

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

*In re*

**DISTRIBUTION OF CABLE  
ROYALTY FUNDS**

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

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**REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS  
OF THE TESTIMONY OF R. GARRISON HARVEY**

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## INTRODUCTION

JSC and SDC argue that Mr. Harvey merely provided arithmetical quantifications and offered no opinions as to whether the quantified amounts were actually what he said they were. That is incorrect. Despite the limited areas of expertise for which he was proffered, Mr. Harvey's opinions ranged far and wide. He testified that certain quantities of stations "were carried pursuant to the Must Carry rule," Ex. 7105 at 47 (Harvey WDT), and offered his own economic interpretations and theories regarding various "tests" of regression models that he devised. He even offered his own views about which Public Television programs were "obscure." *Id.* at 57. Mr. Harvey was not qualified to offer these opinions.

Moreover, no other expert stepped in to opine that Mr. Harvey's quantifications represented what he said they did, or that his "tests" were properly selected, appropriate, and economically meaningful. JSC and SDC's narrow theory of Mr. Harvey's testimony therefore leaves an evidentiary gap. JSC and SDC attempt to bridge that gap by arguing that it is simply self-evident that his quantifications accurately reflect the must-carry laws, and that the economic implications of his "tests" can be inferred without any expert opinion. That too is incorrect. Mr. Harvey's "must-carry analysis" was not a simple, straightforward quantification of the must-carry laws; Mr. Harvey certainly made no such claim. And the economic inferences to be drawn from his "tests" are disputed, and certainly not so self-evident as to obviate the need for expert testimony from an economist.

Lacking any other response, JSC repeatedly advances its own arguments that Mr. Harvey's analyses were "conservative" or "correct." JSC Opp. at 4. That is incorrect, as Public

Television has argued extensively elsewhere;<sup>1</sup> but for this motion, it is beside the point. Mr. Harvey was not qualified to offer the testimony at issue. It should be excluded.

### LEGAL STANDARD

JSC does not dispute that it is JSC's burden to establish Mr. Harvey's qualifications to offer his testimony, not Public Television's burden to prove the contrary. Advisory Notes to Fed. R. Evid. 702 (2000 Amends.) (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)); Order on Copyright Owners' Motions to Exclude Written Testimony and Accompanying Analyses, Spotify's Motion to Admit Trial Exhibit 1095, and Services' Motions Seeking Exclusion of Certain Fact Witness and Expert Witness Testimony at 4, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Docket No. 16-CRB-0003-PR (2018–2022) (July 24, 2022) (eCRB no. [13837](#)) (“The Judges will not accept as expert opinion any testimony by a witness that is not qualified as an expert in the field.”).

### ARGUMENT

#### **I. Mr. Harvey Was Not Qualified to Present His Testimony That Purported to Apply the Must-Carry Laws.**

If, as SDC suggests, no expert testimony was “necessary to establish the law,” SDC Opp. at 5, then Mr. Harvey's extensive testimony on various aspects of must-carry law was unnecessary and inadmissible. *See* PTV Mot. at 3 (listing testimony improperly opining regarding must-carry law); Fed. R. Evid. 702(a) (prohibiting expert testimony that is unhelpful to the trier of fact). As noted by SDC, an “expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, *but he may not testify as to whether the legal standard has been satisfied.*” SDC Opp. at 5 (quoting *Burkhart v.*

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<sup>1</sup> *See, e.g.*, PTV Br. 17–18, 21–23; PTV PFF ¶¶ 72–75, 77–82; PTV R-PFF ¶¶ 65–68.

*Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1212 (D.C. Cir. 1997). Yet much of the challenged testimony does exactly that. Mr. Harvey spends numerous paragraphs of his written testimony stating his interpretation of the putative legal requirements for must-carry eligibility, *see, e.g.*, Ex. 7105, ¶¶ 82–83, 89, 118, 122, 125 (Harvey WDT); *see also* Tr. at 1844:25–1845:13, 2315:15–21, then concludes that those legal requirements have been met in thousands of specific instances, *see, e.g.*, Ex. 7105, ¶¶ 80, 84, 86–87, 92, 118–21 (Harvey WDT); Tr. at 1836:23–15. Mr. Harvey was not qualified to offer those opinions.

JSC and SDC argue that Mr. Harvey was merely reciting “assumptions” about the law from counsel so that he could develop his quantification analysis. *See* JSC Opp. at 7; SDC Opp. at 4. But as a core step in his analysis, Mr. Harvey stated legal criteria under which he “understand[s]” a station may demand carriage under must-carry law, Ex. 7105 ¶ 82, then identified conditions that he “understand[s]” to be “generally indicative” of must-carry carriage, *id.* at ¶ 83. Mr. Harvey did not explain the extent to which the proxies he used *actually* coincide with must-carry carriage, *see id.* ¶ 83; Tr. 2307:13–2308:3 (Harvey), although he acknowledged that he could not merely apply the legal requirements in a straightforward way (contrary to SDC’s suggestion). Tr. 2315:7–11 (Harvey).

Moreover, other experts and JSC, SDC, and CTV have not treated Mr. Harvey’s testimony as so narrowly cabined as JSC and SDC now suggest, and instead have treated his testimony as an authoritative source on must-carry topics, such as whether particular signals met the legal requirements for carriage under must-carry law. *See* PTV Mot. at 4 n.2 (reciting examples of testimony). For example, JSC and CTV in their respective proposed findings of fact cite the challenged testimony as their factual basis for must-carry carriage eligibility requirements. JSC PFF ¶ 469; CTV PFF ¶ 254. JSC, SDC, and CTV also erroneously

mischaracterize that testimony as establishing that certain signals were, in fact, carried pursuant to a must-carry demand, rather than merely as putatively consistent with must-carry eligibility. JSC PFF ¶¶ 468, 470–73; SDC PFF ¶ 203; CTV PFF ¶ 255.

It is undisputed that Mr. Harvey lacks the necessary expertise for such opinions. *See* JSC Opp. at 1; SDC Opp. at 2. His corresponding testimony must be excluded.

Curiously, JSC and SDC laud the fact that Mr. Harvey has a history of pushing the limits of acceptable expert testimony. *See* JSC Opp. at 10; SDC Opp. at 2–3, 8–11 (discussing challenges before the U.S. District Court for the Eastern District of New York that Mr. Harvey sought to testify beyond his field of expertise). JSC neglects to mention that the District Court for the Eastern District of New York ordered that Mr. Harvey’s testimony must be limited in much the same way as Public Television seeks to limit it here. There, the court held that Mr. Harvey may refer to areas outside of his expertise, but only “if he supports these claims with citations and does not proffer them as the primary subject of his expert opinion.” Memorandum & Order, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 14814183, at \*7 (E.D.N.Y. Oct. 9, 2022). Here, Mr. Harvey failed both requirements. Mr. Harvey did not provide citations establishing that the data he used as purported proxies “generally indicative” of must-carry carriage coincided with the actual legal requirements (indeed, he neglected to cite the key definitions of “cable system”). *See* PTV Mot. at 4–6. And, based on those unreliable proxies, Mr. Harvey opined definitively that certain Public Television distant signals were carried pursuant to the must-carry rules—a core aspect of his testimony upon which other experts and parties rely. *Id.* at 4 n.2; Ex. 7105, ¶¶ 84–92 (Harvey); JSC PFF ¶¶ 468–73; SDC PFF ¶ 203; CTV PFF ¶¶ 254–55.

## II. Mr. Harvey Was Not Qualified to Present Economic Opinions.

JSC and SDC spill much ink on a point that Public Television does not contest in this motion: Mr. Harvey may offer his (deeply flawed) statistical opinions. *See* JSC Opp. at 9–12; SDC Opp. at 7–10. Public Television’s motion is much more limited. It seeks only to strike those narrow portions of the cited testimony that rely on economic theory rather than statistical analysis. Public Television’s motion is therefore consistent with the boundaries drawn in the decisions cited by JSC and SDC. *See Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 808–10 (7th Cir. 2013) (allowing a statistician to testify on the variables to include in a regression analysis); *In re Polyurethane Foam Antitrust Litig. Direct Purchaser Class*, 2015 WL 12747961, at \*1–3 (N.D. Ohio Mar. 6, 2015) (prohibiting statistician from testifying on “matters for which a fuller understanding of the [relevant] industry would be necessary”); *United States v. Johnson*, 122 F. Supp. 3d 272, 339 (M.D.N.C. 2015) (allowing statistician to criticize “statistical conclusions” of another expert); *TC Systems Inc. v. Town of Colonie*, New York, 213 F. Supp. 2d 171, 178 (N.D.N.Y. 2002) (rejecting the unremarkable proposition that engineer is not “per se unqualified” to rebut all aspects of an economist’s testimony); *Mahaska Bottling Co. v. PepsiCo, Inc.*, 441 F. Supp. 3d 745, 761–62 (S.D. Iowa 2019) (allowing statistician to offer testimony that “did not attempt to create an economic model beyond his expertise”). In fact, in the recent case cited by JSC and SDC concerning Mr. Harvey himself, the Eastern District of New York applied a limitation similar to what Public Television seeks here: Mr. Harvey could testify on statistical matters “so long as his opinions are based on his area of expertise and not on economic theory in which he is not qualified.” Memorandum & Order, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 14814183, at \*6 (E.D.N.Y. Oct. 9, 2022). The court explained that “precisely because Mr. Harvey is not an economist, he

will not be allowed to make claims about the but-for world in response” to criticisms of his use of benchmarks “that resemble the but-for world in some way.” *Id.* at \*10.

Public Television therefore seeks to have Mr. Harvey’s testimony appropriately limited to his field of competence: statistics. In general, the competence of a statistician includes compiling data, conducting regression analyses, and providing statistical methodological critiques of other witnesses’ regression analyses. *See, e.g., City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565–66 (11th Cir. 1998) (citations omitted). Where, however, Mr. Harvey strays into offering unqualified opinions regarding the economic theory and economic implications and interpretations of regression analyses, his testimony should be stricken.

Mr. Harvey goes astray with respect to his discussion of revealed preference. Ex. 7105, ¶¶ 5, 44–45, 80, 127–29 (Harvey WDT); Tr. 1842:4–20, 1860:16–1861:10, 2226:23–2227:12 (Harvey). Revealed preference is a well-known theory in the field of economics. *See* Tr. 388:8–17 (Johnson). Mr. Harvey, as a statistician and applied mathematician, might be qualified to collect, tabulate, and analyze data regarding observed choices and behaviors, but he is unqualified to draw the economic conclusion whether those choices and behaviors reveal preferences.

Mr. Harvey also oversteps his qualifications in attempting to opine regarding relative marketplace value. *See, e.g.,* Ex. 7106, ¶¶ 36, 39, 40, 45, 46, 55, 62, 74, 79, 81, 83–85, 88, 91, 93, 126, 137 (Harvey WRT); Tr. 1779:22–1780:7, 1913:6–16, 1929:2–4, 1931:20–23, 1986:6–8, 1986:13–17 (Harvey). As Mr. Harvey acknowledged, the question of relative marketplace value is an economic question. Tr. 2025:14–2026:20 (Harvey). Because he is neither an economist nor a cable industry expert, Mr. Harvey does not have the requisite knowledge, training, or

experience to opine on relative marketplace value or how cable operators and broadcast stations would transact in a hypothetical marketplace of distant signals.<sup>2</sup> Lacking foundation in what the relative marketplace value of distantly retransmitted programming is, Mr. Harvey's opinion regarding the reliability of regression estimates of relative marketplace value is not admissible. Fed. R. Evid. 702(b). Mr. Harvey may present the results of his statistical tests, *see* Tr. 1783:6–19 (Harvey), but the admissibility of Mr. Harvey's opinion as an expert in statistics and applied mathematics goes no further. *See City of Tuscaloosa*, 158 F.3d at 565 (explaining that an expert statistician's characterizations of evidence and conclusions regarding factual issues are outside his competence and excluding portions of his testimony on that basis).

JSC asserts that Mr. Harvey's opinions regarding reliability of regression analyses should not be excluded because they are based on "external evidence of the relative marketplace value" offered by their industry experts. JSC Opp. at 10. But the generic, conclusory assertions of those experts are quite different from the interpretations that Mr. Harvey offers regarding specific "tests" he devised. In any event, to the extent JSC contends that Mr. Harvey is merely repeating the testimony of other experts, that testimony and the results of Mr. Harvey's statistical tests are available to the Judges. Mr. Harvey's commentary regarding the economic reliability of regression estimates, however, should be excluded.

### **III. Mr. Harvey Was Not Qualified to Opine on the Value of Particular Programs.**

The rationales advanced by JSC in support of Mr. Harvey's gratuitous statements regarding the value of particular programming are illogical and should be rejected. JSC argues that Mr. Harvey may opine that certain Public Television programming is "obscure," and that

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<sup>2</sup> Mr. Harvey's written testimony does not cite to any testimony of JSC's qualified economic experts regarding relative marketplace value of distantly retransmitted programming.



postseason sports “would be expected to be of very high value,” because other witnesses testified similarly. JSC Opp. at 13. However, JSC does not—indeed, could not—attempt to claim that Mr. Harvey actually relied on those other witnesses to support his statements. Mr. Harvey apparently did not even read those witnesses’ testimony until much later. *See generally* Ex. 7105 (Harvey WDT) (including no citations to the written testimony of Mr. Singer or Mr. Hartman in the 2014–17 cable proceeding); *see also* Fed. R. Evid. 703 (noting that an expert’s reliance may be justified by record facts “that the expert has been made aware of”). Moreover, even if Mr. Harvey’s personal view ultimately proved consistent with those of other experts, his lay opinion would be duplicative and unhelpful.

#### **IV. Public Television Timely Moved to Strike.**

SDC argues, and JSC suggests in passing in a footnote, that Public Television should have moved to strike Mr. Harvey’s testimony before the hearing commenced. SDC Opp. at 1; JSC Opp. 1 n.1. That is incorrect. Before the hearing commenced, no party was required to identify the particular areas of expertise on which it intended to qualify its expert witnesses. Nor were parties required to provide descriptions of relevant training, coursework, or other experience witnesses might have that would support qualifying them as experts in particular fields. Nor had Public Television had the opportunity to question Mr. Harvey about those topics. Accordingly, Public Television could only speculate as to the areas on which JSC would seek to qualify Mr. Harvey as an expert, and could only speculate as to the bases for which JSC might seek such qualification. Mere speculation is not a basis for a well-founded motion.<sup>3</sup>

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<sup>3</sup> Moreover, even where (unlike here) written testimony has provided considerable evidence on which a motion to exclude testimony might be decided, the Judges denied such a motion and instead directed the parties to make a later motion after the opportunity for oral testimony. *See* Order 29.

## CONCLUSION

For the foregoing reasons, and those identified in Public Television's motion, the Judges should exclude from evidence the portions of Mr. Harvey's testimony identified in Public Television's motion.

Date: June 28, 2023

Respectfully submitted,

### PUBLIC TELEVISION CLAIMANTS

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# Proof of Delivery

I hereby certify that on Wednesday, June 28, 2023, I provided a true and correct copy of the Public Television's Reply ISO Motion to Strike Portions of Harvey Testimony to the following:

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Signed: /s/ Dustin Cho