. Ford testified that he thought the standard for allocating royalty payments in this proceeding is relative market value.[1056] He defined market value for the purposes of these proceedings as "the price at which the programming that appears on these distant signals would exchange in a market setting with willing buyers, willing sellers and no regulations."[1057]

421. To determine the relative market value of distant signal programming, Dr. Ford assumes that programming would be valued in the same way it is in the advertising-supported local broadcast market.[1058] He creates prices that would supposedly be earned for advertising sales for the various distant signal program categories on the basis of "cost per thousand viewers" or "CPM" data from local TV advertising markets, which he adjusts based on assumptions about the demographic profile of different programming categories and the time of day at which the different programming supposedly airs.[1059] For the volume component of his relative value calculation, Dr. Ford uses the viewing minute shares in the MPAA Custom Viewing Study sponsored by Paul Lindstrom.[1060]

a. Dr. Ford's Market

422. Because the cable distant signal market lacks a "market setting with willing buyers, willing sellers, and no regulations," Dr. Ford turned instead to a different market, that of

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1054 Ford WDT (PS Ex. 11) at 1.

1055 Ford WDT (PS Ex. 11) at 3.

1056 Ford WDT (PS Ex. 11) at 4; Tr. 2119 (Ford).

1057 Tr. 2116 (Ford).

1058 *See* Ford WDT (PS Ex. 11) at 5-6, 11-12.

1059 *See* Ford WDT (PS Ex. 11) at 18-31.

1060 *See* Ford WDT (PS Ex. 11) at 19-20.

local broadcast stations' purchases of exclusive broadcast rights in their own local markets.[1061] He explained that

> We want to know what the market value of the programming is. And to find out market value, we need to go find a market where this stuff is bought and sold and use that to determine market value.[1062]

423. Dr. Ford testified that "it doesn't matter so much that the cable operator[']s retransmitting" the distant signal programming.[1063] In response to a question from Judge Wisniewski, he explained that even though cable operators receive subscription revenues,

> . . . that does not determine the value of the programming. That determines the value of the cable system. Okay?
>
> The programming – the price that the broadcaster has actually paid for this programming is not impacted by the fact that the cable operator makes profits selling subscriptions. That doesn't affect the exchange of the program that we're talking about on a broadcast station. It is not relevant.
>
> Okay? Do you understand?[1064]

424. Dr. Ford explained that in his, view cable operators "are not in the business of buying and selling programming," and instead "just retransmit signals."[1065] As a result, Dr. Ford stated that

> ". . . as an economist, I assume myself into the data flow, into the actual transactions, which provide me information, actual market information, which allow me to establish prices and market values for the programming rather than setting myself up where I don't have that information."[1066]

1061 Tr. 2117 (Ford).

1062 Tr. 2124 (Ford).

1063 Tr. 2131 (Ford).

1064 Tr. 2131-32 (Ford).

1065 Tr. 2122 (Ford).

1066 Tr. 2123 (Ford).

425. He later reiterated, in response to questions from Judge Roberts, that "[t]he cable system is irrelevant to the analysis."[1067]

426. Dr. Ford concludes that since market value cannot be directly observed in the regulated cable distant signal market, and the programs at issue appear on broadcast signals, "it makes sense to focus on the valuation approach relevant to broadcasters."[1068] He explained that his approach was as follows:

> "Ask the question that puts you in the data flow, right, that says I know how market value gets determined there, okay, so I'm going to assume that's the world I'm in."[1069]

427. Dr. Ford's "simulated scenario of market value" is based on a hypothetical broadcast station in the distant cable market broadcasting the programs that were carried on the stations actually retransmitted as distant signals in 2004-05.[1070] He assumes that this hypothetical station makes program-by-program purchases,[1071] is advertising revenue driven,[1072] does not receive subscriber revenues,[1073] serves only the cable community rather than the entire DMA,[1074] would purchase exclusive rights to programs against other stations in the DMA,[1075] and purchases all the same programs that were carried on the distant signals that were actually retransmitted.[1076]

428. Dr. Ford did not use or seek to use data regarding prices actually paid by distant signals for the programs they carried.[1077]

1067 Tr. 2189 (Ford).

1068 Ford WDT (PS Ex. 11) at 10.

1069 Tr. 2192 (Ford).

1070 Ford WDT (PS Ex. 11) at 10 n. 10.

1071 Tr. 2199-2200 (Ford).

1072 Tr. 2200 (Ford).

1073 Tr. 2200-01 (Ford).

1074 Tr. 2205 (Ford).

1075 Tr. 2206 (Ford).

1076 Tr. 2204 (Ford); *see also* Ford WRT (PS Ex. 16) at 8-9.

1077 Tr. 2172, 2224-26 (Ford).

b. Dr. Ford's "Price" Data

429. The market information he used to determine "prices" consisted of advertising price data from the local broadcast market.[1078] These data were average television station spot sales prices for selected markets on a "cost per thousand" or "CPM" basis, broken down by demographic group, year, and broadcast day-part.[1079] In general, the price Dr. Ford assigned to a program category started with an average across the CPMs for the various day-parts, which typically varied from a low CPM for Daytime or Early Morning to a high for Prime Time.[1080] Dr. Ford made a complicated series of adjustments to these CPM data for different claimant categories to produce different relative advertising prices for the various categories.[1081]

430. Among the adjustments Dr. Ford made was the omission of any credit for the Prime Time CPM for CTV programming, which had the effect of reducing the CPM used for CTV programming in Dr. Ford's calculations.[1082] Dr. Ford did so based on his "assumption" that only network programming appeared on network affiliates during Prime Time, and that both network affiliates and non-network-affiliated stations "think it's not good to put local origination on in prime time."[1083]

431. By contrast, Dr. Ford credited all other program categories with the Prime Time CPM.[1084] He testified that he believed that the high levels of the Prime Time CPMs did not reflect the value of network programming itself, because he believed that network affiliated stations were not permitted to sell advertising during network programs.[1085] He agreed that, if his belief were not correct, the crediting of Prime Time CPMs to all other categories would produce a distortion in his analysis.[1086] He further stated that eliminating the Day-Part

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1078 Ford WDT (PS Ex. 11) at 18-19; Tr. 2120-21 (Ford).

1079 Ford WDT (PS Ex. 11) at 18-19, 21-29; Tr. 2208-11 (Ford).

1080 Ford WDT (PS Ex. 11) at 25-29 and Table 4.

1081 Tr. 2133 (Ford); Ford WDT (PS Ex. 11) at 22-31.

1082 Ford WDT (PS Ex. 11) at 26-27; Tr. 2142-43 (Ford).

1083 Tr. 2142-43 (Ford); Ford WDT (PS Ex. 11) at 26.

1084 Ford WDT (PS Ex. 11) at 25-26.

1085 Tr. 2259 (Ford).

1086 Tr. 2264 (Ford).

adjustment he made to the CTV category alone would result in approximately a twenty percent increase in the relative share of CTV programming in his analysis.[1087]

432. Dr. Ford applied the CPM analysis to the Canadian programming category, even though none of the advertising data were for Canadian markets.[1088]

433. PTV programming is on non-commercial stations, for which no advertising market transactions exist.[1089] Dr. Ford considers that corporate sponsorship contributions to support public broadcasting can reasonably be treated as a "proxy for advertising."[1090] He testified that about 15 percent of PTV annual revenues are attributable to such sponsorships,[1091] while approximately 100 percent of commercial television revenues are attributable to audience sales.[1092] Dr. Ford used commercial station advertising data to represent the market price of PTV programming in his analysis, but he reduced the CPM by two-thirds to reflect the fact that non-program time on PTV stations represented about one-third of the amount of non-program time on commercial stations.[1093]

434. No advertising is sold during Devotional programming.[1094] Dr. Ford used commercial station advertising data to represent the market price of Devotional programming in his analysis.[1095] He proposed that an adjustment should be made to reduce the Devotional share to zero to reflect the fact that Devotional programmers purchase time on commercial broadcast stations to air their programs.[1096]

1087 Tr. 2276 (Ford).

1088 Tr. 2211 (Ford).

1089 Ford WDT (PS Ex. 11) at 36.

1090 Ford WDT (PS Ex. 11) at 36.

1091 Ford WDT (PS Ex. 11) at 36.

1092 Tr. 2219 (Ford); SP Ex. 44.

1093 Ford WDT (PS Ex. 11) at 37; Tr. 2147-48 (Ford).

1094 Johansen WDT (Devo Ex. 2) at 7.

1095 Ford WDT (PS Ex. 11) at 35, 39 Table 6.

1096 Ford WDT (PS Ex. 11) at 34; Tr. 2148-49 (Ford); *see* Johansen WDT (Devo Ex. 2) at 4.

c. Dr. Ford's Calculation of Relative Shares

435. After determining an advertising-based relative price for each of the program categories, Dr. Ford then multiplied that price by the relative share of viewing measured in the MPAA Custom Viewing Study to arrive at his estimated relative market value for each program category.[1097] His approach results in a proposed share for Program Suppliers of 68.283% for 2004 and 74.961% for 2005.[1098] The difference is attributable principally to a difference in the Program Suppliers' viewing share as reported in the MPAA Custom Viewing Study.[1099]

436. Dr. Ford observes that "with the exception of JSC, viewer share provides a reasonably good proxy for relative market value, at least among the more commercially viable program categories."[1100] He also testifies that "[g]iven the standard of relative market value, exceedingly large deviations between the viewer share and relative market value should be carefully scrutinized."[1101]

d. Dr. Ford's "Hybrid" Approach

437. Dr. Ford also suggests a "Hybrid Approach," which consists of splitting the difference between the shares presented by Dr. Ford and those presented by Dr. Gruen's subscriber survey.[1102] This approach would result in a reduction in Program Suppliers' share and increases in the shares for JSC, CTV, and PTV.[1103] Dr. Ford states that the approach would be "conceptually plausible" because it "would acknowledge dual sources of value for distantly retransmitted television programming – advertising and subscription."[1104] He concludes, however, that because the programs air on broadcast stations and the broadcast market is driven by advertising revenues, it would be more "accurate" to ignore value derived from subscriber

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1097 Ford WDT (PS Ex. 11) at 37-39 and Table 6; Tr. 2154-55 (Ford).

1098 Ford WDT (PS Ex. 11) at 39 Table 6 (CORRECTED); Tr. 2286 (Ford) (agreeing that difference in relative market shares in 2004 and 2005 was a "significant difference").

1099 Tr. 2287-88 (Ford).

1100 Ford WDT (PS Ex. 11) at 40.

1101 Ford WDT (PS Ex. 11) at 41.

1102 Ford WDT (PS Ex. 11) at 49-50.

1103 Ford WDT (PS Ex. 11) at 50, 39 Table 6, 48 Table 8.

1104 Ford WDT (PS Ex. 11) at 50.

revenues and base the relative market allocations exclusively on his local broadcast market advertising approach.[1105]

2. Problems With Dr. Ford's Study

438. The Settling Parties presented several rebuttal witnesses who provided expert opinions and other evidence demonstrating problems with the approach, implementation, and assumptions of Dr. Ford's study.[1106]

a. Using the Local Broadcasting Market as a Proxy for the Relative Value of Distant Signal Programming Carried by Cable Systems

(i) Using Advertising Data Instead of Focusing on Maintaining and Attracting Subscribers

439. Dr. Gregory S. Crawford presented rebuttal testimony for CTV on behalf of the Settling Parties.[1107] Dr. Crawford testified as an expert economist with experience in the analysis of television programming markets, specifically including cable television programming markets.[1108]

440. Dr. Crawford received his PhD in Economics from Stanford University.[1109] He has taught economics at Duke University and the University of Arizona, and is currently a Professor of Economics at the University of Warwick in the United Kingdom.[1110] In 2007-08, Dr. Crawford served as the Chief Economist at the Federal Communications Commission, where he advised the Chairman and his staff on various communications policy issues.[1111]

441. Dr. Crawford has focused in his academic work on the subfield called empirical industrial organization, in which he gathers economic data on a product market and applies econometric techniques to analyze questions of policy, strategy, or competition in that

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1105 Ford WDT (PS Ex. 11) at 50.

1106 *See e.g.,* Tr. 2344-45 (Crawford), Tr. 2700-01 (Trautman), Tr. 2607-09 (Desser); *see also* Tr. 229-230, (Crandall).

1107 Crawford WRT (SP Ex. 52) at 2; Tr. 2337 (Crawford).

1108 Tr. 2343 (Crawford).

1109 Crawford WRT (SP Ex. 52) at 1, Tr. 2338 (Crawford).

1110 Crawford WRT (SP Ex. 52) at App.1, p.1, Tr. 2338-39 (Crawford).

1111 Crawford WRT (SP Ex. 52) at 1, Tr. 2340 (Crawford).

market.[1112] He has specialized in his academic research on analyses of the cable and satellite television industries.[1113]

442. In particular, Dr. Crawford has written and published papers involving measuring and analyzing the incentives and consequences of the bundling of program channels by cable system operators.[1114] As Chief Economist at the FCC, he spent the greatest part of his time analyzing the potential effects of a la carte, or unbundled, program channel offerings by cable operators, and also worked on trying to measure quality-adjusted cable television pricing.[1115] He has published extensively on evaluating conditions of supply and demand in the cable television industry and the consequences of regulation on economic incentives in cable markets, including the chapter on cable industry regulation in "Economic Regulation and Its Reform: What Have We Learned?," which is forthcoming from the University of Chicago Press.[1116]

443. Dr. Crawford evaluated the analytical approach taken by Dr. Ford's study.[1117] Based on his experience and expertise in economic analyses of the cable television programming market, he concluded that Dr. Ford's approach should not be used as a basis for determining the relative market value of distant signal programming.[1118]

444. As Dr. Crawford explained, Dr. Ford's approach is fundamentally flawed from an economic perspective.[1119] The flaw is that the approach relies exclusively on the broadcast advertising market and not at all on the cable subscription market.[1120] Dr. Ford himself testified that the cable market is irrelevant to the measurement of relative value of distant signal

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1112 Tr. 2339 (Crawford).

1113 Crawford WRT (SP Ex. 52) at 1, Tr. 2339-40 (Crawford).

1114 Crawford WRT (SP Ex. 52) at 1, Tr. 2340 (Crawford).

1115 Crawford WRT (SP Ex. 52) at , Tr. 2340-41 (Crawford).

1116 Crawford WRT (SP Ex. 52) at 2 n.2.

1117 Crawford WRT (SP Ex. 52) at 2, Tr. 2341 (Crawford).

1118 Crawford WRT (SP Ex. 52) at 16, Tr. 2344 (Crawford).

1119 Crawford WRT (SP Ex. 52) at 11, Tr. 2345 (Crawford).

1120 Crawford WRT (SP Ex. 52) at 11, Tr. 2345 (Crawford).

programs, and he proposed no adjustments to reflect any differences between the broadcast advertising market and the cable subscription market.[1121]

445. Longstanding economic research establishes that there are fundamental differences in program content choices between advertising-supported and pay-supported programming markets.[1122] Dr. Crawford explained that in the advertising-supported broadcast market, the broadcaster will value programs that maximize the size of the audience.[1123] By contrast, in the subscription-supported cable market, the cable operator is concerned about the intensity of subscribers' preferences or "willingness to pay" rather than the quantity of their viewing and is also concerned about the extent to which it can actually extract the subscribers' willingness to pay.[1124]

446. The first difference between the two markets means that programming that will attract broad audiences is most valued in the broadcast market, but special interest programming for which subscribers have the highest willingness to pay is most valued in the cable market.[1125] The second concern of cable operators produces a further difference in the relative economic value of different types of programming.[1126]

447. As Dr. Crawford explained, cable operators are able, because they sell programming in bundles, to extract more of the subscribers' willingness to pay when subscriber preferences are "negatively correlated" with each other.[1127] This describes a situation in which various subscribers' program preferences are opposite those of others.[1128] A cable operator is able to maximize its profits by adding programming that even a relatively small group of new

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1121 Tr. 2131-32, 2186-89 (Ford).

1122 Crawford WRT (SP Ex. 52) at 5-6, Tr. 2347-49 (Crawford).

1123 Crawford WRT (SP Ex. 52) at 6, Tr. 2345 (Crawford).

1124 Crawford WRT (SP Ex. 52) at 6, Tr. 2346 (Crawford).

1125 Crawford WRT (SP Ex. 52) at 6, Tr. 2347-48 (Crawford).

1126 Crawford WRT (SP Ex. 52) at 7, Tr. 2349 (Crawford).

1127 Crawford WRT (SP Ex. 52) at 7-9, Tr. 2354-55 (Crawford).

1128 Crawford WRT (SP Ex. 52) at 7.

subscribers, for example, values more than the average value they have for the programming already offered.[1129]

448. Dr. Crawford illustrated this economic principal during his testimony using simplified numerical examples.[1130] But he also has done empirical studies of cable systems that analyzed their profitability associated with carriage of various cable network channels.[1131] These studies showed that "special interest" networks that tend to appeal to niche tastes, such as ESPN, CNN, and The Learning Channel, produce greater negative "elasticity effect" than general interest networks such as USA and TNT, which in turn will enable cable operators to realize higher profits due to the bundling effect.[1132]

449. The types of niche programming channels that most likely involve negative correlation and thus higher cable operator profitability are also the types that appeal to smaller audiences than general interest programming channels.[1133] These economic principles apply equally to program types across channels as to entire cable channels.[1134]

450. Dr. Crawford testified that, in light of these economic principles as confirmed through his own research, "if you try to measure the relative market value based on advertising outcomes, you're just going to get the wrong answer."[1135] For this reason, he concluded that Dr. Ford's conceptual framework is "fundamentally flawed, from the perspectives of both economic theory and market reality," and should not be used as a basis for allocating the royalties.[1136]

451. The record of this proceeding includes additional evidence supporting Dr. Crawford's conclusion, in the form of viewing data and cable operator valuation data.[1137] The

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1129 Crawford WRT (SP Ex. 52) at 8, Tr. 2353-55 (Crawford).

1130 Crawford WRT (SP Ex. 52) at 8-9, Tr. 2350-58 (Crawford).

1131 Crawford WRT (SP Ex. 52) at 10, Tr. 2358-62 (Crawford).

1132 Crawford WRT (SP Ex. 52) at 10, Tr. 2361-62 (Crawford).

1133 Crawford WRT (SP Ex. 52) at 11, Tr. 2363 (Crawford).

1134 Tr. 2362 (Crawford).

1135 Tr. 2363 (Crawford).

1136 Crawford WRT (SP Ex. 52) at 16.

1137 *Compare* Bortz Report (SP Ex. 2) at 3 (Table I-1) *with* Lindstrom WDT (SP Ex. 9) at PL-3, PL-5.

general interest Program Suppliers programming with the relatively large viewing numbers in 2004-2005 (54.1%, 68.0%) receives relatively lower cable operator valuation shares in the Bortz surveys (36.5%, 37.6%), whereas the relatively special interest programming of the Joint Sports Claimants gets lower viewing numbers (7.0%, 5.5%) but much higher cable operator value shares (33.5%, 36.9%).[1138]

452. Dr. Crawford also evaluated Dr. Ford's "hybrid" approach.[1139] That approach would rely in part on the separate cable subscriber survey that was presented by Dr. Gruen on behalf of Program Suppliers.[1140] But apart from the flaws in the implementation of Dr. Gruen's subscriber survey, it suffered from two flaws that made its results impossible to use in trying to assess the relative value of distant signal programs to cable operators.[1141] First, it failed to establish whether the respondents, who were asked for their views on the relative value of different distant signal programming categories, valued any distant signal programming at all.[1142] Second, it failed to ask the relative value the subscribers placed on the remainder of the programming offered by the cable systems, which would be necessary to assess the extent of "negative correlation" between particular program types and that other programming, which is critical to determining the value to the cable operator.[1143]

(ii) Assessment of Dr. Ford's Hypothetical Market in Light of Economic Realities of the Marketplace

453. Dr. Ford's hypothetical marketplace would take the assumed form of a broadcast station serving only the cable community currently transmitting a distant signal, which would purchase the same programs as are on the distant signal, based on revenues it would receive from local advertising sales.[1144]

1138 *Compare* Bortz Report (SP Ex. 2) at 3 (Table I-1) *with* Lindstrom WDT (SP Ex. 9) at PL-3, PL-5.

1139 Crawford WRT (SP Ex. 52) at 14-15, Tr. 2363 (Crawford).

1140 Crawford WRT (SP Ex. 52) at 15, Tr. 2363-64 (Crawford).

1141 Crawford WRT (SP Ex. 52) at 15, Tr. 2364-65 (Crawford).

1142 Crawford WRT (SP Ex. 52) at 15, Tr. 2364-65 (Crawford).

1143 Crawford WRT (SP Ex. 52) at 15, Tr. 2365 (Crawford).

1144 Ford WDT (PS Ex. 11) at 10 n. 10, Tr. 2200-06 (Ford).

454. Dr. Ford recognized that such broadcast stations do not currently exist, characterizing them as the "missing piece" in the distant market.[1145] To resolve this issue, Dr. Ford assumes that instead of distant signals being re-transmitted to cable systems, the distant broadcast station would set up a tower in the cable community where its programming is currently being retransmitted and insert local advertising as a means of obtaining revenue in that market.[1146] For instance, with respect to WGN in Chicago, the most widely carried distant signal, Dr. Ford's model assumes that if WGN is carried in a city such as Birmingham, Alabama, in the absence of a compulsory license, WGN would put a "tower" in Birmingham and substitute local advertisements targeted at Birmingham residents.[1147] Dr. Ford characterized this is as the "most likely" scenario, though he acknowledged that cable operators might purchase the programming instead of the newly built broadcast station.[1148] Dr. Ford noted that stations with wider distribution might also move toward more nationally-based advertising, though he conceded he had no empirical evidence that this would happen.[1149]

455. Dr. Ford was somewhat equivocal in his description of the structure of his hypothetical market, noting that with respect to the "demand side" of the market, it was his "guess" that the buyer would be a broadcast station like WGN selling local advertising in Birmingham.[1150] Dr. Ford presented no empirical evidence to substantiate his theory that in the absence of a compulsory license, distant signals retransmitted on cable systems would be replaced by local broadcasters who would carry the same programming.[1151] Dr. Ford acknowledged that such a broadcast station would need staffing to sell advertising,[1152] but he never provided any evidence that the advertising potential of the distant programming would justify such operating costs in a distant location.

1145 Tr. at 2122 (Ford).

1146 Tr. at 2123 (Ford).

1147 Tr. at 2127 (Ford).

1148 Tr. at 2169-70 (Ford).

1149 Tr. at 2170 (Ford).

1150 Tr. 2182 (Ford).

1151 *See* Ford WDT (PS Ex. 11) at 10 n. 10.

1152 Tr. 2182 (Ford).

456. Dr. Ford noted that "it's hard to really say what would exist without the compulsory license."[1153] That is why, according to Dr. Ford, "we have to go try to find some market evidence somewhere that we -- that we think would be relevant."[1154]

457. In rebuttal, CTV presented the testimony of Gregory Stone, an experienced television broadcaster manager who had worked for ten years at a TV "rep" firm selling spot advertising, then was Director of Sales and then General Manager of a Charlotte, NC television station, and finally General Manager of an Atlanta television station.[1155] He had experience in both advertising sales and in program purchasing for his television stations.[1156]

458. Mr. Stone's testimony stated that a broadcast station serving only a cable community was equivalent to a Low-Power TV ("LPTV") station, of which there are real-world examples.[1157] Contrary to Dr. Ford's assumptions, LPTV stations do not earn the ratings of their full-power competitors, do not command the advertising rates of their full-power competitors, and are unable to purchase programming comparable to that purchased by the full-power television stations that are carried as distant signals.[1158] He provided an example of a program schedule published by an LPTV station that serves Mountain Home, Arkansas, demonstrating that the programming was markedly different from the programming on distant signal KATV carried by the Mountain Home cable system, which was described in Mr. Fritz's testimony.[1159]

459. Dr. Crawford also testified that the distant signal marketplace, in the absence of a compulsory license, would be unlikely to take the form assumed by Dr. Ford.[1160] Marketplace evidence suggests that advertising revenue would not support the delivery of the programs currently provided on distant signals through separate stations serving only the distant cable

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[1153] Tr. 2171 (Ford).

[1154] Tr. 2171 (Ford).

[1155] Stone WRT (SP Ex. 50) at 1.

[1156] Stone WRT (SP Ex. 50) at 1.

[1157] Stone WRT (SP Ex. 50) at 2.

[1158] Stone WRT (SP Ex. 50) at 2.

[1159] Stone WRT (SP Ex. 50) at 3 and App. 1; Fritz WDT (SP Ex. 19) at 4-5; SP Ex. 16.

[1160] Crawford WRT (SP Ex. 52) at 13.

market.[1161] Indeed, even in the current market, broadcasters carried as distant signals cannot derive advertising revenue from distant carriage of their stations, because they do not get ratings numbers from other DMAs that they can sell to advertisers.[1162] For distant signals – or even LPTV stations operating in the cable community -- viewing limited to the particular cable community may not even get reported in the Nielsen books for the cable system's DMA at all, and thus cannot produce advertising revenue.[1163] In the hypothetical market without the compulsory license, it is more likely that the current distant signals would become intermediaries, and that the relative value of the programs on the distant signals would continue to be determined not by advertising revenue but by their relative ability to attract and retain subscribers paying subscription fees.[1164]

b. Problems With Dr. Ford's "Price" Data

(i) Faulty Assumptions about CTV Programming

460. Dr. Ford calculated "prices" for the different distant signal program categories based on a series of adjustments to local market advertising data.[1165] His adjustments that reduced the CPM "price" for CTV programming were based on a series of assumptions about local television station advertising sales and prime time scheduling practices.[1166]

461. Mr. Stone's rebuttal testimony demonstrated that Dr. Ford's assumption that network affiliated stations do not sell local advertising during prime time was flatly wrong,[1167] and that his assumption that television stations do not air station-produced programs, including newscasts, during prime time was flatly wrong.[1168] Contrary to Dr. Ford's adjustments, CPMs

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1161 Crawford WRT (SP Ex. 52) at 13-14.

1162 Tr. 979, 988-92, 999 (Fritz).

1163 Stone WRT (SP Ex. 50) at 2; Tr. 2008-11 (Lindstrom); SP Ex. 37.

1164 Crawford WRT (SP Ex. 52) at 14 & n.30; Tr 990-91 (Fritz).

1165 Ford WDT (PS Ex. 11) at 22-31; Tr. 2133 (Ford).

1166 Ford WDT (PS Ex. 11) at 26-27; Tr. 2142-43, 2259 (Ford).

1167 Stone WRT (SP Ex. 50) at 3; SP Ex. 47 at p. 52.

1168 Stone WRT (SP Ex. 50) at 4.

for station produced news programs are generally higher, not lower, than CPMs for entertainment programs.[1169]

(ii) Failure to Incorporate Non-Advertising Value of Programming Such As Sports

462. Setting Parties offered rebuttal testimony from Ed Desser, the President of Desser Sports Media, Inc (DSM), who testified about the value of sports programming to cable and broadcast stations. DSM specializes in consulting for the sports media community.[1170] Since 2005, DSM has provided numerous valuation analyses of media rights, and participated in the negotiation of billions of dollars in media rights agreements.[1171] DSM clients include major league teams, leagues, federations and associations, as well as distributors, start-up, and technology companies.[1172] DSM has created business plans for new networks, assessed the ability of sports programming to drive adoption of new technology platforms, valued cable networks, and advised potential purchasers of networks and teams.[1173]

463. Prior to starting DSM, Mr. Desser spent 23 years in senior management positions in the Commissioner's Office at the National Basketball Association in New York City.[1174] Positions included President, NBA Television & New Media Ventures, EVP, Strategic Planning and Business Development, VP/General Manager, NBA Entertainment, Inc., and Director of Broadcasting & Executive Producer.[1175] During his time with the NBA, Mr. Desser was primarily responsible for the valuation and negotiation of the league's media rights agreement with various cable and broadcast networks, including TNT, as well as arrangements with most major cable MSOs and all satellite operators (DirecTV, PrimeStar and Echostar).[1176]

1169 Stone WRT (SP Ex. 50) at 4; SP Ex. 47 at p. 64.

1170 Desser WRT (SP Ex. 55) at 2.

1171 *Id.*

1172 *Id.*

1173 *Id.*

1174 *Id.*

1175 *Id.*

1176 Desser WRT (SP Ex. 55) at 2.

464. Mr. Desser explained that sports programs provide additional elements of value to the stations that carry them. These additional elements of value to the stations carrying sports programming include: (1) promotional value of carrying sports programming; (2) the halo effect/prestige from carrying such programming; (3) the increased ability to package advertising for sports with non-sports programming; (4) the ability to use sports programming to create an audience flow to other programming.[1177] Indeed, because sports programming carries these additional elements of value, that programming is often used as a "loss leader" for the networks that carry them.[1178]

465. Mr. Desser explained that sports are highly promotable because sports leagues and teams are well known and have much beloved brands.[1179] Because the leagues and teams are "household names" built over generations, their names and logos can be efficiently used to promote tune-in and association due to their ability to "stand out and grab attention."[1180]

466. Because there is considerable prestige resulting from an association with sports, Mr. Desser also explained that networks that carry sports programming often receive a "halo effect." The reason, Mr. Desser noted, is that "[s]ports fans' affection for their sports can rub off on those who are associated."[1181] According to Mr. Desser, the branding value from carrying sports programming is completely ignored in the Ford analysis.

467. Mr. Desser also points out that Ford's analysis fails to address the fact that sports programming is often used as a "hook" to sell packages of advertising in multiple programs.[1182] Networks in some instances may package commercial time in a sports event with advertising in adjacent programming and other programming on the network or cable system.[1183] Mr. Desser explained that even if the portion of the package price allocated to sports programming is higher

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1177 *Id.* at 4.

1178 *Id.*

1179 *Id.*

1180 *Id.*

1181 *Id.*

1182 Desser WRT (SP Ex.55) at 5.

1183 *Id.*

than the price for other types of programming, one still must account for the fact that without the sports programming, the other ads may not have ever been sold.[1184]

468. Another element of the value of sports programming is its ability to be used as a "tent pole" to attract viewers and cycle them into other programs that are either promoted in the sports event, or which precede or follow it.[1185] In this way, value created by the presence of the sports programming is reflected in the sales of other programming.

469. Sports programming is different than other programs because it typically carries less risk. Mr. Desser noted that most shows that are developed fail and of the handful that survive, even fewer shows become "hits."[1186] While the success of a particular team may vary over time, sports TV programming overall is consistent and predictable in performance.[1187] Consequently, there is less risk associated with sports than many other forms of entertainment programming.[1188] That track record of success enhances the value of sports programming as compared to other entertainment programs, and that value is not reflected in the Ford model.[1189]

470. Mr. Desser also pointed out how sports programming is used to drive penetration of programming networks.[1190] Examples include the Fox Television Network, which was launched harnessing the NFL Sunday afternoon package. Similarly, the NFL and NBA were used to successfully launch TNT, widely considered one of the most successful network launches in cable TV history.[1191] And Superstation penetration was driven by the presence of the MLB Atlanta Braves and NBA Hawks games on WTBS and the Chicago Cubs, White Sox and Bulls on WGN.[1192.]

1184 *Id.*

1185 *Id.*

1186 *Id.*

1187 Desser WRT (SP Ex.55) at 5.

1188 *Id.*

1189 *Id.*

1190 *Id.*

1191 Desser WRT (SP Ex.55) at 5.

1192 *Id.* at 6.

471. Sports programming is also used to influence the selection of multi-video providers by consumers without regard to any advertising that might be sold in the process.[1193] The NFL's Sunday Ticket package, long a fixture on DIRECTV, has aided the growth of this platform against cable. The same is true of the NCAA's Mega March Madness package. The cable industry was recently outbid by DIRECTV for the NASCAR multi-car camera package in order to further improve its competitive position. Each of these are examples of the unique power and value of sports programming in the cable industry, completely ignored by the Ford analysis.[1194]

472. Because it is compelling and topical, sports is typically consumed live, and not TIVO'ed, or downloaded to be seen later.[1195] Indeed, John Mansell, who testified on behalf of the acknowledged that live sports are "unique" because in comparison to nonsports programming, sports is a "one-time event" that is not like other programs "which can be time shifted . . . and videotaped and seen at another time."[1196] In contrast, entertainment programming is not only available on a first run basis, but then also in re-runs, syndication, cable network runs, and via web site streaming, iTunes downloads, and DVDs. Because such programming is often viewed on a delayed or recorded basis, subscribers can "fast forward" through the commercials without stopping to watch the ads.[1197] Ford's analysis in no way addresses this growing phenomenon which disproportionately affects the programming offered by the Program Suppliers.[1198]

473. Sports is often viewed in groups, such as in bars, restaurants, airports, college dorms, health clubs, typically unmeasured by Nielsen, and therefore not truly reflected in the Ford analysis.[1199]

1193 *Id.*

1194 *Id.*

1195 Desser WRT (SP Ex.55) at 7.

1196 Tr. 1704 (Mansell).

1197 Desser WRT (SP Ex.55) at 7.

1198 *Id.*

1199 *Id.*

c. Problems With Dr. Ford's Share Calculations

474. Dr. Ford calculates what he believes to be the most accurate relative market value shares by multiplying his adjusted advertising "price" numbers by the viewing share numbers reported in the MPAA Custom Viewing Study.[1200] In rebuttal, CTV presented the testimony of Dr. Michael D. Topper, an economist and Vice President of Cornerstone Research.[1201] Dr. Topper reviewed the data underlying the MPAA Custom Viewing Study for possible errors, and discovered a number of errors that affected the relative shares reported for the various program categories.[1202] In performing the study for MPAA, Nielsen (1) failed to delete viewing in both 2004 and 2005 for a range of non-compensable syndicated programs on WGN that should have been deleted pursuant to the "Syndex processing" step, (2) failed to delete viewing in 2005 to a number of widely viewed non-compensable network programs, (3) failed to delete a large amount of viewing in 2005 to Rochester broadcast stations that occurred within the stations' local market and should have been deleted from the distant signal viewing totals, and (4) miscategorized viewing to WGN News at Noon and WGN News at Nine as Program Suppliers viewing rather than CTV viewing.[1203] These errors would tend to increase the viewing share reported for 2005 as opposed to 2004, and the viewing shares reported for the Program Suppliers category, in the MPAA Custom Viewing Study.[1204] In addition, Nielsen's failure to account for different station types in weighting the viewing from its sample stations produced a misleading reduction in the viewing reported for the PTV category between 2004 and 2005 in the MPAA Custom Viewing Study.[1205] As a result of the errors, the base numbers that Dr. Ford uses to calculate his relative market value shares are subject to significant errors.[1206]

1200 Ford WDT (PS Ex. 11) at 37-39 and Table 6; Tr. 2154-55 (Ford).

1201 Topper WRT (SP Ex. 49) at 1.

1202 Topper WRT (SP Ex. 49) at 2.

1203 Topper WRT (SP Ex. 49) at 3-4 and App. 2 & 3.

1204 *See* Tr. 2051-2062, 2066-67 (Lindstrom).

1205 Topper WRT (SP Ex. 49) at 4; *see* Tr. 2039-42 (Lindstrom).

1206 Topper WRT (SP Ex. 49) at 4.

d. Comparing Results of Ford's Analysis with Real World Examples

475. Dr. Ford represents that his viewer-to-value calculation provides the "relative market value" of the various types of programming at issue in this proceeding.[1207] He hypothesizes that the "buyer" in his hypothetical market would most likely be another broadcaster, though he suggests it "could" also be a cable system.[1208] In order to test the validity of Dr. Ford's analysis, Mr. Trautman applied Dr. Ford's analysis to programming in the cable marketplace to see if the results were consistent.[1209]

476. Specifically, Mr. Trautman looked at TBS, TNT, and the Top 25 Cable Networks (as defined by number of subscribers).[1210] To determine the value of programming carried on each network, Mr. Trautman obtained information about the programming expenditures for such programming and used that information as a proxy for the market value of that programming. Dr. Ford testified that the ideal way of valuing programming carried by a station is to look at how much that station paid for such programming.[1211] According to Dr. Ford, he had to use advertising data as a proxy for the expenditures because he did not have access to the information about the program costs.[1212]

477. The first network Mr. Trautman looked at was TBS, the former distant signal that converted to a cable network in 1997.[1213] As a result of that conversion, cable operators were required to negotiate in the marketplace directly with TBS in order to carry the copyrighted programming that previously had been carried pursuant to compulsory licensing.[1214] TBS also was required to negotiate in the marketplace with copyright owners in order to provide that programming to cable operators pursuant to negotiated deals rather than compulsory

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1207 Tr. 2118-19 (Ford).

1208 Tr. 2169 (Ford).

1209 Trautman WRT (SP Ex. 57) at 2.

1210 *Id.* at 3, 6, and 8.

1211 Tr. 2172-74 (Ford).

1212 Tr. 2224 (Ford).

1213 Trautman WRT (SP Ex. 57) at 3-4.

1214 *Id.*

licensing.[1215] TBS televised 78 games of the Atlanta Braves in 2004 and 72 games in 2005 pursuant to an agreement that it had negotiated with Major League Baseball.[1216] According to Howard Homonoff, another Program Suppliers' witness, virtually all of the other programming on TBS in 2004 and 2005 consisted of programming that would be classified as programming comparable to that within the Program Suppliers' claim.[1217] The viewing-based formula developed by Dr. Ford suggests that TBS should have spent approximately 4.25% of its 2004 programming budget (and 3.51% of its 2005 programming budget) for the rights to televise the Atlanta Braves. *See* Appendix A, Table A-2.[1218] In fact, however, TBS spent at least 24.08% of its 2004 programming budget (and 24.65% of its 2005 programming budget) for the rights to televise the Atlanta Braves.[1219] The relative dollar amounts that TBS spent on the Braves programming (versus the programming comparable to that within the Program Suppliers' claim) were substantially in excess of the relative amounts of time that such programming was broadcast by TBS, *i.e.,* 2.67% in 2004 and 2.47% in 2005.[1220] The relative dollar amounts that TBS spent on the Braves programming (versus the programming comparable to that within the Program Suppliers' claim) also were substantially in excess of the relative amounts of time that cable and DBS subscribers spent viewing these different programming categories, *i.e.,* 2.6% in 2004 and 2.42% in 2005.[1221]

1215 *Id.*

1216 *Id.*

1217 Homonoff WDT (PS Ex. 7) at HBH-5 and HBH-6.

1218 Trautman WRT (SP Ex. 57) at 4-5.

1219 *Id.*

1220 *Id.*

1221 *Id.*

MLB on TBS Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (Braves)*	2.67%	2.60%	4.25%	24.08%
Program Suppliers/Other	97.33%	97.40%	95.75%	75.92%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (Braves)*	2.47%	2.42%	3.51%	24.65%
Program Suppliers/Other	97.53%	97.58%	96.49%	75.35%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

Sources: Testimony of George S. Ford; Testimony of Howard Homonoff; SNL Kagan, *Cable Program Investor*, April 17, 2007; SNL Kagan, *Media Sports Business*, various issues; and Major League Baseball.

478. Mr. Trautman noted that these numbers were conservative because they did not include any amounts TBS paid to broadcast Big 12 or PAC 10 college football, data that was not available to be included in his analysis.[1222] Also, the programming expenditures did not include substantial production costs for the live sports telecasts.[1223]

479. The next cable network examined by Mr. Trautman was TNT. According to Mr. Trautman, TNT is a good example of the potential outcome of marketplace negotiations for distant signal programming in that it offers a combination of JSC and Program Suppliers' programming for which actual market prices can be directly compared.[1224] In 2004 and 2005, TNT exhibited NBA games that accounted for between two and three percent of the cable network's total programming hours and roughly five percent of the network's total viewing time.[1225] Dr. Ford's methodology suggests that TNT would have allocated 8.6% of its 2004 programming budget (and 7.0% of its 2005 programming budget) for the rights to this NBA

1222 *Id.*

1223 *Id.*

1224 Trautman WRT (SP Ex. 57) at 6.

1225 *Id.*

programming.[1226] However, TNT actually committed nearly one- half of its total programming budget to the NBA in these two years.[1227]

NBA on TNT Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (NBA)*	2.74%	5.37%	8.60%	46.15%
Program Suppliers/Other	97.26%	94.63%	91.40%	53.85%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (NBA)*	2.80%	4.86%	6.96%	45.06%
Program Suppliers	97.20%	95.14%	93.04%	54.94%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

480. Mr. Trautman also applied Ford's analysis to the same "Top 25" Cable Networks analyzed in the testimony of Howard Homonoff.[1228] MLB, NBA, NFL and NHL programming accounted for 0.7% of the total programming hours on his top 25 cable networks in 2004 and 0.6% of the total programming hours in 2005.[1229] Relying upon SNL Kagan data, Mr. Trautman determined that that MLB, NBA, NFL and NHL programming accounted for 1.7% of the 2004 (and 1.4% of the 2005) total time that cable and satellite households spent viewing the programming on the Top 25 cable networks.[1230] Relying upon SNL Kagan data (and information for TBS supplied by Major League Baseball), Mr. Trautman determined that the

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1226 *Id.*

1227 *Id.*

1228 Trautman WRT (SP Ex. 57) at 8.

1229 *Id.*

1230 *Id.*

top 25 cable networks spent approximately 20% of their 2004 programming budget (and 17% of their 2005 programming budget) in order to obtain the rights to MLB, NBA, NFL and NHL programming.[1231] In contrast, the Ford formula suggests that the comparable amounts would be 2.8% and 2.1%.[1232]

JSC on Top 25 Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (MLB, NBA, NFL, NHL)*	0.72%	1.71%	2.80%	20.12%
Program Suppliers/Other	99.28%	98.29%	97.20%	79.88%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (MLB, NBA, NFL, NHL)*	0.55%	1.41%	2.05%	17.35%
Program Suppliers/Other	99.45%	98.59%	97.95%	82.65%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

481. Mr. Trautman observed that the actual ratios for sports programs carried on the top 25 cable networks were likely understated due to Mr. Homonoff's failure to account for regional sports networks (RSNs).[1233] RSNs collectively reach a very high percentage of cable subscribers and would certainly be considered among the "Top 25" cable networks carried by any individual cable system.[1234] SNL Kagan reported that Fox Sports Net, which represents a collection of several RSNs owned by the same company, had programming expenditures of nearly $2.4 billion in 2004-05, second only to ESPN and over $1 billion more than any other

1231 *Id.*

1232 *Id.*

1233 Trautman WRT (SP Ex. 57) at 8, n.6.

1234 *Id.*

cable network.[1235] Most of these expenditures were used to acquire and/or produce JSC programming.[1236] Therefore, by excluding RSNs, the ratios presented in Table 3 and Figure 3 understate the true value of JSC programming in the cable network marketplace.[1237]

B. Gruen Constant Sum Surveys of Cable Subscribers

482. Program Suppliers introduced their own constant sum survey sponsored by Dr. Arthur Gruen (hereinafter "the Gruen Surveys"). Rather than surveying cable operators, however, the Gruen Surveys targeted cable subscribers.[1238] Specifically, the survey asked cable subscribers to allocate a hypothetical budget of $10 among various program categories.[1239] Subscribers were asked about the following program categories: "Live Team Sports," "News and Community Events," "PBS Programs," "Series," "Movies and Specials," "Devotional Programs," "Non-Team Sports," and "Programs on Canadian Stations."

483. The Gruen Survey instructed respondents to value the programming shown only on a particular distant signal or set of signals carried by the cable system to which they subscribe.[1240] The survey questions did not, however, attempt to ascertain whether the individual respondents had any knowledge or familiarity with the programming shown on the distant signals about which they were being asked.[1241] When subscribers were asked to value the various program categories shown on these distant signals using the ten dollar constant sum, they were provided with "examples" of such programs, including specific titles of shows such as "*American Idol*," "*The Oprah Winfrey Show*," or "*Seinfeld*" along with movies like "*Star Wars*" or "*Independence Day*." The examples were provided regardless of whether the programs cited as examples were actually televised by any of the distant signals carried by the subscriber's cable system.[1242]

1235 *Id.*

1236 *Id.*

1237 *Id.*

1238 Gruen WDT (PS Ex. 8) at 6.

1239 Gruen WDT (PS Ex. 8) at 8.

1240 Gruen WDT (PS Ex. 8) at 8.

1241 Tr. 1917-1919 (Gruen).

1242 Tr. 1922-1925 (Gruen).

484. Approximately 1500 people were surveyed each year. Neither Dr. Gruen nor any of the other witnesses who testified in support of the survey provided any evidence about the total number of people who were contacted or who refused to participate in the survey.[1243] Those who agreed to complete the survey were eligible for a $25 participation payment.[1244]

485. The Settling Parties introduced a number of criticisms of the Gruen Surveys. Most of the criticisms relate to the design and administration of those surveys. In addition, however, Settling Parties have challenged the premise that cable subscribers are an appropriate target group given the fact that copyrighted programming is actually supplied to cable operators.

1. Survey Design and Administration

486. Settling Parties raised a number of issues related to the survey design and execution. Dr. Gregory Duncan, an expert in survey methodology and design whose credentials are discussed in detail above,[1245] analyzed the Gruen Surveys and noted a number of significant defects. He then evaluated those defects against the standards for survey evidence referenced in the *Scientific Reference Manual* published by the Federal Judicial Center. In addition, the Settling Parties introduced expert testimony from Mr. Jeffery Berman, a senior partner and executive vice president at C&R Research in Chicago, Illinois, a full-service custom marketing research company.[1246]

487. Mr. Berman earned an MBA from the University of Chicago.[1247] He is an experienced survey researcher who has specialized in survey research in the cable and entertainment industry.[1248] He has nearly thirty years of experience surveying cable subscribers.[1249] Since joining C&R Research over 25 years ago, he has been in charge of all research C&R conducts in the cable television and entertainment industries.[1250] Prior to his work

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1243 Tr. 1867-68 (Gruen).

1244 Gruen WDT (PS Ex. 8) at 66.

1245 *See* Reliability And Validity of the 2004-05 Bortz Surveys, *supra* ¶¶ 96-125.

1246 Tr. 2426 (Berman).

1247 Berman WRT (SP Ex. 53) at 3.

1248 Tr. 2426-27 (Berman).

1249 Berman WRT (SP Ex. 53) at 2-3.

1250 Berman WRT (SP Ex. 53) at 2-3.

at C&R Research, Mr. Berman conducted survey research of cable subscribers for one of the nation's largest MSOs, Cox Communications.[1251] Mr. Berman's survey work has involved every aspect of the survey process, including overall survey design, designing survey questionnaires, formulating sampling plans, monitoring data collection, tabulating and analyzing survey data, and issuing reports and recommendations based on survey data.[1252]

488. Between his work at C&R Research and Cox Communications, Mr. Berman has overseen hundreds of surveys involving cable subscribers.[1253] His clients have included a number of major MSOs, including AT&T Broadband/TCI, Bresnan, Brighthouse, Cablevision, Cablevision Industries, Colony, Comcast, Cox, Media One/Continental, Primestar, Rifkin, Suddenlink, Time Warner, and United Cable.[1254] He has also conducted subscriber surveys for cable networks such as ABC Cable Networks, A&E, BBC America, Cartoon Network, Discovery Channel, DMX Music, ESPN, Food Network, MTV Networks, Nickelodeon, Showtime Networks, Turner Entertainment Sports, and TV Guide/Prevue Networks.[1255] He was recognized as an expert in survey research involving cable subscribers.[1256]

489. Mr. Berman also analyzed the Gruen Surveys and listed a number of objections based on his vast experience surveying cable subscribers. In addition, Mr. Berman designed and coordinated the execution of a survey which was modeled after the Gruen Surveys but which contained additional questions designed to probe the responses to the survey to determine what effect, if any, the survey design had on the answers provided.

490. Mr. Berman conducted a pilot study in October 2009.[1257] The study involved a survey of 110 cable subscribers from seven cable systems located throughout the United States (Arizona, California, Florida, Georgia, Michigan, Oklahoma, and Pennsylvania).[1258] The MSOs

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1251 Berman WRT (SP Ex. 53) at 2-3.

1252 Berman WRT (SP Ex. 53) at 3.

1253 Berman WRT (SP Ex. 53) at 3.

1254 Berman WRT (SP Ex. 53) at 2.

1255 Berman WRT (SP Ex. 53) at 2.

1256 Tr. 2428, 2431 (Berman).

1257 Berman WRT (SP Ex. 53) at 3.

1258 Berman WRT (SP Ex. 53) at 3.

represented in the study were Comcast, Cox, Charter, and BrightHouse.[1259] All of the systems sampled carried WGN as the only distant signal.[1260] Moreover, each system sampled was included in the samples used for the Gruen Surveys.[1261]

491. The survey was designed to replicate the Gruen Surveys by asking subscribers the same set of questions along with a few additional follow-up questions designed to test Mr. Berman's criticisms of the Gruen Surveys. Other than updating a couple of program examples to reflect current carriage and updating the valuation period (2008 rather than 2004 or 2005), the survey questions were identical to the ones used in the Gruen Surveys. In addition, after the original Gruen questions were asked, the survey respondents were then asked a series of four follow-up questions to determine: (1) what time period they were thinking about when they were valuing programming (the current year or the previous year); (2) whether the respondents were providing valuations for themselves or their households; (3) how often the respondents watched the distant signal (WGN) carried by their system and what shows they watched on that signal; and (4) how important the carriage of the distant signal was in maintaining their subscription decision.[1262] Moreover, in contrast to the Gruen Surveys, the gender of the respondent was recorded.[1263]

a. Response Rate

492. The witnesses who testified in support of the Gruen Surveys did not provide a response rate for the Gruen Surveys.[1264] Dr. Gruen defined the response rate as the ratio of: (1) respondents who completed the survey to (2) the number of persons who were initially contacted about participating in the survey. In the 1983 case, the CRT defined it as the ratio of completed surveys to the number in the sample from which respondents are drawn.[1265] The response rate is

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1259 Berman WRT (SP Ex. 53) at 15.

1260 Berman WRT (SP Ex. 53) at 3.

1261 Berman WRT (SP Ex. 53) at 15 (Appendix B).

1262 Berman WRT (SP Ex. 53) at 15 (Appendix B).

1263 Berman WRT (SP Ex. 53) at 15 (Appendix B).

1264 Tr. 1867-68 (Gruen).

1265 1983 CRT Determination at 12798. Dr. Ratchford provided another definition: the contact rate (percent of those able to be contacted who were contacted) times the cooperation rate

Footnote continued on next page

a tool used to determine whether there is non-response bias in the survey results.[1266] Non-response bias occurs when a lack of response to a survey is not distributed randomly across an entire target population.[1267] If a particular group is disproportionately affected by its lack of response, a survey that attempts to target the general population may become biased and unreliable.[1268] In the 1983 proceeding, the Copyright Royalty Tribunal concluded that a response rate of 27% was too low to be reliable.[1269] The CRT also expressed reservations about a subscriber survey with a response rate of 33%.[1270]

493. Dr. Gruen did not calculate a response rate.[1271] Dr. Frankel, who constructed the sampling plan, also did not include a response rate in his testimony.[1272] Instead, Dr. Gruen reported a "cooperation" rate which represented the number of people who participated in the qualification process and who then agreed to complete the remainder of the survey.[1273] While approximately 1500 people agreed to respond to the survey, Program Suppliers introduced no evidence about how many people were contacted and/or refused to participate in either of the years the Gruen Survey was conducted. According to Dr. Ratchford's analysis of the discovery documents, he estimates that there were thousands of initial refusals in each survey year along with many more attempted contacts that went unanswered.[1274]

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(percent of those who were contacted and agreed to participate) times the completion rate (the percent of those who actually completed the survey after agreeing to participate. Ratchford WRT (CCG Ex. 6) at 14. *See also*, Duncan WRT (SP Ex. 54) at 10.

1266 Duncan WRT (SP Ex. 54) at 10.

1267 Duncan WRT (SP Ex. 54) at 9-10. (citing Shari Seidman Diamond, "Reference Guide on Survey Research," *Reference Manual on Scientific Evidence,* pp. 229-276 (2d ed. 2000) ("Reference Manual").

1268 Duncan WRT (SP Ex. 54) at 10.

1269 1983 CRT Determination, 51 Fed. Reg. at 12809.

1270 1983 CRT Determination, 51 Fed. Reg. at 12810.

1271 Tr. 1867 (Gruen).

1272 *Id.*

1273 Gruen WDT (PS Ex. 8) at 18-19.

1274 Ratchford WRT (CCG Ex. 6) at 13-15.

494. Dr. Duncan provided testimony about the importance of obtaining a response rate when evaluating survey results.[1275] Dr. Duncan stated that in order to determine whether there was any non-response bias, it is important to collect accurate information on survey response rates. Bruce Hoynoski, appearing on behalf of Program Suppliers in support of their Nielsen Viewing Study, agreed that "response rates are an important fact in evaluating survey evidence."[1276] Dr. Duncan stated that in a typical survey, the response rate is always given.[1277] Dr. Duncan testified that the "cooperation" rate reported by Dr. Gruen is not a standard measurement and cannot be used to measure non-response bias.[1278] According to Dr. Duncan, the absence of a useful response rate makes it impossible to determine whether the sample for the subscriber survey is representative of the target population.[1279]

495. Though none of the Program Suppliers' witnesses testified about the actual response rate, the CCG's survey expert, Dr. Brian Ratchford, attempted to compute the response rate from the discovery materials underlying the survey.[1280] According to Dr. Ratchford's calculations, the response rate for the survey was 15.83% in 2004 and 27.17% in 2005.[1281]

b. Gender of Respondents

496. The Gruen Surveys collected specific demographic information, such as the marital status, age, income, and education of the respondents.[1282] Dr. Gruen used some of that information to help him analyze the results of his surveys. But the Gruen Surveys did not collect any information concerning the gender of the respondents.[1283]

497. The Scientific Reference Manual published by the Federal Judiciary notes that "[t]he survey report should contain a description of the target population, a description of the

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1275 Tr. 2502 (Duncan); Duncan WRT (SP Ex. 54) at 9-11.

1276 Tr. 2094 (Hoynoski).

1277 Tr. 2547 (Duncan).

1278 Tr. 2546 (Duncan); Duncan WRT (SP Ex. 54) at 10.

1279 Duncan WRT (SP Ex. 54) at 11.

1280 Ratchford WRT (CCG Ex. 6) at 12-14.

1281 Ratchford WRT (CCG Ex. 6) at 13-15.

1282 Gruen WDT (PS Ex. 8) at 45-47; Tr. 1852-53 (Gruen).

1283 Tr. 1860 (Gruen).

survey population actually sampled, a discussion of the difference between the two populations, and an evaluation of the likely consequences of that difference."[1284] Dr. Gruen agreed that obtaining demographic information is necessary in order to see how different demographic subcategories respond to questions.[1285] In consumer surveys, it is standard to collect data about the gender of respondents.[1286] In a prior survey of potential cable customers, Dr. Gruen recorded the gender of the respondents and adjusted the results of that survey because males were underrepresented.[1287]

498. No adjustment can be made here because gender data was not collected.[1288] Dr. Ford noted that live team sports attracts a disproportionately male audience.[1289] Mr. Berman explained why the collection of such information was necessary, noting that subscriber surveys typically skew toward older, female participants.[1290] Because we have no data regarding gender here, we cannot determine whether women were overrepresented, as they typically are in consumer surveys, or whether women gave sports a lower value on average than their male counterparts.[1291] Dr. Gruen conceded that gender data should have been recorded here.[1292] Neither Mr. Berman nor Professor Duncan could recall any consumer surveys they had overseen or been involved with where gender data was omitted from the demographic data collected.[1293]

499. In the 1983 proceeding, the representativeness of a subscriber survey was called into question because of an imbalance between male and female respondents. In that case, females represented 59.3% of the subscribers while males represented the remaining 40.7%.[1294]

[1284] Duncan WRT (SP Ex. 54) at 8-9.

[1285] Tr. 1853-54 (Gruen).

[1286] Tr. 1859-60 (Gruen).

[1287] Tr. 1861-62 (Gruen).

[1288] Tr. 1864-65 (Gruen).

[1289] Ford WDT (PS Ex. 11) at 23.

[1290] Berman WRT (SP Ex. 53) at 10.

[1291] Tr. 1863-64 (Gruen).

[1292] Tr. 1859.

[1293] Berman WRT (SP Ex. 53) at 10.

[1294] 1983 CRT Determination at 12799.

While males gave sports a value of $33 (out of $100), female respondents only gave sports programming a value of $20.[1295] The CRT rejected the cable subscriber survey in part because of reservations the tribunal had with respect to the male-female ratio in the survey sample.[1296] According to Professor Duncan, in the absence of gender information, one cannot determine what the male-female ratio was here and whether the survey sample was representative of the larger cable universe.[1297]

500. Unlike the Gruen Survey, Mr. Berman's pilot study deviated from the Gruen Surveys by recording the gender of the respondent. Of the 110 respondents to the survey, approximately 56% were female and 61% were 55 years or older. Women comprised 52% of the cable universe in 2004-05 and those 55 and older comprised only about 30% of the cable universe during that time period. Age did not result in a significant difference in terms of how respondents evaluated Live Team Sports and Series. There was, however, a significant difference in responses by gender, as women valued Series programs much more highly than Live Team Sports while males valued Live Team Sports more highly than programs in the Series category:

Pilot Study -- Value By Gender[1298]

Programming Categories	**Males**	**Females**
News & Community Events	$1.51	$1.38
Series	1.50	2.73
Devotional Programming	0.84	1.14
Movies & Specials	2.01	2.09
Live Team Sports	2.91	1.58
Non-Team Sports	0.81	0.81

501. Though Mr. Berman noted that the sample size was too small to project these numbers to the universe, he concluded that the difference in average values between men and

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1295 *Id.*

1296 1983 CRT Determination at 12799, 12810.

1297 Duncan WRT (SP Ex. 54) at 9.

1298 Berman WRT (SP Ex. 53) at 11.

women was a statistically significant one.[1299] Such disparities can be adjusted but only if the gender of the sample population is known, which is not the case in the Gruen Surveys because that information was not recorded.[1300]

c. Use of Program Examples

502. Both Dr. Duncan and Mr. Berman testified that using program examples was inappropriate and lead to misleading results.[1301] The Gruen Surveys identified the distant signal(s) that each respondent's cable system carried for the time period in question and the program categories on those signals for which relative valuations were sought.[1302] The Gruen Surveys also provided "examples" of specific program titles included within each category. The identity of the distant signal(s) and the program category definitions (along with the examples) appeared three times in the survey: first, as "Descriptive Information;" then in asking about the popularity of various program categories; and finally, when asking respondents to provide valuations for each program category as part of the constant sum question. [1303]

503. For the "Series" category, the survey stated described the category as:

> SERIES PROGRAMS: This category includes sitcoms such as *Seinfeld*, dramas such as *Star Trek: Enterprise*, reality shows such as *American Idol*, game shows such as *Jeopardy*, and talk shows such as the *Oprah Winfrey Show* shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR CITIES OF ORIGIN).[1304]

504. Similarly, for the "movies and specials" category, the survey described the category as:

> MOVIES AND SPECIALS: These include feature films, Movies of the Week, and specials shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR

1299 Berman WRT (SP Ex. 53) at 10; Tr. 2490 (Berman).

1300 Berman WRT (SP Ex. 53) at 10; Ratchford WRT (CCG 6) at 9.

1301 Berman WRT (SP Ex. 53) at 6-7; Duncan WRT (SP Ex. 54) at 7-8.

1302 Gruen WDT (PS Ex. 8) at 13.

1303 Gruen WDT (PS Ex. 8) at 31, 51 (Appendix B, D).

1304 Gruen WDT (PS Ex. 8) at. at 33, 35, and 41 (Appendix B).

> CITIES OF ORIGIN). Examples include *Star Wars*, *Independence Day*, and *Lethal Weapon 3*.

505. The Gruen Surveys also added an additional category, "non-team sports," which was defined as:

> NON-TEAM SPORTS: These include professional wrestling, NASCAR auto racing, and pre- and post-game shows surrounding live team sports broadcasts shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR CITIES OF ORIGIN).[1305]

506. For the devotional category, the Gruen Surveys defined the category as:

> DEVOTIONAL PROGRAMS: These include shows with religious themes shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR CITIES OF ORIGIN). Examples include Old Time Gospel Hour, 700 Club, and Joel Osteen Ministry.[1306]

507. Examples of specific program titles were also used for Public Television and Canadian Stations.[1307] There were no specific program titles used for "Live Team Sports," though the survey did make reference to specific team sports leagues such as MLB, NFL, NBA, NHL, NCAA College Football and Basketball, and MLS.[1308]

508. Professor Duncan criticized the use of the program examples, noting that they create an "anchoring" effect which can bias responses. Specifically, Professor Duncan noted that the use of these specific examples can focus an individual's attention away from the full set of programming in that category.[1309] Professor Duncan also explained that because respondents may not remember where they watched a particular show, their responses may reflect their preferences for certain program types rather than their relative preferences for programming types actually carried on distant signals.[1310]

[1305] Gruen WDT (PS Ex. 8) at 34, 37, and 42 (Appendix B).

[1306] Gruen WDT (PS Ex. 8) at 33, 36, and 42 (Appendix B).

[1307] Gruen WDT (PS Ex. 8) at 34, 38 (Appendix B).

[1308] Gruen WDT (PS Ex. 8) at 34, 37, and 42 (Appendix B).

[1309] Duncan WRT (SP Ex. 54) at 7.

[1310] Duncan WRT (SP Ex. 54) at 7.

509. Mr. Berman noted that the way the examples were described in the survey, a respondent could reasonably interpret the question as representing that these program titles were actually carried on the distant signal even though many were not.[1311] According to Mr. Berman, the use of the examples was particularly problematic with respect to WGN, the most widely carried distant signal in 2004 and 2005.[1312] During that time period, nearly half of the Form 3 cable systems that carried a distant commercial signal carried WGN as their only distant signal, while approximately 70% of all Form 3 cable systems carried WGN as one of their distant signals.[1313] In 2004, approximately 47% of respondents to the Gruen Surveys received WGN as their only distant station; that number was approximately 52% in 2005.[1314] Approximately half of the respondents to the Gruen Survey would have been provided with a string of program examples in the "Series" category like "Seinfeld," "American Idol," "Jeopardy," "Star Trek Enterprise" and "*the Oprah Winfrey Show*" and titles in the "Movies" category like "Lethal Weapon 3"and "Independence Day" even though none of those movies or shows were actually carried by WGN in 2004 or 2005.[1315] In fact, the survey's sponsor, Dr. Gruen, could not say whether the program examples that were used were even representative of the programming carried on WGN.[1316]

510. Besides the JSC telecasts, some of the actual television programs which were regularly broadcast "full signal"[1317] on WGN in 2004-05 included:

1311 Tr. 2434 (Berman); Berman WRT (SP Ex. 53) at 6-7.

1312 Tr. 2434 (Berman).

1313 Trautman WRT (SP Ex. 57) at 15 n. 14.

1314 Berman WRT (SP Ex. 53) at 6.

1315 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 2.

1316 Tr. 1923-26 (Gruen).

1317 As explained in Section IV.D.4. of the PFOF, only programming shown "full signal" on WGN is eligible for compensation under the Copyright Act. When Dr. Gruen was asked about how this issue should be addressed with respect to his survey results, he indicated that he was aware of the fact that some WGN programming is not compensable and that survey respondents would not be able to draw such a distinction in valuing programming on WGN. Tr. 1915-16 (Gruen). But when asked whether an adjustment should be made to address this issue, Dr. Gruen said he did not believe an adjustment was necessary "because

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Will & Grace	5:30 PM (daily)
Street Smarts	12:30 AM (daily)
Home Improvement	3:00 AM (daily)
Matlock	3:30 AM (daily)
Beastmaster	11:00 AM (weekend)
Soul Train	12:00 PM (weekend)
The Fresh Prince of Bel-Air	12:00 PM (weekend)
Mutant X	3:30 PM (weekend)
Andromeda	4:30 PM (weekend)
Maximum Exposure	1:30 AM (weekend)[1318]

None of these programs were used as examples in the Gruen Surveys.[1319]

511. Similarly, respondents to the Gruen Survey were provided with examples of "non-team sports" like "NASCAR auto racing" and "professional wrestling" which also were not carried on WGN.[1320] The only other examples of non-team sports referenced in the Gruen Survey were pre-game and post-game shows surrounding sports broadcasts; although there were some of these programs on WGN, they were produced by that station and therefore properly belonged in the Commercial Television Category, not the Program Suppliers.[1321] The same was true for Devotional Programs, like the "Joel Osteen Ministry," which was not broadcast on WGN.[1322] According to Mr. Berman, the danger of wording questions in this manner is that respondents will be encouraged to associate the examples with the distant station and value the programming

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there's really no way of knowing what [the respondents] took into account . . . ." *Id.* at 1916-17.

1318 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 2-3.

1319 Gruen WDT (PS Ex. 8) at Appendix B, D.

1320 *Id.*; *see also* Tr. 2436 (Berman); Tr. 3259-60 (Kessler).

1321 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 3.

1322 Tr. 2436 (Berman).

on that station based on programs not actually carried by that station.[1323] In Mr. Berman's view, the use of such examples is inappropriate and biases the results of the survey.[1324]

512. Mr. Berman tested this criticism in his pilot study by asking survey respondents, at the end of the survey, which programs they viewed on WGN. Mr. Berman's survey used nearly all of the same program examples used in the Gruen Surveys. All of the respondents to the Berman Pilot Study received WGN as their only distant signal.[1325] As with the Gruen Surveys, many of the listed programs were not broadcast by WGN.[1326] Nonetheless, when asked which programs the respondents watched on WGN, nearly half of the respondents identified the programs used as examples in the survey even though they were not carried by WGN.[1327] Examples of programs that respondents purported to have watched on WGN despite the fact that those programs were not carried on WGN included:

Program Examples Respondents Mistakenly Claimed to Have Watched on WGN	**Number of Respondents**	**Claimant Category**
Oprah	21	Program Supplier
Seinfeld	17	Program Supplier
American Idol	13	Program Supplier
NASCAR	9	Program Supplier
Jeopardy	6	Program Supplier
Joel Osteen	5	Devotionals
Wrestling	4	Program Supplier

513. The three most commonly cited program titles were the series programs "*Oprah,*" "*Seinfeld,*" and "*American Idol,*" all of which belong in the Program Supplier category.[1328] A number of respondents also indicated that they had watched programs used as examples in the "non-team sports" category such as NASCAR and wrestling even though WGN did not

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1323 Tr. 2434 (Berman).

1324 Berman WRT (SP Ex. 53) at 6-7.

1325 Berman WRT (SP Ex. 53) at 4.

1326 Tr. 2435-36 (Berman).

1327 Berman WRT (SP Ex. 53) at 7.

1328 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B).

broadcast either type of program.[1329] And those numbers do not include generic responses such as "car racing" even though there is no evidence that any auto racing was retransmitted by WGN in 2004-05.[1330] Some respondents also listed team sports which were not actually shown on WGN.[1331]

514. Overall, approximately 56 of the 89 people who provided an example of a program they watched on WGN listed one of the survey examples even though that program was not carried by WGN.[1332] Most of these programs would have been available from sources other than distant signals.[1333]

515. Survey questions should be framed in a non-leading manner.[1334] According to Mr. Berman, the use of these programming examples violated this principle by causing respondents to focus on programs carried outside the distant signal universe. In his experience, and based on the results of his pilot study, it is very likely that respondents to the Gruen Surveys incorporated the value of programming shown on other cable networks when they attempted to value the programming shown on their distant signals.[1335]

d. Qualification of Survey Respondents

516. Another criticism raised by the Settling Parties related to the qualifications of some of the subscribers who responded to the survey. The Reference Manual on Scientific Evidence provides that "[i]in a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey."[1336] Professor Duncan noted that the Gruen Surveys failed to determine whether any of the respondents: (a) were familiar with the programming carried on their distant signals; (b) had ever watched any of the programming on the distant signals (frequently or ever); and (c) had

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1329 Tr. 2436 (Berman).

1330 Tr. 3259-60.

1331 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B); Tr. 1925-26 (Gruen).

1332 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B).

1333 Berman WRT (SP Ex. 53) at 7.

1334 Berman WRT (SP Ex. 53) at 8.

1335 Berman WRT (SP Ex. 53) at 7.

1336 Duncan WRT (SP Ex. 54) at 6 (citing Reference Manual at p. 247).

assigned any value to that programming in terms of their reason for subscribing to cable. According to Professor Duncan, by failing to exclude respondents in any of these categories, the Gruen Surveys virtually ensure that some portion of the respondent pool will not be qualified to provide meaningful answers.[1337] And in the opinion of Professor Duncan, the inclusion of guesses and conjectures among carefully considered and knowledgeable answers renders the overall results unreliable.[1338]

517. Mr. Berman also expressed concern about whether respondents were qualified to participate in the survey. "[E]ffective survey research requires survey respondents to be knowledgeable so that they are able to answer the questions being asked."[1339] The Gruen Surveys did not ask respondents whether they were familiar with the programming carried on their distant signals.[1340] Respondents were not even asked whether they received the distant signal.[1341] Indeed, respondents to the survey were not even asked whether they had ever heard of the distant signals.[1342] The only qualification to participate in the survey was that the respondent have subscribed to the cable system receiving the distant signal.[1343] So even if a respondent had no interest, no familiarity, and had never watched any of the signals being asked about, they would be asked to provide program valuations as part of the Gruen Surveys.[1344]

518. The average cable subscriber only watches 12 to 15 channels even though they may receive 100 or more.[1345] But there is no way from the Gruen Surveys to determine whether any of the distant signals that respondents were asked to provide values for were one of the 12-15 signals watched by the respondents.[1346] Though a field test and pilot study were conducted

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1337 Duncan WRT (SP Ex. 54) at 6-7.

1338 Duncan WRT (SP Ex. 54) at 7.

1339 Rubin WDT (PS Ex. 4) at 4.

1340 Tr. 1887-88 (Gruen).

1341 Tr. 1835-36 (Gruen).

1342 Tr. 1885 (Gruen).

1343 Tr. 1885 (Gruen).

1344 Tr. 1885-86 (Gruen).

1345 Tr. 1889 (Gruen).

1346 Tr. 1890 (Gruen).

before the Gruen Surveys were fully implemented[1347], neither Dr. Gruen nor Professor Rubin mentioned any follow up questions or discussions with respondents to test whether they were in fact knowledgeable about the subject matter about which they were being asked.[1348]

519. According to Mr. Berman, the failure to establish that the survey respondents were in some way knowledgeable about the programming means that some of the responses were from unqualified respondents. [1349] Thus, in the view of Mr. Berman, the survey did not constitute "effective survey research" because respondents were not necessarily knowledgeable about the issues they were asked to address in the survey.[1350]

520. A similar criticism was raised by Dr. Crawford, an expert economist with experience in the analysis of cable television programming markets. First, it failed to establish whether the respondents, who were asked for their views on the relative value of different distant signal programming categories, valued any distant signal programming at all.[1351] According to Dr. Crawford, a person that has never seen a particular distant signal or lacks any familiarity with its programming cannot provide relevant information when asked to allocate a constant sum. [1352]

521. The concern about respondent qualifications was also raised by Professor Brian Ratchford on behalf of the CCG. Dr. Ratchford pointed out that because the Gruen Surveys do not ask respondents whether and to what extent they ever viewed programs on distant signals or even whether they were aware of the signals and the programming carried on those signals, the responses to the survey are difficult to interpret.[1353] Dr. Ratchford noted that the majority of

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[1347] Gruen WDT (PS Ex. 8) at 7. The field test involved two markets and twenty-five respondents. *Id.* Dr. Gruen testified that this was a large enough sample to give [the survey designers] a sense of how respondents would react to the questionnaire." *Id.* Dr. Gruen and his associates subsequently conducted a pilot test that involved 150 respondents. *Id.* at 10.

[1348] *See generally* Gruen WDT (PS Ex. 8) at 31, 51 (Appendix B, D).; Rubin WDT (PS Ex. 4) at 9-12.

[1349] Berman WRT (SP Ex. 53) at 8.

[1350] Berman WRT (SP Ex. 53) at 8.

[1351] Crawford WRT (SP Ex. 52) at 15, Tr. 2364-65 (Crawford).

[1352] Crawford WRT (SP Ex. 52) at 15.

[1353] Ratchford WRT (CCG 6) at 4.

channels tend to attract a relatively small share of all subscribers, so it is unlikely that all survey respondents would have had significant experience with the programming on distant signals.[1354] Dr. Ratchford also explained that because respondents were given $25 payments, they had ample incentive to provide some response.[1355]

522. Mr. Berman's pilot study also attempted to assess the qualifications of the survey respondents to see whether the survey was likely to include responses from individuals unfamiliar with the programming carried on their distant signals. Each respondent was asked about the frequency with which they watched their distant signal (WGN).[1356] The following results were obtained:

Pilot Study -- Frequency with Which Viewers Watched WGN in Preceding Year[1357]	
Frequently	32.7
Occasionally	36.4
Rarely	20.0
Never	8.2
Don't know	2.7

523. Mr. Berman also noted that because respondents may have mistakenly believed that certain programming was carried on WGN because of the use of the program examples, that mistake could have also influenced their assessment of how often they had watched WGN.[1358] Because over half of the respondents who listed examples of programs they watched on WGN listed the titles that were not broadcast by that station but which were used as examples in the survey, Mr. Berman concluded that the use of the survey examples in the pilot study most likely tainted the responses of those who claimed to have watched WGN.[1359] Mr. Berman could not put an exact number on the number of unqualified respondents in the Gruen Surveys but was confident that at least 30% (and likely more) of the respondents to his survey were unfamiliar

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1354 Ratchford WRT (CCG 6) at 5.

1355 Ratchford WRT (CCG 6) at 10.

1356 Berman WRT (SP Ex. 53) (Appendix C) at 26.

1357 Berman WRT (SP Ex. 53) at 9.

1358 Tr. 2473-4 (Berman); Berman WRT (SP Ex. 53) at 9.

1359 Berman WRT (SP Ex. 53) at 9.

with the programming on WGN.[1360] In his view, that supported his concern that the results of the Gruen Surveys were diluted by the inclusion of a number of respondents who were not qualified to assign program valuations.[1361]

e. Wording of Questions

524. Both Professor Duncan and Mr. Berman raised two other issues about the wording of the questions in the Gruen Surveys.[1362] The first issue concerned valuations in multi-person households. The Gruen Surveys were intended to provide "household" values for survey respondents.[1363] Approximately two-thirds of the households in the surveys had two or more respondents.[1364] Dr. Ratchford, on behalf of the CCG, criticized this approach, noting that many respondents may not be familiar with the viewing behavior of other household members or be able to accurately assess the strength of their preferences.[1365] Even if respondents are capable of providing accurate valuations of household members, however, Settling Parties raised an issue about whether the survey design unintentionally caused respondents in multi-person households to provide individual valuations.[1366]

525. Rather than consistently asking the respondent to provide responses for "the household," the Gruen Surveys used a mix of different language which may have confused respondents about whether they were to answer for themselves or everyone in their home. In the section entitled "Program Value," the instructions first say that "[w]e are now going to ask you a few questions on how <u>you</u> value the program categories shown [on the distant stations at issue]."[1367] Before asking subscribers to provide values for programming, the Gruen Surveys asked about the popularity of the program categories it used.[1368] The popularity questions first

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1360 Tr. 2474-5 (Berman).

1361 Tr. 2475 (Berman).

1362 Duncan WRT (SP Ex. 54) at 8; Berman WRT (SP Ex. 53) at 11-12.

1363 Tr. 1863 (Gruen).

1364 Ratchford WRT (CCG 6) at 9.

1365 Ratchford WRT (CCG 6) at 9.

1366 Duncan WRT (SP Ex. 54) at 8; Berman WRT (SP Ex. 53) at 11-12.

1367 Gruen WDT (PS Ex. 8) at 40 (Appendix B) (emphasis added).

1368 Gruen WDT (PS Ex. 8) (Appendix B).

instruction thus suggests that the value will be that of the respondent.[1369] The survey then asks the respondent to assume that ten dollars of their last cable bill was for carriage of the distant stations being asked about in the survey. The respondent is then instructed to divide the ten dollars "according to how valuable you feel each program category was in your own home."[1370] This instruction appears to target household value.[1371] After some additional instructions that encourage the respondents to write down the categories and make sure they add up to ten dollars, the respondents are then provided with a description of the program categories. After that, respondents are asked the key valuation question: "what is the value to you, if any, of all [insert category] shown on this station for this category?"[1372]

526. The Reference Manual on Scientific Evidence provides that "[w]hen unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the question."[1373] The Reference Manual further provides that "[i]f the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey."[1374] Professor Duncan noted that because of the changing descriptions, "it is not clear whose valuation is reflected in the survey responses."[1375] Similarly, Mr. Berman noted that the shift in terminology was likely to produce confusion among respondents about whose valuations should be provided (the respondent's or the entire household).

527. Mr. Berman's pilot study tested this issue.[1376] Each respondent was asked, after the initial Gruen questions were completed, whether the valuations they provided were their own

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1369 Berman WRT (SP Ex. 53) at 11.

1370 Gruen WDT (PS Ex. 8) at 40 (Appendix B) (emphasis added)..

1371 Berman WRT (SP Ex. 53) at 11.

1372 Gruen WDT (PS Ex. 8) at 41 (Appendix B) (emphasis added).

1373 Duncan WRT (SP Ex. 54) at 7 (citing Reference Manual at 248).

1374 Duncan WRT (SP Ex. 54) at 7 (citing Reference Manual at 248).

1375 Duncan WRT (SP Ex. 54) at 8.

1376 Berman WRT (SP Ex. 53) at 11-12.

or were instead intended to reflect the values of their household.[1377] Mr. Berman found that one out of five respondents in multi-person households provided their personal valuations rather than valuations for their household.[1378] According to Mr. Berman, the manner in which the final valuation question was worded made it likely that some portion of the respondents misapprehended the purpose of the question and provided their own valuations rather than those of their households.[1379]

528. Another problem addressed by both Dr. Duncan and Mr. Berman related to the time period respondents considered when they valued programming on distant signals. The popularity question in the Gruen Survey is introduced using the past tense and informs respondents that they are going to be asked about "the popularity of each type of program last year IN YOUR OWN HOME."[1380] When the valuation question was introduced, there is no reference to the previous year; instead, respondents are told that "[w]e are now going to ask you a few questions on how you value the program categories shown on these same stations."[1381] The survey then provides instructions about how to divide the ten dollar constant sum, explaining that subscribers should assume that the ten dollars represents how much the subscribers paid last year for the distant signals carried on their cable system.[1382] The instructions then say that the ten dollars should be divided according to how valuable the programming "was" in their own home.[1383] Mr. Berman noted that at this point, the survey appears to be asking respondents to look backward to the previous year in providing valuations.[1384] But when the valuation questions is ultimately asked, the survey shifts back to the present tense, asking respondents "what is the value to you?"[1385]

1377 Berman WRT (SP Ex. 53) at 12.

1378 Berman WRT (SP Ex. 53) at 12.

1379 Berman WRT (SP Ex. 53) at 12.

1380 Gruen WDT (PS Ex. 8) at 40 (Appendix B) (emphasis added).

1381 *Id.* (emphasis in original).

1382 Berman WRT (SP Ex. 53) at12-13; Gruen WDT (PS Ex. 8) at 40.

1383 Gruen WDT (PS Ex. 8) at 40.

1384 Berman WRT (SP Ex. 53) at 13.

1385 Gruen WDT (PS Ex. 8) at 41.

529. Professor Duncan noted that the survey's wording does not clearly define the time period to which the valuations should relate.[1386] Thus, according to Professor Duncan, one cannot clearly ascertain whether the valuations provided were for the previous year (as the surveyors intended), the current time period, or some other time frame.[1387] This concern was also referenced by Mr. Berman, who indicated that the time period being valued was not clearly described.[1388] Mr. Berman tested this criticism in his pilot study by asking respondents, after they had answered the original Gruen questions, what time period they were thinking about when they provided relative values of the different program categories.[1389] Less than a fifth of those who responded to the survey indicated that they thinking about the previous year when they provided program values:

Pilot Study -- Time Period for Which Programming Values Were Given[1390]	
Currently On	11.8
From a year ago	17.3
Not thinking about a time frame	67.3
Don't know	3.6

530. Because respondents were not focused on the prior year as a result of the survey's lack of clear instructions, Mr. Berman concluded that survey's intent of obtaining values from the previous year was not met.[1391]

f. Failure to Measure Intensity of Interest

531. Dr. Ratchford also criticized the Gruen Surveys for failing to weight survey responses by intensity of interest. According to Dr. Ratchford, by assigning the same weight to all responses, the Gruen Surveys improperly dilute the values of small segments of very

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1386 Duncan WRT (SP Ex. 54) at 8.

1387 *Id.*

1388 Berman WRT (SP Ex. 53) at 12.

1389 Berman WRT (SP Ex. 53) at 26 (Appendix C).

1390 Berman WRT (SP Ex. 53) at 13.

1391 Berman WRT (SP Ex. 53) at 13.

committed viewers.[1392] Some subscribers he noted, value programming so highly that it influences their decision as to whether or not to subscribe to a particular cable service. Others may be relatively indifferent.[1393] Averaging those two groups results in small overall share and may obscure the strong preferences of those subscribers who place a very high value on such programming.[1394]

2. Reliance Upon Cable Subscribers Versus Operators

532. One of the problems Settling Parties raised with respect to the Gruen Surveys is that they focus on cable subscribers rather than cable operators. The Reference Manual for Scientific Evidence published by the Federal Judicial Center provides that if the population surveyed is not the one whose perceptions the survey is intended to represent, then the survey itself is irrelevant.[1395] Professor Duncan criticized the Gruen Surveys for asking valuation questions of cable subscribers even though the ultimate question faced in these proceedings is the value cable operators ascribe to distant signal programming.[1396]Even if the Gruen Surveys had been able to accurately measure the valuations of cable subscribers, those values would be only one factor in the cable operator's own value of the programming televised on distant signals.

533. Professor Duncan, an economist with expertise in network industries, whose credentials are discussed *infra* PFOF ¶107, noted that other economic forces play an important role in determining the relative amounts that cable operators would pay for different categories of programming carried on distant signals.[1397] The other economic forces that play a role in the relative amounts cable operators would be willing to pay for different categories of programming include: (1) amount and type of local programming available; (2) market penetration by competitors; (3) monthly subscription fees and their relationship to the valuation of all program categories; and (4) network costs, which may differ by operator. Those network costs may

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1392 Ratchford WRT (CCG 6) at 7.

1393 Ratchford WRT (CCG 6) at 7-8.

1394 Ratchford WRT (CCG 6) at 8.

1395 Duncan WRT (SP Ex. 54) at 6-7.

1396 Duncan WRT (SP Ex. 54) at 4-5.

1397 Duncan WRT (SP Ex. 54) at 5-6.

include local fees, bandwidth limitations, maintenance expenses, depreciation, and any other factors that are not uniform across operators.[1398]

534. Dr. George Ford, who testified on behalf of Program Suppliers and discussed the possibility of using a "subscriber" survey as part of a "hybrid" valuation model, has acknowledged in prior research that cable operators face different economic forces than their subscribers and do not always act in lockstep with their wishes. Specifically, in an article about the effects of "bundling" various program networks, Dr. Ford and his co-authors observed that MPVDs "do not create their tiers of programming solely by reference to what subscribers want to watch (or not want to watch)--an MVPD establishes tiers in order to maximize profits."[1399] Dr. Ford agreed that cable operators sometimes bundle programming in ways that do not match the preferences of their subscribers, noting that this sometimes happens "because of outside influences."[1400] Dr. Ford also conceded that these "outside influences" may increase profits for cable operators.[1401]

535. Professor Duncan noted that in his experience conducting research about enterprise customers, his market research group would have never surveyed the customers of the enterprise.[1402] Professor Duncan observed that the best way to measure the values of a cable operator or any other enterprise is to ask them directly.[1403]

C. MPAA Custom Viewing Study

536. Program Suppliers witness Paul Lindstrom, a senior vice president with the Nielsen Company, presented a viewing study in the proceeding.[1404] The study was a custom

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1398 Duncan WRT (SP Ex. 54) at 6.

1399 A La Carte and "Family Tiers" as a Response to a Market Defect in the Multichannel Video Programming Market (SP Ex. 48) at 37.

1400 Tr. 2298-2299 (Ford).

1401 Tr. 2298-2299 (Ford).

1402 Tr. 2531 (Duncan).

1403 Tr. 2532 (Duncan).

1404 Lindstrom WDT (PS Ex. 9) at 4-5.

analysis of viewing data collected for other purposes, which was commissioned by the Motion Picture Association of America (MPAA).[1405]

537. Mr. Lindstrom has presented an MPAA Custom Viewing Study in every cable distribution proceeding since the 1980 proceeding.[1406] With some changes due to the shift from using diary data to using metered data, the methodology has been the same.[1407] Because the methodologies were consistent, Mr. Lindstrom testified that one could compare the results of the 1998-99 MPAA Custom Viewing Study and the 2004-05 MPAA Custom Viewing Study.[1408]

538. The 1998-99 CARP found that "the Nielsen study does not directly address the criterion of relevance to the Panel."[1409] It did not consider viewing data useful because distant signals are of value to cable operators in helping to attract and retain subscribers, not in "contributing to supplemental advertising revenue."[1410] The 1998-99 CARP concluded that because the viewing study "'fails to measure the value of the retransmitted programming in terms of its ability to attract and retain subscribers,' it cannot be used to measure directly relative value to [Cable System Operators]."[1411]

539. In this proceeding, Mr. Lindstrom agreed that, beyond counting up the minutes when television sets were tuned to particular channels, his study did not investigate how important the programs were to the viewers.[1412] He testified that neither he nor The Nielsen Company is presenting the results of the MPAA Custom Viewing Study as a measure of the marketplace value of distant signal programming.[1413] Dr. Ford agreed that viewership is not

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1405 Lindstrom WDT (PS Ex. 9) at 4-5.

1406 Tr. 1976, 1985 (Lindstrom).

1407 Tr. 1985-87 (Lindstrom).

1408 Tr. 1986-87 (Lindstrom).

1409 1998-99 CARP Report at 38.

1410 1998-99 CARP Report at 38.

1411 1998-99 CARP Report at 38.

1412 Tr. 1978 (Lindstrom).

1413 Tr. 1988-89 (Lindstrom).

equal to value and that the MPAA Custom Viewing Study does not present numbers that represent a measure of marketplace value of distant signal programming.[1414]

540. In the 1998-99 proceeding, Program Suppliers for the first time, in "a significant departure from past proceedings," did not propose using the raw numbers resulting from the Custom Viewing Study as the basis for setting the royalty shares.[1415] Instead, it proposed using the viewing numbers as adjusted by a series of steps presented by Dr. Gruen.[1416] In this proceeding, Program Suppliers seek allocations of the royalty funds based on the raw numbers resulting from the 2004-05 Custom Viewing Study as adjusted by a series of steps presented by Dr. Ford.[1417]

a. The Study

541. The MPAA Custom Viewing Study analyzes People Meter viewing data that were collected for a different purpose.[1418] Although the data from People Meter households are ordinarily weighted to make sure they are representative of the national television viewing audience, those weights are not used in the MPAA Custom Viewing Study.[1419] A sample of distant signals is selected, and viewing is only supposed to be counted in the MPAA study if it occurs to one of the selected stations in a meter sample households where the station would be a distant signal.[1420]

542. Programs are categorized into the claimant categories by Nielsen, based in significant part on the categorizations it made in prior years' studies.[1421] For WGN, Nielsen performed "Syndex processing" for the purpose of identifying and deleting viewing to programs

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1414 Tr. 2229-31 (Ford) ("To try to defend viewship as value to me is hopeless, because it's not. Viewership is not value. Different viewership has different value.").

1415 1998-99 CARP Report at 32.

1416 1998-99 CARP Report at 32, 34-44.

1417 *See Supra*, ¶¶ 416-419, 435.

1418 Tr. 1962-63, 1998 (Lindstrom).

1419 Tr. 1997-98 (Lindstrom).

1420 Lindstrom WDT (PS Ex. 9) at 4-5.

1421 Tr. 1961-62 (Lindstrom).

that were non-compensable substitute programs.[1422] Nielsen also sought to eliminate viewing to programs on the selected sample stations that was recorded in households located in counties where the station would have been a local rather than a distant signal.[1423]

543. The resulting numbers are presented in Exhibits PL-3 and PL-5 attached to Mr. Lindstrom's Written Direct Testimony.[1424] The percentage numbers for the program categories are not ratings numbers, which are the primary viewing numbers broadcasters use to sell local advertising.[1425] Nor are they "shares," as that term is defined in connection with Nielsen local market viewing reports, which broadcasters sometimes also use in selling advertising [1426] Attempting to derive ratings numbers from the MPAA Custom Viewing Study percentage figures would be complicated and would not produce meaningful results.[1427]

544. The MPAA Custom Viewing Study results purport to show a total of 5.6 million household distant signal program viewing minutes for 2004 compared with 8.3 million for 2005.[1428] Mr. Lindstrom had no explanation for the difference, but commented that the total viewing to distant signals was small compared with television viewing in general, and at that scale, shifts of 50% might be caused by unknown factors.[1429] Similarly, the MPAA Custom Viewing Study purported to show a 90% increase in the distant signal viewing minutes to Program Suppliers programming between 2004 and 2005.[1430] Mr. Lindstrom again had no explanation based on general viewing patterns in the overall television marketplace that would explain such an increase, but suggested that it was more important in any case to look at the relative percentages rather than changes in absolute amounts of viewing minutes for a particular

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1422 Tr. 2051-53 (Lindstrom).

1423 Tr. 1959-60 (Lindstrom).

1424 Lindstrom WDT (PS Ex. 9) at Ex. PL-3, PL-5.

1425 Tr. 2012-13 (Lindstrom).

1426 Tr. 2004, 2012-13 (Lindstrom), SP Ex. 37.

1427 Tr. 2013-16 (Lindstrom).

1428 Lindstrom WDT (PS Ex. 9) at Ex. PL-3, PL-5; Tr. 2032-33 (Lindstrom).

1429 Tr. 203337 (Lindstrom).

1430 Lindstrom WDT (PS Ex. 9) at Ex. PL-3, PL-5; Tr. 2037 (Lindstrom).

category.[1431] But the change in distant signal viewing minutes favored Program Suppliers more than other program categories, with the percentage viewing share reported in the MPAA Custom Viewing Study increasing by more than 25%, from 54.1% to 68.0% in the 2004 and 2005 studies.[1432]

b. Problems With the Viewing Study

545. In rebuttal, CTV witness Dr. Michael Topper, an economist serving as Vice President and Head of the Antitrust & Competition Practice at Cornerstone Research, analyzed the Nielsen viewing data produced in discovery as underlying the MPAA Custom Viewing Study, and investigated potential errors.[1433] Because Program Suppliers did not produce the underlying data in a form that included program titles, Dr. Topper's analysis was limited to portions of the data for which Cornerstone had additional data as a result of its role in assisting the analyses presented by CTV witnesses Ducey and Waldfogel.[1434]

546. The first error Dr. Topper discovered in the viewing study numbers related to viewing minutes for non-compensable programming on WGNA which were erroneously included by Mr. Lindstrom in the viewing totals.[1435] As Mr. Lindstrom testified, WGNA sometimes provides substitute programming on the distant signal, for which any recorded viewing should not be included in the viewing minute totals.[1436] Although Mr. Lindstrom agreed that viewing to such non-compensable programs should not be counted, Dr. Topper discovered that seven of the top 25 most-viewed programs on WGNA, as reported in Mr. Lindstrom's viewing study, were transmitted by WGNA during periods for which syndex substitutions had been identified and should have been deleted.[1437] Dr. Topper found in his analysis of the

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1431 Tr. 2038-39 (Lindstrom).

1432 Lindstrom WDT (PS Ex. 9) at Ex. PL-3, PL-5.

1433 Topper WDT (SP Ex. 49) at 1.

1434 Topper WDT (SP Ex. 49) at 2.

1435 Topper WDT (SP Ex. 49) at 3.

1436 Tr. 2052 (Lindstrom).

1437 Topper WDT (SP Ex. 49) at 3, and Appendix 3.

underlying data that there were entire date ranges for which no "Syndex processing" to eliminate non-compensable minutes was performed at all.[1438]

547. Dr. Topper also found that Mr. Lindstrom's MPAA Custom Viewing Study included viewing minutes for programming distributed by ABC, CBS, and NBC, which are network programs and not eligible for compensation in this proceeding.[1439] The network programs, appearing among the Top 25 most-viewed programs in the entire study, included Good Morning America, General Hospital, CBS Evening News, Guiding Light, and ABC World News Tonight.[1440] Further analysis showed that these network programs, which were likely to have been categorized as Program Suppliers programs, appeared only in the 2005 viewing data, in which Mr. Lindstrom reported large increases in overall viewing and in particular in the share of viewing attributable to Program Suppliers, as compared with 2004.[1441]

548. Dr. Topper also discovered several programs with substantial viewing numbers in the MPAA Custom Viewing Study were simply titled "News," which would have been categorized by Mr. Lindstrom as Program Suppliers programming because the same program title appeared on multiple stations.[1442] The viewing to these programs, which turned out to be local news programs on Rochester, NY stations, however, occurred in households that were located in "Rochester City, NY."[1443] As such, they should have been deleted from the viewing study.[1444] Again, these improperly included highly-viewed programs, whose inclusion would have increased the Program Suppliers' viewing totals, were found only in the 2005 data, not 2004.[1445]

549. Dr. Topper also discovered that for a number of appearances of the CTV programs WGN News at Noon and WGN News at Nine, the viewing in the MPAA Custom

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1438 Topper WDT (SP Ex. 49) at 3.

1439 Topper WDT (SP Ex. 49) at 3, and Appendix 4; Tr. 2066 (Lindstrom).

1440 Topper WDT (SP Ex. 49) at 3, and Appendix 4; Tr. 2064-65 (Lindstrom).

1441 Topper WDT (SP Ex. 49) at 3, and Appendix 5; *see* Tr. 2065-68 (Lindstrom).

1442 Tr. 2062 (Lindstrom).

1443 Topper WDT (SP Ex. 49) at 3, and Appendix 5.

1444 Tr. 1959-60, 2063-64 (Lindstrom).

1445 Topper WDT (SP Ex. 49) at 3, and Appendix 5.

Viewing Study was credited to the Program Suppliers category rather than the Commercial Television category, thus inflating the Program Suppliers' reported viewing share.[1446] Given the nature of this categorization error and based on his review of the underlying data as a whole, Dr. Topper believed that it is likely there were additional errors in Mr. Lindstrom's classification of programs into claimant categories.[1447]

550. There was a significant reduction in the relative percentage share attributed to the Public Television category in the MPAA Custom Viewing Study between 2004 and 2005.[1448] Dr. Topper determined that this decline was attributable in significant measure to the fact that Mr. Lindstrom's sample of stations selected for the study under-represented PTV stations in 2005 as compared with 2004, and that Mr. Lindstrom made no attempt to control for or adjust for this under-representation.[1449]

551. Dr. Topper could not provide a revised set of viewing minute shares of the different claimant groups because of the structure of the datasets provided by Mr. Lindstrom and the types of errors discovered.[1450] However, he concluded that "the values reported in PL-3 and PL-5 are subject to significant errors.[1451]

c. The Viewing Study in Context

552. Mr. Lindstrom agreed that the amount of viewing to distant signals is very small compared with television viewing in general.[1452] He said he would not be surprised to learn that as many as one out of every four or five stations selected for the MPAA Custom Viewing Study would have had zero distant signal viewing or that a number of distant signal programs had only a minute of viewing for an entire year.[1453]

1446 Topper WDT (SP Ex. 49) at 3-4.

1447 Topper WDT (SP Ex. 49) at 2.

1448 Lindstrom WDT (PS Ex. 9) at Ex. PL-3, PL-5; Tr. 2039-40 (Lindstrom).

1449 Topper WDT (SP Ex. 49) at 4; Tr. 2040-42 (Lindstrom).

1450 Topper WDT (SP Ex. 49) at 2.

1451 Topper WDT (SP Ex. 49) at 4.

1452 Tr. 2014, 2024-28 (Lindstrom).

1453 Tr. 2024-26 (Lindstrom).

553. Dr. Topper made an estimate of the proportion of all cable household television viewing that was represented by the viewing included within the MPAA Custom Viewing Study.[1454] He calculated, conservatively, that the distant signal viewing represented at most 0.66% of the viewing done in the cable households in the Nielsen People Meter sample, and just 0.0000584% of all the viewing done in all cable households in 2004-2005.[1455]

D. Response to Homonoff

554. Mr. Homonoff was asked by Program Suppliers to provide an analysis of the cable marketplace in 2004 and 2005.[1456] Mr. Homonoff stated that, consistent with his own experience, in trying to determine what the hypothetical free market would look like, it is both useful and valid to look to the cable network marketplace for guidance.[1457] According to Mr. Homonoff, "a hypothetical market for programming on distant signals is closely analogous to the market for whole cable networks . . . ."[1458] Mr. Homonoff observed that subscriber-generated revenue still "dominates the overall revenue picture at most MSOs."[1459] Accordingly, though Mr. Homonoff acknowledged several factors that affect carriage decisions by MSOs, "what counts is the impact of such decisions on subscriber behavior."[1460]

555. In his analysis of the cable marketplace, Mr. Homonoff observed that "[a] key path to understanding the relative importance of any particular type of programming . . . is to observe the actual marketplace decisions made by MSOs."[1461] Mr. Homonoff declared that, as the CARP noted in the 1998-99 case, "[t]he relative program value seen in the cable network marketplace is a very helpful guidepost for a hypothetical relative program value in the broadcast distant signal marketplace."[1462] Mr. Homonoff did not, however, attempt to provide the Judges

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1454 Topper WDT (SP Ex. 49) at 4-5.

1455 Topper WDT (SP Ex. 49) at 5 & n.8.

1456 Homonoff WDT (PS Ex. 7) at 5-6.

1457 Homonoff WDT (PS Ex. 7) at 5-6.

1458 *Id.* at 6.

1459 Homonoff WDT (PS Ex. 7) at 10.

1460 *Id.* at 9.

1461 Homonoff WDT (PS Ex. 7) at 13.

1462 Homonoff WDT (PS Ex. 7) at 14.

with an estimate of the relative value cable operators would place on Program Supplier programming in either 2004 or 2005.[1463]

556. Mr. Homonoff first looked at the total number of networks carrying Program Supplier programming, and in his judgment, 37 of the Top 50 cable programming networks carried programming he considered to be "Programming Supplier/Entertainment" programming.[1464] That included networks like TNT, which as Mr. Trautman testified, spent approximately 45-56% of its programming budget on JSC programming.[1465] Mr. Homonoff's analysis of the Top 50 networks also focused on subscriber reach, so it necessarily omitted RSNs. Those RSNs collectively reach a very high percentage of cable subscribers.[1466] Mr. Homonoff also made no effort to value the programming carried on those networks.

557. Mr. Homonoff then looked at the gross tonnage of programming on the Top 25 cable networks (as determined by subscriber reach) by looking at a sample of program weeks in each year. [1467] Mr. Homonoff then attempted to determine the total quantity of programming shown on those channels for programming in the News, Sports, and Program Supplier categories.[1468] Mr. Homonoff did not look at the licensing fees paid for this programming or attempt to place a relative value on this programming time.[1469]

558. Finally, Mr. Homonoff looked at the distribution of program expenditures among the Top 50 cable networks. He acknowledged that ESPN, a network that carries a substantial amount of JSC programming, was by far the most expensive network based on the license fee charged for each subscriber.[1470] But according to Mr. Homonoff, the license fees for program networks in the Program Supplier category –which again included networks like TNT which devoted nearly half of its budget to JSC programming – averaged approximately $6.85 per

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1463 Tr. 1760-61 (Homonoff).

1464 Homonoff WDT (PS Ex. 7) at 15.

1465 Trautman WRT (SP Ex. 57) at 15.

1466 Trautman WRT (SP Ex. 57) at 8, n.6 and 29.

1467 Homonoff WDT (PS Ex. 7) at 19.

1468 Homonoff WDT (PS Ex. 7) at 19.

1469 Tr. 1762-63 (Homonoff).

1470 Homonoff WDT (PS Ex. 7) at 22.

month in license fees in 2004 and $7.19 in 2005. [1471] He then compared that total to the aggregate license fees for sports channels, noting that they carried total fees of $4.92 in 2004 and $5.53 in 2005.[1472] Thus, according to Mr. Homonoff's numbers, the license fees for sports networks grew at a rate of 12.40% in 2005 while the license fees for Program Supplier networks grew at a rate of 4.96% that year.[1473] Once again, his analysis did not include RSNs carried on cable systems throughout the country but which individually did not reach enough subscribers to make it into the Top 50 networks.[1474] According to Mr. Trautman, the average license fee charged by a RSN is second only to ESPN among cable networks.[1475]

559. Mr. Homonoff did not analyze program expenditures on any of the cable networks he selected for his analysis.[1476] Mr. Trautman looked at the same Top 25 networks that Mr. Homonoff used in his tonnage comparison and analyzed the program expenditures on those networks in comparison to the amount of time programs aired on those networks. First, Mr. Trautman noted that the relative amount of time occupied by programming does not equate to the relative marketplace value of the programming.[1477] Even Mr. Homonoff's own analysis shows that the disparity in license fees between "program supplier" and "sports" networks was far smaller than the disparity in program volume.[1478]

560. Mr. Trautman then looked at expenditure data from SNL Kagan, the same data source used by Mr. Homonoff.[1479] Relying on this data, Mr. Trautman determined that that the Top 25 networks analyzed by Mr. Homonoff spent approximately $400,000 per hour for each

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1471 Homonoff WDT (PS Ex. 7) at 22.

1472 Homonoff WDT (PS Ex. 7) at 22.

1473 Homonoff WDT (PS Ex. 7) at 22.

1474 Homonoff WDT (PS Ex. 7) at (HBH-2) (listing Top 50 networks); Trautman WRT (SP Ex. 57) at 8, 29 (listing regional sports networks and number of subscribers per network).

1475 Trautman WRT (SP Ex. 57) at 18.

1476 Homonoff WDT (PS Ex. 7) at 13-24.

1477 Trautman WRT (SP Ex. 57) at 10.

1478 Homonoff WDT (PS Ex. 7) at 22.

1479 Trautman WRT (SP Ex. 57) at 24; Homonoff WDT (PS Ex. 7) at 22 (listing Kagan as source of license fee data).

hour of the JSC programming that they televised in 2004 and 2005 compared to $32,000 per hour for each hour of the Program Suppliers' programming that they televised during those same years.[1480] In other words, each hour of that JSC programming on the top 25 cable networks cost approximately twelve times more on average than each hour of Program Suppliers' programming on those networks.[1481]

561. When Mr. Trautman applied those same per-hour valuations to the relative amounts of JSC and Program Suppliers' programming on distant signals during 2004-05, he found that the programming had approximately the same value even though Program Suppliers' programming. occupied substantially more telecast time than did JSC programming.[1482]

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Programming Hour Method)

	2004-05	
	JSC	PS
1. Percent of Distant Signal Programming Hours	4.6%	50.1%
2. Cable Network Expenditures Per Programming Hour	$396,703	$32,153
3. Time-Adjusted Expenditures (1*2)	$18,248	$16,109
4. Share of Relative Value	53.1%	46.9%

Sources: Trautman WRT (SP Ex. 57) at 11.

562. Mr. Trautman then looked at the amount of program viewing on those same Top 25 cable networks included in Mr. Homonoff's analysis.[1483] He noted that those networks spent nearly $2.9 billion in 2004 and 2005 to acquire the rights to televise JSC (MLB, NBA, NFL and NHL) programming; those license fees amounted to $0.77 for each hour (or $0.013 per each

[1480] Trautman WRT (SP Ex. 57) at 11.

[1481] Trautman WRT (SP Ex. 57) at 11.

[1482] Trautman WRT (SP Ex. 57) at 11.

[1483] Trautman WRT (SP Ex. 57) at 12.

minute) that households spent viewing the JSC programming on the top 25 cable networks.[1484] In contrast, the Top 25 cable networks spent approximately $12.6 billion in 2004 and 2005 to acquire the rights to televise Program Suppliers' programming; those license fees amounted to approximately $0.056 for each hour (or $0.001 per each minute) that households spent viewing the Program Suppliers programming on the top 25 cable networks).[1485] In other words, each viewing minute of JSC programming on Mr. Homonoff s Top 25 cable networks cost on average 13 times more than each viewing minute of Program Suppliers' programming on those networks in 2004 and 2005.[1486]

563. Mr. Trautman then applied these same per-viewing minute valuations to the viewing minutes attributed to JSC and Program Suppliers' programming on distant signals in 2004 and 2005.[1487] He concluded that using this metric, the JSC programming on distant signals in 2004-05 had approximately the same value as the Program Suppliers programming on distant signals during those years -notwithstanding that cable subscribers spent substantially more time viewing Program Suppliers programming than JSC programming on distant signals.[1488]

1484 Trautman WRT (SP Ex. 57) at 12.

1485 Trautman WRT (SP Ex. 57) at 12.

1486 Trautman WRT (SP Ex. 57) at 12-13.

1487 Trautman WRT (SP Ex. 57) at 13.

1488 Trautman WRT (SP Ex. 57) at 13.

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Viewing Minute Method)

	2004-05	
	JSC	PS
1. Number of Distant Signal Viewing Minutes	838,907	8,633,838
2. Cable Network Expenditures Per Viewing Minute	$0.013	$0.001
3. Projected Distant Signal Market Value (1*2)	$10,906	$8,634
4. Share of Relative Value	55.8%	44.2%

*Note that the number of viewing minutes reflected in the Testimony of Mr. Lindstrom is attributable to only a small sample of households in each year. As such, the number of viewing minutes (and resulting estimated programming values) would be far larger if applied to viewing minutes across all households. For example, the number of PS viewing minutes on the Top 25 cable networks in 2005 was approximately 7 trillion, compared with less than 6 million in Mr. Lindstrom's Nielsen sample.
Sources: Trautman WRT (SP Ex. 57) at 14.

E. Response to Mansell

564. Program Suppliers introduced testimony from John Mansell, of John Mansell Associates, Inc., to support their claim that circumstances have changed since the 1998-99 proceeding. Mr. Mansell noted that an increasing percentage of teams' games are shown on cable rather than broadcast networks.[1489] He also testified that sports programs on broadcast stations face more competition as a result of new sports networks, such as the Golf Channel and Tennis Channel, and new media on which sports programs can be shown such as Video-on-Demand.[1490] Finally, Mr. Mansell, as part of his rebuttal testimony, introduced evidence that for certain flagship stations responding to the Bortz Survey, the number of games carried per station declined from 1998-99 to 2004-05.[1491]

565. At no point did Mr. Mansell attempt to quantify this purported decline in the quantity of JSC programming and translate it into an estimate of any change in relative value of

[1489] Mansell WDT (PS Ex. 6) at 6-15.

[1490] *Id.* at 16-17.

[1491] Mansell WRT (PS Ex. 15) at 9.

that programming.[1492] Though Mr. Mansell relied heavily in his analysis on the sheer quantity of games broadcast per station, he never compared the actual volume of JSC broadcasts in 1998-99 to 2004-05. Dr. Ducey did, however, make such a comparison, and he found that JSC's share of programming time was virtually the same (4.9% in 1998-99 and 4.6% in 2004-05) – while Program Suppliers' time share declined from 60% in 1998-99 to 50% in 2004-05.[1493] Similarly, while Mr. Mansell noted that the number of MLB games broadcast on WGN declined somewhat from 1998-99 to 2004-05, he did not compare that to the relative decline in compensable programming for Program Supplier programming.[1494] The number of movies broadcast full signal on WGN, for instance, declined from 556 to 252 from 1998-99 to 2004-05. [1495] In contrast, telecasts of Cubs, White Sox and Bulls games accounted for approximately 12% of WGN's full signal program time in both 1998-99 and 2004-05.[1496] In 2004 and 2005, WGN, the most widely carried distant signal, televised a greater number of MLB and NBA games (combined) than any other broadcast television station in the country.[1497]

566. Mr. Mansell also failed to introduce any evidence about the relative value of the games being broadcast in 2004-05 compared to 1998-99. ESPN, for instance, paid an increased rights fee during this time period for the right to broadcast MLB games even though its contract called for fewer games to be broadcast.[1498] In connection with the new MLB contract that resulted in increased revenue for ESPN despite the "significant decline" in the number of games being shown on the network, Mansell published in the September 30, 2005 edition of Media Sports Business, written by Mansell, that "[n]aysayers forecasting the market cannot sustain

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1492 Tr. 1723 (Mansell).

1493 Ducey WDT (SP Ex. 8) at 7.

1494 Tr. 676 (Mansell).

1495 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 (SP. Ex. 51) at 2.

1496 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 (SP. Ex. 51) at 2.

1497 *See* Trautman WRT (SP Ex. 57) at 15.; Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 (SP. Ex. 51) at 2.

1498 Tr. 1701-05 (Mansell)

ever-higher national sports rights fees, continue to miss the mark."[1499] Mr. Mansell also alluded to the increasing value of sports programming by noting that teams were able to establish RSNs by using broadcasts of their games and that RSNs were able to "lock up" professional sports programming by paying "very high rights fees."[1500] Mr. Mansell also noted in passing that FOX received the exclusive rights to post-season coverage in 2004-05, something it did not have in 1998-99 when it split post-season coverage with a network. Thus, there were more playoff games available on distant FOX stations in 2004-05 than in 1998-99.

567. Mr. Mansell suggests that distant signal sports programming was faced with more competition from other cable networks in 2004-05. He points to examples such as "the Golf Channel" and "Tennis Channel" as evidence of this phenomenon.[1501] Yet Mr. Mansell presents no evidence that broadcasts of golf or tennis on a cable network impact cannibalize viewers of other types of live sporting events. And neither Mr. Mansell nor any other witness in this proceeding can point to any record evidence of a professional golf or tennis event that was actually carried by a distant signal.[1502]

568. Another change Mr. Mansell points to is the increase in the number of NASCAR broadcasts. Mr. Mansell does not compare the increase in total NASCAR broadcasts to JSC broadcasts. And though there has been a gross increase in NASCAR broadcasts, such broadcasts are only available in the distant cable universe on distant FOX stations.[1503]

1499 Tr. 1701-05 (Mansell); *See also* Tr. 1692-93 (Mansell) (Mansell agreed that the Cubs were a valuable property because of the national following they developed as a result of superstation distribution on WGN).

1500 Mansell WDT (PS Ex. 6) at 10.

1501 Mansell WDT (PS Ex. 6) at 16.

1502 Tr. 1696-97 (Kessler).

1503 Questions were raised during the hearings about whether Bortz respondents would have attached value to NASCAR. No evidence was presented to show that any respondent considered NASCAR to be included in the category "live professional and college team sports. It should be noted that most NASCAR events were televised in 2004-05 on broadcast or cable networks and therefore not subject to the Section 111 compulsory license. *See* Trautman WRT (SP Ex. 57) at _16. WGN, the most widely carried distant signal, did not carry any NASCAR events, and other than distant FOX stations, there were no broadcasts of compensable NASCAR events in the distant signal universe in 2004 and 2005. *Id.* at _15-16. Approximately 15-16 percent of cable systems carried FOX as a

Footnote continued on next page

569. Finally, although Mr. Mansell talks about the number of different mediums on which sports programming was available in 2004-05, he fails to show how that differs in any way from other types of programming shown on distant signals. Though some sports programs were available on video-on-demand, the same was true for movies and syndicated programs.[1504] Indeed, Mansell conceded that there were many more options for consumers for all types of programming in 2004-05 than in 1998-99.[1505] Mansell could not say whether there were more sports relative to other programs available on the internet in 2004-05[1506] even though internet sources for programming were available for sports and entertainment programming during this time period. Mr. Mansell has not shown that the availability of new mediums for carrying programming affected sports programming more than any other type of programming.

VI. Canadian Claimants' Approach

570. The Settling Parties provided a thorough description of the Canadians' approach in its proposed findings for the 2000-2003 cable royalty distribution proceeding. We present a similar description here, revised to reflect the record of the 2004-2005 proceeding.

A. The Canadian's Methodology for Determining Their Award

571. The Canadians seek an award of royalties based on a combination of (a) the amount of royalties reported in the SOAs and allocated by CDC to Canadian signals (referred to as "fees generated" or "fees gen") and (b) the relative values cable operators assign to the Canadian and non-Canadian programming on those signals.[1507]

Footnote continued from previous page

distant broadcast station in 2004-05. *Id.* at 16. And FOX also broadcast a number of JSC programs, including Major League Baseball (regular season games of the week, the MLB All Star Game, the American and National League Division Playoff Series, the American and National League Championship Playoff Series, and the World Series), the NFL (preseason games, regular season NFC games, NFC wildcard, divisional and championship round playoff games, and the 2005 Super Bowl), and the Cotton Bowl (a NCAA football bowl game). *Id* .at 16-17. FOX spent approximately $200 million to acquire NASCAR rights in both 2004 and 2005 compared to $967 million for MLB and NFL. *Id.* at 17.

1504 Tr. 1681-83 (Mansell).

1505 Tr. 1678 (Mansell).

1506 Tr. 1682 (Mansell).

1507 Direct Case of the Canadian Claimants Group, at 5.

572. The SOAs do not report the royalties cable operators pay for individual Canadian signals.[1508] Instead, the Canadian's methodology relies on a "fees generated" exercise by which CDC allocates the total royalties paid by each Form 3 system across the distant signals the system carries based on several assumptions and protocols.[1509] CDC's fees-generated protocols are merely CDC's own method of matching royalties to stations.[1510] The number that results from this allocation of royalties among signals is called the "fee generated" or "fees gen" for a signal.[1511]

573. The carriage data focuses on Form 3 cable systems that retransmit distant signals for two reasons: (1) the fundamental purpose of requiring payment of royalty fees is to compensate copyright owners for retransmission of broadcast signals beyond their local broadcast areas (i.e., distant retransmission)[1512] and (2) Form 3 systems pay about 97 percent of the royalties each accounting period.[1513]

574. The Canadians calculated their proposed share of Section 111 royalties using the following steps:

(a) Identifying the percentage of the Base Rate and 3.75% Fees allocated to Canadian distant signals by CDC in its "fees gen" exercise.[1514]

(b) Determining from cable operator surveys performed by Dr. Ringold the relative values attributed by U.S. cable operators to the different programming components on distant Canadian signals they chose to carry: Canadian programming, JSC

1508 *See* Kessler WDT (PS Ex. 5) at 15–22, MEK-3, MEK-4.

1509 de Freitas WDT (CDN Ex.1) at 10; Martin WDT (SP Ex. 7) at Appendix A, pgs. 4–10; Tr. 2926–28.

1510 Martin WDT (SP Ex. 7) at Appendix A, pg. 5.

1511 Martin WDT (SP Ex. 7) at Appendix A, pgs. 4–5.

1512 Kessler WDT (PS Ex. 5) at 7–8.

1513 Kessler WDT (PS Ex. 5) at 14.

1514 Direct Case of the Canadian Claimants Group, at 9; de Freitas WDT (CDN Ex. 1) at CDN-1-P.

programming, and Program Suppliers' programming.[1515]

(c) Multiplying the relative value percentage attributed to the categories of Canadian programming (determined in step b) by the percentage of fees allocated to Canadian distant signals by CDC (determined in step a).[1516]

(d) Adjusting the percentage (determined in step c) to account for awards to other parties.[1517]

(e) Applying the determined percentage to the royalties paid by all cable systems regardless of whether they were eligible to carry Canadian distant signals.[1518]

B. CDC's "Fees Gen" Allocation Methodologies

1. Allocation of Base Royalties

a. CDC's Default Allocation

575. CDC attempts to allocate the Base Rate royalties to particular distant signals carried on a distant basis by a particular cable system using the DSE count as a bridge.[1519] CDC's default allocation, which it describes as "actual" fees gen because it is the data that is reported on CDC's standard reports,[1520] spreads the total Base Royalties among stations, not in equal shares based on the number of distant stations, but in proportion to the DSE counts of the

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1515 Direct Case of the Canadian Claimants Group, at 9–10; Ringold WDT (CDN Ex. 4-A) at 4.

1516 Direct Case of the Canadian Claimants Group, at 10.

1517 Direct Case of the Canadian Claimants Group, at 10.

1518 de Freitas WDT (CDN Ex. 1) at 10–13.

1519 Martin WDT (SP Ex. 7) at Appendix A, pg. 7.

1520 Tr. 2920 (Martin) (comparing the standard fees gen allocations to the fees gen allocations that result under the alternative Min/Max analysis discussed in more detail below).

various stations.[1521] This allocation has "somewhat of an averaging effect."[1522] CDC's allocations do not determine what a cable system actually pays for a particular signal.[1523]

576. CDC allocates base royalties using the following procedures:

a. For systems with at least 1 distant signal and a total DSE count of 1.0 or greater, CDC allocates the royalties in proportion to DSE count.[1524] For example, a system that carried 2 distant network stations (0.5 DSEs) and 1 distant independent station (1.0 DSEs) and paid $30,000 in royalties would have the following allocations: [1525]

Network Station A: (0.25 DSE/1.5 DSE)($30,000) = $5,000

Network Station B: (0.25 DSE/1.5 DSE)($30,000) = $5,000

Independent Station: (1.0 DSE/1.5 DSE)($30,000) = $20,000

b. For systems with no distant signals, although the system must pay the Minimum Fee, CDC does not allocate any portion of the Minimum Fee to individual signals.[1526] Instead, the entire portion of the Minimum Fee is allocated to a category called "Minimum Fees" in CDC's reports.[1527]

c. For systems with at least one distant signal but a total DSE count of less than 1.0, the cable system pays the Minimum Fee, which CDC allocates proportionately based on the DSE count of the distant signals.[1528] For example, a

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1521 Martin WDT (SP Ex. 7) at Appendix A, pg. 7; Tr. 2920 (Martin).

1522 Tr. 2921 (Martin).

1523 Tr. 2939 (Martin) ("We don't get into saying, you know, what they pay for it."); *id.* at 2952–53 (Martin).

1524 Martin WDT (SP Ex. 7) at Appendix A, pg. 7.

1525 Martin WDT (SP Ex. 7) at Appendix A, pgs. 7–8.

1526 Martin WDT (SP Ex. 7) at Appendix A, pg. 8. After WTBS converted to a cable network and the effect on payment of minimum fees became apparent, CDC modified its allocation methods in response to the criticism of the Canadians to account for the change in the amount of minimum fees paid by cable systems. Martin WDT (SP Ex. 7) at Appendix A, pgs. 6–7; Tr. 2927 (Martin). CDC's earlier protocols would have allocated more royalties to U.S. signals.

1527 Martin WDT (SP Ex. 7) at Appendix A, pg. 8.

1528 Martin WDT (SP Ex. 7) at Appendix A, pg. 8.

system that carried 2 distant network stations and 1 distant educational station and paid $15,000 in Minimum Fee would result in the following allocations:[1529]

Network Station A: (0.25 DSE/1.0 DSE)($15,000) = $3,750

Network Station B: (0.25 DSE/1.0 DSE)($15,000) = $3,750

Educational Station: (0.25 DSE/1.0 DSE)($15,000) = $3,750

CDC Minimum Fee Category: (0.25 DSE/1.0 DSE)($15,000) = $3,750

The "CDC Minimum Fee Category" is not allocated to any signal.[1530]

577. Using the allocation procedures explained in the paragraphs above, the final allocation of Base Rate royalties to Canadian signals was:[1531]

Summary of Basic Fund Royalties

Year	Base Rate Royalties Allocated to Canadian Signals	Canadian Signal Base Rate Royalties as a Percentage of All Base Rate Signal Royalties
1998	$2,230,717	3.31027%
1999	$2,585,328	3.64297%
2000	$2,847,858	3.84417%
2001	$3,058,354	4.06297%
2002	$3,817,598	4.80822%
2003	$3,835,003	4.73598%
2004	$3,435,724	4.15345%
2005	$3,862,437	4.36346%

(i) CDC's Minimum/Maximum Allocation of Base Rate Royalties

578. In the rebuttal phase of the case, the Canadians presented an analysis prepared by CDC.[1532] In this analysis, Base Rate royalties were allocated based on the minimum and maximum possible fees that could supposedly be allocated to Canadian stations.[1533]

1529 Martin WDT (SP Ex. 7) at Appendix A, pgs. 8–9.

1530 Martin WDT (SP Ex. 7) at Appendix A, pg. 8.

1531 de Freitas (CDN Ex. 1) at CDN-1-P.

1532 Martin WRT (CDN Ex. R-1).

1533 Martin WRT (CDN Ex. R-1) at 2.

579. Cable systems pay for DSEs on a sliding scale, paying the most for the 1st DSE, less for the 2nd through 4th DSEs, and the least for DSEs above 4.[1534] But nothing in the SOA allows any signal to be identified as the "first" DSE, or the "second" or the "fifth."[1535] Thus, the Canadian's minimum/maximum analysis was based on the hypothetical assumptions that the Canadian signal was always the first DSE and then always the last DSE.[1536]

580. The technique used to calculate the Min-Max Basic Fees for a signal type is straightforward. To calculate the maximum for a single system, the royalties that would have been allocated to all Canadian distant signals can be calculated for each individual system carrying such signals as if they were the first distant signals carried (which applies the higher DSE rates and generates the highest Basic Fee royalties).[1537] To calculate the minimum for a single system, the royalties are treated as if they were the last distant signals carried (which applies the lower DSE rates and generates the lowest Basic Fee royalties).[1538] The sum of all of the royalties based on treating the Canadian signals as the first signals provides the maximum royalties that might have been allocated to Canadian signals.[1539] The sum of all the royalties based on treating the Canadian signals as the last signals provides the minimum royalties that might have been allocated to Canadian signals.[1540]

581. For example, if in 2005-2 a cable system carried two distant independent signals, one U.S. and one Canadian, the U.S. signal's fees would be calculated at the first base rate of 0.01013 times gross receipts and the Canadian station's fees would be calculated at 0.00668 times gross receipts, and then the calculations would be flipped.[1541] The resulting minimum/maximum allocations based on this analysis were as follows:[1542]

1534 Martin WRT (CDN Ex. R-1) at 2; Tr. 2918 (Martin).

1535 Martin WRT (CDN Ex. R-1) at 2; Kessler WDT (SP Ex. 5) at MEK-4.

1536 Martin WRT (CDN Ex. R-1) at 2.

1537 Martin WRT (CDN Ex. R-1) at 3; Tr. 2918 (Martin).

1538 Martin WRT (CDN Ex. R-1) at 3; Tr. 2918 (Martin).

1539 Martin WRT (CDN Ex. R-1) at 3.

1540 Martin WRT (CDN Ex. R-1) at 3.

1541 Martin WRT (CDN Ex. R-1) at 3.

1542 Martin WRT (CDN Ex. R-1) at 4.

Base Royalty Min/Max Calculation for Canadian Distant Signals, 2004-2005

Year	Minimum Canadian Base Fees	Actual or "Default" CDC Canadian Fees Gen	Maximum Canadian Base Fees	Min Base Fee As % of Actual	Max Base Fee As % of Actual
2004	$3,253,644	$3,418,469	$3,610,509	95.18%	105.62%
2005	$3,674,384	$3,838,746	$4,033,266	95.72%	105.07%

582. CDC's new minimum and maximum fee calculations produced a swing of approximately 5 percent above and below the "fees gen" totals calculated in CDC's original allocation.[1543]

583. The difference between CDC's "maximum Canadian base fees" calculation and "minimum Canadian base fees" calculation for 2004 and 2005 total approximately $700,000 in the aggregate.

584. Similar efforts were undertaken in the 1990-1992 Proceeding and the 1998-1999 Proceeding (although in those years, only two accounting periods were done because of the effort involved), and in the 2000-2003 Proceeding.[1544] Those results were as follows: [1545]

Base Royalty Min/Max Calculation for Canadian Distant Signals, 1991-2, 1992-2, 1998-2, and 1999-2, 2000-2003

Period	Minimum Canadian Base Fees	Actual or "Default" CDC Canadian Fees Gen	Maximum Canadian Base Fees	Min Base Fee As % of Actual	Min Base Fee As % of Actual
1991-2	$1,010,951	$1,262,459	$1,573,058	80.08%	124.60%
1992-2	$1,072,095	$1,337,176	$1,654,633	80.18%	123.74%
1998-2	$1,050,862	$1,097,286	$1,183,725	95.77%	107.88%
1999-2	$1,293,624	$1,317,249	$1,428,206	98.21%	108.42%
2000	$2,649,851	$2,760,030	$2,899,995	96.01%	105.07%
2001	$2,712,491	$2,815,634	$2,955,502	96.50%	104.75%
2002	$3,298,580	$3,456,589	$3,660,761	95.43%	105.91%
2003	$3,622,282	$3,800,001	$4,019,290	95.32%	105.77%

1543 Tr. 2919 (Martin).

1544 *See* Tr. 2917 (Martin).

1545 Calfee WRT (CDN Ex. R-3) at Appendix B, pgs. 8–9.

b. Allocation of 3.75% Royalties

585. As described above, cable systems pay the 3.75% Fee based on the number of DSEs reported as "nonpermitted."[1546]

(i) CDC's Default Allocation of 3.75% Royalties

586. CDC's initial "fees gen" allocations treat the 3.75% royalty fees based on the following procedures:

a. For systems that pay more than the Minimum Fee, CDC proportionally allocates the total reported 3.75% Fee royalties among the distant stations the SOA identifies as "nonpermitted," in proportion to each such station's DSE count.[1547]

b. For systems that pay a Minimum Fee in addition to 3.75% Fee royalties, CDC first proportionately allocates the dollar value of the system's calculated royalty for each subscriber group among the distant signals reported in that subscriber group according to each station's prorated DSE value.[1548] CDC then allocates the difference between the system's total calculated royalty and the total Minimum Fee paid by the system to the Minimum Fee Category.[1549] The Minimum Fee Category does not become part of CDC's "fees gen" allocation for any signal.[1550]

587. The same distant fee allocation methodology is used for each separate subscriber group reported by the cable system on its SOA.[1551] CDC adds the "fees gen" allocations for each subscriber subgroup together to reach a system total.[1552]

1546 Kessler WDT (PS Ex. 5) at 19–20, MEK-4; Martin WDT (SP Ex. 7) at Appendix A, pg. 9.

1547 Martin WDT (SP Ex. 7) at Appendix A, pg. 9.

1548 Martin WDT (SP Ex. 7) at Appendix A, pgs. 9–10.

1549 Martin WDT (SP Ex. 7) at Appendix A, pg. 10.

1550 Martin WDT (SP Ex. 7) at Appendix A, pg. 8.

1551 Martin WDT (SP Ex. 7) at Appendix A, pg. 10.

1552 Martin WDT (SP Ex. 7) at Appendix A, pg. 10.

(ii) CDC's Alternate Allocation of 3.75% Royalties

588. CDC also prepared, at the Canadian's request, an alternative allocation of 3.75% Fees to eliminate the arbitrary effect of the payment rules.[1553] Because 3.75% Fees are paid where a cable system has both permitted and non-permitted signals and "it may be somewhat arbitrary as to which of the stations the cable system could indicate as 'permitted,'"[1554] CDC's alternative allocation divided the total 3.75% Fees across permitted and non-permitted stations based on DSE counts.[1555] In this case, all stations are independent stations.[1556] The criteria for inclusion in this analysis were: (1) Form 3 systems that paid a 3.75% Fee and (2) reported at least one U.S. Independent station and at least one Canadian station, of which one was "permitted" on a market-quota basis.[1557] CDC applied this reallocation protocol to every qualifying U.S. and Canadian independent station in the category above.[1558] For example, if a cable system carried 3 independent stations — A, B, and C — and only two independent stations were "permitted," the 3.75% Fees could have been allocated to any one of A, B, or C.[1559] To account for this possibility, CDC's alternative reallocation divided the 3.75% and Base Rate Fees equally among the independent stations.[1560] The results of this reallocation were:[1561]

1553 Martin WRT (CDN Ex. R-1) at 4; Tr. 2921 (Martin) (stating the analysis is intended "to eliminate any arbitrary effect").

1554 Martin WRT (CDN Ex. R-1) at 4; Tr. 2921 (Martin).

1555 Martin WRT (CDN Ex. R-1) at 4–5.

1556 Martin WRT (CDN Ex. R-1) at 4.

1557 Martin WRT (CDN Ex. R-1) at 4; Tr. 2923 (Martin).

1558 Martin WRT (CDN Ex. R-1) at 5.

1559 Martin WRT (CDN Ex. R-1) at 5.

1560 Martin WRT (CDN Ex. R-1) at 5; Tr. 2922 (Martin).

1561 Martin WRT (CDN Ex. R-1) at 5.

3.75% Fee Reallocation for Systems Carrying Canadian Distant Signals

		CDC's Standard Allocation Method			Adjusted Reallocation Method			
Year	Station Type	Total	Base Rate	3.75% Rate	Total	Base Rate	3.75% Rate	Total Difference
2004	Canadian	$548,811	$50,671	$498,140	$433,638	$79,828	$353,810	($115,173)
2004	US-Ind.	$738,657	$186,041	$552,616	$853,830	$156,884	$696,946	$115,173
2005	Canadian	$578,505	$18,417	$560,088	$447,819	$56,544	$391,275	($130,686)
2005	US-Ind.	$517,283	$132,037	$385,246	$647,969	$93,910	$554,059	$130,686

589. Applying this reallocation can be done by adding the difference between CDC's adjusted and standard allocation to the Canadian royalties shown in the above tables. The total royalties remain the same. For base rate royalties, the results applied to 2004 through 2005 are as shown in the following Table:[1562]

Adjustment of Base Rate Fees for 3.75% Fee Signal Designation

Year	Canadian Signals	Canadian Royalties Subject to Adjustment			Adjusted Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
		CDC's Standard Allocation Method	Adjusted Reallocation Method	Adjustment			
1998	$2,230,717					$67,387,814	3.31%
1999	$2,585,328					$70,967,638	3.64%
2004	$3,435,724	$50,671	$79,828	$29,157	$3,464,881	$82,719,673	4.15%
2005	$3,862,437	$18,417	$56,544	$38,127	$3,900,564	$88,517,711	4.36%

590. For 3.75% Fees, the adjustment results for 2004 to 2005 are as shown in the following Table:[1563]

1562 de Freitas WDT (CDN Ex. 1) at CDN-1-M; Martin WRT (CDN Ex. R-1) at 5.

1563 de Freitas WDT (CDN Ex. 1) at CDN-1-M; Martin WRT (CDN Ex. R-1) at 5.

Adjustment of 3.75% Rate Fees for 3.75% Fee Signal Designation

Year	Canadian Signals	Canadian Royalties Subject to Adjustment			Adjusted Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
		CDC's Standard Allocation Method	Adjusted Reallocation Method	Adjustment			
1998	$24,539					$9,671,797	0.25%
1999	$65,555					$10,408,844	0.63%
2004	$679,898	$498,140	$353,810	($144,330)	$535,568	$19,419,520	3.50%
2005	$560,260	$560,088	$391,275	($168,813)	$391,447	$17,346,106	3.23%

591. The difference in dollars between CDC's standard allocation method and CDC's adjusted reallocation method (based on an equal split among all stations) for 3.75% Fees for Canadian stations is approximately $300,000.

(iii) Canadian Distant Signals' Share of "Fee Generation"

592. The CDC "fees gen" allocation methodology results in Canadian distant signals being attributed with the following percentage shares of cable royalties for the years 1998-2005: [1564]

[1564] de Freitas WDT (CDN Ex. 1) at CDN-1-P.

Summary of Royalties Generated by Canadian Distant Signals, 1998 through 2005

Base Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$2,230,717	$67,387,814	3.31027%
1999	$2,585,328	$70,967,638	3.64297%
2000	$2,847,858	$74,082,435	3.84417%
2001	$3,058,354	$75,273,898	4.06297%
2002	$3,817,598	$79,397,334	4.80822%
2003	$3,835,003	$80,975,978	4.73598%
2004	$3,435,724	$82,719,673	4.15345%
2005	$3,862,437	$88,517,711	4.36346%

3.75% Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$24,539	$9,671,797	0.25372%
1999	$65,555	$10,408,844	0.62980%
2000	$70,077	$12,018,489	0.58308%
2001	$279,779	$13,472,358	2.07669%
2002	$549,960	$16,339,148	3.36590%
2003	$698,567	$16,714,091	4.17951%
2004	$679,898	$19,419,520	3.50111%
2005	$560,260	$17,346,106	3.22989%

c. "Fee Generation" and Relative Marketplace Value

2. De Freitas Testimony

593. Ms. Janice de Freitas was the only Canadian witness who presented testimony on "fees gen" during the Canadian's direct case. Ms. de Freitas is the manager of the Rights Administration Unit of the Canadian Broadcasting Corporation and has served as chairman of

the Canadian Claimants Group for the last 15 years.[1565] Ms. de Freitas presented the "fee gen" data.[1566]

3. Calfee Testimony

594. Dr. Calfee is an economist who submitted written testimony in the 1990-1992, 1998-1999, and written and oral testimony in the 2000-03 cable royalty distribution proceedings.[1567] Dr. Calfee's written testimony for the 2004-05 proceeding, which included his written testimony in the 2000-2003 proceeding, was admitted without live testimony pursuant to a stipulation of the parties. In addition, Dr. Calfee's oral testimony from the 2000-2003 proceeding was admitted into evidence in this proceeding.[1568]

595. Dr. Calfee has no professional experience, other than his work with the Canadians, involving the entertainment, media, or cable television industries.[1569] Dr. Calfee has never performed any other research or analysis regarding: the pricing of copyrighted works in the entertainment and media industries, marketplace prices paid for copyright licenses, or the distribution of fees collected to individual rights owners in the media or entertainment industries.[1570] While Dr. Calfee has experience in the pharmaceutical, tobacco and more broadly, food and drug industries, he has never, other than his work for the Canadians, researched nor performed analyses in the context of compulsory copyright licenses nor has he ever appeared as an expert witness on the economic attributes of any aspect of the entertainment or media industries.[1571]

596. Part of Dr. Calfee's written testimony purports to provide an account of the legislative history of the Copyright Act and the intent of the Copyright Office and copyright owners in operating under the statutory copyright license,[1572] Dr. Calfee was not admitted as an

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1565 de Freitas WDT (CDN Ex. 1) at 1.

1566 *See* de Freitas WDT (CDN Ex. 1) at CDN-1-M to CDN-1-V.

1567 Calfee WRT (CDN Ex. R-3) at 2.

1568 CDN Ex. R-4 (Calfee).

1569 CDN Ex. R-4 at 869 (Calfee).

1570 CDN Ex. R-4 at 872–73 (Calfee).

1571 CDN Ex. R-4 at 870–75(Calfee).

1572 *See* Calfee WRT (CDN Ex. R-3) at Appendix B.

expert in legislative intent, in the history of the Copyright Act, or in the Copyright Office's proceedings regarding the statutory copyright licenses.[1573] Dr. Calfee confirmed that he did not testify in the Copyright Office's Section 109 proceeding involving the compulsory copyright licenses, draft comments for any party in that proceeding, or participate in the drafting of any regulations relating to the cable compulsory license.[1574] He was not involved in the drafting of Section 111 or any other section of the Copyright Act and did not participate in the process leading to the enactment of the cable compulsory license.[1575]

597. In his written testimony, Dr. Calfee comments that an examination of the compulsory licensing system "reveals strong relationships" between fees and the relative value of distant signals.[1576] At the conclusion of his written testimony, Dr. Calfee states that "my opinion is that the fee generation method reasonably measures relative value."[1577] During the course of the proceeding, however, Dr. Calfee also agreed that the "fees generation" allocations may not reflect relative marketplace value:

> Q. . . . It's my understanding that it's your opinion that disparity between relative values and fee allocation is unavoidable under the compulsory license system?
>
> A. Yes.
>
> Q. And the fact that two signals can generate the same fees but have a different relative value is an unavoidable consequence of the way the system is set up, correct?
>
> A. Yes.
>
> Q. And so for a particular system, a Canadian signal may generate the same fee as an independent signal, say, WGN, but have a different relative value, correct?
>
> A. Yes.

1573 CDN Ex. R-4 at 868 (Calfee).

1574 CDN Ex. R-4 at 873–75 (Calfee).

1575 CDN Ex. R-4 at 875 (Calfee).

1576 Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 6.

1577 Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 17.

> Q. And that's an unavoidable result, correct?
>
> A. Yes.
>
> Q. And the reason it's an unavoidable result is systemic. By its very nature, a compulsory licensing system is bound to introduce numerous anomalies, including seemingly arbitrary fees; isn't that right?
>
> A. Yes.[1578]

598. Dr. Calfee also stated that "[f]ees arising from compulsory licensing inevitably appear arbitrary and generate numerous anomalies."[1579]

599. Dr. Calfee also testified:

> All we know is after a few years, we observed that the Canadian signals are generating a larger proportion of fees than they used to. We don't know exactly why. . . . [I]f we compare results later on with results earlier on and we see that there's been a – a change in the pattern of fees, might that change in pattern of fees be the result of something other than – other than relative value? It's hard to, you know, reject that – that possibility.[1580]

600. He further testified:

> [I]f you assume that . . . certain signals have a certain relative value, ... then when the fees ... are assessed and allocated, . . . the results ... would not be in close accordance with the relative values that are assumed to be there. And I'm sure that happens all the time. I think it's impossible to design a compulsory licensing system that would not have anomalous results like that. After all, the whole purpose is to . . . force the parties to pay a certain fee regardless of . . . certain circumstances, which might generate different values if they were freely negotiated. But they're not freely negotiated.[1581]

601. Dr. Calfee stated:

1578 CDN Ex. R-4 at pgs. 933–34 (Calfee).

1579 Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 17; CDN Ex. R-4 at 933–34 (Calfee).

1580 CDN Ex. R-4 at pg. 923 (Calfee).

1581 CDN Ex. R-4 at pgs. 888–89 (Calfee).

JUDGE WISNIEWSKI: I'm not sure I completely follow where you've gone with this in a sense. If – if we can't identify the factors or measure any of the factors, then how do we know that it actually occurred or been responsible for any change in relative value?

THE WITNESS: I don't think we do.

***

JUDGE WISNIEWSKI: But you, yourself, have said that the fees-gen method, at best, is a crude method --

THE WITNESS: Yes.[1582]

602. He testified:

And the [compulsory licensing] system had various elements which were designed and, I think, succeeded in establishing a rough relationship, far from perfect, but a rough relationship between the fees and the allocation of fees and the relative value of the various signals.[1583]

603. He further testified:

[T]he numerical example that [Ms. McLaughlin] provided . . . demonstrated that if you have fees fixed by laws and if you have relative values that are not directly established or not directly taken account of in the fee system, then you're going to get some – some odd results. And I think that's inevitable.[1584]

604. He further testified:

Q. And although the cable system pays 1.0 DSE, it – it does not necessarily value [Canadian signal] CBUT at one DSE, correct?

A. That is correct.[1585]

1582 CDN Ex. R-4 at pgs. 922, 924 (Calfee).

1583 CDN Ex. R-4 at pgs. 878–79 (Calfee).

1584 CDN Ex. R-4 at pg. 889 (Calfee).

1585 CDN Ex. R-4 at pg. 970 (Calfee).

605. He also testified:

> Q. Now, it's not possible to know, just by looking at the fees-generated allocations, what the relative value of these two [distant] signals are to the cable operator in terms of attracting and retaining subscribers. Is that fair to say when we're looking at these two [distant] signals . . . ?
>
> A. No, you cannot infer, directly, the relative value of those two signals to either the system or their subscribers.[1586]

606. Dr. Calfee also testified that an increase in subscribers and rates, both of which affect the "fees gen" calculation for Canadian signals,[1587] might be the result of something other than an increase in relative value:

> Q. [C]ould you list off for us, the different reasons that you can think of why the number of subscribers might increase in a cable system?
>
> A. Mergers; they might still be extending the cable system to previously unwired parts of town; there might be new construction in the area, so there are new places to be – to be hooked up.
>
> There might be some competition. Maybe there are some areas that have more than one cable system; that would tend to reduce subscribers. On the other hand, you can get some fairly vigorous price wars. There might be competition between the cable system and a satellite system or more than one satellite provider that might result in some – in some price decreases and so on.
>
> There are a number of factors – I'm sure there are others – that, you know, that might eventually come to mind. . . .
>
> Q. How about the rate, the rate that the cable system charges its subscribers? Are there a variety of reasons why that rate might increase over the time period 1999 to 2003?
>
> * * *

1586 CDN Ex. R-4 at pgs. 923, 979–85 (Calfee).

1587 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

A. [I]f they moved a distant signal from one tier to another, then the rate would switch from being the rate for the – for the first tier to the rate for whatever tier they switched to.

* * *

Q. And what are some reasons that a cable system might increase its rates?

A. [T]he cable system might be essentially beefing up its offering, offering more channels than it did before, offering much more in the way of downloads, On Demand, those kinds of things.

Cable systems have come to provide a variety of services, you know, much more than the original idea, simply retransmitting broadcast signals.

So they might be expanding, essentially, the offerings that it provides. It may be – they may be moving from digital – from analog to digital cable boxes, signals, et cetera. So they may think that's more attractive to their customers, and they may, therefore, raise prices.

They may be changing some of the tiers. And so you may get big price changes for some tiers, but not for other tiers depending on how they're pushing signals around amongst different tiers.

It could be that at one point, a system was facing vigorous competition from satellite TV. Maybe after a few years, the system decided that the satellite TV threat wasn't as strong as they realized and they might test the market by increasing the prices and see whether that works well.

They may be offering Internet access through their system. They may have some bundled prices involving TV offerings and Internet offerings and so on.

* * *

Q. So as I understand your testimony, there are… a lot of reasons why rates might increase, correct?

A. Yes.

Q. And there are a lot of reasons why subscribers might increase, correct?

A. Yes.

> Q. And of those reasons, there are certainly a lot of reasons why either rates or subscribers increase that would have really nothing to do with a perception that – among subscribers – or perception with the cable operator that [a distant signal] was, you know, increasing in value. Is that fair to say?
>
> A. Yes.[1588]

607. Dr. Calfee could not conclude that the "fees gen" allocation method actually measures the relative value of different distant signals as opposed to producing a "spurious" result.[1589]

608. Dr. Calfee stated that for those cable systems that carried a Canadian station as its only distant signal, the fact that some carried both a Canadian signal along with WTBS prior to WTBS's conversion to a cable network is evidence that cable operators valued Canadian programming.[1590] At best this shows only the amount cable operators were willing to pay for Canadian and WTBS programming at the time both signals were carried; one cannot use this analysis to infer the particular value of Canadian signals after the WTBS conversion.[1591] Indeed, the record contains examples of Canadian channels that were carried jointly with WTBS that diminished in value after the WTBS conversion.[1592]

609. In this proceeding, the Canadians have not presented any evidence to explain why the value of Canadian programming increased from 1998-99 to 2004-05 relative to other types of programming. In fact, the Canadian's economist, Dr. Calfee, testified that "[a]ll we know is after a few years, we observed that the Canadian signals are generating a larger proportion of fees than they used to. We don't know exactly why."[1593] Dr. Calfee also explained that an increase in

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1588 CDN Ex. R-4 at pgs. 979–84 (Calfee).

1589 CDN Ex. R-4 at pgs. 924, 937 (Calfee) ("I'm hesitant to say [that] if you have a system that is subscribing to two or three or four signals, . . . that it will be clear to anyone except, perhaps, someone inside the cable system itself as to which of those signals is the most valuable, which is the second most valuable, and so on.").

1590 CDN Ex. R-4 at pgs. 897–900 (Calfee).

1591 *See* CDN Ex. R-4 at pgs. 971–73 (Calfee).

1592 *See* CDN Ex. R-4 at pgs. 964–70 (Calfee).

1593 CDN Ex. R-4 at pg. 923 (Calfee).

"fees gen" allocated to Canadian signals could be the product of factors unrelated to an increase in the relative value of Canadian programming.[1594]

4. Martin Testimony

610. Ms. Martin's testimony demonstrated that CDC's fees gen allocation does not reflect the amount a cable operator would save if it dropped all distant signals. For example, in accounting period 2004-1, the cable system NYL 050 carried two distant signals, both of which were Canadian.[1595] During that same period, NYL 050 had gross receipts of about $12.5 million.[1596] Under the formula for calculating royalties, because the system retransmitted two independent distant signals (at 2.0 DSE), the system paid approximately $150,000 in royalties.[1597] However, if the cable system would have dropped all of its distant signals, it would still have paid the Minimum Fee, approximately $120,000.[1598] Therefore, by dropping all of its distant signals, the cable system would have saved only about $30,000.[1599] Nevertheless, under CDC's standard protocols, CDC allocated the entire $150,000 in royalties as fees gen for the two Canadian signals.[1600]

611. CDC's default allocation also does not reflect the amount a cable operator would save if it dropped only one distant signal. For example, in accounting period 2004-1, cable system MTK 200 carried one distant Canadian signal and one distant public television station.[1601] Under CDC's standard allocation procedure, CDC allocated about $14,000 in fees gen to the Canadian signal and the remainder of the royalties to the public television station.[1602] If the cable system dropped the distant public television station, it would save the same amount in

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1594 CDN Ex. R-4 at pgs. 979–85 (Calfee); McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, at pgs. 4–9.

1595 Tr. 2945 (Martin).

1596 Tr. 2945–46 (Martin).

1597 *See* Tr. 2946 (Martin).

1598 Tr. 2946 (Martin).

1599 Tr. 2946 (Martin).

1600 Tr. 2948 (Martin).

1601 Tr. 2949 (Martin).

1602 Tr. 2950–51 (Martin).

royalty fees as if it had dropped the Canadian station.[1603] However, under CDC's standard fees gen allocations, the allocations would vary because CDC allocates fees gen based on the DSE, and public television stations are 0.25 DSE and Canadian stations are 1.00 DSE.[1604]

612. Ms. Martin's testimony also demonstrates that CDC's "Minimum/Maximum" analysis and "3.75%" analysis do not reflect what a cable operator would actually save if it dropped a particular distant signal.[1605]

5. McLaughlin Testimony

613. Ms. McLaughlin concluded that the "fee generation" allocations do not reflect relative marketplace value for at least five reasons described in detail below.[1606] In summary, these reasons include:

614. *First,* because the royalty calculation is based on "gross receipts" derived from tiers of programming that not only vary greatly in size and quality but that also include subscriber charges for a large quantity of programming that is not relevant to this proceeding (e.g., local broadcast stations, public/educational/government channels, and cable networks), the royalties paid by cable systems will not be proportional to the marketplace value of the distant signals retransmitted by that system. PFOF ¶¶ 619-624.

615. *Second,* payment of the Minimum Fee, which constitutes more than half of the royalties allocated by CDC to Canadian distant signals, makes it impossible to link "fees gen" allocations to relative marketplace value. Because cable systems pay the same royalties whether they carry up to 1.0 DSE or no distant signals at all, the decision to carry distant signals with DSE counts up to 1.0 DSE may indicate that the value of those signals is greater than zero, but does not indicate that the value of the signal or signals is as large as the Minimum Fee payment. PFOF ¶¶ 625-27.

616. *Third,* the various statutory payment rules frustrate any attempts to link "fees gen" allocations and relative marketplace value. PFOF ¶¶ 628-34. For example, as a result of the

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1603 Tr. 2951 (Martin).

1604 Tr. 2951 (Martin).

1605 Tr. 2949, 2954–55 (Martin).

1606 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, at pg. 1.

sliding-scale rate schedule and the way that CDC allocates royalties, the "fees gen" allocation results in CDC allocating a larger percentage of fees than the minimum value that can be inferred for each signal. PFOF 628. The payment rules also require that each independent signal be assigned the same DSE count of 1.0, even though the value of each independent signal is likely to vary among different cable systems. PFOF 629. Different DSE counts are assigned to different types of stations without regard to the existence of non-compensable or duplicative programming on those stations. PFOF 641. For example, a 0.25 DSE is assigned to distant network affiliates, which broadcast some amount of non-compensable network programming, while Canadian signals are all automatically assigned 1.0 DSE, even though they broadcast non-compensable U.S. network programming and duplicate programs available on other U.S. stations or on widely available cable networks. PFOF 642.

617. *Fourth,* the payment rules for 3.75% Fees contradict economic theory, which states that the first item that is chosen for purchase from among a number of alternatives is worth the most and the second is worth somewhat less. PFOF 635-37. Although CDC prepared an alternative allocation to eliminate some of the "arbitrary effect" of its initial "fees gen" allocation method for 3.75% royalties, no allocation can overcome the problem that the first signal is valued significantly less than the second signal. PFOF 638-39.

618. *Fifth,* while the DSE counts have no relationship to relative marketplace value, CDC uses the DSE counts as a "bridge" in allocating royalties among distant signals. PFOF 575. Contrary to economic theory, the DSE scale does not decline for each successive distant signal, and there is no basis for assuming that the relative value of the second DSE should be about two-thirds of the first. PFOF 640-44.

a. Effect of Tiering

619. Form 3 Cable systems pay royalties based on a percentage of their "gross receipts."[1607] Gross receipts include the amounts paid by subscribers to receive tiers of services that include distant broadcast signals.[1608]

[1607] Kessler WDT (PS Ex. 5) at 15–22.

[1608] Kessler WDT (PS Ex. 5) at 10–11; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

620. The royalty calculation is based on the combined price for all tiers that include any distant broadcast stations and for the entire tier of programming services, not on prices for separate, identifiable channels.[1609] Thus, the base for the royalty calculation includes subscriber charges not only for distant signals but for all other channels of programming on the relevant tiers.[1610]

621. Generally, distant signals are contained in the basic service tier, which all cable subscribers must purchase.[1611] The composition of the basic service tier varies widely among cable systems and may include all local broadcast stations, public/educational/government channels, various distant broadcast stations, and cable networks.[1612] Because the tier includes more than distant signals, gross receipts from these tiers and, hence, royalties paid, will not necessarily be proportional to the marketplace value of the distant signal(s).[1613]

622. The majority of subscribers (90 percent) purchase a bundle of two tiers at a combined price.[1614]

623. The fact that the basic service tier is most often sold in combination with other tiers, such as an expanded basic tier, obscures the economic significance of which channels are included in the basic tier and affects, whether the price ascribed to the basic service tier itself accurately reflects its relative marketplace value.[1615] For this reason, the price of the basic tier, on which the royalty calculations are often based, may not reflect the marketplace value of the distant signals in the basic tier.[1616]

1609 Kessler WDT (PS Ex. 5) at 10–11; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5.

1610 See Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc., 836 F.2d 599, 610–11 (D.C. Cir. 1988).

1611 CDN Ex. R-5 at 682 (McLaughlin).

1612 WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5.

1613 WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5.

1614 CDN Ex. R-5 at 684 (McLaughlin).

1615 *See* WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 5–6.

1616 WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 5–6.

624. Even if the price of the basic tier reflected the value of the programming contained in the basic tier, prices for basic tiers would vary depending on the tier's size and quality.[1617] Higher prices for some systems' basic service tiers may reflect only the fact that they include more channels or more popular cable networks rather than necessarily that the distant signals they include are more valuable.[1618] Cable systems with higher rates for the basic tier would generate more gross receipts and hence royalty payments per subscriber, but those larger royalties could well reflect attributes of the tier other than a higher marketplace value for the distant signals.[1619]

b. Effect of the Minimum Fee

625. The Minimum Fee is another factor that makes it impossible to link "fees gen" allocations to relative marketplace value.[1620] Form 3 cable systems must pay the Minimum Fee (which covers up to 1.0 DSE) even if they import no distant signals.[1621] In 2004-2005, Form 3 systems covering about 30 percent of subscribers imported less than one DSE and paid the Minimum Fee — about 20 percent carried no distant signals and about 10 percent carried only a fractional DSE.[1622]

626. Because cable systems pay the same royalties whether they carry up to 1.0 DSE or no distant signals at all, the decision to carry distant signals with DSE counts up to 1.0 DSE may indicate that the value of those signals is greater than zero, but does not indicate that the value of the signal or signals is as large as the Minimum Fee payment.[1623]

1617 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5.

1618 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1619 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6; CDN Ex. R-5 at 684–85, 687 (McLaughlin).

1620 *See* McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7–8.

1621 CDN Ex. R-5 at 696 (McLaughlin).

1622 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7. Where a system pays the Minimum Fee and carries no distant signals, CDC makes no allocation of those Minimum Fee royalties. CDN Ex. R-5 at 696 (McLaughlin).

1623 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 7–8; CDN Ex. R-5 at 696–99 (McLaughlin) ("You can't conclude that the person is paying [the Minimum Fee] for that signal since they would have to pay it in any event.").

627. In 2004, cable system WAS 050, located in Seattle, Washington, carried a Canadian signal as its only distant signal.[1624] This single system accounts for about 40 percent of all the fees gen allocated to the Canadians.[1625] For accounting period 2004-1, WAS 050 paid the Minimum Fee, approximately $690,000 in royalties, which were all allocated to CBUT in CDC's fees gen allocations.[1626] WAS 050, however, would have paid exactly the same $690,000 whether it carried this Canadian distant signal or no distant signals at all.[1627] If WAS 050 dropped this Canadian distant signal, it would save zero dollars ($0.00).[1628]

c. Effect of Payment Rules

628. Even in systems that carry more than 1.0 DSE, the economic principle that the extra cost of the signal must cover its value reveals little. For example, a system that carries 2.0 DSEs and pays more than the Minimum Fee (an extra 0.63 percent of gross receipts) reveals only that each DSE is worth at least the cost of the second signal (the 0.63 percent).[1629] CDC's "fee gen" protocols allocate these royalties by averaging the rate for up to one DSE (0.956 percent) and the rate for 2.0 – 4.0 DSEs (0.63 percent) and applies the average rate, 0.793 percent, to each signal.[1630] Thus the fees allocated by CDC are larger than the minimum value that can be inferred for each signal.[1631]

629. The value of individual Canadian signals is bound to vary among the various cable systems because the signals may provide a different benefit to the cable operator in terms

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1624 CDN Ex. R-4 at 968–69 (Calfee).

1625 Tr. 2935 (Martin).

1626 Tr. 2938 (Martin).

1627 *See* Kessler WDT (PS Ex. 5) at 18, MEK-4 at 7; McLaughlin WDT (SP 6) at PTV 04-05 Ex. 9, pg. 7; Tr. 2939 (Martin) ("[W]e would still allocate that fees-gen to the Canadian station in this case, because it's the only distant station. Understanding that . . . it's the same amount that it would have paid if it didn't carry any distant stations.").

1628 Tr. 2940–41 (Martin).

1629 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 8.

1630 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 8.

1631 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 8.

of attracting and retaining subscribers.[1632] Under the payment rules, however, each Canadian signal is assigned the same DSE value of 1.0.[1633]

630. Because of the sliding scale used in determining royalties, in which cable operators pay different percentages based on their total number of DSEs, it is not possible to determine a particular amount that was paid for any given distant signal.[1634]

631. The "fees gen" allocations created by CDC reflect the payment rules set forth in the Form 3 Statement of Account and the rates set forth in 17 U.S.C. § 111(d) rather than relative market value. [1635]

632. For example, two independent signals may have relative marketplace values of 75 and 25, respectively, but both signals, paid for at the statutory Base Royalty rates and analyzed by CDC, would be allocated the same "fees gen," say, 20, for each.[1636] While both are valued in excess of the "fees gen" allocated for them, the excess is large for one and small for the other.[1637] If the royalties were distributed according to relative marketplace value, the higher valued signal would receive 30 and the lower valued signal would receive 10.[1638] The higher valued signal would receive more than the "fee gen" number allocated to it while the lower valued signal receives less than its "fees gen" allocation.[1639] This example is demonstrated in the following chart:

1632 CDN Ex. R-4 at 931–32 (Calfee).

1633 Kessler WDT (PS Ex. 5) at 15.

1634 *See* McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1635 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 3; CDN Ex. R-5 at 669, 675–76 (McLaughlin); see also Waldfogel WDT (SP Ex. 18) at 5.

1636 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

1637 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

1638 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4; *see also* Tr. 488–89 (McLaughlin).

1639 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4; CDN Ex. R-5 at 676–77 (McLaughlin).

SIGNAL	"FEES GEN"	VALUE	DOLLAR AWARD
A	$20	$75	$30 (75%)
B	20	25	10 (25%)
TOTAL	40	100	40

633. Ms. McLaughlin testified that "the fees-generated system doesn't relate the fee that you have to pay as the cable operator to the value of the signal to you, rather, it just . . . depends on a particular rule, which could . . . give you the same price for two signals, it could give you slightly different prices for two signals, or it could give you quite different prices for two signals."[1640]

634. Ms. McLaughlin explained that "[a]n examination of the demand conditions and the payment rules shows not only that there is no relationship between the payment rules and the absolute or relative demand for different types of signals but also that, in particular circumstances, the payment rules produce higher fees for signals of lower value."[1641]

d. Effect of Payment Rules for 3.75% Fees

635. Cable systems in smaller markets can import one distant independent station and pay the basic fee (which is, on average, less than 1 percent).[1642] Additional distant signals, however, cause the cable system to be subject to the 3.75% Fee.[1643]

636. Economic theory states that the first item that is chosen for purchase from among a number of alternatives is worth the most and the second is worth somewhat less.[1644] Under the

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1640 CDN Ex. R-5 at 679–80 (McLaughlin).

1641 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

1642 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1643 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1644 CDN Ex. R-5 at 716–18 (McLaughlin); McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4; *see also* CDN Ex. R-4 at 938 (Calfee).

3.75% Fee structure, however, cable systems pay considerably more for additional signals rather than incrementally less.[1645]

637. CDC's default allocation of 3.75% Fees, which simply accepts the cable operators' designations for "nonpermitted" signals and allocates the 3.75% Fees to those signals, generally reflects an arbitrary decision, not an indication of relative value.[1646] To the extent the designation by the cable operator identifies the last signal selected for carriage, the "fees gen" allocation produces a relative allocation that is exactly the opposite of the actual relative values of the permitted and nonpermitted signals to the cable operator.[1647]

638. Dr. Calfee, the Canadian's expert, endorsed the "new allocation method submitted by CDC in which the royalties are split equally among the originators of the signal [because it] probably doesn't make sense to try to figure out which one of those signals merits more – a larger portion of the fee than the other ones do."[1648]

639. Although CDC prepared an alternative allocation to eliminate some of the "arbitrary effect" of its initial "fees gen" allocation method for 3.75% royalties,[1649] no allocation can overcome the problem that the first signal is valued significantly less than the second signal.[1650] As Dr. Calfee observed, regardless of the allocation methodology, "we know very little about which one is worth – worth more. And even if we think the first one is worth more,

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1645 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6; CDN Ex. R-5 at 687–90 (McLaughlin).

1646 CDN Ex. R-5 at 700 (McLaughlin) ("Under certain circumstances, when a system imports two or more distant signals, one or more of those signals must be paid for at the 3.75% rate, in which case the signal generates a fee of 3.75%, nearly four times the 0.956% for the first signal. When the cable operator can select which signal to treat as the 3.75% signal or signals by designating one or more signals as 'permitted', the designation made by the cable system may be seen as arbitrary."); *see also* Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 6; CDN Ex. R-4 at 890 (Calfee) ("I guess you can say the [3.75 percent rate] designation is – the designation itself is arbitrary."); *id.* at 940 (Calfee) ("[U]nder the market quota standard, any one of two or more signals could have been designated as the permitted signal.").

1647 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1648 CDN Ex. R-4 at 941 (Calfee).

1649 Martin WRT (CDN Ex. R-1) at 4.

1650 CDN Ex. R-5 at 687–90, 711–12, 715 (McLaughlin).

we know very little about how much more it is worth."[1651] The extent of the difference in value might vary widely.[1652]

e. Effect of DSE Counts

640. Although the basic fee has a declining scale, roughly consistent with economic theory of declining marginal value, the scale does not decline for each successive distant signal.[1653] Rather, the schedule provides one rate for up to one DSE, a lower rate for the next three additional DSEs, and a still lower rate for all additional DSEs.[1654] Additionally, the magnitude of the decline is arbitrary: there is no basis for assuming that the relative value of the second DSE should be about two-thirds of the first.[1655] Thus, even though the CDC's "Min/Max" re-allocation presented by the CCG in the rebuttal phase of the hearings introduces some differentials in the "fees gen" allocated among multiple distant signals carried by a system, it cannot measure the actual relative value of those signals to the cable operator.

641. In addition, different DSE counts are assigned to different types of stations without regard to the existence of non-compensable or duplicative programming on those stations.[1656] Distant network affiliates (ABC, CBS, and NBC stations), which broadcast some non-compensable network programming, and educational stations are assigned 0.25 DSE.[1657] Other types of stations also broadcast non-compensable programming but are counted as a full DSE and thus receive greater "fee generation" allocations from CDC.[1658]

1651 CDN Ex. R-4 at 943 (Calfee).

1652 CDN Ex. R-4 at 939 (Calfee).

1653 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1654 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5.

1655 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pgs. 5–6; CDN Ex. R-5 at 694 (McLaughlin); *see also* CDN Ex. R-4 at 893 (Calfee) ("But her point was those amounts are arbitrary, which is true. They are fixed by a compulsory licensing law."); Calfee WRT (CDN Ex. R-3) at Appendix B, pgs. 7–8 (conceding that "designation of which of two or more signal[s] generates the initial, largest fee, is often arbitrary").

1656 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg.6.

1657 Kessler WDT (PS Ex. 5) at 15–16.

1658 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg.6–7.

642. Distant Canadian stations that contain non-compensable U.S. network programming in addition to Canadian programming are one example.[1659] Canadian signals are all automatically assigned 1.0 DSE.[1660] But some Canadian stations broadcast non-compensable U.S. network programming and duplicate programs available on other U.S. stations or on widely available cable networks.[1661]

643. The extent to which stations provide programs that are non-compensable or duplicative is relevant to the stations' relative marketplace value, but is not reflected in their DSEs. As Ms. McLaughlin testified:

> What the cable system is trying to do is get an array of programming to satisfy the consumers and to bring new consumers in. And so presumably, they would want to have programming that's different or at least on it at a different time period.[1662]

644. The DSE schedule does not reflect those distinct differences at all, either the signal is an independent or it is not. If the station is a network affiliate or public television station, it is assigned a quarter DSE.[1663]

6. Prior Findings in Distribution Decisions

645. The Copyright Royalty Tribunal, prior CARPs, and the Court of Appeals have historically either rejected or pointed to flaws in using "fees gen" as a measure of relative marketplace value:

1659 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7 n.13; CDN Ex. R-5 at 691–93 (McLaughlin).

1660 Kessler WDT (PS Ex. 5) at 15; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 5; CDN Ex. R-4 at 957 (Calfee) ("I wouldn't be surprised to learn that at least in some private [Canadian] stations, that they carry at least as much U.S. programming [as Canadian programming]").

1661 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7 n.13; CDN Ex. R-5 at 691–93 (McLaughlin).

1662 CDN Ex. R-5 at 693–94 (McLaughlin).

1663 CDN Ex. R-5 at 693–94 (McLaughlin).

- The 1979 Tribunal "declined to employ fee-generated formulas, as urged upon us by the Canadians." 1979 Cable Royalty Decision, 47 Fed. Reg. 9879, 9894 (Mar. 8, 1982).
- The 1980 Tribunal explained that "the request [for a fee-generated award] is based upon a methodology which the Tribunal has repeatedly indicated fails to lend itself to an application of the Tribunal's criteria." 1980 Cable Royalty Decision, 48 Fed. Reg. 9552, 9569 (Mar. 7, 1983).
- The 1983 Tribunal "rejected fee generation formulas as a mechanical means toward making our allocations." 1983 Cable Royalty Decision, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986).
- The Court of Appeals embraced the position of the 1983 Tribunal, stating that "the Tribunal has consistently rejected the use of any fee-generated formula as a mechanical means for allocating royalties . . . Thus, evidence of mere carriage does not compel distribution to the Canadians of royalties generated by French-language programming." *NAB v. CRT*, 809 F.2d 172, 182 (2d Cir. 1986).
- The 1990-1992 Panel stated that it "did not wish to use a fee generation method" for Canadians and "tried to distance them[selves] from it," but used the method to determine the Canadian Claimants' award because no claimant group objected to the amount of the award. 90-92 CARP Op. at 141; 61 Fed. Reg. 55653, 55667 (Oct. 28, 1996).
- The 1998-1999 Panel relied upon fee generation and changed circumstances to determine the Canadians award "despite our expressed concerns respecting fee generation and changed circumstances." 1998-1999 Carp Op. at 72.

646. In the 2000-2003 cable royalty distribution proceeding, the Judges adopted two joint stipulations that resulted in the parties presenting "the Judges with only two possible choices: either the average of the 1998-1999 Canadian Claimants' awards, or the numbers produced by the fee generation approach (as only done by the 1998-99 CARP) applied to 2000-2003 data, and then reduced to fit other 1998-1999 claimants' awards." 2000-2003 Distribution Order at 15.

647. In choosing to apply the fee generation approach in the unique circumstances of the 2000-2003 proceeding, the Judges made clear that they "do not opine as to what may be the

best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings." 2000-2003 Distribution Order at 18. The Judges also declined to decide "whether the 1998-99 CARP's fee generation approach, or fee generation in general, is the best means of determining the relative marketplace value of the Canadian Claimants' programming." 2000-2003 Distribution Order at 25. The Judges recognized that the relationship between fees generated and relative marketplace value may be "rough," "crude," and "wobbly." 2000-2003 Distribution Order at 27.

648. The Judges stated that the Canadians' awards in the 2000-2003 proceeding are:

> "*not* representative of *the* relative marketplace value of their programming in this proceeding for at least three reasons. First, the awards given the Canadian Claimants by the CARP are not the true product of the fee generation approach employed by the CARP. Rather, they are the fee generation numbers adjusted downward to accommodate the awards of other claimants and equalize the distribution to one hundred percent of the funds. . . . Second, the fee generation approach utilized by the CARP is not the sole method in which fee generation may be employed. The Canadian Claimants themselves have presented alternative ways of conducting fee generation in this proceeding. . . . Third, and perhaps most importantly, the Judges are not being offered any evidentiary alternatives to the fee generation approach.

2000-2003 Distribution Order at 17–18 (emphasis in original).

649. The Judges were not able to consider the "several observations" offered by expert Linda McLaughlin "as to how royalty payments under the compulsory license may be divorced from how programming would be bought and sold in the free marketplace" because the Judges were "precluded by the Joint Stipulations and the parties' presentations from considering how the free marketplace might work and what bearing that might have on relative marketplace value." 2000-2003 Distribution Order at 27; see also PFOF 613-644.

C. The Ringold Cable Operator Survey

650. In the years 2004 through 2005, marketing experts Drs. Debra Ringold and Gary Ford conducted a constant sum survey of the eligible population of Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signal.[1664]

651. The survey was entitled "The Value of Canadian Programming to Cable Systems in the United States: 2004-2005" ("Ringold Study").[1665] The Ringold Study estimates the value of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators.[1666] The Ringold Study utilized a constant sum survey technique intended to estimate the relative value of Canadian programming on Canadian distant signals.[1667] The constant sum technique has been well studied and is considered a sound and reliable tool for measuring relative values.[1668] It is well suited to the task of determining a cable operator's valuation of programming on a single distant signal.[1669] The Ringold Study asked respondents to assign a portion of 100 percent to each of several categories of programming carried on Canadian distant signals.[1670] The research methodology used by Drs. Ford and Ringold was rigorous and designed to accurately gauge value while avoiding significant bias or error.

652. The Ringold Study was not a sample survey; rather, the Ringold Study was taken of the entire population of eligible systems (59 systems in 2004 and 52 in 2005).[1671] An effort was made to reach every cable system in the eligible population.[1672] An eligible system is defined as a Form 3 U.S. cable system that carried one or more Canadian signals on a distant

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1664 Ringold WDT (CDN Ex. 4-A) at 2; Tr. 1301–04 (Ringold) (explaining how French language stations were handled).

1665 Ringold WDT (CDN Ex. 4-A).

1666 Tr. 1287 (Ringold); Ringold WDT (CDN Ex. 4-A) at 2.

1667 Ringold WDT (CDN Ex. 4-A) at 9; Tr. 1298–99 (Ringold).

1668 Tr. 1299–1300 (Ringold).

1669 Tr. 1300 (Ringold).

1670 Tr. 1299 (Ringold); Ringold WDT (CDN Ex. 4-A) at 9–10; Tr. 1290, 1295–96, 1299 (Ringold).

1671 Tr. 1302–03 (Ringold); Ringold WDT (CDN Ex. 4-A) at 6, Appendix 4.

1672 Tr. 1303–04 (Ringold).

basis in either accounting period of the survey year, and where the individual respondent could not participate in more than two interviews.[1673] Several steps were taken to increase response rates: (1) the systems were initially contacted to obtain the identity of the qualified respondent for the system; (2) the respondent was faxed a notification letter; (3) the respondent also was offered an honorarium to participate; (4) the survey company continued efforts to reach the respondent until the survey was completed or the respondent expressly refused to participate; and (5) the survey company used the same interviewer for both years for consistency and experience.[1674]

653. The Ringold Study asked about the value of seven different types of programming carried on a single Canadian signal randomly chosen from those Canadian signals retransmitted by the cable system.[1675] The seven types of programming were: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian-produced news, public affairs, religious, and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis, and auto racing; (5) Canadian-produced series, movies, arts and variety shows, and specials; (6) Canadian-produced children's programming; and (7) other programming.[1676] This approach allowed a signal-specific determination of the relative value of Canadian-produced programming on Canadian signals compared to programming produced by members of other claimant groups and retransmitted on Canadian signals.[1677]

654. Response bias occurs when survey respondents know the purpose of the survey and unconsciously or consciously modify their responses in a way that affects the outcome.[1678] In the Canadian survey, response bias was reduced by making the survey double blind so that

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1673 Ringold WDT (CDN Ex. 4-A) at 6.

1674 Ringold WDT (CDN Ex. 4-A) at 5–7; Tr. 1303–06 (Ringold).

1675 Ringold WDT (CDN Ex. 4-A) at 2.

1676 Ringold WDT (CDN Ex. 4-A) at 2–3; Tr. 1300–01 (Ringold).

1677 Ringold WDT (CDN Ex. 4-A) at 3.

1678 Ringold WDT (CDN Ex. 4-A) at 7; Tr. 1309 (Ringold).

neither the respondent nor the interviewer were told the purpose of the survey, limiting multiple respondents, and using similarly-worded questions about U.S. independent stations as foils.[1679]

655. The Canadian survey was conducted with the persons responsible for deciding which distant signals their cable systems retransmit ("respondents").[1680] On average, each respondent was in this position at his or her cable system for six years and thus, was experienced at making these decisions.[1681] Respondents were also queried as to their program budget responsibilities.[1682] Ninety-two percent of the respondents identified themselves as the individual responsible for making program budget decisions or recommendations.[1683]

656. The Canadian survey garnered response rates of 54 percent and 62 percent for years 2004 and 2005, respectively.[1684] These response rates are at the "bare minimum," with the acceptable response rate being 50 percent.[1685] Non-response bias increases where a survey has a large percentage of non-respondents, thereby making the data collected less compelling because of the large number of uncounted or untabulated results.[1686] As the response rate increases, the likelihood of non-response bias decreases. Response rates of 50 percent are the minimum necessary to avoid non-response bias.[1687]

657. The percentage reported by Dr. Ringold for each program category was a simple average of the percentages reported by individual cable system respondents.[1688] The underlying survey responses reflected a wide range of percentage values reported for Canadian programming.[1689]

1679 Ringold WDT (CDN Ex. 4-A) at 7–8; Tr. 1296–98 (Ringold).

1680 Ringold WDT (CDN Ex. 4-A) at 2; Tr. 1288–89 (Ringold).

1681 Ringold WDT (CDN Ex. 4-A) at 2.

1682 Ringold WDT (CDN Ex. 4-A) at 2; Tr. 1337 (Ringold).

1683 Ringold WDT (CDN Ex. 4-A) at 2.

1684 Ringold WDT (CDN Ex. 4-A) at 2; Tr. 1306 (Ringold).

1685 Tr. 1306 (Ringold).

1686 Ringold WDT (CDN Ex. 4-A) at 5.

1687 Tr. 1306 (Ringold).

1688 Tr. 1357 (Ringold).

1689 Ringold WDT (CDN Ex. 4-A) at Table 1.

658. The results of the Canadian survey are summarized below:[1690]

Summary of Results for Canadian Signals

Programming Category	2004	2005
Canadian-produced programming	59.94%	60.37%
Live professional and college team sports	27.167%	29.91%
U.S. syndicated series and movies	12.75%	9.56%

659. Dr. Ringold reported that her study showed that the average value of Canadian programming on the Canadian distant signals she studied was 60 percent during the 2004-05 time period.[1691] The average value for each of the seven program categories during the 2004-05 time period are as follows:[1692]

Program Category	Avg. Value 2004	Avg. Value 2005
Live professional and college team sports, excluding Canadian Football League games	27.16%	29.91%
Canadian-produced sports programming such as the Olympics, Canadian League games, skating, skiing, tennis and auto racing.	17.34%	21.31%
Canadian-produced news, public affairs, religious, and documentary programs. This includes both Canadian network- and station-produced programs.	23.25%	17.34%
Canadian produced series, movies, arts and variety shows, and specials. This does not include children's programming.	11.22%	12.56%
U.S. syndicated series, movies and specials.	12.75%	9.56%
Canadian-produced children's programming.	8.13%	9.16%
Other Programming	0.16%	0.16%

660. Dr. Ringold concluded that there was no change in the relative value to cable operators of Canadian programming on Canadian distant signals from 1996 to 2005.[1693]

D. The Ringold Longitudinal Study

661. Dr. Ringold also conducted a longitudinal study of the Canadian survey entitled: "The Longitudinal Value of Canadian Programming to Cable Systems In the United States 1996

1690 Ringold WDT (CDN Ex. 4-A) at 3–4, Table 1; Tr. 1310–11 (Ringold).

1691 Ringold WDT (CDN Ex. 4-A) at 4.

1692 Ringold WDT (CDN Ex. 4-A) at Table 1.

1693 Ringold WDT (CDN Ex. 4-B), Figure 1.

to 2005."[1694] The report reviewed ten years of constant sum surveys of eligible Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signals.[1695] The same study methodology was used in each of the ten studies.[1696]

662. A longitudinal study involves analyzing data collected using the same methodology to ask the same population of respondents the same question(s) over time.[1697] It is useful in evaluating the stability and/or robustness of an estimate.[1698]

663. Stability is evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time.[1699] Stability is achieved when measure(s) reveal consistent response(s) over time.[1700]

664. Robustness is further evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time under differing conditions.[1701] Thus, robustness of an estimate refers to stability over time despite changes in conditions such as economic/political circumstances, industry structure, survey research contractors, individual respondents, and survey response rates.[1702] Robustness is achieved when measure(s) reveal consistent response(s) over time despite change.[1703]

665. Longitudinal studies also permit the evaluation of error in an estimate.[1704] The differences between the (in this case, annual) observed values of a measure and the long-run average of the observed values in repetitions of the measurement are informative.[1705] The smaller

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1694 Ringold WDT (CDN Ex. 4-B).

1695 Ringold WDT (CDN Ex. 4-B) at 1.

1696 Ringold WDT (CDN Ex. 4-B) at 3; Tr. 1316 (Ringold).

1697 Ringold WDT (CDN Ex. 4-B) at 2.

1698 Ringold WDT (CDN Ex. 4-B) at 2.

1699 Ringold WDT (CDN Ex. 4-B) at 2.

1700 Ringold WDT (CDN Ex. 4-B) at 2; Tr. 1317–18 (Ringold).

1701 Ringold WDT (CDN Ex. 4-B) at 2–3.

1702 Ringold WDT (CDN Ex. 4-B) at 3; Tr. 1318 (Ringold).

1703 Ringold WDT (CDN Ex. 4-B) at 3.

1704 Ringold WDT (CDN Ex. 4-B) at 3.

1705 Ringold WDT (CDN Ex. 4-B) at 3.

the difference between each (annual) estimate and the long-run average of the estimate, the less error associated with the estimate.[1706]

666. During the years 1996 to 2005, response rates varied from 54 percent to 82 percent and two different survey research contractors were used.[1707]

667. During the years 1996 to 2005, economic and industry circumstances varied and a number of Form 3 cable systems retransmitting a distant Canadian signal came under new ownership, were the object of mergers, and/or changed status with respect to these hearings.[1708] During this period, a number of Form 3 systems retransmitting a distant Canadian signal changed individuals responsible for selecting distant signals for retransmission, and participated some years but refused in other years.[1709] During the years 1996 to 2005, cable system operators who transmitted Canadian signals reported that Canadian programming constituted from 58 percent to 64 percent of the total programming value provided by imported Canadian signals.[1710] A weighted average of these results reveals that, for this period, Canadian programming constituted about 61 percent of the total programming value provided by imported Canadian signals.[1711] Inspection of Figure 1 of Ringold's testimony reveals that the relative value of Canadian programming on distant Canadian signals to cable systems during the period 1996 to 2005 is remarkably stable and robust.[1712]

E. Subscriber Instances

668. The Canadian and U.S. distant subscriber instances for the periods 1998-1 through 2005-2 were as follows:[1713]

1706 Ringold WDT (CDN Ex. 4-B) at 3.

1707 Ringold WDT (CDN Ex. 4-B) at 3.

1708 Ringold WDT (CDN Ex. 4-B) at 3.

1709 Ringold WDT (CDN Ex. 4-B) at 3.

1710 Ringold WDT (CDN Ex. 4-B) at 3.

1711 Ringold WDT (CDN Ex. 4-B) at 3.

1712 Ringold WDT (CDN Ex. 4-B) at Figure 1.

1713 de Freitas WDT (CDN Ex. 4-A) at CDN-1-R, pg. 1.

By Accounting Period		
Accounting Period	Canadian Signals	Total All Other Signal Types
1998-1	2,327,993	64,059,396
1998-2	2,444,712	65,383,286
1999-1	2,439,682	66,538,738
1999-2	2,517,869	65,546,945
1998-1999 Accounting Period Average	*2,432,564*	*65,382,091*
2000-1	2,669,097	67,651,296
2000-2	2,585,301	66,144,447
2001-1	2,653,758	66,258,761
2001-2	2,913,025	67,658,907
2002-1	2,940,482	70,284,785
2002-2	2,803,228	67,886,093
2003-1	2,921,592	65,080,421
2003-2	3,262,903	67,828,088
2004-1	2,760,217	66,611,390
2004-2	2,614,578	71,256,505
2005-1	3,020,164	68,399,151
2005-2	2,860,093	65,278,076

669. The Table below summarizes the change in subscriber instances attributable to the carriage of Canadian signals from the 1998-1999 proceeding to the present proceeding as a percentage of all distant subscriber instances:[1714]

[1714] de Freitas WDT (CDN Ex. 1-A) at CDN-1-R. The number of subscribers presented in this table is cumulative. So, if a cable system has 10,000 subscribers and carries one Canadian and four independent signals on a distant basis in a given accounting period, CDC allocates 10,000 subscribers to Canadian signal for that period and 10,000 to each independent signal. Though the total number of subscribers reported by CDC exceeds the number of people subscribing to cable in the U.S., the subscriber instances reported by CDC depict the number of people who can see a particular distant signal in the U.S. de Freitas WDT (CDN Ex. 1-A) at 15.

Change in Subscriber Instances

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*4,865,128*	*130,764,183*		
2000	5,254,398	133,795,743	8%	2%
2001	5,566,783	133,917,668	14%	2%
2002	5,743,710	138,170,878	18%	6%
2003	6,184,495	132,908,509	27%	2%
2004	5,374,795	137,867,895	10%	5%
2005	5,880,257	133,677,227	21%	2%

670. As Table X indicates, the number of subscriber instances for Canadian distant signals declined in 2004-2005 relative to the 2003 high point and the 2000-2003 average. In contrast, subscriber instances for all other distant signal types in 2004-2005 increased from 2003 and the 2000-2003 average.

671. Ms. de Freitas did not attempt to analyze the data or explain the trends in the data that she presented.

VII. Devotionals' Approach

672. The Devotional Claimants last participated in a cable royalty proceeding in the 1990-1992 CARP proceeding.[1715] In that case, they were awarded 1.25% of the Basic Funds, which was adjusted, in order to accommodate other awards, to 1.19385% of the 1990 Basic Fund, 1.19375% of the 1991-1992 Basic Funds, and 0.95% of the 1990-1992 3.75 Funds.[1716] The Devotional Claimants settled their claims to the 1998-1999 cable royalty funds, for a share of 1.19375% of the Basic Funds and 0.90725% of the 3.75 Funds.[1717]

673. In this proceeding, the Devotional Claimants seek a share of the Basic and 3.75 Funds of 7.8% for 2004 and 6.6% for 2005, which are the shares reported in the Bortz cable

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[1715] 1990-92 CARP Report at 131.

[1716] 1990-92 Librarian Determination at 55669.

[1717] 1990-92 CARP Report at 3 n.2, Appendix B at 8-9.

operator surveys for "Devotional and religious programming."[1718] They made the same request for an award exactly equal to their Bortz survey shares in the 1990-1992 proceeding, in which their Bortz survey shares were 3.6%, 4.3%, and 3.9% for the three years.[1719] The 1990-1992 CARP declined to grant their request, and instead made an award to the Devotional Claimants that was less than one-third of their Bortz survey shares, after finding that the Devotional Claimants' supporting evidence was "anecdotal or individual opinions, not quantified and/or not related to the Devotionals' proportionate share of the royalty fund."[1720] The CARP further found that there was no evidence of any price at which Devotional programmers sold their programming, and that there had been no change in circumstances since the previous cable distribution proceeding determination.[1721] For the same reasons, the Devotional Claimants' 2004-05 evidence fails to provide any basis for a change in the award made by the 1990-92 CARP.

A. The Devotional Claimants' 2004-05 Evidence

674. Devotional Claimants present the written testimony of Dr. Charles F. Stanley, Senior Pastor of First Baptist Church in Atlanta and founder of In Touch Ministries, a Devotional Programming producer and distributor.[1722] The testimony presents evidence of substantial growth between 1992 and 2005 in the availability of In Touch Ministries' programming via television stations, radio stations, CDs, videos, and DVDs.[1723] In Touch Ministries purchased its own cable network channel in 2007 for the distribution of its devotional programming to cable systems.[1724] Its programs aired on 435 television stations by the end of 2005.[1725] There are only about 210 television markets in the United States.[1726]

[1718] Direct Case of the Devotional Claimants at 4; Tr. 1365-66 (Devo Opening Statement).

[1719] 1990-92 CARP Report at 50.

[1720] 1990-92 CARP Report at 130.

[1721] 1990-92 CARP Report at 130.

[1722] Stanley WDT (Devo Ex. 1) at 1.

[1723] Stanley WDT (Devo Ex. 1) at 4-5.

[1724] Stanley WDT (Devo Ex. 1) at 3.

[1725] Stanley WDT (Devo Ex. 1) at 4.

[1726] *See* Tr. 2211 (Ford); Ford WDT (PS 11) at 19, footnote 32.

675. In Touch Ministries purchases time on broadcast stations to air its programs, paying $27 million in FY 2004-2005 for all radio and television broadcasts.[1727] Dr. Stanley's testimony provided no information about the amounts spent on television alone.[1728]

676. Dr. Stanley's testimony provided no information whatsoever about whether and, if so, to what extent In Touch Ministries' programming was carried on any television stations retransmitted as distant signals in 2004-2005.[1729]

677. Dr. Stanley's testimony provided information about donations and telephone calls received by In Touch Ministries.[1730] His testimony provided no information whatsoever about whether and, if so, to what extent any such donations or phone calls came from individuals who had become familiar with In Touch Ministries through any television stations carrying its programming that had been retransmitted as distant signals in 2004-2005, as opposed to through local television stations, radio stations, CDs, videos, DVDs, its website, its cable network, its podcasts, its magazine, its satellite channel, its mp3 players, or other means.[1731]

678. Dr. Stanley's explanation of why the Devotional Claimants should be awarded their 2004-05 Bortz survey share is that such a share "would be much more in line with the relative value we see in our content."[1732]

679. Devotional Claimants also present the written testimony of Bruce Johansen, former President and CEO of the National Association of Television Program Executives.[1733] Mr. Johansen confirms that Devotional programming is generally distributed through the purchase of time from television broadcasters.[1734] He states that he observed increasing interest among broadcasters, particularly religious "specialty" stations, in airing syndicated devotional

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[1727] Stanley WDT (Devo Ex. 1) at 4.

[1728] *See* Stanley WDT (Devo Ex. 1).

[1729] *See* Stanley WDT (Devo Ex. 1).

[1730] Stanley WDT (Devo Ex. 1) at 4-5.

[1731] *See* Stanley WDT (Devo Ex. 1) at 3-5.

[1732] Stanley WDT (Devo Ex. 1) at 8.

[1733] Johansen WDT (Devo Ex. 2) at 1.

[1734] Johansen WDT (Devo Ex. 2) at 4, 8.

programming, but provides no quantitative evidence about whether such broadcasts increased.[1735]

680. Mr. Johansen's testimony also states that devotional programming is "currently" available on 24 different cable networks, but provides no information about cable networks in 2004-05 and provides no information about whether and to what extent devotional programming was carried on any broadcast station retransmitted as a distant signal in 2004-05.[1736] He states his personal opinion, without support in the form of specific cable operator statements, that the carriage of devotional cable network channels is

> "a reflection of [cable operators'] appreciation of the phenomenon of the mega church – the huge number of people interested in religion – as well as the fact that devotional programmers are successfully involved in many aspects of lives and passions of their viewers outside broadcast time, and cable companies want to attach themselves to some of that appeal tin order to maintain existing subscribers and attract new ones."[1737]

681. Mr. Johansen also testifies that he has had "conversations with friends and colleagues" who have "indicated" that devotional programs affected their decision whether to subscribe to cable or satellite services, but he does not state whether any of those programs were on distant signals, or which way devotional programs affected their decisions.[1738]

682. Devotionals presented the testimony of William Brown, a professor at Regent University.[1739] Mr. Brown was accepted as an expert on communication theory and research but was not qualified to offer an opinion on the perceived value to cable operators of the "devotional audience."[1740]

683. Mr. Brown presented testimony, based on third-party sources, that the audience for religious programming had grown through the 1980s, but that that audience had remained

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1735 Johansen WDT (Devo Ex. 2) at 6-7.

1736 Johansen WDT (Devo Ex. 2) at 9-10.

1737 Johansen WDT (Devo Ex. 2) at 12.

1738 Johansen WDT (Devo Ex. 2) at 12.

1739 Brown WDT (Devo Ex. 3) at 1.

1740 Tr. 1402-03, 1420 (Brown).

"remarkably consistent" terms of its size from the 1980s through the early 2000s.[1741] He presented no specific evidence about any growth in audiences to cable distant signal programming between 1990 and 2005.[1742]

684. Mr. Brown discussed his perception of the avidity of religious audiences, but in the end he agreed that his views regarding the greater avidity of religious viewers as compared with the avidity of viewers of other types of programs was based on his personal subjective opinion, and that such avidity had in any event existed since the 1980s.[1743] He could cite no objective research or authority supporting his personal opinion.[1744]

685. Mr. Brown then testified regarding social trends that in his opinion increased the avidity of religious audiences.[1745] His testimony included his observations, and citations from third parties, regarding reactions against sex and violence on television, a desire for moral and spiritual television content, the threat of Islam, distrust of the news media, and a reaction to what he called the "Hostility of Intellectual Elite toward Religious Faith."[1746] Under questioning, he conceded that the social issues he identified as affecting the avidity of the religious audience had been present for some time even before the 1990s, and that he had no quantitative evidence demonstrating that any of the issues had had an increased effect between 1990 and 2005.[1747] In any event, he did not seek to analyze the relative growth in the value of any other type of distant signal programming during the period he considered.[1748]

B. Other Evidence Regarding the Devotionals' Share

686. WGN was by far the most widely carried distant signal in 2004-05.[1749] CTV witness Richard Ducey analyzed the programming on WGN for purposes of identifying

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1741 Brown WDT (Devo Ex. 3) at 7.

1742 Brown WDT (Devo Ex. 3) at 4-7.

1743 Tr. 1427-28, 1430-31, 1491-92 (Brown).

1744 Tr. 1433-34 (Brown).

1745 Brown WDT (Devo Ex. 3) at 8-18.

1746 Brown WDT (Devo Ex. 3) at 8-17.

1747 Tr. 1477-92 (Brown).

1748 Tr. 1476 (Brown).

1749 Ducey WDT (SP Ex. 8) at 7.

programming that was substituted on the distant signal for Syndex reasons.[1750] Such substitute programs are not eligible to receive royalties in this proceeding and were referred to by Dr. Ducey as "non-compensable."[1751] His analysis is presented in SP Exhibit 14.[1752] Of all the Devotional programs that appeared on the distant signal version of WGN, only ten percent were compensable, and ninety percent were substituted non-compensable programs.[1753]

687. CTV witness Dr. Joel Waldfogel presented the results of a regression analysis that compared the amounts of programming in the various categories that were carried on all the stations Form 3 cable operators chose to retransmit against the royalties paid by each cable system.[1754] Using all the data available, the regression analysis produced a negative coefficient for Devotional programming.[1755] The coefficient was not statistically significant, meaning that it could not be predicted with confidence that it was different from zero.[1756] Based on the standard error, there was a 29 percent probability that the Devotional coefficient was above zero.[1757] Dr. Waldfogel testified that he thought the statistically insignificant negative coefficient seemed "implausible" but "not inconceivable" in his professional opinion.[1758] Based on further analysis, Dr. Waldfogel testified that the regression analysis shares statistically corroborated all of the Bortz survey's shares except for the Devotional share, which was higher in the Bortz survey.[1759]

688. The Devotional Claimants presented Dr. Michael Salinger, an Economics Professor at Boston University, as a rebuttal witness to seek to discredit the regression study.[1760] Dr. Salinger did not present any evidence of what a proper regression coefficient for Devotional

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1750 Tr. 558-59 (Ducey).

1751 Tr. 558-59 (Ducey).

1752 SP Ex. 14; *see* Tr. 561-62 (Ducey).

1753 SP Ex. 14; *see* Tr. 564-65 (Ducey).

1754 Waldfogel WDT (SP Ex. 18).

1755 Waldfogel WDT (SP Ex. 18) at 11 Table 2.

1756 Waldfogel WDT (SP Ex. 18) at 12 n.12.

1757 Waldfogel WDT (SP Ex. 18) at 12 n.12.

1758 Tr. 914-15 (Waldfogel).

1759 Tr. 784-88 (Waldfogel).

1760 Salinger WRT (Devo Ex. 4), at 1.

programming might be, or evidence or explanation as to why a very small or even negative coefficient for Devotional programming was somehow impossible or inconceivable.[1761] Instead, Dr. Salinger testified that Dr. Waldfogel's professional opinion that the fact that the data had produced a negative but statistically insignificant coefficient for Devotionals was, while implausible, not inconceivable, resulted from Dr. Waldfogel's "Ivy League snobbery."[1762] In his testimony, Dr. Salinger pointed out the imprecision and volatility of the coefficients that naturally arose when Dr. Waldfogel used all of the actual data that resulted from cable operators' actual distant signal purchase transactions in a regression that was logical and made common sense in light of the realities of the cable distant signal marketplace.[1763] Dr. Salinger, by contrast, was unfamiliar with the economic realities of Form 3 cable operators' carriage decisions,[1764] and fell back on an "omitted variable" criticism that even he admitted can always be leveled no matter how well specified a regression study is.[1765] Dr. Salinger's attempts to discredit the study ultimately did no more than raise the same concern that the 1998-99 CARP identified about the imprecision and volatility of the results of these kinds of econometric studies of actual distant signal market purchase data.[1766]

1761 *See* Salinger WRT (Devo Ex. 4).

1762 Tr. 2823 (Salinger).

1763 Salinger WRT (Devo Ex. 4) at 8-10; *see* Tr. 755-57, 768-69, 917-18 (Waldfogel).

1764 Tr. 2887 (Salinger).

1765 Tr. 2873 (Salinger).

1766 *See* Section IV.B.1.e., *supra (¶¶82-187).*

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	**Docket No. 2007-3 CRB CD 2004-2005**
Distribution of the	)	
2004 and 2005 Cable Royalty Funds	)	
	)	

PROPOSED CONCLUSIONS OF LAW

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PROPOSED CONCLUSIONS OF LAW

I. Purpose of Proceeding

1. The purpose of this proceeding is to allocate approximately $300 million in 2004-05 Section 111 cable royalties among four claimant groups -- the Settling Parties (comprised of the Joint Sports Claimants ("JSC"), Commercial Television Claimants ("CTV"), Public Television Claimants ("PTV") and Music Claimants ("Music")), Program Suppliers, Canadian Claimants and Devotional Claimants. Cable systems paid these royalties in exchange for a compulsory license to retransmit distant signal non-network programming on broadcast signals during the years 2004 and 2005 pursuant to Section 111 of the Copyright Act. 17 U.S.C. § 111.

2. The programming and other works within the claims of these parties are as follows:

> Program Suppliers. Syndicated series, specials and movies, other than Devotional Claimants programs as defined below.
>
> Syndicated Series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. Commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.
>
> Joint Sports Claimants. Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.
>
> Commercial Television Claimants. Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart 3) of the "Program Suppliers" definition.
>
> Public Television Claimants. All programs broadcast on U.S. noncommercial educational television stations.

Devotional Claimants. Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

Canadian Claimants. All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners.

Music Claimants. Musical works performed during the course of programs that are themselves separately represented as parts of the preceding categories.

II. Legal Standards for Allocating Cable Royalties

3. Section 803(a)(1) of the Copyright Act,17 U.S.C. § 803(a)(1), provides that:

> The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty CARPs (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

The 1998-99 CARP, interpreting similar statutory language, stated:

> [T]he CARP must "act on the basis of ... prior decisions of the Copyright Royalty Tribunal, prior Copyright Arbitration CARP determinations, and rulings by the Librarian ..." 17 U.S.C. § 802(c) (203). Therefore, the CARP must accord precedential value to prior awards. But that does not mean the former awards are immutable. *See* 1990-92 Librarian Determination at 55659 ("While the CARP must take account of Tribunal [and CARP] precedent, the CARP may deviate from it if the CARP provides a reasoned explanation of its decision to vary from precedent.")

1998-99 CARP Report at 13.

4. The issues in this proceeding have been shaped during more than thirty years of litigation involving the distribution of Section 111 royalties. The 1998-99 CARP stated: "[p]lainly, a CARP ought not casually depart from established precedent." 1998-99 CARP Report at 14. "[A] system that already imposes substantial burdens on copyright owners would become completely unworkable if such precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly — simply because new decision-makers had different views or different personal preferences concerning the intrinsic worth of certain programming." *See id.* at 14 (citation omitted). The CARP concluded its discussion of precedent by balancing the need for precedent with the obligation to make decisions based on the record before it regardless of whether circumstances have changed since the last proceeding. *See id.*

5. As the U.S. Court of Appeals for the D.C. Circuit held in a seminal opinion regarding these successive, interrelated cable royalty distribution proceedings, the decision making body should ask two questions in determining the shares to be awarded in the current case: (1) Have any parties presented persuasive evidence "tending to show that past conclusions were incorrect"?, and (2) Have changed circumstances occurred since the last litigation that require a change in the parties' prior awards? *National Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 772 F.2d 922, 932 (D.C. Cir. 1985).

III. The Distribution Standard -- Relative Marketplace Value

6. Congress did not set forth a statutory standard for cable royalty allocations. However, the 1998-99 CARP concluded (as did the 1990-92 CARP) that the royalty shares should reflect the relative marketplace value of the different claimant categories, *i.e.*, the relative amounts of royalties that each such category would receive in a free market absent compulsory licensing. *See* 1998-99 CARP Report at 9–10; 1990-92 CARP Report at 23 ("'market value' is the only logical and legal touchstone"). In affirming the 1998-99 CARP Report, the Court of Appeals for the D.C. Circuit noted:

> We detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards.

> Indeed, it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme. . . . Bortz adequately measured the key criterion of relative market value.

Program Suppliers v. Librarian of Congress, 409 F.3d 395, 401 (D.C. Cir. 2005) ("*Program Suppliers v. Librarian*"); *see also id.* at 402 ("While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard . . . the CARP made no such change. Like the 1990-92 CARP, it relied on relative market value"). All of the parties in this proceeding accept relative marketplace value as the proper standard for allocating the royalties at issue. *See* SP PFOF ¶¶49-58.

7. The 1998-99 CARP described the nature of the marketplace in which the claimants' programming would be valued as follows:

> The upshot of this likely marketplace structure is that, absent a compulsory license, the distant signal retransmission market would not be fundamentally different than under the compulsory license. Broadcasters (unlike cable networks) would likely continue to make programming decisions based on their own broadcast market needs. They would make programming decisions calculated to attract viewers in order to maximize advertising revenue — irrespective of any possibility that their signals might be subsequently retransmitted as distant signals. See id. at 7. Broadcasters would be indifferent respecting distant retransmission because distant carriage does not enhance their advertising revenues. Accordingly, in the hypothetical market with no compulsory license, CSOs would, as they do now, face a fixed configuration and quantity of distant signal programming. The supply curve for each type of programming would remain vertical — the supply of programming remains the same, irrespective of the price. The consequence of the hypothetical marketplace structure that we envisage is that it is the "demand side" that will determine relative values of each type of programming.

1998-99 CARP Report at 12-13. The record in this proceeding supports, and nothing in the record warrants a departure from, the above conclusion. *See* SP PFOF ¶¶57-61, 189, 444-459, 482-531.

IV. The Programming Studies At Issue

8. As in the 1998-99 CARP proceeding, the central issue in this proceeding is which of several competing studies provides the best evidence of the relative market value of the different categories of programming represented by the claimants in the relevant hypothetical marketplace. The studies at issue are:

- Constant sum surveys of cable operator 2004-05 program valuations, conducted by Bortz Media on behalf of JSC ("Bortz surveys");
- Adjustments to the Bortz survey results made by Ms. McLaughlin on behalf of PTV ("McLaughlin adjustment") and Dr. Gary Ford on behalf of the Canadians ("Ford adjustment");
- Constant sum surveys of 2004-05 cable operator valuations of programming on Canadian signals, conducted by Dr. Ringold and Dr. Gary Ford on behalf of the Canadians ("Ringold surveys");
- A regression analysis, conducted by Dr. Waldfogel on behalf of CTV ("Waldfogel study");
- An allocation of the "fees generated" by distant signals, provided by Ms. Jonda Martin of Cable Data Corporation ("CDC") on behalf of the Canadians ("CDC fee generation");
- A study of 2004-05 distant signal viewing minutes and local broadcast advertising costs performed by Dr. George Ford on behalf of Program Suppliers ("Ford study"); and
- Constant sum surveys of 2004-05 cable subscribers conducted by Dr. Gruen on behalf of Program Suppliers ("Gruen surveys").

9. Program Suppliers also presented the results of a custom study of the amount of time that cable subscribers purportedly viewed different types of distant signal programming according to data obtained from the A.C. Nielsen company ("MPAA custom viewing study"). Dr. Ford relied upon the MPAA custom viewing study in performing his analysis. However, Program Suppliers acknowledged (as they did in the 1998-99 proceeding) that they are not presenting the unadjusted viewing minute shares reflected in that study as evidence of relative market value -- notwithstanding that they had relied upon such studies in numerous past proceedings. *See* SP PFOF ¶538. The CARP considered a similar custom viewing study in the 1998-99 proceeding and properly concluded that it "does not directly address the criterion of relevance" and "cannot be used to measure directly relative value" to cable operators. 1998-99 CARP Report at 38.

A. Bortz Surveys

10. The 1998-99 CARP concluded that the "Bortz survey is clearly the best measure of relative marketplace value" and it accepted

> the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative market value for PS, JSC and NAB -- for both the Basic Fund and the 3.75% Fund. Indeed, for reasons discussed *infra,* we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups. Bortz also establishes a Basic Fund floor . . . for PTV.

1998-99 CARP Report at 52, 31. The CARP concluded that its decision to tie the PS, JSC and CTV awards directly to the Bortz results -- and not to rely upon raw or adjusted viewing data in fashioning these awards -- was the "natural evolution of a discernible trend" where "[s]uccessive decision-makers have been according greater and greater weight to Bortz, and concomitantly lesser weight to [the] Nielsen" viewing data that had been the cornerstone of the CRT's early distribution decisions. *Id.* at 53. The 1998-99 CARP also concluded the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy." *Id.* at 52.

11. The record in this proceeding supports, and does not provide any proper basis for departing from, those conclusions. Unlike any of the other studies presented in this proceeding, the Bortz studies have a twenty-five year track record of providing methodologically sound, fully-vetted, reliable and valid estimates of relative marketplace values. Bortz Media has continuously refined and improved its constant sum surveys in response to issues raised in these proceedings. The parties also have presented a substantial amount of evidence over several distribution proceedings (including this proceeding) in support of a constant sum methodology in general, and the Bortz surveys in particular, as providing the best approach to determining relative market value. JSC, CTV and the Canadians have each offered constant sum surveys of cable operators in distribution proceedings. In this proceeding, JSC, CTV, PTV and Devotionals support the Bortz surveys while the Canadians and the Program Suppliers have presented separate surveys that also use the constant sum methodology. *See* SP PFOF ¶¶63-85, 96-125.

12. Furthermore, the record in this proceeding demonstrates that the 2004-05 Bortz surveys are methodologically sound; they provide the best available evidence of the relative marketplace values of the programming represented by PS, JSC and CTV and, with the adjustments described below, provide the best estimates of the programming represented by PTV and the Canadians as well. The record also contains substantial evidence (including the Waldfogel study, a study of programming expenditures by cable networks, and an analysis of changed circumstances) that corroborate the 2004-05 Bortz survey results. While the Program Suppliers have leveled criticisms against the Bortz surveys, none of these criticisms is new and none is supported by any empirical evidence. None justifies according the 2004-05 Bortz surveys less weight than the CARP accorded the 1998-99 Bortz surveys. *See* SP PFOF ¶¶86-125, 131-308.

13. On two separate occasions the U.S. Court of Appeals for the DC Circuit has affirmed reliance upon cable operator constant sum surveys in allocating the cable royalty funds. In *Christian Broad. Network, Inc. v. CRT,* 720 F.2d 1295, (D.C. 1983), the Court of Appeals stated:

> Indeed, given Congress' evident intent to have the [CRT] operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, see House Report at 89, [the Court] find[s] the [CRT's] receptiveness to evidence simulating the commercial attitudes of the "buyers" in this supplanted marketplace to be more than reasonable.

Id. at 1306. Likewise, the Court of Appeals affirmed the decision of the 1998-99 CARP to accord the Bortz results determinative weight in setting the awards of the Program Suppliers, JSC and CTV, stating that the Bortz surveys "adequately measured the key criterion of relative market value." *Program Suppliers v. Librarian,* 409 F.3d at 402. The decision to accord determinative weight to the Bortz surveys is thus fully consistent with applicable precedent.

B. McLaughlin and Ford Adjustments

14. In the 1998-99 proceeding, the CARP concluded that although the Bortz survey is "an extremely robust (powerfully and reliably predictive) model for determining relative value," the results of the Bortz survey "understate the relative value of PTV" due to "the Bortz treatment

of cable systems that carried only PTV as distant signals." 1998-99 CARP Report at 22, 31. The CARP observed that "[t]he exclusion of the PTV-only systems artificially depresses the PTV Bortz score" because that is "the category of cable operators that would be expected to give the highest value to a PTV distant signal." 1998-99 CARP Report at 23. The CARP recognized, as did the 1990-92 CARP and the 1983 and 1989 CRT, that the Bortz results must be adjusted to take account of the differences in the way PTV is treated in the survey. *See* 1998-99 CARP Report at 24; 1990-92 CARP Report at 123–24; 57 Fed. Reg. at 15299–300; 51 Fed. Reg. at 12811. Consequently, the CARP concluded that the Bortz survey "establishes a relative value floor" for PTV programming. 1998-99 CARP Report at 60.

15. In this proceeding, PTV sponsored testimony from Linda McLaughlin that provided a mathematical adjustment to the Bortz study to address the fact that some cable systems carried only PTV and/or Canadian distant signals. *See* SP PFOF ¶¶309-324, 330. The results of this adjustment are set forth in SP PFOF ¶¶314-317 and the Appendix. Because this adjustment addresses the 1998-99 CARP's "primary concern about the Bortz survey," the Bortz survey, as adjusted, is representative of PTV's relative marketplace value.

16. The adjusted Bortz survey results are corroborated by the fact that there was "a meaningful increase in the relative growth" of PTV's programming from 1998-99 to 2004-05. 2000-03 Distribution Order at 34 (referring to Canadian growth between 1998-99 and 2000-03). PTV's percentage of distant subscriber instances of carriage increased from 10.2 percent in 1998-99 to 12.1 percent in 2004-05. *See* SP PFOF ¶217. This increase was greater than that experienced by the Canadians between 1998-99 and 2000-03 -- an increase that the Judges found to be a "significant" changed circumstance supporting an increase in Canadians' award. *See* 2000-03 Distribution Order at 34.

17. In contrast to the 1998-99 proceeding, where the CARP decided to hold PTV's award flat in part because PTV's raw Bortz share had not increased since the last proceeding, 1998-99 CARP Report at 66, in this case PTV's raw unadjusted Bortz share increased from 2.9 percent in 1998-99 to 3.6 percent in 2004-05. *See* SP PFOF ¶217. This increase is consistent with and reflective of the increase in subscriber instances and other changed circumstances. *See*

SP PFOF ¶¶217-219; *see also* 1998-99 CARP Report at 16 ("changed circumstances are embedded within methodologies that provide reliable estimates of ... relative valuations").

18. The Canadians' witness Dr. Gary Ford expanded on Ms. McLaughlin's adjustment to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. The results of this adjustment are set forth in SP PFOF ¶330 and the Appendix.

C. Ringold Surveys

19. The Canadians' witnesses Drs. Debra Ringold and Gary Ford conducted a constant sum survey that estimates the value of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators. *See* SP PFOF ¶¶650-660. Dr. Ringold testified that her study showed that the average value of Canadian programming on the Canadian distant signals she studied was 60 percent during the 2004-05 time period. *See* SP PFOF ¶659. In light of that fact, it is necessary to adjust the augmented Canadian Bortz shares downward and the augmented JSC and Program Supplier Bortz shares upward to account for the presence of JSC and Program Supplier programming on Canadian distant signals. The results of this adjustment are set forth in SP PFOF ¶336 and the Appendix.

D. Waldfogel Study

20. The Waldfogel study is a regression analysis that compares the relative amounts of distant signal programs retransmitted in each of the claimant categories against the cable copyright royalties paid. The cable distant signal market is, of course, subject to regulatory constraints, and individual program category values cannot be determined by direct observation, but cable operators make economic decisions when they choose to carry the distant signals for which they pay royalties. The Waldfogel study was designed to glean as much useful information as possible from these marketplace data by applying an econometric analysis to the complete set of data about all of the distant signal programming that Form 3 cable operators actually chose to carry in 2004 and 2005 along with all of the royalties that each Form 3 cable system actually paid for those programs in 2004 and 2005. *See* SP PFOF ¶¶134-145.

21. Dr. Waldfogel designed the study based on the underlying economics of the distant signal marketplace and a common sense approach to identifying the variables that would be expected to have an effect on system royalties. Dr. Waldfogel included the program categories themselves as independent variables because measuring their relative value is the only question to be answered in this case. He included other independent variables that reflected system size, the economic attributes of the cable community's market, the availability in each system of other programming sources (relative number of local signals and total channels), and a number of aspects of the cable royalty structure that would affect the total royalties (partially distant, minimum fee, and 3.75 variables). The regression resulted in coefficients that were the equivalent of unit prices for the different program categories, which, when multiplied by the relative amounts of programming actually purchased in 2004 and 2005, produced shares representing the relative values of the distant signal program categories. *See* SP PFOF ¶¶146-176.

22. Dr. Waldfogel made a close comparison between the results of his study and the results of the Bortz surveys. After making adjustments in his study's share calculations so that they covered the same scope of compensable and non-compensable programming that was covered in the Bortz surveys, and using augmented Bortz survey shares so that they include the omitted PTV-only and Canadian-only sample systems that were covered in the regression analysis, he concluded that on an apples-to-apples basis, the shares resulting from the two studies, with the exception of the Devotional shares, were very similar, and given their overlapping confidence intervals, were statistically indistinguishable. The Devotional coefficient in the regression study was negative, although statistically insignificant, and even at the top end of its confidence interval, produced a share that was significantly lower than the Bortz survey share for Devotional programming. *See* SP PFOF ¶¶177-181.

23. In the 1998-99 Proceeding, CTV presented a similar regression analysis, the results of which were somewhat volatile and imprecise, but which the 1998-99 CARP relied on as useful evidence corroborating the Bortz survey results. *See* 1998-99 CARP Report at 49-50. Dr. Waldfogel took several of the past criticisms into account in the design and evaluation of his regression study, but opposing rebuttal witnesses pointed out that its results were also imprecise and somewhat volatile. In this case as in the 1998-99 case, the regression analysis provides

strong support and corroboration for the Bortz survey results, except for the Devotional share. It finds in the economic data that resulted from the actual operation of the distant signal marketplace in 2004-05 a set of relative value shares that are substantially the same as those the cable operators themselves reported in response to the 2004-05 Bortz surveys. *See* SP PFOF ¶¶177-181.

24. In the adjustments that Dr. Waldfogel made in order to have an apples-to-apples comparison, the regression study provides a strong independent evidentiary basis corroborating the PTV and Canadian adjustments to the 2004-05 Bortz survey results that have been proposed and explained by Ms. McLaughlin and Dr. Gary Ford, and which were accepted by Mr. Trautman. In addition, the comparison provides an evidentiary relative value basis for making the "WGN Adjustment" that the 1998-99 CARP found may be conceptually proper but for which it lacked sufficient evidence. *See* 1998-99 CARP Report at 27-28. On the record of the 2004-05 proceeding, the Judges have a strong evidentiary base for reducing the Program Suppliers' Bortz survey share by up to 23.2 percent, and allocating the adjustment proportionally among the remaining programming categories. *See* SP PFOF ¶¶309-348.

E. CDC Fee Generation

25. The Canadians once again seek to rely upon "fee generation" to determine its shares in this proceeding. "Fee generation" refers to the amounts of Section 111 royalties that Cable Data Corporation ("CDC") allocates to each broadcast station carried as a distant signal under Section 111, based upon various protocols that CDC has established.

26. The CRT, prior CARPs, and the Court of Appeals have historically either rejected or pointed to flaws in using "fees gen" as a measure of relative marketplace value. *See* SP PFOF ¶¶645-649. In choosing to apply the fee generation approach in the unique circumstances of the 2000-03 proceeding, the Judges made clear that they "do not opine as to what may be the best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings." 2000-03 Distribution Order at 18. The Judges also declined to decide "whether the 1998-99 CARP's fee generation approach, or fee generation in general, is the best means of determining the relative marketplace value of the Canadian Claimants' programming." 2000-03 Distribution Order at 25. Indeed, the Judges

observed that the Canadians' awards in the 2000-03 proceeding were "not representative of the relative marketplace value of their programming in this proceeding." 2000-03 Distribution Order at 17–18.

27. The Judges recognized that the relationship between fees generated and relative marketplace value may be "rough," "crude," and "wobbly," 2000-03 Distribution Order at 27, but considered themselves constrained by the parties' stipulations designed to promote the efficiency of the proceeding and by the lack of any evidentiary alternative to use the fees generated approach for the narrow purpose of determining the Canadian Claimants' share in the 2000-03 proceeding. *See* 2000-03 Distribution Order at 15, 18, 25-26. The Judges stated that they were not able to consider the "several observations" offered by expert Linda McLaughlin "as to how royalty payments under the compulsory license may be divorced from how programming would be bought and sold in the free marketplace" because the Judges were "precluded by the Joint Stipulations and the parties' presentations from considering how the free marketplace might work and what bearing that might have on relative marketplace value." 2000-03 Distribution Order at 27; *see also* SP PFOF ¶¶613-644. No such constraints exist here.

28. Ms. McLaughlin's testimony, which was not before the CARP in the 1998-99 or 1990-92 proceedings, provides several substantive criticisms of the "fees gen" methodology and plainly establishes that "fee generation" does not reflect relative marketplace value. *See* SP PFOF ¶¶613-644. As Ms. McLaughlin explained, the amounts that CDC allocates to particular signals under its "fee generation" protocols reflect a variety of factors that have nothing to do with how cable operators value (or pay for) distant signals, or how the free marketplace might work in the absence of the compulsory license. *See* SP PFOF ¶¶613-644.

29. In addition, the Canadians' own witness, Dr. Calfee, conceded, among other things, that: (1) there is an unavoidable disparity between relative values and fee allocation; (2) two signals can generate the same fees, but have a different relative value; (3) "one cannot infer, directly, [just by looking at the fees gen allocations] the relative value of . . . two signals to either the system or their subscribers;" (4) the "fees gen" methodology could produce a "spurious" result; and (5) changes in the "fees gen" numbers could result from a number of factors that have nothing to do with the relative value of programming retransmitted on distant signals, ranging

from expansion of the cable system's service area, to an improved On Demand service offering, to bundled television and Internet service offerings. *See* SP PFOF ¶¶597-609. In addition, the testimony of Canadians' witness Jonda Martin demonstrated that CDC's standard fees gen allocations, "Minimum/Maximum" analysis, and "3.75%" protocols do not reflect the amount a cable operator would save if it dropped all distant signals or only one distant signal. *See* SP PFOF ¶¶610-612.

30. Finally, the Canadians' "fees gen" methodology contemplates that the Judges would apply the Canadians 2004-05 "fee generation" shares against the royalties paid by all cable systems, without regard to whether those systems had any right to retransmit Canadian broadcast signals pursuant to the Section 111 compulsory license. *See* 17 U.S.C. § 111(c)(4) (limiting the geographic region within which cable systems may retransmit Canadian signals under the Section 111 compulsory license). This would include the royalties paid by cable systems that paid only the "Minimum Fee" for the "privilege of further retransmitting" broadcast signals (17 U.S.C. § 111(d)(1)(B)(i)), even though many of those systems did not enjoy that privilege with respect to Canadian signals. The Canadians submit no evidence that it is advisable or permissible to include the royalties by cable systems that were precluded by the terms of the Section 111 license from retransmitting Canadian signals. It is not only inadvisable for the Judges to apply the Canadians 2004-05 "fee generation" shares against the royalties paid by all cable systems, without regard to whether those systems had any right to retransmit Canadian broadcast signals pursuant to the Section 111 compulsory license, but it is deficient as a matter of law as well.

31. Unlike in the 2000-03 proceeding, the Settling Parties in this case have offered a reliable and robust "evidentiary alternative" to the fee generation approach, undertaking a similar multi-step process as proposed by the Canadians but using the Canadians' adjusted Bortz share as the starting point, rather than Canadians' relative percentage of CDC's fees generated allocation. *See* SP PFOF ¶¶62-415 and the Appendix.

32. The 1998-99 CARP declined to use the Bortz results for the Canadians saying only that the survey was not "designed" to include the Canadians and did not provide "statistically significant results" for the Canadians. *See* 1998-99 CARP Report at 31 n.13. The

CARP acknowledged, however, that "fee generation does not reach the level of robustness and reliability of the Bortz study." Id. at 64. The record of this proceeding provides the strongest support yet for using the Bortz survey results to set the Canadians' award. The number of Bortz respondents who carried distant Canadian signals in 2004-2005 and whose valuations are taken into account in the adjusted (or unadjusted) Bortz results is significantly greater than in 1998 and 1999. *See* SP PFOF ¶326. On the basis of this more complete record, the Judges should reject fee generation and rely upon the 2004-05 Bortz survey results, as adjusted, to determine the Canadians' 2004-05 award. *See* SP PFOF ¶¶325-330.

F. Ford Study

33. To support an over 30 percentage point increase over their 1998-99 share, the Program Suppliers rely on a study presented by Dr. George Ford. The Ford study follows the approach espoused by Program Suppliers in the 1998-99 proceeding, in that it starts from the base of the discredited MPAA custom study of viewing minutes and multiplies the shares of viewing minutes by a series of arbitrary adjustments to produce a larger share for Program Suppliers. As with the 1998-99 Gruen "avidity adjustment" manipulations, the Ford study suffers from fatal flaws, and provides no basis whatsoever for the allocation of royalty funds in this proceeding. *See* SP PFOF ¶¶460-481.

34. As expert rebuttal witnesses demonstrated, Ford's study is fundamentally flawed from an economics perspective, in that it uses data from the wrong market. Dr. Ford's explanation for using broadcast market advertising data as the basis for his analysis was that he found a market where data was available, and just assumed that the relative values would be the same. He repeatedly confirmed that cable operators were irrelevant to the question of relative value under his approach. But as Dr. Crawford explained, different kinds of programs are valuable in the broadcast advertising-supported market as contrasted with the cable market, so Dr. Ford's use of the wrong market produces the wrong relative value answers. *See* SP PFOF ¶¶422-428, 439-452.

35. Dr. Ford's approach is inconsistent with the Congressional intent underlying Section 111 and applicable judicial precedent. It improperly relies upon advertising revenues that neither cable operators nor broadcasters receive from distant signal programming.

Moreover, nothing in the record corroborates Dr. Ford's results or demonstrates that his study is reliable. To the contrary, the record establishes that Dr. Ford's approach is wholly inconsistent with marketplace evidence. *See* SP PFOF ¶¶448-450, 453-481. Furthermore, Dr. Ford has never before done his study and has presented results for only two years. *See* 1998-99 CARP Report at 50, 48 (refusing to adopt the Rosston regression analysis as a "methodology for independently determining relative value" in part because "the lack of any historical bases for assessing reliability is of concern"); *id.* at 88 ("Unlike the Bortz survey, the Schinck approach is not time-tested. Similar approaches have not been adopted, or even presented for litigation scrutiny, for over 20 years. Unlike reliance on 'tried and true' methodologies such as the Bortz survey, this Panel is loath to slash drastically an award based upon such untested methodologies"). The concern over reliability is particularly significant here given that, as Dr. Ford acknowledged, there is a "significant difference" in his results for the years 2004 and 2005. *See* SP PFOF ¶¶435, 544-550.

36. Moreover, having "assumed himself into the data flow" of the broadcast market, Dr. Ford proceeded to adjust those very data in ways that were flatly inconsistent with the realities of the actual broadcast market. These erroneous adjustments had the effect of further increasing the Program Suppliers share under the Ford approach. And Dr. Ford's share calculations were then based on the MPAA Custom Viewing Study shares, which besides being irrelevant to relative market value were erroneous in ways that inflated the Program Suppliers share. Dr. Ford's study is fatally flawed in both its conception and its implementation, and provides no credible or valid evidence on which royalty allocations can properly be based. *See* SP PFOF ¶¶438-481.

G. Gruen Surveys

37. The Gruen cable subscribers do not provide any reliable basis for determining the claimants' royalty shares. These studies contain several methodological flaws, as demonstrated by a pilot study that the survey research firm C&R Research conducted. That pilot study provided an empirical basis for the criticisms that various survey experts and others leveled against the Gruen surveys. Among other things, the Gruen surveys use of examples of programs not actually received on a distant signal basis by the respondents rendered useless the valuations provided by those respondents; those valuations plainly covered programming other than the

distant signal programming at issue in this proceeding. Moreover, the failure to provide the Judges with the basic information that routinely accompanies consumer surveys -- response rates and gender of respondents -- precludes any finding that the results of these surveys are representative of the cable subscriber universe; it also precludes any assessment of whether these surveys respond to the concerns raised the last time that a cable subscriber survey was introduced in the distribution proceedings. Finally, by surveying any subscriber willing to respond -- without regard to whether they actually placed any value on, or had any familiarity with the distant signal programming, about which they were questioned, the Gruen surveys obtained meaningless information -- comparable to asking all car owners how they value the different options on a Bentley or Rolls Royce they had never driven let alone owned. *See* SP PFOF ¶¶57-61; 189; 444-459; 482-531.

38. Wholly apart from the methodological deficiencies of the Gruen surveys, the surveys were conceptually problematic. The relevant issue in this proceeding concerns how cable operators, not cable subscribers, would allocate their royalty payments. The best evidence on that issue comes from cable operators themselves, not cable subscribers. And Dr. Crawford's empirical studies show that cable subscribers' preferences do not translate directly into higher cable operator profitability anyway, because of the economic effects of bundling. As the 1998-99 CARP recognized (and as the Court of Appeals affirmed), it is reasonable to conclude that the program valuations provided by cable operators who respond to the Bortz surveys take account of cable operator preferences. *See Program Suppliers v. Librarian,* 409 F.3d at 402.

V. The Music Share

A. The Music Claimants

39. Music Claimants represent every songwriter, composer and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming. Copyright Office Final Regulations, 59 Fed. Reg. 63,025, 63,029 (Dec. 11, 1994); 1990-1992 Decision, 61 Fed. Reg. at 55655 (Oct. 28, 1996); *see also* Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed. Reg. 20,428, 20,429 (Apr. 24, 1998). There has been an increased emphasis on music in local television programs over the past ten years. *See* SP PFOF ¶¶351-363. In particular,

entertainment oriented shows such as the ratings juggernaut "American Idol" have used increasingly focused on feature music. *See* SP PFOF ¶354.

40. Music Claimants are claimants to each of the Basic, 3.75%, and Syndex Funds. In the past, Music Claimants always received the same share of the Basic, 3.75%, and Syndex Funds in all CARP and CRT awards, and should again in this proceeding.

B. The 1998-99 CARP Report

41. The 1998-99 CARP found that the Bortz study provided meaningful indications of the relative values of sports, movies and other types of programming, but was not relevant for music because music is a program element rather than a program type. 1998-99 CARP Report at 31. The 1998-99 CARP found that an alternate methodology provided some evidence of the relative market value of music. Specifically, the CARP considered, as a "floor" for the ultimate distribution percentage set, the relative value of music based on the ratio of music license fees to the total music license and broadcast rights expenses incurred by television broadcasters in the over-the-air broadcast market (the "Unadjusted Music Ratio"). *See* SP PFOF ¶¶350, 374-375, 394-396, 400. Although the CARP recognized that the market for distant signal programming by cable system operators is different from the market for programming in the over-the-air broadcast market, "in the absence of better measures," the CARP found that "the broadcast television ratio of music expenses to the total broadcast rights expenses is at least one reasonable measure of Music's relative value ...." 1998-99 CARP Report at 85; *see* SP PFOF ¶¶350, 375-376, 394-396.

42. The 1998-99 CARP concluded that this Unadjusted Music Ratio was "worthy of some weight in determining the relative weight of Music," but also found that the inclusion of expenditures made by the Big 3 networks may artificially decrease the Unadjusted Music Ratio to a level below where it would have been if the Big 3 networks had been excluded, as they should have been. 1998-99 CARP Report at 84-86. The CARP therefore awarded Music Claimants 4% of the 1998-99 funds — nearly twice the 2.33% suggested by the unadjusted "floor" study.

C. The Zarakas Study

43. The Zarakas Study addressed the concerns of the 1998-99 CARP and is the most reliable evidence of Music's value in this proceeding. *See* SP PFOF ¶¶350, 364-372, 373-392, 409-415.

44. The Music Claimants' proposed share is based on the music ratio concept accepted by the CARP in the 1998-99 proceeding; however, the analysis was refined to address the CARP's concerns that the ratio reflect music's value in the distant signal market and to exclude rights payments for Big 3 network programming, which is not compensable in this proceeding. *See* SP PFOF ¶¶350, 373-392 Mr. William P. Zarakas, an economist and expert in the valuation of assets and businesses in the communications and media industries, designed a music valuation analysis to meet each of the 1998-99 CARP concerns. *See* SP PFOF ¶¶350, 373-392. Mr. Zarakas focused his detailed analysis on using data available in the over-the-air local broadcast market to estimate the relative value of music in the distant signal market. *See* SP PFOF ¶¶350, 364-372, 376-390. To do this, he obtained reliable data on market-negotiated blanket music license fees and television broadcast rights payments and calculated music ratios for different categories of television stations in the over-the-air local broadcast market, such as Independent stations or network affiliates. *See* SP PFOF ¶¶364-372, 376-390. Importantly, Mr. Zarakas used only music license fees and broadcast rights payments for non-Big 3 network, non-network, and locally produced programs. *See* SP PFOF ¶¶377, 383-390. He then weighted these music ratios to reflect the relative importance of the stations retransmitted by cable systems in the distant signal market in 2004 and 2005, finding aggregate music ratios that represent the relative value of music, 5.2% in 2004 and 4.6% in 2005. *See* SP PFOF ¶¶376, 391-392.

45. Mr. Zarakas found that the most reliable and accurate measures of the value of music license fees in the over-the-air local broadcast market are the negotiated market prices of the PRO blanket music licenses. *See* SP PFOF ¶¶364-372, 377-383, 410. The Music Claimants operate in the marketplace primarily through blanket licenses. *See* SP PFOF ¶¶ 365-372. A blanket license grants the privilege to a licensee to perform publicly any and all of the musical works within the repertory of the respective performing rights organization in exchange for either a flat fee or a percentage of gross receipts. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 5 (1979); *see* SP PFOF ¶¶365-366. "Sound business

judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement...." *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950), quoted in *Broadcast Music, Inc. v. Columbia Broadcasting System. Sys., Inc.*, 441 U.S. at 8-9 fn.13.

46. Blanket licenses have been the only form of license in place between the PROs and the cable system operators for the limited programming that they license. *See* SP PFOF ¶372. Indeed, Congress itself has elected to use the compulsory blanket license concept in the cable television statutory license, as well as in other statutory licenses. *See* 17 U.S.C.§§ 111, 118 and 119. For example, in enacting the satellite carrier statutory license, the House Committee on the Judiciary stated: "Negotiation of individual copyright royalty agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the revenues produced by a single earth station are so small." H. Rep. No. 100-887, Part 1, 100th Cong., 2d Sess. (1988) at 24.

47. As observed by the U.S. Supreme Court, "[m]ost users want unplanned, rapid, and indemnified access to any and all of the repertory of the compositions...." *Broadcast. Music, Inc. v. Columbia Broadcasting. Systems, Inc., supra*, 441 U.S. at 20. Given this demand, "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided." *Id.* In this context, the Court found that, "[t]he blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of the parts; it is, to some extent, a different product." *Id.* at 21-22.

48. Based upon previous agreements between cable operators and performing rights organizations, as well as unrebutted evidence from Mr. Michael O'Neill, Senior Vice President Licensing at BMI, Mr. Zarakas reasonably concluded that without a statutory cable license, each of the performing rights organizations would offer and negotiate blanket licenses with cable operators for the public performing rights to all music contained in programming on stations retransmitted by distant signal. *See* SP PFOF ¶¶364-372, 377-383, 410. And the licensees would be satisfied because the blanket license offers users a more efficient product at a lower

price than a large number of direct licenses would offer to cable operators. *See* SP PFOF ¶¶365-366.

49. Mr. Zarakas' weighting of station types by subscriber instances is appropriate because different types of stations (Big 3 network affiliates, independent, and small network affiliates) have different music ratios in the local market and are carried in differing amounts to the subscribers in the distant signal market as compared to the local market. *See* SP PFOF ¶¶375-376, 391-392, 411. Thus, Mr. Zarakas' weighting analysis specifically addresses the 1998-1999 CARP's concern that any music ratio must reflect the important differences between the local television and distant signal markets. *See* SP PFOF ¶¶350, 375-376, 391, 394-396. Specifically, by weighting the distant signal half-years for stations received by subscribers, Mr. Zarakas accounted for the distant signals that cable systems actually chose to transmit in the 2004-2005 period in a manner that appropriately accounts for differences in subscribership between small and large cable systems. *See* 2000-03 Distribution Order at 34 (finding that increases in relative amount subscriber instances to be "significant" and corroborates increase in value of Canadian Claimants' share); *see* SP PFOF ¶¶ 376, 391, 411.

50. Mr. Zarakas' analysis was not only objective and reasonable but also generally conservative. *See* SP PFOF ¶¶385, 387, 389-390, 392. Music's proposed award, as a component of the Settling Parties' share, is appropriate because it falls within the "zone of reasonableness" based on the evidence presented. *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 772 F.2d 922 (D.C. Cir. 1985).

D. Woodbury Criticisms

51. The criticisms of Mr. Zarakas' analysis by Program Supplier's witness Dr. John R. Woodbury are not persuasive and should be rejected. *See* SP PFOF ¶¶ 409-415. His principal criticism of Mr. Zarakas' study concerns Mr. Zarakas' use of negotiated blanket music license fees instead of Dr. Woodbury's incomplete measure of music license fees paid only to the PROs. *See* SP PFOF ¶¶409-410. This objection fails for two reasons. First, the unrebutted testimony establishes that the PROs would negotiate a blanket license with the cable operators to license the music contained in programming carried on stations transmitted as distant signals. *See* SP PFOF ¶¶364-372, 377-383, 410-412. Second, using only PRO receipts from the stations, as Dr.

Woodbury proposes, fails to include any value for direct license payments made by the stations and thus severely undervalues the music license fees at issue. *See* SP PFOF ¶¶ 367-372, 377-383, 398, 404-405, 410. The blanket license fee amounts used by Mr. Zarakas are the only data available that accurately and reliably reflect the negotiated marketplace value of all the music in local television programs. *See* SP PFOF ¶¶367-372, 377-383, 398, 404-405, 410. And Dr. Woodbury did not and could not testify with any empirical support that Mr. Zarakas' use of blanket music license fees underestimated to any measurable or material degree the total music license fee payments by the local stations. *See* SP PFOF ¶¶ 404-405, 410.

52. Dr. Woodbury's other criticisms of Mr. Zarakas' analysis were equally unsupported and worthy of no weight. Dr. Woodbury criticized Mr. Zarakas for weighting by distant signal half-years by claiming that viewership is more appropriate. *See* SP PFOF ¶¶401, 411-412. But Mr. Woodbury did not weight his calculation at all, and he provided no justification either to support the use of viewership data for weighting purposes or to undermine the value of using distant signal half-year weights to reflect what was carried and received by subscribers as distant signals. *See* SP PFOF ¶¶401, 411-412. Likewise, Mr. Zarakas accurately defines WGN America as an independent station, unaffiliated with any network, and Dr. Woodbury could provide no factual basis to assert otherwise. *See* SP PFOF ¶¶413-415. Indeed, WGN America is an Independent station using the very definition that Dr. Woodbury used in his testimony. *See* SP PFOF ¶¶ 413-415.

E. Woodbury's Alternative Music Valuation.

53. Dr. Woodbury's alternative music valuation does not address the concerns of the 1998-99 CARP and uses flawed data. *See* SP PFOF ¶¶ 393-408.

54. Dr. Woodbury's analysis is factually flawed beyond correction, is factually inaccurate in numerous ways, deserves no weight from the Judges as evidence, and is contrary to law. *See* SP PFOF ¶¶393-408. *First*, Dr. Woodbury's own music ratio analysis failed to address any of the CARP's criticisms of the 1998-1999 study by including network fees and rights payments for ABC, NBC, and CBS (the Big 3 networks), even though Big 3 network programming is non-compensable under Section 111, and by failing to make any weighting adjustment to his calculation based on which television stations were actually retransmitted

distantly and in what degree. *See* SP PFOF ¶¶393-402, 410. Thus, Dr Woodbury's calculation is contrary to Section 111's and the 98-99 CARP's demand that compensation only occur for compensable programming retransmitted as distant signals. 17 U.S.C. § 111(d); *see* SP PFOF ¶¶350, 393-402, 410.

55. *Second,* Dr. Woodbury's calculations systematically understated the music share because he used incomplete, mismatched, and inaccurate data inputs. For example, Dr. Woodbury used an incomplete, in several respects, music license fee value in the numerator. *See* SP PFOF ¶¶397-399, 403-408. The numerator of Dr. Woodbury's music ratio included only music license fees paid to the PROs, and he did not include any value for direct license fees paid to composers for their music which were the basis for the fee reductions to the PROs. *See* SP PFOF ¶¶371, 397-399, 404-405, 409-410. By contrast, the denominator of Dr. Woodbury's ratio included all music license fee payments, including direct payments. *See* SP PFOF ¶¶397-399, 404-405, 409-410. Similarly, although the numerator included only music license fees paid to PROs by commercial stations, the denominator of Dr. Woodbury's music ratio, sourced from the Census survey report, included broadcast rights payments for both commercial and non-commercial stations. *See* SP PFOF ¶¶398, 406. *Third,* Dr. Woodbury further understates even his own music ratio because he used data from a U.S. Census Bureau survey report that was revised and corrected in a way that necessarily increases music's relative value. *See* SP PFOF ¶¶399, 407-408.

VI. Royalty Awards

56. The above assessment of the studies offered by the parties and other record evidence support the following approach to determining the proper allocations of the 2004-05 cable royalty funds.

57. *First,* as in the 1998-99 proceeding, Program Suppliers, JSC and CTV should receive the same relative shares of the 2004-05 royalties as their relative shares in the 2004-05 Bortz cable operator surveys.

58. *Second,* as in the 1998-99 proceeding, the 2004-05 Bortz results provide a floor for the PTV award. In the 1998-99 proceeding the CARP awarded PTV the same share that it

had received in the 1990-92 proceeding, the last prior proceeding where PTV's share was litigated. In this proceeding, however, as noted above, the record strongly supports basing the PTV share directly on the Bortz results, as adjusted by Ms. McLaughlin and Dr. Ford.

59. *Third,* the 1998-99 CARP determined the Canadians' award in part by multiplying (a) the fee generation of Canadian signals and (b) the results of the Ringold constant sum surveys of cable operators. With respect to the first component of the prior calculation, however, the record of this proceeding strongly supports basing the share for Canadian signals directly on the Bortz results, as adjusted by Ms. McLaughlin and Dr. Ford, rather than on fee generation, and then following the same second step as the 1998-99 CARP in determining the Canadian Claimants award .

60. *Fourth,* the 1990-92 CARP denied the Devotional Claimants an award based directly on their Bortz shares because of a lack of evidence showing that its relative market value was higher than the award it had received in the 1989 CRT proceeding. Because the Devotional Claimants have again failed to present any credible evidence that their relative market value in 2004-05 is any greater than in 1992-99, and because other evidence of relative value and changed circumstances since 1990-92 suggest that their award should be smaller than their Bortz shares, the Judges should award the Devotional Claimants the same award they received in the 1990-1992 proceeding.

61. *Finally*, the Music Claimants share should be determined in accordance with the Zarakas study. Based upon that study and other record evidence, the Music Claimants are entitled to receive 5.2% for 2004 and 4.6% for 2005. No party in this proceeding has challenged the traditional approach of taking the Music share "off the top" so that it is deducted proportionately from each of the other claimants (except Devotional Claimants, whose 1990-1992 award was adjusted to reflect the awards of other parties including Music).

62. Based upon the above approach, the 2004-05 cable royalty funds should be allocated as follows:

Basic Fund

Claimant	2004 Share	2005 Share
Settling Parties	62.5	61.7
Program Suppliers	35.1	36.1
Devotional	1.2	1.2
Canadian	1.2	1.0

3.75% Fund

Claimant	2004 Share	2005 Share
Settling Parties	59.7	58.8
Program Suppliers	38.2	39.2
Devotional	0.9	0.9
Canadian	1.2	1.1

Syndex Fund

Claimant	2004 Share	2005 Share
Settling Parties	5.2	4.6
Program Suppliers	94.8	95.4

THE CALCULATIONS

1. The calculations for the proposed final shares of the Basic and 3.75% Funds for each year are set forth below. Because only Music and PS participate in the Syndex Fund, the Settling Parties (of which Music is a part) should receive 5.2% of the Syndex Fund for 2004 and 4.6% of the Syndex Fund for 2005, which necessarily means that PS should receive 94.8% of the Syndex Fund for 2004 and 95.4% of the Syndex Fund for 2005. *See* SP PFOF 50, 350.

2. These calculations track in significant part the logic, language and structure of the calculations set forth in Appendix B to the 1998-99 CARP Report.

I. BASIC FUND CALCULATIONS

Step 1

3. We begin by calculating, for each year, the percentages for PS, JSC, CTV, PTV and Canadian relative to each other, derived from the Bortz survey as augmented by McLaughlin, *see* SP PFOF 309-324, as if these five claimant groups constituted 100% of the entire universe of claimant groups.

A. 2004

4. The 2004 augmented Bortz valuation figures for these five claimants (*see* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5); SP PFOF 317, 330) are as follows:

PS	34.40%
JSC	31.60%
CTV	17.40%
PTV[1]	7.20%
Canadian[2]	1.90%

---

[1] For purposes of the Basic Fund calculations, PTV's 2004 and 2005 augmented Bortz shares are adjusted upward (and the other Bortz shares are adjusted downward) to account for PTV's non-participation in the 3.75% or Syndex funds. *See* 1998-99 CARP Op. at 26 n.10 ("The Panel agrees … that PTV's Bortz share should be adjusted upward to account for PTV's non-participation in the 3.75% or Syndex funds."); SP PFOF 317.

[2] To be conservative, we incorporate an adjustment to the Canadian share proposed by Canadian witness Gary Ford to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. *See* Gary Ford WDT (CDN Ex. R-2) at 21; SP PFOF 330. The remaining shares are adjusted pro rata.

5. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

34.40X + 31.60X + 17.40X + 7.20X + 1.90X			= 100%
	92.50X		= 100%
	X		= 1.0810811 (adjustment factor)
Restated Bortz PS	=	34.40 x 1.0810811	= 37.18919%
Restated Bortz JSC	=	31.60 x 1.0810811	= 34.16216%
Restated Bortz CTV	=	17.40 x 1.0810811	= 18.81081%
Restated Bortz PTV	=	7.20 x 1.0810811	= 7.78378%
Restated Bortz Canadian	=	1.90 x 1.0810811	= 2.05405%
			100.0%

B. 2005

6. The 2005 augmented Bortz valuation figures for these five claimants (*see* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5); SP PFOF 317, 330) are as follows:

PS	35.80%
JSC	35.20%
CTV	14.10%
PTV	7.05%
Canadian	1.65%

7. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

$$35.80X + 35.20X + 14.10X + 7.05X + 1.65X = 100\%$$

$$93.80X = 100\%$$

$$X = 1.0660981 \text{ (adjustment factor)}$$

Restated Bortz PS	=	35.80 x 1.0660981	= 38.16631%
Restated Bortz JSC	=	35.20 x 1.0660981	= 37.52665%
Restated Bortz CTV	=	14.10 x 1.0660981	= 15.03198%
Restated Bortz PTV	=	7.05 x 1.0660981	= 7.51599%
Restated Bortz Canadian	=	1.65 x 1.0660981	= 1.75906%
			100.0%

Step 2

8. We next calculate the Canadian share for each year as adjusted by the Ringold survey of Canadian, PS and JSC content for 2004 and 2005. *See* SP PFOF 331-336. The JSC and PS portions of the distant Canadian signals must also be calculated and will be added to their respective shares in Step 3.

A. 2004

9. In 2004, carriage of distant Canadian signals equaled 2.05405% of the Basic Fund royalties. This must be apportioned to Canadian, JSC and PS using the Ringold survey for 2004 as follows[3]:

Canadian share of Signal	2.05405% x .5993	=	1.231077%
JSC share of Signal	2.05405% x .2716	=	0.557825%
PS share of Signal	2.05405% x .1275	+	0.261866%
Other	2.05405% x .0016		0.003286%
			2.05405%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

[3] The apportionment factors have been recalibrated to equal 1.

10. As noted above, the Ringold survey contained an "other programming" category. Though the amount is very small, for added precision, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other programming" category, as follows:

$$1.231077X + 0.557825X + 0.261866X = 2.05405\%$$

$$2.050768X = 2.05405\%$$

$$X = 1.0016024$$

Canadian share of Signal	1.231077 x 1.0016024	= 1.23305%
JSC share of Signal	0.557825 x 1.0016024	= 0.55872%
PS share of Signal	0.261866 x 1.0016024	= 0.26229%
		2.05405%

B. <u>2005</u>

11. In 2005, carriage of distant Canadian signals equaled 1.75906% of the Basic Fund royalties. This must be apportioned to Canadian, JSC and PS using the Ringold survey for 2005 as follows:

Canadian share of Signal	1.75906% x .6037	= 1.061946%
JSC share of Signal	1.75906% x .2991	= 0.526135%
PS share of Signal	1.75906% x .0956	= 0.168166%
Other	1.75906% x .0016	0.002814%
		1.75906%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

12. Again, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other" programming category, as follows:

$$1.061946X + 0.526135X + 0.168166X = 1.75906\%$$

$$1.756247X = 1.75906$$

$$X = 1.0016026$$

Canadian share of Signal	1.061946 x 1.0016026	= 1.06365%
JSC share of Signal	0.526135 x 1.0016026	= 0.52698%
PS share of Signal	0.168166 x 1.0016026	= 0.16844%
		1.75906%

Step 3

A. 2004

13. In this step, we apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.23305% (or by reducing 2.05405% by the combined PS/JSC portion) and adding 0.26229% to PS and 0.55872% to JSC.

The results are as follows:

PS	37.45147%
JSC	34.72088%
CTV	18.81081%
PTV	7.78378%
Canadian	1.23305%
	100%

B. 2005

14. In this step we apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.06365% and adding 0.16844% to PS and 0.52698 % to JSC.

The results are as follows:

PS	38.33475%
JSC	38.05363%
CTV	15.03198%
PTV	7.51599%
Canadian	1.06365%
	100%

Step 4

15. We now have the relative valuations of five claimant groups (PS, JSC, CTV, PTV and Canadian) expressed to represent a 100% universe. The next step is to combine this universe with the remaining claimant groups (Devotional and Music) for which final net shares have been determined. Devotional receives the same share as in the 1990-92 litigated proceeding. *See* SP PFOF 672-688. Music receives the shares determined by the Zarakas study in this proceeding. *See* SP PFOF 350. This adjustment is achieved by reducing each of the shares of PS, JSC, CTV, PTV and Canadian by 6.39375% in 2004 and 5.79375% in 2005 (the combined shares of Devotional and Music).

The 2004 Basic Fund results are as follows:

Devotional	**1.19375% net**
PTV	**7.28611% net**
Music	**5.20000% net**
PS	**35.05692% net**
JSC	**32.50091% net**
CTV	**17.60809% net**
Canadian	**1.15421% net**
	100%

The 2005 Basic Fund results are as follows:

Devotional	**1.19375% net**
PTV	**7.08053% net**
Music	**4.60000% net**
PS	**36.11373% net**
JSC	**35.84890% net**
CTV	**14.16107% net**
Canadian	**1.00202% net**
	100%

Step 5

16. Step 5 combines the shares of JSC, CTV, PTV and Music into a single Settling Parties share.

The final 2004 Basic Fund results are as follows:

Settling Parties	**62.59512% net**
PS*	**35.05692% net**
Devotional	**1.19375% net**
Canadian	**1.15421% net**
	100%

The final 2005 Basic Fund results are as follows:

Settling Parties	**61.69050% net**
PS*	**36.11373% net**
Devotional	**1.19375% net**
Canadian	**1.00202% net**
	100%

* Note: The PS award is a *ceiling*. Settling Parties believe that the substantial (and increased) amount of non-compensable PS programming on WGN in 2004-05 provides a substantial record basis for reducing the PS award below their Bortz share. *See* SP PFOF 342-348.

II. 3.75% FUND CALCULATIONS

Step 1

17. We begin by calculating, for each year, the percentages for PS, JSC, CTV and Canadians relative to each other, derived from the Bortz survey as augmented by McLaughlin, *see* SP PFOF 309-324, as if these four claimant groups constituted 100% of the entire universe of claimant groups.

A. 2004

18. The 2004 augmented Bortz valuation figures for these four claimants (*see* McLaughlin WDT (SP Ex. 6) at 11 (Chart 4); SP PFOF 314-317, 330) are as follows:

PS	34.90%
JSC	32.00%
CTV	17.60%
Canadian[4]	1.90%

[4] To be conservative, we incorporate an adjustment to the Canadian share proposed by Canadian witness Gary Ford to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. *See* Gary Ford WDT (CDN Ex. R-2) at 21; SP PFOF 330. The remaining shares are adjusted pro rata.

19. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

34.90X + 32.00X + 17.60X + 1.90X		= 100%	
	86.40X	= 100%	
	X	= 1.1574074 (adjustment factor)	
Restated Bortz PS	=	34.90 x 1.574074	= 40.393519%
Restated Bortz JSC	=	32.00 x 1.574074	= 37.037037%
Restated Bortz CTV	=	17.60 x 1.574074	= 20.370370%
Restated Bortz Canadian	=	1.90 x 1.574074	= 2.199074%
			100.0%

B. 2005

20. The 2005 augmented Bortz valuation figures for these four claimants (*see* McLaughlin WDT (SP Ex. 6) at 11 (Chart 4); SP PFOF 314-317, 330) are as follows:

PS	36.20%
JSC	35.50%
CTV	14.20%
Canadian	1.65%

21. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

36.20X + 35.50X + 14.20X + 1.65X		= 100%	
	87.55X	= 100%	
	X	= 1.1422045 (adjustment factor)	
Restated Bortz PS	=	36.20 x 1.1422045	= 41.347801%
Restated Bortz ISC	=	35.50 x 1.1422045	= 40.548258%
Restated Bortz CTV	=	14.20 x 1.1422045	= 16.219303%
Restated Bortz Canadian	=	1.65 x 1.1422045	= 1.884637%
			100.0%

Step 2

22. We next calculate the Canadian share for each year as adjusted by the Ringold survey of Canadian, PS and JSC content for 2004 and 2005. *See* SP PFOF 331-336. The JSC and PS portions of the Canadian signals must also be calculated and will be added to their respective shares in Step 3.

A. 2004

23. In 2004, carriage of distant Canadian signals equaled 2.19907% of the 3.75% Fund royalties.[5]

Canadian share of Signal	2.19907% x .5993	=	1.317993%
JSC share of Signal	2.19907% x .2716	=	0.597209%
PS share of Signal	2.19907% x .1275	=	0.280354%
Other	2.19907% x .0016	=	0.003518%
			2.19907%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

[5] The apportionment factors have been recalibrated to equal 1.

24. As noted above, the Ringold survey contained an "other programming" category. Though the amount is very small, for added precision, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other programming" category as follows:

$$1.317993X + 0.597209X + 0.280354X = 2.19907\%$$

$$2.195556X = 2.19907\%$$

$$X = 1.001602$$

Canadian share of Signal	1.317993 x 1.001602	=	1.320105%
JSC share of Signal	0.597209 x 1.001602	=	0.598166%
PS share of Signal	0.280354 x 1.001602	=	0.280803%
			2.16895%

B. 2005

In 2005 carriage of distant Canadian signals equaled 1.88464%.

Canadian share of Signal	1.88464% x .6037	=	1.137756%
JSC share of Signal	1.88464% x .2991	=	0.563695%
PS share of Signal	1.88464% x .0956	=	0.180171%
Other	1.88464% x .0016	=	0.003015%
			1.88464%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

25. Again, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other" programming category, as follows:

$$1.137756X + 0.563695X + 0.180171X = 1.88464\%$$

$$1.881622X = 1.88464\%$$

$$X = 1.001603$$

Canadian share of Signal	1.137756 x 1.001603	=	1.139579%
JSC share of Signal	0.563695 x 1.001603	=	0.564598%
PS share of Signal	0.180171 x 1.001603	=	0.180460%
			1.88464%

Step 3

26. In this step, we add the JSC and PS portions of the Canadian signals to their respective shares, while concomitantly reducing the Canadian share of the Canadian signals by that amount.

A. 2004

27. We apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion at 1.32011% and adding 0.28080% to PS and 0.59817% to JSC:

PS	40.67432%
JSC	37.63520%
CTV	20.37037%
Canadian Signal	1.32011%
	100%

B. 2005

28. We apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.13958% and adding 0.18046% to PS and 0.56460% to JSC:

PS	41.52826%
JSC	41.11286%
CTV	16.21930%
Canadian Signal	1.13958%
	100%

Step 4

29. We now have the relative valuations of four claimant groups (PS, JSC, CTV and Canadian) expressed to represent a 100% universe. The next step is to combine this universe with the remaining claimant groups -- Devotional and Music (PTV does not participate in the 3.75% Fund). Devotional receives the same share of the 3.75% Fund as in the 1990-92 litigated proceeding. *See* SP PFOF 672-688. Music receives the shares determined by the Zarakas study in this proceeding. *See* SP PFOF 350. This final adjustment is achieved by reducing each of the shares of PS, JSC, CTV and Canadian by 6.10725% in 2004 and 5.50725 in 2005 (the combined shares of Devotional and Music).

The 2004 3.75% Fund results are as follows:

Devotional	**0.90725% net**
Music	**5.20000% net**
PS	**38.19024% net**
JSC	**35.33673% net**
CTV	**19.12630% net**
Canadian	**1.23948% net**
	100%

The 2005 3.75% Fund results are as follows:

Devotional	**0.90725% net**
Music	**4.60000% net**
PS	**39.24120% net**
JSC	**38.84867% net**
CTV	**15.32607% net**
Canadian	**1.07682% net**
	100%

30. Because PTV does not participate in the 3.75% Fund, its share is zero for both 2004 and 2005.

Step 5

31. Step 5 combines the shares of JSC, CTV and Music into a single Settling Parties share.

The final 2004 3.75% Fund results are as follows:

Settling Parties	**59.66303% net**
PS*	**38.19024% net**
Devotional	**0.90725% net**
Canadian	**1.23948% net**
	100%

The final 2005 3.75% Fund results are as follows:

Settling Parties	**58.77473% net**
PS*	**39.24120% net**
Devotional	**0.90725% net**
Canadian	**1.07682% net**
	100%

* Note: The PS award is a *ceiling*. Settling Parties believe that the substantial (and increased) amount of non-compensable PS programming on WGN in 2004-05 provides a substantial record basis for reducing the PS award below their Bortz share. *See* SP PFOF 342-348.

CERTIFICATE OF SERVICE
Docket. No. 2007-3 CRB CD 2004-2005

I hereby certify that a copy of the foregoing Proposed Findings of Fact and Conclusions of Law of the Settling Parties was sent via electronic mail and delivered via personal courier service on March 17, 2010 to the following parties:

L. Kendall Satterfield
Richard M. Volin
FINKELSTEIN THOMPSON LLP
1050 30th Street NW
Washington, DC 20007
Counsel for Canadian Claimants Group

Gregory O. Olaniran
Dennis Lane
Lucy Homes Plovnick
STINSON MORRISON HECKLER LLP
1150 18th Street, N.W. Suite 800
Washington, DC 20036
Counsel for Program Suppliers

Arnold P. Lutzker
Carolyn W. Martin
Allison L. Rapp
Jeanette M. Carmadella
LUTZKER & LUTZKER LLP
1233 20th Street, N.W. Suite 703
Washington, DC 20036
Counsel for Devotional Claimants

Troy Strunkey

Proof of Delivery

I hereby certify that on Monday, July 16, 2018 I provided a true and correct copy of the JSC Response to Order Soliciting Further Briefing and Supporting Declaration to the following:

Commercial Television Claimants (CTC), represented by John Stewart served via Electronic Service at jstewart@crowell.com

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

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

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

Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Signed: /s/ Michael E Kientzle