

Before the  
UNITED STATE COPYRIGHT ROYALTY JUDGES  
The Library of Congress  
Washington, D.C.

*In re*

**DISTRIBUTION OF CABLE  
ROYALTY FUNDS**

**NO. 16-CRB-0009-CD (2014-17)**

**JOINT SPORTS CLAIMANTS' MOTION FOR REHEARING**

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, the Joint Sports Claimants (“JSC”) respectfully request rehearing in order to conform the Judges’ allocations to the record evidence and the law by: (1) correcting the Initial Determination’s reliance on an outdated and unreliable version of the “McLaughlin adjustment” calculation; (2) adjusting JSC’s 2014 share to align with the record evidence and the reasoning of the Initial Determination; and (3) eliminating reliance on a regression model for the 2015-17 time period that no witness endorsed and is at odds with the record evidence. In moving for rehearing on these specific issues, JSC does not concede the correctness of any other part of the Initial Determination and reserves the right to challenge any and all aspects of the Initial Determination on appeal.

**I. The Initial Determination Relies on an Incorrect Version of the McLaughlin Adjustment**

The Initial Determination states that the Judges rely in part on the Bortz Survey with the McLaughlin adjustment. *See* Initial Determination at 181, 197-98. Specifically, the Judges use the version of the McLaughlin adjustment contained in Exhibit 3049. *See id.* at 177-78, 181.

However, Exhibit 3049 is an inaccurate version of the McLaughlin adjustment, and there are two separate errors in relying on it. *First*, Exhibit 3049 was an early, preliminary calculation of the “conventional McLaughlin adjustment,” as proposed in prior proceedings, that was subsequently updated in Exhibit 3105. Thus, as between Exhibit 3049 and 3105, Exhibit 3105 is

the more accurate calculation of the McLaughlin adjustment. At a minimum, if they do not also address the need (as explained below) for a weighting system that takes into account the proliferation of minimum fee systems in 2015-17, the Judges should use Exhibit 3105 rather than Exhibit 3049.

*Second*, Exhibit 3049, as well as Exhibit 3105, rely on royalty-based weighting that is economically inappropriate after the conversion of WGNA and the enormous increase in minimum fee systems. Bortz subsequently implemented a revised weighting system (referred to as “base plus 3.75”) that takes account of the proliferation of minimum fee systems in 2015-17 by weighting based on what the CSO would have paid according to the system’s distant signal usage absent the minimum fee. Use of royalty-based weighting for 2015-17 conflicts with the Judges’ findings regarding minimum fee systems. If the Judges are relying on Bortz with the McLaughlin adjustment, they should use the version set forth in Exhibits 4001-4003, which applies base plus 3.75 weighting.

In short, Exhibit 3049 is doubly flawed. Exhibit 3105 updates and improves upon Exhibit 3049, and Exhibits 4001-4003 improve upon Exhibits 3049 and 3105 by applying base plus 3.75 weighting.

**A. Exhibit 3049 is Outdated and Should not be Used to Determine Shares**

Mr. Trautman prepared Exhibit 3049 in July 2020, roughly two years before he submitted testimony in this proceeding. *See* Tr. at 3142:22-3143:8, 3145:2-3146:11 (Trautman); Ex. 7100 (Trautman Corrected WDT). As Mr. Trautman testified, it takes an extensive period of time—well beyond when the surveys are fielded—for Bortz to obtain and evaluate the voluminous programming data presented in this proceeding. *See* Tr. at 2886:21-2887:9 (Trautman). That programming data is used in the Bortz results to project allocations to non-respondents according to programming carriage patterns. *See* Ex. 7101 (Corrected Bortz Report), at 29 (“Bortz

projected non-respondent values based on signal carriage characteristics,” including “the carriage (or lack thereof) of JSC programming”). Thus, while the survey responses are not changed over time, the weighted results of the survey can be expected to become more accurate over time, as Bortz evaluates more comprehensive programming information.

Mr. Trautman performed, and JSC produced, “UPDATED” calculations of the weighted Bortz Survey results and “conventional McLaughlin adjustment” dated “1-21-21” which are different in small but significant respects from the July 2020 calculations. These “UPDATED” calculations are in the record at Exhibit 3105 and a copy is attached as Exhibit 1 hereto. *See* Tr. at 3099:12-21 (admitting Exhibit 3105).

There is no reasoned basis or record support for relying on the outdated, incorrect version of the “conventional McLaughlin adjustment” calculation in Exhibit 3049 given that an updated version is in the record at Exhibit 3105 and was cited to the Judges. Indeed, the proposed findings of fact of Public Television Claimants (“PTV”) cite to Exhibit 3105 (not Exhibit 3049) in presenting the “Proposed Shares” of PTV and JSC “Determined by Various Analyses of Relative Marketplace Value in 2014-17.” PTV Corrected PFF ¶ 12, Table 3 & ¶ 43, Table 5. At a minimum, if the Judges are to rely on Mr. Trautman’s calculation of the “conventional McLaughlin adjustment,” they should rely on the “UPDATED” calculation in Exhibit 3105.

The existing record supports the use of Exhibit 3105 rather than Exhibit 3049. However, if the Judges believe that additional information on this issue would be helpful, JSC respectfully requests that rehearing be granted to present additional evidence. Throughout the course of this proceeding, “[n]o party argue[d] that royalty fund allocations . . . should be made strictly according to the Bortz initial results subject to the McLaughlin adjustment,” and “no party had its expert calculate the McLaughlin adjustment . . . for presentation at the hearing.” Initial Determination at 178. As a result—while JSC vigorously argued that the McLaughlin

adjustment should not be used in the abstract, *see, e.g.*, JSC Post-Hearing Br. at 65-68—JSC has not had an opportunity to present evidence on which specific version of that calculation is most accurate and reliable.

**B. If the McLaughlin Adjustment is Used, Base Plus 3.75 Weighting Should be Applied, not Royalty-Based Weighting**

There is a second, independent issue concerning the Judges' application of the McLaughlin adjustment. Both Exhibit 3049 (the outdated version) and Exhibit 3105 (the updated version) use royalty-based weighting. However, after creating these exhibits, Mr. Trautman determined that royalty-based weighting is not appropriate for 2015-17 due to the overwhelming number of minimum fees systems. Mr. Trautman subsequently ran the Bortz results with the McLaughlin adjustment using the revised base plus 3.75 weighting, as set forth at Exhibits 4001-4003. If the Judges are relying on the Bortz Survey with the McLaughlin adjustment, they should use this version that applies base plus 3.75 weighting rather than royalty-based weighting.

As Mr. Trautman and Dr. Majure testified, use of royalty-based weighting improperly skews the survey calculations by giving inordinate weight to minimum fee systems that typically did not even use their full minimum fee budget. *See* JSC PFOF ¶ 302. The Judges similarly concluded that decisions by minimum fee systems during the 2015-17 period are not probative of relative market value. *See* Initial Determination at 129 & n.155 (“[T]hese [minimum-fee-paying] CSO decisions do not provide the Judges with any useful information regarding the relative value of the retransmittal of the various programming categories . . .”).

The Initial Determination explains that in “2015-2017, the overwhelming percentage of CSOs pay only the minimum fee, and the vast majority of Section 111 royalties are generated by those minimum-fee-paying CSOs.” *Id.* at 134. The Initial Determination likewise discusses how both the regression and survey methodologies changed (or should have changed) to account for

the “dramatic increase in the number of minimum-fee only” systems in these years. *See, e.g., id.* at 21-22, 167 n.206. As relevant here, the Bortz Survey methodology “changed to weight the results based on the Base-plus-3.75 fees attributable to the actual signal carriage of the Form 3 systems, and to apply the results using signal carriage-based fee calculations rather than actual royalties paid.” *Id.* at 167 n.206. This change in the weighting was necessary to avoid “‘introduc[ing] a distortion, by giving excessive weight to systems with large Minimum Fee payments even when they have chosen to carry very little distant signal programming.’” JSC Post-Hearing Br. at 56 (quoting testimony of Dr. Majure). No party disputed the propriety of Bortz’s new weighting approach, nor is it questioned in the Initial Determination.

Bortz developed its revised base plus 3.75 weighting approach over time, after recognizing that there were many more CSOs paying the minimum fee in 2015-17. *See* Tr. at 3149:11-3151:11 (Trautman). The first calculation in the record using an early version of the revised weighting approach (initially only applied to PTV-only systems) was performed in June 2021. *See* Ex. 3048; Tr. at 3147:19-3149:5 (Trautman). The “conventional McLaughlin adjustment” calculations in Exhibits 3105 and 3049 predate that change, *see supra* at pp. 2-3, instead applying the historical, royalty-based weighting that undisputedly distorts the results, making them unreliable for 2015-17.

The record contains more recent calculations of the McLaughlin adjustment for the years 2015-17 applying the corrected, base plus 3.75 weighting. These calculations are part of the Bortz Survey data that JSC produced in connection with Mr. Trautman’s written direct testimony. *See* Ex. 4001, “2015 Data File” at Rows 588-590, Columns W-AD (showing “Adjusted Royalties” after “PTV/Canadian Adjustment” for 2015); Ex. 4002, “2016 Data File” at Rows 573-575, Columns W-AD (same for 2016); Ex. 4003, “2017 Data File” at Rows 571-573, Columns W-AD (same for 2017); *see also* Tr. at 4792:7-4793:20 (Carbert) (identifying and

admitting Exhibits 4000-4003). These calculations are the most accurate and reliable version of the McLaughlin adjustment in the record, on which the Judges should rely to the extent they give weight to the adjustment.<sup>1</sup> A table setting forth the relevant results from Exhibits 4001-4003 is attached as Exhibit 2 hereto.

If the Judges conclude that identifying the correctly weighted McLaughlin adjustment calculation requires further information, JSC respectfully requests that the Judges grant rehearing to present additional evidence on the issue. In the post-hearing briefing, JSC raised the problem of royalty-based weighting in the “conventional McLaughlin adjustment” calculation in response to PTV’s citation to Exhibits 3049 and 3105. *See* JSC Post-Hearing Reply Br. at 62 (“[B]lindly applying the McLaughlin adjustment as it was proposed in prior proceedings, PTV argues that it should be attributed . . . 100% of all of those royalties, massively inflating its share . . . . PTV overlooks that almost all PTV Only CSOs were paying the Minimum Fee in 2015-17, so their substantial royalty payments have nothing to do with their distant signal usage.”). However, because PTV first embraced this calculation in its post-trial briefing, without having previously offered any witness who endorsed it, JSC did not have an opportunity to directly address the reliability of the calculation through its own witnesses.

## **II. JSC’s Share in 2014 is Inconsistent With the Record Evidence and the Reasoning of the Initial Determination**

The Initial Determination allocates JSC a share of the 2014 cable royalty funds that is lower than JSC’s share under any methodology the Judges credited in this proceeding. JSC respectfully requests that the Judges grant rehearing in order to adjust JSC’s 2014 share to accord with the record evidence and the Judges’ reasoning.

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<sup>1</sup> With proper weighting, the Bortz Survey results with the McLaughlin adjustment estimate shares for PTV that are within 4 percentage points of the Judges’ final award to PTV in each year 2015-17.

The Judges relied upon both regression evidence and Bortz Survey evidence in arriving at JSC's share. Initial Determination at 197. Among the regressions submitted, the Judges found that "the Tyler model is the most appropriate regression model" and "accorded it the most weight." *Id.*

Yet, for 2014, the Initial Determination allocates JSC a share of 35.97%, which is less than either the Bortz Survey or the Tyler Model estimates JSC's share to be for that year. The Bortz Survey, after applying the version of the McLaughlin adjustment calculation on which the Judges relied, estimates a 39.0% JSC share. *Id.* at 181. The baseline Tyler Model estimates a 37.5% JSC share, after the Judges' adjustments.<sup>2</sup> *Id.* at 143.

No methodology that the Judges credited supports a JSC share of less than 37.5% for 2014. The Marx Model estimates a JSC share of 41.73% or 43.89% in 2014, depending on whether duplicated minutes are included. *Id.* at 58-59. With respect to the George and Johnson Models, the Judges explained that these experts erred insofar as they "pooled" regression coefficients across the 2014-17 period, notwithstanding the WGNA conversion. *Id.* at 101 ("The Johnson Model improperly 'pools' data across the 2014-2017 period to estimate a single coefficient for each program category. . . . The most consequential impact of 'pooling' was the underestimating of the JSC share for 2014 . . ."); 88 ("Dr. Bennett's recalculation of an unpooled version of the George Model is a more probative model.") When that error is corrected and the George and Johnson Models are run for 2014 alone, they estimate JSC shares of 44.6% and

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<sup>2</sup> While the Tyler Model allocates JSC a lower share of 32.4% in 2014 when minimum fee CSOs are excluded, *id.* at 13, the Judges held that it was not proper to exclude those CSOs in 2014. As the Judges explained in applying the Tyler Model in 2014, "the allocation of shares can be identified by reference to all the CSOs, including those who paid the minimum fee." *Id.* at 140-41.

40.5%, respectively. Ex. 7207 (Bennett WRT), Fig. 14<sup>3</sup> (recalculating George Model estimates with unpooled coefficients); Ex. 7106 (Harvey WRT), Table 4 (recalculating Johnson Model estimates for 2014).

Accordingly, JSC's share of the 2014 cable royalties should be at least 37.5%, which is the lowest JSC estimate generated by any of the regression models when estimating separate coefficients for 2014. Indeed, JSC's share should be higher than 37.5%, as the Judges explained that they were "heavily" weighting the Bortz Survey results in arriving at JSC's share, Initial Determination at 197, and the Bortz Survey estimates that JSC's share in 2014 is 39%.

### **III. The Judges Adopted a Version of the Tyler Model that No Witness Endorsed for the 2015-17 Time Period**

By relying upon an adjusted version of the Tyler Model limited to only CSOs paying more than the minimum fee for the allocation of the 2015-17 cable royalty funds, the Judges adopted a regression model that no party or witness in this proceeding, including Dr. Tyler, even suggested as a potential basis for the Judges' allocation. Moreover, the Judges' substantial adjustments to the Tyler Model are unsupported and arbitrary. JSC respectfully requests rehearing so that the Judges may modify the shares for the 2015-17 period to fully rely upon the Bortz Survey, which is supported by the evidentiary record, or, in the alternative, so that parties may submit evidence addressing the shortcomings of the version of the Tyler Model limited to systems above the minimum fee.

Neither Dr. Tyler nor the party that offered his testimony, Program Suppliers, presented his non-minimum-fee model as a basis for allocating shares. To the contrary, Dr. Tyler explained that dropping CSOs paying the minimum fee from his primary model was "probably

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<sup>3</sup> Mr. Harvey also recalculated the George Model for 2014 alone, replacing Dr. George's flawed data with the data underlying the Johnson Model. Ex. 7106 (Harvey WRT), Table 3. Under this approach, the George Model estimates a JSC share of 51.3% in 2014. *Id.*



too extreme,” and presented this alternative only as a “sensitivity” worth “considering.” Tr. at 5474:2-8 (Tyler); Ex. 7600 (Tyler ACWDT) at 63-64. Likewise, Program Suppliers argued in post-trial briefing that “dropping most of the observations isn’t the best way to address an issue like” the increased presence of minimum fee CSOs because “that would be too extreme,” and noted that “[n]o expert in this proceeding took the approach of dropping minimum fee systems from the analysis.” PS PFF ¶ 327.

No other party or expert endorsed this (or any) version of the Tyler Model. Indeed, every other economist to address the Tyler Model found that it failed to measure relative market value, whether minimum fee CSOs were included or not. *See* JSC PFF ¶¶ 208-212 (citing Drs. Johnson, George, Rubinfeld, Erdem, and Majure). Beyond the question of whether to exclude minimum fee systems, every other expert concluded that the Tyler model merely parroted the statutory formula.

Moreover, the manner and extent to which the Judges have adjusted the results of the non-minimum fee Tyler Model in allocating shares to certain parties in this proceeding is not within any reasonable limits but rather unsupported by the record evidence and arbitrary. For example, while the non-minimum-fee version of the Tyler Model upon which the Judges place primary weight allocates between 12.7% and 14.7% to PTV for each year in the 2015-17 period, after the Judges made multiple adjustments to the results, PTV’s share in the adjusted regression increased by 51% in 2015, by 69% in 2016, and 105% in 2017. *See* Initial Determination at 143-144; 198.<sup>4</sup> With respect to the 2015-17 shares for the Canadian Claimants Group (“CCG”), the

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<sup>4</sup> The Judges’ adjustment of PTV’s share also contains an error. The Initial Determination states that the Judges applied “downward adjustments” to PTV’s share to account for the “presence of Must Carry PTV stations.” Initial Determination at 143. However, the Judges’ Must Carry adjustment for 2017 actually *increases* PTV’s share by 0.8 percentage points. *Id.* There is no basis in the record for the Judges to increase PTV’s share of royalties based upon the presence of Must Carry PTV stations. According to Dr. Bennett’s calculations—upon which the Judges

Initial Determination does not rely upon the non-minimum-fee version of the Tyler Model at all, but instead upon the Tyler Model inclusive of minimum fee systems, notwithstanding the Judges' finding that none of the regressions meaningfully estimate relative market value for minimum fee systems after 2014. *Id.* at 21 (“[T]he Judges find that the dramatic increase in the number of minimum fee-only CSOs . . . renders regression analyses that include those CSOs less reliable and thus can be accorded only very limited economic evidentiary weight.”).

Moreover, there is no factual or industry record evidence that remotely supports the more than doubling of CCG's share in 2015-17 or the large shares awarded to PTV for that period. To the contrary, multiple former senior MVPD programming executives testified that CSOs would only pay a small relative share for CCG content given its small, niche status in northern states. *See, e.g.*, Ex. 7109 (Singer WRT) at ¶¶ 44-45; Ex. 7111 (Hartman WRT) at ¶ 30; Ex. 7115 (Witmer WRT) at ¶ 41. Likewise, these same witnesses testified that CSOs would not pay significant amounts for PTV content. *See, e.g.*, Ex. 7108 (Singer WDT) at ¶ 33; Ex. 7110 (Hartman WDT) ¶ 36; Ex. 7115 (Witmer WRT) at ¶ 29. Even PTV's own industry witness did not suggest that CSOs would pay large amounts for PTV content. Yet, the Initial Determination awards PTV between 19.22%-29.10% for 2015-17. Given the record evidence, the awards to CCG and PTV relying on the Judges' substantial adjustments to a regression model not endorsed by any expert is arbitrary and at odds with the record.

## CONCLUSION

For the foregoing reasons, the Judges should grant JSC's motion for rehearing.

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relied—removing Must Carry PTV stations from the Tyler Model in 2017 *decreased* the PTV share by nearly seven percentage points. *Id.* at 46, 143.

Dated: September 21, 2023

**JOINT SPORTS CLAIMANTS**

*/s/ Ryan White*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of September, 2023, I caused a copy of the foregoing to be served on all parties registered to receive notice by eCRB by filing through the eCRB filing system.

/s/ Ryan White  
Ryan White

# **EXHIBIT 1**

*Filed In Native Format*

# **EXHIBIT 2**

## **Bortz Survey Results with McLaughlin Adjustment as Set Forth in Exhibits 4001-4003<sup>1</sup>**

	<b>2015</b>	<b>2016</b>	<b>2017</b>
<b>JSC</b>	23.07%	20.96%	21.91%
<b>CTV</b>	24.02%	22.04%	21.31%
<b>PS</b>	21.35%	20.44%	16.68%
<b>PTV</b>	22.37%	28.07%	32.21%
<b>Devotional</b>	5.22%	4.4%	3.79%
<b>Canadian</b>	3.97%	4.1%	4.09%

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<sup>1</sup> Numbers shown to the second decimal place as reported in Exhibits 4001-4003. Shares may not sum to 100% due to rounding.



# Proof of Delivery

I hereby certify that on Thursday, September 21, 2023, I provided a true and correct copy of the Joint Sports' Claimants Motion for Rehearing to the following:

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Signed: /s/ Ryan D White