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

In the Matter of: Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)	Docket No. 16–CRB–0001–SR/PSSR (2018–2022)

MUSIC CHOICE'S REPLY TO SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW AND FINDINGS OF FACT

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Table of Contents

Page

I. INTRODUCTION 1

II. REPLIES TO SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW 2

III. REPLIES TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT 35

TABLE OF ABBREVIATIONS

Crawford WDT	Testimony of Gregory S. Crawford, Ph.D. Tr. Ex. 54
Crawford WRT	Written Rebuttal Testimony of Gregory S. Crawford, Ph.D. Tr. Ex. 59
Del Beccaro WDT	Written Direct Testimony of David J. Del Beccaro Tr. Ex. 55
Del Beccaro WRT	Written Rebuttal Testimony of David J. Del Beccaro Tr. Ex. 57
Williams WDT	Written Direct Testimony of Damon Williams Tr. Ex. 56
Williams WRT	Written Rebuttal Testimony of Damon Williams Tr. Ex. 58
Wazzan WDT	Corrected Written Direct Testimony of C. Paul Wazzan Tr. Ex. 501
Wazzan WRT	Corrected Written Rebuttal Testimony of C. Paul Wazzan Tr. Ex. 502
Walker WRT	Written Rebuttal Testimony of Jeff Walker Tr. Ex. 50
Kushner WDT	Written Direct Testimony of Michael Kushner Tr. Ex. 34
Lys WDT	Written Direct Testimony of Thomas S. Lys Tr. Ex. 24
MC PFF	Music Choice's Proposed Findings of Fact
MC PCL	Music Choice's Proposed Conclusions of Law
SEPFF	SoundExchange's Proposed Findings of Fact
SEPCL	SoundExchange's Proposed Conclusions of Law

I. INTRODUCTION

In SoundExchange's Proposed Findings of Fact and Conclusions of Law, it seems to have taken the approach of writing a 1,000-page brief, and then afterwards putting numbers before each paragraph and flipping a coin to determine whether each paragraph should be numbered as a Proposed Finding of Fact or a Proposed Conclusion of Law. Consequently, the Proposed Findings and Conclusions are mixed together throughout the document. Given the Judges' instructions at trial and the manner in which the Judges indicated they wish to use the participants' Replies, Music Choice does not replicate this feature of SoundExchange's document, but instead replies first to SoundExchange's Proposed Conclusions of Law, sequentially, and then similarly to its Proposed Findings of Fact. Music Choice hopes and believes that this approach will be easier for the Judges to use, to the extent they wish to find Music Choice's Reply to any given Proposed Finding or Conclusion.

Additionally, as if over 2,400 Proposed Findings and Conclusions were not enough, SoundExchange includes an additional, twenty-five page "executive summary." This summary does not comprise any separate Proposed Findings or Conclusions and does not contain any cites to the record evidence. Consequently, Music Choice does not follow suit with any argumentative summary of its actual Replies, and does not otherwise respond to SoundExchange's extraneous summary. Instead, Music Choice limits its Replies to the specific Proposed Conclusions of Law and Findings of Fact directed to the PSS part of this proceeding.

II. REPLIES TO SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW

Reply to SEPCL 1-2 (pp. 416-417):

No response.

Reply to SEPCL 3 (p. 540):

There is nothing in the statutory text or historical practice consistent with SoundExchange's proposed conclusion that the Judges cannot use the prevailing statutory rate for a licensee as the starting point for setting that licensee's rate for the upcoming rate period. To the contrary, such an approach has been used in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services* ("*SDARS II*"), 78 Fed. Reg. 23,054-01, 23,058 (Apr. 17, 2013); *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding* ("*Phonorecords I*"), 74 Fed. Reg. 4,510, 4,523 (Jan. 26, 2009). Indeed, on appeal of the *SDARS II* determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1012 (D.C. Cir. 2014) ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Reply to SEPCL 4 (pp. 540-541):

Nothing in the cited usage of the words "determine" or "establish" indicates any congressional intent to deprive the Judges of the discretion to use a licensee's prevailing rate as the starting point for setting that licensee's rate for the upcoming period. Nor does SoundExchange cite a single precedent supporting such a cramped interpretation. Such an approach has been used in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. Indeed, on appeal of the *SDARS II* determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Reply to SEPCL 5 (p. 541):

Nothing in the cited usage of the words "determine" or "adjust" supports the dichotomy SoundExchange seeks to read into those terms, or otherwise indicates any congressional intent to deprive the Judges of the discretion to use a licensee's prevailing rate as the starting point for setting that licensee's rate for the upcoming period. Nor does SoundExchange cite a single precedent supporting such a cramped interpretation. The Judges have used the terms "determination" and "adjustment" interchangeably, including in their notice adopting the settlement of the PSS rate in

SDARS I. See Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services ("*SDARS I PSS Settlement*"), 72 Fed. Reg. 71,795-01 (Dec. 19, 2007). The prevailing rate has been used as the starting point for setting the rate in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. Indeed, on appeal of the *SDARS II* determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

<u>Reply to SEPCL 6 (pp. 541-541):</u>

Nothing in the general guidelines for statutory construction cited by SoundExchange applies to Congress's use of "determine" and "adjust," because the two terms do not necessarily mean different things. An "adjustment" of rates is nothing more than a "determination" of a rate where there is already a prevailing rate in place. Nor do the statutory provisions at issue indicate any congressional intent to deprive the Judges of the discretion to use a licensee's prevailing rate as the starting point for setting that licensee's rate for the upcoming period. Nor does SoundExchange cite a single precedent supporting such a cramped interpretation. The Judges have used the terms "determination" and "adjustment" interchangeably, including in their notice adopting the settlement of the PSS rate in *SDARS I. See*

SDARS I PSS Settlement, 72 Fed. Reg. 71,795-01. The prevailing rate has been used as the starting point for setting the rate in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. Indeed, on appeal of the *SDARS II* determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Reply to SEPCL 7 (p. 542):

The statutory language cited by SoundExchange does nothing more than demonstrate that when there is a prevailing rate at the time Congress drafts a statute, it tends to use the term "adjustment" to describe the rate determination process, but when there is no prevailing rate, it uses the term "determination" because there is no prevailing rate to adjust in the first resulting proceeding. The Judges have used the terms "determination" and "adjustment" interchangeably, including in their notice adopting the settlement of the PSS rate in *SDARS I. See SDARS I PSS Settlement*, 72 Fed. Reg. 71,795-01. The prevailing rate has been used as the starting point for setting the rate in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. Indeed, on appeal of the *SDARS II*

determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Reply to SEPCL 8 (pp. 542-543):

SoundExchange misstates the Judges' past practice. In fact, the Judges have used the terms "determination" and "adjustment" interchangeably, including in their notice adopting the settlement of the PSS rate in *SDARS I*. *See SDARS I PSS Settlement*, 72 Fed. Reg. 71,795-01. They have not, as SoundExchange implies, limited their rate-setting methodology to benchmarking in Section 114 proceedings, or others where Congress used the term "determine." The prevailing rate has been used as the starting point for setting the rate in prior proceedings, including the *SDARS II* and *Phonorecords I* proceedings. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. Indeed, on appeal of the *SDARS II* determination, the D.C. Circuit Court of Appeals rejected SoundExchange's argument that the Judges erred by using the prevailing rate as the starting point for the Section 801(b)(1) analysis. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Reply to SEPCL 9 (p. 543):

This Proposed Conclusion adds no new analysis. It merely restates SEPCL 3-9. Accordingly, Music Choice incorporates by reference herein its Replies to SEPCL 3–9.

Reply to SEPCL 10 (p. 583):

No response.

Reply to SEPCL 11 (p. 583):

Music Choice agrees that this is one available methodology for setting rates in this proceeding, but it is not the only available methodology. The Judges may also use economic models to directly estimate a marketplace rate or otherwise develop a starting point for the Section 801(b)(1) policy analysis. *See, e.g.*, *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13,423-02, 13,428 (Mar. 13, 2015) ("To assess relative marketplace value, the Judges previously have looked to hypothetical, simulated, or analogous markets . . . ."); *id.* at 13,428-30 (discussing the use of a Shapley valuation model to determine relative market value); *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, ("*SDARS I*"), 73 Fed. Reg. 4,080-01, 4,092 (Jan. 24, 2008) ("[A] non-cooperative game approach may have been more appropriate under the circumstances"). The Judges may also use the prevailing rate as a starting point. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b)

analysis."); *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. 4,510, 4,523.

Reply to SEPCL 12 (pp. 583-584):

Music Choice agrees that after a starting point rate, or range of rates, is developed, that starting point must be further evaluated pursuant to the Section 801(b)(1) policy objectives. The Section 801(b)(1) standard requires that the Copyright Royalty Judges exercise "legislative discretion" in making independent policy determinations that balance the interests of copyright owners and users. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1224 (D.C. Cir. 2009); *Recording Indus. Assn. of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 8-9 (D.C. Cir. 1981) (holding that the statutory rate-setting factors of Section 801(b)(1) "invite the Tribunal [now the Judges] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users").

If the starting point is limited to one single rate, that rate should be adjusted to maximally promote the four policy objectives (and sub-objectives). If the starting point is a range of reason, analysis of the policy objectives may be used to select a rate from within that range, with the analysis of the various objectives used to determine where within that range the rate should be set. Indeed, this very approach was used in the first PSS rate proceeding by both the CARP and the Librarian of Congress. In that proceeding, the CARP "considered three benchmarks, weighing each in light of the record evidence to determine whether the proposed

models shed light on how the marketplace would value a performance license in sound recordings. Once the Panel identified the useful models, it used the corresponding rate information to craft a range of potential royalty rates for the section 114 license, then chose the rate within the range which would further the stated statutory objectives." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings* ("*Librarian's PSS I Determination*"), 63 Fed. Reg. 25,394-01, 25,396 (May 8, 1998). On appeal, the Register rejected certain of the CARP's adjustments to the benchmarks and weighed them somewhat differently, but nevertheless followed the same basic approach. *See id.* at 25,407 ("The Register approves the Panel's basic approach in utilizing the factors to determine its rate for the digital performance right and adopts the Panel's findings where the evidence supports its conclusions"). Such analysis necessarily entails evaluating each factor individually, but then balancing the various objectives.

<u>Reply to SEPCL 13 (p. 584):</u>

This conclusion is flatly wrong, because it is premised upon an invalid presumption that marketplace rates always maximally further all four of the Section 801(b)(1) policy objective. This presumption is not only false as a matter of fact, it is contrary to appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to

be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit Court of Appeals affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *Recording Indus. Assn. of American v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999). The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id.* Notably, the court of appeals issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1)

> and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects."

Id. (citations omitted).

Applying a presumption that marketplace benchmarks satisfy any, much less all, of the Section 801(b)(1) policy objectives would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"); *See also* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

This is not to say that rates contained in marketplace agreements can never be found to further the policy objectives of Section 801(b). However, such a finding could not be based upon a general rule or presumption. Instead, it would have to be specific to a particular marketplace agreement and based upon a specific evidentiary showing with respect to the policy objectives as applied to that rate when applied to the PSS.

Reply to SEPCL 14 (pp. 584-585):

As noted in Music Choice's Reply to SEPCL 13, this conclusion's premise, that the Section 801(b)(1) policy factor analysis considers only differences between the benchmark and target markets, is false. Additionally, although any adjustments must be supported by record evidence, the Judges are not limited to consideration of adjustments that can be precisely quantified with mathematical precision. Unlike in rate-setting proceedings pursuant to the marketplace rate standard applicable to webcasters and new subscription services providing audio channels to cable and satellite television subscribers (the "CABSATs"), the Section 801(b)(1) standard requires that the Copyright Royalty Judges exercise "legislative discretion" in making independent policy determinations that balance the interests of copyright owners and users. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d at 1224; *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8-9 (holding that the statutory rate-setting factors of Section 801(b)(1) "invite the Tribunal [now the Judges] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users"). Because of the fundamental fairness and public policy focus of the PSS rate standard, as well as the unique legislative purpose of the PSS designation, neo-classical economics is of limited assistance in interpreting and applying the PSS rate standard. MC PFF ¶¶ 326-31; *see, e.g.*, 5/3/17 Tr. 2317:20-25 (Wazzan); 4/26/17 Tr. 1281:17-25 (Lys); 4/27/17 Tr. 1407:17-1409:3 (Lys).

Rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music Operators Ass'n. v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1159 (7th Cir. 1982). The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19. Consequently, the Judges should not refuse to rely on evidence of facts relevant to the policy objectives, such as the promotional impact of Music Choice, merely because the impact of those facts cannot be specifically or precisely calculated. If such facts provide directional guidance for adjustment of the PSS rate, they should be considered.

Reply to SEPCL 15 (p. 589):

As a preliminary matter, with respect to setting the PSS rate, the Section 801(b)(1) factors must be interpreted in light of the unique legislative purpose behind the creation of the PSS license. *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, 46 Fed. Reg. 10,466-02, 10,479 (Feb. 3, 1981) (holding that the Section 801(b)(1) policy objectives in a mechanical license proceeding must be interpreted in light of the specific legislative purpose of the Section 115 mechanical license). Consequently, interpretations of the policy factors in proceedings for licenses other than the PSS are not necessarily dispositive of interpretive issues in this proceeding.

Music Choice agrees that one consideration in the Judges' analysis of the PSS factors should be the PSS rate's potential effect on the record companies' incentive to create additional sound recordings that can be made available to the public through the PSS. SoundExchange has introduced no evidence of the degree to which the PSS rate actually affects the record company's incentives to increase or decrease the creation of sound recordings. Relying on a presumption, as SoundExchange seeks to do, that a market rate always maximizes a seller's output is clearly wrong. Crawford WRT, Trial Ex. 59, ¶¶ 140-49.

Moreover, the creation of sound recordings should not be the end of the inquiry. Merely creating sound recordings does not make them "available to the public." Consequently, the Judges should also consider the rate's effect on Music Choice's efforts to maximize the availability of those recordings through its service, as well as the various original works that Music Choice creates as part of its service, as well as the promotional impact of Music Choice's service and the effect that impact has on the creation of sound recordings. *See* MC PCL ¶¶ 43-45, 136-44.

<u>Reply to SEPCL 16 (p. 590):</u>

Although, as recognized in the cases cited by SoundExchange, the record companies historically have made the recordings available by their distribution of physical copies, that mode of distribution is disappearing and, in any event, is irrelevant to the PSS rate. Consequently, the Judges should also consider the rate's effect on Music Choice's efforts to maximize the availability of those recordings through its service, as well as the various original works that Music Choice creates

as part of its service, as well as the promotional impact of Music Choice's service and the effect that impact has on the creation of sound recordings. *See* MC PCL ¶¶ 43-45, 136-44.

Reply to SEPCL 17 (p. 596):

Marketplace outcomes are not necessarily fair and cannot be assumed necessarily to promote the second policy objective of fair return and fair income. *First*, such a presumption is inconsistent with the legislative purpose of the PSS license and applicable appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit Court of Appeals affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *Recording Indus. Assn. of American v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be

defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id.* Notably, the court of appeals issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects."

Id. (citations omitted).

Applying a presumption that marketplace rates inherently provide a fair return and fair income under the second policy objective would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. United States*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should

be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-Zhuo*, 70 F.3d at 139 ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). *See also* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

Second, SoundExchange's claim (and the Judges' view in the cited decisions) that market rates inherently satisfy the second objective is grounded in testimony from prior proceedings based on principles of neoclassical economics. As the record demonstrates in this proceeding, however, neoclassical economics does not actually deal with fairness, much less fairness in the legal sense embodied in the Section 801(b)(1) policy objectives, and is of limited help advancing the equitable policy objectives intentionally applied by Congress rather than have the PSS subject to a marketplace rate standard. *SoundExchange v. Librarian of Congress*, 571 F.3d at 1224; *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8-9 (holding that the statutory rate-setting factors of Section 801(b)(1) "invite the Tribunal [now the Judges] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users."); Crawford WRT, Trial Ex. 59, ¶¶ 150-58. MC PCL ¶ 25; MC PFF ¶¶ 326-31; *see, e.g.*, 5/3/17 Tr. 2317:20-25 (Wazzan); 4/26/17 Tr. 1281:17-25 (Lys); 4/27/17 Tr. 1407:17-1409:3 (Lys).

Reply to SEPCL 18 (p. 626):

SoundExchange's citation of *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d at 1157 for the supposed proposition that the third policy objective is one that "marketplace evidence, standing alone does not address" is wildly misleading. There is no discussion of the third policy objective anywhere on the cited page. Moreover, SoundExchange quotes part of a sentence out of context, but the full portion of the decision from which that quote is taken actually disproves SoundExchange's argument. In fact, in that decision the Seventh Circuit Court of Appeals rejected a variation of SoundExchange's position, holding that a rate set pursuant to the Section 801(b)(1) policy objectives need **not** be directly linked to a marketplace rate and that marketplace evidence had to be considered "in light of" the four policy objectives:

> In its decision, the Tribunal acknowledged that the rate which it approved could not be directly linked to marketplace parallels, but it found that such parallels served as appropriate points of reference to be weighed together with the entire record and the statutory criteria. Although we agree with ASCAP that the analogous marketplace evidence is significant, we do not believe that the Tribunal was bound by that evidence to select a fee rate within the $70.00-$140.00 "zone" which, according to ASCAP, governs this case. The Tribunal carefully weighed the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arrived at a royalty rate for coin-operated phonorecord players of $50.00 per machine. In recognition particularly of the fourth statutory criterion, which counseled minimization of the disruptive impact on the industries involved, the Tribunal ordered the $50.00 rate to go into effect on a phased-in basis. Indeed, the Tribunal could not ignore this statutory directive to consider industry disruption-a

> factor which the marketplace evidence, standing alone, does not address. Moreover, AMOA accurately points out that certain characteristics of jukebox music such as direct customer selection and a direct customer charge for the music, are not found in the forms of music relied on for the marketplace analogies. Thus, we believe that the Tribunal's reliance on the ASCAP/SESAC evidence together with the statutory criteria and the entire record in arriving at the $50.00 fee is not arbitrary and capricious and is fully supported by substantial evidence on the record as a whole.

Id. (emphasis added). In doing so, the court noted that the fourth factor could not possibly be addressed by marketplace evidence alone. By giving that example, the court did not hold that all of the other factors could be addressed by marketplace evidence alone. Such a reading is inconsistent with the totality of the court's ruling that the Tribunal appropriately considered available marketplace evidence, along with other evidence and the policy objectives themselves, to properly set the rate.

Reply to SEPCL 19 (pp. 626-627):

As a preliminary matter, the language in the willing buyer / willing seller standard is not identical to that of the third Section 801(b)(1) policy objective, which includes the parties' relative contribution to the opening of new markets for creative expression and media for their communication. This sub-factor is particularly important to determination of rates and terms for the PSS, which were the world's first digital music services. The very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants was to recognize the PSS' unique role in opening new

markets for creative expression and media for their communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); H.R. Rep. No. 105-796, at 81 (1998)("*DMCA Committee Report*"); *Opinion of the Register on a certified question from the Judges*, 71 Fed. Reg. 64,639, 64,646-64,647 (Nov. 23, 2006)("*Register's PSS Opinion*"); *see* MC PCL ¶¶ 7-21. Thus, any argument that the third factor is no different from a marketplace rate standard must be rejected for that reason alone. Moreover, as set forth in Music Choice's Reply to SEPCL 13, which Music Choice incorporates by reference herein, any presumption that a marketplace rate necessarily promotes any of the Section 801(b)(1) policy objectives is inconsistent with the legislative intent and appellate precedent applicable to the PSS license.

Reply to SEPCL 20 (p. 627):

As noted in Music Choice's Reply to SEPCL 13, which Music Choice incorporates by reference herein, this conclusion's premise, that the Section 801(b)(1) policy factor analysis only considers differences between the benchmark and target markets, is false.

Reply to SEPCL 21 (p. 636):

Music Choice agrees that marketplace rates do not inherently satisfy the fourth policy objective, but as set forth in various of Music Choice's Replies above, including its Reply to SEPCL 13, which Music Choice incorporates by reference

herein, none of the other policy objectives are necessarily satisfied by market rates, either.

Reply to SEPCL 22 (p. 637):

Music Choice acknowledges that the Judges have, in certain prior proceedings, created a narrow standard in connection with the fourth policy objective, stating that this objective should impact the rate under consideration only if that rate would "directly produce[] an adverse impact that is substantial, immediate, and irreversible in the short-run." *SDARS II*, 78 Fed. Reg. at 23,061. That strict limitation on the scope of the fourth policy objectives has no support in the legislative history or statutory language, which requires that the rate "minimize any disruptive impact," 17 U.S.C. § 801(b)(1)(D), and is contrary to the precedent of the *PSS I* appeal, which held that "a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business [i.e., the PSS] to continue to do so." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,408. To be sure, the rate need not completely avoid any negative impact on the industries, *id.*, but the rate also should not be the reason for Music Choice's demise. The CARP and Register were focused on avoiding a rate that would "cause one or all of the Services to abandon the businesses." *Id.* Under the existing and prior rates, Music Choice is the only PSS remaining as an active market participant. MC PFF ¶¶ 467-68, 504. The cramped and narrow view of disruption embodied in the "substantial, immediate, and irreversible" test must therefore be rejected. Instead, a

fair rate must be set that, among other things, strives to "minimize any disruptive impact" on the PSS.

Reply to SEPCL 23-24 (p. 637-638):

No response.

Reply to SEPCL 25 (p. 668):

Music Choice agrees that this is one available methodology for setting rates in this proceeding, but it is not the only available methodology. The Judges may also use economic models to directly estimate a marketplace rate or otherwise develop a starting point for the Section 801(b)(1) policy analysis. *See, e.g.*, *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. at 13,428 ("To assess relative marketplace value, the Judges previously have looked to hypothetical, simulated, or analogous markets . . . ."); *id.* at 13,428-30 (discussing the use of a Shapley valuation model to determine relative market value); *SDARS I*, 73 Fed. Reg. at 4,092 ("[A] non-cooperative game approach may have been more appropriate under the circumstances"). The Judges may also use the prevailing rate as a starting point. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis."); *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523.

Reply to SEPCL 26-32 (pp. 679-702):

No response.

Reply to SEPCL 33 (p. 719):

Although there may be, and are, many additional differences between the PSS and any given "new subscription service" that could be relevant in a rate proceeding, Music Choice agrees that the statutory definition is tied to services in operation prior to the enactment of the DMCA. Congress used that temporal dividing line precisely because its very purpose in the creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants was to recognize the PSS' unique role in opening new markets for creative expression and media for their communication prior to the existence of the digital sound recording performance right. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Committee Report*, H.R. Rep. No. 105-796, at 81; *Register's PSS Opinion* at 64,646-64,647; *see* MC PCL ¶¶ 7-21. This congressional protection of the PSS' investments and business expectancies does not apply to "new subscription services" which, by definition, entered the market long after the passage of the DPRSRA and DMCA.

Reply to SEPCL 34-35 (pp. 722-723):

No response.

Reply to SEPCL 36 (p. 723):

Rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d at 1159. The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19. Unlike in rate-setting proceedings pursuant to the marketplace rate standard applicable to webcasters and new subscription services providing audio channels to cable and satellite television subscribers (the "CABSATs"), the Section 801(b)(1) standard requires that the Copyright Royalty Judges exercise "legislative discretion" in making independent policy determinations that balance the interests of copyright owners and users. *SoundExchange v. Librarian of Congress*, 571 F.3d at 1224; *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8-9 (holding that the statutory rate-setting factors of Section 801(b)(1) "invite the Tribunal [now the Judges] to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users"). Because of the fundamental fairness and public policy focus of the PSS rate standard, as well as the unique legislative purpose of the PSS designation, neo-classical economics is of limited assistance in interpreting and applying the PSS rate standard. MC PFF ¶¶ 326-31; *see, e.g.*, 5/3/17 Tr. 2317:20-25 (Wazzan); 4/26/17 Tr. 1281:17-25 (Lys); 4/27/17 Tr. 1407:17-1409:3 (Lys).

Although reliable marketplace benchmarks, if available, may be instructive to setting rates under Section 801(b)(1), such evidence is not necessary so long as the Judges set rates that further the policy objectives. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

<u>Reply to SEPCL 37 (p. 723):</u>

SoundExchange's citation is accurate, and Music Choice acknowledges that benchmarking is one methodology that the Judges may use in this proceeding, to the extent a reliable benchmark is available. However, the quoted language does not state that benchmarking is the only available methodology. Moreover, subsequent to the *PSS I* proceeding, the Judges have used other methodologies, including starting with the prevailing rate and analyzing it under the Section 801(b)(1) policy objectives. *See Music Choice v. Copyright Royalty B'd*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b)

analysis."); *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. The Judges may also use economic models rather than marketplace benchmarks. *See, e.g.*, *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. at 13,428 ("To assess relative marketplace value, the Judges previously have looked to hypothetical, simulated, or analogous markets . . . ."); *id.* at 13,428-30 (discussing the use of a Shapley valuation model to determine relative market value); *SDARS I*, 73 Fed. Reg. at 4,092 ("[A] non-cooperative game approach may have been more appropriate under the circumstances").

Reply to SEPCL 38 (pp. 723-724):

Music Choice acknowledges that benchmarking is one methodology that the Judges may use in this proceeding, to the extent a reliable benchmark is available. However, the quoted language does not state that benchmarking is the only available methodology. Moreover, subsequent to the *PSS I* proceeding, the Judges have used other methodologies, including starting with the prevailing rate and analyzing it under the Section 801(b)(1) policy objectives. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis."); *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. The Judges may also use economic models rather than use marketplace benchmarks. *See, e.g.*, *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. at 13,428 ("To assess relative marketplace value, the Judges previously have looked to hypothetical, simulated, or analogous markets

. . . ."); *id.* at 13,428-30 (discussing the use of a Shapley valuation model to determine relative market value); *SDARS I*, 73 Fed. Reg. at 4,092 ("[A] non-cooperative game approach may have been more appropriate under the circumstances").

Reply to SEPCL 39 (p. 730):

No response.

Reply to SEPCL 40 (p. 806):

By suddenly – *after twenty years* – seeking to require Music Choice to pay additional, separate royalties pursuant to the commercial subscription webcasting license and rates, SoundExchange certainly does seek to change the scope of the PSS license. The legislative history of the section of the DMCA creating the PSS license clearly demonstrates that, unlike the CABSATs or SDARS, Congress specifically intended the PSS license to include internet-based transmissions if the nature of those transmissions is similar to the service's television-based transmissions. See MC PFF ¶¶ 532-34. When Congress passed the DMCA, the Conference Committee report expressly noted that "if a cable subscription music service making transmissions on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service." *See DMCA Conference Report* at 89; *see also Register's PSS Opinion,* 71 Fed. Reg. at 64,642 ("A designation as a preexisting subscription service means that the service will pay royalty fees that are set according to a standard that may result in below market rates and it has the added

benefit that the service makes its offerings of subscription transmissions in a new medium without losing the status as a preexisting service." (emphasis added)).

Notably, Music Choice has been providing ancillary internet transmissions of its residential audio channels to its PSS subscribers since 1996, before Congress passed the DMCA. Thus, Music Choice did not "expand" into internet service. Those transmissions were already a part of the very service existing on July 31, 1998, that Congress expressly grandfathered as a PSS. In any event, Music Choice has been paying the PSS royalties based upon revenues generated from the bundled television and internet service for all that time, and SoundExchange has never before taken the position that those payments did not cover the entire PSS. MC PCL ¶¶ 204-207.

SoundExchange cites no record evidence for its claim that Music Choice's internet transmissions are "sufficiently different from the core PSS television-based service," nor for its claim that those transmissions have recently "increased to a significant level." This is because the uncontroverted record evidence demonstrates that Music Choice's internet transmissions are identical to its television audio channels, with the addition of twenty-five similar audio channels available only on the internet platforms, which are programmed in exactly the same way. *See* MC PFF ¶ 522-26, 537-40.

<u>Reply to SEPCL 41 (p. 807):</u>

There is nothing in the Copyright Act that requires ancillary internet transmissions by the CABSATs to be excluded from the CABSAT license. That limitation is solely

the function of the CABSAT terms, which in turn are solely the function of the settlement between SoundExchange and Sirius XM. That settlement, and the resulting rates and terms, cannot be used as a benchmark for this proceeding for a number of independently dispositive reasons. *See* MC PCL ¶¶ 82-100. Additionally, Sirius XM, the only counterparty to the CABSAT settlement with SoundExchange, does not bundle internet services with its CABSAT service, but rather sells a separate internet-based product at a significant additional fee. *See* MC PFF ¶ 515; Del Beccaro WRT, Trial Ex. 57, pp. 3-4. As a result, Sirius XM had no incentive to negotiate away the separate webcasting royalties in the CABSAT settlement, because that provision does not apply to Sirius XM. *See* Crawford WRT, Trial Ex. 59, ¶ 217. Finally, the only CABSAT that has ever bundled internet access with its CABSAT service did not actually pay any webcasting royalties for two years after its webcasting usage spiked beyond *de minimis* levels, and SoundExchange has done nothing to require payment for that usage. MC PFF ¶¶ 541-46; Crawford WRT, Trial Ex. 59, ¶¶ 207-08; *see, e.g.*, 4/25/2017 Tr. 825:4-828:12 (Crawford), 5/10/2017 Tr. 3211:7-3212:5, 3301:7-23 (Bender), 5/18/2017 Tr. 4603:11-4604:21 (Del Beccaro). Thus, the mere fact that the current CABSAT regulations exclude internet transmissions from the CABSAT license is wholly irrelevant to whether they should be excluded from the PSS license.

<u>Reply to SEPCL 42 (pp. 807-808):</u>

This conclusion is duplicative of SEPCL 41. Music Choice therefore incorporates here its Reply to SEPCL 41.

Reply to SEPCL 43 (p. 842):

This conclusion is flatly wrong, because it is premised upon an invalid presumption that marketplace rates always maximally further all four of the Section 801(b)(1) policy objectives. This presumption is not only false as a matter of fact, it is contrary to appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit Court of Appeals affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *Recording Indus. Assn. of American v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id.* Notably, the court of appeals issued its decision after the passage of

the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects."

Id. (citations omitted).

Applying a presumption that marketplace benchmarks satisfy any, much less all, of the Section 801(b)(1) policy objectives would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. United States*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-Zhuo*, 70 F.3d at 139 ("An endlessly reiterated principle of

statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). *See also* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

This is not to say that rates contained in marketplace agreements can never be found to further the policy objectives of Section 801(b). However, such a finding could not be based upon a general rule or presumption. Instead, it would have to be specific to a particular marketplace agreement and based upon a specific evidentiary showing with respect to the policy objectives as applied to that rate when applied to the PSS.

Reply to SEPCL 44 (p. 853):

Music Choice acknowledges that the Judges have, in certain prior proceedings, created a narrow standard in connection with the fourth policy objective, stating that this objective should only impact the rate under consideration if that rate would "directly produce[] an adverse impact that is substantial, immediate, and irreversible in the short-run." *SDARS II*, 78 Fed. Reg. at 23,061 That strict limitation on the scope of the fourth policy objectives has no support in the legislative history or statutory language, which requires that the rate "minimize any disruptive impact," 17 U.S.C. § 801(b)(1)(D), and is contrary to the precedent of the *PSS I* appeal, which acknowledged that "a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business [i.e., the PSS] to continue to do so." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,408. To be sure, the rate need not completely avoid any negative

impact on the industries, *id.*, but the rate also should not be the reason for Music Choice's demise. The CARP and Register were focused on avoiding a rate that would "cause one or all of the Services to abandon their businesses." *Id.* Under the existing and prior rates, Music Choice is the only PSS remaining as an active market participant. MC PFF ¶¶ 467-68, 504. The cramped and narrow view of disruption embodied in the "substantial, immediate, and irreversible" test must therefore be rejected. Instead, a fair rate must be set that, among other things, strives to "minimize any disruptive impact" on the PSS. 17 U.S.C. §801(b)(1)(D).

Reply to SEPCL 45-46 (p. 860):

No response.

Reply to SEPCL 47 (p. 860):

Although the Judges have sometimes implemented conforming changes to the various license regulations, especially in the absence of any dispute, there is no applicable statutory presumption or congressional intent that regulations for different services subject to the Section 114 compulsory license be uniform. To the contrary, the legislative history of the DPRSRA indicates that Congress intended that different terms (as well as rates) be set for different services, as recognized by Register in the original PSS proceeding. *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,409 (noting the broad discretion Congress granted the CARPs to set different rates and terms for different types of digital audio services). Indeed, Section 114 itself provides that the Copyright Royalty Judges should set different terms, as well as rates, for different types of digital audio services. 17 U.S.C.

§ 114(f)(1)(A). In *SDARS II*, the Judges rejected a host of similar (and in some cases identical) "conforming" changes requested by SoundExchange because it failed to provide any justification, other than consistency with other regulations, and should do the same here. *SDARS II*, 78 Fed. Reg. at 23,074 ("[T]he Judges decline to adopt the proposed language because it would be a substantive change for which SoundExchange provides no justification"). Given the many unique features of the PSS compared to other statutory licensees, as well as the fact that the PSS regulations only apply to two licensees, it is neither surprising nor inappropriate that the PSS regulations differ in some respects from those of other statutory licensees.

Moreover, it is well established that the Copyright Royalty Judges may not impose terms in the applicable regulations that are unsupported by evidence in the record. The D.C. Circuit Court of Appeals has held that mere argument that proposed regulations conform or are parallel to other existing regulations is insufficient to support imposition of such conforming amendments. *Recording Indus. Assn. of American v. Librarian of Congress*, 176 F.3d at 535-36. Thus, with respect to terms that are already long established, it is the party seeking to change the terms, and not the party seeking to retain the existing terms, that bears the burden of supporting the changes with record evidence.

Notably, SoundExchange and the PSS have been operating under the existing PSS regulations for approximately twenty years, and SoundExchange was unable to identify a single actual problem caused by the existing regulations in all

that time. MC PFF ¶¶ 565-71. Moreover, SoundExchange administers statutory license payments for only five different classes of licensees. 5/10/2017 Tr. 3317:5-8 (Bender). Only two companies actually pay license fees pursuant to the PSS license, and the number of PSS is strictly limited by statute. Thus, any real burden of having different terms for the PSS is insignificant.

Reply to SEPCL 48-54 (pp. 876-879, 903):

No response.

III. REPLIES TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT

Reply to SEPFF 1-18 (pp. 1-6):

No response.

Reply to SEPFF 19 (p. 6):

The characterization of Music Choice's internet transmissions as "webcasting" is misleading and factually inaccurate. Webcasts are typically one-to-one transmissions to users, in which the programming of each transmission is unique to each user. Music Choice, by contrast is a broadcaster: Its transmissions, including those through its web portal and apps, are one-to-many radio broadcasts, where every user hears the same programming on the same channel. 5/18/17 Tr. 4651:1-14, 4652:13-20 (Del Beccaro). Music Choice provides those transmissions only to its authenticated PSS subscribers. Del Beccaro WRT, Trial Ex. 57, p. 25.

SoundExchange's attempt to characterize Music Choice's internet transmissions as outside the scope of the PSS license ignores Congress's express

intent to allow PSS providers to expand their methods of transmission beyond the television, provided the nature of the service itself remains the same. Bender WRT, Trial Ex. 48, p. 28. In fact, the legislative history of the PSS license explicitly states that "if a cable subscription music service making transmissions on July 31, 1998 were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service." *DMCA Committee Report*, at 89. Under the clear legislative intent behind the PSS license, the internet transmissions of the Music Choice channels are an integrated part of its PSS offering, and are included in the PSS royalty payments Music Choice makes pursuant to the statutory license.

Reply to SEPFF 20-72 (pp. 7-27):

No response.

Reply to SEPFF 73 (p. 27):

While 37 C.F.R. § 351.4(b)(3) allows parties to amend their rate proposals up to, and including, the filing of proposed findings of fact and conclusions of law in order to take into account any changes justified and supported by record evidence after the hearing where issue was joined, it would be inequitable to permit SoundExchange's wholesale rewrite of its method for calculating its proposed additional royalty for Music Choice's ancillary internet transmissions after the close of the proceeding. At this time, issue joinder can no longer occur, SoundExchange's witnesses can no longer be cross-examined regarding these changes, and Music Choice's witnesses no longer have the opportunity to testify regarding the problems

these changes could cause. Moreover, SoundExchange's change to its method of calculating its proposed internet royalty payments are not supported by any record evidence, and should be rejected on that ground as well. This new rate calculation is not in the current webcasting regulations and is not applicable to the CABSAT licensees, bringing it outside the scope of SoundExchange's sole justification for this new, additional royalty burden in the first place. Indeed, SoundExchange has not submitted a single proposed finding of fact or conclusion of law supporting this new change to its rate proposal for the PSS.

Moreover, the record evidence demonstrates that the only data Music Choice has relating to its internet transmissions cannot reliably be used to estimate the number of actual performances or the particular recordings performed. 5/18/17 Tr. 4650:12-4652:20, 4669:22-4672:8 (Del Beccaro). Indeed, when SoundExchange tried to estimate the number of performances based upon Music Choice's listening data, it used two different methodologies, which yielded results that differed by almost one billion listening hours per month. SEPFF 2009. Had Music Choice been given the opportunity to specifically rebut this new proposal, it could have developed a more detailed record as to why this new proposal is improper and unworkable, but SoundExchange's unjustified delay in amending its proposal deprived Music Choice of that ability. Notably, Music Choice made it clear during the direct phase discovery period in this proceeding that it could not track individual internet performances. Trial Ex. 504, p. 11 (Music Choice Interrogatory Responses, dated November 22, 2016). Thus, SoundExchange was on notice of this fact since

November of last year, at the latest, prior to the submission of written rebuttal testimony. There is simply no excuse for SoundExchange's delay in proposing this significant change in its rate proposal until after the trial closed.

Reply to SEPFF 74 (p. 27):

Music Choice incorporates by reference its Reply to SEPFF 73.

Reply to SEPFF 75 (p. 27):

Music Choice incorporates by reference its Reply to SEPFF 73.

Reply to SEPFF 76-81 (pp. 28-29):

No response.

Reply to SEPFF 82 (p. 29):

Music Choice does not dispute that SoundExchange proposes the rate described in SEPFF 82. However, that rate proposal should be rejected for the myriad reasons discussed *infra*.

Reply to SEPFF 83 (p. 29):

The definition of "subscriber" proposed by SoundExchange is a new definition, not included in the current PSS regulations. This proposed addition is intended to facilitate SoundExchange's proposed change from a percentage of revenue rate to a per subscriber rate. However, as discussed in great length in Music Choice's Replies to SEPPF 1960 – SEPFF 1998, the proposal to change from a percentage of revenue based rate to a per-subscribe rate is premised on SoundExchange's patently false assertion that Music Choice gives its cable company

partners below market rates. Because the sole premise for changing the PSS rate structure to a per-subscriber basis is plainly false, the percentage of revenue structure should remain, the added definition of "subscriber" should be rejected as unnecessary to the function of the PSS regulations.

Reply to SEPFF 84 (pp. 29-30):

SoundExchange's proposal that Music Choice pay additional royalties for its internet transmissions ignores the plain statutory intent of the PSS license, which permits the PSS to expand into other methods of transmission, provided the nature of the service remains the same. Bender WRT, Trial Ex. 48, p. 28. *See also DMCA Committee Report*, at 89 (noting that "if a cable subscription music service making transmissions on July 31, 1998 were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service."). *See also*, Music Choice's Replies to SEPFFs 2003-2016.

Moreover, and as SoundExchange is well aware given Music Choice's discovery responses last year and Mr. Del Beccaro's testimony at trial Music Choice does not have the data necessary to track individual performances. Trial Ex. 504, p. 11 (Music Choice Interrogatory Responses, dated November 22, 2016); Del Beccaro WRT, Trial Ex. 57, p. 31, 5/18/17 Tr. 4658:12-23 (Del Beccaro); Trial Ex. 978.

Sound Exchange now attempts to save its proposal by introducing an amended rate proposal after the close of trial. This is completely inappropriate, as set forth in Music Choice's Reply to SEPFF 73, which is incorporated herein by reference.

Reply to SEPFF 85 (p. 30):

SoundExchange's framing of its proposal as a mere continuation of the existing regulation is misleading. The current language of the minimum fee provision appears to be the product of a scrivener's error. In *SDARS II*, Music Choice and SoundExchange stipulated that for the PSS, the minimum fee should be governed by substantially the following regulatory language:

> Each Licensee making digital performances of sound recordings pursuant to 17 U. S. C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of $100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under [cross reference to bundled royalty rate] shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

Trial Ex. 930 at 2-3.

For unknown reasons, when the regulations were ultimately adopted, the stipulated language was not incorporated correctly in the current regulations, despite the fact that the *SDARS II* final determination had no mention of diversion from the agreed-upon language. *See* 37 C.F.R. § 382.3(b).

SoundExchange has provided no justification for why the existing error should be carried forward into the next rate period. 5/10/17 Tr. 3308:25-3313:5 (Bender). Nor would such a result be fair. If the PSS can only recoup their advance minimum payment against the small, 5% portion of each royalty payment attributed to the Section 112 ephemeral license, it will take much

longer to recoup the advance payment or may cause the payment to go entirely unrecouped. Del Beccaro WRT, Trial Ex. 57, p. 44. The minimum payment language should be changed back to the original language, as agreed to in *SDARS II*.

Reply to SEPFF 86 (p. 30):

No response.

Reply to SEPFF 87 (p. 30):

SoundExchange misleadingly characterizes its proposed regulations as "harmonizing" the PSS regulations to the current regulations in Part 380. Despite its claims that the changes it has proposed are intended to conform the PSS regulations with those in other parts of Chapter 37, many of SoundExchange's proposed regulations actually differ from those applicable to webcasters, showing that SoundExchange is cherry-picking changes that will most inure to its benefit. For example, it notably wants to keep the regulations different from the various other statutory license regulations with respect to the provision determining which party would bear the cost of an audit, because the PSS regulations are more favorable to SoundExchange on that point. Del Beccaro WRT, Trial Ex. 57, p. 37.

Reply to SEPFF 88-1764 (pp. 31-717):

No response.

Reply to SEPFF 1765 (p. 718):

SoundExchange's characterizations of Trial Exhibits 408 and 441 are misleading and based on pure speculation. While these exhibits were admitted

pursuant to a joint stipulation by the parties, Music Choice agreed to such admission with the understanding that, at trial, foundation would be laid and Music Choice's witnesses would have the opportunity to testify as to the meaning and accuracy of these documents. But at trial, SoundExchange did not use these documents, so the documents remain unexplained.

Because SoundExchange has never questioned Music Choice's witnesses as to the meaning of these documents, it speculates as to what Music Choice meant when it referred to the cost of its music rights. In any event, such speculation is irrelevant to analysis of the Section 801(b)(1) policy objectives in connection with the PSS license. The very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants (including the CABSATs) was to recognize the PSS' unique role in opening new markets for creative expression and media for their communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647; See MC PCL ¶¶ 7-21.

<u>Reply to SEPFF 1766 (p. 718):</u>

While the music marketplace has changed since 1998 and there are now many digital music services, Music Choice nonetheless remains unique among

digital music services – a fact that the Judges acknowledged just five years ago in *SDARS II*, finding that there were no appropriate benchmarks for the PSS given the unique characteristics of the PSS, which "significantly dim the possibility of market comparators." *SDARS II*, 78 Fed. Reg. at 23,058.

Moreover, it is misleading for SoundExchange to now cite the Section 801(b)(1) policy objectives and characterize its case as including an analysis of those factors. Indeed, SoundExchange cites only the language from the statute itself – and not any substantive analysis by Dr. Wazzan of the "existing economic conditions" because, in his written and trial testimony, Dr. Wazzan passed over the Section 801(b)(1) analysis. Instead he relied on Dr. Orszag's claim that a marketplace rate already incorporates all of the section 801(b)(1) policy objectives to support his benchmark. Wazzan WDT, Trial Ex. 501, p. 6 ¶19.

The evidence shows that under existing economic conditions, the record companies are thriving. Although the record industry previously experienced stress associated with the transition from physical to digital distribution, the record companies have remained consistently profitable throughout that transition. 5/16/17 Tr. 4186:2-25 (Gallien). Indeed, the record companies have effectively adapted to the changing market. Industry revenues have increased for the past two years and are projected to continue increasing for the foreseeable future. 5/16/17 Tr. 4169:4-9, 4191:5-11 (Gallien); 5/11/17 Tr. 3604:24-25 (Kushner).

Moreover, as Mr. Kushner admitted, record industry revenues are currently about the same as they were in 1982 and 1983 (even adjusting for inflation) – the time period before the CD replacement cycle briefly and artificially increased revenues for the industry. 5/11/17 Tr. 3597:22-3598:11 (Kushner); Trial Ex. 929. And just days prior to the commencement of the trial in this proceeding, Universal Music Group was valued at a staggering $22 billion dollars – a figure that its witnesses Messrs. Harrison and Gallien confirmed at trial. 5/16/17 Tr. 4079:7-15 (Harrison); 5/16/17 Tr. 4193:15-22 (Gallien). This is a significant increase from the valuations UMG had received only a few years ago, ranging between six or seven and fifteen billion Euros. 5/16/17 Tr. 4193:23-41944:16 (Gallien).

Reply to SEPFF 1767 (pp. 718-719):

Music Choice does not dispute that SoundExchange proposes the rates described above, but disputes that those rates would in any way further the Section 801(b)(1) policy objectives, as explained in more detail in Music Choice's Replies to SEPFFs 2112-2159. Moreover, the very premise of SoundExchange's case, that the PSS should have to pay the same rates as the CABSATs, is inconsistent with the legislative intent behind the PSS license. The very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants (including the CABSATs) was to recognize the PSS' unique role in opening new markets for creative expression and media for their

communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647; See MC PCL ¶¶ 7-21.

And SoundExchange's attempt to classify Music Choice's internet transmissions as "webcasting" is misleading and inappropriate, because Music Choice is a broadcaster, not a webcaster, as explained in Music Choice's Reply to SEPFF 19, which is incorporated by reference herein.

Music Choice's internet transmissions must be considered a part of Music Choice's PSS offering, not a separate webcasting offering – a fact made abundantly clear by the legislative history of the PSS license, which explicitly states that "if a cable subscription music service making transmissions on July 31, 1998 were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service." *DMCA Committee Report*, at 89. This legislative history makes clear that Congress specifically intended to allow the PSS to expand into new transmission platforms without penalty so long as the fundamental nature of the music channels remained the same and the service was provided on a subscription basis. Bender WRT, Trial Ex. 48, p. 28.

Notably, Music Choice subscribers have had access to Music Choice audio channels through internet transmissions since 1996, even before the PSS

category was created in the DMCA – initially simulcast over a web interface, and later accessible through mobile apps. Del Beccaro WRT, Trial Ex. 57, p. 25. And at all times, access to the internet simulcasts of Music Choice's audio channels has been limited to authenticated subscribers who received and paid for the Music Choice services through their cable packages. Del Beccaro WRT, Trial Ex. 57, p. 25.

Music Choice has always viewed these internet transmission as a minor component *integrated into* the residential audio PSS service. Del Beccaro WRT, Trial Ex. 57, p. 25; 5/18/17 Tr. 4599:6-11 (Del Beccaro). Music Choice's PSS license payments have included payments for its internet transmissions since 1996. Del Beccaro WRT, Trial Ex. 57, p. 27. To the extent Music Choice's internet transmissions have value, that value has been factored into the fee that Music Choice negotiates with its MVPD affiliates, and SoundExchange has been paid for that value through the percentage of revenue rate it receives for the PSS license. *Id.*

<u>Reply to SEPFF 1768 (p. 719):</u>

No response.

<u>Reply to SEPFF 1769 (p. 719):</u>

No response.

<u>Reply to SEPFF 1770 (pp. 719-720):</u>

While Music Choice does not dispute that SoundExchange proposes the rates identified in SEPFF 1770, this rate proposal must be rejected.

First, the royalty rates paid by CABSAT services cannot serve as a benchmark for those of the PSS. As explained in more detail in Music Choice's Reply to SEPFF 1820, SoundExchange's introduction of those rates as a benchmark is based on Dr. Wazzan's faulty assumption that those rates were set by the Judges in a proceeding applying the willing buyer / willing seller standard. In fact, contrary to Dr. Wazzan's key assumption, those rates were the product of a settlement between SoundExchange and a single CABSAT provider (Sirius XM), and the Judges had no authority to analyze, evaluate, or reject the settlement agreement. *See Determination of Terms and Royalty Rates for Ephemeral Reproductions and Public Performance of Sound Recordings by a New Subscription Service*, 80 Fed. Reg. 36,927-01 (June 29, 2015).

Moreover, the settlement expressly prohibited using the rates and terms therein as a benchmark in later royalty proceedings before the CRB. Trial Ex. 922. p. 2, ¶4 (emphasis added). That settlement was not indicative of any competitive marketplace transaction – a fact that the parties acknowledged in the language of the settlement agreement itself. *Id. See also* Crawford WRT, Trial Ex. 59, ¶¶55-56. 4/24/17 Tr. 779:13-781:20 (Crawford). Additionally, the CABSAT market is neither stable nor competitive: services paying CABSAT royalties pay large percentages of their revenues to SoundExchange – with Sirius XM paying a whopping [[[redacted]]] of revenue for its CABSAT royalty payments. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984. Before exiting the market, DMX was paying

[[[redacted]]] of its revenue for its CABSAT royalties. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Ex. 975.

SoundExchange also provides no justification for its proposed 3% annual rate increase. While Mr. Bender testified at trial that that he understood the annual increase structure to "track[] the historical trend in increases in the consumer fees," 5/10/17 Tr. 3220:1-3 (Bender), he did so without knowing that the Music Choice services is bundled with other offerings in cable packages and not sold as a standalone offering to consumers. 5/10/17 Tr. 3329:4-25 (Bender). As Mr. Del Beccaro testified, the prices that Music Choice has been able to obtain from the MVPDs for its service have historically decreased, not increased. Del Beccaro WDT, Trial Ex. 57, pp. 21-22. To impose an annual 3% increase, based on a per-subscriber rate not tied to Music Choice's actual revenues, would actually have the effect of a unjustified rate increase as Music Choice's per-subscriber fees from MVPDs continue to decline. Crawford WRT, Trial Ex. 59, ¶¶188-189. This effect would be fundamentally unfair.

<u>Reply to SEPFF 1771 (p. 720):</u>

SoundExchange's request to add the definition of "subscriber" to the PSS regulations is based on its proposed transition from a percentage of revenue rate structure to a per-subscriber rate structure for the PSS. But SoundExchange's rationale for that shift in revenue basis is based solely upon a false premise: Dr. Wazzan's disproven claim that Music Choice grants its cable partners lower rates

than non-partner affiliates, as discussed in detail in Music Choice's Replies to SEPFFs 1960-1998.

Moreover, despite its claim that its proposed changes to the regulations are intended to conform the PSS regulations to other currently codified regulations, SoundExchange now admits in this very proposed finding that it omitted a portion of the current regulation in 37 C.F.R. § 383.2(g). This illustrates that SoundExchange is not conforming its regulations as it claims, but simply cherry-picking the language it believes will be most beneficial.

However, Music Choice agrees that if the Judges were to implement a per-subscriber rate structure, the complete definition of "Subscriber"' found in 37 C.F.R. § 383.2(g) should be imported, as the previously eliminated proviso language would be necessary for Music Choice to comply with the requirements of this definition.

Reply to SEPFF 1772 (p. 720):

SoundExchange once again mischaracterizes Music Choice's internet transmissions as "webcasting" and Music Choice's internet transmissions as "functionally equivalent" to those of commercial webcasters. As explained in Music Choice's Replies to SEPFF 19 and SEPFF 1767, Music Choice is a broadcaster – transmitting its audio channels on a one-to-many basis to its authenticated subscribers over the internet is within the scope of the PSS license, as was made clear by the legislative history of that license – and Music Choice has been making its internet transmissions for almost as long as it has been in existence. Moreover, SoundExchange has provided no benchmarking analysis comparing the features of

commercial subscription webcasters, or the market characteristics in which those webcasters sell their services, to those of the PSS. Crawford WRT, Trial Ex. 59, ¶92; Del Beccaro WRT, Trial Ex. 57, p. 31. Indeed, SoundExchange has not even identified which webcasters actually pay under the subscription (as opposed to ad-supported) webcasting rates. Its proposed finding must be rejected.

Reply to SEPFF 1773 (pp. 720-721):

SoundExchange once again refers to Music Choice as a webcaster, and then attempts to paint it as an outlier among webcasters due to its inability to track individual performances on its internet transmissions. But, as explained in Music Choice's Replies to SEPFF 19 and SEPFF 1767, Music Choice is not a webcaster, and therefore does not invest in the infrastructure necessary to track individual performances. It is relatively simple for webcasters to track individual performances because their transmissions are one-to-one and therefore inherently contain the metadata necessary to track each performance. This is not true for Music Choice. As a broadcaster, it provides its service, including its internet broadcasts, on a one-to-many basis, which would require complex disaggregation to track individual performances. 5/18/17 Tr. 4569:22-4572:8, 4651:1-4652:20 (Del Beccaro). Especially given that Music Choice's internet broadcasts are only a very small component of its PSS, accounting for only [[[redacted]]] of its listening (Del Beccaro WRT, Trial Ex. 57, p. 26. 5/18/17 Tr. 4599:6-11 (Del Beccaro), it would make no sense for Music Choice to invest in the prohibitively expensive changes required to track its internet transmissions, especially considering that the cost of

such tracking would [[[redacted]]] 5/18/17 Tr. 4651:15-4652:8 (Del Beccaro).

Reply to SEPFF 1774 (p. 721):

SoundExchange's "accommodation" is actually part of an entirely new regulatory proposal. To introduce this change after the close of trial, when issue joinder is impossible and Music Choice cannot substantively respond to this new proposal is inappropriate and fundamentally inequitable.

As noted in Music Choice's Reply to SEPFF73, which is incorporated herein by reference, SoundExchange should not be permitted to blindside Music Choice with this substantive change to its proposed rates and terms at this late point in the proceeding, when Music Choice cannot substantively respond, particularly when it was on notice of Music Choice's inability to track individual performances at least as early as November of last year.

Reply to SEPFF 1775 (p. 721):

Music Choice incorporates by reference its Reply to SEPFF 85.

Reply to SEPFF 1776 (pp. 721-722):

This finding mischaracterizes Music Choice's case, as well as the record evidence regarding its current financial condition. Providing a fair income to the PSS under "existing economic conditions" is among the relevant considerations in the Section 801(b)(1) analysis used to determine an appropriate royalty rate for the PSS. To help the Judges in their analysis of this factor in every prior proceeding, Music Choice has presented information regarding its financial condition and

relevant economic factors and market forces affecting that financial condition. Indeed, Music Choice has faced financial challenges throughout most of its existence. Music Choice lost money [[ ]] Del Beccaro WDT, Trial Ex. 55, p. 20. But at the time of *SDARS II*, following years of losses, Music Choice had reached a period of modest profitability. Del Beccaro WDT, Trial Ex. 57, p. 21.

Music Choice has presented evidence in this proceeding that its financial condition is in fact *worse* than it was at the time of the last proceeding, due in part to the rate increase implemented in that proceeding, but also in part to changes in the MVPD market that are affecting the fees Music Choice can obtain from its cable affiliates – i.e., the existing economic conditions in the marketplace in which Music Choice operates. Specifically, consolidation among MVPDs and shrinking margins in the cable industry, combined with competitive pressure, have led to [[ ]] Del Beccaro WDT, Trial Ex. 55, p. 21-22. Smaller cable affiliates with whom Music Choice has historically been able to negotiate higher fees are being acquired by larger cable companies, which have increased bargaining leverage to negotiate lower rates. *Id.*, at p. 22.

In the past three years, Music Choice has seen a [[ ]] reduction in its average per-subscriber license rate. Three years ago, the average price for

[[[redacted]] of Music Choice's subscriber base was [[[redacted]]] per subscriber per month. The average price for Music Choice's [[[redacted]]] largest affiliates, which make up [[[redacted]]] of its total subscriber base is now [[[redacted]]] per customer per month. And at the time of the *SDARS II* proceeding, Music Choice's license fees averaged [[[redacted]]] per customer per month. Del Beccaro WDT, Trial Ex. 55, p. 23.

SoundExchange attempts to contradict the evidence of Music Choice's financial struggles by discussing an exhibit for which no foundation was laid at trial and about which Music Choice's witnesses were never questioned. Because this exhibit was never introduced at trial, there was no opportunity for issue joinder, or for Music Choice's witnesses to explain the contents or context of Exhibit 408. Moreover, SoundExchange's proposed interpretation of Exhibit 408 is not a logical one. While the passage cited by SoundExchange may refer to [[[redacted] [redacted]]] it says nothing about actual financial success or viability, and as such does not contradict the abundant record evidence and sworn testimony demonstrating the financial difficulties that Music Choice has faced and faces now more than ever.

<u>Replies to SEPFF 1777 (p. 722):</u>

SoundExchange mischaracterizes both the substance and tenor of Mr. Del Beccaro's testimony. Mr. Del Beccaro (and Mr. Williams) actually testified that the witnesses SoundExchange hand-selects for these proceedings are attorneys who work in departments unrelated to the radio promotions departments whose

employees understand the importance of promotion on the Music Choice channels and work hand-in-hand with Music Choice to promote their artists. This fact was confirmed at trial with regard to each of the record company witnesses who testified. See 5/10/17 Tr. 3524:10-3525:2 (Kushner); 5/18/17 Tr. 4730:2-7; (Williams); 5/15/17 Tr. 3881:21-3882:2 (Walker); 5/16/17 Tr. 3913:18-23 (Harrison). And just as those record company lawyers have no knowledge of the promotional activities of their label-level radio promotions departments, the record label promotions employees who lobby Music Choice have no knowledge of the PSS royalties and make it clear that their lobbying is only for the purpose of promotion. 5/18/17 Tr. 4721:9:20 (Williams). It is this fundamental disconnect that Messrs. Del Beccaro and Williams spoke to.

But if the Judges are interested in examples of truly patronizing testimony, they need look no further than that of SoundExchange's witnesses, for example Jeff Walker, who criticized Music Choice's business model in his testimony, even though he has no experience running a company like Music Choice and no personal knowledge of the MVPD market in which Music Choice operates. Walker WRT, Trial Ex. 50, ¶¶ 16-19. 5/15/17 Tr. 3881:3-6 (Walker).

<u>Replies to SEPFF 1778 (p. 722):</u>

Music Choice does not dispute that the lawyers who take part in this proceeding on behalf of the record companies (though not the artists) have contemplated their interests prior to signing on to SoundExchange's case. But, as explained in Music Choice's Reply to SEPFF 1777, which Music Choice incorporates

by reference herein by reference, it is clear that those lawyer witnesses do not communicate with the radio promotions groups that collaborate with and rely on Music Choice, and that this disconnect has led to a proposed royalty that would deprive the record labels of promotion they currently rely upon for many of their artists.

Replies to SEPFF 1779 (p. 723):

Music Choice does not dispute that, as a general matter, benchmarking is one way to estimate a reasonable royalty rate. However, benchmarking is by no means the only method by which to determine a reasonable royalty rate. In previous proceedings, the Judges have considered a variety of other methods, including beginning with the prevailing rate (*See SDARS II*, 78 Fed. Reg. at 23,058; *see Music Choice*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.")), and using economic modeling (*See, e.g.*, *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13423-02, 13428 (Mar. 13, 2015) ("To assess relative marketplace value, the Judges previously have looked to hypothetical, simulated, or analogous markets . . . ."); *id.* at 13428-30 (discussing the use of a Shapley valuation model to determine relative market value); *SDARS I*, 73 Fed. Reg. 4092 ("[A] non-cooperative game approach may have been more appropriate under the circumstances.").

Replies to SEPFF 1780 (p. 724):

Music Choice incorporates by reference its Reply to SEPFF 1779.

Replies to SEPFF 1781 (p. 724):

SoundExchange misleadingly paraphrases Mr. Del Beccaro's testimony. Music Choice's position is not that the judges **must** set a rate without considering a market rate, but rather that they certainly **may** do so, contrary to SoundExchange's repeated premise that the Judges must always start with a marketplace rate before engaging in the Section 801(b)(1) policy objectives. SoundExchange's position has been repeatedly rejected and Music Choice's position, that 801(b)(1) ratemaking need not be based on market rates at all, has been well established.

In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999). The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates.

Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*. The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other respects.")

Id. (citations omitted).

Requiring that the Judges start with a marketplace rate would contravene this clear congressional intent. Moreover, such a requirement would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. U.S.*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-*

Zhuo, 70 F.3d at 139 ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.").

Moreover, the Judges have, in fact, set rates pursuant to 801(b)(1) by using the prevailing regulated rate, and not marketplace rates, as a starting point. *SDARS II*, 78 Fed. Reg. at 23,058; *Phonorecords I*, 74 Fed. Reg. at 4,523. That approach has been affirmed by the D.C. Circuit, which specifically rejected SoundExchange's argument that the Judges were required to start from a marketplace rate. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis").

Finally, Mr. Del Beccaro's point that market rates, to the extent they are used in connection with the Section 801(b)(1) policy analysis, serve to set a ceiling on the reasonable rate, is well established by appellate precedent. *Recording Indus. Assn. of America v. Copyright Royalty Tribunal*,, 662 F.2d at 12 (adopting RIAA's argument that a rate set above a market rate, even if done for the purpose of allowing a lower rate to be negotiated in the marketplace, cannot be reasonable); *see also Register's PSS Opinion,* 71 Fed. Reg. at 64,642 (noting that the PSS rate standard "may result in below market rates.").

<u>Reply to SEPFF 1782 (p. 725):</u>

While comparability is a key characteristic of a reliable benchmark, there are other key characteristics that SoundExchange has failed to mention– most notably,

that the benchmark come from a "workably competitive market." In the recent *Webcasting IV* decision, under the willing buyer/willing seller rate standard, the Copyright Royalty Judges concluded that "they are required by law to set a rate [in that proceeding] that reflects a market that is *effectively competitive*" (emphasis added). *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings*, 81 Fed. Reg. 26316-01, 26,332 (May 2, 2016) ("*Web IV")*. Later in the same decision, the Judges equate "effective" with "workable" competition, with the latter defined by Professor Carl Shapiro as "[a market in which there] is regular, significant competition among suppliers for the patronage of buyers. …" Dr. Shapiro further concludes, "A market can also be workably competitive even if it is quite concentrated, so long as the suppliers compete regularly and energetically to win business from each other." *Web IV*, 81 Fed. Reg. at 26,341; Crawford WDT, Trial Ex. 54, p. 13 ¶43.

<u>Reply to SEPFF 1783 (p. 725):</u>

SoundExchange's cursory summation of the characteristics of an ideal benchmark omits two key requirements: The first is that the benchmark represent a workably competitive market, as explained in Music Choice's Reply to SEPFF 1782, which is incorporated herein by reference.

The second requirement is that the buyers and sellers not only be the same, but that the buyers and the sellers in both the target and benchmark market have similar stakes, especially when dealing with a benchmark from a hybrid market. Crawford WDT, Trial Ex. 54, p. 15, ¶50, 5/24/17 Tr. 695:22-696:12 (Crawford). In a

hybrid market – such as that of the CABSAT rates and terms SoundExchange proposes as its sole benchmark – negotiations occur in a marketplace setting, but, in case of impasse, either party to the negotiation can appeal to a judicial or regulatory body for a rate determination. Such negotiations are sometimes described as occurring "in the shadow" of a rate proceeding. Because appeals of rate proceedings are often time-consuming, costly, and uncertain, the ideal hybrid benchmark market would have similar stakes to each party in the benchmark market as in the hypothetical market. This would avoid relying on marketplace outcomes in which one or another party could gain from a negotiation less than the cost of the regulatory process. Crawford WDT, Trial Ex. 54, p. 15, ¶50, 5/24/17 Tr. 697:8-14 (Crawford).

And Dr. Wazzan agreed with Professor Crawford's view of comparability, including the need for similar stakes when using a benchmark from a hybrid market. 5/3/17 Tr. 2298:4-2299:11 (Wazzan). But Dr. Wazzan's own benchmark fails to meet this measure of comparability, because the current CABSAT rates and terms were set by a settlement agreement between SoundExchange on one hand, representing the entire recorded music industry, and Sirius XM on the other, which had no incentive to vigorously negotiate for a fair market deal. Crawford WRT, Trial Ex. 59, ¶¶ 55-56. As such, the settlement did not reflect any sort of competitive marketplace. Sirius XM had no rational business incentive to litigate the last CABSAT proceeding, so it had little choice but to settle. Crawford WRT, Trial Ex. 59, ¶¶55-56. 4/24/17 Tr. 779:13-781:20 (Crawford).

Sirius XM is not an active participant in the CABSAT market. It provides its CABSAT service to only one affiliate, DISH Network, and is not even trying to expand beyond that one affiliate. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:14-4577:2 (Del Beccaro). This is because the Sirius XM CABSAT offering is treated as a promotional vehicle to drive subscriptions to its primary business line, the Sirius XM satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Sirius XM's CABSAT service is insignificant to its overall business, generating only [[[redacted]]] of Sirius XM's revenues. Crawford WRT, Trial Ex. 59, ¶43.

Given that its CABSAT service is not an actual business line, and provides an insignificant portion of Sirius XM's revenue, there was no reason for Sirius XM to vigorously negotiate the CABSAT settlement, let alone incur the costs of a rate setting proceeding. Crawford WRT, Trial Ex. 59, ¶¶55-56. And these stakes are drastically different than the stakes Music Choice has in this proceeding, in which its PSS is its primary business line. 4/24/17 Tr. 780:11-19 (Crawford).

<u>Reply to SEPFF 1784 (p. 725):</u>

Music Choice incorporates by reference its Replies to SEPFFs 1782-83, which identify additional characteristics of an ideal benchmark that Professor Crawford identified and which SoundExchange has failed to list.

Reply to SEPFF 1785 (p. 725):

No response.

Reply to SEPFF 1786 (pp. 725-726):

SoundExchange omits key facts and key legal analysis from the *PSS I* decision: In 1993 and 1994, Music Choice agreed to pay license fees to Warner Music Group, Sony Music and EMI Music in exchange for investments those companies made in Music Choice, and which Music Choice was desperate to secure. Del Beccaro WDT, Trial Ex. 55, p. 8. The royalty rate requested by the labels was two percent of revenue, adjusted for the share of each record company's music played on the Music Choice service so that two percent would cover the entire record industry. Del Beccaro WDT, Trial Ex. 55, p. 8; See also Trial Exs. 912-914. That two percent rate represented the value the record labels hoped to place on the sound recording performance right. Del Beccaro WDT, Trial Ex. 55, pp. 8-9. As such, there did exist a market for the licensing sound recording performance rights. And while the Register in *PSS I* used the estimate of 10% of revenue for the PSS PRO License Rate as a benchmark, she used those license agreements as a supporting point of reference for setting the sound recording rate lower than the musical composition rate, and after also considering the Section 801(b)(1) policy objectives, proposed a rate of 6.5% of revenue for the PSS. *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,409-25,411. Notably, just as was the case in *PSS I*, there is still no comparable marketplace benchmark other than the PSS PRO License Rate.

Reply to SEPFF 1787 (p. 726):

SoundExchange provides no record evidence for its claim that the Judges in *SDARS II* had a "more sophisticated understanding of comparability" or "a more complete record." As noted above, the Judges found that there were no other usable marketplace benchmarks, just as was the case in *PSS I*. Notably, the *Librarian's PSS I Determination* was an appellate ruling, while the decisions cited by SoundExchange are all trial-level rulings. Thus, while Music Choice recognizes that the Judges have in those cases rejected the PRO license benchmark, they certainly could choose to use it again consistent with the Register's appellate ruling, particularly in the absence of any more comparable marketplace benchmark.

Reply to SEPFF 1788 (pp. 726-727):

SoundExchange's reference to and implicit criticism of the "lower" PSS rates, without reference to the policy reasons why those pioneering PSS services were granted additional protections by Congress and that led to the PSS rates, is misleading.

When Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 , it also created the compulsory license in Section 114 of the Copyright Act for non-interactive subscription music services so that copyright owners could not refuse to license these non-interactive services. *Digital Performance Right in Sound Recordings Act of 1995*, § 3, 109 Stat. 336, 338, 340-42 (1995)("DPRSRA").

At the time Congress passed the DPRSRA, there was already a small number of digital, non-interactive subscription services in operation, including Music

Choice, which had been in business for several years without any statutory obligation to pay royalties to sound recording copyright owners. The DPRSRA changed the rules for these businesses. Thus, while creating an entirely new revenue stream for the recording industry at the expense of these businesses, one of the specific reasons cited by Congress for creating the compulsory license (and other limitations on the new performance right) was to ensure that it would remain economically feasible for existing music services to continue their current uses of sound recordings. S. Rep. No. 104-128, at 16 (1995) ("DPRSRA Senate Report"); H.R. Rep. No. 104-274, at 14 (1995))("DPRSRA House Report").

Further to this legislative purpose, Congress provided that the rates for the Section 114 license would be set, in the absence of industry agreement, using a multi-factor policy based standard set out in Section 801(b)(1) of the Copyright Act. DPRSRA, 109 Stat. at 340-41. Congress made this choice deliberately, given that at least one other compulsory license in the Copyright Act already used a marketplace, fair market value rate-setting standard at the time of the passage of the DPRSRA. *RIAA v. Librarian of Congress*, 176 F.3d at 533 (citing 17 U.S.C. §119(c)(3)(B)).

In 1998, Congress again modified the legal landscape in which digital music services operate, in response to the record industry's concerns that certain non-subscription digital music services, i.e., webcasters, had not been expressly addressed in the DPRSRA or the Section 114 license. *Digital Millennium Copyright Act*, Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2890 (1998) ("DMCA"); *DMCA Committee Report*, H.R. Rep. No. 105-796, at 80.

With the passage of the DMCA, Congress also changed the Section 114 rate-setting standard for future services otherwise eligible for the Section 114 license to a marketplace, willing buyer – willing seller standard. DMCA, § 405(a), 112 Stat. at 2896. *See also Register's PSS Opinion*, 71 Fed. Reg. at 64,641. At the same time, however, Congress "grandfathered" the three PSS, Music Choice, DMX and Muzak, which were already in operation at the time the DMCA was passed, allowing the PSS to continue operating under the 801(b)(1) policy-based rate standard rather than be subjected to the new marketplace standard. Del Beccaro WDT, Trial Ex. 55, p. 5; *Register's PSS Opinion,* 71 Fed. Reg. at 64,641; DMCA, § 405(a), 112 Stat. 2894-95.

Congress continued to apply the Section 801(b)(1) policy-based rate standard to the PSS, even while it moved future market entrants to a marketplace standard, in recognition of the PSS' legitimate business expectancies as pioneers who launched the very first digital music services under a different legal and licensing landscape than those who would enter the market in the future. *Music Choice v. Copyright* Royalty *Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647

The legislative history of the DMCA expressly states that the reason for continuing to apply the policy-based rate standard of Section 801(b)(1) to the PSS

was "to prevent disruption of existing operations by such services." *DMCA Conference Report* at 81.

The legislative history of the Section 114 license applicable to the PSS, as discussed above, evinces a specific legislative intent to protect the unique business expectancies of the PSS, even as against later market entrants, which is inapplicable to other statutory licensees and must inform any interpretation or application of the 801(b)(1) policy standard to the PSS. *See*, *e.g.*, *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, 46 Fed. Reg. at 10,479 (holding that the Section 801(b)(1) policy objectives in a mechanical license proceeding must be interpreted in light of the specific legislative purpose of the Section 115 mechanical license). SoundExchange, in its proposed finding however, attempts to gloss over this legislative history, instead framing the PSS rate as the result of some arbitrary or erroneous judicial decision-making, and ignoring the clear statutory history and congressional intent protecting the PSS.

Moreover, the mere fact that non-comparable services pay different rates provides no useful data for setting the PSS rates, as held by the Judges in *SDARS II*. *SDARS II*, 78 Fed. Reg. at 23058.

<u>Reply to SEPFF 1789 (p. 727):</u>

Music Choice agrees with Dr. Wazzan that the CABSAT rates and terms are not a marketplace benchmark and that there are no types of licensed music services that are comparable to the PSS. But it is disingenuous to claim that Music Choice

might, in other contexts, be satisfied with the statutory PSS rate. Music Choice does not view the PSS rate as below-market, but rather above-market, and the result of settlements that Music Choice had little choice but to accept to avoid the crippling cost of litigating the *PSS I* and *SDARS I* rate proceedings. Del Beccaro WDT, Trial Ex. 55 at 10-11.

Nor is the fact that there are no direct licenses for the PSS in any way an indication that the PSS are satisfied with the PSS rate, but rather a reflection of certain realities that would make directly licensing a PSS service impracticable. Mr. Del Beccaro testified that Music Choice has never even tried to develop a direct licensing program, in part because the costs of adding the necessary infrastructure to negotiate the thousands of licenses necessary would be prohibitive. 5/18/17 Tr. 4547:1- 4548:13;4619:4-11 (Del Beccaro). Nor would it make any sense for Music Choice to try to negotiate these licenses, even if one of the majors were willing. The PSS royalty is currently calculated as 8.5% of the gross revenue from Music Choice's residential audio service. 37 CFR § 382.3(a). That royalty provision has no express carve-out for direct licenses. Thus, if Music Choice (or any PSS) entered into a direct license with one, or even all, of the major record companies, it would have to pay the royalties required by those licenses **in addition to** its current payment of 8.5% of revenue for its PSS royalties. 5/18/17 Tr. 4673:10-19 (Del Beccaro). Unless a PSS were able, immediately, to license 100% of its music through direct licensing, direct licensing at any rate would cost Music Choice even more than it pays now.

Reply to SEPFF 1790 (p. 727):

No response.

Reply to SEPFF 1791 (pp. 727-728):

No response.

Reply to SEPFF 1792 (p. 728):

As Dr. Wazzan himself admits, the CABSAT rates are not market rates Wazzan WDT, Trial Ex. 501, ¶64. Those rates were derived from a settlement agreement that *by its terms* acknowledged that non-market factors influenced the rates and terms therein. *See* Trial Ex. 922. p. 2, ¶4, stating that those rates and terms were influenced by the parties' understanding of "market *and legal conditions, among other things.*"

The bargaining and market dynamics that led to the settlement from which the current CABSAT rates and terms are derived also make clear that those rates are not market rates, or even market-like: The CABSAT settlement agreement was negotiated only by SoundExchange on one hand, representing the entire recorded music industry, and Sirius XM on the other, which had no incentive to vigorously negotiate for a fair market deal. Crawford WRT, Trial Ex. 59, ¶¶ 55-56. Consequently, the settlement did not reflect any sort of competitive marketplace. Sirius XM had no rational business incentive to litigate the last CABSAT proceeding, so it had little choice but to settle. Crawford WRT, Trial Ex. 59, ¶¶55-56. 4/24/17 Tr. 779:13-781:20 (Crawford). Sirius XM is not an active participant in the CABSAT market. It provides its CABSAT service to

only one affiliate, DISH Network, and is not even trying to expand beyond that one affiliate. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:14-4577:2 (Del Beccaro). This is because the Sirius XM CABSAT offering is treated as a promotional vehicle to drive subscriptions to its primary business line, the Sirius XM satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Sirius XM's CABSAT service is inconsequential to its overall business, generating only [[[redacted]]] of its revenues. Crawford WRT, Trial Ex. 59, ¶43.

Given that its CABSAT service is not an actual business line, and provides an insignificant portion of Sirius XM's revenue, there was no reason for Sirius XM to vigorously negotiate the CABSAT settlement, let alone incur the costs of a rate setting proceeding. Crawford WRT, Trial Ex. 59, ¶¶55-56.

Even as a relatively small company with limited means, Music Choice spent over [[[redacted]]] litigating the last PSS proceeding. Given the much higher revenues and royalty payments involved, Sirius XM has surely spent a multiple of that on each of its SDARS proceedings. Crawford WRT, Trial Ex. 59, ¶¶55-56.

Even if it were to have put on a scaled-down case similar to Music Choice, Sirius XM could not have hoped to save enough on royalty expenses for a minor promotional program to justify the cost of litigation. Crawford WRT, Trial Ex. 59, ¶ 56. Nor could it free-ride on any other licensee's litigation efforts, because

it was the only licensee that petitioned to participate. Del Beccaro WRT, Trial Ex. 57, p. 4.

Thus, not only would Sirius XM not be willing to litigate the case, its unwillingness to litigate greatly diminished its ability (or desire) to negotiate the settlement aggressively. Its only rational choice was to settle on the best terms it could quickly and easily get from SoundExchange. Crawford WRT, Trial Ex. 59, ¶¶55-56. In short, the stakes Sirius XM had in negotiating or litigating its CABSAT rates were drastically different than the stakes Music Choice has in this proceeding, in which its PSS is its primary business line. 4/24/17 Tr. 780:11-19 (Crawford). Consequently, the CABSAT benchmark lacks a key indicator of comparability – similar stakes, which Dr. Wazzan agreed must be present when using a benchmark from a hybrid market. 5/3/17 Tr. 2298:4-2299:11 (Wazzan).

<u>Reply to SEPFF 1793 (p. 728):</u>

SEOFF 1793 is simply false. Although Dr. Wazzan was unaware of this key fact, the CABSAT rates and terms were the product of a settlement between one seller, SoundExchange, representing the entire record industry, and Sirius XM. Thus, even if it were not otherwise flawed, it was not comparable to an agreement with one of many record companies in a competitive market. Crawford WRT, Trial Ex. 59, ¶¶71-75.

Reply to SEPFF 1794 (p. 728):

As noted in Reply to SEPFF 1793, the sellers are not similarly situated. Nor were do the buyers have similar stakes, as demonstrated above in Reply to SEPFF 1792.

Reply to SEPFF 1795 (pp. 728-729):

While Dr. Wazzan has identified some similarities between the CABSAT and PSS services, he has failed to account for the requirement that a benchmark market be "workably competitive," as explained in Music Choice's Reply to SEPFF 1782. The CABSAT market is neither competitive nor stable, rendering it inappropriate as a benchmark. There has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr.784:12-785:8 (Crawford).

The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6

(Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which it uses it as a promotional tool, and is not competing for new business. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:1-5; 4575:14-4577:2 (Del Beccaro). And Sirius XM pays a CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22—4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id*.

There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music Choice's larger MVPD affiliates. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which Stingray predominantly contracts. Were Stingray required to pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber

rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

Moreover, Dr. Wazzan fails to account for the fact, because he did not know, that the CABSAT rates and terms were the product of a litigation settlement. Dr. Wazzan himself notes that such settlement are typically unreliable as benchmarks. Wazzan WDT, Trial Ex. 501, ¶41-43l; See also infra ¶¶ 263-264. Similarly, SoundExchange's expert Dr. Orszag also argues that licenses negotiated in the shadow of a statutory license are not good benchmarks. 4/25/17 Tr. 967:25-928:5 (Orszag).

The current CABSAT rates and terms were set by a settlement agreement between only two parties – SoundExchange on one hand, representing the entire recorded music industry, and Sirius XM on the other, which had no incentive to vigorously negotiate for a fair market deal. Crawford WRT, Trial Ex. 59, ¶¶ 55-56. As such, the settlement did not reflect any sort of competitive marketplace. Sirius XM had no rational business incentive to litigate the last CABSAT proceeding, so it had little choice but to settle. Crawford WRT, Trial Ex. 59, ¶¶55-56. 4/24/17 Tr. 779:13-781:20 (Crawford).

Sirius XM is not an active participant in the CABSAT market. It provides its CABSAT service to only one affiliate, DISH Network, and is not even trying to expand beyond that one affiliate. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:14-4577:2 (Del Beccaro). This is because the Sirius XM CABSAT offering is treated as a promotional vehicle

to drive subscriptions to its primary business line, the Sirius XM satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Sirius XM's CABSAT service is inconsequential to its overall business, generating only [[[redacted]] of its revenues. Crawford WRT, Trial Ex. 59, ¶43.

Given these facts, it should not be surprising that Sirius XM's CABSAT is also different from Music Choice's PSS in terms of the service offerings: It does not include internet or mobile app access as part of its DISH Network service, nor does it include a video on demand ("VOD") or linear music video channel. Del Beccaro WRT, Trial Ex. 57, p. 4; Crawford WRT, Trial Ex. 59, ¶90. Sirius XM does not invest in designing an engaging on-screen display for the DISH service (as Music Choice does for its own service), given that such a display would not be useful for Sirius XM's real business of satellite radio in the car. Del Beccaro WRT, Trial Ex. 57, p. 4.

Moreover, Sirius XM's CABSAT service transmits only a subset of the same programming it uses for its satellite radio product. Crawford WRT, Trial Ex. 59, ¶87; Del Beccaro WRT, Trial Ex. 57, p. 4. This means that Sirius XM incurs very little cost to provide its CABSAT service, which allows it to give the service away at a very low price. Crawford WRT, Trial Ex. 59, ¶87. Given that its CABSAT service is not an actual business line, and provides an insignificant portion of Sirius XM's revenue, there was no reason for Sirius XM to vigorously negotiate the CABSAT settlement, let alone incur the costs of a rate setting proceeding. Crawford WRT, Trial Ex. 59, ¶¶55-56. Even as a relatively small company with limited means, Music Choice spent over [[[redacted]]] litigating

the last PSS proceeding. Given the much higher revenues and royalty payments involved, Sirius XM has surely spent a multiple of that on each of its SDARS proceedings. Crawford WRT, Trial Ex. 59, ¶55 – 56.

Even if it were to have put on a scaled-down case similar to Music Choice, Sirius XM could not have hoped to save enough on royalty expenses for a minor promotional program to justify the cost of litigation. Crawford WRT, Trial Ex. 59, ¶ 56. Nor could it free-ride on any other licensee's litigation efforts, because it was the only licensee that petitioned to participate. Del Beccaro WRT, Trial Ex. 57, p. 4. Thus, not only would Sirius XM not be willing to litigate the case, its unwillingness to litigate greatly diminished its ability (or desire) to negotiate the settlement aggressively. Its only rational choice was to settle on the best terms it could quickly and easily get from SoundExchange. Crawford WRT, Trial Ex. 59, ¶¶55-56. In light of the realities of Sirius XM's CABSAT service in the context of its overall business, and the other negotiating dynamics described above, it would be unreasonable to view the CABSAT rates set in that settlement agreement as reflecting fair market rates that would have been negotiated in a competitive marketplace transaction by a company actively trying to operate a profitable CABSAT business. Crawford WRT, Trial Ex. 59, ¶¶45-56.

Thus, the CABSAT market lacks many of the characteristics of an ideal benchmark identified by Professor Crawford supra ¶¶80-88. Most predominantly, the CABSAT market lacks the first characteristic of an ideal

benchmark – marketplace outcomes (with similar stakes) described by Professor Crawford *supra* ¶¶86-87. The requirement of similar stakes is particularly important for benchmarks like the CABSAT settlement rates and terms that come from a hybrid regulated market. *Id.* Indeed, the CABSAT settlement is infected with all of the problems that Dr. Wazzan gives as to why litigation settlements are not typically usable as benchmarks, and more.

Reply to SEPFF 1796 (p. 729):

SEPFF 1796 is pure argument which contains no analysis and cites no record evidence. As such, it merits no substantive reply.

Reply to SEPFF 1797 (p. 729):

Music Choice does not dispute that both the PSS and the CABSAT services are television based services. However, SoundExchange downplays the importance of the key distinction between those services – the date they commenced operation. As explained in Music Choice's Reply to SEPFF 1788, the very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants (including the CABSATs) was to recognize the PSS' unique role in opening new markets for creative expression and media for their communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the

recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647; See MC PCL ¶¶ 7-21.

Reply to SEPFF 1798 (p. 729):

No response.

Reply to SEPFF 1799 (p. 730):

While it is true that providers of PSS and CABSAT services both sell cable radio to MVPDs, SoundExchange's broad characterization of both the PSS products and the CABSAT products makes no attempt to account for differences in quality, programming, on screen display, or other features that set Music Choice apart from the CABSATS. For example, while both types of services have on-screen displays, as discussed in more detail *infra* in Reply to SEPFF 1800, Music Choice has gone to great lengths to add visual and textual elements above and beyond the song title and artist name that CABSATs display on their screens in compliance with their statutory licenses. Similarly, the Music Choice service is hand-curated by humans with extensive experience in music programming, rather than by algorithms. Williams WDT, Trial Ex. 56, p. 8-10, and that programming is intended specifically for its PSS product. By contrast, Sirius XM's CABSAT, for example retransmits only a subset of the same programming the Sirius XM uses for its satellite radio product. Crawford WRT, Trial Ex. 59, ¶87; Del Beccaro WRT, Trial Ex. 57, p. 4.

Reply to SEPFF 1800 (pp. 730-731):

SoundExchange omits key facts about the very elements of the Music Choice display that distinguish it from the statutorily required display on the Stingray

service, and mischaracterizes Music Choice's testimony. Music Choice has provided unrebutted evidence that its screen displays, which are covered by various patents and include features such as researched and curated facts about the artists and other contextually-linked information, are uniquely engaging and provide significantly more promotional impact that screen displays by any CABSAT service, which do not have these features. Williams WDT, Trial Ex. 56, pp. 11-12, 14, 29-30, 35; 5/18/17 Tr. 4687:15-4688:3, 4724:6-25 (Williams); 5/18/17 Tr. 4565:4-4566:5, 4576:1-14 (Del Beccaro) (noting patented features of Music Choice screen display that CABSATs do not have). Moreover, given that the CABSAT rates are the product of a settlement only with Sirius XM, it would only be the Sirius XM screen display that would be relevant to any benchmark analysis.

Music Choice's witnesses also emphasized the improvements it has made to its on-screen display, adding functionality far above and beyond the textual display of the artist name and song title and adding graphical elements to draw the user's attention to the screen – where that textual information is also displayed. The basic textual song and artist information was an element of Music Choice's on screen display even at the time of the first CARP (See *CARP Report*, Trial Ex. 979 at ¶91), but it is the significant improvements that Music Choice has made since that time that differentiate its display. Music Choice's on-screen display features additional elements to capture the user's attention. These improvements include the addition of artist facts, album artwork, artist images and more. As currently configured, Music Choice transmits an elaborate on-screen display, with graphical components,

photographs and textual facts related to the artists whose songs are playing, and in some instances contextual advertising to promote the artist's recordings and live appearances. Williams WDT, Trial Ex. 56, p.11.

Of course, SoundExchange introduced, and cites, no record evidence concerning any CABSAT's on-screen display, which provides another reason to reject this Proposed Finding of Fact.

Reply to SEPFF 1801 (p. 731):

SoundExchange attempts to add this new definition to the PSS regulations to facilitate the implementation of its proposal that Music Choice be required to pay new, additional royalties for any of its transmissions made through the internet. As explained in Music Choice's Replies to SEPFF 19 and SEPFF 1767 above, that rate proposal should be rejected for many reasons, and for those same reasons these proposed changes to the regulations should be rejected. But they should be rejected for another reason: the proposed changes would drastically limit the scope of the PSS license by making the PSS rate applicable only to Music Choice's service when it is provided to MVPDs via television. As explained in Music Choice's Reply to SEPPFF1767, the Copyright Act does not limit the PSS license to a television platform, but allows the PSS to expand into other transmission platforms. *See DMCA Conference Report*, at 89. Nor does the statutory license in any way limit the types of affiliates Music Choice provides its service to. Del Beccaro WRT, Trial Ex. 57, p. 10. These proposed changes would damage Music Choice by narrowing the scope of its rights under the PSS license—a license that was intentionally made

broad by Congress and upon which Music Choice has relied to transmit its service for decades. Del Beccaro WRT, Trial Ex. 57, p. 10.

Reply to SEPFF 1802 (p. 731):

This language comes from the CABSAT regulations, which were created as part of the settlement between SoundExchange and Sirius XM. *See* Trial Ex. 922*;* 5/3/17 Tr. 2396:17-2406:19 (Wazzan). As noted in Music Choice's Reply to SEPFF 1801, it would be wholly improper to add this limitation to the PSS regulations because it would effectively limit the scope of the license granted specially to the PSS by Congress.

Reply to SEPFF 1803 (pp. 731-732):

There is nothing in the statutory definition of a PSS that limits it to transmission via television or through MVPDs. To the contrary, Congress specifically allowed the PSS to expand into different transmission media and channels, so long as they provided similar programming on a subscription basis. *DMCA Committee Report*, at 89. Thus, the various limitations on the scope of the CABSAT license agreed to by Sirius XM cannot be used as points of comparability to the PSS. Moreover, it is essential to note the defining characteristic of the PSS, which SoundExchange has neglected to consider. The PSS were the three pioneering companies in operation prior to the existence of the sound recording performance right at issue in this proceeding – a fact that is not true of the CABSAT services. By virtue of its early entry into the digital music marketplace, and in recognition of the risks inherent in such early entry, Music Choice was

among a closed group of music services given the PSS designation and the accompanying legal protections by Congress, as explained in Music Choice's Reply to SEPFF 1788. The CABSAT services, however, entered the marketplace only after the PSS designation was in place, and by virtue of that later market entry are subject to different statutory and regulatory considerations. This difference in characteristic – the timing of the service's entry into the digital music marketplace – is an essential distinction, and one that SoundExchange has failed to account for.

Reply to SEPFF 1804 (p. 732):

It is unclear how this finding is relevant to the considerations in this proceeding. Moreover, SoundExchange has identified only a handful of agreements – notably, with only two licensees, [[[redacted]]] – to support its argument that voluntary agreements do not necessarily convey rights for multi-level distribution. Neither [[[redacted]]] is in the market of cable or satellite distribution. More important, the fact that neither of two licensees has obtained syndication or sublicensing rights does not meant that no voluntary licenses include the right to transmit licensed service through an intermediary. SoundExchange's reliance on these two examples for its broad statement is misleading and based on incomplete evidence. In fact, voluntary agreements for services which – unlike [[[redacted]]] – are distributed over cable systems do, in fact, allow for intermediary transmission, as evidenced by the direct licenses Music Choice obtains for its video service. *See*, *e.g.*, Trial Ex. 994.

Reply to SEPFF 1805 (p. 733):

No response.

Reply to SEPFF 1806 (p. 733):

SEPFF 1806 cites no supporting record evidence and should be rejected on that ground alone.

Reply to SEPFF 1807 (p. 733):

No response.

Reply to SEPFF 1808 (p. 733):

Music Choice does not dispute that it provides 50 channels of programming available through television, and 25 additional channels through its web portal and app. However, and as discussed in detail *infra*, Music Choice's internet transmissions are not properly classified as "webcasting" because, as explained in detail in Music Choice's Replies to SEPFF 19 and SEPFF 1767, those transmissions are and have always been included in its PSS service and covered by the PSS license.

Reply to SEPFF 1809 (pp. 733-734):

No response.

Reply to SEPFF 1810 (p. 734):

No response.

Reply to SEPFF 1811 (p. 734):

Music Choice does not dispute that the D.C. Circuit determined that Muzak's service taken over from DMX must be classified as a CABSAT service. However, Music Choice notes that shortly following this decision by the D.C. Circuit, Mood Media, the parent company of Muzak and DMX, filed for bankruptcy. *See* http://www.digitalmusicnews.com/17/05/25/mood-media-muzak-bankruptcy/.

Reply to SEPFF 1812 (p. 734):

No response.

Reply to SEPFF 1813 (pp. 734-735):

It would be strange if any curated digital music service did not have a channel for current hits (Hit List) or channels covering common genres such as Rock, cited by SoundExchange in its attempt to paint Music Choice as similar to other services. The partial overlap in genres does not mean the programming of the respective services' channels for each overlapping genre will be the same. Indeed, SoundExchange claims that certain songs will be in "heavy rotation" on both services' respective channels. But one of the very ways that Music Choice differs from other digital music services is that it employs a complex programming strategy, implemented by experienced music programmers, with the specific goal of avoiding repetitive "heavy rotation" of the same song on the same channel, because that heavy rotation would lead to listener fatigue. *See* Williams WDT, Trial Ex. 56 at 8-9. Mr. Williams gave extensive testimony regarding how different Music Choice's programming philosophy, and resulting music curation, is from any other

music service. Williams WDT, Trial Ex. 56 at 8-10; 5/18/17 Tr. 4682:15-4684:7 (Williams); Trial Ex. 935. Notably, SoundExchange offered, and cites, no record evidence demonstrating any similarity between Music Choice's actual programming and that of any other music service.

Reply to SEPFF 1814 (p. 735):

As noted in Replies to SEPFFs 1795, 1800, and 1813, the record evidence demonstrates that Music Choice is very different from all other television-based music services. Moreover, the PSS PRO License benchmark provides music rights for the exact same types of usage at issue in this proceeding. Crawford WDT, Trial Ex. 54, p. 17 ¶57.

Reply to SEPFF 1815 (p. 736):

Music Choice does not dispute that Professor Crawford dedicated much of his rebuttal testimony to explaining the many reasons, including difference in quality, why the CABSAT market is not an appropriate benchmark for the PSS, and did not devote much energy to addressing the musical works benchmark – a benchmark he did not even utilize in his ultimate analysis in this proceeding.

Reply to SEPFF 1816 (p. 736):

SoundExchange grossly mischaracterizes Professor Crawford's testimony, which did not characterize the lack of a VOD service as the "principal" difference. In the paragraphs cited, Professor Crawford was not discussing the characteristics of the PSS and CABSATs as standalone services, but rather the demand for products in those markets. In that context, the fact that Music Choice bundles its residential

PSS with its video offerings is critical and relevant, because those bundled offerings provide a value proposition that is appealing to MVPD providers and allows it to compete effectively against the Stingray and Sirius XM's CABSAT services. Crawford WRT, Trial Ex. 59, ¶¶88-90.

But bundling a VOD service with its residential audio service is only one of many distinguishing factors that Professor Crawford identified. In the paragraph immediately following those cited by SoundExchange, Professor Crawford lists several other important qualitative distinctions between the Music Choice services and the CABSAT services. First, Sirius XM does not allow Internet or mobile app access as part of its CABSAT offerings and that, because they treat it as promotional, they don't provide their full suite of audio channels on their CABSAT service. Crawford WRT, Trial Ex. 59, ¶91. Second, Music Choice expends significant resources on programming staff and that while Sirius XM no doubt also has significant programming staff, Dr. Wazzan has not provided any evidence about the nature of Sirius XM's cable radio programming and programming expenses. *Id*. Finally, Professor Crawford notes that while both Sirius XM and Music Choice offer a suite of audio music channels, the majority of Sirius XM's listeners listen in their cars, while Music Choice's listeners watch/listen on a television in their home. This could well lead to important differences in consumer demand characteristics or willingness to pay, as well as each firm's willingness to invest in providing useful on-screen information. For example, Professor Crawford notes, while very useful in

an at-home environment, too much on-screen information in the car might be unsafe. *Id*.

Reply to SEPFF 1817 (p. 736):

While it is true, and would be bizarre if it were not the case, that both PSS and CABSAT providers that transmit their music stations over the television have on-screen displays with some similar elements, SoundExchange omits key facts about the very elements of the Music Choice display that distinguish it from those of the CABSATs. In addition to displaying the artist name and song title – as Stingray does pursuant to its statutory requirements – Music Choice's on-screen display features additional elements to capture the user's attention. These include artist facts, album artwork, artist images and more. Williams WDT, Trial Ex. 56, p.11; Trial Ex. 936. Music Choice has provided unrebutted evidence that its screen displays, which are covered by various patents and include features such as researched and curated facts about the artists and other contextually-linked information, are uniquely engaging and provide significantly more promotional impact that screen displays by any CABSAT service, which do not have these features. Williams WDT, Trial Ex. 56, pp. 11-12, 14, 29-30, 35; 5/18/17 Tr. 4687:15-4688:3, 4724:6-25 (Williams); 5/18/17 4565:4-4566:5, 4576:1-14 (Del Beccaro)(noting patented features of Music Choice screen display that CABSATs do not have).

In the testimony cited by SoundExchange, Mr. Williams merely acknowledged that Stingray has an on-screen display – not that the display was in any way comparable to the technologically advanced and visually captivating

display that Music Choice has developed and improved. Williams WDT, Trial Ex. 56, p. 11. It would be strange were Stingray to have no display at all, so Mr. William's testimony that there is, in fact, something displayed on the screen while the Stingray service is playing music does not establish that the display is in any way comparable.

Reply to SEPFF 1818 (p. 737):

SoundExchange offers no evidence in support of its conclusory claim that the complaints identified by Professor Crawford are statistically insignificant or should be disregarded. It has not introduced any contrary survey or other evidence, nor has it offered any statistical analysis to support its claim.

Reply to SEPFF 1819 (pp. 737-738):

As explained in Music Choice's Replies to SEPFFs 1782-1783, the ideal benchmark would also have buyers and sellers with similar stakes as those in the target market, and would be the product of a workably competitive market. And for the reasons explained in Music Choice's Replies to SEPFFs 1833-34; 1836-39; and 1843 (regarding similar stakes) and SEPFFs 1795, 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria. The handful of similarities that SoundExchange has identified in SEPFF 1819 does not save the CABSAT benchmark from these fatal shortcomings.

Reply to SEPFF 1820 (p. 738):

While this is one among the numerous characteristics of an ideal benchmark, it is by no means paramount. As explained in Music Choice's Replies to SEPFFs

1782-1783, the ideal benchmark would also have buyers and sellers with similar stakes as those in the target market, and would be the product of a workably competitive market. For the reasons explained in Music Choice's Replies to SEPFFs 1833-34; 1836-39; and 1843 (regarding similar stakes) and SEPFFs 1795, 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria.

Moreover, Dr. Wazzan's opinion that the CABSAT benchmark required no adjustment was not based upon any analysis or reasoning. In fact, Dr. Wazzan admitted that he performed no analysis of the CABSAT settlement or the factors that led to its rates and terms, insisting that he did not need to perform such analysis because he believed that the Judges had reviewed the settlement and independently evaluated it as satisfying the willing buyer/willing seller standard. 5/18/17 Tr. 2416:17-21 (Wazzan).

At the time that Dr. Wazzan concluded that no adjustment was necessary to the CABSAT benchmark, he was unaware of key facts regarding its genesis – namely that it was derived from a settlement, and the factors surrounding that settlement. This was made clear at his deposition, when he testified as follows:

> "Question: Now, just so I can be crystal clear on your testimony today, at the time that you wrote your written direct testimony, you were aware that the current CABSAT rates were the product of a settlement between Sirius XM and SoundExchange?
>
> "Answer: No, I wasn't.
>
> "Question: Okay. And so you thought that the Judges set the rate themselves in a proceeding?

"Answer: Yes."

5/3/17 Tr. 2397:20-2398:6.

At trial, Dr. Wazzan acknowledge that he had testified to that effect, but attributed that testimony to "some confusion" that led to him getting "tripped up," 5/3/17 Tr. 2307:1-2308:16 (Wazzan); to him becoming "confused" by counsel for Music Choice's questioning; or that, by framing the question to seek a clear answer, counsel for Music Choice had "pushed him around." 5/3/17 Tr. 2396:21-2397:3 (Wazzan).

But Dr. Wazzan's deposition testimony could not be more clear. At the time of his written testimony, he was unaware that the CABSAT rates originated from a settlement. There was nothing tricky or confusing about the question asked of him, nor was there any hesitation or hedging in Dr. Wazzan's answer.

Dr. Wazzan had several opportunities to correct his testimony before trial but did not do so with regard to the CABSAT settlement. During his deposition, including after this testimony, Dr. Wazzan took several breaks during which he caucused in a private room with SoundExchange's counsel. 5/3/17 Tr. 2398:16-2399:1 (Wazzan). At the end of his deposition, Dr. Wazzan corrected an error in his deposition testimony from earlier that day. *Id*. Tr. at 2399:2-7. Strikingly, he did not at any time during that process seek to change his clear testimony that he was unaware of the CABSAT settlement at the time he filed his written testimony.

Even after receiving the deposition transcript, Dr. Wazzan did not file any errata sheet seeking to "correct" this testimony. 5/3/17 Tr. 2388:8-2400:3 (Wazzan). Nor does Dr. Wazzan, anywhere within his written direct or rebuttal testimony, make any mention of the CABSAT settlement that led to the current CABSAT rates and terms, though he includes various arguments regarding the unreliability of settlement rates as benchmarks in his direct testimony. *Id*. at 2308:20-23, 2401:24-2402:7. It is simply not credible that Dr. Wazzan would fail to even mention the settlement if he knew it was the genesis of the very rates and terms he propounds as his sole benchmark.

Dr. Wazzan also admitted at trial that he had not reviewed the Federal Register notice implementing the CABSAT settlement rates and terms, although he did review almost every other notice implementing rates for markets he considered and rejected as benchmarks – essentially every other type of statutory license. 5/3/17 Tr. 2402:8-2404:7 (Wazzan). Had he bothered to read the one relevant Federal Register notice, it clearly discloses that the rates and terms were the product of a settlement. Moreover, the notice also clearly states that because SoundExchange and Sirius XM were the only participants in the proceeding, the Judges had no statutory authority to substantively evaluate those rates and terms, but rather were required to implement them without review. *See Determination of Terms and Royalty Rates for Ephemeral Reproductions and Public Performance of Sound Recordings by a New Subscription Service*, 80 Fed. Reg. 36,927-01 (June 29, 2015)("NSS III").

Even after changing his testimony regarding whether he was *aware* of the CABSAT settlement prior to filing his written testimony, Dr. Wazzan admits he never asked for or reviewed the settlement agreement itself and never reviewed its terms – including the prohibition on use in later rate proceedings – in formulating his analysis of the CABSAT rates as his benchmark. 5/3/17 Tr. 2413:13-19 (Wazzan).

Because he never reviewed the terms of the settlement agreement, he never actually *considered* what impact those terms have on the reliability of the CABSAT benchmark, or whether any adjustments were necessary.

Reply to SEPFF 1821 (p. 738):

While it is true that the cable radio services are all distributed by intermediary MVPDs, this is only one single characteristic. Comparability in one single characteristic by no means overcomes the failures of the CABSAT market to meet other key requirements of an acceptable benchmark – that the buyers and sellers in both the target and benchmark markets have similar stakes (as discussed in Music Choice's Reply to SEPFF 1783) and that the benchmark would be the product of a workably competitive market (as discussed in Music Choice's Reply to SEPFF 1782). For the reasons explained in Music Choice's Replies to SEPFFs 1833-1834; 1836-39; and 1843 (regarding similar stakes) and SEPFFs 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria.

Reply to SEPFF 1822 (pp. 738-739):

While this is one among the numerous characteristics of an ideal benchmark, it is by no means paramount. As explained in Music Choice's Replies to SEPFFs 1782-1783, the ideal benchmark would also have buyers and sellers with similar stakes as those in the target market, and would be the product of a workably competitive market. And for the reasons explained in Music Choice's Replies to SEPFFs 1833-1834; 1836-1839; and 1843 (regarding similar stakes) and SEPFFs 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria.

Reply to SEPFF 1823 (p. 739):

This proposed finding contains no analysis and cites no record evidence. As such, it is pure argument and warrants no response.

Reply to SEPFF 1824 (p. 739):

No response.

Reply to SEPFF 1825 (p. 739):

There has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr. 784:12-785:8 (Crawford). The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the

CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which, as discussed supra ¶¶ 243-246, it uses it as a promotional tool, and is not competing for new business. And Sirius XM pays a CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22—4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id*. There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music Choice's larger MVPD affiliates, at the same (or lower) rates received by Music Choice. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which Stingray predominantly contracts. Were Stingray required to

pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

Reply to SEPFF 1826 (pp. 739-740):

Music Choice has provided unrebutted evidence that its screen displays, which are covered by various patents and include features such as researched and curated facts about the artists and other contextually-linked information, are uniquely engaging and provide significantly more promotional impact that screen displays by any CABSAT service, which do not have these features. Williams WDT, Trial Ex. 55, pp. 11-12, 14, 29-30, 35; 5/18/17 Tr. 4687:15-4688:3, 4724:6-25 (Williams); 5/18/17 Tr. 4565:4-4566:5, 4576:1-14 (Del Beccaro)(noting patented features of Music Choice screen display that CABSATs do not have).

Additionally, Music Choice's witnesses gave extensive testimony regarding how different Music Choice's programming philosophy, and resulting music curation, is from any other music service – including Stingray. Williams WDT, Trial Ex. 56 at 8-10; 5/18/17 Tr. 4682:15-4684:7 (Williams); 5/18/17 Tr. 4538:9-18 (Del Beccaro). Trial Ex. 935. Notably, SoundExchange offered, and cites, no contrary (or other) record evidence demonstrating any similarity between Music Choice's actual screen displays or programming and that of any other music service.

Reply to SEPFF 1827 (p. 740):

SoundExchange has introduced, and cited, no record evidence regarding the length of Stingray's contracts with its affiliates. Having AT&T as an affiliate for two years hardly renders Stingray comparable to Music Choice, which has long-term affiliate agreements, including many with terms of [[[redacted]]] or greater. Del Beccaro WDT, Trial Ex. 55, p. 4 [[[redacted]]]; Del Beccaro WRT, Trial Ex. 57, p. 18 [[[redacted]]].

Reply to SEPFF 1828 (p. 740):

No response.

Reply to SEPFF 1829 (pp. 740-741):

While this is one among the numerous characteristics of an ideal benchmark, it is by no means paramount. As explained in Music Choice's Replies to SEPFFs 1782-1783, the ideal benchmark would also have buyers and sellers with similar stakes as those in the target market, and would be the product of a workably competitive market. And for the reasons explained in Music Choice's Replies to SEPFFs 1833-34; 1836-39; and 1843 (regarding similar stakes) and SEPFFs 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria.

Reply to SEPFF 1830 (p. 741):

No response.

Reply to SEPFF 1831 (p. 741):

While this is one among the numerous characteristics of an ideal benchmark, it is by no means paramount. As explained in Music Choice's Replies to SEPFFs 1782-1783, the ideal benchmark would also have buyers and sellers with similar stakes as those in the target market, and would be the product of a workably competitive market. And for the reasons explained in Music Choice's Replies to SEPFFs 1833-34; 1836-39; and 1843 (regarding similar stakes) and SEPFFs 1825 and 1848 (regarding the requirement of workable competition), the CABSAT benchmark fails to meet those criteria.

Reply to SEPFF 1832 (p. 741):

While the PSS and CABSAT services may broadly fit some of the characteristics of the "same buyers," they do not meet the criteria that those buyers have similar stakes. Specifically, as Professor Crawford noted at trial, one way in which the target and benchmark markets should have similar stakes is in the costs and benefits of going through a regulatory proceeding. And, as explained in detail in Music Choice's Replies to SEPFFs 1833-34; 1836-36 and 1843, these stakes are not equal – as is illustrated by the market forces in the CABSAT market and the specific business interests of the parties to the regulatory settlement that led to the current CABSAT rates. In short, because the CABSAT rates were negotiated in a settlement by Sirius XM – whose CABSAT is only a very small portion of its overall business, those stakes were drastically different than those for Music Choice, whose

PSS is its primary business line. 4/24/17 Tr. 780:11-19 (Crawford). The same is true of all of the CABSATs. Crawford WRT, Trial Ex. 59, pp. 11-2, ¶¶ 34-37.

Reply to SEPFF 1833 (p. 741):

Muzak is not a similar buyer with similar stakes. Its CABSAT operations taken over from DMX are an insignificant part of its overall business, which is a commercial background music service. DMX had only serviced one CABSAT affiliate of any significance for many years, had not attempted to gain new business, and only served its one affiliate in order to obtain financial benefits for its primary, commercial background music business line. Crawford WRT, Trial Ex. 59, pp. 11-12, ¶¶ 35-37; Del Beccaro WRT, Trial Ex. 57, pp. 6-8; 5/18/17 Tr. 4572:1-24 (Del Beccaro). Moreover, it is uncertain whether Muzak can or will continue buying the rights for the DMX service at the CABSAT rates: Shortly after the decision in *SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713 (D.C. Cir. 2017) which obligated Muzak to pay CABSAT, not PSS rates for its DMX service, Mood Media (Muzak's parent company) filed for bankruptcy. *See* http://www.digitalmusicnews.com/17/05/25/mood-media-muzak-bankruptcy/.

Reply to SEPFF 1834 (p. 741):

While individual services in CABSAT and PSS markets share some common characteristics, this alone does not render the CABSAT market an appropriate benchmark for the PSS. First, the stakes in the CABSAT and PSS markets are not similar. *See* 4/24/17 Tr. 780:4-19; 783:3-20 (Crawford). Second, the CABSAT market is not a workably competitive market by any means, as explained in detail in Music

Choice's Replies to SEPFFs 1795, 1825 and 1848, which are incorporated herein by reference.

Reply to SEPFF 1835 (p. 742):

As explained in Music Choice's Replies to SEPFFs 1832-34, 1836-38 and1843, which are incorporated herein by reference, PSS and CABSAT services are not similarly situated because the stakes for the PSS and the CABSAT services are drastically different.

Reply to SEPFF 1836 (p. 742):

While it is true that the providers of the CABSAT services offer multiple service lines, this fact is what makes the stakes of the players in those markets non-comparable. For Music Choice, its PSS is the primary business line in its enterprise, and it has significant stakes in that business line. The same is not true for any of the CABSAT providers, for whom their CABSAT services are insignificant to their overall businesses, offered as an ancillary business line, or to obtain benefits for their primary business lines. Crawford WRT, Trial Ex. 59, pp. 11-12, ¶¶ 35-37; Del Beccaro WRT, Trial Ex. 57, pp. 6-8; 5/18/17 Tr. 4572:1-24 (Del Beccaro); 4/24/17 Tr. 780:4-19; 783:3-20 (Crawford).

Reply to SEPFF 1837 (p. 742):

It is not at all clear that Muzak will actually remain in business long enough to "benefit" from the rates set in this proceeding, or that its DMX service will continue to exist – because after the close of trial in this proceeding and only shortly after the decision in *SoundExchange, Inc. v. Muzak LLC*, which obligated Muzak to

pay CABSAT, not PSS rates for its DMX service, Mood Media (Muzak's parent company) filed for bankruptcy. *See* http://www.digitalmusicnews.com/17/05/25/mood-media-muzak-bankruptcy/.

Reply to SEPFF 1838 (pp. 742-743):

Sirius XM's CABSAT service is not a business line for Sirius XM, it is a promotional tool for its real business, its satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Moreover, the CABSAT service generates only [[[redacted]]] of its revenues. Crawford WRT, Trial Ex. 59, ¶43. These key facts fundamentally affect the stakes it has in negotiating or litigating the rates and terms for the CABSAT service. Crawford WRT, Trial Ex. 59, ¶¶55-56.

Reply to SEPFF 1839 (p. 743):

Stingray's scale and success on an international level, and based upon its other business lines, is one reason why its US CABSAT business line is not comparable to the Music Choice PSS service. In fact, Stingray's international success is likely the only reason that it has been able to survive in the US CABSAT market. While, in the years for which data is available, Stingray has proven to be very profitable in Canada (Crawford WRT, Trial Ex. 59 at ¶ 39 and Table 1), it is unlikely that Stingray is seeing such successes for its CABSAT service in the US market. Stingray's share of total CABSAT revenue paid in royalties to SoundExchange jumped from a **[[**[redacted]**]]** since it signed AT&T in October 2014, and would increase even more if it

signed more large customers. Crawford WRT, Trial Ex. 59 at ¶60. High CABSAT royalty rates make it difficult to recover Stingray's fixed costs of serving the U.S. CABSAT market. Stingray's net revenue, an upper bound on their variable profits from the CABSAT market, is less than [[[redacted]]] the value of Music Choice's fixed costs from serving the PSS market. Crawford WRT, Trial Ex. 59 at ¶61 and n. 47. Because Stingray can subsidize its American operations from its Canadian and other non-CABSAT profits, it is possible Stingray has lower fixed costs of serving the U.S. market than does Music Choice, but it is unlikely that they would be [[[redacted]] lower. Crawford WRT, Trial Ex. 59 at ¶ 61 and n. 48. Furthermore, in order to be competitive with Music Choice, Stingray has begun offering a VOD service and must pay royalties not only for its CABSAT service, but also for this video service, and all from the (lower) bundled fees it earns from its cable affiliates. Crawford WRT, Trial Ex. 59 ¶61. It is very unlikely that Stingray is now or will ever be profitable in the CABSAT market if they have to pay the CABSAT rates.

<u>Reply to SEPFF 1840 (p. 743):</u>

It is true that, as an enterprise Music Choice has other business offerings besides its PSS service – but Music Choice has never tried to deny that fact. And Music Choice's PSS is its primary business line, unlike any of the CABSAT providers. *See* 4/24/17 Tr. 780:4-19; 783:3-20 (Crawford). Music Choice's financial performance as a stand-alone PSS is the proper consideration under the Section 801(b)(1) policy standard applicable to the PSS license. In the last PSS proceeding the Judges specifically criticized Music Choice for including costs and revenue from

its commercial audio residential video service in Professor Crawford's financial analysis. Crawford WDT, Trial Ex. 54, p. 32 ¶110; *SDARS II*, 78 Fed. Reg. at 23,059. In that determination, the Judges made clear that "the appropriate business to analyze for the purpose of this proceeding is the residential audio service offered by Music Choice, the subject of the Section 114 license." *Id.*

Nor would inclusion of Music Choice's other business lines be consistent with precedent. In *PSS I*, the Register (and CARP) also limited their analysis, throughout all of the policy objectives, of the financial performance of the PSS to the PSS operations of those companies. *CARP Report*, Trial Ex. 979, at ¶¶99, 108; See also *id.* at ¶¶117-118 (noting that a rate set too high would result in any or all of the services leaving "this new industry" or "this business" in reference to PSS business operations, not the longstanding commercial background music industry in which Muzak also operated); *Librarian's PSS I Determination* at 25,407, discussing the services startup costs and costs of bringing the creative product to market in a new and novel way. See also, *id.* at 25,408 noting that setting the rate too high could cause one or all of the services to abandon the business. Notably, at the time of *PSS I* Muzak's primary business line was its commercial background music service. It was the oldest and largest company in the commercial background music market with roots dating back to 1922. *CARP Report*, Trial Ex. 979, ¶27; *Librarian's PSS I Determination* at 25,394; Del Beccaro WRT, Trial Ex. 57, pp. 6-7. Yet in discussing and analyzing the financial performance of the PSS, neither the Register nor the CARP considered Muzak's overall profitability driven by its thriving, primary

business line. *CARP Report*, Trial Ex. 979, at ¶¶99, 108, 117-118; *Librarian's PSS I Determination* at 25,409-25,410; Nor did the Register propose, or even consider, that Muzak should have subsidized its PSS business with the profits from its commercial background service operations. *CARP Report*, Trial Ex. 979, at 28-20; *Librarian's PSS I Determination* at 25,409-25,410.

Reply to SEPFF 1841 (pp. 743-744):

As set forth in more detail below in Replies to SEPFFs 2003-2006, Music Choice does not offer a separate webcasting line of business, but for over twenty years had included internet access to its audio channels as an integrated part of its PSS line of business.

Reply to SEPFF 1842 (p. 744):

As noted above, SoundExchange fails to account for the key fact that, unlike any of the CABSATs, Music Choice's primary business line is its residential audio service. This has important ramifications for the accounting treatment of common costs, which SoundExchange fails to address, much less rebut. Crawford WDT, Trial Ex. 54, pp. 36-37, ¶¶ 126-27.

Reply to SEPFF 1843 (pp. 744-745):

SoundExchange correctly notes that none of the CABSAT providers offer a CABSAT as their primary line of business, whereas Music Choice's PSS is its primary business line. It is for this reason (among others) that the CABSAT market is not a proper benchmark for the PSS, because those markets do not meet the

requirement of "similar stakes" identified in Music Choice's Reply to SEPFF 1783. *See also* 4/24/17 Tr. 780:4-19; 783:3-20 (Crawford).

Reply to SEPFF 1844 (p. 745):

The undisputed evidence demonstrates that the only basis for any projected change in revenue mix is a very large projected increase in [[ ]] which is highly unreliable. Crawford WDT, Trial Ex. 54, pp. 33-35, ¶¶ 115-120; Del Beccaro WDT, Trial Ex. 55, p. 27; 5/18/17 Tr. 4544:11-4546:11 (Del Beccaro); 4/24/17 Tr. 726:22-730:1 (Crawford); 4/25/17 Tr. 870:19-871:8, 873:9-21 (Crawford). Music Choice has been projecting similar future increases every year since the [[ ]] and they have never come to pass. Del Beccaro WDT, Trial Ex. 55, p. 27.

Reply to SEPFF 1845 (pp. 745-746):

SoundExchange's criticism of Music Choice's enterprise-wide business strategy and its claims that Music Choice should have focused its efforts on non-PSS business lines are not relevant to the considerations in this proceeding. As the Judges made clear in *SDARS II*, "the appropriate business to analyze for the purpose of this proceeding is the residential audio service offered by Music Choice, the subject of the Section 114 license." *SDARS II*, 78 Fed. Reg. at 23,059.

Reply to SEPFF 1846 (p. 746):

It is not only the differences in size and variation in product offerings, but also the difference in the relative importance of the licensed business line to their overall businesses that render the CABSATs and Music Choice non-comparable in a

critical sense: the relative stakes. While, for Music Choice, the PSS is its primary business line and it has significant stakes in that business line, the same is not true for any of the CABSAT providers. Consequently, Music Choice has dramatically different stakes in negotiating or litigating the PSS rates it must pay than the CABSAT services do with regard to their royalty rates. *See* 4/24/17 Tr. 780:4-19; 783:3-20 (Crawford).

Reply to SEPFF 1847 (p. 746):

Music Choice notes that Dr. Wazzan exercised no caution at all in using the non-marketplace CABSAT benchmark. He performed no analysis of the settlement that led to the CABSAT rates and terms, and made no adjustments whatsoever to those rates and terms, as explained in Music Choice's Reply to SEPFF 1886, which it incorporates by reference.

Reply to SEPFF 1848 (p. 746):

By relying on the supposed "market-like" nature of the CABSAT rates to support using its those rates as a benchmark, SoundExchange ignores the fact that rates set pursuant to the Section 801(b)(1) policy objectives are not meant to be the same as market rates. It is well established that the Section 801(b)(1) policy-based rate standard, particularly as applied to the PSS, is not a marketplace standard and the resulting rate need not bear any relationship to a marketplace rate. See, e.g. *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399, holding that the standard for setting the PSS rate "is not fair market value." *See also id.* at 25,409, rejecting the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had

to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – *and rarely does* – because it is a mechanism whereby Congress implements policy considerations *which are not normally part of the calculus of the marketplace rate*." *Id*. at 25,409 (emphasis added). The D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. As the court noted, the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*.

The D.C. Circuit's decision, issued after the passage of the DMCA, held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other respects.")

Id. (citations omitted).

But more important, the current CABSAT rates in no way reflect a rate that would arise a workably competitive market, and as such are not even market-like. In fact, the very wording of the settlement agreement from which the current CABSAT rates were derived acknowledged that non-market factors influenced the rates and terms therein. Trial Ex. 922. p. 2, ¶4 (stating that those rates and terms were influenced by the parties' understanding of "market *and legal conditions, among other things*.") (emphasis added).

The bargaining and market dynamics that led to the CABSAT settlement also make clear that those rates are not market-like. That agreement was negotiated by only two parties – SoundExchange on one hand, representing the entire recorded music industry, and Sirius XM on the other, which had no incentive to vigorously negotiate for a fair market deal. Crawford WRT, Trial Ex. 59, ¶¶ 55-56. Consequently, the settlement did not reflect any sort of competitive marketplace. Sirius XM had no rational business incentive to litigate the last CABSAT proceeding, so it had little choice but to settle. Crawford WRT, Trial Ex. 59, ¶¶55-56. 4/24/17 Tr. 779:13-781:20 (Crawford). Sirius XM is not an active participant in the CABSAT market. It provides its CABSAT service to only one affiliate, DISH Network, and is not even trying to expand beyond that one affiliate. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:14-4577:2 (Del Beccaro). This is because the Sirius XM CABSAT offering is treated as a

promotional vehicle to drive subscriptions to its primary business line, the Sirius XM satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Moreover, the CABSAT service generates only [[[redacted]]] of its revenues. Crawford WRT, Trial Ex. 59, ¶43.

Given that its CABSAT service is not an actual business line, and provides an insignificant portion of Sirius XM's revenue, there was no reason for Sirius XM to vigorously negotiate the CABSAT settlement, let alone incur the costs of a rate setting proceeding. Crawford WRT, Trial Ex. 59, ¶¶55-56.

Even as a relatively small company with limited means, Music Choice spent over [[[redacted]]] litigating the last PSS proceeding. Given the much higher revenues and royalty payments involved, Sirius XM has surely spent a multiple of that on each of its SDARS proceedings. Crawford WRT, Trial Ex. 59, ¶¶55 – 56.

Even if it were to have put on a scaled-down case similar to Music Choice, Sirius XM could not have hoped to save enough on royalty expenses for a minor promotional program to justify the cost of litigation. Crawford WRT, Trial Ex. 59, ¶ 56. Nor could it free-ride on any other licensee's litigation efforts, because it was the only licensee that petitioned to participate. Del Beccaro WRT, Trial Ex. 57, p. 4.

Thus, not only would Sirius XM not be willing to litigate the case, its unwillingness to litigate greatly diminished its ability (or desire) to negotiate the settlement aggressively. Its only rational choice was to settle on the best

terms it could quickly and easily get from SoundExchange. Crawford WRT, Trial Ex. 59, ¶¶55-56.

Reply to SEPFF 1849 (p. 747):

First, and as discussed in the Reply to SEPFF 1848 (which is incorporated herein by reference), the PSS rates are not market rates nor are they intended to be. Second, while the CABSAT rates would be subject to the willing buyer/ willing seller standard if they were ever set in a CABSAT rate proceeding before the Copyright Royalty Judges, the CABSAT rates and terms have never been set by the Judges in a proceeding. The current rates and terms are the product of a series of settlements which the Judges had no power to adjust or reject unless a participant in those proceedings objected. *See* 17 U.S.C. § 801(b)(7)(A)(ii); *NSS III*, 80 Fed. Reg. 36927-01, 36927 (June 29, 2015) ("The Judges will adopt the negotiated rates and terms unless a participant in a proceeding objects . . . . The Judges 'may decline to adopt the agreement . . . only 'if any participant [to the proceeding] objects . . . .'" (brackets original)). SoundExchange's own expert, Dr. Wazzan, opines that settlement rates are inherently unreliable as indicators of market outcomes, citing with approval language from a judicial decision:

> [M]any factors come into play in reaching and obtaining settlement and, as such settlement payments could not be a reliable guide for computing the value of a reasonable royalty. For instance, a party may wish to avoid incurring attorney's fees or other litigation expenses. It may wish to avoid the distraction caused by litigation, or avoid the negative publicity which attends litigation. A party may value its privacy, and be willing to settle a case to preclude discovery into its affairs. A settlement may also more reflect the parties'

> perceptions of the true merits of the claim and not the true value of the claim, if the claim was in fact a valid one.

Wazzan WDT, Trial Ex. 501 ¶¶ 41-43. ¶ 41 (quoting *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 651 (N.D. Ill. 1994)).

Dr. Wazzan concludes, "[i]n short, there are many reasons why a settlement lacks reliability as to the true value of a royalty rate." Wazzan WDT, Trial Ex. 501 ¶43. (citing J. Gregory Sidak, *The Meaning of FRAND, Part I: Royalties*, 9 J. Competition L. & Econ. 1005 (2013)). Clearly, Dr. Wazzan provided this testimony while unaware that his very own benchmark was, itself, the result of a settlement. SoundExchange's expert Dr. Orszag also argues that licenses negotiated in the shadow of a statutory license are not good benchmarks. 4/25/17 Tr. 967:25-928:5 (Orszag).

Second, SoundExchange's assertion that Stingray entered the market knowing the full magnitude of the current statutory CABSAT royalty rates is false. As Dr. Wazzan acknowledged at trial, Stingray was already in the U.S. market at the time that the most recent CABSAT rates were set through the settlement between SoundExchange and Sirius XM. 5/3/17 Tr. 2407:1-4 (Wazzan). Moreover, as noted by SoundExchange's own expert Dr. Lys, the mere fact that a licensee accepts a "take it or leave it" proposition cannot form the basis of a marketplace benchmark, because there is no negotiation involved. 4/27/17 Tr. 1479:8-21, 1481:7-13 (Lys).

Reply to SEPFF 1850 (p. 747):

No response.

Reply to SEPFF 1851 (pp. 747-748):

No response.

Reply to SEPFF 1852 (p. 748):

SoundExchange's assertion that this settlement was only adopted by the Judges "in the absence of any objections or negative comments" is misleading. The Judges simply do not have the authority to reject the settlement of a rate proceeding to which all parties who petitioned to participate in that proceeding agreed. *See* 17 U.S.C. § 801(b)(7)(A)(ii); *NSS III*, 80 Fed. Reg. at 36,927 ("The Judges will adopt the negotiated rates and terms unless a participant in a proceeding objects . . . . The Judges 'may decline to adopt the agreement . . . only 'if any participant [to the proceeding] objects . . . .'" (brackets original)); *Mechanical & Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. 4,510-01, 4514 (Jan. 26, 2009) ("The comments received from non-parties have no bearing on the outcome since the statute does not grant us authority to reject or amend the settlement on that basis. Only if an objection is received by one of more of the parties are we given any discretion over the settlement . . . ."). Thus, even if there had been non-participants in or planning to enter the CABSAT market, comment on their part would have been futile – so the absence of comment is not indicative that the settlement rates escape the pitfalls of settlements discussed *supra* in Music Choice's Reply to SEPFF 1949. Music Choice also notes that MTV decided to exit

the market by the end of the rate period covered by this settlement. Del Beccaro WRT, Trial Ex. 57, p. 9 (MTV decided to exit market in 2010).

Reply to SEPFF 1853 (pp. 748-749):

As explained in Reply to SEPFF 1852, which is incorporated herein by reference, SoundExchange's assertion that this (or any settlement of a rate proceeding) was adopted by the Judges only "in the absence of any objections or negative comments" is misleading. And even if there had been non-participants in or planning to enter the CABSAT market, comment on their part would have been futile – so the absence of comment is not indicative that the settlement rates escape the pitfalls of settlements discussed *supra* in Reply to SEPFF 1949.

Reply to SEPFF 1854 (p. 749):

As with the discussion of preceding settlements, SoundExchange misleadingly refers to this settlement as adopted by the Judges only "in the absence of any objections or negative comments." In response to this proposed finding, Music Choice incorporates by reference its Replies to SEPFFs 1852-1853.

Reply to SEPFF 1855 (pp. 749-750):

SoundExchange inaccurately recites the Register's considerations in *PSS I*. The Register used the estimate of 10% of revenue for the PSS PRO License Rate as a benchmark, but also used the DCR License Agreements that Music Choice had entered into with its record company partners as a supporting point of reference for setting the sound recording rate lower than that benchmark, and after also considering the Section 801(b)(1) policy objectives, proposed a rate of 6.5% of

revenue for the PSS. Id at 25,409-25,411. Moreover, it remains just as true today as it was during *PSS I* that there are no other usable marketplace benchmarks.

Reply to SEPFF 1856 (p. 750):

Setting aside the fact that the PSS rates are not set pursuant to the willing buyer/willing seller standard referenced in this proposed finding, SoundExchange also addresses only one, and omits the remainder, of the reasons Dr. Wazzan believes that settlements should be viewed with caution when determining an appropriate benchmark. While "regulatory overhang" is one reason to approach a settlement benchmark with caution, Dr. Wazzan provided others reasons, testifying that settlement rates are inherently unreliable as indicators of market outcomes, citing with approval language from a judicial decision:

> [M]any factors come into play in reaching and obtaining settlement and, as such settlement payments could not be a reliable guide for computing the value of a reasonable royalty. For instance, a party may wish to avoid incurring attorney's fees or other litigation expenses. It may wish to avoid the distraction caused by litigation, or avoid the negative publicity which attends litigation. A party may value its privacy, and be willing to settle a case to preclude discovery into its affairs. A settlement may also more reflect the parties' perceptions of the true merits of the claim and not the true value of the claim, if the claim was in fact a valid one.

Wazzan WDT, Trial Ex. 501 ¶¶ 41-43. ¶ 41 (quoting *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 651 (N.D. Ill. 1994)).

Dr. Wazzan's ultimate conclusion on this point was that "[i]n short, there are many reasons why a settlement lacks reliability as to the true value of a royalty rate." Wazzan WDT, Trial Ex. 501 ¶43. (citing J. Gregory Sidak, The Meaning of

FRAND, Part I: Royalties, 9 J. Competition L. & Econ. 1005 (2013)). Clearly, Dr. Wazzan provided this testimony while unaware that his very own benchmark was, itself, the result of a settlement. Notably, SoundExchange's expert Dr. Orszag also argues that licenses negotiated in the shadow of a statutory license are not good benchmarks. 4/25/17 Tr. 967:25-928:5 (Orszag).

SoundExchange now passes over these reasons why settlements are unreliable benchmarks, because these very same reasons directly apply to its own benchmark in this proceeding.

Reply to SEPFF 1857 (pp. 750-751):

There are many reasons why the settlement negotiations that led to the current CABSAT rate are not indicative of a willing buyer/willing seller marketplace negotiation.

As the CABSAT settlement agreement itself expressly states, the settlement rates and terms are based on various non-marketplace factors, including "legal conditions, among other things." Trial Ex. 922 at 2 ¶ 4. At trial, Dr. Wazzan admitted that SoundExchange and Sirius XM acknowledged in the text of the agreement that factors other than marketplace factors impacted the terms of that settlement. 5/3/17 Tr. 2414:18-22 (Wazzan).

Additionally, the CABSAT settlement agreement was negotiated by only two parties – SoundExchange on one hand, representing the entire recorded music industry, and Sirius XM on the other, which had no incentive to vigorously

negotiate for a fair market deal. Crawford WRT, Trial Ex. 59, ¶¶ 55-56. As such, the settlement did not reflect any sort of competitive marketplace.

Sirius XM is not an active participant in the CABSAT market. It provides its CABSAT service to only one affiliate, DISH Network, and is not even trying to expand beyond that one affiliate. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:14-4577:2 (Del Beccaro). This is because the Sirius XM CABSAT offering is treated as a promotional vehicle to drive subscriptions to its primary business line, the Sirius XM satellite radio service. Crawford WRT, Trial Ex. 59, ¶¶46-47; 5/18/17 Tr. 4575:1-5 (Del Beccaro). Sirius XM's CABSAT service is inconsequential to its overall business, generating only [[[redacted]] of its revenues. Crawford WRT, Trial Ex. 59, ¶43.

Given these facts, it should not be surprising that Sirius XM's CABSAT is also different from Music Choice's PSS in terms of the service offerings: It does not include internet or mobile app access as part of its DISH Network service, nor does it include a video on demand ("VOD") or linear music video channel. Del Beccaro WRT, Trial Ex. 57, p. 4; Crawford WRT, Trial Ex. 59, ¶90. Sirius XM does not invest in designing an engaging on-screen display for the DISH service (as Music Choice does for its own service), given that such a display would not be useful for Sirius XM's real business of satellite radio in the car. Del Beccaro WRT, Trial Ex. 57, p. 4.

And Sirius XM transmits only a subset of the same programming it uses for its satellite radio product. Crawford WRT, Trial Ex. 59, ¶87; Del Beccaro WRT, Trial Ex. 57, p. 4. This means that Sirius XM incurs very little cost to provide its

CABSAT service, which allows it to give the service away at a very low price. Crawford WRT, Trial Ex. 59, ¶87.

Given that its CABSAT service is not an actual business line, and provides an insignificant portion of Sirius XM's revenue, there was no reason for Sirius XM to vigorously negotiate the CABSAT settlement, let alone incur the costs of a rate setting proceeding. Crawford WRT, Trial Ex. 59, ¶¶55-56; 4/24/17 Tr. 779:13-781:20 (Crawford).

Even as a relatively small company with limited means, Music Choice spent over [[[redacted]]] litigating the last PSS proceeding. Given the much higher revenues and royalty payments involved, Sirius XM has surely spent a multiple of that on each of its SDARS proceedings. Crawford WRT, Trial Ex. 59, ¶55 – 56.

Even if it were to have put on a scaled-down case similar to Music Choice, Sirius XM could not have hoped to save enough on royalty expenses for a minor promotional program to justify the cost of litigation. Crawford WRT, Trial Ex. 59, ¶ 56. Nor could it free-ride on any other licensee's litigation efforts, because it was the only licensee that petitioned to participate. Del Beccaro WRT, Trial Ex. 57, p. 4.

Thus, not only would Sirius XM not be willing to litigate the case, its unwillingness to litigate greatly diminished its ability (or desire) to negotiate the settlement aggressively. Its only rational choice was to settle on the best terms it could quickly and easily get from SoundExchange. Crawford WRT, Trial Ex. 59, ¶¶55-56.

In light of the realities of Sirius XM's CABSAT service in the context of its overall business, and the other negotiating dynamics described above, it would be unreasonable to view the CABSAT rates set in that settlement agreement as reflecting fair market rates that would have been negotiated in a competitive marketplace transaction by a company actively trying to operate a profitable CABSAT business. Crawford WRT, Trial Ex. 59, ¶¶45-56.

Dr. Wazzan's speculation that the parties to the CABSAT settlement would have been mindful of the willing buyer/willing seller standard in the course of their negotiations is just that – speculation, for which he has provided no support. He notably failed to consider any of the actual considerations of the parties, noted above, because he was unaware that the CABSAT rates and terms were actually the produce of a settlement, and thought that they had been evaluated and set by the Judges in a rate proceeding when he submitted his testimony. Wazzan WDT, Trial Ex. 501, ¶64; Wazzan WRT, Trial Ex. 502, ¶19; 5/3/17 Tr. 2312:25-2413:5; 2416:22-2417:5 (Wazzan). Nor did he review the Federal Register notice implementing the settlement, though he reviewed many Federal Register notices for various other statutory license determinations. 5/3/17 Tr. 2402:8-2404:7 (Wazzan). Consequently, he did not review (or even see) the actual terms of the settlement agreement, which not only expressly acknowledge that the CABSAT rates and terms were influenced by non-marketplace factors, but specifically prohibit the use of those rates and terms as a benchmark in this proceeding. Trial Ex. 922. p. 2, ¶4; 5/3/17 Tr. 2413:13-19, 2414:18-22 (Wazzan).

Reply to SEPFF 1858 (p. 751):

No response.

Reply to SEPFF 1859 (p. 751):

Dr. Wazzan agreed with Professor Crawford's view of comparability, including the need for similar stakes when using a benchmark from a hybrid market. 5/3/17 Tr. 2298:4-2299:11 (Wazzan). Yet he failed to even consider the lack of comparable stakes between Sirius XM, the only party to the CABSAT settlement, and Music Choice. In contrast, the stakes of Music Choice in negotiating its PRO License Rates were identical to its stakes regarding the PSS license. SoundExchange attempts to gloss over this fundamental difference.

SoundExchange also misleadingly frames this proposed finding to imply that the willing buyer/ willing seller standard was applied in the process of setting of the current CABSAT rates. As discussed *supra* in Music Choice's Reply to SEPFF 1857, those rates were the product of a settlement that in no way approximated a marketplace outcome in a workably competitive market. And the settlement agreement itself expressly states that the rates are based on various non-marketplace factors, including "legal conditions, among other things." Trial Ex. 922 at 2 ¶ 4.

Moreover, the Judges had no authority to independently review that settlement and alter it by applying the willing buyer/ willing seller standard to its terms, as explained in Music Choice's Replies to SEPFFs 1852-1853.

SEPFF 1860 (p. 752):

As noted above, Music Choice's stakes in negating its PRO License Rates quite obviously are the same as its stakes regarding the PSS license. SoundExchange's conclusory statement that "[b]ecause the PSS and CABSAT services are so similar, their stakes in negotiating sound recording royalties are likewise similar" is flatly wrong. As explained in Music Choice's Replies to SEPFFs 1838, 1843 and 1846, which are incorporated herein by reference, the CABSAT providers have drastically different stakes in negotiating the CABSAT rates and terms, particularly Sirius XM when it was the only CABSAT that actually negotiated the current CABSAT rates and terms.

Reply to SEPFF 1861 (p. 752):

SoundExchange's claim that the litigation costs for these rate proceedings are felt evenly by both parties is not supported by the evidentiary record. Professor Crawford did not, as SoundExchange claims, testify that the litigation costs, or the impact of those costs, were felt equally by both SoundExchange and Sirius XM. He merely acknowledged that both sides would save some litigation costs. 4/25/17 Tr. 930:24-931:13 (Crawford).

As Mr. Del Beccaro explained, SoundExchange has no independent business to protect or to "distract" it from hyper-litigation of these proceedings. Moreover, all of its litigation expenses are deducted from the royalties it collects from licensees like Music Choice. Those expenses are thus effectively spread among SoundExchange's thousands of members, in proportion to the revenues they receive

from SoundExchange. Del Beccaro WDT, Trial Ex. 55 at 13. This is in stark contrast to the impact of those costs on a service, because unlike the record companies and artists, the service's interests are not represented by a large trade organization. Del Beccaro WDT, Trial Ex. 55 at 12. Moreover, SoundExchange's analysis of the costs of litigation is balanced against the entirety of all payments for a given license, while Sirius XM's analysis takes into account only its own payments.

It is ironic that SoundExchange extols the virtues of encouraging settlement, which is a factor irrelevant to whether the cost versus benefit of litigation skews the results of a given settlement away from a marketplace rate. Having agreed, as one of the only negotiated terms of the CABSAT settlement, that the current CABSAT rates and terms could not be used as a benchmark or otherwise as precedent in any future rate proceeding (as explained in Music Choice's Reply to SEPFF 1864, which is incorporated by reference), it now ignores that restriction in this proceeding. If the Judges allow SoundExchange to violate a key term of its settlement agreement by relying upon the CABSAT rates and terms, such a result will undermine future settlements and the very congressional goal cited by SoundExchange.

Reply to SEPFF 1862 (pp. 752-753):

Given that Dr. Wazzan was not aware of the CABSAT settlement when he formulated his opinion, it is quite convenient that he "did not find [the argument that facts surrounding the settlement rendered the resulting rates and terms unusable as a benchmark] compelling." In any event, because he was unaware of the settlement, and had not even seen the settlement agreement, as set forth above

in Reply to SEPFF 1857, he did not submit any analysis that would rebut Music Choice's argument. His conclusory statements at trial, outside the scope of his written testimony and unsupported by record evidence, must be rejected.

SoundExchange mischaracterizes Mr. Del Beccaro's testimony. In fact, when Mr. Del Beccaro testified that Sirius XM did not appear to [[ ]], 5/18/17 Tr. 4575:6-13 (Del Beccaro), he was merely noting that Sirius XM has no incentive to expand beyond its one affiliate because its CABSAT service is operated as a loss-leader. *Id*. And so the very testimony that SoundExchange attempts to twist proves the opposite point – that the CABSAT rates are, in fact, a bad deal for Sirius XM, and could never allow it to provide an actual, long-term business.

Reply to SEPFF 1863 (p. 753):

Given that Dr. Wazzan was not even aware of the CABSAT settlement when he formulated his opinion, it is quite convenient and quite irrelevant that he "was similarly unpersuaded" by the argument that SoundExchange exercised excessive market power by representing the entire record industry in the CABSAT settlement. In any event, because he was unaware of the settlement and had not even seen the settlement agreement, as set forth above in Reply to SEPFF 1857, he did not submit any analysis that would rebut Music Choice's argument. His conclusory statements at trial, outside the scope of his written testimony and unsupported by record evidence, must be rejected.

Moreover, Dr. Wazzan's after-the-fact attempt to salvage his flawed benchmark ignores the requirement that a benchmark arise from a workably-competitive market, as explained in Music Choice's Reply to SEPFF 1848, which is incorporated herein by reference.

Reply to SEPFF 1864 (p. 753):

It is telling that SoundExchange has not quoted the language it claims Music Choice "makes much of." Had SoundExchange included the plain language of the settlement agreement, it would be abundantly clear that the agreement was very much intended to be nonprecedential, as evidenced by its explicit terms and by the use of that very phrase. Paragraph 4 of the CABSAT settlement agreement provides:

> Agreement ***Non-Precedential***. The royalty rates and terms set forth in the Proposed Regulations are intended to be ***nonprecedential*** in nature and based on the Parties' current understanding of market and legal conditions, among other things. Such royalty rates and terms shall be subject to de novo review and consideration in future proceedings. Such royalty rates and terms ***shall not be relied upon as precedent*** in any proceeding to set statutory royalty rates and terms (other than the NSS proceeding [*NSS III*]).

Trial Ex. 922. p. 2, ¶4 (emphasis added).

This provision clearly prohibits the use of the CABSAT rates and terms resulting from this settlement as a benchmark, or otherwise as the basis to set rates and terms in future proceedings, and does so precisely because the parties acknowledged that the those rates and terms were influenced by non-market factors. SoundExchange, throughout this proceeding, has attempted to circumvent

the plain language of this provision by using the very CABSAT rates and terms set by this agreement as its sole benchmark in this proceeding. But the language is clear and subject to no reasonable alternative interpretation, and for this reason alone, SoundExchange's rate and term proposal in this proceeding must be rejected. Crawford WRT, Trial Ex. 59, pp. 20-21 ¶¶65-68; Del Beccaro WRT, Trial Ex. 57, p. 3; See MC PCL ¶¶ 82-91.

Although the settlement agreement's language is clear regarding the prohibition on benchmark use, the negotiation history that CABSAT settlement further demonstrates that the provision is not mere boilerplate, but was specifically negotiated and agreed upon. The parties, while negotiating the settlement, referred to this prohibition as [[ ]] Trial Ex. 905 at SoundX_000477840 (December 3, 2014 email from Todd Larson to Brad Prendergast et al.). Notably, SoundExchange did not argue in opposition to Music Choice's motion in limine that the word "precedent" had any special or narrower meaning. Joint Artist/Copyright Owner Participants' Opp. to Music Choice's Motion In Limine to Exclude SoundExchange's Use of Testimony and Evidence Related To or Based On the CABSAT Rates and Terms (filed Apr. 11, 2017), and only now attempts to introduce an alternative reading of that provision.

In the course of the negotiations SoundExchange [[

[redacted] Trial Ex. 905 at SoundX_000477898 (Nov. 26, 2014 email from SoundExchange to Sirius XM proposing this change) and *id.* at SoundX_000477953 (accompanying redline).

Sirius XM [[redacted]]] Trial Ex. Ex. 905 at SoundX_000477898; 000477913. It is clear from this discussion that the parties understood this provision as prohibiting any use of the resulting rates and terms to derive future rates and terms in any other proceeding.

As is evident from the face of the final agreement, [[redacted]]] Trial Ex. 922. SoundExchange's attempt to now circumvent the clear prohibition it negotiated and agreed to should not be countenanced by the court.

<u>Reply to SEPFF 1865 (p. 754):</u>

The obvious reason that no CABSAT other than Sirius XM has ever litigated the CABSAT rates and terms is that, as extensively demonstrated by Professor Crawford and Mr. Del Beccaro, there has never been a CABSAT provider that has been able to develop a viable, long-term business for such a service, and therefore no CABSAT has had a rational justification to endure the significant costs of such a

litigation. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr.784:12-785:8 (Crawford). The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which, as discussed supra ¶¶ 243-246, it uses it as a promotional tool, and is not competing for new business. And Sirius XM pays a CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984. There is no universe in which any of these companies, but least of all DMX, could have rationally justified the cost of a rate proceeding, and so the fact that DMX did not petition to participate for a rate proceeding by no means indicates it was satisfied with the CABSAT royalty rates it pa*id*.

<u>Reply to SEPFF 1866 (pp. 754-755):</u>

SoundExchange mischaracterizes Music Choice's criticism of the CABSAT rates as being grounded solely in the fact that those rates were the product of a series of settlements. As explained in Music Choice's Reply to SEPFF 1964, which is incorporated herein by reference, the very wording of the CABSAT settlement

agreement, and the market realities of the two parties to that settlement, render its terms and rates completely unusable as a benchmark.

Moreover, the fact that Stingray did not choose to exit the market after the implementation of the CABSAT settlement rates does not somehow magically transform the settlement rates and terms into marketplace rates and terms. As demonstrated above with respect to Sirius XM, the fact that a company generates significant revenue in other business lines has nothing to do with whether that company has a rational incentive to spend millions litigating a rate for an insubstantial part of its overall business. Music Choice submitted unrebutted testimony that Stingray's CABSAT business comprises a very small part of its revenue, and its primary business line is highly profitable. Crawford WRT, Trial Ex. 59, pp. 12-13, ¶¶ 38-40. Given its small share of the CABSAT market, the cost of a rate proceeding (identified by Professor Crawford in the context of analyzing Sirius XM's motivation to settle the most recent CABSAT proceeding) (*See* Crawford WRT Crawford WRT, Trial Ex. 59, ¶¶55 – 57) would far eclipse any rate relief they could get in the proceeding. This is particularly true at the time of the most recent CABSAT settlement, which occurred before Stingray was able to capture the AT&T business, and when its total revenue from the U.S. CABSAT service was minimal. Indeed, in February 2015 – a year after the commencement of the most recent CABSAT rate proceeding – Stingray was still only generating about [[[redacted]]] in revenue per month from its CABSAT service. Crawford WRT, Trial Ex. 59, p. 14, n. 35; *See also* 80 Fed. Reg. at 36,927 (showing that the *CABSAT III* proceeding

commenced January 2014). The cost of a rate proceedings would have consumed the vast majority of that revenue.

Moreover, as noted by SoundExchange's own expert Dr. Lys, the mere fact that a licensee accepts a "take it or leave it" proposition cannot form the basis of a marketplace benchmark, because there is no negotiation involved. 4/27/17 Tr. 1479:8-21, 1481:7-13 (Lys).

SoundExchange's repeated assertion that Stingray came into the U.S. market after the CABSAT rates were set and willingly pays those rates are false and misleading. In fact, and as Dr. Wazzan testified at trial, Stingray was already in the U.S. market at the time that the most recent CABSAT rates were set through the settlement between SoundExchange and Sirius XM. 5/3/17 Tr. 2407:1-4 (Wazzan).

Reply to SEPFF 1867 (p. 755):

SoundExchange takes Professor Crawford's testimony out of context. Professor Crawford's quoted testimony addresses only the merits of the case Stingray would have if it opted to participate in the rate proceeding for a future rate period. Professor Crawford was not testifying as to Stingray's incentives to litigate or not litigate at the time of the last proceeding.

Professor Crawford testified that Stingray is, even years after entering the market, a minor player (having captured only 6% of the MVPDs). Crawford WRT, Trial Ex. 59, p.18-19, ¶59. Given its small share of the CABSAT market, the cost of a rate proceeding (identified by Professor Crawford in the context of analyzing

Sirius XM's motivation to settle the most recent CABSAT proceeding) (Crawford WRT, Trial Ex. 59, ¶55 – 57) would far eclipse any rate relief they could get in the proceeding. This is particularly true at the time of the most recent CABSAT settlement, which occurred before Stingray was able to capture the AT&T business, and when its total revenue from its CABSAT service was minimal. Indeed, in February 2015 – a year after the commencement of the most recent CABSAT rate proceeding – Stingray was still only generating about [[[redacted]]] in revenue per month from its CABSAT service. Crawford WRT p. 14, n. 35; *See also* 80 FR at 36927, showing that the *CABSAT III* proceeding commenced January 2014. The cost of a rate proceedings would have consumed the vast majority of that revenue.

And, as explained in Music Choice's Reply to SEPFF 1866, Stingray is not "willingly" paying the CABSAT rates. Rather, it is doing so because it is required by law, and its only other option is to exit the market (which it may yet do).

<u>Reply to SEPFF 1868 (p. 755):</u>

This proposed finding is improper sur-rebuttal, advancing an argument not raised at trial and which Music Choice had no opportunity to test through cross-examination or challenge with testimony from its own witnesses. At the time of trial Dr. Wazzan did not advance this argument, and was unable to testify in any detail as to what consideration (if any) he gave to the financial concerns that may have prevented Stingray from litigating the most recent CABSAT proceeding. *See* 5/3/18 Tr. 2407:10-25 (Wazzan).

Moreover, even if a rate proceeding could have saved Stingray significant money on royalties today, SoundExchange has presented no evidence that Stingray's CABSAT business could have rationalized the litigation costs at the relevant time. To the contrary, the evidence shows that in February 2015 – a date long after the commencement of the most recent CABSAT rate proceeding – Stingray was only generating about [[[redacted]]] in revenue per month from its CABSAT service. Crawford WRT p. 14, n. 35. *See also* 80 FR at 36927 (showing that the *CABSAT III* proceeding commenced January 2014). The cost of a rate proceeding would have consumed the vast majority of that revenue. Even SoundExchange's irrelevant calculation, based on increased revenues that only developed long after the CABSAT III rate proceeding, demonstrates that the amount of revenue that could have been saved in a successful litigation, factoring the always-present uncertainties of litigation results as well as the various soft costs involved, would not have justified litigation.

<u>Reply to SEPFF 1869 (pp. 755-756):</u>

As explained in Music Choice's Reply to SEPFF 1866, which is incorporated herein by reference, to characterize any payments made under a statutory license as equivalent to a willing buyer / willing seller negotiation in a competitive market is misleading. Moreover, by claiming that Stingray could have sought to enter into direct licenses if it viewed the statutory CABSAT rate as above market, SoundExchange ignores the realities of what would be required to directly license the Stingray service.

Like the PSS license, the CABSAT license does not provide a carve-out for directly-licensed sound recordings. *See* 37 CFR § 383.3. So if Stingray entered into a direct license with one, or even all, of the major record companies, it would have to pay the royalties required by those licenses in addition to its current per-subscriber payment for its CABSAT royalties. *See* 5/18/17 Tr. 4673:10-19 (Del Beccaro) (discussing this challenge in the context of the PSS license). Unless Stingray were able, immediately, to license 100% of its music through direct licensing, direct licensing at any rate would cost Stingray even more than it pays now.

Nor would direct licensing its CABSAT service, even with a carve-out, necessarily be cheaper than paying the exorbitantly high CABSAT royalty rates. Music Choice, in the course of examining the possibility of directly licensing its own residential audio service, determined that a service would have to negotiate 3,500 direct licenses, taking it account that some of the over 7,000 independent record labels that are not distributed by any major record company, but accounting for the fact that some are owned by the same entities. 5/18/17 Tr. 4547:25-4548:7 (Del Beccaro). Considering the vast number of licenses that would be required to directly a residential audio service, that initiative would cost at a minimum [[ ]]. 5/18/17 Tr. 4548:8-13 (Del Beccaro).

But even if a service undertook to directly license the recordings it uses, there is no reason to think it would be able to obtain preferable pricing, because once they have obtained an above-market statutory license rate, and in the absence of true competition, the record labels have no reason to agree to a lower rate for a direct

license. As Mr. Del Beccaro testified, the record labels view the statutory rate as a floor for the license to be negotiated. 5/18/17 Tr. 4621:1. And outside of the statutory license, the major record labels enjoy an unconstrained complimentary oligopoly, such that each major label has enough market power that it would have no incentive to agree to a fair market rate. 4/24/17 Tr. 752:4-753:10 (Crawford).

Reply to SEPFF 1870 (p. 756):

While CABSAT rates actually set in a rate proceeding adjudicated by the Judges would be set pursuant to the willing buyer/willing seller standard, this is not true of the rates currently in effect, which were set by a settlement. In fact, the very wording of the settlement agreement from which the current CABSAT rates were derived acknowledged that non-market factors influenced the rates and terms therein. *See* Trial Ex. 922. p. 2, ¶4., stating that those rates and terms were influenced by the parties' understanding of "market *and legal conditions, among other things*."

Dr. Wazzan's reliance on the fact that CABSAT services have "agreed" to pay the rates that *they are statutorily required to pay* for his proposition that the CABSAT rates are market-like does not hold water when viewed in the context of the historically unstable CABSAT market. The realities of the CABSAT market render it unfit to serve as a marketplace benchmark: There has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed

in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr. 784:12-785:8 (Crawford).

The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which it uses it as a promotional tool, and is not competing for new business. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 5/18/17 Tr. 4575:1-5; 4575:14-4577:2 (Del Beccaro). And Sirius XM pays a CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22—4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates

pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id*.

Reply to SEPFF 1871 (p. 756):

While Mr. Del Beccaro has acknowledged that Stingray competes with Music Choice, there is no evidence that it is a "fierce" competitor by any means. To the contrary, Stingray has, in the 6 years since it entered the U.S. market, succeeded in capturing only 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22—4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id*. Indeed, in October 2014, Stingray signed its first big cable operator, AT&T. But because large operators pay relatively low per-subscriber fees, this affiliation has had a significant impact on the share of Stingray's CABSAT revenue that goes to sound recording performance royalties (increasing it from [[[redacted]]] in 2015). Crawford WRT, Trial Ex. 59 at ¶60.

Reply to SEPFF 1872 (p. 756):

Mr. Del Beccaro testified that Stingray is a Canadian business, whose primary focus is on its international business lines and that until very recently did not even provide programming specific to its U.S. products. 5/18/17 Tr. 4538:19-25 (Del Beccaro). Stingray also has very few employees located in the United States, and does not market or invest in consumer research in the US, and as such does not

have the practical operative understanding of how the U.S. cable radio market operates, and what consumers in that market want. 5/18/17 Tr. 4539:1-7 (Del Beccaro).

Reply to SEPFF 1873 (p. 757):

Stingray's success on an international scale, and based upon its other business lines, is irrelevant. As a standalone CABSAT service in the US, it would be unlikely to achieve long-term profitability under the current CABSAT rates.

While, in the years for which data is available, Stingray has proven to be very profitable in Canada (Crawford WRT at ¶ 39 an Table 1) Stingray is not seeing such successes for its CABSAT service in the U.S. market. Stingray's share of total CABSAT revenue paid in royalties to SoundExchange jumped from a [[ ]] since it signed AT&T in October 2014, and would increase even more if it signed more large customers. Crawford WRT, Trial Ex. 59 at ¶60. High CABSAT royalty rates make it difficult to recover Stingray's fixed costs of serving the U.S. CABSAT market. Stingray's net revenue, an upper bound on their variable profits from the CABSAT market, is less than [[ ]] the value of Music Choice's fixed costs from serving the PSS market. Crawford WRT, Trial Ex. 59 at ¶61 and n. 47.

Because Stingray can subsidize its American operations from its Canadian and other non-CABSAT profits, it is possible Stingray has lower fixed costs of serving the U.S. market than does Music Choice, but it is unlikely that they would be [[ ]] lower. Crawford WRT, Trial Ex. 59 at ¶61 and n. 48. Furthermore, in

order to be competitive with Music Choice, Stingray has begun offering a VOD service and must pay royalties not only for its CABSAT service, but also for this video service, and all from the (lower) bundled fees it earns from its cable affiliates. Crawford WRT, Trial Ex. 59 ¶61. It is very unlikely that Stingray is now or will ever be profitable in the CABSAT market if they have to pay the existing (or broadly similar) CABSAT rates.

Stingray's ability, as an international enterprise, to succeed regardless of the losses it must be experiencing from its U.S. CABSAT line is not relevant in this proceeding. As the Judges made clear in *SDARS II*, the appropriate analysis in a rate setting proceeding for the Section 114 PSS license is limited to the specific business line to be licensed. *SDARS II*, 78 Fed. Reg. at 23,059. Since the financial analysis of the target market is limited to that one business line, it would make no sense to analyze entities operating in the benchmark market on an enterprise-wide level.

Reply to SEPFF 1874 (p. 757):

As explained in Music Choice's Reply to SEPFF 1873, which is incorporated by reference herein, Stingray's success as an international enterprise, based on the successes of business lines other than its CABSAT or on the successes it has experienced in markets outside the United States is not relevant to this proceeding – which looks only at the financial condition of the specific business line to be licensed (*See SDARS II*, 78 Fed. Reg. at 23,059), and as such should also look only at the business line containing the proposed benchmark. Nor does the document

cited by SoundExchange disclose how many, if any, of the programmers identified are actually involved in programming channels for the U.S. CABSAT service. Indeed, SoundExchange introduced no evidence whatsoever regarding Stingray's CABSAT operations during this proceeding. Of course, Stingray's operations are not relevant to the CABSAT benchmark, in any event, because Stingray had no involvement in the negotiation of the settlement that set the CABSAT rates and terms.

Reply to SEPFF 1875 (pp. 757-758):

The evidence does not support SoundExchange's claim that the Stingray service "quickly changed" from being an app-based service on AT&T. In the testimony cited by SoundExchange, Mr. Del Beccaro explained that when the Stingray service was first made available on AT&T it was **only** available through the app, and that even after Stingray started providing channels on the television the app-based channels are still a prominent part of the service. Del Beccaro WRT, Trial Ex. 57, p.33. The AT&T Stingray channel lineup dated after Stingray added its television channels shows that a large number of those channels are still only available through the app. Trial Ex. 928. Moreover, the Stingray service remains significantly inferior to that of Music Choice, which is why Music Choice has been able to keep almost all of its affiliates, even while charging a significant premium of between [[[redacted]]] higher rates than those offered by Stingray. Del Beccaro WDT, Trial Ex. 55, p. 31. After AT&T switched to Stingray, there was significant dissatisfaction among subscribers with the change to Stingray. Crawford WRT,

Trial Ex. 59, pp. 47-48, ¶ 168 & Appx.. A-2. Notably, after that switch, AT&T subscribership has declined significantly. *Id.* at p. 19, fn. 46.

Reply to SEPFF 1876 (p. 758):

No response.

Reply to SEPFF 1877 (p. 758):

No response.

Reply to SEPFF 1878 (p. 758):

The lawsuits SoundExchange mentions are not relevant to this proceeding – a fact that the Judges recognized at trial when they *specifically excluded* evidence of the pleadings of these unrelated lawsuits. It is completely inappropriate for SoundExchange to now attempt to shoehorn these litigations into the findings of fact. And, as Chief Judge Barnett noted at trial when she excluded the documents evidencing these lawsuits, "claims are just claims." 5/18/17 Tr. 4644:15-16.

Reply to SEPFF 1879 (pp. 758-759):

SoundExchange's attempt to attribute Music Choice's request for a rate reduction to Stingray's entry into the U.S. market is misplaced. Music Choice has presented many compelling reasons why it should be granted a rate reduction, including:

1) That the rate increase in the last proceeding was improvidently granted as it was premised on Music Choice's planned increase to 300 channels, which never occurred and which was an argument not advanced by any party during the trial and to which Music Choice was never given the opportunity to respond. Del Beccaro

WDT, Trial Ex. 57, p. 15-18. Music Choice has asked for a rate reduction to correct for the overpayment it has made during the current rate period as a result of this erroneous rate increase. *See* MC PFF ¶¶201-204.

2) Fundamental changes in the dynamics of the television and MVPD markets have decreased the prices Music Choice – and other television programming providers- can obtain from its cable affiliates, as described in detail in Music Choice's Reply to SEPFF 1950.

Nor is Stingray's undercutting Music Choice on price actually good from a public policy perspective. Stingray in simply engaging in a misguided attempt at predatory pricing. But it is not working, because it cannot afford to develop a good product at those prices, and Music Choice has been able to keep almost all of its affiliates while charging a significant premium of between [[[redacted]]] higher rates than those offered by Stingray to try to steal the business. Del Beccaro WDT, Trial Ex. 55, p. 31. Even if Stingray had been successful in driving Music Choice out of the market by undercutting its price and taking losses subsidized by its profitable, primary business, it would massively lose money and would have to exit the market entirely if it were to expand into the larger cable operators served by Music Choice. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

<u>Reply to SEPFF 1880 (p. 759):</u>

As a preliminary matter, SEPFF 1880 is duplicative of SEPFFs 1866-1869, and Music Choice incorporates by reference herein its Replies to those SEPFFs.

Contrary to Dr. Wazzan's claims of Stingray's "success" – which he bases on a cursory review of Stingray's consolidated international business – there is no evidence that Stingray is successful in the U.S. as a CABSAT service. After six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22-4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id*. While Stingray was able to sign AT&T, at that point Stingray's share of total CABSAT revenue paid in royalties to SoundExchange jumped from a [[[redacted]], and that share of revenue would increase even more if it signed more large customers. Crawford WRT, Trial Ex. 59 at ¶60. High CABSAT royalty rates make it difficult to recover Stingray's fixed costs of serving the U.S. CABSAT market.

Stingray's net revenue, an upper bound on their variable profits from the CABSAT market, is less than [[[redacted]] the value of Music Choice's fixed costs from serving the PSS market. Crawford WRT, Trial Ex. 59 at ¶61 and n. 47. Because Stingray can subsidize its American operations from its Canadian and other non-CABSAT profits, it is possible Stingray has lower fixed costs of serving the U.S. market than does Music Choice, but it is unlikely that they would be [[[redacted]] lower. Crawford WRT, Trial Ex. 59 at ¶ 61 and n. 48. Furthermore, in order to be competitive with Music Choice, Stingray has begun offering a VOD service and

must pay royalties not only for its CABSAT service, but also for this video service, and all from the (lower) bundled fees it earns from its cable affiliates. Crawford WRT, Trial Ex. 59 ¶61. It is very unlikely that Stingray is or will ever be profitable in the CABSAT market if it has to pay the existing (or broadly similar) CABSAT rates.

Stingray's ability, as an enterprise, to succeed regardless of the losses it must be experiencing from its CABSAT line is not properly considered in determining its "success" or its appropriateness as a benchmark for the purpose of this proceeding. As the Judges made clear in *SDARS II*, the appropriate analysis in a rate setting proceeding for the Section 114 PSS license is limited to the specific business line to be licensed. *SDARS II*, 78 Fed. Reg. at 23,059. Given that the financial analysis of the target market is limited to that one business line, it would make little sense to analyze entities operating in the benchmark market on an enterprise-wide level.

Reply to SEPFF 1881 (p. 759):

Notably, SoundExchange cites no record evidence rebutting any of Music Choice's evidence concerning the specific CABSAT providers identified in SEPFF 1881.

Reply to SEPFF 1882 (pp. 759-760):

As a preliminary matter, the information set forth in SEPFF 1882 is not relevant to the section 801(b)(1) policy objectives or any other factors that weigh upon the analysis in this proceeding. However, the fact that CABSAT services pay such high amounts relative to their share of the cable radio market is a function of

the unsustainably high CABSAT rates, which account for a large percentage of these services' revenues – ranging from [[ ]] Crawford WRT, Trial Ex. 59 at ¶44. Under the historically high CABSAT rates, both MTV and DMX have exited the CABSAT market. 5/18/17 Tr. 4577:3-14 (Del Beccaro); 5/3/17 Tr. 2418:5-12 (Wazzan). Very recently, Mood Media, the parent company of Muzak filed for bankruptcy shortly after receiving an appellate ruling that it would have to pay CABSAT rates, and not PSS rates, for the one MVPD affiliate it took over from DMX. 5/10/17 Tr. 3205:11-23 (Bender). *See* http://www.digitalmusicnews.com/17/05/25/mood-media-muzak-bankruptcy/. In any event, the record companies' views of "significance" are not relevant to the Section 801(b)(1) policy standard applicable to the PSS rates in this proceeding.

Reply to SEPFF 1883 (p. 760):

The relative cumulative royalties of the CABSAT services versus the PSS services is not relevant to any of the considerations in this proceeding. Moreover, now that DMX's legacy service is no longer "erroneously" classified as a PSS, its parent company filed for bankruptcy shortly after receiving the appellate ruling that it would have to pay CABSAT rates, and not PSS rates, for the one MVPD affiliate Muzak took over from DMX. 5/10/17 Tr. 3205:11-23 (Bender). *See* http://www.digitalmusicnews.com/17/05/25/mood-media-muzak-bankruptcy/.

Reply to SEPFF 1884 (pp. 760-761):

SoundExchange cites no record evidence to support its calculations. The page of Mr. Del Beccaro's written testimony that SoundExchange cites in support of this finding contains nothing that supports *any* of the figures that SoundExchange has used in its calculation. And – as is clear from the fact that this Proposed Finding cites only Music Choice testimony, and erroneously so, instead of the testimony of its own witnesses – SoundExchange did not present this calculation at trial. This calculus should be disregarded as untested and improperly introduced. In any event, the relative amounts paid by CABSATs versus PSS are not in any way relevant to the Section 801(b)(1) policy standard applicable to the PSS rate in this proceeding.

Reply to SEPFF 1885 (p. 761):

The only way that any usage of Music Choice could "undercut" services that pay more money to SoundExchange would be if that usage were substitutional in a way that lowered overall record company revenues. But SoundExchange has produced no evidence at all of actual substitution, and both of the witnesses SoundExchange quotes for this very proposition admitted a trial that they have no empirical evidence that Music Choice cannibalizes higher revenue services. *See*, *e.g.* 5/16/17 Tr. 4076:18-4077:1 (Harrison); 5/15/17 Tr. 3882:19-23 (Walker).

Reply to SEPFF 1886 (p. 761):

Dr. Wazzan's opinion that the CABSAT benchmark required no adjustment was not based upon any analysis or reasoning. In fact, Dr. Wazzan

admitted that he performed no analysis of the CABSAT settlement or the factors that led to its rates and terms, insisting that he did not need to perform such analysis because he believed that the Judges had reviewed the settlement and independently evaluated it as satisfying the willing buyer/willing seller standard. 5/18/17 Tr. 2416:17-21 (Wazzan).

At the time that Dr. Wazzan concluded that no adjustment was necessary to the CABSAT benchmark, he was unaware of key facts regarding its genesis – namely, the fact that it was derived from a settlement, and the factors surrounding that settlement. This was made clear at his deposition, when he testified as follows:

> "Question: Now, just so I can be crystal clear on your testimony today, at the time that you wrote your written direct testimony, you were aware that the current CABSAT rates were the product of a settlement between Sirius XM and SoundExchange?
>
> "Answer: No, I wasn't.
>
> "Question: Okay. And so you thought that the Judges set the rate themselves in a proceeding?
>
> "Answer: Yes."

Id. at 2397:20-2398:6.

At trial, Dr. Wazzan acknowledge that he had testified to that effect, but attributed his testimony to "some confusion" that led to him getting "tripped up," *Id.* at 2307:1-2308:16; to him becoming "confused" by counsel for Music Choice's questioning; or that, by framing the question to seek a clear answer, counsel for Music Choice had "pushed him around." *Id.* at 2396:21-2397:3.

But Dr. Wazzan's deposition testimony could not be more clear. At the time of his written testimony, he was unaware that the CABSAT rates originated from a settlement. There was nothing tricky or confusing about the question asked of him, nor was there any hesitation or hedging in Dr. Wazzan's answer.

Dr. Wazzan had several opportunities to correct his testimony before trial but did not do so regarding the CABSAT settlement. During his deposition, including after this testimony, Dr. Wazzan took several breaks during which he caucused in a private room with SoundExchange's counsel. *Id*. at 2398:16-2399:1 (Wazzan). At the end of his deposition, Dr. Wazzan corrected an error in his deposition testimony from earlier that day. *Id*. at 2399:2-7. Strikingly, he did not at any time during that process seek to change his clear testimony that he was unaware of the CABSAT settlement at the time he filed his written testimony.

Even after receiving the deposition transcript, Dr. Wazzan did not file any errata sheet seeking to "correct" this testimony. *Id*. at 2399:8-2400:3 (Wazzan). Nor does Dr. Wazzan, anywhere within his written direct or rebuttal testimony, make any mention of the CABSAT settlement that led to the current CABSAT rates and terms, though he includes various arguments regarding the unreliability of settlement rates as benchmarks in his direct testimony. *Id*. at 23018:20-23, 2401:24-2402:7. It is simply not credible that Dr. Wazzan would

fail to even mention the settlement if he knew it was the genesis of the very rates and terms he propounds as his sole benchmark.

Dr. Wazzan also admitted at trial that he had not reviewed the Federal Register notice implementing the CABSAT settlement rates and terms, although he did review almost every other notice implementing rates for markets he considered and rejected as benchmarks – essentially every other type of statutory license. *Id*. at 2402:8-2404:7. Had he bothered to read the one relevant Federal Register notice, it clearly discloses that the rates and terms were the product of a settlement. Moreover, the notice also clearly states that because SoundExchange and Sirius XM were the only participants in the proceeding, the Judges had no statutory authority to substantively evaluate those rates and terms, but rather were required to implement them without review. *See* 80 Fed. Reg. 36927-01 (June 29, 2015).

Even after changing his testimony regarding whether he was *aware* of the CABSAT settlement prior to filing his written testimony, Dr. Wazzan admits he never asked for or reviewed the settlement agreement itself and never reviewed its terms – including the prohibition on use in later rate proceedings – in formulating his analysis of the CABSAT rates as his benchmark. 5/3/17 Tr. 2413:13-19 (Wazzan). Because he never reviewed the terms of the settlement agreement, he never actually *considered* what impact those terms have on the reliability of the CABSAT benchmark, or whether any adjustments were necessary.

Reply to SEPFF 1887 (p. 761):

No response.

Reply to SEPFF 1888 (pp. 761-762):

Music Choice incorporates by reference herein its Reply to SEPFF 1886.

Reply to SEPFF 1889 (p. 762):

SoundExchange misrepresents Music Choice's case when it claims neither party has proposed using the prevailing PSS rate as a starting point for the Section 801(b)(1) analysis. While Professor Crawford uses the Nash Bargaining Solution to generate a bargaining model to set the PSS rate, Mr. Del Beccaro has submitted extensive testimony analyzing the current rate and demonstrating how that rate should be adjusted pursuant to the policy objectives. Del Beccaro WDT, Trial Ex. 55, pp. 26-46. *See also* MC PCL ¶¶125-130; MC PFF ¶¶188-201; 385; 396-401; 443-446; 450-452; 455-456; 499-507.

While it is true that both SoundExchange and Music Choice agree that the current PSS rate does not reflect fair market value, SoundExchange misleadingly attempts to paint this as an indication that Music Choice believes that the PSS rate *must* reflect fair market value. It need not, because the policy objectives behind the PSS license account for factors that would not be found in the marketplace. It is well established that the Section 801(b)(1) policy-based rate standard, particularly as applied to the PSS, is not a marketplace standard and the resulting rate need not bear any relationship to a marketplace rate.

In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – *and rarely does* – because it is a mechanism whereby Congress implements policy considerations *which are not normally part of the calculus of the marketplace rate*." *Id*. at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*.

The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other respects.")

Id. (citations omitted).

Reply to SEPFF 1890 (p. 762):

As a preliminary matter, SoundExchange attempts to support this argument with exhibits for which no foundation was laid at trial and about which Music Choice's witnesses were never questioned. Because neither this argument nor the exhibits SoundExchange uses to support it were discussed at trial, there was no opportunity for issue joinder, or for Music Choice's witnesses to respond to this theory. In any event, none of the language cited out of context by SoundExchange provides any probative evidence regarding the current PSS rate's relationship to a market rate.

SEPFF 1891 (p. 762):

SoundExchange's claim that the Judges must look elsewhere to start the Section 801(b)(1) analysis is simply wrong. The Judges can – and have – used the existing PSS rate as its starting point for the Section 801(b)(1) analysis. *See SDARS II*, 78 Fed. Reg. at 23,058; *Music Choice*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.").

SEPFF 1892 (p. 763):

First, it is an exaggeration to state that the musical works rate has been "thoroughly discredited as an indicator of sound recording royalty rates." In *PSS I*, the Librarian of Congress ultimately set the PSS rate, adopting the recommendation of the Register of Copyrights in reviewing the CARP's initial decision in that proceeding, using the PSS' combined public performance licenses from ASCAP, BMI and SESAC as a benchmark, or marketplace reference. *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,409-25,410.

In reviewing the CARP decision, the Register had reexamined the record evidence and set a new PSS rate based upon her own analysis, while giving deference, where appropriate, to the factual findings of the CARP. *Id.* at 25,401.

The Register considered both Music Choice's DCR agreements (i.e. its agreements with affiliated record companies) and the PSS musical works rate, but ultimately used the PSS PRO musical works as the primary benchmark and the DCR agreements as support for her determination that the sound recording performance rate should be set lower than the benchmark PSS PRO License Rate:

> In formulating her recommendation as to the appropriate rate for the digital performance license, the Register, like the Panel, considered the relevant marketplace points of reference offered into evidence. . . . But unlike the Panel, the Register gave more consideration to the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings. . . . Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination

> that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component.

Id. at 25,409-25,410.

The Register ultimately used the estimate of 10% of revenue for the PSS PRO License Rate as a benchmark, with the DCR License Agreements as a supporting point of reference for setting the sound recording rate lower than that benchmark, and after also considering the Section 801(b)(1) policy objectives, proposed a rate of 6.5% of revenue for the PSS. *Id* at 25,409-25,411.

The Librarian of Congress adopted the Register's rate proposal, and the D.C. Circuit affirmed. *RIAA v. Librarian of Congress*, 176 F.3d at 531 (noting that the Register used the PSS PRO License Rate as the primary benchmark). **Thus, the PSS PRO License Rate is the only marketplace benchmark that has ever been used to set the PSS rate at issue in this proceeding, and that use has been affirmed at *two* levels of appeal**. And today, the PSS PRO License Rate remains the only marketplace benchmark that has ever been used to set the PSS rate.

Second, there are important policy reasons why the PSS rate need not reflect a market rate. Specifically, rates set pursuant to the Section 801(b)(1) policy objectives are not meant to be the same as market rates. *See Librarian's PSS I Determination*, 63 Fed. Reg. at 25,409, noting that the PSS rate "need not mirror a

freely negotiated marketplace rate – and rarely does – because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of the marketplace rate." *Id*. at 25,409. These policy considerations are precisely what sets the PSS rate apart from a market rate.

Finally, the current rate is not based in any way on the PSS PRO License Rate benchmark. Rather, it was a rate determined (without reference to any market benchmark) to satisfy the Section 801(b)(1) policy objectives, which is the only requirement for setting the PSS rate. SoundExchange's premise, that the Judges must always start from a marketplace rate, has been repeatedly rejected, including on appeal of the very *SDARS II* determination that set the current PSS rate. *Music Choice*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.").

Reply to SEPFF 1893 (p. 763):

No response.

Reply to SEPFF 1894 (pp. 763-764):

No response.

Reply to SEPFF 1895 (p. 764):

SoundExchange omits key facts: In 1993 and 1994, Music Choice agreed to pay license fees to Warner Music Group, Sony Music and EMI Music in exchange for the investment those companies made in Music Choice, and which Music Choice was desperate to secure. Del Beccaro WDT, Trial Ex. 55, p. 8. The royalty rate

requested by the labels was two percent of revenue, adjusted for the percentage of each record company's music played on the Music Choice service so that two percent would cover the entire record industry. Del Beccaro WDT, Trial Ex. 55, p. 8; See also Trial Exs. 912-914. The rate requested by the record companies at that time, two percent of revenue (allocated among the whole record industry based upon amount of airplay), represented the value the record labels hoped to place on the sound recording performance right. Del Beccaro WDT, Trial Ex. 55, pp. 8-9. Moreover, the Register found the PSS PRO License Rate benchmark to be a satisfactory, if not perfect, benchmark, and in fact used it as the primary benchmark to set the PSS rate. *Librarian's PSS I Determination*, 63 Fed. Reg. 25394, 25,409-25,410, *RIAA v. Librarian of Congress*, 176 F.3d at 531.

Reply to SEPFF 1896 (p. 764):

No response.

Reply to SEPFF 1897 (pp. 764-765):

No response.

Reply to SEPFF 1898 (p. 765):

No response.

Reply to SEPFF 1899 (p. 765):

SoundExchange mischaracterizes the Register's analysis. In fact, the Register used the Music Choice DCR agreements as a reference in conjunction with the primary benchmark employed in that decision – the PSS musical works rate. As the Librarian explained:

> In formulating her recommendation as to the appropriate rate for the digital performance license, the Register, like the Panel, considered the relevant marketplace points of reference offered into evidence. . . . But unlike the Panel, the Register gave more consideration to the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings. . . . Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component.

Librarian's PSS I Determination, 63 Fed. Reg. at 25,409-25,410. (emphasis added).

<u>Reply to SEPFF 1900 (p. 766)</u>

Music Choice incorporates by reference its Reply to SEPFF 1899, which includes a more complete portion of the decision that SoundExchange selectively and misleadingly quotes.

<u>Reply to SEPFF 1901 (p. 766):</u>

SoundExchange's argument that the musical works rate does not provide any useful information about the value of the PSS sound recording rights is incorrect. As explained in Music Choice's Reponses to SEPFF 1892, the PSS PRO License Rate remains the only marketplace benchmark that has ever been used to set the PSS rates, and that use was upheld on appeal.

In reviewing the CARP decision in that proceeding, the Register used the PSS PRO musical works as the primary benchmark, with the DCR License Agreements as a supporting point of reference for setting the sound recording rate lower than that benchmark, and after also considering the Section 801(b)(1) policy objectives, proposed a rate of 6.5% of revenue for the PSS. *Id* at 25,409-25,411.

The Librarian of Congress adopted the Register's rate proposal, and the D.C. Circuit affirmed. *RIAA v. Librarian of Congress*, 176 F.3d at 531 (noting that the Register used the PSS PRO License Rate as the primary benchmark). **Thus, the PSS PRO License Rate is the only marketplace benchmark that has ever been used to set the PSS rate at issue in this proceeding, and that use has been affirmed at *two* levels of appeal**. And the PSS PRO License Rate remains the only marketplace benchmark that has ever been used to set the PSS rate. As such, it is as indicative if not more so of the value of sound recording rights than any other benchmark for the PSS royalties.

Thus, while Music Choice recognizes that the Judges have rejected the PRO license benchmark in other proceedings, they certainly could choose to use it again consistent with the Register's appellate ruling, particularly in the absence of any more comparable marketplace benchmark.

<u>Reply to SEPFF 1902 (p. 766):</u>

Neither Professor Crawford nor Music Choice has "concede[d] that the musical works benchmark has been definitively rejected by the Judges." Music Choice acknowledges that in other proceedings the Judges have chosen other

available starting points for their rate analyses, as they have broad discretion to do, but given the precedent noted above, it would certainly be within the Judges' discretion to consider the PSS PRO License rate if they wished. In any event, Music Choice has not relied upon the PSS PRO License rate benchmark in this proceeding.

Reply to SEPFF 1903 (pp. 766-767):

Music Choice incorporates by reference its Reply to SEPFF 1901.

Reply to SEPFF 1904 (p. 767):

As noted above, the *Librarian's PSS I Determination* was an appellate ruling, while the decisions cited by SoundExchange are all trial-level rulings. Moreover, the webcasting determinations were decided under the inapplicable willing buyer / willing seller marketplace standard, and are therefore not precedential for a PSS proceeding. *RIAA v. Librarian of Congress*, 176 F.3d at 533 (rejecting RIAA's arguments based upon certain Copyright Royalty Tribunal decisions, holding that only decisions applying the Section 801(b)(1) policy objectives are relevant precedent). Thus, while Music Choice recognizes that the Judges have in the webcasting proceedings rejected the PRO license benchmark, they certainly could choose to use it again consistent with the Register's appellate ruling, particularly in the absence of any more comparable marketplace benchmark.

Reply to SEPFF 1905 (p. 767):

There are no factual findings in SEPFF 1905, only argument. In any event, as the Register held on the first level of appeal in *PSS I*, the musical composition performance right is a very similar input to the sound recording performance right.

Librarian's PSS I Determination, 63 Fed. Reg. at 25409-2410. Both are intermingled within the musical recordings performed by the PSS, and neither may be used without the other. Dr. Wazzan's claim that such similar rights are no different than marketing costs, infrastructure costs, and the other disparate items he references is absurd on its face, contrary to the Register's ruling, and certainly unsupported by any record evidence.

Reply to SEPFF 1906 (p. 768):

The current rate is not based in any way on the PSS PRO License Rate benchmark. Rather, it was a rate determined (without reference to any market benchmark) to satisfy the Section 801(b)(1) policy objectives, which is the only requirement for setting the PSS rate. SoundExchange's premise, that the Judge must always start from a marketplace rate, has been repeatedly rejected, including on appeal of the very *SDARS II* determination that set the current PSS rate. *Music Choice*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.")

Reply to SEPFF 1907 (p. 768):

Music Choice incorporates by reference its Replies to SEPFF 1901 and 1906. SoundExchange's argument keeps missing the point by implicitly assuming that the Judges must always start with a marketplace rate in a PSS proceeding. This argument has been rejected many times, including in the very *SDARS II* proceeding that set the current PSS rate.

Reply to SEPFF 1908 (p. 768):

While it is true that, in 2003, the PSS settled on rates and terms that included a PSS rate of 7% for 2002-2003 and 7.25% for 2004-2007, an increase from the rates determined by the Register in *PSS I*, Music Choice settled solely to avoid the prohibitive costs associated with the rate-setting process and not because it believed the settled upon rate reflected any of the statutory policy objectives or had any relationship to the fair market value of the license. Del Beccaro WDT, Trial Ex. 55, pp. 10-11.

When the initial rate period expired, due to an inequality in bargaining power, Music Choice was forced to accept a rate increase to 7 percent for 2002 to 2003 and 7.25 percent for 2004 through 2007. Music Choice agreed to the increase simply because it could not, from a business perspective, justify the expense in money and staff resources for another proceeding so soon after the conclusion of the appeal process of the first proceeding. [[[redacted]]]. Del Beccaro WDT, Trial Ex. 55, pp. 9-10. That settlement did not reflect Music Choice's views of any changes in circumstances related to the policy objectives, but was the result of a cost/benefit analysis of going through and spending millions of dollars on the proceeding versus taking the increase in its royalty rate. Del Beccaro WDT, Trial Ex. 55, pp. 10-11.

Reply to SEPFF 1909 (pp. 768-769):

SoundExchange omits significant facts about the SDARS I settlement process. Despite repeated efforts by Music Choice to engage in settlement discussions during that proceeding, SoundExchange did not participate in settlement negotiations until after it was directed to by the Copyright Royalty Judges during opening statements at the hearing in June 2007. By the time SoundExchange complied, Music Choice had already incurred [[ ]] in legal fees and again was forced to agree to a slight increase, to 7.5 percent only in the final rate period year of 2012, in order to avoid incurring millions more in legal fees. Del Beccaro WDT, Trial Ex. 55, p. 11. The rate increase Music Choice agreed to was unrelated to any of the Section 801(b)(1) policy objectives. *Id*.

Reply to SEPFF 1910 (p. 769):

As a preliminary matter, the PSS rates are set pursuant to the Section 801(b)(1) policy objectives, not the willing buyer/willing seller standard, and so SoundExchange's criticism that the PSS rates are not those a willing buyer and willing seller would agree to is misplaced. More important, SoundExchange has skipped past Dr. Wazzan's other criticisms of litigation settlements as indicators of market outcomes. Dr. Wazzan opines that settlement rates are inherently unreliable as indicators of market outcomes, citing with approval language from a judicial decision:

> [M]any factors come into play in reaching and obtaining settlement and, as such settlement payments could not

> be a reliable guide for computing the value of a reasonable royalty. For instance, a party may wish to avoid incurring attorney's fees or other litigation expenses. It may wish to avoid the distraction caused by litigation, or avoid the negative publicity which attends litigation. A party may value its privacy, and be willing to settle a case to preclude discovery into its affairs. A settlement may also more reflect the parties' perceptions of the true merits of the claim and not the true value of the claim, if the claim was in fact a valid one.

Wazzan WDT, Trial Ex. 501 ¶¶ 41-43. ¶ 41 (quoting *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 651 (N.D. Ill. 1994)).

Dr. Wazzan concludes, "[i]n short, there are many reasons why a settlement lacks reliability as to the true value of a royalty rate." Wazzan WDT, Trial Ex. 501 ¶43. (citing Sidak, *The Meaning of FRAND*).

As Mr. Del Beccaro testified, the cost of litigation – one of the factors identified by Dr. Wazzan in his analysis of why settlements do not necessarily indicate market value – was the driving factor behind Music Choice's decision to settle for an above-market rate for its PSS royalties for the term starting in 2007. The cost of litigation is not felt evenly by Music Choice and SoundExchange, because unlike the record labels and artists, Music Choice's interests are not represented by a large trade organization. Del Beccaro WDT, Trial Ex. 55 at 12. SoundExchange, on the other hand, has no independent business to protect or to "distract" it from hyper-litigation of these proceedings. Moreover, all of its litigation expenses are merely deducted from the royalties it collects from licensees like Music Choice. Those expenses are then effectively spread among SoundExchange's

thousands of members, in proportion to the revenues they receive from SoundExchange. Del Beccaro WDT, Trial Ex. 55 at 13.

Reply to SEPFF 1911 (p. 769):

SoundExchange's argument keeps missing the point by implicitly assuming that the Judges must always start with a marketplace rate in a PSS proceeding. This argument has been rejected many times, including in the very *SDARS II* proceeding that set the current PSS rate.

Reply to SEPFF 1912 (p. 770):

While it is true that *SDARS I* settled only after the Judges, at trial, encouraged settlement, the late timing of the settlement of that proceeding was due solely to SoundExchange's refusal to engage in settlement negotiations at any earlier point. Prior to the commencement of the trial, Music Choice had made repeated efforts to engage in settlement discussions during that proceeding, but SoundExchange did not participate in settlement negotiations until after it was directed to by the Copyright Royalty Judges during opening statements at the hearing in June 2007. Moreover, the Judges' "encouragement" was not directed at both parties, it was pointedly directed at SoundExchange. Del Beccaro WDT, Trial Ex. 55, p. 11. By the time SoundExchange complied, Music Choice had already incurred [[[redacted]]] in legal fees and again was forced to agree to a slight increase, to 7.5 percent only in the final rate period year of 2012, in order to avoid incurring millions more in legal fees. *Id*. Finally, the very fact that the Judges implied that it would not be in SoundExchange's

interest to continue litigating, followed by the Judges' ruling that the then-prevailing PSS rate satisfied the Section 801(b)(1) policy objectives in *SDARS II*, only serves to prove that SoundExchange's similar request for a massive rate increase in this proceeding is unreasonable.

Reply to SEPFF 1913 (p. 770):

SoundExchange's characterization of Mr. Del Beccaro's testimony is misleading. In the sentence immediately following that which SoundExchange quotes and to which it adds misleading emphasis, Mr. Del Beccaro explained that the financial pressure to settle is not felt evenly by Music Choice and SoundExchange, because unlike the record labels and artists, Music Choice's interests are not represented by a large trade organization. Del Beccaro WDT, Trial Ex. 55 at 12. SoundExchange, on the other hand, has no independent business to protect or to "distract" it from hyper-litigation of these proceedings. Moreover, all of its litigation expenses are merely deducted from the royalties it collects from licensees like Music Choice. Those expenses are then effectively spread among SoundExchange's thousands of members, in proportion to the revenues they receive from SoundExchange. Del Beccaro WDT, Trial Ex. 55 at 13.

Reply to SEPFF 1914 (p. 770):

SoundExchange willfully ignores the fact that the existing PSS rate, precisely **unlike** Dr. Wazzan's proposed CABSAT benchmark, is not the product of a settlement agreement. The current PSS rate was set by the Judges, independent of any settlement, by evaluation and application of the Section 801(b)(1) policy

objectives, and the Judges' approach was upheld on appeal. *Music Choice*, 774 F.3d at 1012 ("[G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis."). Indeed, Dr. Wazzan continues to claim that the CABSAT benchmark is reliable and free of regulatory overhang because (he believed) it was set by the Judges and not the product of a settlement. But Dr. Wazzan has this exactly wrong: the CABSAT rates and terms were never once evaluated or set by the Judges - a fact that SoundExchange tacitly admits in SEPFF 1866, which describes those rates and terms as "the product of a series of settlements." *See also* Crawford WRT, Trial Ex. 59, ¶¶31-33. It is the prevailing PSS rate that was set by the Judges, free of any extraneous settlement values.

Reply to SEPFF 1915 (pp. 770-771)

No response.

Reply to SEPFF 1916 (p. 771):

As a preliminary matter, SoundExchange admits that the PSS rate should not increase or decrease based upon the number of channels offered. Wazzan WDT, Trial Ex. 501, ¶66. Thus, it cannot dispute that the *SDARS II* rate increase based on "usage" from planned additional channels was erroneous.

Moreover, no participant in the *SDARS II* proceeding had advanced this usage-based argument, and so Music Choice had no opportunity to respond to it during that proceeding. Del Beccaro WDT, Trial Ex. 57, p. 15. And, as the Judges have subsequently acknowledged, the Register of Copyrights interprets

D.C. Circuit precedent as "barring the Judges from relying on theories 'first presented in the Judges' determination and not advanced by any participant." *Web IV*, 81 Fed. Reg. at 26319.

Moreover, the "usage" argument was ill-founded: The PSS license allows the public performance of sound recordings. It is not a general "usage" license. Making additional channels available does not necessarily lead to a greater number of performances. Music Choice listeners can only listen to one channel at a time, regardless of how many channels are available for them to choose from. Del Beccaro WDT, Trial Ex. 55, p. 16. Even since adding 25 channels to its app and internet platforms, the best month of listening in those platforms resulted in an increase of [[[redacted]]] to Music Choice's overall listening. Del Beccaro WDT, Trial Ex. 57, p. 16.

The rate formula for the commercial webcasting license also reflects the principle that performance license royalties should be paid based only on performances, not on a broader concept of "usage": Under the webcasting regulations, royalties do not increase based on additional channels offered by a webcaster. The royalties increase only based upon additional performances. Del Beccaro WDT, Trial Ex. 57, p. 17. *See* 37 C.F.R. § 380.7, which calculates royalties based on number of performances, and defines a royalty-bearing performance as "each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g.,

the delivery of any portion of a single track from a compact disc to one listener)." 37 C.F.R. § 380.7.

Moreover, if additional channels made the Music Choice service more valuable to consumers, that increased value would be reflected in a relative increase in Music Choice's revenue. Del Beccaro WDT, Trial Ex. 57, p. 17, Crawford WDT, Trial Ex. 54, p. 58, ¶213. Any relative increase in Music Choice's revenue based on an increase in channels would leave to relatively more royalties paid to SoundExchange under the current percentage-of-revenue-based PSS rate structure. Del Beccaro WDT, Trial Ex. 57, p. 17, Crawford WDT, Trial Ex. 54, p. 58, ¶213.

Various PRO licenses for Music Choice and other licensees are calculated as a percentage of revenue, which does not increase or decrease based on the number of channels broadcasted. This further demonstrates that increased channels alone do not necessarily justify any increase in a percentage of revenue royalty rate. Del Beccaro WDT, Trial Ex. 57, p. 17; Trial Exs. 915-917.

Even if the reasoning behind the rate increase had been sound, the factual premise upon which the increase was based turned out to be false. Because of financial difficulties – which were exacerbated by the rate increase implemented in *SDARS II* – Music Choice could not afford to go through with its planned expansion to 300 channels. Del Beccaro WDT, Trial Ex. 55, p. 18.

As noted above, Music Choice has seen no material increase in listenership following the small increase in internet channels since the last

proceeding. And given current market conditions and its financial condition, Music Choice [[ ]] Del Beccaro WDT, Trial Ex. 55, p. 18.

Because its planned channel increase never occurred, Music Choice has been overpaying for the past rate period, when the rate should have been kept at 7.5% of revenue. Del Beccaro WDT, Trial Ex. 55, p. 18.

Reply to SEPFF 1917 (p. 771):

SoundExchange repeatedly criticizes the current PSS rate on the basis that it is not a marketplace rate. But this critique falls flat. It is well established that the Section 801(b)(1) policy-based rate standard, particularly as applied to the PSS, is not a marketplace standard and the resulting rate need not bear any relationship to a marketplace rate.

In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument made by the SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – *and rarely does* – because it is a mechanism whereby Congress

implements policy considerations *which are not normally part of the calculus of the marketplace rate*." *Id*. at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*.

The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other respects.")

Id. (citations omitted).

Reply to SEPFF 1918 (p. 772):

Music Choice incorporates by reference herein its Reply to SEPFF 1914.

Reply to SEPFF 1919 (p. 772):

Music Choice incorporates by reference herein its Reply to SEPFF 1914. Moreover, SoundExchange's argument is inconsistent. After spending pages repeating its assertion that the musical works performance right is so non-comparable to the sound recording performance right that it cannot possibly be used as a benchmark, SoundExchange now attempts to use the musical works rate as a benchmark. Such gamesmanship should be rejected.

Reply to SEPFF 1920 (p. 772):

Music Choice incorporates by reference herein its Reply to SEPFF 1914. It is SoundExchange's proposed CABSAT benchmark, and not the current PSS rate, that is the product of a litigation settlement.

Reply to SEPFF 1921 (p. 773):

SoundExchange, after devoting much energy to arguing that musical works rates are not good indicators of the value of sound recording rights (*see* SEPFF 1901 – SEPFF 1920), now asks the Judges to draw conclusions from those very musical works rates. If, as SoundExchange has argued *ad nauseam*, those rates are truly non-comparable to the value for sound recording performance rights, then SoundExchange's attempt to now make arguments based on musical works rates should be rejected.

Moreover, the supposed evidence SoundExchange seeks to rely upon for support of its arguments is scant, and comes from complimentary oligopoly markets infected by the major record companies' market power. As the Judges held in *Webcasting IV*, the market that produced those rates is a complimentary oligopoly, devoid of competition, which allows the record companies to extract those supracompetitive rates. *Web IV*, 81 Fed. Reg. at 26,334 (explaining that the "'complementary oligopoly' power of the Majors . . . serves to prevent effective competition"); *id*. at 26,343 (noting the "substantial, unrebutted evidence that the interactive services market is not effectively competitive," and concluding that they "c[ould not] ignore the testimony from several record company witnesses . . . that they never attempted to meet their competitors pricing when negotiating with interactive services.").

Reply to SEPFF 1922 (p. 773):

As noted in Music Choice's Reply to SEPFF 1921, SoundExchange has taken the inconsistent position that the musical works rates are not reliable indicators of the value of sound recording performance rights but that the Judges should now draw inferences based on those rates nonetheless.

And in supporting the proposed finding that the rates for sound recording rights are significantly higher than those for musical works, SoundExchange has cited very little evidence – apparently relying on only two examples, Spotify and Pandora, neither of which offer services even closely comparable to the PSS. Moreover, at trial Dr. Wazzan acknowledged that he did not consider any other

markets where sound recording and musical composition royalties are in fact equivalent, such as performance licenses in other countries where terrestrial radio must pay for sound recording performance rights. 5/3/17 Tr. 2385:8-15 (Wazzan). SoundExchange has not presented sufficient evidence to draw any generally applicable conclusions about the relationship between sound recording and musical composition rights, much less the relationship in competitive marketplaces. Nor has it presented any benchmarking analysis supporting any finding of comparability with the PSS market.

Reply to SEPFF 1923 (pp. 773-774):

As a preliminary matter, SoundExchange presented no benchmarking analysis comparing the on-demand streaming market to the PSS market, and those markets were deemed non-comparable in *SDARS II*. *SDARS II*, 78 Fed. Reg. at 23,058. Moreover, the disparity that SoundExchange has identified between Spotify's musical works rates and sound recording rates is driven by the inherently supracompetitive level of sound recording license rates. As the Judges held in Webcasting IV, the market that produced those rates is a complimentary oligopoly, devoid of competition, which allows the record companies to extract those supracompetitive rates. *Web IV*, 81 Fed. Reg. at 26,334 (explaining that the "'complementary oligopoly' power of the Majors . . . serves to prevent effective competition"); *id*. at 26,343 (noting the "substantial, unrebutted evidence that the interactive services market is not effectively competitive," and concluding that they "c[ould not] ignore the testimony from several record company witnesses . . . that

they never attempted to meet their competitors pricing when negotiating with interactive services.”).

Reply to SEPFF 1924 (p. 774):

SoundExchange presented no benchmarking analysis in this proceeding comparing the non-interactive webcasting market to that of the PSS. The disparity that SoundExchange has identified between the musical works rates and the sound recording rates for Pandora’s noninteractive webcasting is driven by the inherently supracompetitive nature of the market for interactive music services discussed in Music Choice’s Reply SEPFF 1923, which market was used as the benchmark for webcasting services.

Reply to SEPFF 1925 (pp. 774-775):

Music Choice incorporates by reference herein its Replies to SEPFFs 1921 – 1924.

Reply to SEPFF 1926 (p. 775):

Music Choice incorporates by reference herein its Reply to SEPFF 1904.

Reply to SEPFF 1927 (p. 775):

Music Choice incorporates be reference herein its Replies to SEPFFs 1921 – 1924.

Reply to SEPFF 1928 (pp. 775-776):

SoundExchange mischaracterizes both the substance and tenor of Mr. Del Beccaro’s testimony. Mr. Del Beccaro (and Mr. Williams) actually testified that the

witnesses SoundExchange always hand-selects for these proceedings are attorneys who work in departments unrelated to the radio promotions departments whose employees understand the importance of promotion on the Music Choice channels and work hand-in-hand with Music Choice to promote their artists. This fact was confirmed at trial with regard to each of the record company witnesses who testified. *See* 5/10/17 Tr. 3524:10-3525:2 (Kushner); 5/18/17 Tr. 4730:2-7; (Williams); 5/15/17Tr. 3881:21-3882:2 (Walker); 5/16/17 Tr. 3913:18-23 (Harrison). And just as those record company lawyers have no knowledge of the promotional activities of their label-level radio promotions departments, the record label promotions employees who lobby Music Choice have no knowledge of the PSS royalties and make it clear that their lobbying is only for the purpose of promotion. 5/18/17 Tr. 4721:9:20 (Williams). It is this fundamental disconnect that Messrs. Del Beccaro and Williams spoke to.

But if the Judges are interested in examples of truly patronizing testimony, they need look no further than that of SoundExchange's witnesses, for example Jeff Walker, who criticized Music Choice's business model in his testimony, even though he has no experience running a company like Music Choice and no personal knowledge of the MVPD market in which Music Choice operates. Walker WRT, Trial Ex. 50, ¶¶ 16-19. 5/15/17 Tr. 3881:3-6 (Walker).

<u>Reply to SEPFF 1929 (p. 776):</u>

SoundExchange once again mischaracterizes Mr. Del Beccaro's testimony, which established that once presented with a statutory license rate set above a fair

market rate, the record companies have no reason to agree to a lower rate for a direct license due to the lack of competition among major record companies. 5/18/17 Tr. 4621:1 (Del Beccaro). And in the complimentary oligopoly that is the recorded music industry, each major label has enough power that it would have no incentive to agree to a fair market rate. 4/24/17 Tr. 752:4-753:10 (Crawford). Notably, however, when UMG, the largest of the major record companies, recently tried to use its unregulated leverage over Music Choice in its video license negotiations to [[[redacted]]] Del Beccaro WRT, Trial Ex. 55, pp. 21-22. This fact alone demonstrates how absurdly high SoundExchange's rate proposal is in this proceeding.

Reply to SEPFF 1930 (p. 776):

Music Choice incorporates by reference its Reply to SEPFF 1929.

Reply to SEPFF 1931 (pp. 776-777):

Music Choice agrees that it is not surprising, given that the major record companies can exercise their unrestrained market power in those negotiations.

Reply to SEPFF 1932 (p. 777):

As a preliminary matter, Mr. Walker addressed the PSS only in his Written Rebuttal Testimony. But as he admitted at trial, while he drafted written testimony purporting to rebut Music Choice's written direct case, he did not actually review the testimony of any of Music Choice's witnesses in this proceeding. 5/15/17 Tr.

3879:24-3880:18 (Walker). This non-rebuttal testimony should be rejected on that basis alone.

Mr. Walker also admitted at trial that there are several differences in functionality between the PSS and mid-tier services: the PSS do not allow users to skip from one song to the next, whereas mid-tier services do. 5/15/17 Tr. 3885:18-23 (Walker); the PSS do not allow offline caching, which mid-tier services do. 5/15/17 Tr. 3886:13-18 (Walker); and the PSS do not allow replays whereas mid-tier services do. 5/15/17 Tr. 3886:19-25 (Walker). These critical distinctions clearly set the PSS apart from the mid-tier offerings to which Mr. Walker attempts to liken them.

Reply to SEPFF 1933 (pp. 777-778):

As explained in Music Choice's Reply to SEPFF 1932, which is incorporated herein by reference, the Music Choice service is not a premium product when compared to the types of streaming services licensed by the record companies, as illustrated by the many differences in characteristics between the Music Choice service and premium or mid-tier products. Moreover, the very fact that SoundExchange's two computations yield results that differ by almost one billion hours per month demonstrates the unreliability of these computations.

Reply to SEPFF 1934 (p. 778):

SoundExchange has presented, and cites, no evidence supporting its claim that the percentage of revenue metric actually disincentives Music Choice from effectively monetizing its service. Nor has SoundExchange offered any evidence that Music Choice has failed to maximize its revenue. To the contrary, the record

evidence clearly establishes that Music Choice has done an outstanding job of maximizing its financial performance by constantly adapting its business to marketplace difficulties, and is the only one of the original PSS that was able to stay active in that business line. Del Beccaro WDT, Trial Ex. 55, pp. 19-26, 44-45; 5/18/17 Tr. 4611:11-4612:17 (Del Beccaro). Moreover, SoundExchange's implication that Music Choice is not effectively monetizing its service under the percentage of revenue structure is based in large part on its claims that Music Choice offers below markets rates to its cable partner affiliates. This claim is simply untrue, as explained in Music Choice's Replies to SEPFF 1960-SEPFF 1998.

Reply to SEPFF 1935 (p. 778):

The revenues SoundExchange receives from other statutory licensees relative to those received from the PSS are not relevant to the Section 801(b)(1) policy objectives to be considered in this case – nor has SoundExchange submitted or cited any record evidence demonstrating that those other services are in any way comparable to the PSS.

Reply to SEPFF 1936 (p. 778):

SoundExchange attempts to paint the PSS as substitutional of other higher-revenue paying services. But SoundExchange has produced no evidence at all that Music Choice cannibalizes revenue other music services. And at trial Sound Exchange's witnesses admitted that they have no actual evidence that Music Choice is substitutional. *See*, *e.g.* 5/16/17 Tr. 4076:18-4077:1 (Harrison); 5/15/17 Tr. 3882:19-23 (Walker). Nor does SoundExchange take into account the key fact that

Music Choice does actually substitute for terrestrial radio, which pays no royalties at all. This substitution for terrestrial radio in the home is so strong that radio broadcasters have given up on trying to regain that listening, and have done strategic deals with Music Choice instead to increase terrestrial radio listening outside of the home. 5/18/17 Tr. 4561:12-4563:2 (Del Beccaro). The record companies, themselves, treat Music Choice's audio channels like terrestrial radio, and differently from internet streaming services. 5/18/17 Tr. 4721:9-4722:2 (Williams).

Music Choice, on the other hand, has submitted abundant evidence that its service is actually net-promotional of music in a way that drives consumption on higher-revenue platforms, by providing a mechanism for consumers to discover new music. Consumers do not usually seek to stream on-demand or to download music that they have not heard before. Williams WDT, Trial Ex. 56, p. 39. *See also* Trial Ex. 958 at 4; Trial Ex. 664 at 53, discussing music discovery. Indeed, SoundExchange's own expert Dr. Ford stated in his testimony at trial that he would be surprised if playing music didn't lead to additional music consumption, and that he himself purchases records when he is exposed to them. 5/1/17 Tr. 1852:17-22 (Ford). And so, by the very logic that SoundExchange advances, if only a trivial portion of Music Choice's listeners discover music that they then consume on a higher-paying service, Music Choice has actually *increased* the record companies' revenues above and beyond the amounts they receive for the PSS royalty.

Reply to SEPFF 1937 (p. 779):

Music Choice does not contest this broad definition of "opportunity cost." But, as explained in Music Choice's Reply to SEPFF 1936 which is incorporated herein by reference, SoundExchange has presented no empirical evidence that the PSS market substitutes or diminishes sales (or royalties) in any higher-paid market – and Music Choice has submitted unrebutted evidence that it actually promotes music consumption in those other markets.

Reply to SEPFF 1938 (p. 779):

Music Choice does not dispute the cited expert testimony as to how opportunity cost may generally influence seller behavior. But the very conduct of the record companies with regard to the Services indicates that the statutory rate is, in fact, above the labels' opportunity cost, as Professor Shapiro explained at trial. The labels consistently lobby the Music Choice for more airplay at the existing statutory royalty rate. Williams WDT, Trial Ex. 56, p. 14; 33; Williams WRT, Trial Ex. 58, pp. 1-2; 5/18/17 Tr. 4720:8-4722:9 (Williams). As Professor Shapiro explained, if the rate were not at least covering the labels' marginal and opportunity costs associated with the PSS license, the labels would rather have their music played less, and would not be lobbying for additional airplay at the statutory rate. 4/20/17 Tr. 284:11-285:4 (Shapiro).

Reply to SEPFF 1939 (p. 779):

Despite Mr. Walker's assertions, SoundExchange has produced no evidence at all that Music Choice cannibalizes higher-revenue music services, and at trial

Sound Exchange's witnesses (including Mr. Walker himself) admitted a trial that they have no empirical evidence that Music Choice is substitutional. See, e.g. 5/16/17 Tr. 4076:18-4077:1 (Harrison); 5/15/17 Tr. 3882:19-23 (Walker).

Reply to SEPFF 1940 (pp. 779-780):

SoundExchange's suggestion that, were Music Choice to exit the market, the CABSAT services would be able take its place is controverted by the evidence. First, there are only two CABSAT services remaining, and only one which is actively seeking to expand to new affiliate. DMX recently exited the CABSAT market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which it uses it as a promotional tool, and is not competing for new business. Crawford WRT, Trial Ex. 59, ¶¶46-47; 4/24/17 Tr. 779:13-781:20 (Crawford); 5/18/17 Tr. 4573:17-4574:3; 4575:1-5; 4575:14-4577:2 (Del Beccaro). That leaves Stingray as the only CABSAT which might attempt to expand into the void that would be left if Music Choice ceased operations. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22—4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id.*

There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music

Choice's larger MVPD affiliates. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which Stingray predominantly contracts. Were Stingray required to pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

Moreover, this argument ignores the clear congressional intent behind the PSS license itself. The very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants (including the CABSATs) was to recognize the PSS' unique role in opening new markets for creative expression and media for their communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647; See MC PCL ¶¶ 7-21. Thus, even if there were any opportunity cost merely from the fact that CABSATs pay a different rate than the PSS, equalizing those rates due to that opportunity cost would contravene this fundamental policy judgment of Congress.

Reply to SEPFF 1941 (p. 780):

Despite Mr. Walker's and Mr. Harrison's claims in their written testimony, both admitted a trial that they have no empirical evidence that Music Choice is substitutional. See, e.g. 5/16/17 Tr. 4076:18-4077:1 (Harrison); 5/15/17 Tr. 3882:19-23 (Walker).

Reply to SEPFF 1942 (p. 780):

The fact that there are no direct licenses for the PSS is not in any way an indication that the PSS rate is below market, but rather a reflection of certain realities that would make directly licensing a PSS service impracticable. Mr. Del Beccaro testified that Music Choice has never even tried to develop a direct licensing program, in part because the costs of adding the necessary infrastructure to negotiate the thousands of licenses necessary would be prohibitive. 5/18/17 Tr. 4547:1- 4548:13;4619:4-11 (Del Beccaro). Nor would it make any sense for Music Choice to try to negotiate these licenses, even if one of the majors were willing. The PSS royalty is currently calculated as 8.5% of the gross revenue from Music Choice's residential audio service. 37 CFR § 382.3(a). That royalty provision has no express carve-out for direct licenses. Thus, if Music Choice (or any PSS) entered into a direct license with one, or even all, of the major record companies, it would have to pay the royalties required by those licenses in addition to its current payment of 8.5% of revenue for its PSS royalties. 5/18/17 Tr. 4673:10-19 (Del Beccaro). Unless a PSS were able, immediately, to license 100% of its music through direct licensing, direct licensing at any rate would cost Music Choice even more than it pays now.

Reply to SEPFF 1943 (pp. 780-781):

Music Choice incorporates by reference its Reply to SEPFF 1942.

Reply to SEPFF 1944 (p. 781):

Music Choice incorporates by reference its Reply to SEPFF 1942.

Reply to SEPFF 1945 (p. 781):

The fact that Music Choice negotiates with record companies for its video services has no bearing on whether it would be able to negotiate direct licenses for its PSS. Because Music Choice's video services are not licensed pursuant to a statutory license, Music Choice has no choice but to directly license them. But the absence of a statutory license for Music Choice's video products is what enables Music Choice to directly license those products without running into the double-payment issue described in SEPFF 1942, which is incorporated herein by reference.

Reply to SEPFF 1946 (p. 781):

Music Choice incorporates by reference its Reply to SEPFF 1942.

Reply to SEPFF 1947 (pp. 781-782)

SoundExchange's attempts to characterize Trial Exhibits 408, 409, 418 and 441 are misleading and based on pure speculation. While these exhibits were admitted pursuant to a joint stipulation by the parties, Music Choice agreed to such admission under the belief that, at trial, foundation would be laid and Music Choice's witnesses would have the opportunity to testify as to the meaning and accuracy of these documents. But at trial, SoundExchange did not use these documents, so neither of those events occurred. Because SoundExchange has never

questioned Music Choice's witnesses as to the meaning of these document, it speculates as to what Music Choice meant when it referred to the cost of its music rights.

Moreover, SoundExchange is simply wrong about the reasons why Music Choice has not sought direct licenses. Those reasons are explained in detail in Music Choice's Reply to SEPFF 1942, which it incorporates by reference.

Reply to SEPFF 1948 (p. 782):

Music Choice does not dispute that SoundExchange proposes a per-subscriber rate structure. However, for reasons discussed *infra*, that proposed rate structure is based on false premises, and should be rejected.

Reply to SEPFF 1949 (p. 782):

Because, as explained in detail *supra*, in Music Choice's Replies to SEPFF 1792 – SEPFF 1888, the CABSAT rates and terms are not an appropriate benchmark for the PSS and must be rejected, the change to a per-subscriber rate structure must also be rejected.

Reply to SEPFF 1950 (pp. 782-783):

SoundExchange, in referencing the per-subscriber mechanism by which Music Choice's MVPDs pay Music Choice, brings to light one of the most compelling reasons why implementing a per-subscriber rate would be fundamentally unfair:

Recent changes in the MVPD market have affected the fees Music Choice can obtain from its cable affiliates – i.e., the existing economic conditions in the marketplace in which Music Choice operates. Specifically, consolidation among

MVPDs and shrinking margins in the cable industry, combined with competitive pressure, have led to [[ ]] Del Beccaro WDT, Trial Ex. 57, p. 21. Due in part to consolidation in the cable industry, Music Choice has recently experienced increased pricing pressure when it renegotiates licensing fee arrangements with cable affiliates. Del Beccaro WDT, Trial Ex. 57, p. 22. Smaller cable affiliates with whom Music Choice has historically been able to negotiate higher fees are being acquired by larger cable companies, which have increased bargaining leverage to negotiate lower rates. Del Beccaro WDT, Trial Ex. 55, p. 22.

In the past three years, Music Choice has seen a [[ ]] reduction in its average per-subscriber license rate. Three years ago, the average price for [[ ]] of Music Choice's subscriber base was [[ ] per subscriber per month. The average price for Music Choice's [[ ]] largest affiliates, which make up [[ ]] of its total subscriber base is now [[ ]] per customer per month. And at the time of the *SDARS II* proceeding, Music Choice's license fees averaged [[ ]] per customer per month. Del Beccaro WDT, Trial Ex. 55, p. 23.

Music Choice is a television content provider, and competes and negotiates in MVPD negotiations in a manner similar to other television content providers. Del Beccaro WDT, Trial Ex. 55, p. 24. Television content providers no longer have the security of knowing that once they are carried on a cable system, they will not be dropped. In the past few years, MVPDs, including mid-

size operators whose margins are more affected given their relative lack of bargaining leverage, have begun dropping even name-brand networks. Del Beccaro WDT, Trial Ex. 55, p. 24. For example, Suddenlink and Cable One dropped at least 24 and 15 networks respectively in 2014, and GCI dropped 13 networks in 2015. Del Beccaro WDT, Trial Ex. 55, p. 24. Popular networks, such as AMC, have been dropped by smaller cable operators. Del Beccaro WDT, Trial Ex. 55, p. 24. And virtually every independent network has had to take reduced fees from MVPDs in recent years. Del Beccaro WDT, Trial Ex. 55, p. 24. Even very popular networks such as ESPN are facing increased pressure: Comcast and Cox, among other MVPDs, have dropped ESPN from their lower-priced cable packages. This means that even if its per-subscriber price is not reduced, ESPN's overall revenues are reduced.

Music Choice experiences these same pressures that other television content providers experience, and these pressures have fundamentally changed the financial outlook for Music Choice's residential audio service. Del Beccaro WDT, Trial Ex. 55, pp. 24-25.

Thus, Music Choice does not have any "revenue protection" in the downstream market. Implementing a per-subscriber rate not tied to Music Choice's actual revenues have the effect of a rate increase as Music Choice's per-subscriber fees from MVPDs continue to decline. Crawford WRT, Trial Ex. 59, ¶¶188-189. This effect would be fundamentally unfair.

Reply to SEPFF 1951 (p. 783):

As a preliminary matter, SoundExchange did not present, and has not cited, any record evidence demonstrating that the percentage of revenue rate structure has been difficult to administer, or has otherwise caused any problems in the twenty years that the PSS have been paying royalties. Nor does SoundExchange cite any evidence that any "complicated allocation of bundled revenue" has actually occurred with respect to Music Choice's PSS payments, much less that any such allocations have ever caused a dispute. Notably, Music Choice has been bundling its video service with its audio service since 2004. Del Beccaro WDT, Trial Ex. 55, p. 28. If computation of Music Choice's percentage of revenue had presented any difficulties in all that time, one would think that SoundExchange would have some evidence to cite.

While Dr. Orszag cites the ease of calculating a per subscriber rate as one advantage to that mechanism, he acknowledges that there are advantages and disadvantages to each rate mechanism. Orszag WDT, Trial Ex. 26 at ¶ 27. And Dr. Orszag's testimony explicitly notes that a "percentage-of-revenue mechanism arguably is preferable because revenues are linked to consumers' willingness-to-pay for a service." Orszag WDT, Trial Ex. 26 at ¶ 27. Considering the well documented downturn in the prices MVPDs are willing or able to pay for the Music Choice service, as explained in Music Choice's Reply to SEPFF 1950, a percentage of revenue mechanism is indeed preferable in the context of the PSS license. And while it is kind of SoundExchange to express concern over Music Choice's

transaction costs, Music Choice respectfully submits that, considering the downturn in its affiliate fees, those costs are necessary to prevent the de facto rate increase that a per-subscriber rate untethered to its revenues would impose.

Reply to SEPFF 1952 (pp. 783-784):

SoundExchange correctly notes that there has never been a dispute as to the accuracy of Music Choice's royalty payments, as noted in Reply to SEPFF 1951. SoundExchange's conjecture is not a substitute for record evidence and cannot support its proposal.

Reply to SEPFF 1953 (p. 784):

As noted above, SoundExchange has presented and cited no record evidence that this supposed "lack of transparency" has actually presented any problem or controversy of the past twenty years. Nor does SoundExchange explain how a royalty statement disclosing representations of subscriber numbers is any more "transparent" than a royalty statement disclosing representations of revenue. Moreover, the calculation of a fixed percentage of that revenue is just as simple as the calculation of a per-subscriber rate. SoundExchange is clearly grasping at straws.

Reply to SEPFF 1954 (p. 784):

The payment structure of marketplace agreements from a non-competitive market is not relevant to the considerations in this proceeding. Moreover, the very paragraph of Dr. Orszag's testimony that SoundExchange cites explicitly notes that a "percentage-of-revenue mechanism arguably is preferable because revenues are

linked to consumers' willingness-to-pay for a service." Orszag WDT, Trial Ex. 26 at ¶ 27. Considering the well-documented downturn in the prices MVPDs are willing or able to pay for the Music Choice service, as explained in Music Choice's Reply to SEPFF 1950, a percentage of revenue mechanism is indeed preferable in the context of the PSS license. Music Choice also notes that SoundExchange has not proposed a greater-of structure for the PSS license, and the Judges have consistently rejected SoundExchange's requests for such structures in other proceedings. *See, e.g., Web IV*, 81 Fed. Reg. at 26,325-26,326.

Reply to SEPFF 1955 (pp. 784-785):

As explained in its Reply to SEPFF 1950, Music Choice is not "slashing the price of the music it distributes." The lower prices it now receives from its cable affiliates are directly related to market forces in the MVPD industry which affect every television provider, and not related to any voluntary reduction in price by Music Choice.

Reply to SEPFF 1956 (p. 785):

While Music Choice acknowledges that its affiliate fees have declined in the time since *SDARS II*, Music Choice incorporates herein by reference its Reply to SEPFF 1950, which explains the market forces behind that decline. SoundExchange has not explained why the record companies should be entitled to a higher percentage of those fees at the same time the value of their music to MVPDS and their subscribers is falling.

Reply to SEPFF 1957 (p. 785):

As explained in Music Choice's Reply to SEPFF 1950, which it incorporates herein by reference, it is not "price cutting," but rather responding to market forces. As such, the premise of this entire finding fails and this finding should be rejected. Moreover, in *Phonorecords I*, the Judges were considering a mechanical license rate that had always been computed as a per-copy penny rate. The PSS rate has always been computed as a percentage of revenue.

Reply to SEPFF 1958 (p. 786):

As demonstrated above, in Replies to SEPFFs 1950 and 1957, the history and context of the mechanical license is wholly unrelated to those of the PSS license. Nor does a percentage of revenue formula allow Music Choice to "discount the price" it pays for the license. It merely accounts for changes in the derived demand in the MVPD market for music services.

Reply to SEPFF 1959 (p. 786):

As explained in Music Choice's Replies to SEPFF 1960 - SEPFF 1998 below, which are hereby incorporated herein by reference, the assertion that Music Choice has given certain of its affiliates prices that do not reflect the full value of the music service being delivered is entirely false, and was definitively disproven at trial.

Reply to SEPFF 1960 (p. 786):

It is remarkable that SoundExchange continues to cite the error-filled testimony of Dr. Wazzan relating to Music Choice's ownership and affiliate deals with its partners after those errors were so clearly demonstrated at trial. Not only

are SoundExchange's claims in this Proposed Finding not "undisputed," they are conclusively disproven by the record evidence. As a preliminary matter, even SoundExchange's initial list of Music Choice cable partners is incorrect. Time Warner Cable and Bright House (a Music Choice partner SoundExchange left off of its erroneous list) were recently acquired by Charter, so Charter now owns the Time Warner Cable and Bright House partnership interests. Del Beccaro WRT, Trial Ex. 57, p. 17; 5/18/17 Tr. 4584:14, 4587:2, 4589:22 (Del Beccaro).

More important, the uncontroverted evidence demonstrates that Music Choice has historically charged, and does currently charge, similarly situated non-partner affiliates the same [[[redacted]]] charged to its partners. For example, in [[[redacted]]] Music Choice entered into an agreement with [[[redacted]]], which is roughly [[[redacted]]] the size of Music Choice's [[[redacted]]] Music Choice gave [[[redacted]]] rates equivalent to the partners. 5/18/17 Tr. 4582:14-23 (Del Beccaro). From [[[redacted]]] was an affiliate, Music Choice charged [[[redacted]]] Del Beccaro WRT, Trial Ex. 57, p. 18; 5/18/17 Tr. 4593:21-4594:10 (Del Beccaro); 4/24/17 Tr. 804:8-805:1 (Crawford). Music Choice is [[[redacted].]] Del Beccaro WRT, Trial Ex. 57, pp. 18-19; 5/18/17 Tr. 4581:1-10, 4594:11-21 (Del Beccaro); 4/24/17 Tr. 805:2-14 (Crawford). Thus, the very premise of SoundExchange's finding and argument, that the partners pay lower rates than any

non-partners, is simply false. Notably, when Dr. Wazzan formulated the opinions in his written testimony, he was unaware that Music Choice [[ ]] 5/3/17 Tr. 2469:15-2470:9 (Wazzan).

Moreover, the supposed "weighted average" computed by Dr. Wazzan, like most of his testimony, is simply incorrect and unreliable for a number of reasons. As he admitted at trial, he only used data from Music Choice's top twenty affiliates (including the partners), so only a very small fraction of Music Choice's non-partner affiliates were included in his computation. He acknowledged that he had access to the data for all of Music Choice's many affiliates, and could not give any reason why he limited his sample in this way. 5/3/17 Tr. 2467:15-2468:20 (Wazzan).

Additionally, Dr. Wazzan used current subscriber counts throughout his analysis, and not the size of each affiliate at the time it negotiated its affiliate agreement. *Id*. at 2468:21-2469:1. He acknowledged that he had access to all of the affiliate agreements, and could have determined each affiliate's size at the time of its deal. *Id*. at 2447:13-22. The uncontroverted evidence demonstrates that an MVPD's size, measured in number of subscribers, is the most important determinant of leverage in a negotiation with Music Choice, which leads to a lower rate. But other factors that impact an affiliate's rate include the length of term that affiliate is willing to accept, with longer terms leading to lower rates, and the level of commitment to a broader suite of Music Choice services, including new product lines that Music Choice is attempting to roll out Del Beccaro WRT, Trial Ex. 57, pp.

16-17; Crawford WRT, Trial Ex. 59, pp. 58-59; 5/18/17 Tr. 4589:12-4591:8 (Del Beccaro); 4/28/17 Tr. 799:9-23 (Crawford). Naturally, it is only an affiliate's size at the time the affiliate agreement is negotiated, which Dr. Wazzan did **not** consider, that impacts the rate set for that affiliate. 5/18/17 Tr. 4591:15-25 (Del Beccaro); 4/24/17 Tr. 799:24-801:3 (Crawford). Nor did Dr. Wazzan consider any of the affiliates' (partner or non-partner) length of term or commitment to services, even though he acknowledged at trial that those factors could be expected to lead to lower rates, all other things being equal. 5/3/17 Tr. 2458:8-20 (Wazzan).

Other than his fatally flawed "weighted average," the only example that Dr. Wazzan pointed to, out of all of Music Choice's hundreds of affiliates, as a supposed example of a non-partner affiliate paying a higher rate than similarly-sized partner is his comparison of partner [[[redacted]]] to non-partner [[[redacted].]] Wazzan WDT, Trial Ex. 501, p. 36; Wazzan WRT, Trial Ex. 502, pp. 33. Even if one example out of hundreds somehow proved any generalizable point, Dr. Wazzan's comparison is again fatally flawed. As with his "weighted average" analysis, Dr. Wazzan only considered [[[redacted]]] current size, not their subscriber counts at the time their deals were done. Wazzan WDT, Trial Ex. 501, p. 36 & fn.22; Wazzan WRT, Trial Ex. 502, p. 42; 5/3/17 Tr. 2446:18-2447:22 (Wazzan).

The undisputed evidence shows that at the time [[[redacted]]] entered into its current affiliate agreement, it was much larger than it is now and in fact [[[redacted]]] DelBeccaro WRT, Trial Ex. 57, p. 18. [[[redacted]

[redacted]]] *Id.*

With respect to [[[redacted],]] when it negotiated its original affiliate deal, it was [[[redacted]]] In [[[redacted],]] with several years left to go on that deal, [[[redacted]]] asked Music Choice to renegotiate [[[redacted]] Music Choice agreed to renegotiate, but even though [[[redacted]]] had grown significantly by that time, it did not have the full leverage to drive the rate down to a level consistent with its then-current size because its original deal was not yet up for renewal and therefore if Music Choice did not agree to a new deal [[[redacted]]] would have had to continue paying the much higher rate from the original deal. Even without full leverage, however, by agreeing to a long term extension, [[[redacted]]] was able to get a slightly reduced rate and [[[redacted]]] 5/18/17 Tr. 4592:1-4593:20 (Del Beccaro). When [[[redacted]]] extended deal is up for an actual renewal in [[[redacted]]] and it can use the full leverage of its massive growth since the original deal, however, Mr. Del Beccaro testified that he fully expects it will be able to negotiate rates consistent with its size and the length of term to which it is willing to commit, likely a rate [[[redacted]]] *Id.* at 4593:11-20. Thus, if one considers the various affiliates' size at the time they negotiated their current deals (even without also considering length of term and

service commitment), the current rates paid by [[ ] are entirely consistent with the typical bargaining dynamics faced by programming providers in the MVPD industry, as are all of the affiliate rates charged by Music Choice.

Reply to SEPFF 1961 (pp. 786-787):

It is true that SoundExchange made the exact same arguments in the *SDARS II* proceeding, and the Judges rejected that argument. SoundExchange does not make any new arguments in this proceeding that it did not make in *SDARS II*. Compare *SDARS II*, SoundExchange Proposed Findings of Fact, ¶¶ 718-129 (making exactly the same arguments made in this proceeding). To the extent that the record in this proceeding is any different, it is that the evidence here even more conclusively proves that Music Choice is not charging its partners below market prices, including for the reasons set forth in Reply to SEPFF 1961.

In addition to those independently dispositive facts, both Music Choice's majority partners and Music Choice's management have strong disincentives to provide any below market rates to the partner affiliates. Although Dr. Wazzan initially (and erroneously) claimed otherwise, Music Choice's cable company partners each own a very small ownership interest in Music Choice, and even at the aggregate level the cable companies in the aggregate own less than a one-third interest in Music Choice. Del Beccaro WRT, Trial Ex. 57, p. 15; 5/3/18 Tr. 2454:18-21 (Wazzan); 4/24/17 Tr. 797:11-24 (Crawford). And cable companies have never owned a 50% or greater interest in Music Choice. 5/18/17 Tr. 4582:24-4583:20 (Del Beccaro). The super-majority of both economic and voting interest in Music Choice

is controlled by non-cable companies (including companies affiliated with record companies). Del Beccaro WRT, Trial Ex. 57, p. 16. At trial, even Dr. Wazzan had to admit that his initial claim was wrong due to his sloppy and careless review of the evidence, that Music Choice was not majority owned by cable companies, and that he had to file amended testimony to correct his error. 5/3/17 Tr. 2454:3-21 (Wazzan).

Given that the cable partners only control less than a one-third interest in the Music Choice partnership, the non-cable partners of Music Choice would have no reason to agree to give the cable company partners below-market rates. The three cable company partners are Music Choice's largest customers and provide the bulk of its revenue; cutting their rates below arms-length rates would only harm Music Choice and reduce its value, which is not in the interest of any of the partners, but especially the non-cable-company partners. Del Beccaro WRT, Trial Ex. 57, p. 19. 287. There is no potential benefit that goes to any of the non-cable partners other than the revenues generated from these deals. They do not receive the service and there are no intangible benefits to them. Any preferential treatment of the cable partners would come directly out of the non-cable partners' pockets with no offsetting gain. Del Beccaro WRT, Trial Ex. 57, p. 19-20. 288. Nor would giving below-market rates to the partner affiliates be in the interest of Music Choice's management. The compensation of all Music Choice's employees, including Mr. Del Beccaro, is substantially tied to the profitability of the company. 5/18/17 Tr. 4588:24-4589:11 (Del Beccaro). Indeed, Dr. Wazzan could not provide any reason

why Music Choice's management would agree to cut below-market rates to the cable partners. 5/3/17 Tr. 2456:6-10 (Wazzan).

Reply to SEPFF 1962 (p. 787):

SoundExchange grossly mischaracterizes Mr. Del Beccaro's testimony. Mr. Del Beccaro did not at any time, much less in the testimony cited, state that Music Choice was not charging arm's length prices to its partners. To the contrary, he comprehensively explained the history and background of how the partners' current rates were negotiated, in conjunction with a re-organization of the partnership in the late 1990s. At that time the company was struggling and had still not become profitable. Management saw a need to adapt Music Choice's business model to improve its long-term chances for viability, including expansion of the service broadly into all digital homes serviced by its affiliates. 5/18/17 Tr. 4584:12-4585:16 (Del Beccaro).

Notably, it was the record company partners that negotiated this re-structuring directly with the cable partners, including the related affiliate deals with the cable partners, which at the time were the largest cable companies in the country. *Id*. The resulting deal was structured so that the cable partners agreed to take very long-term deals in which they would greatly expand the numbers of subscribers receiving the Music Choice service, in order to ensure the survival of the company and help transition the business model. 5/18/17 Tr. 24,586:2-12 (Del Beccaro). In exchange, the partner affiliates got lower rates, consistent with their status as the largest cable companies in the country, the very long terms of the

agreement, and their massively increased commitment to expand the service. *Id*. As noted above, these are all of the factors that typically impact rates in other arms-length deals, and given that they were negotiated directly by record company executives, they were the very paradigm of arms-length deals. 5/18/17 Tr. 4584:15-4588:21 (Del Beccaro). Mr. Del Beccaro testified that the partners [[,]] but not because the original deals were other than arms-length. His point was that, as described above, the partners' rates were certainly market rates, based on size, length of term, and level of service commitment [[ ]] 5/18/17 Tr. at 4586:20-4587:9 (Del Beccaro). His point was that if the partners' agreements were up for renewal right now, [[ ]] *id.* at 4581:1-3.

<u>Reply to SEPFF 1963 (p. 787):</u>

The fact that various partners in Music Choice made their investments for strategic purposed (as all investors do) does not in any way explain why Music Choice's other partners would agree to provide [[ ]] Mr. Del Beccaro's cited testimony was referring to all of Music Choice's partners,

including the record company partners that negotiated the current rate arrangements with the partner affiliates, as described in Reply to SEPFF 1962. Notably, SoundExchange gives no reason why the various partners' strategic interests would have incentivized them to agree to a [[[redacted]]] much less cites any record evidence supporting such a reason, yet Music Choice has amply demonstrated why doing so would be against their interests, as also described in Reply to SEPFF 1962. SoundExchange's illogical and unsupported conspiracy theories must be rejected, as they were in *SDARS II*.

Reply to SEPFF 1964 (p. 788):

There are no factual findings in this paragraph, so no response is necessary.

Reply to SEPFF 1965 (p. 788):

No response.

Reply to SEPFF 1966 (p. 788):

As a preliminary matter, this long recitation of the origins of the Music Choice partnership bears little to no relationship to the current partnership of Music Choice. Moreover, SoundExchange cites no evidence for its speculation that the equipment and technology referenced from Jerrold is the same equipment and technology Music Choice developed during the 1987-1991 period, and it certainly is not the substantial equipment and technology Music Choice developed from 1991 forward. Had SoundExchange asked Mr. Del Beccaro about any of this at trial, or even bothered to take his deposition (it did neither) it would be able to present actual facts to the Judges instead of unsupported speculation.

Moreover, the Music Choice service launched to consumers for product development and test marketing purposes in July 1988. Del Beccaro WDT, Trial Ex. 55, p. 1, 19. It was launched nationally in 1991, after the company was spun off as a standalone entity. *Id*. at p. 2.

Reply to SEPFF 1967 (p. 789):

No response.

Reply to SEPFF 1968 (p. 789):

Although Time Warner Cable and Warner Music were under common ownership at the highest parent level, the two entities' interests in Music Choice were separately acquired, negotiated, and managed by very different companies. In particular, the Warner Music interest was initially negotiated and managed by Warner record company executives, and various benefits for the record company were negotiated as part of that investment. 5/18/17 Tr. 4517:18-4519:14 (Del Beccaro). See also, Music Choice Ownership Chart, Trial Ex. 405 (showing separate interests for Time Warner Cable entities and Warner Music entities). And as noted by SoundExchange, Time Warner Cable and Warner Music have not been under common control for a very long time.

Reply to SEPFF 1969 (pp. 789-790):

No response.

Reply to SEPFF 1970 (p. 790):

There is no record evidence in this proceeding supporting SoundExchange's proposed finding of fact that [[

[[ ]] Notably, SoundExchange never made this claim in its written or trial testimony, nor did it ask Mr. Del Beccaro about this claim at trial, so Music Choice had not ability to provide explanatory evidence relating to the cited language from the original CARP Report. That said, SoundExchange misrepresents the actual language it cites from the CARP Report. That language does not actually state that [[ ]] in connection with its investment in Music Choice. That Section of the CARP Report discusses the history of the negotiation of the record companies' investment in Music Choice, and is predominately concerned with the sound recording performance licenses executed as part of that investment. *CARP Report*, Trial Ex. 979 at ¶¶ 155-166. In passing the CARP states that, during that negotiation, Music Choice, in an attempt to counter an offer on the table from its competitor at the time, DMX, for a similar investment, added to its offer [[ ]] *Id*. at ¶162. Although the CARP Report goes on to recount various subsequent negotiations leading up to the eventual investment deal, it does not say whether that part of the offer was actually contained in the deal with [[ ]] that was eventually signed. In any event, even if Music Choice had provided a temporary benefit to [[ ]] to secure its original investment back in the early 1990s, that fact would be irrelevant to whether [[ ]] is paying fair market rates today.

Reply to SEPFF 1971 (p. 790):

EMI Music Publishing Top Twenty, Inc. is the current legal entity holding the EMI ownership interest in Music Choice, not the entity that originally invested in Music Choice back in 1994. Trial Ex. 405 (showing current partners as of date of recent document). The original investment was negotiated and executed by the EMI recording company. 5/18/17 Tr. 4517:18-4519:14 (Del Beccaro); *CARP Report*, Trial Ex. 979, at ¶164 (noting that EMI's record company joined the partnership on similar terms to Sony and Warner record companies, including the required sound recording license).

Reply to SEPFF 1972 (p. 790):

No response.

Reply to SEPFF 1973 (p. 791):

No response.

Reply to SEPFF 1974 (p. 791):

No response.

Reply to SEPFF 1975 (p. 791):

Contrary to SoundExchange's "alternative facts," there is absolutely no controversy whatsoever regarding whether Music Choice's cable partners own, or have ever owned, a majority stake in the partnership. The do not, and have not. Although Dr. Wazzan, due to sloppy work and carelessness, originally claimed in his written testimony that Music Choice was majority owned by cable companies, he later had to file amended testimony correcting that false statement and admitted at

trial that he had been wrong and that, even in the aggregate, the cable company partners have less than a one-third interest in Music Choice. Trial Ex. 405; 5/3/17 Tr. 2454:3-21 (Wazzan). Moreover, Mr. Del Beccaro gave undisputed testimony that the cable partners have never had a 50% or greater interest in the company at any time in Music Choice's history. At the time of the partnership's formation, cable ownership was 43%. That percentage rose slightly to 49%, and then decreased to the current level of approximately 28%. 5/18/17 Tr. 4582:24-4583:20 (Del Beccaro).

The only evidence SoundExchange cites to support its attempt to manufacture a "controversy" is the recent ownership chart, which it nonsensically claims supports a finding that there "may have been" a majority cable ownership in the 1991-1993 timeframe. But this chart shows the current cable ownership at approximately 28%, which even SoundExchange's own expert agreed could not support a claim of majority ownership. Trial Ex. 405. The chart says nothing at all about the partnership's ownership in the 1991-1993 timeframe, nor does SoundExchange cite any evidence at all to dispute Mr. Del Beccaro's clear testimony that the cable partners have never even had a 50%, much less a majority, interest in the company.

It is telling that Dr. Wazzan testified that "it does not matter" to him whether the cable companies have a majority ownership in Music Choice. 5/18/17 Tr. 2457:15 – 2458:7 (Wazzan). It should matter to Dr. Wazzan, if he were at all concerned with providing an honest and defensible opinion in this matter. His erroneous belief that Music Choice was majority owned by its cable partners was

the premise for his claim that Music Choice gave below-market rates to those cable partners. But he was wrong about that, as even he admitted. Yet he still maintains his opinion that Music Choice provides those below-market rates, even though he could not give any reason why the majority partners or Music Choice management would possibly agree to give such below-market rates that would hurt the company, the partners, and all of the Music Choice employees. See, Reply to SEPFF 1961; 5/3/17 Tr. 2456:6-10 (Wazzan). Indeed, at this deposition Dr. Wazzan admitted that he started from a conclusion that Music Choice gave lower rates to its partners than to its non-partner affiliates (which is wrong, as noted above), and once he adopted that conclusion he did not care if there was **any** legitimate reason that would justify the difference in rates. And he stood by that militant indifference to reasons at trial. 5/3/17 Tr. 2457:15-2458:7 (Wazzan). The Judges should not base their determination on Dr. Wazzan's indifference to the key facts that undermine his conclusion.

SoundExchange's allegation that "almost all of the partners have had preferential commercial arrangement with Music Choice" is unsupported by any record evidence, nor does SoundExchange cite any.

<u>Reply to SEPFF 1976 (p. 792):</u>

Tellingly, SoundExchange does not provide a single cite to record evidence supporting any of its proposed findings in SEPFF 1976, which are all sheer speculation and are not supported by the record. Nor do these speculative findings explain how, even if true, the interests of the various types of businesses that

invested in Music Choice, including those of the major record companies, would have led to the provision of below-market rates to the cable partners, which would have harmed the financial performance of the entire partnership.

Reply to SEPFF 1977 (p. 792):

The first part of SEPFF 1977 is duplicative of SEPFF 1970. Music Choice incorporates its Reply to SEPFF 1970 by reference. SoundExchange provides no citation to any record evidence supporting the rest of this Proposed Finding.

Reply to SEPFF 1978 (pp. 792-793):

No response.

Reply to SEPFF 1979 (p. 793):

SoundExchange seems to be confused. Music Choice is not attempting to use its affiliate agreements as benchmarks in this proceeding. SoundExchange is the party attempting to make an issue of those agreements and has the burden of proving its erroneous claim that Music Choice provides below-market rates to its partners. SoundExchange had full discovery into Music Choice's affiliate and partnership agreements. It had the opportunity to take depositions, though it chose not to. After all that, SoundExchange has not provided one shred of evidence that would support its claim of below-market rates. Nor does it cite any record evidence for this Proposed Finding, which must be rejected.

Reply to SEPFF 1980 (p. 793):

SoundExchange provides no record evidence supporting its alleged "grounds for suspicion."

Reply to SEPFF 1981 (pp. 793-794):

SoundExchange discusses the 1999 Music Choice partnership agreement, yet does not cite that agreement, which is not in the record of this proceeding.

Reply to SEPFF 1982 (p. 794):

The undisputed record evidence demonstrates that the 1999 Music Choice partnership agreement, and the affiliate agreements related to that partnership agreement, were all arms-length agreements and resulted in partner rates that were entirely consistent with the typical negotiating dynamics of programming providers in the MVPD industry. In particular, Mr. Del Beccaro comprehensively explained the history and background of how the partners' current rates were negotiated, in conjunction with a re-organization of the partnership in the late 1990s.

At that time the company was struggling and had still not become profitable. Management saw a need to adapt Music Choice's business model to improve its long-term chances for viability, including expansion of the service broadly into all digital homes serviced by its affiliates. Notably, it was the record company partners that negotiated this re-structuring directly with the cable partners, including the related affiliate deals with the cable partners, which at the time were the largest cable companies in the country. The resulting deal was structured so that the cable partners agreed to take very long-term deals in which they would greatly expand the numbers of subscribers receiving the Music Choice service, in order to ensure the survival of the company and help transition the business model. In exchange,

the partner affiliates got lower rates, consistent with their status as the largest cable companies in the country, the very long terms of the agreement, and their massively increased commitment to expand the service. As noted above, these are all of the factors that typically impact rates in other arms-length deals, and given that they were negotiated directly by record company executives, they were the very paradigm of arms-length deals. 5/18/17 Tr. 4584:15-4588:21 (Del Beccaro). Moreover, at the very time these deals were negotiated, [[ ] 5/18/17 Tr. 4593:21 – 4594:10 (Del Beccaro); 4/24/17 Tr. 804:8-805:1 (Crawford).

SoundExchange cites to no record evidence contradicting Mr. Del Beccaro's testimony, or otherwise demonstrating any way in which these bargaining dynamics would have led to below-market rates for the cable partners.

Reply to SEPFF 1983 (p. 794):

As demonstrated in Music Choice's Replies to SEPFF 1960 - 1982 above, the partners' rates were entirely consistent with their size, length of term, and commitment to the scope and expansion of Music Choice's service at the time of the 1999 partnership agreement.

Reply to SEPFF 1984 (pp. 794-795):

SoundExchange cites no evidence, and provides no example of, any way in which any factors relating to the negotiation of the 1999 partnership agreement would have led the majority non-cable partners, including the record company

partners who actually negotiated the deals, to provide the cable partners with below-market rates.

Reply to SEPFF 1985 (p. 795):

Mr. Del Beccaro did not testify, as claimed by SoundExchange, that Music Choice's "standard-tier pricing was between [[[redacted]]] per subscriber per month." See Del Beccaro WDT, Trial Ex. 55 at 23. The CARP Report does not explain what is meant by "standard-tier" pricing, but in any event, even if credited, this testimony has no relevance to whether Time Warner Cable is currently paying below-market rates. Indeed, Time Warner Cable is now part of Charter, one of the largest cable companies in the country, and therefore the Time Warner agreement at the time of *PSS I* is irrelevant. Del Beccaro WRT, Trial Ex. 57, p. 17.

Reply to SEPFF 1986 (pp. 795-796):

As noted above in Reply to SEPFF 1982, the undisputed evidence demonstrates that all of the features of the affiliate agreements entered into as part of the 1999 partnership agreements, including the effective royalty rates, were consistent with the size, length of term, and commitment to service agreed to by the partner affiliates as part of those deals, which are the typical factors driving rates in the MVPD market.

Reply to SEPFF 1987 (p. 796):

As noted above in Reply to SEPFF 1982, the undisputed evidence demonstrates that all of the features of the affiliate agreements entered into as part of the 1999 partnership agreements, including the effective royalty rates, were

consistent with the size, length of term, and commitment to service agreed to by the partner affiliates as part of those deals, which are the typical factors driving rates in the MVPD market.

Reply to SEPFF 1988 (pp. 796-797):

As noted above in Reply to SEPFF 1982, the undisputed evidence demonstrates that all of the features of the affiliate agreements entered into as part of the 1999 partnership agreements, including the effective royalty rates, were consistent with the size, length of term, and commitment to service agreed to by the partner affiliates as part of those deals, which are the typical factors driving rates in the MVPD market.

Reply to SEPFF 1989 (p. 797):

Music Choice does not claim that size is the only factor influencing the rates its affiliates pay, though it is the most significant factor. Length of term and commitment to service are other key factors. Del Beccaro WRT, Trial Ex. 57, pp. 16-17; Crawford WRT, Trial Ex. 59, pp. 58-59; 5/18/17 Tr. 4589:12-4591:8 (Del Beccaro); 4/28/17 Tr. 799:9-23 (Crawford). Even Dr. Wazzan acknowledged that length of term and commitment to service could influence market rates. 5/3/17 Tr. 2458:8-20 (Wazzan).

All of the partner affiliates took very long-term deals and made major commitments to expanding Music Choice's service as part of the 1999 affiliate agreements. Moreover the partners were all among the largest cable companies in the country at that time. 5/18/17 Tr. 4584:15-4588:21 (Del Beccaro). Of course, this

does not mean that they were all the same size, but as Mr. Del Beccaro testified, the relationship of size to rate is not linear. Instead, there are various tiers, or clumps, of rates based upon size for all of its affiliates. *Id*. at 4589:22-4590:17; 4591:9-14. As the largest cable companies, the partners were all in that top tier (in addition to differentiating themselves by taking the longest term deals and making commitments to expand the penetration of the Music Choice service). *Id*. at 4589:12-4591:8; *id*. at 4584:15-4588:21 (Del Beccaro).

Reply to SEPFF 1990 (pp. 797-798):

Music Choice incorporates its Reply to SEPFF 1989 by reference.

Reply to SEPFF 1991 (p. 798):

As demonstrated in Replies to SEPFFs 1962, 1982, and 1989, above, Music Choice's partner affiliate rates as set in 1999 were entirely consistent with market rates, and SoundExchange has not cited a shred of evidence demonstrating any way in which those rates are inconsistent with fair market rates. Indeed, [[[redacted]]] 5/18/17 Tr. 4582:3-23 (Del Beccaro).

Reply to SEPFF 1992 (pp. 798-799):

As demonstrated in Replies to SEPFFs 1962, 1982, and 1989, above, Music Choice's partner affiliate rates as set in 1999 were entirely consistent with market rates, and SoundExchange has not cited a shred of evidence demonstrating any way in which those rates are inconsistent with fair market rates. Indeed, [[[redacted]

]] 5/18/17 Tr. 4582:3-23 (Del Beccaro). Moreover, the fact that the later [[ ]] agreement omits the language upon which SoundExchange myopically focuses demonstrates that the language was not viewed by the parties as significant.

Reply to SEPFF 1993 (p. 799):

As demonstrated in Replies to SEPFFs 1962, 1982, and 1989, above, Music Choice's partner affiliate rates as set in 1999 were entirely consistent with market rates, and SoundExchange has not cited a shred of evidence demonstrating any way in which those rates are inconsistent with fair market rates. Indeed, [[.]] 5/18/17 Tr. 4582:3-23 (Del Beccaro). And as with the [[ ]] agreement, the fact that the later [[ ]] agreement omits the language upon which SoundExchange myopically focuses further demonstrates that the parties did not view that language as significant.

Reply to SEPFF 1994 (pp. 799-800):

As demonstrated in Replies to SEPFFs 1962, 1982, and 1989, above, Music Choice's partner affiliate rates as set in 1999 were entirely consistent with market rates, and SoundExchange has not cited a shred of evidence demonstrating any way in which those rates are inconsistent with fair market rates. Indeed, [[

[[5/18/17 Tr. 4582:3-23 (Del Beccaro). SoundExchange's claim that the rates are solely a function of partnership status is further proven false by the undisputed facts that Music Choice currently provides the same partner-level rates to [[ ]] Del Beccaro WRT, Trial Ex. 57, pp. 18-19; 5/18/17 Tr. 4581:1-10, 4582:14-23, 4593:21-4594:21 (Del Beccaro); 4/24/17 Tr. 804:8-805:14 (Crawford).

<u>Reply to SEPFF 1995 (p. 800):</u>

As noted above, in Reply to SEPFF 1960, Dr. Wazzan's analysis is fundamentally flawed in several ways, including that he does not consider the sizes of the various affiliates at the time their affiliate agreements were negotiated. He also analyzes [[ ]] *See* Crawford WDT, Trial Ex. 54, p. 34, n. 93. And [[ ]] is notably absent from this analysis. As noted above, [[,]] and is currently paying [[ ]] 5/18/17 Tr. 4582:14-23 (Del Beccaro). Moreover, the [[ ]] rate is driven by its original deal, which was negotiated at a time when it was new to the market and had very few subscribers. Although [[ ]] original affiliate agreement was renegotiated at [[ ]] request, that negotiation took place years before the agreement was

set to expire, and therefore [[[redacted]]] did not have the full leverage to reduce the rate commensurate with its growth. 5/18/17 Tr. 4592:1-4593:20 (Del Beccaro).

Reply to SEPFF 1996 (p. 800):

Nothing in SEPFF 1996 demonstrates, irrespective of the way the contracts are constructed or the language used, that the partners pay below-market rates.

Reply to SEPFF 1997 (pp. 800-801):

As demonstrated in Replies to SEPFFs 1962, 1982, and 1989, above, Music Choice's partner affiliate rates as set in 1999 were entirely consistent with market rates, and SoundExchange has not cited a shred of evidence demonstrating any way in which those rates are inconsistent with fair market rates. Indeed, [[[redacted]]] 5/18/17 Tr. 4582:3-23 (Del Beccaro). SoundExchange's claim that the rates are solely a function of partnership status is further proven false by the undisputed facts that Music Choice currently provides [[[redacted]]] Del Beccaro WRT, Trial Ex. 57, pp. 18-19; 5/18/17 Tr. 4581:1-10, 4582:14-23, 4593:21-4594:21 (Del Beccaro); 4/24/17 Tr. 804:8-805:14 (Crawford).

Reply to SEPFF 1998 (p. 801):

None of the testimony cited by SoundExchange contradicts Music Choice's claims. Mr. Del Beccaro provided unrebutted testimony that [[ ]] 5/18/17 Tr. 4581:1-22 (Del Beccaro). He also testified that [[ ]] was able recently to negotiate rates [[ ]] 5/18/17 Tr. 4582:14-23 (Del Beccaro). The [[ ]] has nothing to do with the rates paid by DirecTV or DISH Network. Moreover, the fact that the low rates offered by Sirius XM, DMX and Muzak offer their services to DirecTV and DISH Network at very low rates to serve ancillary purposes does not change the overall effect on the market. Indeed, Dr. Wazzan testified that he views those rates as market rates. 5/3/17 Tr. 2424:8-2425:25, 2430:11-14.

Reply to SEPFF 1999 (pp. 801-802):

Music Choice incorporates by reference its Reply to SEPFF 1998.

Reply to SEPFF 2000 (p. 802):

No response.

Reply to SEPFF 2001 (p. 802):

No response.

Reply to SEPFF 2002 (pp. 802-803):

Muzak is not an active participant in the PSS market, and its PSS royalty payments will drop significantly as a result of the recent appellate ruling that the subscribers formerly served by DMX's CABSAT service are not covered Muzak's PSS license. *SoundExchange, Inc. v. Muzak LLC*, 854 F.3d at 720-721. In any event, Music Choice, the only remaining active PSS, which pays the vast majority of the PSS royalties, should not be penalized by Muzak's pricing policies, which do not at all impact the relevant Section 801(b)(1) policy analysis.

Reply to SEPFF 2003 (p. 803):

Music Choice is a broadcaster, not a webcaster. Webcasts are typically one-to-one transmissions to users, in which the programming of each transmission is unique to each user. Music Choice is a broadcaster. Its transmissions, including those through its web portal and apps, are one-to-many radio broadcasts, where every user hears the same programming on the same channel. 5/18/17 Tr. 4651:1-14, 4652:13-20 (Del Beccaro). Music Choice does not provide internet transmission of its PSS audio channels "at least" to its PSS subscribers, it provides those transmissions only to its authenticated PSS subscribers. Del Beccaro WRT, Trial Ex. 57, p. 25.

Reply to SEPFF 2004 (p. 803):

SEPFF 2004 contains legal argument and not any proposed factual finding. It is crucial to determine whether Music Choice's internet transmissions are part of its PSS, as Music Choice has demonstrated they are. The legislative history of the PSS

license, which explicitly states that "if a cable subscription music service making transmissions on July 31, 1998 were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service." *DMCA Committee Report*, at 89, makes it abundantly clear that the PSS are allowed to expand into new transmission platforms without penalty so long as the fundamental nature of the music channels remained the same and the service was provided on a subscription basis. Bender WRT, Trial Ex. 48, p. 28. Because Music Choice was a cable subscription music service making transmissions as of July 31, 1998, and Music Choice offered (and continues to offer) the same music service through the internet, Music Choice's internet transmissions are part of its PSS.

Given that these transmissions are part of the PSS, they have always been included within prior PSS royalty payments. And even if they had required separate rates and terms, the rates and terms for those internet transmissions would be governed by the Section 801(b)(1) policy standard, and not the willing buyer / willing seller standard applicable to commercial webcasters.

<u>Reply to SEPFF 2005 (p. 804):</u>

The undisputed evidence establishes that Music Choice has been providing similar internet transmissions to its authenticated PSS subscribers since 1996, even before Congress created the PSS designation for that service. Del Beccaro WRT, Trial Ex. 57, pp. 25-26; 5/18/17 Tr. 4599:2-5, 12-18 (Del Beccaro). Neither Dr. Wazzan nor Mr. Bender, the only two SoundExchange witnesses providing

testimony in support of its proposal to require the PSS to pay additional webcasting royalties, were aware of this key fact when they submitted their testimony. 5/3/17 Tr. 2437:7-16 (Wazzan); 5/10/17 Tr. 3308:3-7 (Bender). SoundExchange's citation of Mr. Del Beccaro's testimony is misleading. Mr. Del Beccaro never used the words "increased significantly." Those were the words of SoundExchange's counsel. Mr. Del Beccaro testified that the current usage of Music Choice's internet transmissions is extremely low, approximately [[[redacted]]] of Music Choice's overall listening, and therefore any relative increase in usage over the past two years is "inconsequential." 5/18/17 Tr. 4658:16-23 (Del Beccaro). Notably, SoundExchange has introduced no evidence even quantifying that inconsequential increase in usage, but the undisputed evidence is that, irrespective of any relative increase, the internet transmissions remain at an insignificant level.

<u>Reply to SEPFF 2006 (p. 804):</u>

Although it is important that Music Choice offers this component of its service, as demonstrated in Reply to SEPFF 2005, Music Choice's internet transmissions are currently, and have always been, an insignificant part of Music Choice's business from a usage perspective. Notably, because the internet transmissions are bundled as part of Music Choice's residential music service, providing those transmissions has always been included within the revenues received, and therefore the PSS royalties paid, by Music Choice. Del Becaro WRT, Trial Ex. 57, p. 27.

Reply to SEPFF 2007 (pp. 804-805):

Words fail to fully convey all that is wrong and improper in SEPFF 2007. SoundExchange attempts to rely upon a document, marked for identification as Trial Ex. 451, that was excluded from the record at trial. The Judges sustained Music Choice's objection when the document was offered because SoundExchange could not authenticate or otherwise lay any foundation for the document, even after being given multiple tries. 5/18/17 Tr. 4661:18-4665:1 (Del Beccaro). The document was excluded from evidence precisely because Mr. Del Beccaro had never seen the document before, did not know what it was, and could not vouch for the accuracy, much less explain, the data contained in the document. When asked more specifically about whether the data in the proposed exhibit was accurate, he testified: "I have never seen the document. I don't know the numbers. I can't relate to the numbers. If you had told me the numbers were 82,000 or 2,000, I wouldn't have known, you know, what they would have been. So I have no reason, no, I have no reason to have an opinion at all." *Id*. at 4663:22-4664:3. SoundExchange's request for a factual finding based upon this excluded document is improper, and its doing so by attempting to mislead the Judges about Mr. Del Beccaro's testimony at trial is outrageous.

The remainder of SEPFF 2007 must also be rejected, because it is based upon data from the excluded document. Additionally, SoundExchange seeks to use calculations of the number of recordings played on Sirius XM, with no evidentiary

linkage or nexus to Music Choice. The Proposed Finding must be rejected on this ground as well.

Reply to SEPFF 2008 (p. 805):

This Proposed Finding is duplicative of SEPFF 2005. Music Choice incorporates by reference herein its Reply to SEPFF 2005.

Reply to SEPFF 2009 (p. 805):

The very fact that SoundExchange's two computations yield results that differ by almost one billion hours per month demonstrates the unreliability of these computations for use in determining Music Choice's hypothetical (or actual) royalty liability under the commercial webcasting rates.

Reply to SEPFF 2010 (pp. 805-806):

As noted above in Reply to SEPFF 2007, this calculation is based upon Professor Shapiro's estimate of the number of songs played per hour on Sirius XM, which has no evidentiary link or nexus to Music Choice. Consequently, this entire calculation is irrelevant and unreliable.

Reply to SEPFF 2011 (p. 806):

SoundExchange yet again grossly mischaracterizes Mr. Del Beccaro's testimony. He did not, as SoundExchange claims, state that Section 114 royalties should necessarily be paid based on individual webcasting performances. He merely noted that the current webcasting regulations are calculated on a per-performance basis, which demonstrates the entirely unrelated point that it is the value of performances actually heard by listeners, and not some more general concept of

"usage," that is valued by the statutory performance licenses. Del Beccaro WDT, Trial Ex. 55, pp. 16-17.

Reply to SEPFF 2012 (p. 807):

Dr. Wazzan provided no actual economic or factual support for his convenient conclusion. His view that the PSS should pay additional, separate webcasting royalties at the rates established for commercial webcasters is based solely upon his use of the CABSAT benchmark. Wazzan WDT, Trial Ex. 501, p. 3-4. In particular, the current CABSAT regulations specifically exclude internet transmissions from the scope of the CABSAT license. Wazzan WDT, Trial Ex. 501, p. 4. Section 114 itself provides no reason why the CABSAT license could not include all ancillary internet transmissions. Del Beccaro WRT, Trial Ex. 57, p. 30. Certain internet transmissions are excluded from the CABSAT license only by the terms of the CABSAT regulations, which were created through a litigation settlement with Sirius XM. Del Beccaro WRT, Trial Ex. 57, p. 30.

As demonstrated above, however, the settlement CABSAT rates and terms cannot be used as a benchmark to set the PSS rates and terms in this proceeding. *Supra*, Replies to SEPFFs 1792 -1888. SoundExchange's webcasting proposal must be rejected for these reasons alone. Indeed the CABSAT benchmark is even more flawed on this point than it is with respect to the PSS rate. Sirius XM does not bundle internet access to its audio channels with its CABSAT service. Instead, it offers a separate webcasting service at a substantial monthly fee. 5/3/17 Tr. 2435:11-2436:3 (Wazzan) Consequently,

Sirius XM had no incentive whatsoever to reject this feature of the CABSAT regulations when it negotiated the current rates and terms with SoundExchange.

Additionally, the commercial subscription webcasting rate that SoundExchange proposes be applied to Music Choice's internet transmissions was set using the willing buyer/ willing seller standard, not the Section 801(b)(1) policy objectives. Del Beccaro WRT, Trial Ex. 57, p. 30. 517. Dr. Wazzan made no effort to perform any benchmarking analysis of the subscription webcasting rates, or adjust or analyze the webcasting rates under the applicable 801(b)(1) policy standard. Del Beccaro WRT, Trial Ex. 57, p. 30. The cost structures and demand characteristics of Music Choice's audio internet transmissions are fundamentally different from those of subscription webcasting. Television subscribers do not pay any discrete or additional charge for the internet transmissions, and MVPD affiliates do not pay any separate fee for those transmissions. Del Beccaro WRT, Trial Ex. 57, p. 30. 520. Dr. Wazzan's testimony makes no mention of these differences in characteristics and makes no attempt to account for them. Crawford WRT, Trial Ex. 59, ¶92; Del Beccaro WRT, Trial Ex. 57, p. 31.

<u>Reply to SEPFF 2013 (p. 808):</u>

This Proposed Finding is not based upon any benchmarking analysis of the commercial webcasting market as compared to the PSS market, or consideration of the Section 801(b)(1) policy objectives. Instead, it confirms that

SoundExchange's proposal that the PSS be required to pay commercial webcasting rates for their ancillary internet transmissions of their PSS to subscribers is based solely upon the CABSAT benchmark. Music Choice incorporates its Reply to SEPFF 2012 herein by reference.

Reply to SEPFF 2014 (p. 808):

SoundExchange leaves out several important related facts. Although Stingray told SoundExchange that it stopped all webcasting activity in 2015, SoundExchange did nothing to verify whether that claim was true. 5/10/17 Tr. 3211:7-3212:5; 3301:7-23 (Bender). In fact, Stingray not only continued its webcasting activities, but massively expanded them. Del Beccaro WRT, Trial Ex. 57, p. 33; 5/18/17 Tr. 4603:11-4604:21 (Del Beccaro); 4/25/17 Tr. 825:4-13 (Crawford); Trial Ex 927; Trial Ex 928; Trial. Ex. 903; Trial Ex. 973. Even after learning the extent of Stingray's extensive webcasting activities in 2015 and 2016, SoundExchange has apparently not taken any action to address Stingray's failure to pay any webcasting royalties during that time. 5/10/17 Tr. 3302:2-3304:1 (Bender). Notably, Dr. Wazzan was unaware that Stingray failed to pay any webcasting royalties while it was actually engaged in webcasting during 2015 and 2016. 5/3/17 Tr. 2436:21-2437:6 (Wazzan). Thus, even though it is irrelevant that the CABSAT regulations require CABSATs to pay separately for ancillary webcasting to subscribers, the fact that the only CABSAT offering such webcasting did not actually pay the royalties further undermines SoundExchange's proposal.

Reply to SEPFF 2015 (p. 809):

Music Choice incorporates by reference herein its Reply to SEPFF 2014. SoundExchange's failure to pursue any remedies against Stingray constitutes at least a tacit waiver of those royalty obligations.

Reply to SEPFF 2016 (p. 809):

SEPFF 2016 contains no actual findings, but rather contains only conclusory legal arguments, for which it offers no factual evidentiary support.

Reply to SEPFF 2017 (p. 809):

SEPFF 2017 comprises a series of partial quotes, out of context, from the *SDARS II Determination*. Music Choice responds that the full text of that *Determination* speaks for itself.

Reply to SEPFF 2018 (pp. 809-810):

Although he presented models based upon the Asymmetric Nash Bargaining Framework in both proceedings, his implementation of that Framework is different in this proceeding, and he uses it for a very different purpose in this proceeding. See, generally, Crawford WDT, Trial Ex. 54, pp. 19-51, ¶¶ 63-184. The testimony cited by SoundExchange does not support its claim that Professor Crawford relied on the same assumptions in both proceedings. He did not. As only one example, he made the conservative assumption that the record company's threat point would be zero in this proceeding, while he assumed it would be negative in *SDARS II*. Crawford

WDT, Trial Ex. 54, p 28, ¶¶ 93-94, p. 32 ¶ 113; 4/24/17 Tr. 725:14 – 726:4, 743:10 – 745:9 (Crawford).

Reply to SEPFF 2019 (p. 810):

SEPFF 2019 contains no facts, but only a conclusory opinion by Dr. Wazzan. Dr. Wazzan has no professional or other experience actually using any form of the Nash Bargaining Framework, and is not qualified to provide expert opinion on that topic. Dr. Wazzan has never published a single peer-reviewed article on Nash bargaining. 5/3/17 Tr. 2351:12-14 (Wazzan). In the course of his entire professional career, Dr. Wazzan. has never utilized the Nash Framework in any of his engagements. 5/3/17 Tr. 2351:15-18 (Wazzan). Even in the several patent litigation matters where Dr. Wazzan was hired as an expert and in which the Nash Framework was utilized to estimate a reasonable royalty, his clients hired other economists to handle the Nash bargaining models, rather than using Dr. Wazzan for that analysis. 5/3/17 Tr. 2351:15-23 (Wazzan). Thus, Dr. Wazzan's opinions regarding Professor Crawford's use of the Nash Bargaining Framework should be excluded or disregarded as outside the scope of his qualification as an expert. See Music Choice PCL at ¶¶ 113-121.

Reply to SEPFF 2020 (p. 810):

SEPFF 2020 consists of an argumentative conclusion by Dr. Wazzan concerning the utility of the Nash Bargaining Framework to royalty rate-setting in this proceeding. As noted in Reply to SEPFF 2019, Dr. Wazzan is not qualified to opine on the proper use of the Nash Bargaining Framework, having

never used it himself in his entire career. Moreover, even Dr. Wazzan admits that it was used (by other, qualified, economists working for his clients) in several patent infringement cases to estimate reasonable royalties. 5/3/17 Tr. 2351:19-23 (Wazzan). The Nash Framework is among the most widely applied tools within economics to analyze negotiations between firms. Crawford WDT, Trial Ex. 54, p. 20, ¶65. Indeed, SoundExchange itself has used the Nash Bargaining Framework in this case to support its rate proposal against Sirius XM. Willig WDT, Trial Ex. 28, pp. 30-31, ¶¶ 47-49.

Reply to SEPFF 2021 (pp. 810-811):

This Proposed Finding is without support either in the record, in economic principles, or in the actual marketplace in which television music providers negotiate. As Dr. Wazzan himself admitted at trial, he has never heard of a circumstance in which a record company negotiated a three-way deal with an MVPD and a provider of television music channels. 5/3/17 Tr. 2459:18 – 2460:12 (Wazzan). Nor is Dr. Wazzan aware of any iteration of the Nash Framework that models a three-way negotiation. 5/3/17 Tr. 2460:4-8 (Wazzan). As Professor Crawford testified, Music Choice's real-life negotiations with record labels for the licensing of its video product have never involved the MVPDs, nor is there any need for the MVPDs to take part in those negotiations. 4/24/17 Tr. 718:18-720:5 (Crawford). Moreover, the fact that Music Choice negotiates downstream with the MVPDs is not ignored, but is already taken into account in Professor Crawford's model, because Music Choice's revenues

are determined in large part by the outcomes of those negotiations. *Id*. at 719:3-15.

Reply to SEPFF 2022 (p. 811):

The premise of SEPFF 2022, that Music Choice provides below-market rates to its partner affiliates, is false and unsupported by the record, as demonstrated in Replies to SEPFFs 1960-1999, above. Nor does Dr. Wazzan's unsupported speculation regarding what positions a record company might take in a hypothetical negotiation provide factual support for this Proposed Finding.

Reply to SEPFF 2023 (p. 811):

The premise of SEPFF 2023, that Music Choice provides below-market rates to its partner affiliates, is false and unsupported by the record, as demonstrated in Replies to SEPFFs 1960-1999, above.

Reply to SEPFF 2024 (pp. 811-812):

As Professor Crawford testified, Music Choice's real-life negotiations with record labels for the licensing of its video product have never involved the MVPDs, nor is there any need for the MVPDs to take part in those negotiations. 4/24/17 Tr. 718:18-720:5 (Crawford). Moreover, the fact that Music Choice negotiates downstream with the MVPDs is not ignored, but is already taken into account in Professor Crawford's model, because Music Choice's revenues are determined in large part by the outcomes of those negotiations. *Id*. at 719:3-15.

Reply to SEPFF 2025 (p. 812):

The quoted language is from the dissent of former Judge Roberts. While the majority noted a general agreement with Judge Roberts' rejection of the particular use of the Nash Bargaining Framework in that proceeding, it do not specifically agree with this particular criticism. Nor was this criticism raised by SoundExchange, or the Judges, at any time during the proceeding, so Music Choice never had the opportunity to respond. In any event, as demonstrated above, this criticism is misplaced. As demonstrated above in Reply to SEPFF 2021, the impact of the downstream negotiations is, in fact, taken into account in Professor Crawford's model. Moreover, Judge Roberts's claim that the relevant negotiation would involve simultaneous negotiations between the record company, Music Choice, and one or more MVPDs is flatly inconsistent with marketplace realities. As Professor Crawford testified, Music Choice's real-life negotiations with record labels for the licensing of its video product have never involved the MVPDs, nor is there any need for the MVPDs to take part in those negotiations. 4/24/17 Tr. 718:18-719:24 (Crawford).

Reply to SEPFF 2026 (p. 812):

In the quoted language, "this assessment" did not refer to the specific criticism quoted by SoundExchange, but to Judge Roberts's overall rejection of the Nash Bargaining Framework as presented in that proceeding. Moreover, Professor Crawford directly addressed and refuted this criticism in his testimony. 4/24/17 Tr. 718:18-720:5 (Crawford).

Reply to SEPFF 2027 (p. 812):

As noted in Reply to SEPFF 2019, Dr. Wazzan is not qualified to opine on the proper use of the Nash Bargaining Framework, having never used it himself in his entire career. Moreover, even Dr. Wazzan admits that it was used (by other, qualified, economists working for his clients) in several patent infringement cases to estimate reasonable royalties. 5/3/17 Tr. 2351:19-23 (Wazzan). The Nash Framework is among the most widely applied tools within economics to analyze negotiations between firms. Crawford WDT, Trial Ex. 54, p. 20, ¶65. Indeed, SoundExchange itself has used the Nash Bargaining Framework in this case to support its rate proposal against Sirius XM. Willig WDT, Trial Ex. 28, pp. 30-31, ¶¶ 47-49.

Reply to SEPFF 2028 (p. 813):

Music Choice incorporates by reference herein its Reply to SEPFF 2027.

Reply to SEPFF 2029 (p. 813):

SEPFF 2029 consists of a string of argumentative conclusions. As noted in Reply to SEPFF 2019, Dr. Wazzan is not qualified to opine on the proper use of the Nash Bargaining Framework, having never used it himself in his entire career. All models, including those used by SoundExchange in this proceeding, may yield varying outputs based on varying inputs. SoundExchange cites no actual inaccurate or unjustifiable input that Professor Crawford has used.

Reply to SEPFF 2030 (p. 813):

No response.

Reply to SEPFF 2031 (p. 814):

No response.

Reply to SEPFF 2032 (p. 814):

It would have been inappropriate for Professor Crawford to include the profits from Music Choice's other, non-PSS lines of business in the threat point or joint agreement profit analysis of his model. Professor Crawford set that threat point at zero as a conservative, simplifying assumption. Trial Ex. 54, p. 27 ¶¶ 93; 113; 114; 173.; 4/24/17 Tr.746:8 – 747:23 (Crawford).

In the hypothetical, competitive market, no single record company could put Music Choice out of business by refusing to strike a deal. Assuming that failure to reach an agreement as to the PSS rates would put Music Choice out of business is inconsistent with a workably competitive market. See 4/24/17 Tr. 746:18-22 (Crawford); 4/24/17 Tr. 539:2 – 9 (Shapiro); 4/19/17 Tr. 184:8 – 185:2 (Shapiro); 5/4/17 Tr. 2595:3 – 17 (Shapiro). But calculating the amount of revenue Music Choice would actually lose without the catalog of only one record company in that hypothetical competitive market (where no record company's catalog is "must-have") was essentially impossible. As Professor Crawford testified, actually estimating the threat points of firms in similar circumstances – a project he is currently undertaking for a client in the television market – is an incredibly complex task that can take many years. 4/24/17 Tr. 747:2-20 (Crawford). And given the timeline for this proceeding, Professor Crawford clearly did not have the time to perform such a calculation here.

Thus, even though the actual threat point would have been positive, Professor Crawford set it at zero because he could not accurately estimate the correct positive figure. Crawford WDT, Trial Ex. 54, p. 27 ¶ 93 & n.73, 173 & n.149. His necessary use of this conservative, simplifying assumption should not be extended even further to add profits from other, non-PSS business lines into the model.

Reply to SEPFF 2033 (p. 814):

This quotation from Professor Crawford's testimony is wholly inapposite. He did not propose that record company profits unrelated to the PSS be considered. Professor Crawford here references profits the record companies receive in other business lines, but only to the extent they are generated from the promotional impact of the PSS. Crawford WDT, Trial Ex. 54, pp. 25-26, ¶85. Moreover, in another conservative move, Professor Crawford did not actually take promotion into account in setting the record company threat point in his model. *Id*., at p. 50, ¶ 176.

Reply to SEPFF 2034 (pp. 814-815):

This Proposed Finding is logically fallacious. As noted above, the key distinction is that the record company profits described by Professor Crawford (though not included in his actual calculations) are profits the record company receives because of the PSS. In contrast, the profits Dr. Wazzan wishes to include in the model are, by definition, not from the PSS.

Reply to SEPFF 2035 (p. 815):

No response.

Reply to SEPFF 2036 (p. 815):

In the hypothetical, competitive market, no single record company could put Music Choice out of business by refusing to strike a deal. Assuming that failure to reach an agreement as to the PSS rates would put Music Choice out of business is inconsistent with a workably competitive market. See 4/24/17 Tr. 746:18-22 (Crawford); 4/24/17 Tr. 539:2 – 9 (Shapiro); 4/19/17 Tr. 184:8 – 185:2 (Shapiro); 5/4/17 Tr. 2595:3 – 17 (Shapiro). But calculating the amount of revenue Music Choice would actually lose without the catalog of only one record company in that hypothetical competitive market (where no record company's catalog was "must-have") was essentially impossible. As Professor Crawford testified, actually estimating the threat points of firms – a project he is currently undertaking for a client in the television market – is an incredibly complex task that can take many years. 4/24/17 Tr. 747:2-20 (Crawford). And given the timeline for this proceeding, Professor Crawford clearly did not have the time to perform such a calculation here.

Thus, even though the actual threat point would have been positive, Professor Crawford set it at zero because he could not accurately estimate the correct positive figure. Crawford WDT, Trial Ex. 54, p. 27 ¶ 93 & n.73, 173 & n.149. His necessary use of this conservative, simplifying assumption should not

be extended even further to add profits from other, non-PSS business lines into the model.

Reply to SEPFF 2037 (pp. 815-816):

It is unclear what SoundExchange means when it claims the three business lines "do not operate independently of one another," nor does SoundExchange provide any evidence supporting this claim. Music Choice's commercial background music service is a wholly separate service from its residential service. Del Beccaro WDT, Trial Ex. 55, p. 29 fn. 3. The two services are financially distinct and serve different markets. Crawford WDT, Trial Ex. 54, p. 10, ¶ 34. Although Music Choice's residential audio and video services are bundled together as a package to MVPDs, the two services are distinct, have completely different content, and are licensed separately. Del Beccaro WDT, Trial Ex. 55, p. 29; Crawford WDT, Trial Ex. 54, p. 11, ¶¶ 37-38.

Reply to SEPFF 2038 (p. 816):

The fact that Music Choice would not continue its other, ancillary, business lines if it were driven out of its primary PSS business, does not justify including the profits from those business lines in the model of a negotiation in a hypothetical, competitive marketplace for only the PSS rights. 4/24/17 Tr. 746:18-22 (Crawford); 4/24/17 Tr. 539:2 – 9 (Shapiro); 4/19/17 Tr.184:8 – 185:2 (Shapiro); 5/4/17 Tr. 2595:3 – 17 (Shapiro).

Reply to SEPFF 2039 (p. 816):

Music Choice incorporates by reference herein its Reply to SEPFF 2038.

Reply to SEPFF 2040 (p. 816):

No response.

Reply to SEPFF 2041 (pp. 816-817):

Music Choice incorporates by reference herein its Reply to SEPFF 2032.

Reply to SEPFF 2042 (p. 817):

Music Choice incorporates by reference herein its Reply to SEPFF 2032.

Reply to SEPFF 2043 (p. 817):

In the discussion cited by SoundExchange, both Judge Strickler and Professor Crawford made clear that they were not discussing the hypothetical competitive market that is the proper object of the bargaining model, but rather were discussing the actual, unconstrained, monopoly, or complementary oligopoly market that the record companies enjoy (and abuse) outside of the compulsory license. 4/24/17 Tr. 752:4-753:10. As noted above, in Reply to SEPFF 2032, it would be inappropriate to fully model a non-competitive market negotiation beyond the simplifying assumption that Professor Crawford made.

Reply to SEPFF 2044 (pp. 817-818):

As demonstrated above in Reply to SEPFF 2032, Dr. Wazzan's inclusion of profits from Music Choice's non-PSS business lines in connection with a threat point analysis is inappropriate. It is also inappropriate to include those profits from other business lines in the calculation of the joint agreement profits for the same, and additional, reasons. First, it is contrary to precedent from the last SDARS proceeding, in which the Judges specifically criticized Music Choice

for including costs and revenue from its commercial audio service in Professor Crawford's financial analysis. Crawford WDT, Trial Ex. 54, p. 32 ¶110; *SDARS II*, 78 Fed. Reg. at 23,059. In that determination, the Judges made clear that "the appropriate business to analyze for the purpose of this proceeding is the residential audio service offered by Music Choice, the subject of the Section 114 license." *Id.*

Moreover, basing the bargaining analysis on Music Choice's consolidated business (as Dr. Wazzan does) would have the result of forcing Music Choice to subsidize its PSS line with the profits from other business lines – an outcome that is inconsistent with sound economic policy and with the statutory objectives of the PSS license. Crawford WRT, Trial Ex. 59, p. 51, ¶176; 4/24/17 Tr. 787:19-25 (Crawford).

Nor would inclusion of Music Choice's other business lines be consistent with appellate precedent. In *PSS I*, the Register (and CARP) also limited their analysis of the financial performance of the PSS, throughout all of the policy objectives, to the PSS operations of those companies. *CARP Report*, Trial Ex. 979, at ¶¶99, 108; *See also id.* at ¶¶117-118 (noting that a rate set too high would result in any or all of the services leaving "this new industry" or "this business" in reference to PSS business operations, not the longstanding commercial background music industry in which Muzak also operated); *Librarian's PSS I Determination* at 25,407, discussing the services startup costs and costs of bringing the creative product to market in a new and novel way.

See also, id. at 25,409 (noting that setting the rate too high could cause one or all of the services to abandon the business). Notably, at the time of *PSS I* Muzak's primary business line was its commercial background music service. It was the oldest and largest company in the commercial background music market with roots dating back to 1922. *CARP Report*, Trial Ex. 979, ¶27; *Librarian's PSS I Determination* at 25,395; Del Beccaro WRT, Trial Ex. 57, pp. 6-7. Yet in discussing and analyzing the financial performance of the PSS, neither the Register nor the CARP considered Muzak's overall profitability driven by its thriving, primary business line. *CARP Report*, Trial Ex. 979, at ¶¶99, 108, 117-118 ; *Librarian's PSS I Determination* at 25,409-25,410; Nor did the Register propose, or even consider, that Muzak should have subsidized its PSS business with the profits from its commercial background service operations. *CARP Report*, Trial Ex. 979, at 28-20; *Librarian's PSS I Determination* at 25,409-25,410.

Additionally, Music Choice already pays sound recording royalties for its other business lines, pursuant to direct and statutory licenses that are already in place, and those market rate license fees are already taken into account in Professor Crawford's model. 4/24/17 Tr. 749:21-25 (Crawford); 5/18/17 Tr. 4548:14-25 (Del Beccaro). Including profits from those separately-licensed business lines in the calculation to derive the rate for the PSS license would effectively make Music Choice double pay for those other sound recording rights.

Dr. Wazzan also errs in his calculation of an alternate version of the joint agreement profits by failing to consider the cost of capital for the other business lines, which must be removed from the financial results to derive the economic profits considered in the Nash model. Crawford WDT, Trial Ex. 54, p. 24, ¶ 81 & fn. 64 (explaining the difference between economic profits and conventional business profits, and why the cost of capital must be subtracted as a cost to derive the joint agreement profits). He likely made this basic error due to his inexperience, having never used the Nash Framework in his entire professional career. In any event, this error renders his calculations useless.

Reply to SEPFF 2045 (p. 818):

Music Choice incorporates by reference herein its Reply to SEPFF 2044.

Reply to SEPFF 2046 (p. 818):

Music Choice incorporates by reference herein its Reply to SEPFF 2044. The errors of Dr. Wazzan's joint agreement profits calculation are further amplified by his use of Music Choice's internal financial projections, which include large amounts of projected increases in [[[redacted]]] The unrebutted evidence demonstrates that Music Choice has projected these increases in every projection [[[redacted]]] but the increases have never materialized, rendering the projections very unreliable. 5/18/17 Tr. 4544:7-4545:16 (Del Beccaro).

Reply to SEPFF 2047 (p. 819):

No response.

Reply to SEPFF 2048 (p. 819):

No response.

Reply to SEPFF 2049 (p. 819):

Professor Crawford followed widely accepted principles and procedures in formulating his economic and Nash bargaining analysis. He worked in conjunction with a support team of accountants at Bates White, as well as accountants at Music Choice, to develop his projections of Music Choice's revenues and costs associated with the residential audio service as a standalone business. Crawford WDT, Trial Ex. 54, p. 35-42; ¶¶122-149; 4/24/17 Tr. 733:22-738:18 (Crawford); 5/18/17 Tr. 4549:1-4552:11 (Del Beccaro). This involved many phone conferences and meetings over the course of several weeks, in which Professor Crawford and the accountants from Bates White and Music Choice, with the assistance of Mr. Del Beccaro, painstakingly worked through the various accounting issues involved in Professor Crawford's analysis. 4/25/17 Tr. 866:1-12, 867:17-24, 868:8-869:13, 878:5-12, 938:11-24 (Crawford); 5/18/17 Tr. 4549:1-18; 4551:19-4552:11 (Del Beccaro). As part of that process, they determined for each and every line item of Music Choice's consolidated costs and revenue the amount that would have been spent and received if Music Choice only operated its residential audio service as a standalone business so that the financial performance (and thus profit) of the residential audio business could be isolated for use in the Nash Framework. Crawford WDT, Trial Ex. 54, p. 35-42; ¶¶122-149; 4/24/17 Tr. 733:22-738:18 (Crawford); 5/18/17 Tr.

4549:1-4552:11 (Del Beccaro). Notably, SoundExchange has not challenged or disputed the substance of any of the allocations or other financial analysis used by Professor Crawford.

Reply to SEPFF 2050 (pp. 819-820):

Professor Crawford did not merely "read a few articles," as SoundExchange claims. He worked extensively with accountants from Bates White and Music Choice, as well as Mr. Del Beccaro, as set forth above in Reply to SEPFF 2049.

Reply to SEPFF 2051 (p. 820):

Music Choice incorporates by reference herein its Reply to SEPFF 2049, and notes that the testimony cited therein amply demonstrates both Professor Crawford's familiarity with the source of the data he used, as well as his reasonable reliance on a team of accountants to assist him.

Reply to SEPFF 2052 (p. 820):

Music Choice incorporates by reference herein its Reply to SEPFF 2049. As part of the financial analysis, Music Choice did not "disaggregate" its consolidated financial statements into three separate business lines, but rather went through every single item of cost and revenue, including the employee headcount in every department, and determined how those figures would be impacted if Music Choice only offered its residential audio service covered by the PSS license. 5/18/17 Tr. 4673:20-4674:10 (Del Beccaro). Having relied on the independent Bates White accountants, as well as the Music Choice accountants

who have a deep understanding of Music Choice's business, there would have been no added utility in speaking with the accountants who prepare Music Choice's consolidated financial statements, which by definition do not involve the differences between Music Choice's business lines and are very straightforward and did not require any explanation. 4/25/17 Tr. 877:9-878:12 (Crawford).

Reply to SEPFF 2053 (pp. 820-821):

SoundExchange again distorts the record. Both Professor Crawford and Mr. Del Beccaro amply demonstrated that the actual and short-term projected audio cost and revenue data used by Professor Crawford were extremely accurate, while the long-term projections, and particularly [[ ]] used by Dr. Wazzan were far less reliable. Crawford WDT, Trial Ex. 54, pp. 33-35, ¶¶ 115-120; Del Beccaro WDT, Trial Ex. 55, p. 27; 5/18/17 Tr. 4544:11-4546:11 (Del Beccaro); 4/24/17 Tr. 726:22-730:1 (Crawford); 4/25/17 Tr. 870:19-871:8, 873:9-21 (Crawford). In particular, it is undisputed that one of the very reasons that Professor Crawford was most comfortable with the reliability of the audio revenue projections for 2017 and 2018 (as opposed to later periods) [[ ]] Crawford WDT, Trial Ex. 54, p. 34, ¶ 119; Del Beccaro WDT, Trial Ex. 55, pp. 27-28; 4/25/17 Tr. 873:9-21 (Crawford).

Reply to SEPFF 2054 (p. 821):

Professor Crawford acknowledged that Music Choice's costs for rate-setting litigation should not have been included in the joint agreement surplus analysis, because the model should assume a hypothetical competitive market in which the statutory license is not present. 4/25/17 Tr. 882:12-883:22 (Crawford). Professor Crawford calculated Music Choice's rate setting litigation costs to be [[[redacted]]] in 2016 and 2017 and [[[redacted]]] in 2018. Professor Crawford calculated these costs based upon the actual costs incurred by Music Choice during 2011-2014 for PSS II rate period (2013–2017) of [[[redacted]]], the annual average costs for 2016 and 2017 and the total forecast costs incurred in 2016–2017 for the (current) PSS-III proceeding [[[redacted]]], and then using the annualized average of those costs for 2018. Crawford WDT, Trial Ex. 54, p. 47 fn. 142; Trial. Ex. 406, at rows 258-260 of tab "Residential Audio Only."

As a preliminary matter, even if these costs are simply removed from the model, Music Choice's proposed rate is still within the range of rates estimated by the model. More important, in a hypothetical competitive negotiation of a direct license, Music Choice's rate setting litigation costs would be replaced by the significant costs of a direct licensing initiative, which were not included in the model.

Those costs would significantly exceed the rate litigation costs, leading to a lower range of rates from Professor Crawford's model. As Mr. Del Beccaro testified at trial, Music Choice has never tried to negotiate direct licenses for its

residential audio service, and the costs of doing so would far exceed the cost of rate setting litigation. This is in part due to the fact that approximately [[[redacted]]] of the sound recordings played on Music Choice's audio service are owned and distributed by independent record labels (whereas [[[redacted]]] of the music videos used by its directly licensed video service are owned by the three major record companies). 5/18/17 Tr. 4547:1-20 (Del Beccaro).

To directly license all the music it actually plays on its audio service, Music Choice would have to negotiate 3,500 direct licenses, taking into account that some of the over 7,000 independent record labels that are not distributed by any major record company, but accounting for the fact that some are owned by the same entities. 5/18/17 Tr. 4547:25-4548:7 (Del Beccaro). Based on Music Choice's calculations, and considering the vast number of licenses it would have to obtain, directly licensing its residential audio service would cost at a minimum [[[redacted]]]. 5/18/17 Tr. 4548:8-13 (Del Beccaro). That figure is [[[redacted]]] the annual litigation costs calculated in Professor Crawford's model, noted above. *See* Crawford WDT, Trial Ex. 54, p. 47 fn. 142; Trial. Ex. 406, at rows 258-260 of tab "Residential Audio Only." This estimate is further supported by the testimony of George White of Sirius XM, who stated that the costs of hiring outside licensing agent, MRI, to assist with Sirius XM's direct licensing program exceed [[[redacted]]] per year. Sirius XM has additional costs associated with that program, including additional consulting fees paid to MRI, and the cost of several full time Sirius XM

employees involved with the direct licensing program. 5/17/17 Tr. 4266:3-4268:8 (White). Thus, even outsourcing the direct licensing program that would be required in the hypothetical marketplace would far exceed the rate litigation costs erroneously included in Professor Crawford's model.

Thus, if Professor Crawford's model were corrected to replace the cost of rate setting litigation with the cost of direct licensing, the corrected result would yield calculations supporting a lower range of rates for the PSS royalties than the range proposed by Professor Crawford.

Reply to SEPFF 2055 (pp. 821-822):

Music Choice incorporates by reference herein its Replies to SEPFFs 2054 and 2049. SoundExchange has not identified a single error in the financial analysis used by Professor Crawford other than the inclusion of rate litigation costs and, as demonstrated above, correcting for that error actually leads to a lower rate.

Reply to SEPFF 2056 (p. 822):

SEPFF 2056 is a broad, conclusory argument, and not a finding of fact. Professor Crawford correctly concluded, based on substantial evidence, that the PSS provide a significant net promotional benefit to the record companies and do not materially substitute for other revenue streams. Crawford WDT, Trial Ex. 54, pp. 28-30, ¶¶ 96-104, pp. 59-60, ¶¶ 215-219; Crawford WRT, Trial Ex. 59, pp. 68-80, ¶¶ 113-176.

Reply to SEPFF 2057 (p. 822):

No response.

Reply to SEPFF 2058 (p. 822):

In contrast to Professor Crawford, Dr. Wazzan provided no evidence whatsoever to support his conclusory speculation that Music Choice's service was net substitutional, nor does SoundExchange cite any evidence in this Proposed Finding.

Reply to SEPFF 2059 (p. 823):

As SoundExchange admits, Dr. Wazzan's "illustration" of a "possible" effect of his speculative "positive threat point" is not based upon any evidence and all the numbers used are entirely made up by Dr. Wazzan. This testimony, untethered to any record evidence, cannot support SoundExchange's Proposed Finding.

Reply to SEPFF 2060 (p. 823):

Professor Crawford correctly concluded, based on substantial evidence, that the PSS provide a significant net promotional benefit to the record companies and do not materially substitute for other revenue streams. Crawford WDT, Trial Ex. 54, pp. 28-30, ¶¶ 96-104, pp. 59-60, ¶¶ 215-219; Crawford WRT, Trial Ex. 59, pp. 68-80, ¶¶ 113-176.

Reply to SEPFF 2061 (pp. 823-824):

SoundExchange cites no record evidence supporting its claim that changes in the market since the time of *PSS I* have impacted the promotional

benefits provided by Music Choice. Notably, the undisputed evidence demonstrates that the key fact cited by the CARP and Librarian, such as the record companies' extensive lobbying for airplay and servicing of Music Choice with free copies of the recordings, have only increased since the time of *PSS I*. Williams WDT, Trial Ex. 56, pp. 18-19, 22. In particular, the important development of Music Choice's audio channels being added to the Mediabase and Nielsen / BDS tracking and charting services, at the request of the record companies, is a relatively recent development that clearly demonstrates the increased promotional impact of airplay on Music Choice. Williams WDT, Trial Ex. 56, pp. 24-29; 5/18/17 Tr. 4699:18-4704:23 (Williams).

Reply to SEPFF 2062 (p. 824):

It is well established that discovery of new music leads to the consumption of new music through purchase and on-demand streaming. Williams WDT, Trial Ex. 56, p. 39; Crawford WRT, Trial Ex. 59, pp. 71-76, ¶¶ 249-263; 4/25/17 Tr. 838:5-842:5 (Crawford). Even SoundExchange's own witnesses admitted that discovery is a necessary step to drive increased revenues. 5/1/17 Tr. 1852:17-22 (Ford); 5/16/17 Tr. 3935:1-17 (Harrison). Music Choice does not allow subscribers to hear particular songs, so it does not serve the same function as a download purchase or on-demand stream after a subscriber has found a new song she likes. In fact, Music Choice substitutes most strongly for terrestrial radio, which pays no royalties at all to the record companies. This substitution for terrestrial radio in the home is so strong that

radio broadcasters have given up on trying to regain that listening, and have done strategic deals with Music Choice instead to increase terrestrial radio listening outside of the home. 5/18/17 Tr. 4561:12-4563:2 (Del Beccaro). The record companies, themselves, treat Music Choice's audio channels like terrestrial radio, and differently from internet streaming services. 5/18/17 Tr. 4721:9-4722:2 (Williams).

Reply to SEPFF 2063 (p. 825):

Music Choice has provided unrebutted evidence that its screen displays, which are covered by various patents and include features such as researched and curated facts about the artists and other contextually-linked information, are uniquely engaging and provide significantly more promotional impact than screen displays by any CABSAT service, which do not have these features. Williams WDT, Trial Ex. 56, pp. 11-12, 14, 29-30, 35; 5/18/17 Tr. 4687:15-4688:3, 4724:6-25 (Williams); 5/18/17 4565:4-4566:5, 4576:1-14 (Del Beccaro)(noting patented features of Music Choice screen display that CABSATs do not have).

Reply to SEPFF 2064 (p. 825):

The types of evidence cited by Professor Crawford are the same types considered and credited by the CARP and Librarian in *PSS I*, only the evidence in this proceeding is much more comprehensive. *Librarians' PSS I Determination*, at 25,408. See also MC PCL ¶¶ 175-76. Moreover, rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music*

Operators Assoc. v. Copyright Royalty Tribunal, 676 F.2d at 1159. The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19. Consequently, the Judges should not refuse to rely on evidence of facts relevant to the policy objectives, such as the promotional impact of Music Choice, merely because the impact of those facts cannot be specifically or precisely calculated. If such facts provide directional guidance for adjustment of the PSS rate, they should be considered, as they were in *PSS I*.

Reply to SEPFF 2065 (pp. 825-826):

Music Choice incorporates by reference herein its Replies to SEPFFs 2060 and 2064.

Reply to SEPFF 2066 (p. 826):

Music Choice incorporates by reference herein its Replies to SEPFFs 2060 and 2064.

Reply to SEPFF 2067 (p. 826):

Music Choice incorporates by reference herein its Replies to SEPFFs 2060 and 2064.

Reply to SEPFF 2068 (p. 826):

SEPFF 2068 must be rejected because it is premised upon an invalid presumption that marketplace rates always maximally further all four of the Section 801(b)(1) policy objective. This presumption is not only false as a matter of

fact, it is contrary to appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id.* The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress

intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects.")

Id. (citations omitted).

Applying a presumption that marketplace benchmarks satisfy any, much less all, of the Section 801(b)(1) policy objectives would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. U.S.*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-Zhuo*, 70 F.3d at 139 ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). *See also,* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

This is not to say that rates contained in marketplace agreements can never be found to further the policy objectives of Section 801(b). However, such a finding

could not be based upon a general rule or presumption, as proposed in SEPFF 2068. Instead, it would have to be specific to a particular marketplace agreement and based upon a specific evidentiary showing with respect to the policy objectives as applied to that rate when applied to the PSS. SoundExchange has not presented any evidence that would satisfy this burden.

Reply to SEPFF 2069 (pp. 826-827):

Music Choice's examples of record companies' recognition of the promotional impact of its audio service were indeed representative examples, and not cherry-picked. 5/18/17 Tr. 4706:11-4707:1 (Williams). SoundExchange has not presented any evidence demonstrating that Music Choice's audio channels actually cause any decrease in revenues to the record companies, or any other relevant substitutional impact of airplay on Music Choice. Music Choice has demonstrated that it substitutes most strongly for terrestrial radio, which pays no royalties to the record companies. 5/18/17 Tr. 4561:12-4563:2 (Del Beccaro). The record company promotions groups, themselves, treat Music Choice's audio channels like terrestrial radio, and differently from internet streaming services. 5/18/17 Tr. 4721:9-4722:2 (Williams).

Contrary to SoundExchange's Proposed Finding, Professor Crawford cited evidence not only of promotion, but also of net promotion. Crawford WDT, Trial Ex. 54, pp. 28-30, ¶¶ 96-104, pp. 59-60, ¶¶ 215-219; Crawford WRT, Trial Ex. 59, pp. 68-80, ¶¶ 113-176. The strongest, and most obvious, evidence that airplay on Music Choice is net promotional is that the record companies lobby

so aggressively to increase that airplay. 4/25/Tr. 837:10-838:4 (Crawford); 5/18/17 Tr. 4708:21-4710:10, 4712:14-4713:4, 4720:8-4722:9 (Williams). This lobbying could not rationally be justified by any slight increase in PSS royalties from the additional spins generated by that lobbying. 4/25/17 Tr. 836:7-837:9 (Crawford); 5/18/17 Tr. 4721:9-4722:2 (Williams).

Reply to SEPFF 2070 (p. 827):

Music Choice incorporates by reference herein its Replies to SEPFF 2068 and 2069.

Reply to SEPFF 2071 (pp. 827-828):

This Proposed Finding is false. Music Choice submitted significant evidence of promotional impact for new artists and other artists that are not "popular artists," including artists in niche genres who are not promoted by terrestrial radio and are most in danger of losing their recording contracts. Williams WDT, Trial Ex. 56, pp. 38, 42. For example, Mr. Williams testified about a promotion for the rock band Five Finger Death Punch, in which Music Choice implemented a social media contest to increase user engagement. Williams WDT, Trial Ex. 56, pp. 13-14, Trial Ex. 938. At trial, counsel for SoundExchange derisively noted that Five Finger Death Punch is not a prominent name in the music marketplace – but as Mr. Williams explained, promoting niche artists is one of the distinguishing characteristics of the Music Choice service. Music Choice reaches a broad audience of music listeners whose taste varies across many genres. While the fans of Five Finger Death punch are

not likely the same individuals who are fans of Beyoncé, Music Choice recognizes that within its own genre and niche, Five Finger Death punch is an important artist. 5/18/17 Tr. 4745:11-24 (Williams). And through its promotion, Music Choice was able to help the band find that audience and expand that niche. Williams WDT, Trial Ex. 56, pp. 13-14.

Reply to SEPFF 2072 (p. 828):

Music Choice incorporates by reference herein its Reply to SEPFF 2069.

Reply to SEPFF 2073 (pp. 828-829):

This Proposed Finding is nonsensical. Of course the conduct discussed is the conduct of the record companies. That conduct clearly demonstrates that the employees specifically tasked with promotion (i.e., increasing record company revenues) view airplay on Music Choice as net promotional, otherwise they would not engage in that conduct, irrespective of the specific cost of that conduct. 4/25/17 Tr. 836:7-838:4 (Crawford). Indeed, the strongest, and most obvious, evidence that airplay on Music Choice is net promotional is that the record companies lobby so aggressively to increase that airplay. 4/25/Tr. 837:10-838:4 (Crawford); 5/18/17 Tr. 4708:21-4710:10, 4712:14-4713:4, 4720:8-4722:9 (Williams). This lobbying could not rationally be justified by any slight increase in PSS royalties from the additional spins generated by that lobbying. 4/25/17 Tr. 836:7-837:9 (Crawford); 5/18/17 Tr. 4721:9-4722:2 (Williams).This is confirmed by Professor Shapiro's testimony that airplay provides a negative opportunity cost because it is

net promotional. 4/19/17 Tr. 207:20-208:8 (Shapiro); 4/20/17 Tr. 284:10-285:4 (Shapiro).

SoundExchange cites no actual record evidence that the incremental costs of such record company lobbying are minimal, as SoundExchange claims. The only cite for this proposition is the testimony of Mr. Williams, but in that testimony, the only cost Mr. Williams discusses is the admittedly minimal hard cost of providing links to copies of sound recordings. But he also notes that record company promotions employees spend between a half hour and an hour on each lobbying call to Music Choice 5/18/17 Tr. 4750:15-4751:21 (Williams). Elsewhere in his testimony, Mr. Williams established that Music Choice receives hundreds of these lobbying calls every week, and thousands of emails seeking increased airplay. *Id.* at 4720:8-4721-8. This undisputed testimony shows that the promotions groups expend significant time and effort trying to get increased airplay, which they would simply not do if airplay on Music Choice was net substitutional. Notably, Dr. Wazzan (the SoundExchange witness who claimed these costs were minimal) admitted at trial that he actually had no idea how many phone calls, emails, or meetings took place with Music Choice, and therefore had no idea how much those efforts cost. 5/3/17 Tr. 2466:6-2467:14 (Wazzan).

<u>Reply to SEPFF 2074 (p. 829):</u>

As noted above, the record companies' lobbying efforts could not rationally be justified by any slight increase in PSS royalties from the additional spins generated by that lobbying. 4/25/17 Tr. 836:7-837:9 (Crawford); 5/18/17 Tr.

4721:9-4722:2 (Williams). In addition to admitting that he had no knowledge of how much lobbying activity is actually involved, or the costs associated with that activity, Dr. Wazzan also admitted that he had no idea how much incremental royalty revenue any of the record labels could get from their lobbying. 5/3/17 Tr. 2466:6-2467:14 (Wazzan). Thus, he had no basis whatsoever for his claim quoted in SEPFF 2074.

Reply to SEPFF 2075 (p. 829):

The types of evidence cited by Professor Crawford are the same types considered and credited by the CARP and Librarian in *PSS I*, only the evidence in this proceeding is much more comprehensive. *Librarian's PSS I Determination*, at 25,408. See also MC PCL ¶¶ 175-76. Moreover, rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music Operators Assoc. v. Copyright Royalty Tribunal*, 676 F.2d at 1159. The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19. Consequently, the Judges should not refuse to rely on evidence of facts relevant to the policy objectives, such as the promotional impact of Music Choice, merely because the impact of those facts cannot be specifically or precisely calculated. If such facts provide directional guidance for adjustment of the PSS rate, they should be considered, as they were in *PSS I*.

Reply to SEPFF 2076 (pp. 829-830):

Music Choice incorporates by reference herein its Reply to SEPFF 2075.

Reply to SEPFF 2077 (p. 830):

Music Choice incorporates by reference herein its Reply to SEPFF 2075. Additionally, in the quoted testimony, Mr. Williams is only referring to measuring the difference between the promotional effect of Music Choice and Sirius XM, in response to a question from SoundExchange's counsel on that specific point. SoundExchange's attempt to mischaracterize the testimony as speaking to broader issues is inappropriate and misleading.

Reply to SEPFF 2078 (p. 831):

Music Choice incorporates by reference herein its Reply to SEPFF 2075. Merely because the promotional impact of Music Choice cannot be specifically quantified, does not mean that it should be ignored.

Reply to SEPFF 2079 (p. 831):

Dr. Ford, in his written rebuttal testimony, purports to relay conversations with music industry executives in which they allegedly claimed that Music Choice does not confer a promotional benefit. That testimony – based on interviews with 25 record company employees, none of whom appeared as witnesses in this proceeding or could be subject to cross-examination – is nothing but regurgitation of hearsay on an issue far outside of Dr. Ford's expertise, and should be rejected on those grounds alone. Indeed, when questioned on cross-examination about his methods for identifying and interviewing the record label personnel with whom he spoke, Dr.

Ford admitted that he did not necessarily speak with individuals personally involved with the promotions he argued were ineffective or lacking in actual promotional value. He allowed the record companies to select the particular employees he spoke with. 5/1/17 Tr. 1922:11-18; 1923:25-1924:8 (Ford). In fact, when Dr. Ford interviewed those cherry-picked record company personnel for the purpose of forming his testimony, he did not actually speak with any of the individuals who are in regular contact with Music Choice and were involved in the specific promotions regarding which he testified, such as that of Chris Brown's album Royalty. 5/1/17 Tr. 1922:19-1923:16 (Ford). Moreover, Dr. Ford has never worked at a record label, and has never worked in record company promotions – the very areas in which he seeks to provide expert testimony. 5/1/17 Tr. 1925:15-18 (Ford). All of this testimony should be rejected as unreliable.

Reply to SEPFF 2080 (p. 831):

Music Choice incorporates by reference herein its Reply to SEPFF 2079.

Reply to SEPFF 2081 (pp. 831-832):

SoundExchange cites no record evidence rebutting Mr. Del Beccaro's specific and credible testimony. As noted above, none of the cherry-picked record company employees whom Dr. Ford was directed to interview were actually involved in the Chris Brown promotion. 5/1/17 Tr. 1922:19-1923:16 (Ford). SoundExchange also ignores the unchallenged testimonial from Chris Brown's manager, stating that "Music Choice was one of the key marketing partners for launching the 'Royalty'

album into the marketplace. It's special to have a network with a large audience and great brand on our side." Williams WDT, Trial Ex. 56, p. 19.

Reply to SEPFF 2082 (p. 832):

The fact that record sales may be driven by more than one promotional factor does not negate the contribution that Music Choice made to the success of "Royalty," nor does it make that contribution any less valuable to RCA.

Reply to SEPFF 2083 (pp. 832-833):

SoundExchange mischaracterizes Mr. Williams's testimony. He did not in any way minimize the significance of the many unsolicited expressions of gratitude Music Choice receives from the record companies. In fact, in the testimony cited by SoundExchange, where he referred to "courtesy," Mr. Williams was responding to a question from SoundExchange's counsel about **Music Choice's** expressions of gratitude, not **the record companies'**. 5/18/17 Tr. 4746:1-20 (Williams). With respect to the record companies, Mr. Williams testified that their expressions of gratitude were genuine and not "merely" as a courtesy or to be polite. *Id*. at 4719:6-14. The uncontroverted evidence demonstrates that Music Choice did not request any of these expressions of gratitude. *Id*. at 4718:19-4720:7.

Reply to SEPFF 2084 (p. 833):

Messrs. Kushner, Walker, and Harrison are record company lawyers, and none of them have any job responsibilities relating to promotion. Their conclusory and self-serving claims, which they fail to support with any empirical or other evidence, are wholly inconsistent with the conduct and statements of the record

company radio promotions employees, who aggressively lobby Music Choice for airplay and constantly acknowledge Music Choice's role in breaking artists and selling records. See 5/10/17 Tr. 3524:10-3525:2 (Kushner); 5/18/17 Tr. 4730:2-7; (Williams); 5/15/17 Tr. 3881:21-3882:2 (Walker); 5/16/17 Tr.. 3913:18-23 (Harrison). For example, as Mr. Kushner admitted at trial, he has never been involved in the marketing or promotions efforts for which Atlantic has collaborated with Music Choice and thus has no personal knowledge of those matters. 5/10/17 Tr. 4730:2-7 (Kushner). In fact, contrary to Mr. Kushner's claims, Atlantic lobbies Music Choice as much as any other record label, and in recent months has contacted Music Choice to collaborate on promotions for its biggest stars, including Ed Sheeran and Bruno Mars. Williams WRT, Trial Ex. 58, p. 8, 11; 5/18/17 Tr. 4730:8 – 4732:20 (Williams); Trial Ex. 964.

As Mr. Williams explained, the record company lawyers who work at the corporate level are completely disconnected from the goings-on in the label promotional departments. 5/18/17 Tr. 4714:4-22 (Williams). It is no accident that in every proceeding, SoundExchange brings a parade of witnesses from the record company legal departments, but never one from the label radio promotions groups that actually lobby Music Choice for airplay.

<u>Reply to SEPFF 2085 (p. 833):</u>

Music Choice incorporates by reference herein its Reply to SEPFF 2079.

Reply to SEPFF 2086 (pp. 833-834):

The importance of airplay on Music Choice to the record industry, irrespective of its inability to track specific performances, is clearly demonstrated by the fact that Music Choice's audio channels are tracked, at the request of the record companies, by Mediabase and Nielsen / BDS and are included in the various airplay charts that reflect, and drive, record company promotional efforts. Williams WDT, Trial Ex. 56, pp. 24-29; 5/18/17 Tr. 4699:18-4704:23 (Williams). These companies track the number of spins of each song played by broadcasters they choose to monitor, and produce airplay charts that are widely published and used by the record companies to break new artists and decide which recordings to support. Nielsen BDS and Mediabase are highly selective in which music programming outlets they choose to track, selecting only platforms that have a tangible impact on the music industry ecosystem, and dropping stations that cease to have that impact. 5/18/17 Tr. 4703-17 (Williams). Notably, other than terrestrial radio stations, Mediabase only tracks Music Choice and Sirius XM; it does not track any webcasters or streaming services. *Id.* at 4702:20-4703:4 (Williams).

Reply to SEPFF 2087 (p. 834):

The aggressive lobbying of Music Choice for airplay by the record label radio promotions groups clearly demonstrates that the employees specifically tasked with promotion (i.e., increasing record company revenues) view airplay on Music Choice as net promotional, otherwise they would not engage in that conduct, irrespective of

the specific cost of that conduct. 4/25/17 Tr. 836:7-838:4 (Crawford). Indeed, the strongest, and most obvious, evidence that airplay on Music Choice is net promotional is that the record companies lobby so aggressively to increase that airplay. 4/25/17 Tr. 837:10-838:4 (Crawford); 5/18/17 Tr. 4708:21-4710:10, 4712:14-4713:4, 4720:8-4722:9 (Williams). This lobbying could not rationally be justified by any slight increase in PSS royalties from the additional spins generated by that lobbying. 4/25/17 Tr. 836:7-837:9 (Crawford); 5/18/17 Tr. 4721:9-4722:2 (Williams).This is confirmed by Professor Shapiro's testimony that airplay provides a negative opportunity cost because it is net promotional. 4/19/17 Tr. 207:20-208:8 (Shapiro); 4/20/17 Tr. 284:10-285:4 (Shapiro).

SoundExchange cites no actual record evidence that the incremental costs of such record company lobbying are minimal, as SoundExchange claims. The only cite for this proposition is the testimony of Mr. Williams, but in that testimony, the only cost Mr. Williams discusses is the admittedly minimal hard cost of providing links to copies of sound recordings. But he also notes that record company promotions employees spend between a half hour and an hour on each lobbying call to Music Choice 5/18/17 Tr. 4750:15-4751:21 (Williams). Elsewhere in his testimony, Mr. Williams established that Music Choice receives hundreds of these lobbying calls every week, and thousands of emails seeking increased airplay. *Id.* at 4720:8-4721-8. This undisputed testimony shows that the promotions groups expend significant time and effort trying to get increased airplay, which they would simply not do if airplay on Music Choice was net substitutional. Notably, Dr. Wazzan (the

SoundExchange witness who claimed these costs were minimal) admitted at trial that he actually had no idea how many phone calls, emails, or meetings took place with Music Choice, and therefore had no idea how much those efforts cost. 5/3/17 Tr. 2466:6-2467:14.

Reply to SEPFF 2088 (p. 834):

As noted above, Mr, Kushner has no personal knowledge of how any record label radio promotions groups actually promote records. 5/10/17 Tr. 4730:2-7 (Kushner). With respect to Mr. Williams's testimony, even SoundExchange admits that Music Choice is lobbied by the record label radio promotions group, which is a separate department from the group that deals with digital music services such as webcasters or on-demand streaming services. 5/18/17 Tr. 4713:5-21 (Williams).

Reply to SEPFF 2089 (p. 835):

Music Choice has submitted evidence demonstrating very significant and aggressive lobbying by the record labels for airplay on Music Choice. Williams WDT, Trial Ex. 56, p. 14; 33; Williams WRT, Trial Ex. 58, pp. 1-2; 5/18/17 Tr. 4720:8-4722:9 (Williams). SoundExchange has submitted no evidence, though it certainly had access to such evidence if it existed, that any other promotional outlet is lobbied more. In any event, it is irrelevant whether certain terrestrial radio stations are lobbied as much or more as Music Choice. Music Choice acknowledges that airplay on terrestrial radio, like airplay on Music Choice, is promotional.

Reply to SEPFF 2090 (p. 835):

No response.

Reply to SEPFF 2091 (p. 835):

Music Choice freely acknowledges that some types of custom promotions done with the record companies and artists provide a benefit to Music Choice. That fact does not make the promotions any less valuable to the record companies. 5/18/17 Tr. 4727:24-4729:1 (Williams). Moreover, Music Choice does not get any promotional value from airplay on the music channels itself, which is the key promotional driver for the record companies. Notably, even the custom promotions involve increased airplay. *Id*. at 4725:1-21.

Reply to SEPFF 2092 (pp. 835-836):

Music Choice incorporates by reference herein its Reply to SEPFF 2091.

Reply to SEPFF 2093 (p. 836):

No response.

Reply to SEPFF 2094 (p. 836):

The types of evidence cited by Professor Crawford regarding promotion are the same types considered and credited by the CARP and Librarian in *PSS I*, only the evidence in this proceeding is much more comprehensive. *Librarians' PSS I Determination*, at 25,408. *See also* MC PCL ¶¶ 175-76. Moreover, rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music Operators Assoc. v. Copyright Royalty Tribunal*, 676 F.2d at 1159. The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19.

Consequently, the Judges should not refuse to rely on evidence of facts relevant to the policy objectives, such as the promotional impact of Music Choice, merely because the impact of those facts cannot be specifically or precisely calculated. If such facts provide directional guidance for adjustment of the PSS rate, they should be considered, as they were in *PSS I*.

Reply to SEPFF 2095 (pp. 836-837):

As Mr. Williams testified, even the custom promotions, which include content available on the video service, always also include increased airplay on the audio channels. 5/18/17 Tr. 4725:1-21 (Williams).

Reply to SEPFF 2096 (p. 837):

Professor Crawford demonstrated that there was a positive, net promotional effect from airplay on Music Choice, such that the record company threat point should have been negative. 4/24/17 Tr. 725:14-726:4 (Crawford). He excluded any promotional benefit from his calculation of the threat points in his model only because he was unable to specifically quantify the economic profits associated with the net promotional benefits to record companies of the Music Choice service. Crawford WDT, Trial Ex. 54, p. 32 ¶113; 4/24/17 Tr. 725:14 – 726:4, 743:10 – 745:9 (Crawford). This lowers the joint agreement profits to be divided and effectively allocates the entirety of any net promotional benefit to the record labels. The exclusion of net promotional value from the joint agreement profits has two effects: it makes Professor Crawford's estimate of the joint agreement profits a lower bound on its true value and it overestimates the royalty that should be paid by Music

Choice to the record label. As a result, this analysis of threat points disadvantages Music Choice and is therefore likely to be conservative. Crawford WDT, Trial Ex. 54, p. ¶176.

This does not mean that the Judges should not consider Music Choice's promotional impact when analyzing the Section 801(b)(1) policy objectives. Rate-making pursuant to Section 801(b)(1) "is an art, not a science." *Amusement & Music Operators Assoc. v. Copyright Royalty Tribunal*, 676 F.2d at 1159. The requisite policy analysis cannot be reduced to mathematical formulae, nor must Section 801(b)(1) rates be "the result of a rigorous mathematical derivation." *Recording Indus. Assn. of American v. Copyright Royalty Tribunal*, 662 F.2d at 8 n.19. Consequently, the Judges should not refuse to rely on evidence of facts relevant to the policy objectives, such as the promotional impact of Music Choice, merely because the impact of those facts cannot be specifically or precisely calculated. If such facts provide directional guidance for adjustment of the PSS rate, they should be considered, as they were in *PSS I*.

<u>Reply to SEPFF 2097 (p. 837):</u>

SEPFF 2097 contains no factual assertions, merely an argumentative conclusion, which has been amply rebutted above.

<u>Reply to SEPFF 2098 (p. 837):</u>

Given that the alleged opportunity cost is no more than SoundExchange's unsupported assertion of a net substitutional impact from airplay on Music Choice,

Professor Crawford demonstrated that there is no such opportunity cost, as set forth extensively above.

Reply to SEPFF 2099 (pp. 837-838):

SoundExchange has cited no evidence whatsoever that Music Choice has any substitutional effect at all, much less one that causes any decrease in record company revenues. Notably, Dr. Wazzan's analysis completely fails to include the effect of Music Choice's substitution for terrestrial radio. Music Choice substitutes most strongly for terrestrial radio, which pays no royalties at all to the record companies. This substitution for terrestrial radio in the home is so strong that radio broadcasters have given up on trying to regain that listening, and have done strategic deals with Music Choice instead to increase terrestrial radio listening outside of the home. 5/18/17 Tr. 4561:12-4563:2 (Del Beccaro). The record companies, themselves, treat Music Choice's audio channels like terrestrial radio, and differently from internet streaming services. 5/18/17 Tr. 4721:9-4722:2 (Williams).

SoundExchange cites no record evidence establishing that Music Choice actually substitutes for any other record company revenue sources. Indeed, SoundExchange's record company witnesses testified that they are not aware of any empirical evidence that the Music Choice service actually cannibalizes other record company revenues. See, e.g. 5/16/17 Tr. 4076:18-4077:1 (Harrison); 5/15/17 Tr. 3882:19-23 (Walker). See also 5/1/17 Tr. 1932:19-23 (Ford). Instead, and likely because there is no evidence showing that Music Choice is

substitutional, it submits unsupported testimony from its record company attorney witnesses that attempts to negate the promotional effect of the Music Choice residential audio service. This unsupported, conclusory testimony is disproven by the very fact that the record companies all aggressively lobby Music Choice for airplay. They would not do that if the net impact of airplay on Music Choice were substitutional. 4/25/17 Tr. 836:7-838:4 (Crawford). This is confirmed by Professor Shapiro's testimony that airplay provides a negative opportunity cost because it is net promotional. 4/19/17 Tr. 207:20-208:8 (Shapiro); 4/20/17 Tr. 284:10-285:4 (Shapiro).

Reply to SEPFF 2100 (p. 838):

It is no doubt true that record company executives would "prefer music users switch from the PSS to higher revenue interactive or non-interactive services." That desire is irrelevant, however, in the absence of any evidence that consumers would actually make that substitution. As set forth in Music Choice's Reply to SEPFF 2099, however, SoundExchange has cited no such record evidence of any kind.

Reply to SEPFF 2101 (pp. 838-839):

Music Choice incorporates by reference herein its Replies to SEPFFs 2099 and 2100.

Reply to SEPFF 2102 (p. 839):

Music Choice incorporates by reference herein its Replies to SEPFFs 2099 and 2100.

Reply to SEPFF 2103 (p. 839):

The fact that so many Music Choice users also use various other services (while continuing to use Music Choice) demonstrates that the services are complimentary, and not substitutional. Crawford WRT, Trial Ex. 59, pp. 68-69, ¶¶ 239-43; 4/24/17 Tr. 744:19-745:9 (Crawford).

Reply to SEPFF 2104 (pp. 839-840):

Music Choice incorporates by reference herein its Reply to SEPFF 2099. In light of the total lack of evidence supporting a finding of net substitution, Dr. Wazzan's theoretical calculations, which also do not take into account any substitution for terrestrial radio, are irrelevant.

Reply to SEPFF 2105 (p. 840):

Music Choice incorporates by reference herein its Replies to SEPFFs 2099 and 2104.

Reply to SEPFF 2106 (p. 840):

Music Choice incorporates by reference herein its Replies to SEPFFs 2099 and 2104, and also notes that there is no evidentiary basis for Dr. Wazzan's assumption of 15 tracks per hour, or his assumption that listening time on one platform equates to listening time on the other.

Reply to SEPFF 2107 (pp. 840-841):

The very reason that the original Nash Bargaining Solution was later extended to the Asymmetric Nash Bargaining Solution was to allow models using the Nash Framework to more accurately reflect real-world scenarios by allowing for

negotiations where the parties do not have exactly equal bargaining power. Crawford WDT, Trial Ex. 54, p. 19, ¶65; 4/24/17 Tr. 702:24-703:21, 705:15-706:1 (Crawford). Dr. Crawford adopted a broad range specifically to allow for this uncertainty, and included a conservative estimate of as high as 80% of the bargaining power belonging to the record labels. And he incorporated this range of bargaining powers into his calculations. He excluded from the range values allowing either party to extract all, or essentially all, of the surplus from the negotiation. Crawford WDT, Trial Ex. 54, p. 49, ¶¶ 177-78.

Reply to SEPFF 2108 (p. 841):

Dr. Crawford did not set the Bargaining power to arbitrary levels, he provided a range reflecting different ratios of bargaining power. Crawford WDT, Trial Ex. 54, p. 51, ¶ 182. This gives the Judges flexibility to select a rate within that range, as they are supposed to do pursuant to Section 801(b)(1).

Reply to SEPFF 2109 (p. 841):

SoundExchange's unsupported claim that the record company's bargaining power should allow it to extract the entire surplus is inconsistent with a competitive marketplace and would be unfair, as acknowledged by SoundExchange's own economist, Dr. Willig. 5/2/17 Tr. 2117:1 – 24 (Willig). The Judges are supposed to consider the results of a negotiation in a hypothetical, competitive market. *See Web IV,* 81 Fed. Reg. at 26,332, noting that the Judges "are required by law to set a rate [in that proceeding] that reflects a market that is effectively competitive." Thus, the self-serving views of what record company executives, who operate as non-

competitive, complimentary oligopolists, claim they would want to get out of such a negotiation, is irrelevant.

Reply to SEPFF 2110 (pp. 841-842):

In the hypothetical, competitive market, no single record company could put Music Choice out of business by refusing to strike a deal. Assuming, in the context of modeling bargaining power that failure to reach an agreement as to the PSS rates would put Music Choice out of business and therefore could extract all or almost all of the surplus is inconsistent with a workably competitive market. See 4/24/17 Tr. 746:18-22 (Crawford); 4/24/17 Tr. 539:2 – 9 (Shapiro); 4/19/17 Tr.184:8 – 185:2 (Shapiro); 5/4/17 Tr. 2595:3 – 17 (Shapiro). Indeed, this is the very reason SoundExchange's own economist, Dr. Willig, gave for why it would be inappropriate to model all, or even most, of the surplus going to one party and why he believed that assuming equal bargaining power is most appropriate in this proceeding. 5/2/17 Tr. 2117:1 – 24 (Willig).

Reply to SEPFF 2111 (p. 842):

Music Choice incorporates by reference herein its Reply to SEPFF 2110, and also notes that Dr. Wazzan's "corrections" to Professor Crawford's threat point and joint agreement profits calculations were erroneous, as set forth in Music Choice's Reply to SEPFF 2044. Moreover, he improperly uses his invalid assumption of "must-have" ability to shut down Music Choice at every step of his analysis to increase the PSS rates. Having already used it at the threat

point and joint agreement profits stages, he now seeks to use it yet again at the bargaining power stage.

Reply to SEPFF 2112 (p. 842):

SEPFF 2112 must be rejected because it is premised upon an invalid presumption that marketplace rates always maximally further all four of the Section 801(b)(1) policy objective. This presumption is not only false as a matter of fact, it is contrary to appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument, made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate'

may not be 'reasonable' and vice versa." *Id.* The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1) and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects.")

Id. (citations omitted).

Applying a presumption that marketplace benchmarks satisfy any, much less all, of the Section 801(b)(1) policy objectives would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. U.S.*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-*

Zhuo, 70 F.3d at 139 ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). *See also* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

This is not to say that rates contained in marketplace agreements can never be found to further the policy objectives of Section 801(b). However, such a finding could not be based upon a general rule or presumption, as presented in SEPFF 2112. Instead, it would have to be specific to a particular marketplace agreement and based upon a specific evidentiary showing with respect to the policy objectives as applied to that rate when applied to the PSS. SoundExchange has not presented any evidence that would satisfy this burden.

Reply to SEPFF 2113 (p. 843):

Music Choice incorporates by reference herein its Reply to SEPFF 2112.

Reply to SEPFF 2114 (p. 843):

Music Choice incorporates by reference herein its Reply to SEPFF 2112. Additionally, even though Dr. Wazzan acknowledges that the CABSAT rate is not a marketplace rate (Wazzan WDT, Trial Ex. 501, p. 28 ¶64), he nonetheless relies on Dr. Orszag's claim that a marketplace rate already incorporates at least the first three section 801(b)(1) policy objectives. Wazzan WDT, Trial Ex. 501, p. 6. This reason alone, warrants rejection of SEPFF 2116.

As Dr. Wazzan testified, he interpreted the 801(b)(1) factors through a neoclassical economics lens, as dealing only with efficient outcomes, not policy or fairness based outcomes. 5/3/17 Tr. 2317:20-25 (Wazzan). Similarly, Dr. Orszag, on

whose testimony Dr. Wazzan relied in part, also only considered "fairness" as equated with efficiency. 4/25/17 Tr. 958:1-7 (Orszag). Such cursory treatments of the fairness element of the 801(b)(1) analysis, and the very presumption that the policy objectives are necessarily promoted by all marketplace rates, clearly controverts the legislative intent behind the PSS license and the implementation of the section 801(b)(1) policy objectives. The requisite policy analysis cannot be avoided by creating a convenient presumption that assumes away that analysis. MC PCL ¶ 135. Dr. Wazzan's false conflation of fairness with efficiency only serves to demonstrate the limitations of the utility of neoclassical economics in determining a reasonable PSS royalty rate. SoundExchange's complete failure to submit any evaluation of its proposed benchmark under the Section 801(b)(1) policy objectives is an independently sufficient ground to reject SoundExchange's rate proposal.

Behavioral economics literature makes clear that market incomes are not necessarily fair, and that firms do not always act as the neoclassical economics model prescribes. Crawford WRT, Trial Ex. 59, ¶¶150-158. Professor Crawford testified at trial as to the many reasons why behavioral economics views fairness differently from neoclassical economics, and would justify allowing Music Choice to keep their profits at a certain reference level. 4/24/17 Tr. 762:21-764:16 (Crawford). Professor Shapiro, Sirius XM's expert, also explained that consumer surplus may not be maximized by market rates. 5/4/17 Tr. 2555:17-2557:5 (Shapiro).

Even SoundExchange's own expert, Dr. Lys, explained the difference between the treatment of fairness in neoclassical economics and in behavioral economics.

4/26/17 Tr. 1281:17-25 (Lys). He noted that neoclassical economics focuses on the efficiency of the process by which an outcome is generated, and that this focus is reflected in a willing buyer/willing seller analysis. The procedural, market-based approach to fairness used in neoclassical economics does not account for distributive fairness. 4/27/17 Tr. 1407:17-1409:3 (Lys). Behavioral economics, however, focuses on distributive fairness – a factor with which the law is very concerned. 4/27/17 Tr. 1411:3-25 (Lys).

Reply to SEPFF 2115 (pp. 843-844):

Music Choice incorporates by reference herein its Replies to SEPFFs 2112 and 2114.

Reply to SEPFF 2116 (p. 844):

Music Choice incorporates by reference herein its Replies to SEPFFs 2112 and 2114.

Reply to SEPFF 2117 (p. 844):

No response.

Reply to SEPFF 2118 (pp. 844-845):

SoundExchange cites no record evidence demonstrating any effect of the addition of new types of music services has had on the PSS' promotion of the availability of creative works to the public, much less what the effect its proposed rates would have on this policy objective. Music Choice has submitted substantial evidence and analysis on this point, including analysis demonstrating that even carrying over the existing rate would not promote the first policy factor, much less

the implementation of SoundExchange's proposed massive rate increase. See MC PFF ¶¶ 334-392.

Reply to SEPFF 2119 (p. 845):

SEPFF 2119 contains only an argumentative conclusion, which merits No response.

Reply to SEPFF 2120 (p. 845):

There is no other service that could take Music Choice's place if it were driven out of the market. As a preliminary matter, the relevant industries in the fourth factor are the record companies and the PSS, not the CABSATs. The Section 801(b)(1) policy objectives were meant to apply to the PSS, but specifically not the CABSATs, so any interpretation of the factors that would provide their benefit to the CABSATs is inconsistent with Congress's clear legislative intent in creating the PSS category. MC PCL ¶¶ 39-41.

Moreover, there has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr.784:12-785:8 (Crawford). The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the

CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which it uses it as a promotional tool, and is not competing for new business. And Sirius XM pays a CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22 – 4605:22; 4668:22 – 4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id.* There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music Choice's larger affiliates, at the same (or lower) rates received by Music Choice. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which Stingray predominantly contracts. Were Stingray required to pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

Reply to SEPFF 2121 (p. 846):

Music Choice incorporates by reference herein its Reply to SEPFF 2121.

Reply to SEPFF 2122 (p. 846):

SoundExchange cites no record evidence for its claim that other music services would, or could, replace Music Choice's promotional impact. Music Choice, on the other hand, demonstrated that its audio channels take the lead in breaking new artists before other digital music services, which are programmed largely or completely by algorithms and follow trends rather than set them like Music Choice does. 5/18/17 Tr. 4690:10-4691:9 (Williams). The relative superiority of Music Choice's promotional impact is further demonstrated by the fact that none of these webcasters or streaming services are tracked or reported by Mediabase, while Music Choice is. Mediabase is highly selective in which music programming outlets it chooses to track, selecting only platforms that have a tangible impact on the music industry ecosystem, and dropping stations that cease to have that impact. 5/18/17 Tr. 4703-17 (Williams). Notably, other than terrestrial radio stations, Mediabase only tracks Music Choice and Sirius XM; it does not track any webcasters or streaming services. *Id.* at 4702:20-4703:4 (Williams).

Reply to SEPFF 2123 (p. 846):

The article cited by Dr. Wazzan demonstrates nothing more than the fact that, even as recently reduced, the statutory webcasting rates are unsustainable. SoundExchange cites no evidence demonstrating whether Live365's alleged "more profitable business model" is working, or even what

that model is. Wazzan WDT, Trial Ex. 501, ¶ 77. That hearsay article certainly does not constitute any kind of proof that putting Music Choice out of business somehow satisfies the first policy objective.

Reply to SEPFF 2124 (p. 847):

SoundExchange cites no record evidence demonstrating that the current or lower rates would actually lead to any less availability of creative works. Nor could it cite any such evidence. Revenues from the PSS license make up only a small percentage of the record labels' revenues – [[[redacted]]]. Crawford WDT, Trial Ex. 54, p. 8, ¶ 26; *Accord*, *id.* at 56 ¶205. This is especially true for Music Choice, whose royalty payments – while onerous for Music Choice – are barely enough to register on the record companies' balance sheets. Thus, a change in the rate will have no appreciable on the record companies' ability to produce and release records or identify and promote new artists.

Reply to SEPFF 2125 (p. 847):

Music Choice incorporates by reference herein its Replies to SEPFFs 2056 through 2106.

Reply to SEPFF 2126 (p. 847):

As Dr. Wazzan testified, he interpreted the 801(b)(1) factors through a neoclassical economics lens, as dealing only with efficient outcomes, not policy or fairness based outcomes. 5/3/17 Tr. 2317:20-25 (Wazzan). Similarly, Dr. Orszag, on whose testimony Dr. Wazzan relied in part, also only considered fairness as equated with efficiency. 4/25/17 Tr. 958:1-7 (Orszag). Such cursory treatments of the fairness

element of the 801(b)(1) analysis, and the very presumption that the policy objectives are necessarily promoted by all marketplace rates, clearly controverts the legislative intent behind the PSS license and the implementation of the section 801(b)(1) policy objectives. The requisite policy analysis cannot be avoided by creating a convenient presumption that falsely assumes away that analysis. MC PCL ¶ 135; see *id.* ¶¶ 39-41. Dr. Wazzan's false conflation of fairness with efficiency only serves to demonstrate the limitations of the utility of neoclassical economics in determining a reasonable PSS royalty rate. SoundExchange's complete failure to submit any evaluation of its proposed benchmark under the Section 801(b)(1) policy objectives is an independently sufficient ground to reject SoundExchange's rate proposal.

Behavioral economics literature makes clear that market incomes are not necessarily fair, and that firms do not always act as the neoclassical economics model prescribes. Crawford WRT, Trial Ex. 59, ¶¶150-158. Professor Crawford testified at trial as to the many reasons why behavioral economics views fairness differently from neoclassical economics, and would justifying allowing Music Choice to keep their profits at a certain reference level. 4/24/17 Tr. 762:21-764:16. Professor Shapiro, Sirius XM's expert, also explained that consumer surplus may not be maximized by market rates. 5/4/17 Tr. 2555:17-2557:5 (Shapiro).

Even SoundExchange's own expert, Dr. Lys, explained the difference between the treatment of fairness in neoclassical economics and in behavioral economics. 4/26/17 Tr. 1281:17-25 (Lys). He noted that neoclassical economics focuses on the

efficiency of the processes by which an outcome is generated, and that this focus is reflected in a willing buyer/willing seller analysis. The procedural, market-based approach to fairness used in neoclassical economics does not account for distributive fairness. 4/27/17 Tr. 1407:17-1409:3 (Lys). Behavioral economics, however, focuses on distributive fairness – a factor with which the law is very concerned. 4/27/17 Tr. 1411:3-25 (Lys).

Reply to SEPFF 2127 (pp. 847-848):

Music Choice incorporates by reference herein its Reply to SEPFF 2126.

Reply to SEPFF 2128 (p. 848):

This is false. Music Choice pays substantially higher royalties than its primary competitor, terrestrial radio. 5/18/17 Tr. 4561:12-4563:2, 4623:6-9 (Del Beccaro).

Reply to SEPFF 2129 (p. 848):

SoundExchange does not even attempt to cite anything in the record supporting this proposed finding, so it must be rejected.

Reply to SEPFF 2130 (p. 848):

SoundExchange mischaracterizes the cited testimony. Mr. Del Beccaro testified that Music Choice has never even tried to develop a direct licensing program, in part because the costs of adding the necessary infrastructure to negotiate the thousands of licenses necessary would be prohibitive. 5/18/17 Tr. 4547:1- 4548:13;4619:4-11 (Del Beccaro). Nor would it make any sense for Music Choice to try to negotiate these licenses, even if one of the majors were willing.

The PSS royalty is currently calculated as 8.5% of the gross revenue from Music Choice's residential audio service. 37 CFR § 382.3(a). That royalty provision has no express carve-out for direct licenses. Thus, if Music Choice entered into a direct license with one, or even all, of the major record companies, it would have to pay the royalties required by those licenses **in addition to** its current payment of 8.5% of revenue for its PSS royalties. 5/18/17 Tr. 4673:10-19 (Del Beccaro). Unless Music Choice were able, immediately, to license 100% of its music through direct licensing, direct licensing at any rate would cost Music Choice even more than it pays now.

Notably, when UMG, the largest of the major record companies, recently tried to use its unregulated leverage over Music Choice in its video license negotiations to [[[redacted]]] Del Beccaro WRT, Trial Ex. 57, pp. 21-22. This fact alone demonstrates how absurdly high SoundExchange's rate proposal is in this proceeding.

<u>Reply to SEPFF 2131 (p. 849):</u>

The Judges are supposed to consider the results of a negotiation in a hypothetical, competitive market. *See Web IV,* 81 Fed. Reg. at 26,332, noting that the Judges "are required by law to set a rate [in that proceeding] that reflects a market that is effectively competitive." Thus, the self-serving views of what record

company executives, who operate as non-competitive, complimentary oligopolists, claim they would want to get out of such a negotiation, is irrelevant.

Reply to SEPFF 2132 (p. 849):

SoundExchange does not even attempt to cite anything in the record supporting this proposed finding, so it must be rejected.

Reply to SEPFF 2133 (pp. 849-850):

Music Choice does not now, and has never, charged below-market rates. In fact, the evidence demonstrates that Music Choice commands a higher price than any other service in the market, due to its superior quality. Music Choice incorporates by reference herein its Reply to SEPFFs 1960-1999.

Reply to SEPFF 2134 (p. 850):

As a preliminary matter, the relevant financial analysis under the second policy factor is the performance of Music Choice's residential audio service covered by the PSS license, as a standalone business, not Music Choice's consolidated performance. In the last PSS proceeding the Judges specifically criticized Music Choice for including costs and revenue from its commercial audio residential video service in Professor Crawford's financial analysis. Crawford WDT, Trial Ex. 54, p. 32 ¶110; *SDARS II*, 78 Fed. Reg. at 23,059. In that determination, the Judges made clear that "the appropriate business to analyze for the purpose of this proceeding is the residential audio service offered by Music Choice, the subject of the Section 114 license." *Id*.

There are additional reasons why the Judges' analysis should focus on only the business line subject to the Section 114 license. As Dr. Crawford explains, basing an analysis on the consolidated business (as Dr. Wazzan does in his own analysis) would have the result of forcing Music Choice to subsidize its PSS line with the profits from other business lines – an outcome that is inconsistent with fundamental economic policy and with the statutory objectives of the PSS license. Crawford WRT, Trial Ex. 59, p. 51, ¶176; 4/24/17 Tr. 787:19-25 (Crawford).

Nor would inclusion of Music Choice's other business lines be consistent with precedent. In *PSS I*, the Register (and CARP) also limited their analysis, throughout all of the policy objectives, of the financial performance of the PSS to the PSS operations of those companies. *CARP Report*, Trial Ex. 979, at ¶¶99, 108; See also *id.* at ¶¶117-118 (noting that a rate set too high would result in any or all of the services leaving "this new industry" or "this business" in reference to PSS business operations, not the longstanding commercial background music industry in which Muzak also operated); *Librarian's PSS I Determination* at 25,407, discussing the services start-up costs and costs of bringing the creative product to market in a new and novel way. See also, *id.* at 25,407-25,408, noting that setting the rate too high could cause one or all of the services to abandon the business. Notably, at the time of *PSS I* Muzak's primary business line was its commercial background music service. It was the oldest and largest company in the commercial background music market with roots dating back to 1922. *CARP Report*, Trial Ex. 979, ¶27; *Librarian's PSS I Determination* at 25,395; Del Beccaro WRT, Trial Ex. 57, pp. 6-7.

Yet in discussing and analyzing the financial performance of the PSS, neither the Register nor the CARP considered Muzak's overall profitability driven by its thriving, primary business line. *CARP Report*, Trial Ex. 979, at ¶¶99, 108, 117-118 ; *Librarian's PSS I Determination* at 25,407; Nor did the Register propose, or even consider, that Muzak should have subsidized its PSS business with the profits from its commercial background service operations. *CARP Report*, Trial Ex. 979, at 28-20; *Librarian's PSS I Determination* at 25,407-25,408.

Additionally, Music Choice already pays sound recording royalties for its other business lines, pursuant to direct and statutory licenses that are already in place, and those market rate license fees are already taken into account in Professor Crawford's model. 4/24/17 Tr. 749:21-25 (Crawford); 5/18/17 Tr. 4548:14-25 (Del Beccaro). Including profits from those separately-licensed business lines in the calculation to derive the rate for the PSS license would effectively make Music Choice double pay for those other sound recording licenses.

The unrebutted evidence clearly demonstrates that under SoundExchange's rate proposal, Music Choice's residential audio business would be massively unprofitable and would cause Music Choice to exit the business. Immediately upon taking effect, Music Choice's payments to SoundExchange would increase [[[redacted]]]. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 924, p. 2. When the audio service subject to the PSS licenses is considered in isolation, Music Choice would take a projected annual net income loss of over [[[redacted]]] increasing to

almost [[[redacted]]] by the end of the upcoming rate period. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex 924, p. 6.

If the overall bundled residential service (including the separately-licensed video service) is considered, the results are slightly better. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 925, p. 6. This improvement is due solely to [[[redacted]]]. Del Beccaro WDT, Trial Ex. 55, p. 27; Del Beccaro WRT, Trial Ex. 57, p. 23. Even considering [[[redacted]], however, the combined residential service would be highly unprofitable under SoundExchange's proposed rate, with [[[redacted]]] in 2018, losses continuing through 2021, and a small positive net income of just over [[[redacted]]] in 2022 (again, driven solely by [[[redacted]]]. Del Beccaro WRT, Trial Ex. 57, p. 23-24.

Although as a general matter, the Section 801(b)(1) policy-based standard does not guarantee every licensee a certain level of profitability, in the particular context of the PSS license, appellate precedent teaches that the rate must be set at a level to allow some profit to fund continued operations. *Librarian's PSS I Determination* at 25,410 (holding that rate should not be set at a level that would drive even one, much less all, of the PSS out of business).

Reply to SEPFF 2135 (p. 850):

SoundExchange has submitted, and cites, no evidence for the supposed fact that Stingray's CABSAT service "is interchangeable with Music Choice's PSS service." The record evidence clearly disproves this, including the evidence that after six years of entering the market, Stingray has been largely unsuccessful at taking business away from Music Choice, capturing only six percent of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Music Choice has been able to keep its affiliates, even while charging a significant premium of between [[ ]] higher rates than those offered by Stingray. Del Beccaro WDT, Trial Ex. 55, p. 31. This would not be the case if the two services were "interchangeable." Moreover, after AT&T switched to Stingray, there was significant dissatisfaction among subscribers with the change to Stingray. Crawford WRT, Trial Ex. 59, pp. 47-48, ¶ 168 & Appx.. A-2. Notably, after that switch, AT&T subscribership has declined significantly. *Id*. at p. 19, fn. 46.

Reply to SEPFF 2136 (p. 851):

As noted above, this finding is premised on the fundamental errors of assuming (1) that marketplace rates inherently satisfy the third policy objective and (2) that the CABSAT rates are marketplace rates. Both of these assumptions are false, so SEPFF must be rejected on those grounds alone. As noted above in Reply to SEPFF 2135, the Music Choice and Stingray services are different in ways that materially affect the relative value of the two services. Moreover, Music Choice has set forth in great detail the significant contributions it makes relevant to the

various sub-factors of the third policy objective. MC PFF ¶¶ 427-501. SoundExchange has not submitted a shred of evidence regarding Stingray's comparative contributions, but merely asks the Judges to assume that they are the same. This finding cannot be adopted without any supporting record evidence.

Reply to SEPFF 2137 (p. 851):

SoundExchange compares apples to oranges. Dr. Wazzan compared Music Choice's property and equipment expenditures, only, as a percent of revenue in a particular three year period to Sirius XM's and Pandora's entire capital expenditures figure for only one year, 2015. Wazzan WDT, Trial Ex. 501, ¶¶ 79-80. He does not explain why he did not do a full capital expenditure analysis for Music Choice, and at trial he admitted that he did not know whether Music Choice had any other capital expenditures during this period. 5/3/17 Tr. 2442:18-2443:3 (Wazzan). He also acknowledged that a company's capital expenditures can fluctuate over the life of the company, yet he did not give any justification for focusing only on Music Choice's expenditures in 2013-15. *Id.* at 2443:4-13. As with the rest of his error-laden testimony, Dr. Wazzan's comparison is meaningless. Nor are the resulting figures that far apart, especially given the massive disparity in size and revenues between Music Choice and the other two companies. In any event, Music Choice has submitted detailed cost data for its business, which speaks for itself. *See* Trial Ex. 406.

Reply to SEPFF 2138 (p. 851):

Again, SoundExchange compares apples to oranges, by comparing Music Choice's property and equipment expenditures to the major record companies' expenditures on A&R and marketing, which are not even capital expenditures. Wazzan WDT, Trial Ex. 501, ¶ 81. This is a non sequitur. Moreover, any capital investments, or other contributions, made by the record companies are not specific to the PSS market, and were not made with the PSS market in mind. To the extent that SoundExchange has provided evidence of its various costs, those costs were generalized and spread across the entire recording-industry, and SoundExchange provided no analysis of why or how those costs would be apportioned to the PSS. Notably, although it seeks a finding about the "contributions, investments and risks" of the record companies, it cites to no record evidence of those contributions, investments, or risks. This Proposed Finding should be rejected on that ground as well.

Reply to SEPFF 2139 (pp. 851-852):

This Proposed Finding contains no fact, or cites to record evidence establishing any facts, but is mere conclusory argument, which does not merit a response.

Reply to SEPFF 2140 (p. 852):

This Proposed Finding contains no fact, or cites to record evidence establishing any facts, but is mere conclusory argument, which does not merit a

response other than to note that Dr. Wazzan creates a straw-man. Music Choice has never suggested that anyone's royalty rate should be reduced to zero.

Reply to SEPFF 2141 (pp. 852-853):

SoundExchange again improperly focuses on the performance of Music Choice's consolidated business and ignore the facts relevant to this proceeding. Music Choice's residential audio business alone, or even combined with its video service, has still not reached cumulative profitability and therefore has not provided any return on the partners' capital investments. Del Beccaro WDT, Trial Ex. 55, pp. 20-21. Even taking Music Choice's entire, consolidated business into account, and allowing the company's ancillary commercial background music business line to subsidize the losses from Music Choice's residential service, the partners' annualized return on their capital investment has been [[ ]] *Id*. p. 21.

Reply to SEPFF 2142 (pp. 853):

SEPFF 2142 must be rejected because it is premised upon an invalid presumption that marketplace rates always maximally further the fourth policy objective. This presumption is not only false as a matter of fact, it is contrary to appellate precedent. In the first level appeal of the first PSS rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,399. The Register flatly rejected the argument,

made by SoundExchange's predecessor, RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate – **and rarely does** – because it is a mechanism whereby Congress implements **policy considerations which are not normally part of the calculus of the marketplace rate**." *Id.* at 25,409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d at 533. The court noted that the PSS rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*. The D.C. Circuit issued its decision after the passage of the DMCA. The court held that Congress's amendment of Section 114(f) in the DMCA, to expressly require the determination of marketplace, willing buyer / willing seller rates and terms for new services, while retaining the Section 801(b)(1) policy standard for the PSS, further demonstrated that Congress intended the Section 801(b)(1) inquiry to be different from the determination of market rates and terms:

> Most strikingly, in the recent amendments to § 114(f), the Librarian is directed to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the new categories of service. Notably, the statutory criteria for establishing rates for preexisting services, such as those at issue here, remain unchanged, even though both subsections (f)(1)

> and (f)(2) were revised by the [DMCA] and are virtually identical in all other aspects.")

Id. (citations omitted).

Applying a presumption that marketplace benchmarks satisfy any, much less all, of the Section 801(b)(1) policy objectives would contravene this clear congressional intent. Moreover, such a presumption would violate the well-established principle of statutory construction prohibiting interpretations that would render express statutory language, such as the Section 801(b)(1) policy objectives, meaningless or mere surplusage. *See, e.g.*, *Corley v. U.S.*, 556 U.S. at 314 ("[O]ne of the most basic interpretive canons [is] that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quotation marks and brackets omitted)); *Qi-Zhuo*, 70 F.3d at 139 ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). *See also* 4/25/17 Tr. 1035:25-1039:1 (Orszag).

<u>SEPFF 2143 (pp. 853-854):</u>

Although as a general matter, the Section 801(b)(1) policy-based standard does not guarantee every licensee a certain level of profitability, in the particular context of the PSS license, appellate precedent teaches that the rate must be set at a level to allow some profit to fund continued operations. *Librarian's PSS I Determination* at 25,395 (holding that rate should not be set at a level that would drive even one, much less all, of the PSS out of business).

There is no other service that could take Music Choice's place if it were driven out of the market. As a preliminary matter, the relevant industries in the fourth factor are the record companies and the PSS, not the CABSATs. The Section 801(b)(1) policy objectives were meant to apply to the PSS, but specifically not the CABSATs, so any interpretation of the factors that would provide their benefit to the CABSATs is inconsistent with Congress's clear legislative intent in creating the PSS category. MC PCL ¶¶ 39-41.

Moreover, there has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr.784:12-785:8 (Crawford). The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[[redacted]]] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which, as discussed supra ¶¶ 243-246, it uses it as a promotional tool, and is not competing for new business. And Sirius XM pays a

CABSAT royalty equivalent to [[[redacted]]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22 – 4605:22; 4668:22 – 4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id.* There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music Choice's larger MVPD affiliates, at the same (or lower) rates received by Music Choice. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which Stingray predominantly contracts. Were Stingray required to pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

<u>Reply to SEPFF 2144 (p. 854):</u>

SoundExchange mischaracterizes Professor Crawford's views. He merely meant that if Music Choice were shown to be wasteful or poorly managed, the policy standard would not require a rate that would subsidize such mismanagement.

Crawford WRT, Trial Ex. 59, pp. 51-52¶¶ 179-80; 5/18/17 Tr. 901:14-18 (Crawford). On the other hand, in the absence of such mismanagement, the rate should not be set at such a high level that it is that rate, itself, that causes the PSS as a standalone business to be unprofitable or exit the market. *Id*. at 862:19-863:9.

Reply to SEPFF 2145 (p. 854):

Dr. Wazzan's view is wholly inconsistent with precedent and the very legislative purpose of the PSS license. The very purpose of Congress's creation of the PSS license and grandfathering the PSS under the policy-based rate standard of Section 801(b)(1) at the same time as it created the willing buyer / willing seller standard for later market entrants (including the CABSATs) was to recognize the PSS' unique role in opening new markets for creative expression and media for their communication. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004 (noting that legislative purpose of PSS license is "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right."); *DMCA Conference Report* at 81; *Register's PSS Opinion* at 64,646-64,647; See MC PCL ¶¶ 7-21. Thus, any argument that the third factor is no different from a marketplace rate standard must be rejected for that reason alone. Moreover, as set forth in Music Choice's Reply to SEPFF 2142, any presumption that a marketplace rate necessarily promotes any, much less all, of the Section 801(b)(1) policy objectives is inconsistent with the legislative intent and appellate precedent applicable to the PSS license.

Reply to SEPFF 2146 (pp. 854-855):

Music Choice faces some competition from Stingray, but neither Muzak nor Sirius XM are attempting to obtain any new affiliates or are otherwise actively competing with Music Choice. Del Beccaro WRT, Trial Ex. 57, p. 9; 5/18/17 Tr. 4572:1-24, 4573:17-4574:10 (Del Beccaro).

Reply to SEPFF 2147 (p. 855):

Music Choice incorporates by reference herein its Reply to SEPFF 2145.

Reply to SEPFF 2148 (p. 855):

Music Choice does not seek a subsidy in this proceeding, but merely seeks a reasonable rate pursuant to the applicable Section 801(b)(1) policy objectives, consistent with Congress's intent in creating the PSS designation, as set forth in its Reply to SEPFF 2145. Stingray's attempts to steal business by undercutting price, which has only been marginally successful after six years, is only one element of the current market conditions relevant to the Judges' analysis of those policy objectives. Music Choice has submitted evidence regarding other, more significant, recent changes in the MVPD market that have significantly impacted Music Choice's financial performance, and would impact any other company that sought to take Music Choice's place.

Consolidation among MVPDs and shrinking margins in the cable industry, combined with competitive pressure, have led to [[[redacted]]] Del Beccaro WDT, Trial Ex. 55, p. 21. Due in part to consolidation in the cable industry, Music Choice has recently experienced

increased pricing pressure when it renegotiates licensing fee arrangements with cable affiliates. Del Beccaro WDT, Trial Ex. 55, p. 22. Smaller cable affiliates with whom Music Choice has historically been able to negotiate higher fees are being acquired by larger cable companies, which have increased bargaining leverage to negotiate lower rates. Del Beccaro WDT, Trial Ex. 55, p. 22. In the past three years, Music Choice has seen a [[[redacted]]] reduction in its average per-subscriber license rate. Three years ago, the average price for [[[redacted]]] of Music Choice's subscriber base was [[[redacted]] per subscriber per month. The average price for Music Choice's [[[redacted]]] largest affiliates, which make up [[[redacted]] of its total subscriber base is now [[[redacted]]] per customer per month. And at the time of the *SDARS II* proceeding, Music Choice's license fees averaged [[[redacted]]] per customer per month. Del Beccaro WDT, Trial Ex. 55, p. 23.

MVPD margins are shrinking, due to a number of factors including increasing consolidation among media programming networks and other content providers, the impact of consumers who cancel or never subscribe to cable television and rely on broadband instead, and constraints on MVPD's ability to raise consumer prices due to current conditions in the economy. Del Beccaro WDT, Trial Ex. 55, p. 23. Because their margins are shrinking, the MVPD's have taken tougher negotiating positions with content providers. Del Beccaro WDT, Trial Ex. 55, p. 23. Music Choice is a television content provider, and competes and negotiates in MVPD negotiations in a manner similar to other television content providers. Del Beccaro WDT, Trial Ex. 55, p. 24. Television content providers no longer have the

security of knowing that once they are carried on a cable system, they will not be dropped.

In the past few years, MVPDs, including mid-size operators whose margins are more affected given their relative lack of bargaining leverage, have begun dropping even name-brand networks. Del Beccaro WDT, Trial Ex. 55, p. 24. For example, Suddenlink and Cable One dropped at least 24 and 15 networks respectively in 2014, and GCI dropped 13 networks in 2015. Del Beccaro WDT, Trial Ex. 55, p. 24. Popular networks, such as AMC, have been dropped by smaller cable operators. Del Beccaro WDT, Trial Ex. 55, p. 24. Virtually every independent network has had to take reduced fees from MVPDs in recent years. Del Beccaro WDT, Trial Ex. 55, p. 24. Even widely popular networks such as ESPN are facing increased pressure: Comcast and Cox, among other MVPDs, have dropped ESPN from their lower-priced cable packages. This means that even if its per-subscriber price is not reduces, ESPN's overall revenues are reduced. Music Choice experiences these same pressures that other television content providers experience, and these pressures have fundamentally changed the financial outlook for Music Choice's residential audio service. Del Beccaro WDT, Trial Ex. 55, pp. 24-25.

<u>Reply to SEPFF 2149 (pp. 855-856):</u>

No response.

<u>Reply to SEPFF 2150 (p. 856):</u>

Music Choice incorporates by reference herein its Reply to SEPFF 2148.

Reply to SEPFF 2151 (p. 856):

The very language of the Section 801(b)(1) policy objectives demonstrates Congress's intent that market forces, such as those impacting Music Choice's downstream market and the declining value of music channels in that market, be considered in setting a reasonable PSS rate. Music Choice incorporates by reference herein its Replies to SEPFFs 2145 and 2148.

Reply to SEPFF 2152 (p. 856):

The record evidence does not support this Proposed Finding. To the contrary, it is clear that SoundExchange's rate would put Music Choice out of business. The unrebutted evidence clearly demonstrates that under SoundExchange's rate proposal, Music Choice's residential audio business would be massively unprofitable and would cause Music Choice to exit the business. Immediately upon taking effect, Music Choice's payments to SoundExchange would increase [[[redacted]]]. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 924, p. 2. When the audio service subject to the PSS licenses is considered in isolation, Music Choice would take a projected annual net income loss of over [[[redacted]] increasing to almost [[[redacted]]] by the end of the upcoming rate period. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex 924, p. 6.

If the overall bundled residential service (including the separately-licensed video service) is considered, the results are slightly better. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 925, p. 6. This improvement is due solely to [[[redacted]

[redacted]

[]. Del Beccaro WDT, Trial Ex. 55, p. 27; Del Beccaro WRT, Trial Ex. 57, p. 23. Even considering [[]], however, the combined residential service would be highly unprofitable under SoundExchange's proposed rate, with [[]] in 2018, losses continuing through 2021, and a small positive net income of just over [[]] in 2022 (again, driven solely by [[]]. Del Beccaro WRT, Trial Ex. 57, p. 23-24.

SoundExchange again improperly focuses on the performance of Music Choice's consolidated business and ignore the facts relevant to this proceeding. Music Choice's residential audio business alone, or even combined with its video service, has still not reached cumulative profitability and therefore has not provided any return on the partners' capital investments. Del Beccaro WDT, Trial Ex. 55, pp. 20-21. Even taking Music Choice's entire, consolidated business into account, and allowing the company's ancillary commercial background music business line to subsidize the losses from Music Choice's residential service, the partners' annualized return on their capital investment has been [[]] *Id*. p. 21.

Reply to SEPFF 2153 (p. 857):

SEPFF 2153 cites no record evidence and therefore requires no response, other than to note that it mischaracterizes Professor Crawford's testimony. Professor Crawford did not rely upon the consolidated projections used by Dr. Wazzan, precisely because those projections were extremely unreliable and likely to grossly overstate Music Choice's consolidated performance in later years. Both Professor Crawford and Mr. Del Beccaro amply demonstrated that the actual and short-term projected audio cost and revenue data used by Professor Crawford were extremely accurate, while the long-term projections, and particularly [[[redacted]]] used by Dr. Wazzan were far less reliable. Crawford WDT, Trial Ex. 54, pp. 33-35, ¶¶ 115-120; Del Beccaro WDT, Trial Ex. 55, p. 27; 5/18/17 Tr. 4544:11-4546:11 (Del Beccaro); 4/24/17 Tr. 726:22-730:1 (Crawford); 4/25/17 Tr. 870:19-871:8, 873:9-21 (Crawford). In particular, it is undisputed that one of the very reasons that Professor Crawford was most comfortable with the reliability of the audio revenue projections for 2017 and 2018 (as opposed to later periods) was that [[[redacted]]] Crawford WDT, Trial Ex. 54, p. 34, ¶ 119; Del Beccaro WDT, Trial Ex. 55, pp. 27-28; 4/25/17 Tr. 873:9-21 (Crawford).

Reply to SEPFF 2154 (p. 857):

No response.

Reply to SEPFF 2155 (pp. 857-858):

As a preliminary matter, the correct financial analysis under the Section 801(b)(1) policy objectives is the performance of Music Choice's residential audio service covered by the PSS license, as a standalone business, not Music Choice's consolidated performance. In the last PSS proceeding the Judges specifically criticized Music Choice for including costs and revenue from its commercial audio residential video service in Professor Crawford's financial analysis. Crawford WDT, Trial Ex. 54, p. 32 ¶110; *SDARS II*, 78 Fed. Reg. at 23,059. In that determination, the Judges made clear that "the appropriate business to analyze for the purpose of this proceeding is the residential audio service offered by Music Choice, the subject of the Section 114 license." *Id.*

There are additional reasons why the policy objective analysis should focus on only the business line subject to the Section 114 license. As Dr. Crawford explains, basing an analysis on the consolidated business (as Dr. Wazzan does in his own analysis) would have the result of forcing Music Choice to subsidize its PSS line with the profits from other business lines – an outcome that is inconsistent with fundamental economic policy and with the statutory objectives of the PSS license. Crawford WRT, Trial Ex. 59, p. 51, ¶176; 4/24/17 Tr. 787:19-25 (Crawford).

Nor would inclusion of Music Choice's other business lines be consistent with precedent. In *PSS I*, the Register (and CARP) also limited their analysis, throughout all of the policy objectives, of the financial performance of the PSS to the PSS operations of those companies. *CARP Report*, Trial Ex. 979, at ¶¶99, 108;

See also *id.* at ¶¶117-118 (noting that a rate set too high would result in any or all of the services leaving "this new industry" or "this business" in reference to PSS business operations, not the longstanding commercial background music industry in which Muzak also operated); *Librarian's PSS I Determination* at 20, discussing the services startup costs and costs of bringing the creative product to market in a new and novel way. See also, *id.* at 21 noting that setting the rate too high could cause one or all of the services to abandon the business. Notably, at the time of *PSS I* Muzak's primary business line was its commercial background music service. It was the oldest and largest company in the commercial background music market with roots dating back to 1922. *CARP Report*, Trial Ex. 979, ¶27; *Librarian's PSS I Determination* at 25,395; Del Beccaro WRT, Trial Ex. 57, pp. 6-7. Yet in discussing and analyzing the financial performance of the PSS, neither the Register nor the CARP considered Muzak's overall profitability driven by its thriving, primary business line. *CARP Report*, Trial Ex. 979, at ¶¶99, 108, 117-118 ; *Librarian's PSS I Determination* at 25,410; Nor did the Register propose, or even consider, that Muzak should have subsidized its PSS business with the profits from its commercial background service operations. *CARP Report*, Trial Ex. 979, at 28-20; *Librarian's PSS I Determination*, at 25,395.

Additionally, Music Choice already pays sound recording royalties for its other business lines, pursuant to direct and statutory licenses that are already in place, and those market rate license fees are already taken into account in Professor Crawford's model. 4/24/17 Tr. 749:21-25 (Crawford); 5/18/17 Tr. 4548:14-25 (Del

Beccaro). Including profits from those separately-licensed business lines in the calculation to derive the rate for the PSS license would effectively make Music Choice double pay for those other sound recording licenses.

The unrebutted evidence clearly demonstrates that under SoundExchange's rate proposal, Music Choice's residential audio business would be massively unprofitable and would cause Music Choice to exit the business. Immediately upon taking effect, Music Choice's payments to SoundExchange would increase [[[redacted]]]. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 924, p. 2. When the audio service subject to the PSS licenses is considered in isolation, Music Choice would take a projected annual net income loss of over [[[redacted],]] increasing to almost [[[redacted]] by the end of the upcoming rate period. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex 924, p. 6.

If the overall bundled residential service (including the separately-licensed video service) is considered, the results are slightly better. Del Beccaro WRT, Trial Ex. 57, p. 23, Trial Ex. 925, p. 6. This improvement is due solely to [[[redacted]]]. Del Beccaro WDT, Trial Ex. 55, p. 27; Del Beccaro WRT, Trial Ex. 57, p. 23. Even considering [[[redacted]]], however, the combined residential service would be highly unprofitable under SoundExchange's proposed rate, with [[[redacted]]] in 2018, losses continuing through 2021, and a small positive net income of just over

[[]] in 2022 (again, driven solely by [[]]. Del Beccaro WRT, Trial Ex. 57, p. 23-24.

Even if Music Choice's other business lines are used to subsidize the PSS, Dr. Wazzan's analysis of the consolidated business shows that SoundExchange's proposed rate would consume almost all of the company's after-tax profits in 2018. To the extent profits are projected to increase in later years for the consolidated business, as demonstrated above, those increases are driven [[]] Crawford WDT, Trial Ex. 54, pp. 33-35, ¶¶ 115-120; Del Beccaro WDT, Trial Ex. 55, p. 27; 5/18/17 Tr. 4544:11-4546:11 (Del Beccaro); 4/24/17 Tr. 726:22-730:1 (Crawford); 4/25/17 Tr. 870:19-871:8, 873:9-21 (Crawford).

<u>Reply to SEPFF 2156 (p. 858):</u>

SoundExchange's tinfoil hat conspiracy theory that Music Choice charges its partners below-market rates has been completely disproven in this proceeding, as demonstrated in Replies to SEPFFs 1960-1999. Nor does Music Choice actually have the ability to pass on any rate increases to its affiliates. The undisputed evidence demonstrates that while the PSS rate has increased several times since the *PSS I* proceeding, Music Choice's per-subscriber affiliate fees have consistently decreased. Del Beccaro WDT, Trial Ex. 55, p. 23. There is no record evidence demonstrating that Music Choice has ever been able to actually pass along any increase. Indeed, the evidence indicates it has not. Mr.

Del Beccaro testified that even if a particular affiliate's rates increase temporarily during the term of an agreement, [[ ]] 5/18/17 Tr. 4530:4-24 (Del Beccaro).

Reply to SEPFF 2157 (pp. 858-859):

Music Choice incorporates by reference herein its Replies to SEPFFs 1960-1999 and 2155.

Reply to SEPFF 2158 (p. 859):

SoundExchange's Proposed Finding is inconsistent with appellate precedent and the very legislative purpose of the PSS designation. In the appeal of *PSS I*, with respect to the fourth factor – market disruption – the Register approved of the CARP's interpretation that "a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business [i.e., the PSS] to continue to do so." *Librarian's PSS I Determination* at 25,408. Specifically, the Register observed that "[t]his balance in favor of the Services supports both the statutory objective to consider the impact on the industries and Congressional intent not to hamper the arrival of new technologies." *Id.* Based on the evidence in *PSS I*, the Register upheld the CARP's determination that "the best way to minimize the disruptive impact on the structure of the industries is to adopt a rate from the low range of possibilities." *Id.* at 25,409. The Register also highlighted that this consideration applies only to what later became the PSS,

because Congress specifically made interactive services ineligible for a compulsory license in light of their greater "threat to traditional record sales." *Id.* at 25,408-09. And, if a new type of digital service were to "emerge[] before the next regularly scheduled rate adjustment proceeding," a new rate-setting proceeding can be initiated by petition. *Id.* at 25,409; *see* 17 U.S.C. § 117(f)(4)(C).

Moreover, the express legislative purpose of Congress's creation of the PSS category was to provide a benefit to the PSS in recognition of their status as the creators of the first digital music services at a time when there was no digital sound recording performance right at all, and to deny that benefit to future market entrants that followed in the PSS' path. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d at 1004. If the relevant industries under the fourth policy objective were defined to include other digital music services, such an interpretation would both provide the benefit of the Section 801(b)(1) policy objectives to the very services that Congress excluded, and effectively deny that benefit to the PSS. That is not what Congress intended.

The unrebutted record evidence further demonstrates that if Music Choice were driven out of business, no other provider could take its place. There has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace. Del Beccaro WRT, Trial Ex. 57, p. 5-6; Crawford WRT, Trial Ex. 59, 11-12, ¶¶34-36; 5/18/17 Tr. 4577:3-8 (Del Beccaro); 4/24/17 Tr.784:12-785:8

(Crawford). The only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. 5/3/17 Tr. 2418:5-12 (Wazzan). MTV left the CABSAT market after only three years. 5/18/17 Tr. 4577:3-14 (Del Beccaro). DMX, in turn, paid between [[ ] of its revenue just for the CABSAT license. 5/3/17 Tr. 2426:17-23; 2429:19-25 (Wazzan); Trial Exs. 974, 975. And DMX only had one affiliate, from which it got certain benefits for its primary business line – its commercial background music. 5/18/17 Tr. 4577:23-4579:6 (Del Beccaro). DMX recently exited the market. 5/3/17 Tr. 2418:5-12 (Wazzan). Sirius XM only has one affiliate, which it uses it as a promotional tool, and is not competing for new business. And Sirius XM pays a CABSAT royalty equivalent to [[ ]] of its CABSAT revenue. Crawford WRT, Trial Ex. 59, 14, ¶44; Trial Ex. 984.

This leaves Stingray as the only active CABSAT. And after six years in the CABSAT market, Stingray has only captured about 6% of the MVPD market. Del Beccaro WRT, Trial Ex. 57, p. 10. Until recently, all of its affiliates were small cable operators, which pay the highest rates. 5/18/17 Tr. 4604:22-4605:22; 4668:22-4669:7 (Del Beccaro). The fact that the majority of its affiliates pay these high rates due to their small size is likely the only thing sustaining Stingray. *Id.* There is simply no way that, if Music Choice were to exit the market as a result of the absurdly high royalties SoundExchange proposes, Stingray could step into its shoes. To do so would require Stingray to contract with Music Choice's larger affiliates, at the same (or lower) rates received by Music Choice. By virtue of their size, those large affiliates are able to negotiate lower fees than the smaller operators with which

Stingray predominantly contracts. Were Stingray required to pay the high per-subscriber CABSAT rates while simultaneously receiving lower average per-subscriber rates from these large MVPDs, it would be massively unprofitable and have to exit the market. 5/18/17 Tr. 4579:9-4580:15; 4604:22-4605:22 (Del Beccaro).

Reply to SEPFF 2159 (p. 859):

SEPFF 2159 is mere conclusory argument, contains no proposed fact, and contains no cite to record evidence, and therefore merits no response.

Reply to SEPFF 2160 (p.860):

It was improper for SoundExchange to presume that the PSS regulations, which have been in place for almost twenty years, should be replaced entirely with regulations applicable to an entirely different type of licensee. There is no applicable statutory presumption or congressional intent that regulations for different services subject to the Section 114 compulsory license be uniform. To the contrary, the legislative history of the DPRSRA indicates that Congress intended that different terms (as well as rates) be set for different services, as recognized by Register in the original PSS proceeding. *Librarian's PSS I Determination*, 63 Fed. Reg. at 25,409 (noting the broad discretion Congress granted the CARPs to set different rates and terms for different types of digital audio services). Indeed, Section 114 itself provides that the Copyright Royalty Judges should set different terms, as well as rates, for different types of digital audio services. 17 U.S.C. § 114(f)(1)(A). Given the many unique features of the PSS compared to other statutory licensees, as well as the fact that the PSS regulations only apply to two

licensees, it is neither surprising nor inappropriate that the PSS regulations differ in some respects from those of other statutory licensees.

Moreover, it is well established that the Copyright Royalty Judges may not impose terms in the applicable regulations that are unsupported by evidence in the record. The D.C. Circuit has held that mere argument that proposed regulations conform or are parallel to other existing regulations is insufficient to support imposition of such conforming amendments. *RIAA v. Librarian of Congress*, 176 F.3d at 535-536. Thus, with respect to terms that are already established, it is the party seeking to change the terms and not the party seeking to retain the existing terms that bears the burden of supporting the changes with record evidence. SoundExchange has submitted no evidence whatsoever justifying its sweeping changes to the PSS regulations.

The PSS regulations were created through the very first CARP proceeding, and have been in place for two decades – longer than the regulations for any other statutory licensee. Del Beccaro WRT, Trial Ex. 57, pp. 36-37. At trial, Mr. Bender acknowledged that the PSS regulations are the oldest regulations and have remained substantively unchanged for all that time. 5/10/17 Tr. 3314:19-25 (Bender). In the over two decades that the parties have operated under the PSS regulations, there has never been any evidence of any problems caused by the current regulations, and SoundExchange has presented none. Del Beccaro WRT, Trial Ex. 57, p. 36.

In *SDARS II*, the Judges rejected similar proposed changes to the regulations, except where SoundExchange was able to provide specific evidentiary justification for the requested changes. Del Beccaro WRT, Trial Ex. 57, p. 3; *SDARS II*, 78 Fed. Reg. at 23,074. Here, SoundExchange has provided no evidentiary justification for the changes it proposes. At trial, Mr. Bender was unable to identify a single problem that the existing PSS regulations have caused for SoundExchange. 5/10/17 Tr. 3317:9-23 (Bender). His sole justification for changing the regulations is the alleged but unspecified inconvenience of training SoundExchange staff on multiple sets of regulations with differing terms. *Id.* That purported justification is meritless. Notably, Mr. Bender does not even try to quantify that supposed burden, and for obvious reasons. SoundExchange only administers five different categories of statutory licenses, and only two companies, Music Choice and Muzak, pay royalties under the PSS regulations. 5/10/17 Tr. 3317:5-8 (Bender). ASCAP and BMI, by contrast, administer dozens of categories of music performance licensees, with many different terms and reporting requirements. See https://www.ascap.com/music-users/licensefinder ; https://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights . Any actual burden from any differences in the PSS regulations are both trivial and much more than offset by the burden on the PSS from changing them after so many years.

Reply to SEPFF 2161 (p.861):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2162 (p. 861):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2163 (p. 861):

Music Choice incorporates by reference herein its Reply to SEPFF 2160. The very quandary identified by SoundExchange further demonstrates why its approach was improper with respect to the PSS regulations.

Reply to SEPFF 2164 (p. 861):

It is impossible for the PSS regulations to have tracked the webcasting regulations. The PSS regulations were created in the very first Section 114 proceeding, well before the webcasting regulations existed, and have remained substantively unchanged ever since. Del Beccaro WRT, Trial Ex. 57, pp. 36-37; 5/10/17 Tr. 3314:19-25 (Bender). Consequently, SoundExchange's very justification for its approach, as set forth in SEPFF 2164, should be rejected. Moreover, given the presumption against changing the long-standing PSS regulations, SoundExchange's approach of only identifying or justifying changes from the webcasting regulations is insufficient. Rather, SoundExchange needed to identify and justify any changes from the existing PSS regulations. It has not done so, providing another independent reason its changes should be rejected.

Reply to SEPFF 2165 (p. 862):

Music Choice's approach to the PSS regulations is set forth in MC PCLs 217-245 and MC PFFs 552-602, which speak for themselves.

Reply to SEPFF 2166 (p. 862):

Notably, the new arguments Mr. Bender included in his rebuttal testimony did not actually respond to anything in Music Choice's written direct testimony. He could not identify any reason why he could not have made those arguments in his direct testimony. 5/10/17 Tr. 3324:12-3325:12 (Bender). In fact, he admitted he never even read any of Music Choice's written testimony. *Id*. at 3299:10-13. For this reason alone, his rebuttal testimony regarding the PSS regulations was beyond the scope of permissible rebuttal and should be disregarded. In any event, at no time during this proceeding did Mr. Bender specifically identify, much less justify, all of the many changes SoundExchange effectively seeks in its proposed wholesale re-write of the PSS regulations.

Reply to SEPFF 2167 (p. 862):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2168 (p. 863):

In *SDARS II*, the Judges rejected similar proposed changes to the regulations, except where SoundExchange was able to provide specific evidentiary justification for the requested changes. Del Beccaro WRT, Trial Ex. 57, p. 3; *SDARS II*, 78 Fed. Reg. at 23,074. Here, SoundExchange has provided no evidentiary justification for the changes it proposes. At trial, Mr. Bender was unable to identify a single problem that the existing PSS regulations have caused for SoundExchange. 5/10/17 Tr. 3317:9-23 (Bender). His sole justification for changing the regulations is the alleged but unspecified inconvenience of training SoundExchange staff on

multiple sets of regulations with differing terms. *Id*. That purported justification is meritless. Notably, Mr. Bender does not even try to quantify that supposed burden, and for obvious reasons. SoundExchange only administers five different categories of statutory licenses, and only two companies, Music Choice and Muzak, pay royalties under the PSS regulations. 5/10/17 Tr. 3317:5-8 (Bender). ASCAP and BMI, by contrast, administer dozens of categories of music performance licensees, with many different terms and reporting requirements. *See* https://www.ascap.com/music-users/licensefinder; https://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights. Any actual burden from any differences in the PSS regulations are both trivial and much more than offset by the burden on the PSS from changing them after so many years.

Reply to SEPFF 2169 (p. 863):

Music Choice incorporates by reference herein its Reply to SEPFF 2168.

Reply to SEPFF 2170 (p. 864):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2171 (p. 864):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2172 (p. 864):

No response.

Reply to SEPFF 2173 (p. 865):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2174 (p. 865):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2175 (p. 865):

Music Choice incorporates by reference herein its Reply to SEPFF 2160, and notes that it has taken more time for the Judges to page through this repetitive, conclusory argument than it would take for a SoundExchange employee to turn from one section of the applicable regulations to another.

Reply to SEPFF 2176 (p. 866):

Music Choice acknowledges that SoundExchange has asked for this change, but notes that SoundExchange has provided no justification for why it is needed with respect to the PSS.

Reply to SEPFF 2177 (p. 866):

As noted above, SoundExchange provides no valid justification for changing the existing PSS regulations relating to the PSS royalty statements. SoundExchange's only attempt at such a justification is that the changes will supposedly "help ensure that licensees will take their statutory license payment obligations seriously." But the undisputed evidence demonstrates that Music Choice has been making its license payments longer than any other Section 114 licensee, and SoundExchange has submitted no evidence (because there is none) that Music Choice has failed to take these obligations seriously. At trial, even Mr. Bender had

to admit that he had no reason to believe that Music Choice does not already take its payment obligations seriously. 5/10/17 Tr. 3325:14-3326:5 (Bender).

Reply to SEPFF 2178 (p. 866):

Music Choice incorporates by reference herein its Reply to SEPFF 2177.

Reply to SEPFF 2179 (p. 867):

SoundExchange cannot avoid its burden to justify its sweeping changes by characterizing them as "editorial." The fact is that SoundExchange failed to even specifically identify all of the changes in its written testimony, and Music Choice should not have been forced to comb through the proposed new regulations to identify all the changes. Notably, even in this section of its Proposed Findings of Fact, SoundExchange does not explain which of its changes it is talking about.

Reply to SEPFF 2180 (p. 867):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2181 (p. 867):

Music Choice incorporates by reference herein its Reply to SEPFF 2160. Moreover, Music Choice moves to strike Appendix A because it is not part of the record, has not been authenticated, and has not been subject to challenge or cross-examination. SoundExchange's attempt to support its findings with a document that was not admitted in this proceeding is wholly improper.

SoundExchange had every opportunity to present a document such as this during the proceeding, but failed to do so at any time. Indeed, SoundExchange never even made this argument during the proceeding. Had it met its burden in its

written direct case, Music Choice could have more comprehensively addressed the changes in its rebuttal case. By waiting until after the trial was completed and the record closed, SoundExchange attempts to unfairly prejudice Music Choice. In any event, SoundExchange's own witness admitted that any changes made to the PSS regulations over the past twenty years have been non-substantive. 5/10/17 Tr. 3314:19-25 (Bender). Notably absent from SoundExchange's case is a similar redline, comprehensively showing all of the changes it is seeking to the current PSS regulations.

Reply to SEPFF 2182 (p. 868):

Music Choice incorporates by reference herein its Reply to SEPFF 2160. Moreover, Mr. Bender's hearsay testimony regarding a supposed lack of complaints from webcasters, even if credited, cannot substitute for the missing evidence meeting SoundExchange's burden to demonstrate a need for the changes.

Reply to SEPFF 2183 (p. 868):

SoundExchange has it exactly backwards. The party proposing substantive changes to the long-standing PSS regulations has the burden of justifying those changes, as the Judge held in *SDARS II*. Del Beccaro WRT, Trial Ex. 57, p. 3; *SDARS II*, 78 Fed. Reg. at 23,074. Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2184 (p. 869):

SEPFF 2184 contains only a broad, conclusory argument, which merits No response.

Reply to SEPFF 2185 (p. 869):

Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2186 (p. 869):

SoundExchange does not in any way rebut Music Choice's substantive objections to its proposed change. The only justification it gives is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2187 (p. 870):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2188 (p. 870):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to

satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2189 (p. 871):

No response.

Reply to SEPFF 2190 (p. 871):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2191 (p. 872):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty

years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2192 (p. 872):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2193 (p. 873):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFFs 2194-2208 (pp. 873-881):

No response.

Reply to SEPFF 2209 (p. 881):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2210 (p. 881):

No response.

Reply to SEPFF 2211 (p. 881):

As demonstrated in Mr. Del Beccaro's testimony, SoundExchange's proposed changes to the PSS audit provisions do not reflect "audit process improvements" but rather constitute unwarranted substantive changes that would unfairly prejudice Music Choice. Del Beccaro WRT, Trial Ex. 57, pp. 51-59. SoundExchange has provided no valid justification for these changes.

Reply to SEPFFs 2212-2287 (pp. 882-907):

No response.

Reply to SEPFF 2288 (p. 907):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time,

Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2289 (p. 907):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2290 (p. 908):

Music Choice proposes, conditionally, that the regulations regarding the cost of audits, 37 C.F.R. § 382.6(f) and 37 C.F.R. § 382.7(f) (or their analog if the relevant terms are moved or consolidated) be amended to provide that the Licensee shall bear the cost of an audit only in the case of an underpayment of 10% or more. This proposed change would serve to eliminate an anomaly, whereby the PSS license is the only statutory licensee with a 5% audit fee-shifting threshold. Every other statutory license category utilizes a 10% threshold before the cost of an audit is shifted to the licensee. Del Beccaro WRT, Trial Ex. 57, p. 58-59. SoundExchange, on the other hand, admitted that there was no reason why the PSS should be treated

differently from any other licensee with respect to this fee-shifting provision. 5/10/17 Tr. 3323:25-3324:4 (Bender).

Music Choice has previously accepted the 5% threshold in the interest of leaving the longstanding PSS regulations in place, and because it has never to date triggered even that threshold. See *id*. In keeping with Music Choice's position below that no changes need to be made to the long-standing PSS regulations without a showing of significant need, Music Choice is willing to forego this proposed change if the Judges do not make any of SoundExchange's requested "conforming" proposed changes.

Reply to SEPFF 2291 (p. 908):

SoundExchange presented no evidence that a 5% underpayment by a PSS would warrant fee-shifting. More important, Mr. Bender admitted at trial that there was no reason why the PSS should be treated differently from any other licensee with respect to this fee-shifting provision. 5/10/17 Tr. 3323:25-3324:4 (Bender).

Reply to SEPFF 2292 (p. 909):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty

years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2293 (p. 909):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2294 (p. 909):

The cited provisions in contracts from the non-competitive on-demand streaming market (*see Web IV*, 81 Fed. Reg. at 26,334 (explaining that the "'complementary oligopoly' power of the Majors . . . serves to prevent effective competition" in the on-demand streaming market) ; *id*. at 26,343 (noting the "substantial, unrebutted evidence that the interactive services market is not effectively competitive," and concluding that they "c[ould not] ignore the testimony from several record company witnesses . . . that they never attempted to meet their competitors pricing when negotiating with interactive services.")), agreed to by companies other than Music Choice, are irrelevant to whether SoundExchange's change to the long-standing PSS regulations is justified. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the

existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2295 (p. 910):

Notably, the only examples SoundExchange can give relate to services other than the PSS. Thus, SoundExchange's attempt to insinuate that Music Choice's position is a "ploy" designed to allow it to "hide its business records in the files of contractors" is an unwarranted non-sequitur. Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Indeed, he acknowledged that this had only been an issue with certain licensees other than Music Choice, and that he had no knowledge of Music Choice ever hiding any of its business records in this fashion. *Id.* at 3326:17-3327:17. Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2296 (p. 910):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty

years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2297 (p. 911):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2298 (p. 911):

SoundExchange has provided no justification for reducing the protections afforded the PSS by requiring delivery of a notice of intent to audit. Nor has SoundExchange has provided a single example of the existing PSS regulation causing any problem for SoundExchange. The only justification it gives for its proposed changes is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2299 (p. 912):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time,

Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Moreover, Music Choice demonstrated that the defensive audit provision of the PSS regulations was very specifically argued for, and won, by the PSS in the *PSS I* proceeding. Del Beccaro WRT, Trial Ex. 57, p. 55; Trial Ex. 931. The current regulatory language providing parties the opportunity to defensively audit themselves has a longstanding and important history and purpose. Del Beccaro WRT, Trial Ex. 57, p. 55. This provision was created in the original CARP proceeding, to shield the PSS from the burden of intrusive, repetitive audits, while still providing protection to copyright owners. Specifically, the CARP panel agreed that "consistent with the principle of limiting unnecessary expense and disruption, that where a Service can provide an audit already performed in the ordinary course of business by an independent auditor, pursuant to the generally accepted auditing standards, such audit and underlying work papers should serve as an audit on behalf of all interested persons" and noted that "[t]his procedure would result in fair opportunity to audit for copyright owners, while reducing the burden and expense of auditing upon the Services." Trial Ex 931, *Report of the Copyright Arbitration Royalty Panel,* No. 95-5 CARP DSTRA, Nov. 12, 1997, ¶ 194.

As Mr. Del Beccaro testified at trial, Music Choice has availed itself of this ability, and has expended significant resources in doing so. 5/18/17 Tr. 4610:17-19

(Del Beccaro). In fact, Music Choice has, through the course of its own defensive-audit process, identified late payments in the past and voluntarily paid interest for those amounts, years before they would have been uncovered, if ever, by a SoundExchange audit. 5/18/17 Tr. 4610:20-3611:7 (Del Beccaro). It is difficult to understand, and SoundExchange has not explained, how it is harmed by Music Choice's proactive audits.

Reply to SEPFF 2300 (p. 912):

Music Choice incorporates by reference herein its Reply to SEPFF 2299. Under the PSS defensive audit provision, Music Choice does not, as SoundExchange claims, have the option of choosing to improperly limit the scope of such an audit. The current regulation clearly provides that any audit must be performed by independent and qualified auditor, pursuant to generally accepted standards. 37 CFR § 382.7(e).

Reply to SEPFF 2301 (p. 912):

Music Choice incorporates by reference herein its Reply to SEPFF 2299. The CARP made the purpose of the defensive audit provision quite clear, and it was not based on the absence of SoundExchange. SoundExchange provides no reason to change this long-standing protection for the PSS, nor does it provide any evidence of this regulations causing any problem for SoundExchange.

Reply to SEPFF 2302 (p. 913):

SoundExchange cites nothing beyond broad, conclusory allegations regarding supposed underpayments by non-PSS licensees, which cannot possibly justify such a

major departure from the PSS defensive audit provision. First of all, by definition those non-PSS licensees could not possibly have performed defensive audits, much less used them to avoid an audit by SoundExchange, so those underpayments have nothing to do with the availability of a defensive audit. Indeed, if those licensees had performed defensive audits pursuant to a similar regulation, any underpayments would have been identified and rectified without SoundExchange having to do a thing. Moreover, SoundExchange crucially fails to explain how underpayments by other licensees could justify taking this protection away from the PSS.

Nor do defensive audits lack sufficient transparency. As noted above, they must be performed in the ordinary course of business by independent, qualified auditors, and if a PSS seeks to invoke such an audit after receiving a notice of intent from SoundExchange, the PSS must provide SoundExchange with the underlying paperwork from the audit. 37 CFR § 382.7(e).

It is clear that, by objecting so strenuously to allowing such audits, SoundExchange's only purpose is to preserve its ability to harass the PSS with burdensome audits and wildly inflated claims, to extract unjustified settlements. Protection from such harassment is the very purpose of the regulation.

<u>Reply to SEPFF 2303 (p. 913):</u>

SoundExchange cites no record evidence for its fanciful speculation that Music Choice "may contemplate cutting off SoundExchange's audit right with an annual financial statement." That is clearly not what is anticipated by the

regulation. It is particularly egregious that SoundExchange would make such an unsupported claim to the Judges when it knows the claim is factually untrue. Music Choice has already provided copies of its defensive audits of its PSS payments in connection with a pending notice of intent to audit served by SoundExchange, so it knows very well that Music Choice is not seeking to rely on its consolidated business audits.

Reply to SEPFF 2304 (p. 914):

The provisions of private agreements from the non-competitive on-demand streaming market (*see Web IV*, 81 Fed. Reg. at 26,334 (explaining that the "'complementary oligopoly' power of the Majors . . . serves to prevent effective competition" in the on-demand streaming market) ; *id*. at 26,343 (noting the "substantial, unrebutted evidence that the interactive services market is not effectively competitive," and concluding that they "c[ould not] ignore the testimony from several record company witnesses . . . that they never attempted to meet their competitors pricing when negotiating with interactive services.")) are wholly irrelevant to terms under the Section 801(b)(1) policy objectives.

Reply to SEPFF 2305 (p. 914):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty

years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2306 (p. 915):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2307 (p. 915):

SoundExchange has failed to even explain, much less prove, the need for its outside attorneys to use Music Choice's confidential information for purposes other than audits. It references unspecified "compliance issues" in this Proposed Finding, but provided no record evidence in this proceeding to substantiate these compliance issues or even explain what they are. In fact, the only need Mr. Bender was able to identify at trial was for SoundExchange's outside counsel to use Music Choice's confidential information for the purpose of doing deals for SoundExchange. 5/10/17 Tr. 3318:21-3319:3 (Bender). Such a cavalier attitude toward the treatment of Music Choice's commercially sensitive information is exactly why Music Choice objects to any change to its confidentiality protections under the existing regulations.

Reply to SEPFF 2308 (p. 916):

SoundExchange cites no record evidence rebutting Music Choice's concerns, which are well placed in light of Mr. Bender's view that it is appropriate for SoundExchange's outside counsel to use Music Choice's confidential information for the purpose of "doing deals."

Reply to SEPFF 2309 (p. 916):

SoundExchange's attorneys have a duty to advance SoundExchange's interests, they have no such duty to Music Choice. Music Choice should not have to hope that those interests always align to protect its interests. Del Beccaro WRT, Trial Ex. 57, pp. 49-50. Nor does SoundExchange cite any evidence establishing any burden to it from the existing regulatory protections afforded Music Choice.

Reply to SEPFF 2310 (p. 916):

The very fact that SoundExchange cannot seem to understand why Music Choice's confidential revenue information should be kept confidential, demonstrates why Music Choice should not have to rely upon SoundExchange's view of propriety or legal ethics to protect that information. SoundExchange still presents no record evidence supporting any reason why Music Choice should have to take any additional risks regarding its confidential information, nor any record evidence demonstrating why SoundExchange has any legitimate need for Music Choice to increase its risk.

Reply to SEPFF 2311 (p. 917):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Reply to SEPFF 2312 (p. 917):

SoundExchange cannot avoid its burden to justify its sweeping changes by characterizing them as "editorial." The fact is that SoundExchange failed to even specifically identify all of the changes in its written testimony, and Music Choice should not have been forced to comb through the proposed new regulations to identify all the changes. Notably, even in this section of its Proposed Findings of Fact, SoundExchange does not explain which of its changes it is talking about.

Reply to SEPFF 2313 (p. 917):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice

incorporates by reference herein its Reply to SEPFF 2160. Moreover, SoundExchange flatly mischaracterizes Mr. Del Beccaro's testimony. He stated only that the top-line revenue and playlists were among the confidential information shared with SoundExchange in the ordinary course of business, but that that he could not give an exhaustive list off the top of his head at trial. 5/18/17 Tr. 4655:13-4656:13 (Del Beccaro).

Reply to SEPFF 2314 (p. 917):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

SEPFF 2315 (p. 918):

The only justification SoundExchange gives for its proposed change is harmonization with the webcasting regulations, which is insufficient alone to satisfy SoundExchange's burden to support its requested change. At the same time, Mr. Bender admitted at trial that he could not identify a single problem that the existing PSS regulations had actually caused for SoundExchange in the past twenty years that they have been in effect. 5/10/17 Tr. 3317:9-23 (Bender). Music Choice incorporates by reference herein its Reply to SEPFF 2160.

Replies to SEPFFs 2316-2368 (pp. 918-937):

No response.

SEPFF 2369 (p. 938):

Sound Exchange has not demonstrated – and indeed has never demonstrated in any proceeding – that there is any independent value to ephemeral copying rights. Because the ephemeral license can be, and traditionally has been, bundled under a single rate with the sound recording performance license it supports, it is merely a matter of SoundExchange's accounting and Music Choice takes no position on SoundExchange's proposal to continue the current apportionment between the performance and ephemeral copying licenses.

Reply to SEPFF 2370 (p. 938):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2371 (p. 938):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2372 (p. 938):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2373 (p. 939):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2374 (p. 939):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2375 (p. 939):

Music Choice incorporates by reference herein its Reply to SEPFF 2369. These very agreements demonstrate that there is no independent value for the ephemeral right.

Reply to SEPFF 2376 (p. 940):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2377 (p. 940):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2378 (p. 940):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to EPFF 2379 (p. 941):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFF 2380 (p. 941):

Music Choice incorporates by reference herein its Reply to SEPFF 2369.

Reply to SEPFFs 2381-2384 (pp. 941-942):

No response.

Reply to SEPFF 2385 (p. 942):

No response.

Reply to SEPFF 2386 (p. 942):

In *SDARS II*, Music Choice and SoundExchange stipulated that for the PSS, the minimum fee should be governed by substantially the following regulatory language:

> Each Licensee making digital performances of sound recordings pursuant to 17 U. S. C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of $100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under [cross reference to bundled royalty rate] shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

Trial Ex. 930 at 2-3. This provision, which allows the PSS to recoup their minimum payment against their entire monthly PSS royalty payment, and not only the small 5% of that payment allocated to the Section 112 ephemeral license, was the same in the PSS regulations prior to *SDARS II*. For unknown reasons, when the regulations were ultimately adopted, the stipulated language was not incorporated correctly in the current regulations, despite the fact that the *SDARS II* final determination had no mention of diversion from the agreed-upon language or the prior PSS regulation. *See* 37 C.F.R. § 382.3(b).

SoundExchange has provided no justification for its attempt to take advantage of this scrivener's error and unfairly delay the PSS' recoupment of their advance minimum payments. 5/10/17 Tr. 3308:25-3313:5 (Bender). Nor would such a result be fair. If the PSS can only recoup their advance minimum

payment against the small, 5% portion of each royalty payment attributed to the Section 112 ephemeral license, it will take much longer to recoup the advance payment or may cause the payment to go entirely unrecouped. Del Beccaro WRT, Trial Ex. 57, p. 44. The minimum payment language should be changed back to the original language, as agreed to in *SDARS II*.

Reply to SEPFF 2387 (p. 942):

Music Choice incorporates by reference herein its Reply to SEPFF 2386.

Reply to SEPFF 2388 (p. 943):

Music Choice incorporates by reference herein its Reply to SEPFF 2386. As SoundExchange is well aware, the actual PSS minimum payment regulation has never limited the minimum payment to a payment for the ephemeral right. Even the existing regulation, with the above-mentioned scrivener's error, characterizes the minimum payment as being due for "making digital performances of sound recordings pursuant to 17 U.S.C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e)." 37 CFR § 382.3(b).

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Dated: July 7, 2017

Respectfully submitted,

Music Choice

By: /s/ Paul M. Fakler

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

In the Matter of: **Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)**	**Docket No. 16–CRB–0001–SR/PSSR (2018–2022)**

CERTIFICATE OF SERVICE

I, Jackson Toof, hereby certify that a copy of the public version of Music Choice's Replies to SX Proposed Findings of Fact with accompanying declaration has been served this 7th day of July, 2017 by eCRB and overnight mail on:

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/s/ Jackson Toof_____
Jackson D. Toof

Certificate of Service

I hereby certify that on Friday, July 07, 2017 I provided a true and correct copy of the Music Choice's Reply to SoundExchange's Proposed Conclusions of Law and Findings of Fact to the following:

Universal Music Group, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

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Sirius XM, represented by Bruce Rich served via Electronic Service at bruce.rich@weil.com

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Signed: /s/ Paul M Fakler