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Before the
UNITED STATES 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' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR REHEARING

Pursuant to Order 44 Granting Leave to Reply to Motions for Rehearing, the Joint Sports Claimants ("JSC") submit this reply in support of their Motion for Rehearing in order to address the responses filed by (1) the Public Television Claimants ("PTV") and (2) the Canadian Claimants Group, Program Suppliers, and Settling Devotional Claimants ("Joint Respondents" and, together with PTV, the "Responding Parties").[1]

In its Motion for Rehearing, JSC identified five clear errors in the Initial Determination, each of which warrants reconsideration. The Responding Parties fail to meaningfully confront, much less rebut, these clear errors. *First*, the Judges' adjustment of PTV's share in 2017 to account for must-carry stations ***inadvertently increased*** PTV's share, rather than decreasing it as the Judges intended. No party disputes that this error occurred or that it resulted in an allocation for 2017 that was different than the Judges thought they were making. *Second*, the Initial Determination assigned JSC a lower share for 2014 than indicated by any methodology the Judges employed for allocating shares. *Third*, in attempting to apply the McLaughlin adjustment to the Bortz Survey, the Judges inadvertently used an early, outdated calculation. *Fourth*, the Initial Determination employed a version of the McLaughlin adjustment that used royalty-based weighting, which gives

[1] Order 44 provides JSC with ten substantive pages to address PTV's response, and six to address the Joint Respondents' response. JSC submit this combined reply of approximately nine substantive pages to address both responses. Aspects of this reply that solely address issues raised in the Joint Response do not exceed six pages.

undue weight to minimum fee-only CSOs during the 2015-17 period. As the Judges recognized in the context of the regression studies, however, minimum fee-only CSOs "do not provide the Judges with any useful information regarding the relative value" of the distant signal programming categories. Initial Determination at 129. Likewise, it is an error to overweight minimum fee-only CSOs in the Bortz Surveys. *Fifth*, the Initial Determination employs a methodology—the Tyler Model limited to non-minimum fee CSOs—that no expert, including Dr. Tyler himself, endorsed. PTV agrees with JSC that there is no basis in the record for this methodology. The Judges should grant rehearing and correct these errors.

I. JSC Challenges Aspects of the Initial Determination That Are Clearly Erroneous

The Judges may grant rehearing whenever a party demonstrates that an aspect of the Judges' determination is "without evidentiary support in the record or contrary to legal requirements." Order Denying Program Suppliers' Motion for Rehearing and Correcting 2010-13 Allocations for Certain Parties, Dkt. No. 14-CRB-0010-CD (2010-13), at 1 ("2010-13 Rehearing Order") (citing 37 C.F.R. §§ 353.1, 353.2). Among other things, under this standard the Judges have explained that they may grant rehearing in order to "correct a clear error." *Id.* That is precisely what JSC ask the Judges to do in this proceeding: to grant rehearing in order to correct clear errors in the Initial Determination.

Unlike the colorful language the Joint Respondents invoke, *see* Joint Response at 3 (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)), the D.C. Circuit has explained clear error as simply a "definite and firm conviction that a mistake has been committed." *See School for Arts in Learning Public Charter School v. Barrie*, 810 F. Supp. 2d 52, 56 (D.D.C. 2011) (quoting *N. Central Airlines, Inc. v. Continental Oil Co.*, 574 F.2d 582, 587 n.14 (D.C. Cir. 1978)). This determination is committed to the broad discretion of the factfinder. *Dyson v. Winfield*, 129 F. Supp. 2d 22, 23 (D.D.C. 2001). Indeed, even without granting rehearing,

the Judges may act on their own authority to correct errors they find in the Initial Determination. 2010-13 Rehearing Order at 16-17.

The Responding Parties seek to portray JSC as attempting "to relitigate old matters" or presenting "repetitive arguments on issues that have already been fully considered." *See* PTV Response at 2 & Joint Response at 2 (both citing 2010-13 Rehearing Order at 1). On the contrary, as explained below, the issues JSC has identified were not addressed by the parties during the hearing, nor could JSC have reasonably anticipated a need to address them. As the parties and the Judges acknowledge, the Initial Determination relies on methodologies that no party proposed as a basis for allocation. *See* Initial Determination at 12, 178. Therefore, JSC's arguments concerning errors in those methodologies could not possibly be a mere "rehash[ing] of the arguments that the Judges considered in the Initial Determination." *See* Order Denying Motions for Rehearing, Dkt. No. 2005-1 CRB DTRA, at 2 (Apr. 16, 2007) ("2007 Rehearing Order").

II. None of the Responding Parties Rebuts the Clear Errors That JSC Identified

Beneath their discussion of standards, none of the Responding Parties meaningfully rebuts the evidence of clear errors in the Initial Determination that JSC presented.

A. The Must-Carry Adjustment to PTV's 2017 Share Is Miscalculated

None of the parties dispute that the Judges' adjustment of PTV's share in 2017 to account for must-carry stations contains an error, resulting in an increase to PTV's share rather than a decrease as the Judges intended. *See* JSC Mot. at 9 n.4; *accord* PTV Mot. at 4 n.3; CTV Resp. at 6. Following the calculations the Judges describe in the Initial Determination, PTV's 2017 share in the Tyler Model after the must-carry adjustment should be 15.96%, rather than 19.09%. Correspondingly, PTV's share in the Tyler Model after both of the Judges' adjustments should be 22.98% rather than 27.49%.

This inadvertent, material miscalculation squarely fits within the rehearing standard for clear error. Indeed, it is the kind of correction that the Judges have previously made even without granting rehearing. In the 2010-13 cable royalty proceeding, for example, the Judges corrected the royalty allocations to certain parties after discovering that "for the years 2012 and 2013, in establishing the ranges of reasonable allocations, and determining the allocations themselves, they ***inadvertently used*** Horowitz survey results for 2011." 2010-13 Rehearing Order at 16 (emphasis added); *see also* 2007 Rehearing Order at 4-5 (revising the Judges' implementing regulations in light of a requested "technical correction" without ordering rehearing). Similarly here, the Judges should revise the Initial Determination to account for a straightforward, inadvertent miscalculation that resulted in an increase to PTV's share when the Judges expressly indicated their intent to decrease PTV's share.

B. 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. *See* JSC Mot. at 6-8. This decision necessarily lacks any evidentiary support and is therefore clear error. The Responding Parties fail to summon any facts or reasoning that could explain away this error.

The Joint Respondents concede that none of the methodologies the Judges credited estimate a JSC share of less than 37.5% for 2014. *See* Joint Resp. at 5; JSC Mot. at 7. Instead, they attempt to shrug off an erroneous reduction in JSC's 2014 share of at least 1.5 percentage points as sufficient for "rough justice" and therefore not worth correcting. Joint Response at 5-6 (internal quotation marks omitted). But this issue alone would change the allocation by at least several million dollars. An error of that magnitude cannot reasonably be ignored.

PTV attempts to defend the JSC share allocation in 2014 based on evidence that the Judges expressly rejected: the "pooled" regression results for JSC in 2014 under the Johnson and George

models. *Compare* PTV Resp. at 7-8 *with* Initial Determination at 88, 101. As the Judges explained, the "most consequential impact" of "improperly" pooling data across the 2014-17 period is "the ***underestimating*** of the JSC share for 2014." Initial Determination at 101 (emphasis added). In other words, the lower shares for JSC in 2014 under the Johnson and George models is a recognized flaw in their models, not support for that result.

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

The Responding Parties offer no evidence-based defense of the Initial Determination's reliance on Exhibit 3049—an outdated, incorrectly weighted version of the McLaughlin Adjustment. *See* JSC Mot. at 1-6.

1. The Unrebutted Evidence is that Exhibit 3049 Is Outdated and Should Not Be Used to Determine Shares

As JSC showed, one reason Exhibit 3049 is incorrect is because it is an early, preliminary calculation that was updated in Exhibit 3105. *See id.* at 1-4. No party disputes that Exhibit 3105 is a more recent, "UPDATED" version of the calculation in Exhibit 3049. *Id.* at 3. Nor does any party dispute that, over time, Bortz incorporates more comprehensive programming information into its calculations. *Id.* at 2-3.

The Responding Parties' speculative attempts to justify reliance on Exhibit 3049 instead of Exhibit 3105 are contrary to the record. The Joint Respondents posit that a "later" calculation "does not by itself render the original version outdated or incorrect." Joint Resp. at 5. But Exhibit 3105 is not simply a "later" calculation; the record supports the conclusion that Exhibit 3105 is more accurate because it incorporates more comprehensive programming data to project allocations to non-respondents. *See* JSC Mot. at 2-3. PTV speculates that Mr. Trautman may have applied some "creative weighting scheme . . . with the purpose of seeking to increase JSC's share" in Exhibit 3105, PTV Resp. at 4-5, but there is no evidence of that. To the contrary, Exhibit 3105

was created for Bortz's internal use, not to present a proposed share allocation in these proceedings. *See* Tr. at 2881:10-2882:1 (Trautman).

2. The Unrebutted Evidence is that, if the McLaughlin Adjustment is Used, Base Plus 3.75 Weighting Should be Applied, not Royalty-Based Weighting.

As a second, independent error, JSC also showed that both (the outdated) Exhibit 3049 and (the updated) Exhibit 3105 are incomplete because they use incorrect, royalty-based weighting. *See* JSC Mot. at 4-6. JSC witnesses explained at the hearing that royalty-based weighting would improperly skew the survey calculations in the 2015-17 period due to the overwhelming number of minimum fee systems. *See id.* at 4. In the context of the regression analyses, the Judges similarly recognized that the increase in minimum fee systems during the 2015-17 period required methodological changes. Initial Determination at 21-22. Accordingly, Bortz revised its methodology to use base plus 3.75 weighting. JSC Mot. at 4. Calculations of the McLaughlin adjustment for the years 2015-17 applying the corrected, base plus 3.75 weighting are in the record at Exhibits 4001-4003. *Id.* at 5-6.

None of the Responding Parties opposed Bortz's change to base plus 3.75 weighting during the proceeding (indeed, SDC and PTV affirmatively bolstered it[2]), and none of them can explain why the reliance on royalty-based weighting in Exhibit 3049 is anything but clear error. The Joint Respondents do not address the issue at all. PTV, lacking any evidence from ***the 2014-17 proceeding***, attempts to rely on testimony from the ***2010-13 proceeding*** supporting royalty-based weighting. *See* PTV Resp. at 6-7. But the difference between this proceeding and the last one is critical: royalty-based weighting became a problem in 2015-17 when, as the Judges found, there

[2] *See* SDC Post-Hearing Br. at 69-70 (arguing that base plus 3.75 weighting in the Bortz survey results was an "improvement" that prevented "distortion"); Johnson WRT ¶ 85 (arguing that the rationale underlying use of base plus 3.75 weighting in the Bortz survey results is "exactly the same principle underlying my application of the Waldfogel-type regression to minimum fee paying CSOs").

was a "dramatic increase in the number of minimum-fee only" systems. Initial Determination at 21. Testimony that royalty-based weighting was appropriate in 2010-13 does not support its use in the changed landscape of 2015-17.

3. JSC Was Diligent In Objecting to PTV's Belated Embrace of the McLaughlin Adjustment

The Joint Respondents and PTV argue that—whatever the evidence of errors in Exhibit 3049—rehearing should be denied because JSC should have raised certain issues, or pointed the Judges to more accurate calculations, sooner. *See* Joint Resp. at 4; PTV Resp. at 3-6. But JSC had no reason to do so because no party in their written testimony or at the hearing argued or presented evidence that the Judges should apply the McLaughlin adjustment at all. Absent such testimony, JSC had no reason to debate the relative reliability of calculations of an adjustment for which no party was advocating. The record shows that JSC promptly objected to PTV's belated embrace of the McLaughlin adjustment with royalty-based weighting when it first arose in post-hearing briefing. *See* JSC Post-Hearing Reply Br. at 62. Nothing in the rehearing standard, or common sense, justifies requiring a party to spend its limited hearing time and briefing space clarifying the most accurate version of each un-endorsed calculation that comes up, particularly where, as here, the alternative calculations presented for even a single base regression numbered in the hundreds. *See* Initial Determination at 28 (discussing Dr. Erdem's testimony that "Dr. Johnson's team had selected the four models that he presented out of more than four hundred regression runs."); Tr. at 701:17-730:24 (SDC counsel cross-examining Dr. Johnson concerning Ex. 7509, a PTV spreadsheet logging the results of hundreds of alternative versions of Dr. Johnson's regression model). The Responding Parties' inaccurate portrayal of how the proceeding unfolded underscores this conclusion.

First, both PTV and the Joint Respondents suggest that JSC should have known to raise the errors in Exhibit 3049 when Mr. Trautman was cross-examined by PTV's counsel on the

document. *See* Joint Resp. at 5; PTV Resp. at 4-5. But pointing a witness to his own alternative calculation is a common form of criticizing a methodology, not an affirmative endorsement of the alternative. *See* Tr. 701:17-730:24 (SDC cross-examination of Dr. Johnson). As the Judges correctly found, neither PTV in that cross-examination nor any party at any point in the proceeding "argue[d] that royalty fund allocations . . . should be made strictly according to the Bortz initial results subject to the McLaughlin adjustment." Initial Determination at 178.

Second, PTV argues that JSC should have understood from PTV's proposed findings of fact that Exhibit 3049 was being proposed as a methodology for allocating shares, and that Exhibit 3105 was not. PTV claims that its findings cite Exhibit 3105 as merely "illustrative," whereas they cite Exhibit 3049 for "use[] in the alternative as a royalty floor." PTV Resp. at 5 (internal quotation marks omitted). PTV's proposed findings say no such things. The findings cite Exhibit 3105 as "Proposed Shares," not "illustrative" ones. PTV Corrected PFF ¶ 12, Table 3 & ¶ 43, Table 5. By contrast, the findings cite to Exhibit 3049 only in arguing for a "floor" to "***Public Television's*** average share," not as a complete allocation methodology. PTV Corrected Post-Hearing Br. at 42-43 (emphasis added) (citing PTV Corrected PFF ¶ 208). For the limited purpose of evaluating PTV's average share, JSC had no reason to argue for the use of Exhibit 3105 over Exhibit 3049 because PTV's average share does not meaningfully differ between the two exhibits (only the shares of the other parties do). *Compare* Exhibit 3049 (reporting a PTV average share of 37.1%) and Exhibit 3105 (reporting a PTV average share of 37.0%).

The implausible degree of foresight that the Joint Respondents and PTV would demand of any party seeking rehearing is well beyond anything necessary to deter parties from "re-litigat[ing] old matters" or raising new arguments out of time. PTV Response at 2 & Joint Response at 2. Rather, denying rehearing on this record would incentivize parties to disguise their intent to rely

on a specific calculation as long as possible, so as to immunize that calculation from the full adversarial vetting process.

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

As shown in JSC's Motion, the adjusted version of the Tyler Model on which the Initial Determination relies was not endorsed by any witness, is unsupported and is arbitrary. *See* JSC Mot. at 8-10; *see also* JSC Resp. to PTV Mot. for Rehearing. No party disputes the fact that no one—no party and no witness—endorsed use of the Tyler Model limited to systems paying above the minimum fee. Indeed, Dr. Tyler himself testified that his model should not be used in this way. That is where the clear error lies.

The Joint Respondents misconstrue JSC's argument, suggesting that JSC's argument is premised on the inconsistency between the regression results and industry expert testimony. *See* Joint Resp. at 6 ("JSC takes issue with the shares awarded to CCG and PTV in light of testimony given by certain industry experts."). The fact that the regression results are so at odds with the experience of senior MVPD programming executives is certainly telling and indicates problems with the regression. But the heart of the error is the misuse of Dr. Tyler's regression in a manner that Dr. Tyler himself disclaimed and for which there is no record support.

CONCLUSION

For the foregoing reasons, the Judges should grant JSC's Motion for Rehearing.

Dated: October 19, 2023

JOINT SPORTS CLAIMANTS

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 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
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Proof of Delivery

I hereby certify that on Thursday, October 19, 2023, I provided a true and correct copy of the Joint Sports Claimants' Combined Reply in Support of Their Motion for Rehearing to the following:

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