

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

In the Matter of:

Determination of Rates and Terms for
Digital Performance of Sound Recordings
and Making of Ephemeral Copies to
Facilitate those Performances (*Web VT*)

Docket No. 23-CRB-0012-WR
(2026-2030)

**SOUNDEXCHANGE’S REPLY TO
NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE
BRIEF REGARDING TESTIMONY RELATED TO NPR/CPB SETTLEMENT**

SoundExchange¹ respectfully submits this response to the NRBMLC’s Brief Regarding Consideration of the 2026-2030 Agreement Between (A) SoundExchange, Inc. and (B) National Public Radio, Inc. and Corporation for Public Broadcasting (eCRB No. 57851) (the “NRBMLC Submission”), and the Judges’ May 15, 2025 request to identify additional topics for expert testimony.²

INTRODUCTION

Both NRBMLC and SoundExchange agree on several of the questions posed by the Judges: (i) administrative notice is appropriate and the Judges can and should take notice of the NPR/CPB Settlement, (ii) the date on which the NPR/CPB Settlement was filed does not have an impact on whether or how the Judges should take administrative notice, (iii) the fact that the settlement has not yet been the subject of objections and comments should not impact the Judges’ decision

¹ Capitalized terms not otherwise defined have the same meaning given to them in SoundExchange’s Briefing Regarding Settlement Agreement Between SoundExchange and National Public Radio and Corporation for Public Broadcasting (“SoundExchange NPR/CPB Submission”), eCRB No. 57850.

² Hearing Tr. 4258:03-08.

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whether to take administrative notice, (iv) that the Judges may take administrative notice of legislative facts as well as judicial facts (v) that the Judges have the authority to conduct a paper proceeding.

The disputed issues between SoundExchange and NRBMLC relate to whether additional testimony and/or discovery is necessary and what evidentiary purpose NPR/CPB Settlement may serve in the current proceeding if taken into consideration. Specifically, the parties disagree as to whether (i) NRBMLC has had sufficient notice and discovery of the NPR/CPB Settlement, (ii) additional discovery or testimony concerning the NPR/CPB Settlement is necessary, and (iii) NPR/CPB Settlement is a suitable benchmark with which to set noncommercial webcasters rates and terms in this proceeding.

With respect to the specific responses provided by NRBMLC regarding the NPR/CPB Settlement, SoundExchange replies as follows:

I. Whether Administrative Notice Applies in This Context (Question 1)

SoundExchange and NRBMLC agree that the Judges may take administrative notice of the NPR/CPB Settlement. *See* SoundExchange NPR/CPB Submission at 2-5; NRBMLC Submission at 2-3.

NRBMLC challenges SoundExchange's reference to the *Web III Initial Determination* for the proposition that the Judges may take consideration of the NAB Settlement as "a useful gauge of the weight to be assigned to the rates" without it being a benchmark. *See* NRBMLC Submission at 3-4. SoundExchange submits, however, that although the *Web III Initial Determination* was reversed on other grounds, it continues to demonstrate that the Judges may consider a settlement agreement in reaching its determination without a formal benchmarking analysis or supporting expert analysis. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012). SoundExchange does not dispute that, if an agreement is sufficiently

comparable and appropriate adjustments are made, a settlement agreement could be used as a benchmark. This is not the case with the NPR/CPB Settlement.

II. Whether the Date on Which the Settlement Was Filed Has an Impact on Whether or How the Judges Should Consider Taking or Applying Administrative Notice of the Settlement (Question 2)

SoundExchange and NRBMLC agree that the date on which the NPR/CPB Settlement was filed should not impact the Judges' consideration of the settlement, and, to the extent that the Judges admit the NAB Settlement into evidence, SoundExchange has no objection to the NPR/CPB Settlement being admitted. *See* SoundExchange NPR/CPB Submission at 2 n.1. To the extent the NRBMLC is seeking an opportunity to present testimony regarding the NPR/CPB Settlement, SoundExchange does not have an objection, should the Judges desire to hear such testimony. However, to the extent the NRBMLC is seeking additional discovery, it is unnecessary. NRBMLC received complete discovery within days of the execution of the NPR/CPB Settlement, and by the time the hearing began, had prepared an updated rate proposal and was prepared to offer expert testimony regarding the application of the NPR/CPB Settlement. *See id.* at 7-8; Porter Decl. Ex. B.³ Indeed, NRBMLC has stated that the NPR/CPB Settlement did not affect the analysis underlying its rate proposal, but merely required a simple mathematical update to its proposed rates. (Hearing Tr. 2211:2-4.) Accordingly, there is no need for delay to allow the parties to further analyze the NPR/CPB Settlement.

³ Declaration of Andrew L. Porter filed in conjunction with the SoundExchange NPR/CPB Submission.

III. Whether the Fact That the Settlement Has Not Yet Been Subject of Objections and Comments Should Impact the Judges' Decision Whether to Take Administrative Notice of the Settlement (Question 3)

SoundExchange and NRBMLC agree that the fact that the settlement has not yet been subject to objections and comments should not impact the Judges' decision to take administrative notice of the NPR/CPB Settlement, particularly as the proposed regulations have now been published⁴ and "the Judges will have the opportunity to consider [] comments before the deadline for issuing a decision in this proceeding elapses." *See* NRBMLC Submission at 6; *see also* 17 U.S.C. § 801(b)(7)(A)(ii).

IV. Whether Assuming the Judges May Take Administrative Notice of the Settlement, the Witnesses, Fact and/or Expert, Whether They May Testify as to the Relevance of the Settlement in this Proceeding, Given that the Settlement is Not Discussed in the Witness' Written Testimonies (Question 4)

As explained in the SoundExchange NPR/CPB Submission, SoundExchange does not believe that further testimony regarding the relevance of the NPR/CPB Settlement is necessary. If the Judges are inclined to hear from the parties' experts on the subject of the NPR/CPB Settlement, Mr. Orszag and Dr. Holder have indicated their availability to give further testimony. *See* SoundExchange NPR/CPB Submission at 8. Such testimony can be easily accommodated within the Hearing, because, as NRBMLC notes, given the NPR/CPB Settlement's similar structure to prior Public Broadcaster settlements, there is no need for "extensive" testimony. NRBMLC Submission at 7.

⁴ *See* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (*Web VT*), 90 Fed. Reg. 20977 (proposed May 16, 2025).

V. Whether Assuming the Judges May Take Administrative Notice of the Settlement, the Judges May Take Administrative Notice of “Legislative Facts,” As Well As “Judicial Facts” as Those Terms Are Used in Deciding the Extent of Administrative Notice or By Analogy Judicial Notice (Question 5)

SoundExchange and NRBMLC agree that the NPR/CPB Settlement generally constitutes an adjudicative fact, which the Judges may take administrative notice of. Moreover, the parties also agree that the standard for legislative facts is broader, in the event the Judges were to take notice of legislative facts that may bear weight as the Judges prepare their final determination. *See* SoundExchange NPR/CPB Submission at 9-10; NRBMLC Submission at 7-8.

VI. Assuming the Judges May Take Administrative Notice of the Settlement, What Do You Intend to Proffer As Your Argument Regarding How the Settlement Should Affect the Judges’ Determination As to Rates and/or Terms in This Proceeding? (Question 6)

Though the parties agree that the Judges should take administrative notice of the NPR/CPB Settlement, SoundExchange and NRBMLC disagree as to its evidentiary value. SoundExchange intends to argue that the NPR/CPB Settlement is not an appropriate benchmark for multiple reasons, including the substantial value of the NPR/CPB Settlement’s consolidated reporting and payment provisions, and the fact that, should those provisions cease to be operational, the Public Broadcasters would be treated as standard noncommercial broadcasters. *See* SoundExchange NPR/CPB Submission at 10-11. NRBMLC intends to argue that the NPR/CPB Settlement can be a benchmark for other noncommercial webcasters. As discussed, *supra* § IV, and conceded by NRBMLC, there is no need for testimony on this topic to be “extensive” and it can be easily accommodated within the hearing.

VII. Assuming the Judges Take Administrative Notice of the Settlement, Should the Judges Order Supplemental Discovery Allowing Supplemental Written and Oral Hearing Testimony and/or Act to Subpoena Witnesses Regarding the Settlement? (Question 7)

NRBMLC states that the Judges should allow limited discovery to seek internal negotiation or valuation documents related to the NPR/CPB Settlement. NRBMLC Submission at 9-10. But

NRBMLC has already requested such documents, and SoundExchange has made a full production. *See* Porter Decl. Ex. A (requesting “all internal/external negotiating and valuation documents”); Ex. B. NRBMLC reviewed that discovery, updated its rate proposal, and was already prepared to offer expert testimony on the subject of the NPR/CPB Settlement at the hearing. *See* SoundExchange NPR/CPB Submission at 7-8. NRBMLC has made plain that the NPR/CPB Settlement did not change its analysis and merely required a mathematical update to its proposed rates. Hearing Tr. 2211:2–4. Since NRBMLC has already received the discovery it says it needs, and incorporated it into its case, there is no need for further discovery.

VIII. Whether the Date on Which the Settlement was Filed has an Impact on Whether or How the Judges Should Allow for Discovery and Testimony (Question 8)

The parties agree that the Judges have authority to order further testimony (if they desire it) and discovery (if they deem it necessary – SoundExchange believes it is not) and can do so here regardless of the date of the settlement. SoundExchange NPR/CPB Submission at 7-8; NRBMLC Submission at 10.

IX. Whether the Judges May or Should Consider Any Additional Testimony Through the Provisions for Paper Proceedings Under 17 U.S.C. 803(b)(5) (Question 9)

The parties agree that the Judges have the authority to request additional testimony on the NPR/CPB Settlement through written submissions pursuant to 17 U.S.C. § 803(b)(5). SoundExchange NPR/CPB Submission at 11-12; NRBMLC Submission at 10-11.

X. Other Expert Testimony Topics

SoundExchange does not believe any additional expert testimony is necessary.

CONCLUSION

For the reasons stated in the SoundExchange NPR/CPB Submission, and as set forth above, SoundExchange respectfully requests that the Judges take the NPR/CPB Settlement into

consideration in a manner consistent with the treatment the Judges afford the NAB Settlement, which SoundExchange believes would be appropriately considered through administrative notice.

Dated: May 16, 2025
New York, NY

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Friday, May 16, 2025, I provided a true and correct copy of the SoundExchange's Reply to National Religious Broadcasters Music License Committee Brief Regarding Testimony Related to NPR/CPB Settlement to the following:

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Signed: /s/ Scott Edelman