

Before the
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In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

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

**PUBLIC TELEVISION'S CONSOLIDATED REPLY IN SUPPORT OF
ITS MOTION FOR REHEARING**

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Public Television's Consolidated Reply
in Support of Its Motion for Rehearing

INTRODUCTION

The Public Television Claimants (“Public Television”) moved for rehearing to correct clear errors in Adjustments B and C, applied to the 2015–17 royalty shares estimated by Dr. Tyler’s sensitivity limited to Above Minimum Fee CSOs. The proposed corrections simply apply the Judges’ reasoning stated in their Initial Determination and are supported by the evidence.

It is essentially undisputed that Public Television’s proposed corrections meet the standard for rehearing, given that neither issue could have been argued prior to the Initial Determination. JSC and CTV do not contend otherwise.¹ In an unexplained conclusory assertion, the other parties suggest that some or all of the issues raised by JSC and Public Television could have been “address[ed] ... during the hearing,” but they do not dispute that it was impossible to anticipate that the Judges would apply their Adjustments B and C to Dr. Tyler’s sensitivity limited to Above Minimum Fee CSOs. Accordingly, the motion for rehearing was the first opportunity for Public Television to present these errors in the application of Adjustments B and C to that sensitivity analysis by Dr. Tyler. Public Television is not seeking to re-litigate issues that could have been argued prior to the Initial Determination; its proposed corrections do not require broad reconsideration of how the Judges have weighed the extensive body of evidence already in the record. The clear errors in Adjustments B and C are at odds with

¹ The Commercial Television Claimants (“CTV”) and Joint Sports Claimants (“JSC”) submitted separate responses to Public Television’s motion for rehearing, and the Canadian Claimants, Program Suppliers, and Settling Devotional Claimants (“SDC”) submitted a joint response. The Judges granted leave for Public Television to file a reply to any response, up to 6 substantive pages regarding CTV’s response, 7 substantive pages regarding JSC’s response, and 6 substantive pages to the joint response. Order 44 Granting Leave to Reply to Motions for Rehearing at 1. In accordance with the Judges’ Order 44, Public Television submits this consolidated Reply.

the Judges’ own stated rationales in their Initial Determination and must be corrected to prevent manifest injustice.

ARGUMENT

I. IT IS A CLEAR ERROR TO APPLY ADJUSTMENT B TO DR. TYLER’S MODEL LIMITED TO ABOVE MINIMUM FEE CSOS.

All parties agree that Dr. Bennett’s sensitivity analysis—on which the Judges’ “Adjustment B” is based—pertains specifically to purportedly “must-carry” Public Television distant signals *carried by Minimum Fee CSOs*.² His sensitivity showed the effect of treating those signals as though they have zero value. It is also undisputed that Dr. Tyler’s sensitivity analysis limited to Above Minimum Fee CSOs *excludes all distant carriage by Minimum Fee CSOs*, thereby treating all distant retransmissions by Minimum Fee CSOs as having zero value. Thus, as a matter of basic logic, the signals that Dr. Bennett analyzed are a perfect subset of, and entirely subsumed by, the excluded distant carriage in Dr. Tyler’s sensitivity. Consequently, applying Adjustment B based on Dr. Bennett’s analysis to Dr. Tyler’s Above Minimum Fee CSOs sensitivity is an erroneous double counting of the Judges’ intended adjustment.³

CTV and the joint respondents argue that the Judges “explained in a note accompanying the Adjustment B Table how they weighted Dr. Bennett’s Figure 52 analysis to avoid the double

² For ease of exposition only, this Reply refers to the distant signals categorized by Mr. Harvey as being subject to mandatory carriage under 47 U.S.C. §§ 534–35 as “must-carry” signals. Public Television does not concede that any Public Television distant signals were actually retransmitted subject to the must-carry rules. Indeed, it is undisputed that most of the signals he identified were not subject to mandatory carriage. Moreover, the Initial Determination improperly imposed the equivalent of an adverse-inference discovery sanction on Public Television, without notice, based on unsupported factual findings. Public Television reserves all rights to appeal the Judges’ determination regarding the signals purportedly carried under the must-carry rules, although if the Judges correct Adjustment B the issue may become moot.

³ As Public Television noted in its motion for rehearing, there also appears to be an arithmetic mistake in the Judges’ Adjustment B Table. PTV Reh’g Mot. at 4 n.3; *see also* CTV Response at 6; JSC Response at 7. This error is moot, however, if the Judges correct the double counting error and do not apply Adjustment B.

counting that PTV’s motion accuses them of.” Joint Response at 7; *see also* CTV Response at 4. But this “weighting” in the Initial Determination is unsupported empirically and as a matter of logic. As JSC concedes, the Judges’ “weighting” merely “scaled [Dr. Bennett’s] must-carry adjustment proportionally.” JSC Response at 3 n.1. For proportional scaling to be appropriate, the proportion of Public Television value derived from “must-carry” signals estimated by Dr. Bennett must have been the same within the above-minimum-fee CSOs as within the minimum-fee-paying CSOs. The undisputed record evidence categorically refutes this assumption.

First, Dr. Bennett’s own analysis examined only the value of “must-carry” signals carried by minimum-fee-paying CSOs. Tr. 4543:7–20 (Bennett). Not only were the values that he estimated not proportionally distributed among minimum-fee and above-minimum-fee CSOs; *zero* of the value he estimated reflected carriage among above-minimum-fee CSOs. His analysis cannot rationally be used to estimate the value of “must-carry” signals carried by CSOs that paid more than the minimum fee.⁴

The other parties do not dispute this, but argue that there may be (unmeasured and unestimated) value attributable to purportedly “must-carry” signals among above-minimum-fee-paying CSOs. *See* CTV Response at 3–4; JSC Response at 3–4; Joint Response at 7. Even if that were true, there is no basis for using the numbers calculated by Dr. Bennett to attempt to estimate that value, and no party points to any evidence other than Dr. Bennett’s calculation.

⁴ To illustrate with an analogy: if an assessor estimated the value of all retail space in the ground floors of commercial high-rises in a city, it would make no sense to estimate the value of retail space *above* the ground floor by “(1) finding the percentage of [total value of all above-ground-level floors of commercial high-rises in a city] ÷ [total value of all floors of commercial high-rises in a city]; [and] (2) multiplying that percentage by the [assessor’s estimate].” *Cf.* Initial Determination at 143. There is no *a priori* reason to believe that retail’s portion of the value on ground floors is the same as its portion of the value on other floors. And in fact, of course, retail is disproportionately concentrated on ground floors. As discussed below, the same is true with respect to the purportedly “must-carry” stations’ value on minimum-fee-paying CSOs.

Second, such an adjustment would be unsupported on the record evidence, because all of the CSOs paying more than the minimum fee could have chosen to decline to carry any distant Public Television signals—which is why Dr. Bennett excluded them from his analysis.⁵ For the Above Minimum Fee CSOs, distant retransmission of a must-carry signal necessarily incurs an incremental royalty cost. The Above Minimum Fee CSOs thus have the right to demand indemnification from the originating station for that incremental royalty burden. PTV PFF ¶ 84; PTV R-PFF ¶ 122; 47 U.S.C. § 535(i)(2). If the station refuses indemnification, then the CSO is not obligated to carry the signal under the must-carry rules. PTV PFF ¶ 84; PTV R-PFF ¶ 122; 47 U.S.C. § 535(i)(2). Thus, a CSO’s decision to carry the signal without indemnification necessarily demonstrates value of the programs on that signal. PTV PFF ¶ 85. Dr. Bennett decided to limit his must-carry sensitivity analysis to must-carry signals carried by Minimum Fee CSOs for precisely this reason. Tr. 4543:21–4544:4 (Bennett) (attributing his decision to limit his sensitivity analysis to Minimum Fee CSOs to the availability of indemnification for Above Minimum Fee CSOs); Ex. 7207 at 32–33 (Bennett WRT); Ex. 7208 at 34–35 (Marx WRT) (recognizing this difference in the economic circumstances of Above Minimum Fee and Minimum Fee CSOs).

All of the evidence indicates that no indemnification payments were made. Public Television explained that there would be *no rational reason* for a public television station to make such an indemnity payment, rather than foregoing its right to mandatory distant carriage. *See, e.g.*, Public Television’s Reply in Support of Its Motion for Reconsideration of Order 33 at 6; Tr. 5863:16–20, 6042:13–21, 6044:17–23; Public Television’s Post-Hearing Brief at 21

⁵ When Dr. Bennett was asked about the appropriate share adjustment to account for must-carry signals carried by Above Minimum Fee CSOs, Dr. Bennett testified, “That’s not something I’ve looked at.” Tr. 4546:15–16 (Bennett).

(“there is no evidence in the record providing any reason why any station rationally would [agree to indemnify a cable operator for its increased Section 111 royalties]” rather than allowing the cable operator to choose not to carry the station distantly). No party or witness disputed that, and the Initial Determination did not make any finding to the contrary.⁶

II. PUBLIC TELEVISION’S PROPOSED CORRECTION FOR ADJUSTMENT C IS A MORE ACCURATE APPLICATION OF THE JUDGES’ STATED RATIONALE AND NECESSARY TO PREVENT MANIFEST INJUSTICE.

In their Initial Determination, the Judges stated that the rationale for Adjustment C was to attribute value to the Public Television signals carried by Minimum Fee CSOs in 2015–17 that had previously “generat[ed] a base fee royalty and an expressly revealed preference and willingness-to-pay.” Initial Determination at 143–44. Public Television respectfully proposes in its motion a correction to Adjustment C, so that Adjustment C would also account for demonstrably valuable Public Television signals previously retransmitted with other, non-WGNA signals that together exceeded the minimum fee. None of the responding parties dispute Dr. Johnson’s analysis that 55 percent of Public Television signals carried by Minimum Fee CSOs previously generated base fee royalties, based on which Public Television seeks the correction to Adjustment C. Their arguments opposing the correction and JSC’s arguments regarding the purported arbitrariness of Adjustment C uniformly lack merit.

⁶ The Initial Determination states that “[t]he regressions will not ‘see’ the indemnification payments made by the PTV stations back to the CSOs who made royalty payments,” but this issue is not at all unique to Public Television. Initial Determination at 48. As Public Television explained, unlike Public Television stations, commercial stations actually do make payments or provide other forms of consideration to cable operators to encourage or force them to carry their programming. *See, e.g.*, PTV PFFCL at 33 n.136; Ex. 7103 at 25, 35 & n.91 (Majure WDT); Ex. 7108 at 14 (Singer WDT); Ex. 7110 at 15 (Hartman WDT).

A. The Judges' Adjustment C Is Not Arbitrary.

JSC opposes Public Television's proposed correction to Adjustment C because it believes that Adjustment C itself is arbitrary, and Public Television's proposed correction does not fix the adjustment's purported flaws. JSC Response at 4. JSC is incorrect that Adjustment C is arbitrary. Adjustment C is absolutely necessary to mitigate the unreasonably low estimates of Public Television's shares by Dr. Tyler's sensitivity limited to Above Minimum Fee CSOs. Further, as a matter of procedure, JSC's position—i.e., any corrections to an otherwise arbitrary determination by the Judges must be rejected unless those corrections eliminate the supposed arbitrariness—would absurdly prevent correcting clear errors in the Initial Determination until all appeals have been exhausted.

The choice by the Judges to use Dr. Tyler's sensitivity limited to Above Minimum Fee CSOs most directly affected Public Television's 2015–17 shares—far more than any other party—because the Judges uniquely gave the regression evidence “dispositive weight” in calculating Public Television's 2015–17 shares, and because the difference between Dr. Tyler's principal model and his Above Minimum Fee CSOs sensitivity was vast for Public Television in particular. *Id.* at 141, 197–98. Accordingly, the Judges most needed to correct for that sensitivity's clear deficiencies with respect to Public Television.

In explaining their decision to choose that sensitivity as a basis for allocating shares, the Judges emphasized that “Dr. Tyler noted that these 2015-2017 share allocations [estimated by the Above Minimum Fee CSOs sensitivity] were not ‘strikingly’ different from the share allocations he recommended by reliance on his regression results for all CSOs”—but that

rationale obviously does not apply to Public Television’s share allocations. *Id.* at 141.⁷ The Judges also relied on Dr. Tyler’s testimony that he was “not aware of any logic, *a priori*, that would suggest that one category might increase share at the expense of another” by virtue of using Dr. Tyler’s sensitivity limited to Above Minimum Fee CSOs, instead of Dr. Tyler’s principal model. *Id.* Thus, the Initial Determination sought to rely on correspondence between Dr. Tyler’s principal model and the selected sensitivity as a basis for reliance on the latter. But the two models starkly diverged with respect to Public Television. On the stand, Dr. Tyler testified that that sensitivity was “probably too extreme” and was not the best way to address any perceived issue with Minimum Fee CSOs. Tr. at 5474:2–8 (Tyler). The “too extreme” nature of the Above Minimum Fee sensitivity with respect to two claimant groups is apparent from its wildly disparate estimates of Public Television’s and the Canadian Claimants’ 2015–17 shares in particular, as Table 1 shows below.

TABLE 1: DIFFERENCES IN PTV AND CCG SHARE ALLOCATIONS
ACROSS DR. TYLER’S PRINCIPAL MODEL AND
SENSITIVITY LIMITED TO ABOVE MINIMUM FEE CSOs

Year	PTV			CCG		
	Principal Model	Above Minimum Fee Sensitivity	Change (% points)	Principal Model	Above Minimum Fee Sensitivity	Change (% points)
2015	27.9%	12.7%	–15.2%	13.3%	23.2%	+9.9%
2016	37.4%	14.7%	–22.7%	13.6%	31.1%	+17.5%
2017	40.4%	14.2%	–26.2%	15.2%	34.6%	+19.4%

Dr. Tyler’s principal model estimated Public Television shares of 27.9 percent, 37.4 percent, and 40.4 percent for years 2015, 2016, and 2017, respectively. Ex. 7600 at 37 (Tyler WDT). On the other hand, his Above Minimum Fee CSOs sensitivity estimated corresponding

⁷ Dr. Tyler argued that the two models were not “strikingly” different because if the sensitivity were starkly different (which, in fact, it is with respect to Public Television and the Canadian Claimants), that would have undermined his argument that the sensitivity corroborated the reliability of his principal model (or vice versa).

Public Television shares of 12.7 percent, 14.7 percent, and 14.2 percent—less than half of the corresponding estimates of Dr. Tyler’s principal model. Ex. 7600 at 64 (Tyler WDT). While this sensitivity dramatically underestimated Public Television’s shares, it unreasonably inflated the Canadian Claimants’ shares. *Id.* The Canadian Claimants’ 2016 and 2017 shares more than doubled when using Dr. Tyler’s Above Minimum Fee CSOs sensitivity. The Judges described this effect of Dr. Tyler’s sensitivity on the Canadian Claimants’ shares as “distortionary” and “anomalous.” *Id.* at 142. The Judges remedied this distortion in the Canadian Claimants’ shares by modifying them downward with their Adjustment A. *Id.* at 141–43.

As Table 1 shows, if the effects of Dr. Tyler’s sensitivity limited to Above Minimum Fee CSOs on Canadian shares were “distortionary,” its effects on Public Television’s shares were even more so. As Adjustment A corrects the “anomalously high” Canadian Claimants’ shares under Dr. Tyler’s Above Minimum Fee CSOs sensitivity, Adjustment C makes a necessary change to mitigate Public Television’s anomalously low share estimates. Without Adjustment C, Dr. Tyler’s Above Minimum Fee CSOs sensitivity plainly cannot reliably inform the allocation of cable royalties at issue.⁸

Contrary to JSC’s assertion, the Judges’ decision to apply Adjustment C was not arbitrary. The Judges recognized that a large portion of Public Television signals carried by Minimum Fee CSOs in 2015–17 were demonstrably valuable by virtue of their generation of base royalty fees in prior accounting periods. *Id.* at 143–44. Dr. Tyler and several other witnesses testified that distant retransmission data of “Positive Carriage Minimum Fee CSOs”

⁸ No party in this proceeding has identified any record evidence supporting reliance on Dr. Tyler’s sensitivity limited to Above Minimum Fee CSOs, with or without Adjustment C. Of course, as shown in Table 1, even applying Adjustment C’s 44-percent increase to Public Television’s shares is insufficient to restore Public Television’s shares to what Dr. Tyler’s principal model estimated.

can reliably inform the allocation of cable royalty funds. Ex. 7600 at 39 (Tyler WDT); PTV PFF ¶¶ 56–59.

JSC argues that Adjustment C improperly attributes value to purportedly must-carry signals and distant retransmissions by Minimum Fee CSOs. JSC Response at 4–6. The Judges already heard the parties’ arguments on those issues at length and have made their decision. JSC’s arguments are precisely the “second bite at the apple” that is not permitted in a rehearing motion. Order Denying Program Suppliers’ Motion for Rehearing and Correcting 2012–13 Allocations for Certain Parties, No. 14-CRB-0010-CD at 1 (Dec. 13, 2018). Even if JSC were correct (which it is not), its arguments have no bearing on whether the clear error in Adjustment C based on the Initial Determination’s own reasoning should be corrected. Public Television’s proposed corrections are limited to novel issues arising from the Judges’ application of Adjustments B and C, to which no party had an opportunity to present evidence.

In yet another broadside extending far beyond the narrow relief sought in Public Television’s motion for rehearing, JSC criticizes the Judges’ Adjustment C for not adjusting other parties’ shares, arguing that commercial distant signals were also carried by Minimum Fee CSOs. JSC Response at 6–7. JSC misunderstands the purpose of Adjustment C. The Judges identified a set of Public Television distant signals carried by Minimum Fee CSOs for which their prior carriage demonstrated their value. Initial Determination at 143–44. Further, as the Judges noted, the shares of CTV, Devotional Claimants, JSC, and Program Suppliers were not so different across Dr. Tyler’s principal model and his sensitivity limited to Above Minimum Fee CSOs. *Id.* at 141. In contrast, the Above Minimum Fee CSOs were particularly “distortionary” with respect to the shares of Canadian Claimants and Public Television, such that the Judges

needed to mitigate those distortions with Adjustment A and Adjustment C, respectively. No other claimant groups meet these criteria.

B. Public Television’s Proposed Correction Best Comports with the Judges’ Stated Rationale Behind Adjustment C.

In opposing Public Television’s correction to the particular percentage multiplier used for Adjustment C, CTV does not offer a substantive argument against the correction. Instead, CTV feebly argues that “the Judges are entitled to adopt whichever percentage they deem most appropriate” among the percentages in the record. CTV Response at 5. That is obviously incorrect as a matter of law. The Judges’ findings may not be arbitrary and must be supported by substantial evidence. 17 U.S.C. § 803(d)(3); 5 U.S.C. § 706; *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1121 (D.C. Cir. 2015) (explaining that “the bottom-line obligation” of the Judges is “to produce a reasoned decision”); *Intercollegiate Broadcast System*, 571 F.3d at 87 (citing *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1421 n.63 (D.C. Cir. 1985)). The percentage that is most appropriate for Adjustment C is the percentage that best comports with the Judges’ stated rationale for Adjustment C—i.e., 55 percent, as Dr. Johnson calculated.

Likewise, the Canadian Claimants, Program Suppliers, and Devotional Claimants argue that “the Judges were well within their discretion to limit Adjustment C to PTV + WGNA combinations.” Joint Response at 8. But the Judges’ stated rationale for Adjustment C provides no basis why it should not account for PTV + non-WGNA combinations that also “generat[ed] a base fee royalty and an expressly revealed preference and willingness-to-pay.” If the Judges had calibrated Adjustment C based on a factual finding distinguishing PTV + WGNA combinations and PTV + non-WGNA combinations in some way, they would have said so. *See* 17 U.S.C. § 803(c)(3) (“A determination of the Copyright Royalty Judges shall be supported by the written

record and shall set forth the findings of fact relied on by the Copyright Royalty Judges.”).

However, the Initial Determination does not identify any evidentiary basis for this differential treatment. And there is none in the record.

The proposed corrections would increase Public Television’s 2015–17 shares to be more consistent with the McLaughlin-adjusted Bortz Survey results, other regression models in the record, and undisputed record evidence of increased distant carriage of Public Television programming since 2014 relative to the other parties. Initial Determination at 181; PTV PFF ¶¶ 12–21.

CONCLUSION

For all the foregoing reasons, Public Television respectfully requests that the Judges grant Public Television’s motion for rehearing.

Date: October 19, 2023

Respectfully submitted,

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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 Public Television's Consolidated Reply in Support of Its Motion for Rehearing to the following:

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