

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

**DISTRIBUTION OF CABLE ROYALTY
FUNDS**

**CONSOLIDATED PROCEEDING
NO. 19-CRB-0010 CD (2018-21)**

**Written Rebuttal Statement
of Public Television
Volume II**

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WRITTEN REBUTTAL STATEMENT OF PUBLIC TELEVISION

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In re

**DISTRIBUTION OF CABLE ROYALTY
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**CONSOLIDATED PROCEEDING
NO. 14-CRB-0010-CD (2010–13)**

**Testimony of
Linda McLaughlin
and
David Blackburn**

April 17, 2017

I. Qualifications

A. Linda McLaughlin

I am an applied microeconomist and an Affiliated Consultant at National Economic Research Associates, Inc. (“NERA”). I have conducted research on entertainment and media industries for over 40 years. I have analyzed marketplace prices paid for copyright licenses, reasonable rates for such licenses, and the distribution of fees collected to individual rights owners in a variety of media, including cable networks, broadcast stations, television programs, motion pictures, books, music compositions and recorded songs. I have submitted reports to and testified before the Copyright Royalty Judges (“CRJs”) and Copyright Arbitration Royalty Panel (“CARP”) concerning the distribution of cable royalty funds for 2000-2003 and 2004-2005, the compulsory license fee for satellite-retransmitted broadcast stations, the distribution of satellite royalty funds, and the costs and revenues of the record labels affiliated with the major U.S. record companies. In addition, I have submitted reports to the Federal Communications Commission and the Federal Trade Commission, and have testified before state and federal courts and arbitrators concerning entertainment market issues. A detailed statement of my qualifications is attached as **Appendix 1**.

B. David Blackburn

I am an applied microeconomist and Director for NERA, an economic consulting firm based in White Plains, New York. I am based in NERA’s Washington, D.C. office. I earned a B.Sc. in Applied Mathematics and Economics from Brown University and a M.A. and Ph.D. in Economics from Harvard University. I have taught economics courses at the graduate and undergraduate level at several institutions. I have written and spoken publicly on a number of economic issues, including intellectual property issues.

At NERA, my practice has focused on the valuation of intellectual property, on antitrust related matters, and on the calculation of economic damages in commercial disputes. A substantial quantity of my economic research, including my Ph.D. dissertation and my testimony in several legal intellectual property disputes has focused on markets for, and valuations of,

copyrights. This has involved copyrights for a variety of entertainment media, including film, television, and music. I have submitted reports to and testified before the CRJs in the Webcaster IV proceeding, and have submitted reports and/or testified before federal courts and the Patent Trial and Appeal Board on intellectual property issues. My CV, including a list of my recent testimony, is attached as **Appendix 2**.

II. Assignment and Summary of Opinions

Counsel for the Public Broadcasting Service has asked us to assess the relative value of distant Public Television (“PTV”) stations imported by cable system operators (“CSOs”) during the time period between 2010 and 2013, inclusive. In preparing this report, we have reviewed information from a variety of sources, including data from Cable Data Corporation (“CDC”), testimony and data provided by other parties in this proceeding and past determinations as to the appropriate distribution of Cable Royalty Funds. In addition, we have relied on our experience and training as applied microeconomists and our experience in the economic analysis of the value of intellectual property.

We reserve the right to supplement our opinions should additional information or testimony become available to us.

Based on our research to date, we have reached the following conclusions:

- Given the information currently available to us, an appropriate method for determining the relative marketplace value of distant PTV stations is to adjust the results of the 2004-05 average share awarded by the Copyright Royalty Judges for changes in relative value that have occurred since that time;
- The relative increase in carriage of distant PTV stations since 2004-05 indicates that the relative marketplace value of distant PTV signals has increased. PTV’s share of distant subscriber instances has increased 32 percent in 2010-13 compared to 2004-05. Based on the relative increase in carriage alone, an

appropriate distribution to PTV from the share of the Basic Fund (excluding music)¹ would be 9.9 percent on average between 2010-13, or on an annual basis, 9.3 percent in 2010, 10.2 percent in 2011, 9.8 percent in 2012, and 10.4 percent in 2013.

- In addition, based on changes since 2004-05 in other measures supplied by experts for other parties—CSO survey value results, CSO econometric value results, and viewing—the relative share of distant PTV programming grew at least approximately as much, and in most cases substantially more, than PTV’s increase in carriage. CSOs appear to be valuing each distant PTV carriage instance at a relatively higher dollar value and subscribers appear to be increasing their viewing intensity of distant PTV stations. Based on changes in these other measures, an appropriate distribution to PTV from the share of the Basic Fund would be about 9.9 to 20.8 percent on average between 2010-13.
- This range of distributions to PTV is in line with the 2010-13 shares of the Basic Fund derived from the estimates of value to CSOs supplied by other parties in their direct testimony: augmented Bortz survey: 9.3 percent; Horowitz survey: 14.9 percent; Israel econometric study: 15.6 percent; and Crawford econometric study: 19.7 percent.

III. Background

A. Recent History of Cable Royalty Distributions

In their most recent determination, the CRJs concluded that the relative marketplace value of distantly carried PTV programming amounted to 7.7 percent of the Basic Fund (excluding music) in 2004 and 7.4 percent of the Basic Fund (excluding music) in 2005, or an

¹ In this testimony, we will use the term “Basic Fund” or “Basic Fund (excluding music)” interchangeably to refer to the Basic Fund awarded to categories other than Music Claimants and National Public Radio. We will use the term “Basic Fund (including music)” to refer to the Basic Fund awarded to all categories, including Music Claimants, other than National Public Radio. Finally, we will use the term “Combined Royalty Funds” to refer to the combined Basic Fund, 3.75 Fund, and Syndex Fund. [See 2004-05 Determination, pp. 29, 58-60.]

average of 7.55 percent over the two periods. This determination was based on the CRJs' assessment of several types of evidence, including in particular Bortz surveys of cable operators' valuations of programming types, as augmented to correct certain omissions in those surveys, and further adjusted based upon regression analysis evidence and other considerations.²

B. “Relative Marketplace Value”

According to the 2004-05 Determination for cable royalty funds, as well as previous proceedings, the standard for determining the distribution of the royalties for cable-retransmitted distant signals among the claimant groups that supply the compensable programming is relative marketplace value, which is determined by the demand of the cable operators for the distant signals they choose to import.³ In past proceedings, the CARP has noted that “relative marketplace value [is] the *sole relevant criterion* that should be applied” and this standard—to “simulate...market valuation” as if there were no compulsory licensing regime—was adopted and has been carried forward by the CRJs.⁴

As has been found in prior distribution determinations, assessing the relative marketplace value of the various claimants is a challenge because no such marketplace exists, nor does a comparable marketplace which could otherwise be used as a benchmark for assessing the relative value provided by the various claimants. In the next section, we discuss these challenges and various possible solutions for overcoming them.

² The CRJs relied on Ms. McLaughlin's testimony in reaching these determinations. CRJs, Distribution Order, In the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005, June 29, 2010 (“2004-05 Determination”), pp. 27-30; Testimony of Linda McLaughlin, In the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005, June 1, 2009, corrected September 30, 2009 (“McLaughlin, 2009”), *available in* Written Direct Statement of Public Television, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13). The augmentations to the Bortz surveys from 2004 and 2005 included valuations for cable operators excluded from the original samples because they carried only distant PTV and/or Canadian signals.

³ 2004-05 Determination, pp. 6-8. A recent decision from the Copyright Royalty Judges confirms the relative market value standard. [CRJs, Initial Determination of Distributions of 1999 Cable Royalty Funds (Phase II), In re Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 98-99 (Phase II), December 10, 2014 (“1999 Phase II Initial Determination”), pp. 10-14.]

⁴ CRJs, Distribution Order, In the Matter of Distribution of the 2000-2003 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-2003, March 3, 2010 (“2000-03 Determination”), p. 15 (emphasis in original); CARP, Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress in Docket No. 2001-8 CARP CD 98-99, p. 10. [Summarized in the 2000-03 Determination, p. 15.]

C. Assessing Relative Marketplace Value of the Various Distant Signals

Because no marketplace exists for the non-compulsory licensing of distant signals, one cannot simply observe the relative values of the signals provided by the claimants to the cable royalty funds. In cases like this involving valuation of intellectual property (“IP”), there are several tools which are commonly relied upon to determine what the value at issue (or relative values at issue) would be if such a market existed. For example, one common practice is to rely on the marketplace valuations of similar IP as benchmarks, which may need to be adjusted to account for various differences between the valuation of the benchmark IP and the IP at issue.⁵ However, in this case, we are not aware of the existence of such marketplace benchmarks. Instead, we must turn to other methods to assess the relative marketplace value provided by the various claimants.

The challenge of assessing the relative value of a variety of IP is not unique to the distribution of cable royalty funds among the various claimants in this proceeding. Indeed, determining how to divide value among various contributors to that value is one of the most active areas of economic analysis. For example, economists have studied this bargaining problem restricted to only two parties, and several methods for assessing fair divisions of the bargain have been developed, including the Nash Bargaining Solution.⁶ This bargaining context also arises commonly in the calculation of economic damages resulting from the infringement of patent and other IP rights, under the guise of a “reasonable royalty” determination. The literature and court decisions relating to determining a reasonable royalty reveal that it can often be difficult to determine how to best make such an apportionment of value.

⁵ For example, many proceedings before the CRJs have relied heavily on the use of benchmarks, and have explicitly noted that the use of such benchmarks can often be the best available information for determining market value of IP. The recent *Web IV* decision focuses primarily on various benchmarks presented by both sides as the basis for their rate proposals. See, generally, CRJs, Determination, In re Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), Docket No. 14-CRB-0001-WR (2016-2020), December 16, 2015.

⁶ See, e.g., Andreu Mas-Colell, Michael D. Whinston and Jerry R. Green, *Microeconomic Theory*, Oxford University Press, 1995 (“MWG”), pp. 838-46.

When more than two parties are present, the challenge is amplified. One such solution to this problem is the so-called “Shapley value,” which can—given appropriate data and information—be calculated via an algorithm in which the marginal contribution of each contributor is measured in each possible ordering of the various contributors.⁷ This results in a Shapley value for every contributor in which each contributor receives the average of all the possible marginal values that it contributes. If there are only two contributors, the Shapley values are the same as the Nash Bargaining Solution, but with more contributors, the Shapley value becomes increasingly more complex. Indeed, with n contributors, there are $n!$ (n factorial) different orderings of the various contributors; thus with even six contributors, one must assess $6!$, or 720, different orderings, and the marginal contribution of all six contributors in each of those 720 orderings. Accordingly, although Shapley values have appeal—as the CRJs observed in the 1998-1999 Phase II cable royalty proceeding⁸—it is simply impractical to apply a Shapley value approach to an allocation proceeding in which there are so many claimants, due to the sheer number of different calculations that would be required, and also due to the difficulty in collecting the relevant information for assessing each of those marginal contributions. The example cited in the 1999 Phase II Initial Determination shows the power and usefulness of the Shapley value and its appeal in these proceedings, but doing so on the scale required here is impractical, if not impossible.

If we lack reliable marketplace benchmarks and the direct calculation of relative value via Shapley value calculations, what is left? In past proceedings, certain parties have argued that the relative value of the various signals can be assessed by looking at how the fees were generated.⁹ However, such an analysis has rightly been found to be flawed because the fees generated by cable retransmissions of distant signals do not depend at all on the relative

⁷ See, e.g., Lloyd S. Shapley, “A Value for N-Person Games,” in *The Shapley Value: Essays in Honor of Lloyd S. Shapley*, Alvin E. Roth, Ed., Cambridge University Press, 1988, pp. 31-40; Alvin E. Roth, “Introduction to the Shapley value,” in *The Shapley Value: Essays in Honor of Lloyd S. Shapley*, Alvin E. Roth, Ed., Cambridge University Press, 1988, pp. 1-27.

⁸ 1999 Phase II Initial Determination, pp. 14-16.

⁹ See, e.g., arguments put forward by the Canadian Claimants in the 2000-03 Determination. [Summarized in 2000-03 Determination, pp. 8-9.]

marketplace value of the signals,¹⁰ but rather are a function of the payment rules themselves which are the result of legislative compromise and are arbitrary.¹¹

Instead, in our opinion, given the information available to us, the most reliable methodology for assessing the relative marketplace value of distant PTV programming is to rely on the relative marketplace value from the 2004-05 Determination, which was largely based on the augmented Bortz survey of cable operators, as a starting point and adjust PTV's relative marketplace value for observable changes in circumstances since that time.¹² In this case, we know that the CRJs determined that PTV's relative marketplace value was 7.7 percent of the Basic Fund (excluding music) in 2004 and 7.4 percent of the Basic Fund (excluding music) in 2005, or an average of 7.55 percent. From that starting point, the question remains as to how that distribution should be adjusted due to any changes in the relative marketplace value in 2010-13 as compared to 2004-05.

In our opinion it is appropriate to look at changes in carriage of the various distant signals to assess how the relative marketplace value of the various signals has changed over time. While observations relating to carriage cannot be used to fully assess the relative marketplace value of the various signals, they do provide direct insight into how the relative value of the different distant signals has changed over time. When a CSO chooses to carry one station instead of

¹⁰ See Testimony of Linda McLaughlin, In the Matter of Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-2003, January 30, 2009, *available in* Written Direct Statement of Public Television, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13). [Summarized in 2000-03 Determination, p. 22.]

¹¹ See, *e.g.*, Copyright Royalty Tribunal, Adjustment of the Royalty Rate for Cable Systems, Docket No. CRT 81-2, November 19, 1982, 47 FR 52146 at 52154. The Tribunal noted that “[t]he rates were established as a legislative compromise, they are arbitrary.”

As an example, all systems must pay at least a minimum fee equal to that of importing one distant signal equivalent (“DSE”)—even if they import fewer than one DSE—and so the value gained by the decision to import signals up to that level need not bear any relation to the fee paid. During 2010 to 2013, about one-third of distant signal subscriber instances (*i.e.*, one subscriber receiving one distant signal) are in systems that import no more than one DSE. [Data provided by CDC.]

¹² The CRJs have previously explained that proving changed circumstances is, essentially, methodologically equivalent to direct, reliable estimates of relative valuations; that is, one need not demonstrate *both* a direct calculation of relative valuations *and* separate proof of changed circumstances. [2004-05 Determination, p. 27 and fn 18.]

another, it is demonstrating that the net expected value generated by that station is greater than the net expected value generated by any other available station that it did not choose to carry.

This holds true not just among distant station programming choices, but among the broader choices of cable networks, local and distant stations. Simply put, CSOs must choose the package of channels that attracts and retains subscribers to maximize their profitability. Thus, for example, if a CSO chooses to add a distant PTV station rather than carrying other distant stations, this reveals that the CSO expects to create more value for itself and its subscribers by carrying that PTV station; economists refer to this demonstration of relative value as “revealed preference.”¹³ Revealed preference allows us to clearly see that, if certain stations and signals are being added more often than others (that is, CSOs are choosing to carry certain stations and signals more often), then the relative value of those signals are rising relative to past periods.¹⁴

Changes in other measures also can indicate whether a specific distant signal programming category is relatively more or less valuable. For example, increases in relative viewing of that category can indicate that subscribers value it to a greater extent. Similarly, increases in relative value to CSOs as measured by surveys and econometric analyses can show that CSOs value that category more highly than before. This is particularly the case if these changes are not simply reflecting changes already captured by changes in carriage—that is, a relatively larger quantity of that category was selected—but also showing that there is relatively greater subscriber viewing per minute or value to CSOs per additional minute of that category.

To that end, in the remainder of this report, we assess, first, how the carriage of PTV and other distant stations’ programming has changed since 2004-05, and then consider changes in measures of viewing and value based on data supplied by experts for other parties.

¹³ See, *e.g.*, MWG, pp. 10-11.

¹⁴ We note that among signals that were previously carried and are still carried, we cannot assess whether or not these signals have become more or less valuable, based on carriage changes alone, other than noting that they did not reduce in relative value enough to be dropped by the CSO.

However, as noted by the CRJs in the 2004-05 Determination in response to some of the omissions in the unadjusted Bortz survey, the choice to carry or not to carry programming can directly reveal relative value, as “a cable system that chooses only PTV or Canadian programming may be *implicitly* making a choice in favor of a 100% relative value score for such programming.” (Emphasis in original.) [2004-05 Determination, p. 15.]

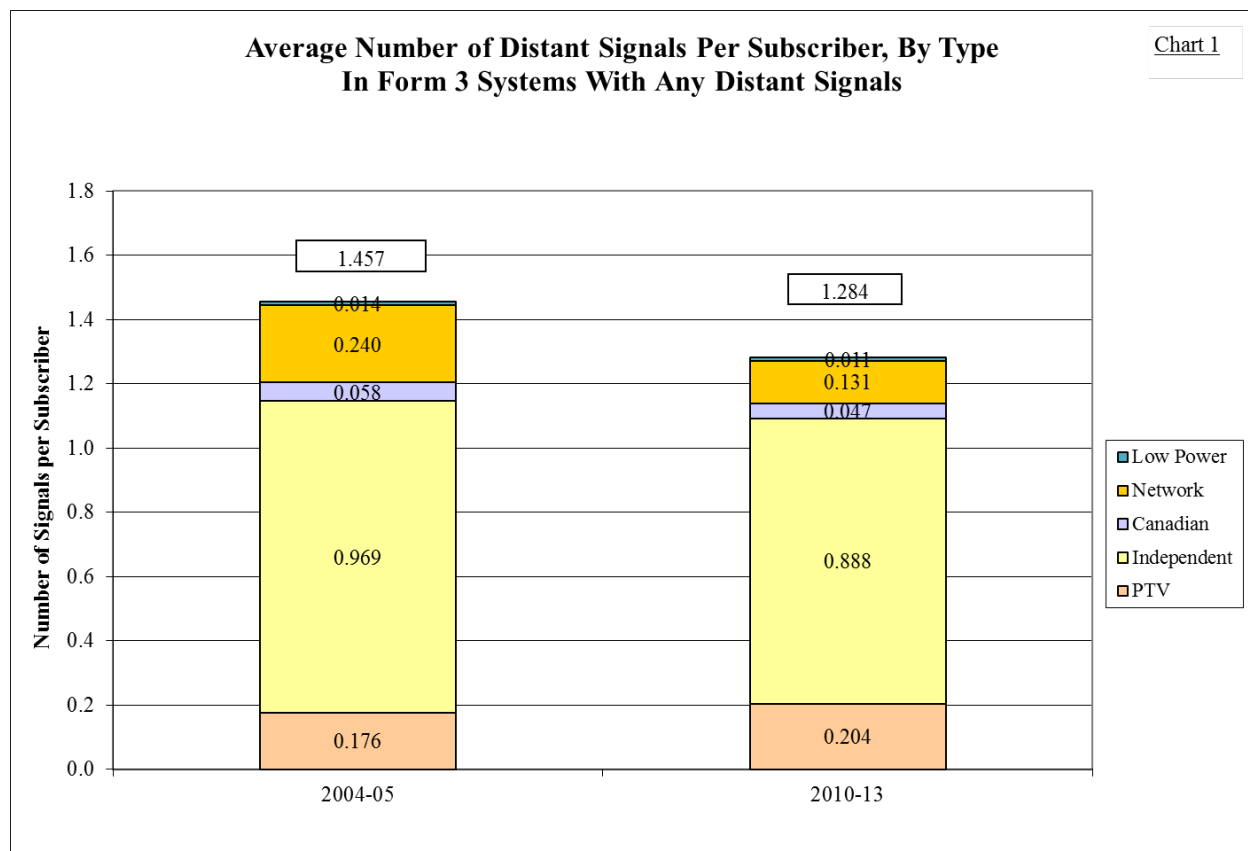
IV. Carriage Changes Since 2004 and 2005

The composition of the distant signals imported by CSOs in 2010-13 has changed since 2004-05.¹⁵ In particular, cable subscribers received more distant PTV stations and fewer distant network, independent and Canadian stations. On average, cable operators that carried distant signals chose to carry somewhat fewer total distant signals per subscriber: 1.284 distant signals per subscriber in 2010-13 compared with 1.457 distant signals per subscriber in 2004-05. This decline in total distant signals per subscriber was due to a decline in the average number of distant signals per subscriber for network stations (a drop of 0.109 per subscriber), U.S. independent stations (a drop of 0.081 per subscriber), Canadian stations (a drop of 0.011 per subscriber), and Low Power stations (a drop of 0.003 per subscriber), offset by an increase in PTV stations (an increase of 0.028 per subscriber). See Chart 1.¹⁶

¹⁵ These and other data in our report represent data compiled by CDC for Form 3 cable systems. Form 3 systems paid 97 percent of royalties in 2004-05 and 99 percent in 2010-13.

¹⁶ Based on data supplied by CDC. The total includes a small number of distant Mexican stations.

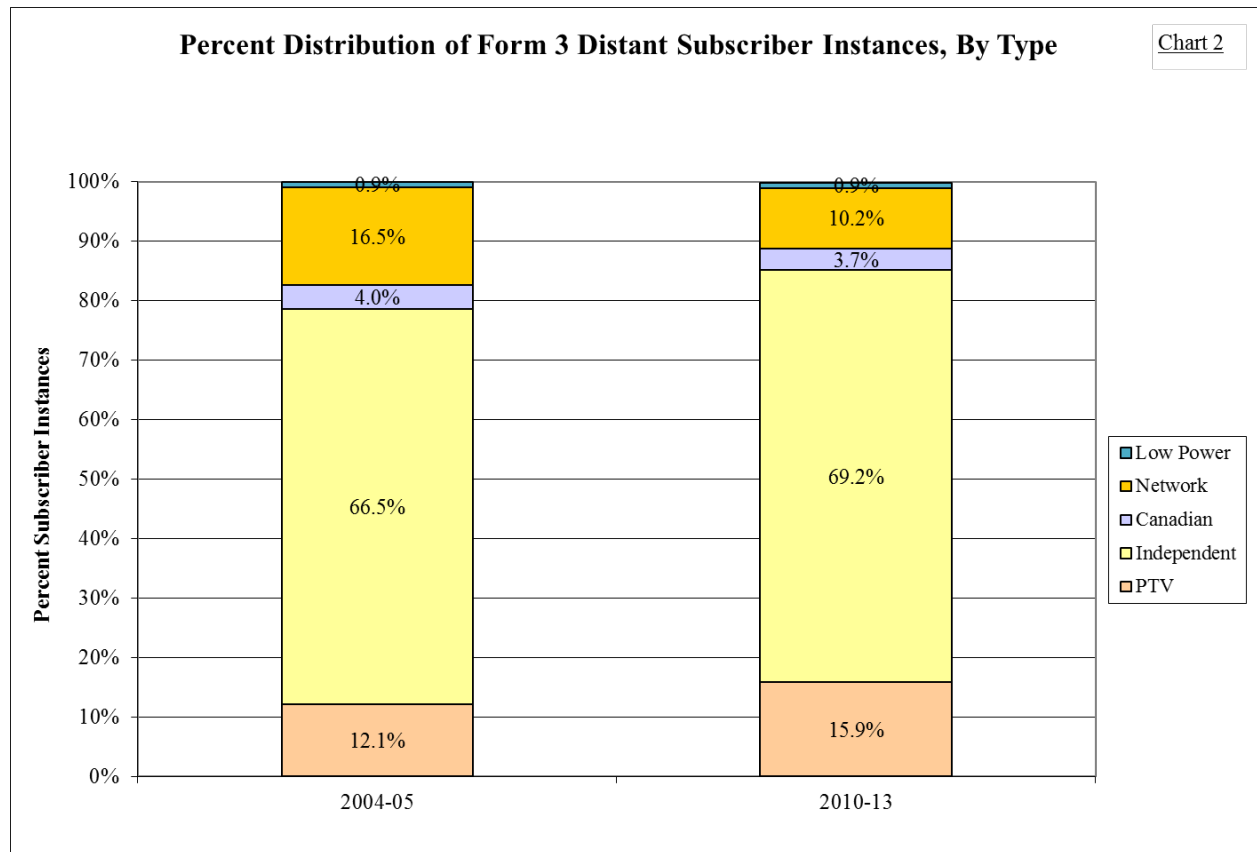
One notable change since 2005 has been the growth in the use of multicast signals. Of these multicast signals, most are PTV multicast signals; out of the 14.9 million total multicast subscriber instances per half year period from 2010 through 2013, 87 percent were PTV multicast instances.



This change in carriage choices by CSOs can also be seen by looking at the distribution of the number of distant subscriber instances. (The number of “distant subscriber instances” is the number of distant signals received by each subscriber, summed for all subscribers. In other words, one distant subscriber instance is one subscriber receiving one distant signal.) While the number of distant signals per subscriber has fallen since 2004 and 2005, there has been an increase in the total number of subscribers.¹⁷ As a result, total distant subscriber instances have increased from an average of about 70.7 million in 2004-05 to about 71.8 million in 2010-13. During this same time, the number of PTV distant subscriber instances increased from about 8.5 million to about 11.4 million. Thus, PTV accounted for about 12 percent of the distant subscriber instances in 2004-05 and about 16 percent in 2010-13. U.S. independents also

¹⁷ Somewhat more subscribers were in Form 3 cable systems that chose to carry distant signals in 2010-13 (on average 56 million or 91 percent of all subscribers) than in 2004-05 (on average 49 million or 82 percent of all subscribers). Data were supplied by CDC.

increased their share, although by only about 3 percentage points, while networks and, to a lesser extent, Canadian and Low Power stations had share declines. See Chart 2.¹⁸



V. Adjustment to PTV’s Share of Basic Fund Based on Carriage Changes

PTV increased its share of subscriber instances by about 32 percent (*i.e.*, from about 12 percent to about 16 percent). As we have described above, this growth in carriage and subscriber instances is evidence that the relative value of distant PTV signals has increased, as CSOs have

¹⁸ As we noted in footnote 15 above, the use of multicast signals is responsible for some of the increase in the use of distant PTV signals. Approximately 94 percent of multicast PTV signals were in systems with more than one prorated DSE, which means that in almost all cases, those systems carrying multicast PTV signals were paying extra to carry them (*i.e.*, paying more than the minimum fee).

PTV’s increased relative share is also attributable to factors other than increased multicasting. Even if PTV multicast distant signals were entirely excluded in 2010-13 (while other stations’ multicast signals remain included), the PTV share of distant signal instances would still have increased to about 14 percent (from about 12 percent).

increasingly chosen to provide their customers with distant PTV as opposed to other distant programming. This carriage data is particularly relevant to assessing the change in relative marketplace value of PTV programming because the PTV category is the only category in this proceeding that consists of *all* of the programming on a particular type of station.¹⁹ By contrast, when a CSO makes a carriage decision regarding a non-PTV station, it can be difficult to disentangle the CSO's relative valuation of the various types of programming carried on that station. The fact that, on the margin, CSOs are increasingly choosing to increase the value of their cable packages by adding distant PTV stations relative to other distant stations reveals an increase in the relative marketplace value of distant PTV programming.

Relative to the set of programming that the CSOs were carrying in 2004 and 2005, as shown above, CSOs have increasingly chosen to add distant PTV stations over other distant station alternatives. Based solely on this measure, assuming there were no other evidence of changes in the relative value of PTV programming, and in light of CSOs' revealed preferences as described above, an appropriate distribution for 2010 through 2013 for PTV would be to increase its share of the Basic Fund in proportion to its growth in distant subscriber instances. PTV was awarded 7.55 percent of the share of the Basic Fund (excluding music) in 2004-05. A 32 percent increase in PTV's share of distant subscriber instances in 2010-13 relative to 2004-05 would increase PTV's average share of the Basic Fund from the 7.55 percent that was awarded in 2004-05 to 9.9 percent of the Basic Fund in 2010-13. These calculations can also be done on an annual basis, relative to the 7.55 percent that was awarded in 2004-05, by calculating the annual change in distant subscriber instances in each year relative to the 2004-05 base. As shown in Table 1, this yields a share of 9.3 percent in 2010, 10.2 percent in 2011, 9.8 percent in 2012, and 10.4 percent in 2013.

¹⁹ CRJs, Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order, In re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), November 25, 2015, Exhibit A.

TABLE 1
PTV Share of Basic Fund for 2010-13
Based on Growth in Share of Subscriber Instances
In Form 3 Systems

<u>Period</u>	<u>PTV</u>
Adjudicated Share	
Average 2004-05	7.55%
Growth in PTV Share of Subscriber Instances	
2004-05 to 2010	23%
2004-05 to 2011	35%
2004-05 to 2012	30%
2004-05 to 2013	38%
Updated Share	
2010	9.3%
2011	10.2%
2012	9.8%
2013	10.4%

VI. Changes in Other Measures Since 2004-05

Experts for other parties have supplied data on measures of value to CSOs from surveys and econometric estimates, and of viewing that are comparable to 2004-05 data. On all these measures, PTV’s share is substantially higher in 2010-13 than in 2004-05.

A. Surveys

Each year, Bortz Media & Sports Group, Inc. (Bortz) conducts a survey of a random sample of cable operators on behalf of Joint Sports Claimants.²⁰ The cable operators are asked how they would allocate a fixed budget among the different programming categories on the

²⁰ Written Direct Testimony of James M. Trautman, Bortz Media & Sports Group, Inc., Cable Operator Valuation of Distant Signal Non-Network Programming, December 26, 2016 (“Trautman”), *in* Written Direct Statement of the Joint Sports Claimants, vol. 1, tab 1, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13).

distant signals they actually carried in the preceding year. The survey results reflect the collective valuations made by the eligible respondents. Certain cable systems are excluded from the Bortz surveys: those that carry distant signals only in the PTV and/or Canadian category. Had these omitted operators been included, those carrying only PTV stations would have been restricted to “allocating the fixed budget” entirely to the PTV category, and similarly those carrying only Canadian stations would have to allocate their entire budget to the Canadian category.²¹ (Omitted systems that carried both PTV and Canadian stations could split their budgets between the two categories.) Mr. Trautman acknowledges that the survey results for PTV and Canadian program categories require adjustment because of these exclusions.²² We testified to that adjustment for 2004-05 and now do the same for 2010-13.²³ That is, we compute the values the Bortz surveys likely would have found had they not excluded from the original samples cable operators that carried only distant PTV and/or Canadian signals.²⁴ We refer to the corrected results as the augmented Bortz survey.

We received the data identifying the cable operators selected to be surveyed according to the Bortz stratified random sample but that then were excluded solely because they carried only PTV and/or Canadian distant signals. As explained in more detail in prior testimony incorporated here,²⁵ we recalculated the survey results, assuming that these systems had been included in the analysis. We further assumed that these omitted systems would have a response rate similar to those that were eligible, and that they would have followed the survey

²¹ The relevant Bortz survey value categories here are PBS and all other programming broadcast by U.S. noncommercial stations and all programming broadcast by Canadian stations carried by the CSO on a distant basis. [Trautman, pp. 17-18.]

²² Trautman, pp. 7-8. The Royalty Judges acknowledged that, without adjustment, “this exclusion clearly biases the Bortz estimates downward for PTV and Canadian programming.” [2004-05 Determination, pp. 14-16.]

²³ McLaughlin, 2009, p. 11.

²⁴ In 2004 and 2005, there were ten omitted systems in each year (an average of eight carrying only PTV distant signals and one only Canadian and one with both PTV and Canadian) compared with 251 systems eligible to be surveyed in each year. In 2010-13, there were an average of 16 omitted systems in each year (an average of 13 carrying only PTV distant signals, one carrying only Canadian, and two with both PTV and Canadian), compared to an average of 302 eligible systems.

²⁵ McLaughlin, 2009, pp. 7-11 and Appendix B.

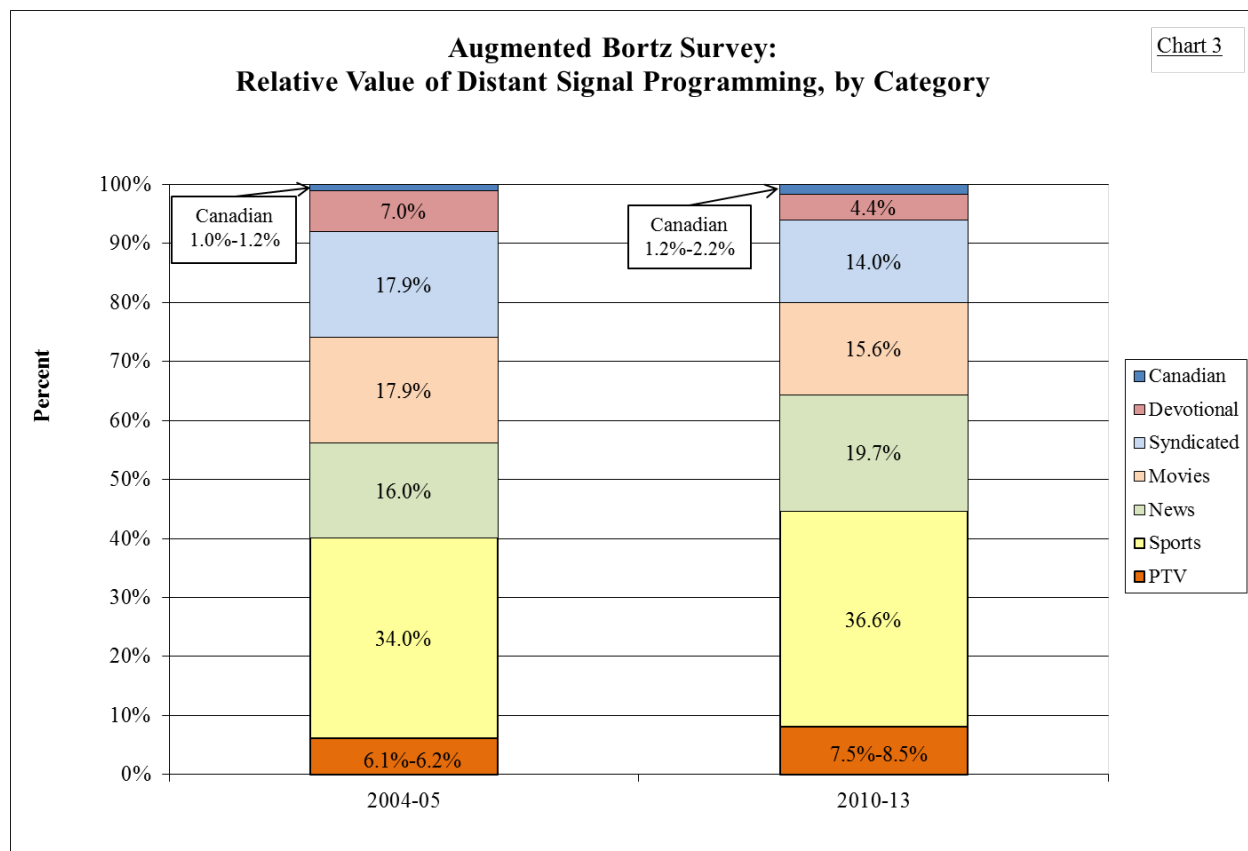
instructions.²⁶ We used the same stratification and weighting process that the Bortz survey employed.²⁷ The CRJs, in their 2004-05 decision, relied on this augmented Bortz calculation in reaching their determinations.²⁸

Chart 3 compares the augmented Bortz results for 2004-05 and 2010-13: It shows an increase in PTV's average share of 24 to 37 percent (depending on whether the bottom or top end of the range is used), or about 31 percent on average. This is in line with the 32 percent change due to the increase in distant PTV subscriber instances alone.

²⁶ That is, systems carrying only PTV (Canadian) distant signals would allocate 100% of their budget to PTV (Canadian). For those carrying both PTV and Canadian, we assumed a range between 100% to PTV and 100% to Canadian signals.

²⁷ In the 2004 and 2005 surveys, there was an implied inclusion of certain noncompensable programming on WGN. As a result, the values cable operators that import WGN ascribe to movies, syndicated series and devotional programming are likely to include both compensable and noncompensable programming, which would overstate the values of the compensable programming in these categories. [Trautman, p. 5 and 2004-05 Determination, pp. 16-17.] Changes were made to the 2010-13 surveys that Mr. Trautman acknowledges reduce but do not eliminate this bias. The survey questions asked of those systems carrying WGN as their single distant signal were tailored to focus on only compensable WGN programming. This was not done for systems carrying WGN and other distant signals. [Trautman, pp. 7 and 30.] The augmented Bortz results do not correct for this bias.

²⁸ "We...us[e] as our starting point the augmented Bortz survey shares as calculated by Ms. McLaughlin which includes appropriate adjustments to the PTV share...; and then, we proceed to adjust these values further...[for Canadian and Devotional Claimants]." (footnote concerning rounding omitted). [2004-05 Determination, p. 27.]



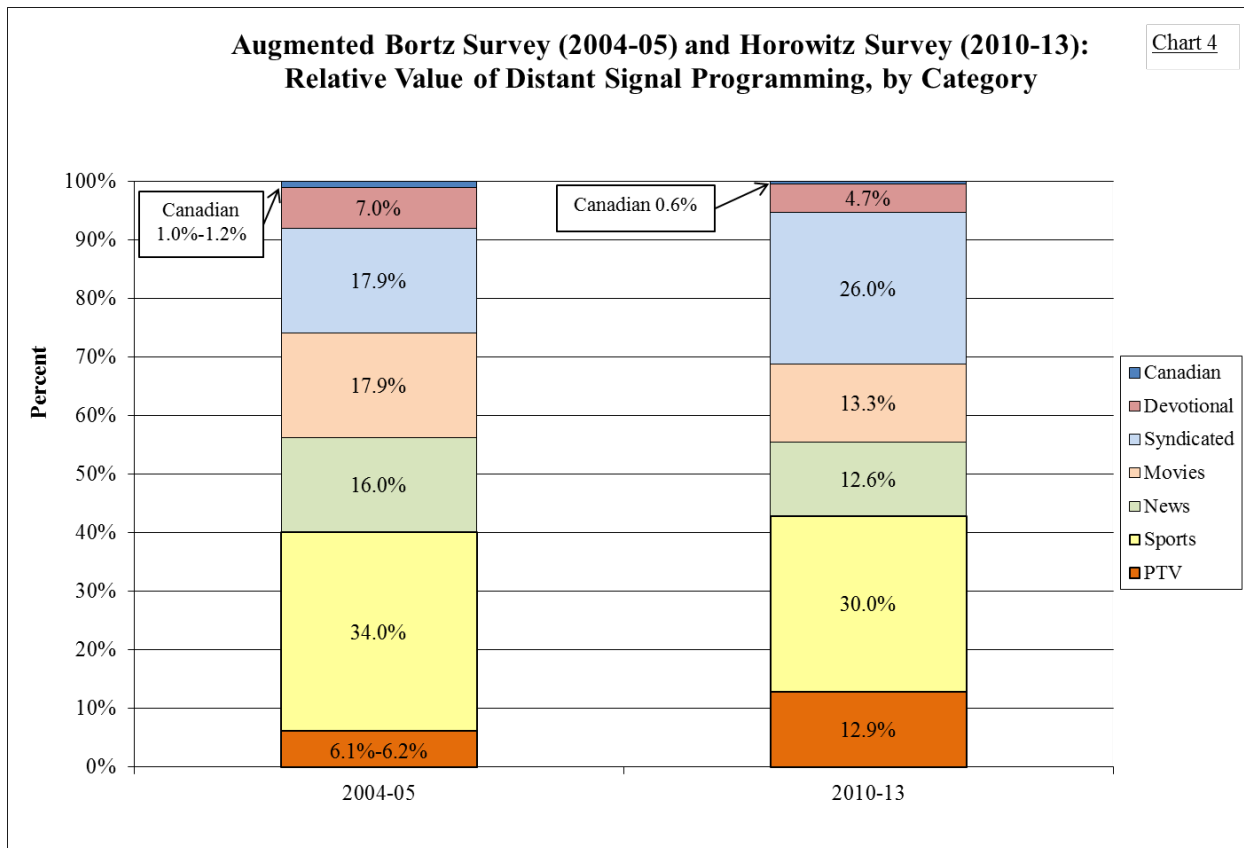
In the 2010-13 period, another CSO survey (the Horowitz survey) was done on behalf of Program Suppliers to replicate and improve on the methods of the Bortz survey in 2004-05.²⁹ In particular, the Horowitz survey included systems carrying only PTV and/or Canadian distant signals, and so is comparable to the augmented Bortz results for 2004-05. It also addresses the issue of bias due to noncompensable programming on WGN.³⁰ Chart 4 below compares the augmented Bortz results for 2004-05 with the Horowitz survey results for 2010-13.³¹ The Horowitz survey shows an increase in the relative value to CSOs for PTV of 109 percent, much

²⁹ Dr. Marvin Frankel selected the sample and Howard Horowitz conducted the survey. Direct Testimony of Marvin R. Frankel, Ph. D. and Direct Testimony of Howard Horowitz, December 22, 2016 (“Frankel” and “Horowitz”), in Written Direct Statement Regarding Allocation Methodologies of Program Suppliers, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13). The weighted estimate produced by Dr. Frankel and Mr. Horowitz is most closely analogous to the 2004-05 Bortz survey, and more particularly, to the augmented Bortz results for that time period.

³⁰ Horowitz, p. 4.

³¹ Chart 4 groups the Horowitz category “other sports” with syndicated programming.

more than the growth of distant subscriber instances alone. These results suggest that PTV’s share may have increased due to an increase in the relative value to CSOs per imported PTV station as well as in the quantity of imported PTV stations (as measured by subscriber instances).



A comparison of Charts 3 and 4 shows that the PTV category has a substantially higher share in the Horowitz survey than in the augmented Bortz survey. In investigating a possible reason for the difference, we noticed that several large systems with PTV multicast stations—a major factor underlying the increase in relative PTV carriage—that were eligible to respond to both surveys, did not actually respond to the Bortz survey, but did respond to the Horowitz survey.³²

³² See, for example, JSC 00008255 Respondents by Company.xlsx; JSC 00008206 [RESTRICTED] JSC_Form_3_Distant_Carriage_Detail_20131.xlsx; JSC 00008265 2013 Sample (Categorized).xlsx; PS-2010-13-C-001054-001106.pdf.

B. Econometric Analyses

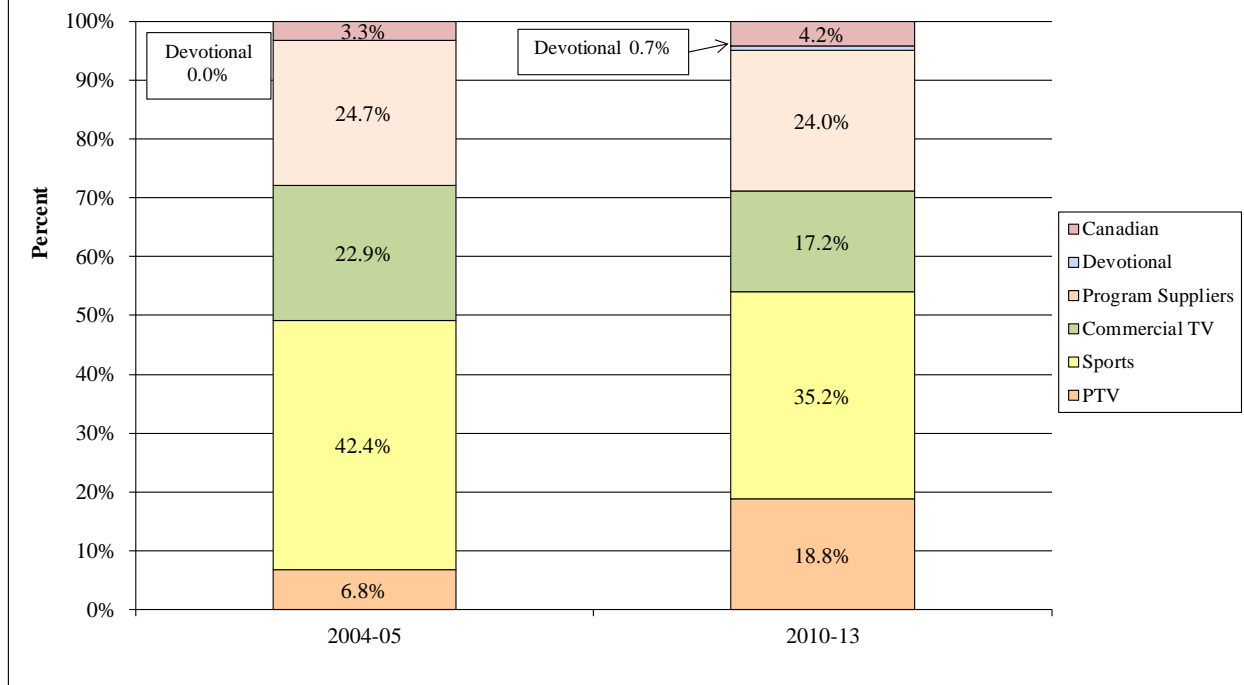
Commercial Television experts Dr. Joel Waldfogel and Dr. Gregory Crawford supplied econometric analyses showing the share of value to CSOs provided by distant compensable programming in 2004-05 and 2010-13, respectively, on a seemingly comparable basis.³³ Chart 5 shows that PTV's share of value to CSOs increased from 6.8 percent in 2004-05 to 18.8 percent in 2010-13, an increase of about 175 percent. This growth was the result of both an increase in the relative share of compensable minutes of distant PTV programming and the value of each minute of programming. The value of an additional distant minute of PTV programming increased from 4.2 cents in 2004-05 to 5.1 cents in 2010-13, an increase of 21 percent.³⁴ That is, there is not only a relatively greater quantity of distant PTV programming selected to be carried by CSOs, but also each unit of programming is more valuable.

³³ Statement of Joel Waldfogel, In the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005, June 1, 2009, p. 13, Table 3 ("Waldfogel"), *available in* Written Direct Statement of the Joint Sports Claimants, vol. 2, tab 18, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13); Testimony of Gregory S. Crawford, Ph. D., December 22, 2016 (corrected April 11, 2017), p. 41, Figure 17 ("Crawford"), *in* Corrected Written Direct Testimony of the Commercial Television Claimants Group, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13). Dr. Crawford also supplied his preferred estimate, which accounted for duplicative programming, unlike the 2004-05 estimate. [Crawford, p. 45, Figure 20.] PTV's share by this measure is 17.0 percent.

³⁴ Waldfogel, p. 13, Table 3; Crawford, p. 40, Figure 16. The period 2010-13 uses Dr. Crawford's "initial" estimate, which does not adjust for duplicative programming, to make his 2010-13 results comparable to the 2004-05 Waldfogel results.

**Waldfogel (2004-05) and Crawford (2010-13) Econometric Analyses:
Relative Value of Distant Signal Programming, by Category**

Chart 5



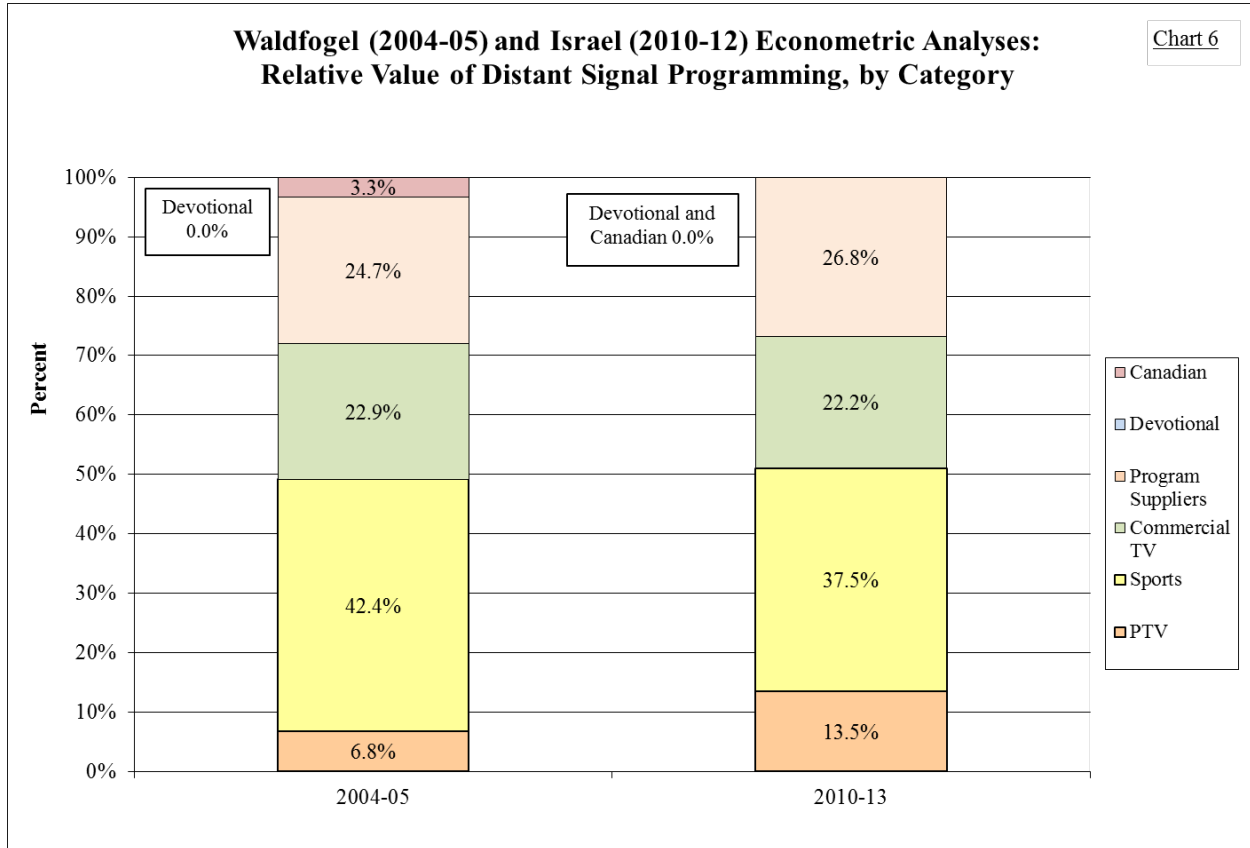
Joint Sports expert Dr. Mark Israel also supplied an econometric analysis showing the share of value to CSOs provided by distant compensable programming in 2010-12.³⁵ Like that done for Commercial Television by Dr. Waldfogel in 2004-05, and by Dr. Crawford for 2010-13, Dr. Israel measures “what CSOs pay as a function of what they choose to carry.”³⁶ While Dr. Israel has made certain adjustments to the Crawford methodology, one of which adjusts the distant signal equivalent to account for only those subscribers in a system that actually receive it,

³⁵ Written Direct Testimony of Dr. Mark A. Israel, December 22, 2016, ¶ 40 (“Israel”), in Written Direct Statement of the Joint Sports Claimants, vol. 1, tab 2, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13). Dr. Israel apparently considers his 2010-12 regression analysis to apply to the entire 2010-13 period. For example, he compares the shares derived from his 2010-12 regression to the Bortz survey shares averaged over the 2010-13 period. [Israel, pp. 21-23.]

³⁶ Israel, ¶¶ 21-25 (“In general, I have employed the same methodology used by Dr. Waldfogel in his 2004-05 study.” Due to a difference in the two analyses in the measure of programming minutes, Dr. Israel’s value of an additional minute of PTV programming (\$0.66) should not be compared to Dr. Waldfogel’s. [Israel, pp. 12-13 and 18-19.]

Dr. Israel treats his 2010-12 results as comparable to those of Dr. Waldfogel for 2004-05.³⁷

Chart 6 shows that PTV’s share of value to CSOs increased from 6.8 percent in 2004-05 to 13.5 percent in 2010-12, an increase of 99 percent.



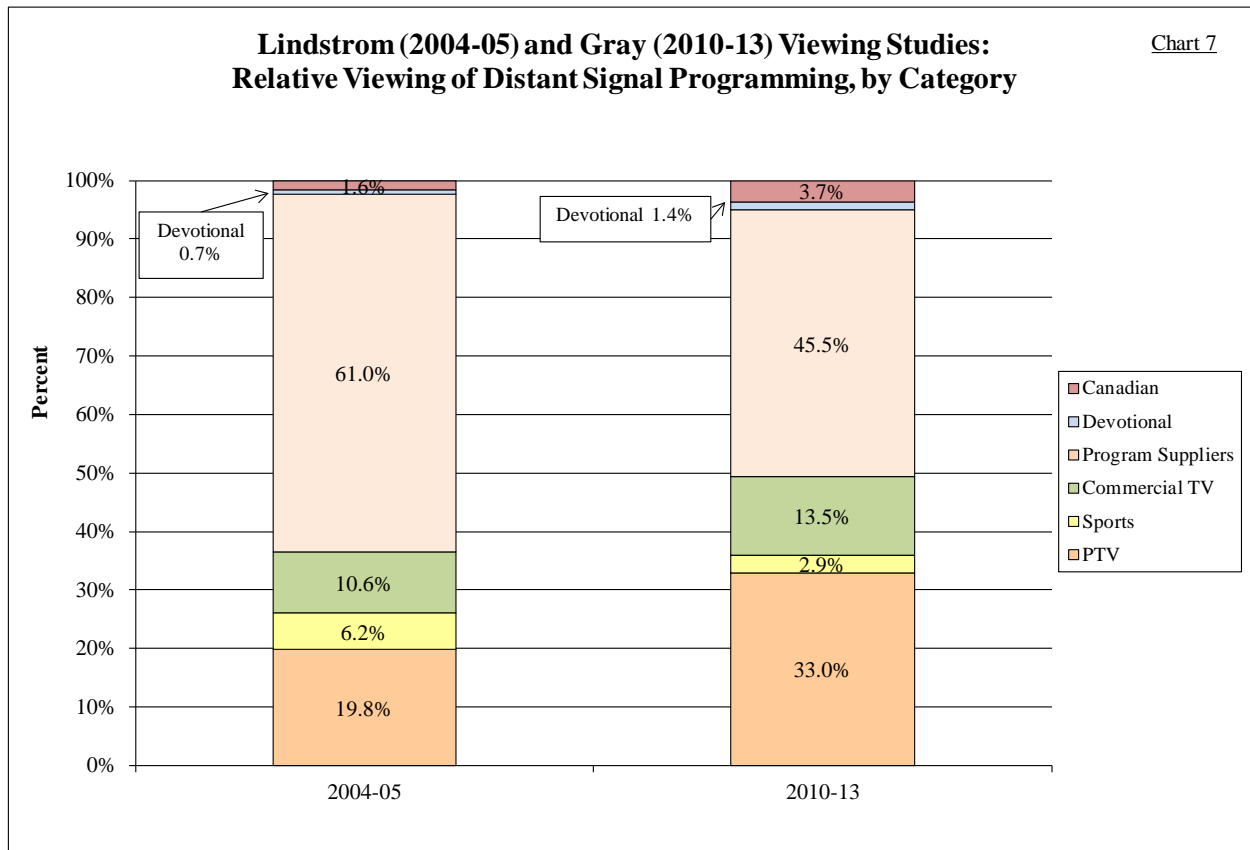
C. Viewing

Program Suppliers experts Paul Lindstrom and Dr. Jeffrey Gray supplied data showing shares of viewing and programming time for distant compensable programming in 2004-05 and 2010-13, respectively.³⁸ Chart 7 shows viewing shares by program category for 2004-05 and

³⁷ Israel, ¶ 26 and ¶ 39, Table V-3.

³⁸ Testimony of Paul Lindstrom, In the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005, June 1, 2009, PS Exhibits, PL-3, p. 1 and PL-5, p. 1, The Nielsen Company, MPAA Metered Total Year, Demographics=Households, Jan-Dec, 2004 and Jan-Dec, 2005 (“Lindstrom”), available in Amended Written Direct Statement of Public Television, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13); Testimony of Jeffrey S. Gray, Ph. D., In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), December 22, 2016 (corrected April 3, 2017), pp. 16 and 19 (Tables 1 and 2) (“Gray”), in Errata to Amended and Corrected

2010-13. Based on these data, PTV’s share of distant compensable viewing increased from 19.8 percent in 2004-05 to 33.0 percent in 2010-13, an increase of 66 percent.



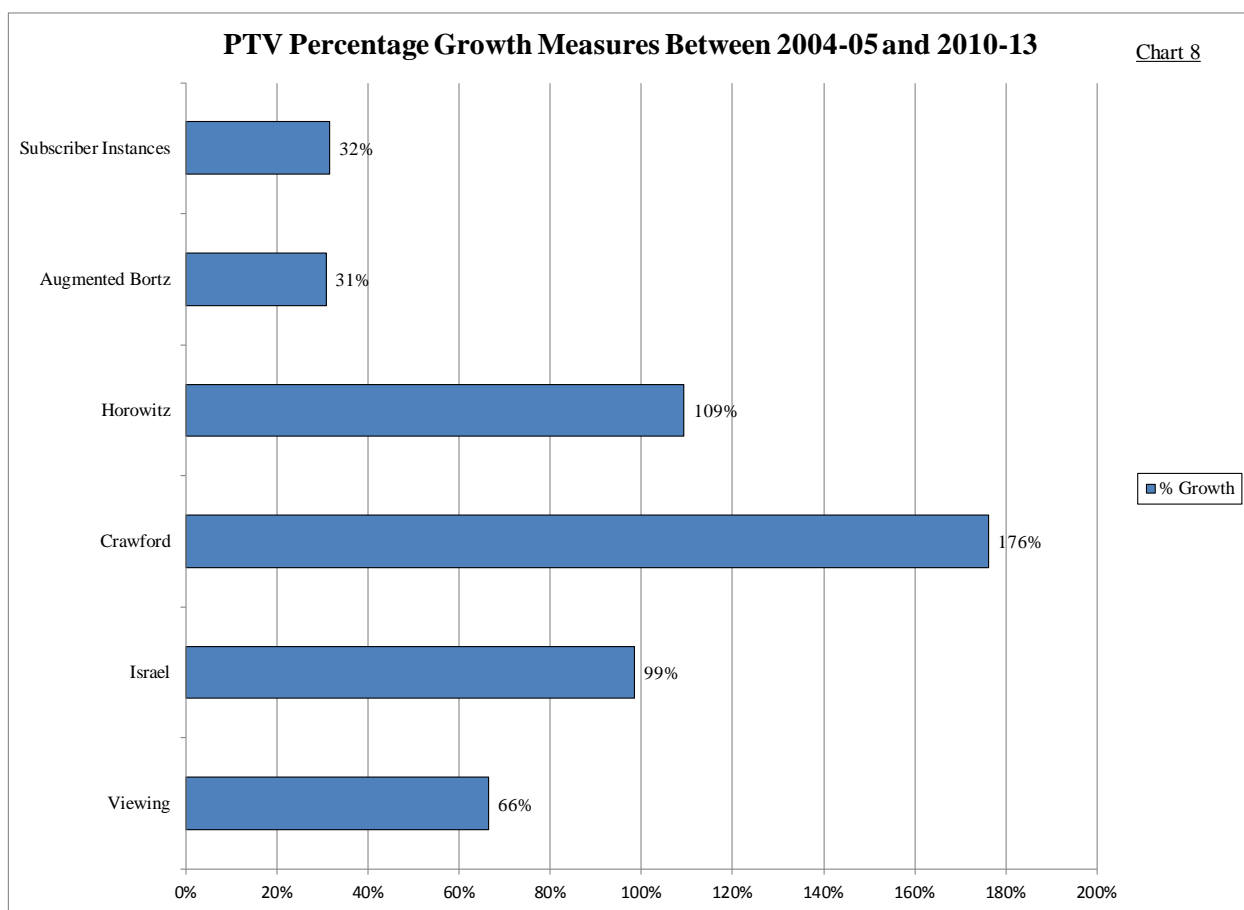
This increase is greater than PTV’s increase in subscriber instances. The larger increase in viewing suggests viewing intensity (relatively more viewing per distant subscriber instance) has increased. In fact, PTV programming was more lightly viewed than other distant compensable programming in 2004-05—its viewing share was almost 25 percent lower than its share of programming time—and it is more heavily viewed than other distant compensable programming in 2010-13—its viewing share was almost 20 percent higher than its share of

Written Direct Statement Regarding Allocation Methodologies of Program Suppliers, In Re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13).

programming time. PTV distant viewing intensity has increased 57 percent from the earlier to the more recent period.³⁹

D. Summary of Growth Estimates

Chart 8 summarizes the growth in PTV's relative distant signal performance between 2004-05 and 2010-13 by the various measures: growth in subscriber instances, growth in CSO survey value (augmented Bortz, Horowitz), growth in CSO econometric value (Crawford, Israel), and growth in subscriber viewing. PTV is the only category that shows positive growth across all these various measures.⁴⁰



³⁹ Lindstrom, PS Exhibits, PL-3, p. 1 and PL-5, p. 1 and Gray, pp. 16 and 19 (Tables 1 and 2).

⁴⁰ Each program category can be compared on Charts 3 through 7. For Program Suppliers, the movies and syndicated program categories on Charts 3 and 4 should be combined to be comparable to the other categories. Commercial TV is called news on Charts 3 and 4.

As discussed above, in 2004-05, PTV was awarded a 7.55 percent share of the Basic Fund (excluding music). A 32 percent increase in PTV's share of distant subscriber instances in 2010-13 relative to 2004-05 would increase PTV's average share of the Basic Fund from the 7.55 percent that was awarded in 2004-05 to 9.9 percent in 2010-13. If, instead, the growth in PTV's share of these other measures from 2004-05 to 2010-13 were applied to the 7.55 percent that PTV was awarded in 2004-05, PTV's share of the Basic Fund would increase to a range of between 9.9 percent and 20.8 percent in 2010-13. Specifically, based on the increase in PTV's share of CSO survey value, PTV's share of the Basic Fund in 2010-13 would increase to 9.9 percent or 15.8 percent, depending on whether the 2004-05 augmented Bortz survey were compared to the augmented Bortz survey or the Horowitz survey in the later period. Based on the increase in PTV's share of CSO econometric value, PTV's share of the Basic Fund would increase to 20.8 percent or 15.0 percent, depending on whether the 2004-05 Waldfogel econometric study were compared to the 2010-13 Crawford study or the 2010-12 Israel study. Finally, PTV's share of the Basic Fund would increase to 12.6 percent in 2010-13 based on the increase in PTV's viewing share since 2004-05. Table 2 shows these calculations for the period as a whole as well as on an annual basis.

TABLE 2
PTV Share of Basic Fund for 2010-13
Based on Growth in Share in Various Measures

Period	Subscriber Instances	Augmented Bortz Survey	Horowitz Survey	Crawford Initial Regression	Israel Regression	Viewing
Adjudicated Share Average 2004-05	7.55%	7.55%	7.55%	7.55%	7.55%	7.55%
Growth in PTV Share						
2004-05 to 2010	23%	21%	25%	127%		41%
2004-05 to 2011	35%	41%	117%	191%		47%
2004-05 to 2012	30%	12%	145%	180%		110%
2004-05 to 2013	38%	49%	151%	202%		68%
2004-05 to 2010-13	32%	31%	109%	176%	99%	66%
Updated Share						
2010	9.3%	9.2%	9.5%	17.2%		10.6%
2011	10.2%	10.7%	16.4%	22.0%		11.1%
2012	9.8%	8.4%	18.5%	21.2%		15.9%
2013	10.4%	11.2%	18.9%	22.8%		12.7%
2010-13	9.9%	9.9%	15.8%	20.8%	15.0%	12.6%

VII. Comparison with Share of Basic Fund Estimates Computed by Other Experts

In sections III to VI, we explained and applied a changed circumstances method to estimate PTV’s share of the Basic Fund in 2010-13. Here, we compare the results obtained by that method with those found by experts for other parties from measures of value to CSOs in 2010-13 alone.

In order to make the comparison, we first need to convert the shares the other experts reported into shares of the Basic Fund. The surveys and econometric estimates of value to CSOs determine shares of the Combined Royalty Funds for each of the programming claimants.⁴¹ However, the Combined Royalty Funds are actually divided into three funds: Basic, 3.75 and Syndex. PTV is eligible for an award only from the Basic Fund, which is approximately 85

⁴¹ These measures are on an “excluding music” basis.

percent of the total. As a result, in order for PTV to receive the share of total value to CSOs estimated by the other experts, it must receive a larger share of the Basic Fund, since it will receive no share from the other funds.

Table 3 shows PTV’s share of the Basic Fund based on the 2010-13 estimates of value to CSOs from the surveys and econometric analyses prepared by other experts.⁴² As the data show, the shares in Tables 2 and 3 are similar, with Table 3 ranging from 9.3 percent to 19.7 percent. These estimates are generally consistent with the results of the changed circumstances method.

TABLE 3
PTV Share of Basic Fund: 2010-13
Based on Surveys and Regressions

<u>Period</u>	<u>Augmented Bortz Survey</u>	<u>Horowitz Survey</u>	<u>Crawford Preferred Regression</u>	<u>Israel Regression</u>
2010	8.6%	8.8%	16.1%	
2011	10.2%	15.6%	21.8%	
2012	8.0%	17.6%	20.1%	
2013	10.5%	17.6%	20.7%	
2010-13	9.3%	14.9%	19.7%	15.6%

VIII. Conclusion

The growth of relative PTV distant subscriber instances alone supports an average PTV share of the Basic Fund excluding music of 9.9 percent for the 2010-13 period. However, other measures—viewing and value to CSOs based on surveys and econometric analyses—show greater growth in PTV’s relative value, and support higher ranges of PTV shares of the Basic Fund excluding music from 9.9 to 20.8 percent. The larger increases are supported by an

⁴² Table 3 uses Dr. Crawford’s “preferred” estimate, which adjusts for duplicative programming,

increase in value per unit of the distant PTV programming, as shown through increased viewing intensity and increased value of an additional minute of such programming. This is consistent with the higher PTV shares found in the Horowitz survey and the Crawford and Israel econometric analyses.

DECLARATION

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of April, 2017



Linda McLaughlin

Executed this 17th day of April, 2017



David Blackburn

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

**DISTRIBUTION OF CABLE ROYALTY
FUNDS**

**CONSOLIDATED PROCEEDING
NO. 14-CRB-0010-CD (2010–13)**

Rebuttal Testimony of

Linda McLaughlin

and

David Blackburn

September 15, 2017

I. Qualifications

A. Linda McLaughlin

I am an applied microeconomist and an Affiliated Consultant at National Economic Research Associates, Inc. (“NERA”). My initial testimony in this proceeding provides additional background information.¹

B. David Blackburn

I am an applied microeconomist and Director for NERA, an economic consulting firm. My initial testimony in this proceeding provides additional background information.²

II. Assignment and Summary of Opinions

Counsel for the Public Broadcasting Service has asked us to assess the representativeness of the Bortz surveys with respect to distant Public Television (“PTV”) carriage in light of data produced by the Joint Sports Claimants in discovery. We reserve the right to supplement our opinions should additional information or testimony become available to us.

In our previous report, we computed the values that the Bortz surveys likely would have found had they not excluded from the original samples cable operators that carried only distant PTV and/or Canadian signals, which we refer to as the “augmented” Bortz surveys.³ Based on our further analysis to date, we conclude that the augmented Bortz surveys’ samples of cable systems for the 2010-13 period have only slightly less distant PTV carriage than the universe of all systems: five percent less. However, not all of those selected to be surveyed actually responded; as we explain below, the actual respondents to the augmented Bortz survey have considerably lower distant PTV carriage than the universe of cable systems: 22 percent less. This shows participation bias with respect to PTV carriage in the augmented Bortz surveys.

¹ Testimony of Linda McLaughlin and David Blackburn, In re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010–13), April 17, 2017 (“McLaughlin-Blackburn Testimony”).

² McLaughlin-Blackburn Testimony.

³ McLaughlin-Blackburn Testimony p. 14.

III. Participation Bias in the Bortz Survey

As we explained in our original report, the Bortz survey, as presented by James Trautman, begins each year with a random sample of cable systems. It then explicitly excludes from the “eligible” sample those systems that carry distant signals only in the PTV and/or Canadian category. A little more than half of those in the eligible sample responded.⁴ The cable operator respondents were asked how they would allocate a fixed budget among the different programming categories based on the distant signals they actually carried in the preceding year. The survey results reflect the collective valuations made by the eligible respondents. Had the omitted systems carrying only PTV and/or Canadian distant signals been included in the eligible sample, they would have been restricted to “allocating the fixed budget” entirely to the category carried. The augmented Bortz results we presented in our original report included these systems, applying the same response rate as those eligible.⁵ We concluded that the augmented Bortz survey showed an increase in PTV value of 31 percent from 2004-05 to 2010-13, which was lower than any other measure of the change in PTV value.⁶

In our initial report, we noted that several large systems carrying distant PTV multicast stations—a major factor underlying the increase in relative PTV carriage—that were eligible to respond to both the Bortz and Horowitz surveys of cable system operator value did not respond to the Bortz surveys but did respond to the Horowitz survey. We suggested that this difference in respondents might explain the reason for the relatively lower Bortz value for PTV programming.⁷ Since our initial report we have further investigated the respondents to the augmented Bortz surveys, based on data produced by the Joint Sports Claimants in discovery.

⁴ Written Direct Testimony of James M. Trautman, Bortz Media & Sports Group, Inc., Cable Operator Valuation of Distant Signal Non-Network Programming, December 22, 2016, pp. 20-21, , *in* Written Direct Statement of the Joint Sports Claimants, vol. 1, tab 1, In re Distribution of Cable Royalty Funds, Consolidated Proceeding No. 14-CRB-0010-CD (2010–13) (“Interviews were completed with between 52 and 57 percent of cable systems included in the sample . . . [R]esponse rates were lower in 2010-13 than the 65 to 68 percent achieved in 2004-05.”).

⁵ McLaughlin-Blackburn Testimony, pp. 13-16.

⁶ McLaughlin-Blackburn Testimony, Chart 8.

⁷ McLaughlin-Blackburn Testimony, p. 17.

The augmented Bortz *sample* for the 2010-13 period has only slightly less distant PTV carriage (15.1 percent) than the universe of all systems (15.8 percent), or 5 percent less.⁸ However, the actual *respondents* to the Bortz surveys, even when similarly augmented, have considerably lower distant PTV carriage (12.4 percent) than both the universe and the augmented sample.⁹ The respondents' carriage of PTV distant signals was 22 percent less than that of the universe of systems. See Table 1.¹⁰ This shows participation bias with respect to PTV carriage.¹¹

**Table 1: PTV Share of Total Distant Subscriber Instances:
Universe Compared with Augmented Bortz Sample and Respondents**

<u>Period</u>	<u>PTV Share of Total Distant Subscriber Instances</u>			Augmented	Augmented
	<u>Universe</u>	<u>Augmented</u>	<u>Augmented</u>	Sample	Respondents
	(1)	Sample	Respondents	Relative to	Relative to
				<u>Universe</u>	<u>Universe</u>
				(2)/(1)-1	(3)/(1)-1
				(4)	(5)
2010-1	13.6%	11.5%	9.8%	-16%	-28%
2011-1	16.7%	16.3%	11.4%	-3%	-32%
2012-1	15.9%	15.6%	13.9%	-2%	-13%
2013-1	16.9%	16.1%	14.1%	-5%	-16%
2010-1 to 2013-1	15.8%	15.1%	12.4%	-5%	-22%

⁸ The augmented Bortz sample includes the Bortz “final eligible” sample plus the systems in the original Bortz sample that were eliminated because they imported only PTV and/or Canadian stations.

⁹ The augmented Bortz respondents include the actual Bortz respondents plus the omitted systems that import PTV and/or Canadian stations weighted by the Bortz response rate.

¹⁰ Data from Cable Data Corporation (“CDC”) based on survey information provided by the Joint Sports Claimants.

¹¹ For a general discussion of the problems with participation (or non-response) bias, see Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence*, Third Edition, Washington, DC: Federal Judicial Center/National Academy of Sciences, The National Academies Press, pp. 359, 383-85.

Because we initially found that several large systems carrying distant PTV stations did not respond to the Bortz surveys but did respond to the Horowitz survey, and now have discovered participation bias in the augmented Bortz surveys, we similarly decided to check for participation bias in the Horowitz survey. We previously concluded that the Horowitz survey showed an increase in PTV value of 109 percent from 2004-05 to 2010-13.¹² Based on data produced by the Program Supplier Claimants in discovery, we found that the respondents to the Horowitz survey have higher carriage of PTV distant signals (18.6 percent) than the universe of all systems (15.8 percent).¹³ The Horowitz survey's respondents' participation bias with respect to carriage of PTV distant signals was in the opposite direction compared to the augmented Bortz respondents, and slightly less biased (18 percent overrepresentation by the Horowitz respondents versus 22 percent underrepresentation by the augmented Bortz respondents).¹⁴

The augmented Bortz surveys' participation bias may partially explain why, unlike other measures of value (including the Horowitz survey), the augmented Bortz surveys do not show an increase in PTV value that is greater than merely the increase in PTV carriage. In our initial report, we concluded that the relative increase in carriage of distant PTV stations in 2010-13 indicates that the relative marketplace value of distant PTV stations has increased. Based on changes in other measures supplied by experts for other parties, including cable system operator ("CSO") survey value results and CSO econometric value results, we further concluded that the relative share of distant PTV programming grew at least approximately as much, and in most cases substantially more, than PTV's increase in carriage.¹⁵ To the extent that these other CSO values for PTV programming increased more than the carriage of that programming, they show an increase in the per-unit value of the PTV programming and, thus, a larger increase in value than the increase in carriage.

¹² McLaughlin-Blackburn Testimony, Chart 8.

¹³ Data from CDC based on data provided by the Program Supplier Claimants in discovery and universe data in Table 1 above.

¹⁴ On a year by year basis, the respondents to the Horowitz survey have higher PTV carriage by about 18 percent in 2010, about 25 percent in 2011, about 5 percent in 2012, and about 17 percent in 2013. (Data from CDC based on data provided by the Program Supplier Claimants in discovery and universe data in Table 1 above.)

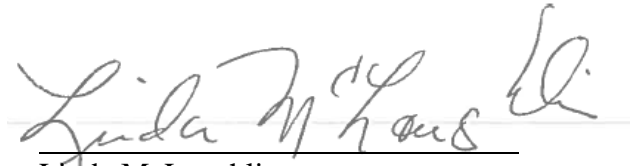
¹⁵ McLaughlin-Blackburn Testimony, pp. 2-3.

While three of the measures of CSO value supplied by experts for other parties (the Horowitz survey and the Crawford and Israel econometric results) show a larger increase in the value of distant PTV programming than the increase in carriage of distant PTV programming, the augmented Bortz surveys show approximately the same increase in value as in carriage.¹⁶ The participation bias as to PTV carriage in the 2010-13 augmented Bortz survey may explain why it does not show a greater increase in *its respondents'* value of PTV programming than *the universe's* increase in PTV carriage: its respondents are not carrying PTV as much as the universe is. In contrast, the Horowitz survey shows an increase in distant PTV programming value even relative to its respondents' higher carriage of distant PTV programming and is generally more consistent with other measures of CSO valuation.

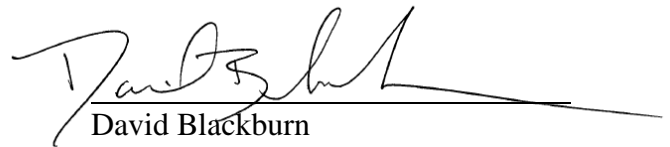
DECLARATION

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of September, 2017


Linda McLaughlin

Executed this 15th day of September, 2017


David Blackburn

¹⁶ McLaughlin-Blackburn Testimony, Chart 8.

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) Docket No.
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5) Docket No.

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7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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20 VOLUME XI

21

22

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1 P R O C E E D I N G S

2 (9:02 a.m.)

3 JUDGE BARNETT: Good morning. Please
4 be seated.

5 Mr. Dove?

6 MR. DOVE: Would you like to swear the
7 witness, Your Honor?

8 JUDGE BARNETT: Oh, I could do that.

9 (Laughter.)

10 Whereupon--

11 LINDA MCLAUGHLIN,
12 having been first duly sworn, was examined and
13 testified as follows:

14 JUDGE BARNETT: Please be seated.

15 DIRECT EXAMINATION

16 BY MR. DOVE:

17 Q. Good morning, Ms. McLaughlin.

18 A. Good morning.

19 Q. Would you please state your name for
20 the record.

21 A. Linda McLaughlin.

22 Q. What is your current position?

23 A. I'm an affiliated consultant at NERA,
24 an economic consulting firm.

25 Q. And when did you begin in that

1 position?

2 A. 2014.

3 Q. Did you hold prior positions at NERA?

4 A. Yes. I've worked at NERA since 1974.
5 I started as a consultant and worked my way up
6 over the course of time to senior vice
7 president. I retired from full-time work in
8 2009, and then I was called a special
9 consultant, and they changed the titles again,
10 and affiliated consultant. Maybe I'll go back
11 to consultant at the end of this.

12 Q. And how long have you been affiliated
13 with NERA?

14 A. For over 40 years, since 1974.

15 Q. Ms. McLaughlin, what is your
16 educational background?

17 A. I have a Bachelor of Science degree in
18 math from Marquette University, and a Master's
19 degree in economics from the University of
20 Pennsylvania.

21 Q. At NERA, in general, what kinds of
22 work do you do?

23 A. I do microeconomics, generally in
24 contested matters like this, antitrust and
25 intellectual property areas for the most part,

1 sometimes commercial damages.

2 Q. And are there particular industry
3 areas in which you tend to concentrate?

4 A. Yes. I have done a lot of work in
5 media and entertainment.

6 Q. And for approximately how many years
7 have you concentrated in the media and
8 entertainment area?

9 A. For more than 30 years.

10 Q. Have you previously testified before
11 the Copyright Royalty Judges or their
12 predecessors as an economic expert regarding
13 copyright licensing or the valuation of
14 copyrighted works?

15 A. Yes, I have.

16 Q. Could you please describe that
17 testimony or identify that testimony.

18 A. So I think the first was in a rate
19 determination for carriage on satellite of
20 television stations, and then I -- and that was
21 -- that was for PBS. And then the second was
22 for MPAA, and that was in the split-up of the
23 satellite royalty fund. And that -- that was
24 just a report or testimony, written testimony.
25 I believe there was a settlement. It didn't go

1 to the hearing.

2 Then in the 2000 to 2003 rate
3 determination in cable of the split-up of the
4 cable pool, similar to this. And the same
5 thing in 2004-'05.

6 Q. And in the 2000 to 2003 cable royalty
7 distribution proceeding, who were you retained
8 by in that proceeding?

9 A. In the last two, both of those were
10 for -- well, one was for PBS and the NAB. That
11 was the 2000 to 2003. And the other was PBS.

12 Q. Do you recall -- let's -- I guess,
13 going back to the satellite rate adjustment
14 proceeding, do you recall in that proceeding,
15 did the Judges adopt the methodology that you
16 put forward?

17 A. Yes, I think they did.

18 Q. And how about in the 2004-'05
19 proceeding? Did the Judges adopt your
20 augmentation in that proceeding?

21 A. Yes. I -- I did something similar to
22 what I'm doing now, augmenting Bortz study, and
23 that was used as a starting point by the
24 Judges.

25 Q. Thank you. Ms. McLaughlin, have you

1 testified or filed reports in other types of
2 proceedings as an economic expert regarding the
3 economic attributes of entertainment and media
4 markets?

5 A. Yes.

6 Q. Would you please provide a few
7 examples of that testimony.

8 A. Yes. I submitted testimony to the FCC
9 in the -- in a proceeding concerning cable
10 rates and the effect of competition on them.
11 Also to the FCC about bargaining power between
12 cable operators and cable networks. And to the
13 FTC on pricing of streaming music services.

14 Then also in federal court, a matter
15 between HBO and a pay-per-view operator
16 concerning the pay-per-view rights to a fight.
17 An arbitration, a matter between Cablevision
18 and the YES Sports Network about what tier the
19 sports network should be carried on.

20 That, you know --

21 Q. Let me drill down. In -- with regard
22 to in the course of your work, have you ever
23 analyzed -- had the need to analyze surveys and
24 other statistical studies?

25 A. Yes. The cable rate hearing was

1 largely about -- not hearing, I'm sorry -- the
2 FCC cable rate inquiry was focused on
3 econometric studies of how competition affects
4 cable rates.

5 On the survey side, I've worked with
6 Nielsen and other viewing data since one of my
7 first projects at NERA, about TV stations in
8 New York and Philadelphia and the people in the
9 middle, what they did, and where, you know,
10 special surveys were done to analyze in more
11 detail than would normally be given in -- in
12 published reports.

13 In the Cablevision case, that also
14 involved surveys, not only the Nielsen data on
15 viewing that Yes would use to sell its
16 advertising time but also in the -- a telephone
17 survey about consumers watched Yankee games,
18 whether they were just available to all cable
19 subscribers or restricted on a special tier.

20 Q. Thank you.

21 MR. DOVE: Your Honors, at this time,
22 we offer Ms. McLaughlin as an expert economist
23 with experience in the economic attributes of
24 entertainment and media markets and the
25 valuation of copyrighted works within those

1 markets.

2 JUDGE BARNETT: Hearing no objection,
3 Ms. McLaughlin is so qualified.

4 MR. DOVE: May I approach the witness
5 and the bench?

6 JUDGE BARNETT: You may.

7 BY MR. DOVE:

8 Q. Ms. McLaughlin, I just handed you a
9 binder of exhibits that contains Exhibit 3012.
10 We've also included in the binder Exhibits
11 1001, 3000, 3002 through 3008, and 3012 for
12 potential reference, but right now I want to
13 focus on Exhibit 3012.

14 And I'd like you to examine that,
15 please, and tell me whether this is the written
16 testimony of you and Dr. Blackburn of April
17 17th, 2017.

18 A. Yes.

19 Q. And I'd like you to please turn to
20 attachment 1 of Exhibit 3012. And I'd like to
21 ask you, is this a description of your
22 experience and qualifications?

23 A. Yes. It's called Appendix 1, but --

24 Q. Okay.

25 A. Yes, it's a description.

1 Q. Who is Dr. David Blackburn?

2 A. David is a director at NERA. He works
3 out of the Washington, D.C. office. I've
4 worked with him, and he's an economist that
5 I've worked with on other recent projects, as
6 well as this one.

7 Q. Turning to attachment 2 of
8 Exhibit 3012, is this a description of
9 Dr. Blackburn's experience and qualifications?

10 A. Yes.

11 Q. And did you and Dr. Blackburn
12 collaborate to prepare the testimony in
13 Exhibit 3012?

14 A. Yes.

15 Q. What were your respective roles?

16 A. Well, Dr. Blackburn worked under my
17 direction. I -- we talked back and forth about
18 the information we were looking at in the
19 report and the actual words in the report. And
20 I asked him to look into certain things more
21 closely than I did, but I would just say he
22 worked under my direction.

23 Q. And do you have any corrections to
24 Exhibit 3012?

25 A. The only thing I noticed when I was

1 reading through this recently is we reference a
2 wrong footnote number, and footnote 18, it says
3 as we noted in footnote 15, but it should
4 really be 16. And they're both on the same
5 page, so it's pretty easy to see that.

6 Q. Okay. Any other corrections?

7 A. No.

8 Q. Thank you. Ms. McLaughlin, on whose
9 behalf are you appearing here today?

10 A. Public Broadcasting Service.

11 Q. And what were you asked to address in
12 your direct testimony?

13 A. I was asked to address the share of
14 the royalties that -- from the -- that PBS
15 should receive from the distribution of its
16 signals in a distant -- on distant cable
17 systems.

18 Q. And was this a determination of
19 relative value? Were you looking at relative
20 value?

21 A. Yes, the relative value of the PTV --
22 of PTV -- I'm sorry about the PBS/PTV, but I've
23 been calling it PTV in my report.

24 So the distribution of the relative
25 value or what is the relative value of the PTV

1 signal compared with other distant signals that
2 are imported by cable systems in 2010 to 2013.

3 Q. And we're going to walk through those
4 -- your conclusions in detail, but just, first,
5 I was wondering if you could explain just, you
6 know, did you -- well, did you reach any
7 conclusions as to the questions you were asked
8 to address?

9 A. Yes.

10 Q. And just in general, what did you
11 conclude?

12 A. Well, I concluded as to the amount of
13 the rate, that it should be at least -- by
14 rate, I mean the relative value -- at least
15 9.9 percent and perhaps as much as
16 20.8 percent.

17 I reached this conclusion based on
18 looking at changed circumstances since 2004-'05
19 beginning with the rate that was established at
20 that time, the relative value that was
21 established at that time for PTV, and first
22 looking at the changes in distant subscriber
23 instances, which is just a measure of units,
24 but it was a quite striking one, and then
25 looking at measures of value or other measures

1 that would indicate the extent to which what I
2 first saw in units was reflected in value.

3 Q. And then after you looked at the
4 changed circumstances, did you -- did you also
5 look at sort of the estimates that were
6 actually presented by some of the other parties
7 in this proceeding?

8 A. Yes. Changed circumstances includes
9 the current -- is going from the past to the
10 current. And if you just looked at the
11 current, it should come out, you know, in a
12 similar way. And, in fact, it did.

13 So I compared the estimates that I got
14 that way with what the -- with what some other
15 parties said as what their relative value for
16 PTV would be.

17 JUDGE STRICKLER: Excuse me, counsel.

18 MR. DOVE: Sure.

19 JUDGE STRICKLER: Good morning. How
20 are you?

21 THE WITNESS: Good morning.

22 JUDGE STRICKLER: I have a question
23 for you, just so I understand, to orient myself
24 to your testimony and consistent with your
25 testimony just now at the bottom of page 2 of

1 your report, together with David Blackburn, you
2 say that you expanded upon what was done in the
3 2004-2005 determination based on the increase
4 in carriage of Public Television stations,
5 correct?

6 THE WITNESS: Right, in terms of the
7 change in -- percentage change in subscriber
8 instances, yes.

9 JUDGE STRICKLER: And then on the next
10 page on page 3, in the first bullet point on
11 that page, you begin by saying "in addition."

12 THE WITNESS: Right.

13 JUDGE STRICKLER: I just want to
14 understand what you mean by "in addition" in
15 that context. Are you saying that on top of
16 that carriage-oriented and increased viewing or
17 subscribership, I should say, that you
18 mentioned in the previous bullet point, this is
19 additive or are you saying it's an additional
20 way of looking at it by reflecting on the
21 additional evidence that you measure, the
22 econometric values, the survey values? So is
23 it an alternative, an additional methodology,
24 or is it a -- are you doing a build-up?

25 THE WITNESS: It's not a build-up. If

1 I understand, it's not first you take this
2 change in share and then you -- in subscriber
3 instances, and then on top of it, you add these
4 other changes in value.

5 Rather, that the change in this units
6 measure may indicate a change in value or
7 perhaps the value of each unit went down,
8 relatively went down. It could have down, up,
9 or stayed the same.

10 So I'm looking at these and other
11 measures of value to see if the units change is
12 reflecting a relative change in value.

13 JUDGE STRICKLER: Okay. Just so I
14 understand it, does "in addition" mean an
15 alternative approach to check and confirm the
16 first approach, the first bullet point on --

17 THE WITNESS: Right.

18 JUDGE STRICKLER: Is that what it
19 means or is it cumulative?

20 THE WITNESS: Well, it's cumulative in
21 the sense that it's not just -- it's not just
22 to check it, but it is also to check it. All
23 right?

24 So if there's -- if there's a change
25 in units -- I said it at the beginning in terms

1 of the numbers. The change in units alone
2 would imply a relative market value for PTV of
3 9.9 percent. When I see values going up at
4 least as much or more, then I can say at least
5 9.9 percent. Do you see -- based on the units.

6 But then I can look at the value
7 measures themselves and say: Well, if you just
8 look at the change in value, knowing that there
9 had been this units increase as part of the
10 reason the value is changing, there's more of
11 it and it's valued at a higher amount. Then
12 you could just look at those as well.

13 JUDGE STRICKLER: So the 20.8 percent
14 that you mention is, in fact, cumulative? It's
15 looking at the additional number of units and
16 the additional evidence that you summarize --

17 THE WITNESS: Right. The --

18 JUDGE STRICKLER: -- in the second
19 bullet point?

20 THE WITNESS: Yes, the 20.8 percent
21 comes from a change in a value measure alone.
22 All right? And that value measure has --
23 involves both a change in price, a change in
24 the amount of minutes, and a change in the
25 amount of carriage.

1 JUDGE STRICKLER: Thank you.

2 BY MR. DOVE:

3 Q. Ms. McLaughlin, let's turn to your
4 analysis of changed circumstances between
5 2004-'05 and 2010-'13 in the distant signal
6 marketplace as relevant to Public Television.

7 What sort of data or information did
8 you review or consider in addressing that
9 issue?

10 A. I use data from the CDC, Cable Data
11 Corp., the past determinations, and both the
12 reports of people that were -- other people
13 submitted in this proceeding and their -- and
14 some of the data underlying those reports.

15 Q. And what types of reports are you
16 referring to that were submitted in this
17 proceeding?

18 A. Reports that looked at -- by other
19 experts, so Mr. Trautman, Dr. Horowitz,
20 Dr. Crawford, and so forth, as well as similar
21 reports from the 2004-'05 proceeding because
22 I'm looking at some changes -- at changes.

23 Q. Let's take those then one at a time.
24 First, what specific steps did you take to
25 analyze the data from Cable Data Corporation to

1 address whether the relative value of distant
2 Public Television signals had changed?

3 A. Well, the first thing I looked at was
4 the change in subscriber instances. And that's
5 -- so that's one subscriber receiving one
6 distant Public Television station or one
7 distant station of any type.

8 And I looked -- I saw how the
9 different types of programs -- the different
10 types of signals, Public Television,
11 independent stations, networks, Canadian, low
12 power, how they changed and in total how all of
13 the importation of distant signals changed
14 compared to any subscribers and systems that
15 imported anything. There are some systems that
16 don't import anything.

17 Q. Is there a table that shows the
18 results of that, of what you saw?

19 A. Yes, my chart 1.

20 Q. Let's pull up chart 1. What does
21 chart 1 show?

22 A. Chart 1 shows, if you just look at the
23 entire bar, that the total of subscriber
24 instances per subscriber went down from
25 2004-'05 to 2010-'13. So the bar is shorter.

1 It went down from 1.45 to 1.28.

2 And the PTV increased during that
3 time, the little part on the bottom, from .176
4 to .204 per -- so a cable subscriber received
5 about 17 -- you know, about 17 and a
6 half percent of them received one signal, and
7 then, you know, about 20 percent of them
8 received one signal in the second time period.

9 However, they're receiving fewer
10 signals and all of the other types of
11 programming, independent stations, et cetera,
12 went down per subscriber. So one went -- PTV
13 went up and the others went down.

14 Q. Let's turn to chart 2 of your report.
15 What does this chart show?

16 A. In this chart, I look at the same
17 information but just look at the percent
18 distribution of the distant subscriber
19 instances. And so here it shows that PTV's
20 share went up from 12 percent to 12.1 percent
21 to 15.9 percent, which is a 32 percent
22 increase.

23 Q. And what happened with regard to the
24 other types of signals?

25 A. Well, the network signals went down a

1 lot. In terms of percentage, Canadian and low
2 power went up because -- and the independents
3 went up a small amount.

4 Now, they went up because there was
5 such a decline in the others that, even though
6 the number went down, the percentage went up.

7 Q. And what did you conclude from this
8 analysis?

9 A. That the subscriber instances for PTV
10 increased by a lot. And if you were to use
11 that measure alone, which as I said, I didn't
12 just use that measure alone, but if you were to
13 just use that measure alone, that the rate --
14 the relative value in 2004-'05 that the
15 previous Judges determined, which was
16 7.55 percent of the Basic Fund excluding music,
17 that that would have increased by -- if that
18 increased by 32 percent, that would bring us up
19 to the 9.9 percent of relative value for PTV
20 that I mentioned earlier.

21 Q. And I think you -- I know you
22 testified to this to some extent, but just to
23 be clear, do you think that distant subscriber
24 instances are the best possible evidence of
25 relative marketplace value?

1 A. No. I think you have to put it
2 together with something that has the price part
3 of the equation in it, not just the -- not just
4 the -- not just the units but the value as
5 well. So that's why I looked at these other
6 measures.

7 Q. I'd now like to turn to the subject of
8 cable operator surveys. Whose testimony
9 regarding cable operator surveys did you
10 consider in addressing changed circumstances
11 from 2004-'05 to 2010-'13?

12 A. I looked at the Bortz -- really my own
13 testimony from 2004-'05, the augmented Bortz
14 report, which relied on Dr. -- on
15 Mr. Trautman's work, and just augmented it to
16 add the signals that he had left out.

17 And then I looked at that, again, in
18 -- I did that same thing in 2010 to '13. And
19 then in the 2010-'13, I also looked at the
20 survey done by Dr. Horowitz.

21 Q. Let's talk about Mr. Trautman's Bortz
22 survey first. On page 14 of your testimony,
23 you discuss an adjustment to the Bortz survey,
24 both in 2004-'05 and in 2010-'13.

25 Why did you decide that you needed to

1 adjust the Bortz survey?

2 A. The Bortz survey asks -- takes a
3 sample of cable operators and asks -- and wants
4 to ask them how they would apportion the value
5 of the signals they carry. They -- but they
6 deemed some people ineligible. They selected
7 them in the sample, but they were ineligible
8 for the survey. And those -- those cable
9 operators were people who imported only PTV
10 signals or only Canadian signals or a PTV and a
11 Canadian signal but nothing else.

12 So what I'm doing is adding them back
13 in so that they can -- we can have a picture of
14 all the cable operators. Or a sample of all
15 the cable operators.

16 Q. And I believe you may have testified
17 to this earlier, but did the Judges in the
18 2004-'05 proceeding rely on your testimony
19 regarding adjustment of the Bortz survey?

20 A. They used it as a starting point for
21 their determination of the relative values.

22 Q. In the 2004-'05 Bortz survey, how many
23 cable systems were excluded from that Bortz
24 survey, even though they imported a Canadian or
25 Public Television distant signal?

1 A. In each year, I think it was ten.

2 Q. And how about in 2010 to 2013? In
3 those years -- or in the Bortz survey for those
4 years, how many cable systems were excluded
5 from that Bortz survey even though they
6 imported a Canadian or Public Television
7 distant signal? And so this is not a memory
8 exercise, for your convenience we put up here a
9 slide that shows that relevant footnote from
10 Mr. Trautman's report.

11 A. Yes. In the -- over the four years,
12 it was an average, I think, of 16, but it was a
13 different number in each year. So the
14 highlighted part here says in 2010, is talking
15 about 15 PBS-only and 2 Canadian. So that
16 would be 17 for that year.

17 But there are different numbers for
18 the different years, 17 PBS-only in 2011, et
19 cetera.

20 Q. In order to do your augmentation of
21 the Bortz survey, what were your initial
22 assumptions?

23 A. I assumed that the systems that I was
24 adding back in would have to answer the survey
25 in the same way it was asked for the other

1 people, and that is they were only allowed to
2 respond to the category they are carrying and
3 they are supposed to split up their value among
4 the categories they are carrying.

5 So they would have to say 100 percent
6 for PTV, if that's all they carried. And if
7 all they carried was Canadian signal, they'd
8 have to say 100 percent for Canadian. And if
9 they carried both, they'd have to say something
10 between, you know, zero for one and 100 to the
11 other or 100 for one and zero to the other.

12 Q. How about with regard to response
13 rate? Did you make any assumptions about that?

14 A. Oh, when I added them in, I -- I
15 followed the same response rate. If you look
16 at the -- some of the highlighted numbers, so
17 in the final eligible sample for the year that
18 we're looking at, 2010, in all the strata
19 together, there were 288 cable systems but only
20 163 of them completed the surveys.

21 So the response rate, 163 over 288,
22 or, you know, maybe that's, you know,
23 60 percent, say, 50, 60 percent. So I used
24 that same response rate and I did it actually
25 by strata and applied that to the omitted

1 signal. So I didn't assume that all 16 were
2 included. I only assumed, you know,
3 approximately half of the 16 were included.

4 Q. In the most simplified form possible,
5 would you please explain how you went about
6 adjusting the Bortz results in 2010 to 2013.
7 And you can feel free to use this Trautman's
8 Table II-1, if that's helpful to you, in
9 providing this overarching description.

10 A. Okay. So the -- just talking without
11 the -- talking about the strata, the 163
12 completed surveys, those people gave in
13 aggregate an answer for PTV value, and there's
14 another page in the Trautman report or the
15 Bortz report that says that value.

16 Q. It's on, I think, on page 3 of
17 Exhibit 1001.

18 A. Sorry, I just don't want to say the
19 wrong number and start off -- yes, in that
20 year, the survey respondents gave 4.4 percent
21 of the value -- said 4.4 percent of the
22 relative value was PBS. And so I say: Well,
23 the 163, multiplied by 4.4 percent, the portion
24 of the 15 PBS-only signals, say 8 of the 15
25 that would have responded, would give

1 100 percent. The two -- the portion of the
2 two, say, one of the two Canadian systems that
3 would have responded would say zero for PTV.
4 And then I would, you know, multiply that out
5 and divide it by the sum of the 163, the eight
6 PBS-only that would have responded and the one
7 Canadian-only that would have responded.

8 Q. And did you give this simplified
9 explanation anywhere in your written testimony?

10 A. I explained it in my 2004-'05
11 testimony.

12 Q. And the actual process you went
13 through to recalculate the Bortz survey results
14 was a little more complicated than that
15 simplified explanation you just described,
16 correct?

17 A. Yes.

18 Q. And what else did you have to do to
19 adjust the Bortz results?

20 A. Well, first, I -- the Bortz survey was
21 done by strata. That is the different size of
22 the systems as is shown on that table, that the
23 small, medium, sort of larger and very largest.

24 And then it was -- in each strata,
25 there was different response rates, so I used

1 the response rates that were applied to the
2 strata.

3 In the -- the Bortz survey doesn't
4 just use each response to weight it equally.
5 It weights them by their royalties. So I
6 weighted each of the people I'm adding in by
7 their royalties.

8 And then at the end, it re-weights all
9 of the strata by the royalties in the --
10 the percent of the royalties that is in the
11 universe as opposed to in the sample. So I did
12 that re-weighting.

13 Q. And did you describe the details of
14 the stratification and weighting process in
15 your written testimony?

16 A. In the 2004-'05 testimony, I had an
17 appendix that did that.

18 Q. And you used the same process in 2010
19 to '13 and provided all of your calculations to
20 the parties in discovery?

21 A. Yes.

22 Q. If we could turn now to chart 3.
23 After you performed the recalculation in
24 2004-'05, what was the adjusted Bortz survey
25 result for Public Television in that year?

1 A. In 2004-'05, it was shown on the first
2 bar there, between 6.1 percent to 6.2 percent
3 with the variation depending on what the people
4 who carried both a PTV and a Canadian would
5 say.

6 Q. So that's why you present that figure
7 as a range?

8 A. Yes.

9 Q. And is that why there is also a range
10 for the Canadian Claimants group at the top of
11 the chart?

12 A. Yes.

13 Q. Sticking with the left side of chart
14 3, how are these other five categories in the
15 middle different from the unaugmented Bortz
16 survey for 2004-'05?

17 A. Well, to the extent that the PTV
18 category -- and Canadian category got bigger,
19 the others shrunk. The percents have to add up
20 to 100 percent.

21 Q. Now, in his written rebuttal
22 testimony, Mr. Trautman states that Public
23 Television should not be credited with
24 100 percent of the value of the programming on
25 PTV-only systems based on the Horowitz surveys.

1 Do you agree with that?

2 A. No.

3 Q. And why not?

4 A. Because the way these surveys were
5 conducted of the people who did respond, they
6 were told: Give us the -- divide up your value
7 in percentage terms between these different
8 categories of the programming that you carry,
9 and make sure the percents add up to
10 100 percent.

11 And then at the end if -- they were
12 reminded: Make sure the percents add up to
13 100 percent. Particularly, I guess, if they
14 didn't, so that they would make them add up to
15 100 percent.

16 And so in order to be consistent with
17 people that actually responded to the Bortz
18 survey and had to have their answers add up to
19 100 percent, however they -- however they
20 divided them, people who carried only PTV would
21 have to say how would I split up the PTV; I
22 would give it all 100 percent because I'm not
23 carrying any other category? The same thing
24 with the Canadians.

25 Q. So let's turn back, again, to chart 3.

1 What does the right-hand side of chart 3 show?

2 A. The right-hand side shows the
3 augmented Bortz survey relative values in
4 2010-2013, and for PTV it shows a range of 7
5 and a half to 8 and a half percent.

6 Q. And how much of a change is that from
7 2004-'05?

8 A. 31 percent.

9 Q. What explains in your view the
10 increase in the augmented Bortz valuation of
11 Public Television from 2004-'05 to 2010-'13?

12 A. Well, there's two parts to it. One is
13 the people who answered the Bortz survey, the
14 actual respondents, gave more to PTV in the
15 second period compared to the first period. On
16 average, they gave -- you know, we use that 4.4
17 as an example, but on average they gave
18 5.1 percent in the later period, and it was
19 something in the 3 percent areas in 2004-'05, 3
20 point something.

21 So, first, the people who actually
22 responded gave more and, second, there was
23 somewhat more PTV-only or PTV plus Canada-only
24 in the second period compared to the first.

25 Q. Is the change in Public Television's

1 augmented Bortz survey valuation consistent
2 with the change in Public Television's distant
3 subscriber instances that we discussed earlier
4 with respect to chart 2?

5 A. Yes, just based on those two pieces of
6 information, you would say that there was
7 approximately the same increase in value as
8 measured by the Bortz survey as there was just
9 in subscriber instances as we first discussed.
10 9.9 percent would be the resulting value if you
11 applied the -- either percent.

12 Q. Now, in 2010 to '13, was there a cable
13 operator survey that included all eligible
14 cable systems, including those whose only
15 distant carriage was Public Television
16 stations?

17 A. Yes.

18 Q. And which survey was that?

19 A. The Horowitz survey.

20 Q. And is this illustrated in chart 4 of
21 your report?

22 A. Yes. In chart 4, I compare the
23 Horowitz survey in the current period to the
24 augmented Bortz survey in the prior period, and
25 I make that comparison to the augmented Bortz

1 because Horowitz already includes the PTV and
2 Canada-only signals.

3 Q. Did Mr. Horowitz conduct a survey
4 himself in the 2004-'05 proceeding?

5 A. No.

6 Q. How does Mr. Horowitz's 2010 to '13
7 survey compare to the 2004-'05 augmented Bortz
8 survey?

9 A. Instead of having the kind of increase
10 we saw before of about 30 percent, here it's
11 approximately double for the PTV share.

12 Q. Sticking to your direct testimony for
13 now, did you notice when you were preparing
14 this report any possible reasons that might
15 explain why on average cable operators
16 responding to the Horowitz survey valued Public
17 Television more highly than cable operators
18 responding to the Bortz survey, even after the
19 Bortz survey had been augmented?

20 A. Yes. When I prepared the report and
21 saw that they were different, I was trying to,
22 you know, understand how that would happen.
23 And so I looked into the responses for -- that
24 is, who was in the respondent group for Bortz
25 and for Horowitz.

1 And I saw that there were some big
2 cable systems that carried -- they were very
3 large; they carried -- in terms of royalty
4 payments. They carried -- and they carried
5 more Public Television signals than the
6 average. So they were -- they had a higher,
7 you know, percent of subscriber instances than
8 the average.

9 And they were not included in the
10 Bortz survey. And these particularly, I didn't
11 -- I didn't say the name of them in the -- you
12 know, I had a footnote in my report and pointed
13 to, you know, documents that I looked at, but
14 these were Verizon systems.

15 Q. And we're going to come back to that
16 when we get to your rebuttal testimony later,
17 but let's now turn and talk about the
18 econometric regression analyses.

19 Whose testimony regarding regression
20 analyses did you consider in addressing changed
21 circumstances between 2004-'05 and 2010-'13?

22 A. For the earlier period, I looked at
23 the regression from Dr. Waldfogel. And from
24 the later period, I looked at two regressions,
25 one from Dr. Crawford and one from Dr. Israel.

1 Q. So looking now at chart 5 from your
2 direct testimony, what does this chart show?

3 A. On the left, it shows Dr. Waldfogel's
4 results in terms of the relative value that
5 came out of his econometric analysis. And for
6 PTV, it shows 6.8 percent.

7 So the -- and then in the -- in the
8 right, it shows the Crawford analysis for the
9 2010-'13 time period. Now, Crawford did two
10 analyses. This is the one that is most
11 comparable -- you know, comparable to
12 Waldfogel. He did a second that he preferred
13 but that wasn't too dissimilar, but it wasn't
14 comparable, so that's why I used this one.

15 And in this initial analysis of
16 Crawford, he found 18.8 percent of the relative
17 value for PTV, which is about almost triple
18 what Dr. Waldfogel found.

19 Q. How did Dr. Crawford's analysis of the
20 marginal value of a minute of Public Television
21 programming compare with Dr. Waldfogel's
22 analysis?

23 A. Dr. Waldfogel found an average -- that
24 the -- that an incremental minute of PTV
25 programming would be worth 4.4 cents -- no, 4.

1 -- I say it in my report. I just don't want to
2 say the -- say it backward. I think it's 4 --
3 4.2 cents, sorry. And Dr. Crawford found that
4 it was 5.1 cents. So it went up, you know,
5 20 percent or so.

6 And so this -- this is showing more or
7 less directly that not only did the units go up
8 in terms of subscriber instances but the price
9 actually went up in terms of the value of an
10 incremental minute.

11 Now, the minutes went up more than the
12 subscriber instances, and that's why the value
13 was tripling and not just increasing by
14 30 percent and then another 20 percent.

15 Q. Let's turn to chart 6. What does this
16 chart show?

17 A. This compares the same Waldfogel
18 analysis with Dr. Israel's 2010 to '12
19 analysis, which Dr. Israel said was comparable
20 to Waldfogel.

21 Q. And what are the results as to Public
22 Television here?

23 A. Here Public Television, you know,
24 approximately doubled from 6.8 percent of
25 relative value to 13.5 percent.

1 Q. Let's turn now to the viewing studies.

2 JUDGE STRICKLER: Just before you
3 do -- counsel, excuse me.

4 I note that you explained through
5 chart 5 and chart 6 the comparisons of the two
6 econometric analyses. You don't favor -- in
7 your report, correct me if I'm wrong, you don't
8 favor one over the other as being more
9 probative; is that right?

10 THE WITNESS: That's right.

11 JUDGE STRICKLER: Thank you.

12 BY MR. DOVE:

13 Q. So, Ms. McLaughlin, turning now to
14 viewing studies, whose testimony regarding
15 viewing studies did you consider in addressing
16 changed circumstances from 2004-'05 to
17 2010-'13?

18 A. I looked at Mr. Lindstrom's study in
19 the earlier period and Dr. Gray's study in the
20 later period.

21 Q. If you could turn to chart 7 of your
22 testimony. What does this chart show?

23 A. This is showing relative viewing in
24 the two periods, and the PTV viewing, according
25 to these data, went up from 20 percent to

1 33 percent.

2 Q. And was --

3 A. But the increase in viewing is not the
4 same as -- as the previous measures we were
5 talking about in value, but it's showing that
6 the increase in viewing was greater than the
7 increase in subscriber instances, suggesting
8 that the program became more popular with
9 consumers, and that might be why the value went
10 up -- also a reason why the value went up to
11 the cable operators. But it's not a value
12 measure itself.

13 Q. All right. If we could turn now to
14 slide 12. And I just want to tie all this
15 together in looking at what is, I guess, chart
16 8 of your testimony.

17 And if you could just sort of walk us
18 through that bar by bar. What does this chart
19 8 demonstrate?

20 A. All right. So here I'm looking at
21 percentage change between 2004-'5 and 2010-'13
22 in a variety of measures. First, I'm looking
23 at my units measure subscriber instances, and
24 that went up 32 percent, all right?

25 So then I wanted to see what about

1 value? The augmented Bortz survey went up
2 31 percent, about the same. The other value
3 measures went up more. For Horowitz, it was a
4 109 percent increase. For Crawford,
5 176 percent. For Israel, 99 percent.

6 So there -- it's suggesting the
7 increase in value was greater than the increase
8 in subscriber instances in three of the four
9 value measures. And then it also shows that
10 viewing went up. You know, it also shows the
11 increase in viewing as well.

12 Q. And then let's turn to Table 2 of your
13 testimony. What does this summary table show?

14 A. This table shows that if you start
15 with the share that the Judges gave to -- of
16 the Basic Fund that the Judges gave to PTV in
17 2004-'05, which was 7.55 percent, and you
18 increased it by each of these measures, what
19 would happen to PTV's share of the Basic Fund
20 in 2010-'13.

21 So if you increased it by the
22 subscriber instances, it would increase
23 9.9 percent. That's the same as if you used
24 the augmented --

25 Q. I'm sorry, it would increase to

1 9.9 percent?

2 A. To 9.9 percent. Yes, it increased the
3 by 32 percent. So from 7 and a half up to 9.9
4 is the 32 percent.

5 Q. And this is at the bottom -- the
6 bottom row you're talking about, right?

7 A. Yes. I calculated it year by year as
8 well.

9 Q. So that's for subscriber instances.
10 Just going across the columns, what are your
11 conclusions with regard to what Public
12 Television's share of the Basic Fund for 2010
13 to '13 should be, based on those different
14 measures?

15 A. Well, it should be at least
16 9.9 percent and I think greater than that
17 because most of the value measures were more
18 than that, but it would be 9.9 percent based on
19 augmented Bortz, 15.8 percent based on
20 Horowitz, 20.8 percent based on Crawford's
21 initial regression, and 15 percent by Israel's.
22 If you used the viewing measure, it would be
23 12.6 percent.

24 Q. And just to recap, you know, why did
25 you look at changed circumstances for Public

1 Television? I mean, why was that an approach
2 you thought was appropriate here?

3 A. Because it has the most information in
4 it, of any of the approaches, it takes into
5 account what happened in the past. It allows
6 us to compare more things. So we can look at
7 subscriber instances -- the change in
8 subscriber instances, which isn't a measure by
9 itself of value, but it's indicative of one
10 part of the -- of the reason why the value
11 would go up, the -- the units part.

12 And we can look at the regressions
13 which started at a higher level than the Bortz
14 survey did or the augmented Bortz survey did in
15 2004-'5, so we can just look at the change and
16 not just at the level. We can say: Well, it's
17 higher before and now, you know, it's higher
18 but it's higher by a bigger amount.

19 We can look at viewing, which I don't
20 see as a measure of value itself, but we can
21 look at the change in viewing to see that there
22 was an increase in popularity in the
23 programming.

24 So I think it enables us to include
25 more information.

1 Q. And as part of this changed
2 circumstances approach, did you decide, you
3 know, that one particular methodology was
4 better than another? Was that part of what you
5 did?

6 A. No, just that the -- that the change
7 -- I concluded that the change in value was at
8 least as great but probably greater than the
9 change in subscriber instances. So --
10 otherwise, I did not -- I didn't say, oh, we
11 should use, you know, this method or that.

12 Q. Up until now, we've just been talking
13 about changed circumstances. Let's just talk
14 for a moment about other experts' analyses
15 which look at 2010 to '13 in isolation and do
16 not look specifically at changes from 2004-'05.

17 Did you assess how any of those
18 analyses compare with your assessment of
19 changed circumstances?

20 A. Yes.

21 Q. And are the results of that assessment
22 summarized here on Table 3?

23 A. Yes.

24 Q. What does this table show?

25 A. So this table shows that if you ignore

1 the past information and only look currently,
2 the augmented Bortz survey would suggest a PTV
3 share of the Basic Fund of 9.3 percent for the
4 period as a whole. The Horowitz survey,
5 14.9 percent. The Crawford preferred
6 regression -- here I'm using his preferred
7 because he prefers it, and I don't have to
8 compare with something else -- 19.7 percent.
9 And the Israel regression, 15.6 percent.

10 And, you know, these numbers are
11 similar, as you would expect, to changed
12 circumstances because if you look at changed
13 circumstances, that begins with the past and
14 moves to the present and tells you what the
15 present would be based on that change. And if
16 you just look at the present, that's going to
17 incorporate the change in it.

18 So, you know, it's not surprising
19 that, you know, they work out to be the same.
20 Not the same, but similar.

21 Q. Now, I notice that the shares in this
22 table are of the Basic Fund. How did you
23 calculate Public Television's share of the --
24 of the -- well, put it this way: Why -- first
25 of all, why would you make these calculations

1 in terms of the Basic Fund?

2 A. So Public Television only receives a
3 share of the Basic Fund. But all of these
4 studies look at, as a percent of all royalties
5 from all funds, how they would divide the
6 relative value.

7 So that if the relative value is of
8 all royalties but you're only going to pay PTV
9 from the Basic Fund, you have to basically --
10 you know, you have to divide -- the answer is
11 -- by the Basic Fund's share of the total.

12 Q. And so how -- how then in this case
13 did you calculate Public Television's share of
14 the Basic Fund?

15 A. Well, I used the data from CDC that
16 showed how much money is in the Basic Fund and
17 the Syndex Fund and in the 3.75 Fund. And PTV
18 has about 86 -- I mean, I'm sorry -- the basic
19 fund has about --

20 Q. We'll take that.

21 (Laughter.)

22 THE WITNESS: -- 86 percent of the
23 total.

24 BY MR. DOVE:

25 Q. And did the Judges in the 2004-'05

1 proceeding also do a similar calculation with
2 regard to the Basic Fund?

3 A. Yes, they -- yes. I followed the same
4 method.

5 Q. So let's come back now to something we
6 started talking about earlier with regard to
7 the Bortz survey. If we could -- if you could
8 turn in your notebook to Exhibit 3002 in your
9 binder.

10 And my question for you,
11 Ms. McLaughlin, is -- well, first, could you
12 examine this document and tell me whether this
13 is the written rebuttal testimony of you and
14 Dr. Blackburn of September 15th, 2017?

15 A. Yes.

16 Q. And did you and Dr. Blackburn
17 collaborate to prepare the testimony in
18 Exhibit 3002?

19 A. Yes.

20 Q. And do you have any corrections to
21 Exhibit 3002?

22 A. No.

23 Q. I believe you testified earlier that
24 you had noticed that several large cable
25 systems that carried Public Television stations

1 had not actually responded to the Bortz survey,
2 even though they were in the eligible sample,
3 but did respond to the Horowitz survey. Is
4 that right?

5 A. Yes.

6 Q. And were you able to obtain data that
7 allowed you to analyze in a systematic way
8 whether the difference in actual participation
9 rates may have biased the Bortz survey results
10 with respect to Public Television programming?

11 A. Yes. If you remember the first thing
12 we talked about was --

13 Q. I guess if we can go to slide 16,
14 which is Table 1 from your Exhibit 3002, to the
15 extent that's helpful in explaining what you
16 did with respect to this issue.

17 A. Right. We saw that PTV's share of
18 distant subscriber instances was about
19 15.8 percent in the universe. We saw that in
20 the beginning of my charts.

21 So I wanted to compare PTV's share of
22 distant subscriber instances in the universe to
23 what was in the Bortz sample and then the Bortz
24 augmented responses. And I chose this measure
25 because of what I noticed when I was first

1 looking at it, that there were large systems
2 that were not only big royalty payers but
3 carried PTV more than that, you know,
4 15.8 percent average, you know, to a greater
5 extent.

6 So I did that and found that the
7 augmented sample of Bortz -- and, you know, of
8 course, I would use the augmented sample
9 because I'm comparing it to the whole universe.
10 The augmented sample was a little bit low, but,
11 you know, not too much lower in Bortz, about
12 5 percent over the whole time period. But the
13 augmented respondents were quite a bit lower.
14 They were more like PTV's share in 2004-'5.

15 So I thought that this suggested that
16 it's a possible reason for the difference for
17 the lower value of the Bortz -- augmented Bortz
18 survey compared to all the other measures of
19 value that didn't show a greater increase in
20 value than the subscriber instances might have
21 been due to just what happened with the -- with
22 the eligible respondents.

23 JUDGE STRICKLER: And with regard to
24 eligible respondents, did you say earlier this
25 morning that the missing eligible

1 respondents -- that is, that did not respond to
2 the survey -- were Verizon systems?

3 THE WITNESS: Some of them were
4 Verizon, and I think that there were -- I think
5 there were only two Verizon systems that
6 responded to the Bortz survey in any year. And
7 I don't think those two carried PTV, those
8 particular systems.

9 And there were -- but there were --
10 but Verizon is quite a large percent. I think
11 Dr. Crawford has a figure of, in his testimony,
12 of how large in royalty paying that the Verizon
13 systems are, but it's something on the order of
14 14 percent, something like that, over
15 10 percent of all royalties come from Verizon.

16 So I didn't just look to see it was
17 Verizon. I tested it more generally because,
18 you know, I don't know that it was -- it was
19 just Verizon. I think -- but I do think that's
20 part of the problem.

21 JUDGE STRICKLER: And turning to the
22 Horowitz survey, was there also a problem of
23 Verizon not responding to that survey?

24 THE WITNESS: No, in fact, Verizon did
25 respond to the Horowitz survey. And since I

1 was checking Bortz to see if they had a -- some
2 bias in their respondents, I checked Horowitz
3 to see, you know, if they had any on the same
4 measure, and Horowitz had a little more PTV
5 distant subscriber instances than the universe.

6 So Horowitz, you know, seemed to be
7 like more -- heavier on the people carrying a
8 lot of PTV, whereas -- and perhaps due to
9 having a lot of Verizon respondents' responses,
10 and Bortz seemed to be a little light on having
11 the people who were carrying PTV an average
12 amount.

13 JUDGE STRICKLER: So the point you're
14 making on Table 1 in your rebuttal testimony
15 applies only to the Bortz -- augmented Bortz
16 survey, rather than to the Horowitz survey?

17 THE WITNESS: Right. I address the
18 Horowitz survey later in the rebuttal report.
19 I didn't do a chart on it, but I just said
20 that -- I checked it, you know, if one is
21 under, maybe the other one is over. And, in
22 fact, I found that was the case, but the
23 Horowitz survey was not over on this measure by
24 as much as the Bortz survey was under.

25 JUDGE STRICKLER: Do you think the

1 Horowitz survey was deficient -- was inaccurate
2 in any way because of this same phenomenon that
3 you're describing with regard to non-response
4 by Verizon and perhaps others?

5 THE WITNESS: I think it might have
6 been that they -- that the Horowitz survey had
7 more Verizon respondents than their
8 representation in the universe, but, in
9 general, forget about Verizon, just in terms of
10 people's carriage of PTV, they might have
11 gotten eligible respondents that were a little
12 heavier on the carriage.

13 JUDGE STRICKLER: Heavier than the
14 augmented Bortz or heavier than the universe?

15 THE WITNESS: Heavier than the
16 universe. Heavier than the universe, yes.

17 JUDGE STRICKLER: So it would
18 actually, to some extent, err in the other
19 direction?

20 THE WITNESS: Yes, exactly. And I
21 explain that on page 4 of the report. I say
22 that it was the Horowitz -- the higher carriage
23 was like 18 percent higher versus 22 percent
24 lower compared to the universe. In other
25 words, if I had put this whole chart in for the

1 Horowitz study instead of a minus 22 in the
2 right-hand corner, it would have been a plus
3 18.

4 JUDGE STRICKLER: Thank you.

5 BY MR. DOVE:

6 Q. Ms. McLaughlin, in his written
7 rebuttal testimony, Mr. Trautman states that
8 based on his analysis in his appendix table
9 A-5, participation bias does not explain the
10 lower value for Public Television in the Bortz
11 surveys.

12 Do you agree with that?

13 A. No.

14 Q. And why not?

15 A. Well, he used a different measure.
16 Not that it's not a valid measure, but it
17 didn't -- didn't incorporate everything. So he
18 used for his survey, how -- how many of the
19 people in his survey who carried PTV at all
20 compared to the universe -- how many in the
21 universe carried PTV at all?

22 And he said they were about the same.
23 Now, he didn't include the PTV-onlys. They had
24 to carry PTV and something else, you know, but
25 I'm not worried about that problem as long as

1 you use the augmented Bortz.

2 So -- but what I found, it wasn't just
3 PTV carriage that I was looking at; it was the
4 amount of PTV carriage and thinking that since
5 the amount of PTV carriage went up and the
6 values generally went up, and these -- from the
7 other studies, and so there might be a bias
8 here because the Bortz study didn't have the
9 same amount of PTV carriage among the people
10 who did carry PTV.

11 Q. Mr. Trautman also states that Public
12 Television's share in the Horowitz survey is
13 inflated by what he calls an outlier MSO
14 respondent.

15 Do you agree that the respondent
16 identified by Mr. Trautman is an outlier that
17 should be removed?

18 A. No.

19 Q. And why not?

20 A. We can give this outlier a name. It's
21 AT&T. AT&T is a large MSO. They account for
22 about 10 percent of all the royalty payments.

23 The survey is supposed to be
24 representative of the people who have -- who
25 have royalty payments. You wouldn't want to

1 throw out somebody who said 10 percent unless
2 you had a reason to believe their answer was
3 wrong for them, to start with.

4 And there is no reason to believe that
5 their answer was wrong for them that I've seen.
6 Their -- they -- the answers that they give to
7 the value of PTV when they do carry it, they
8 don't carry it in every one of their systems,
9 but the answer they give is higher than many
10 other people, but not the highest, not the --
11 not that there's nobody who gives a value.
12 It's just that they are a lot of them. And so
13 they're getting a lot of weight, which they
14 should, because they pay a lot of royalties.

15 This is not the case of I do a sample
16 of 100 people and I'm going to project it to
17 the universe of the country. And so if one
18 person is so different from the rest, I think
19 that it might not -- it might influence our
20 projection in a way that wouldn't be valid,
21 that wouldn't be true, maybe it was a mistake
22 on their part.

23 We don't -- there is no indication
24 this is a mistake on the part of the AT&T
25 systems. They answer similarly from one year

1 to the next. Sometimes the same; sometimes
2 not. In 2010, they were different.

3 But they -- and not only that, it's
4 not like they are one person who is
5 representing, you know, 100,000 people in the
6 universe. They are about 10 percent of the
7 royalty paying. And in the Horowitz survey,
8 they're representing about 14 percent of the
9 value of the respondents.

10 So they're only standing in for, you
11 know, somebody who is -- themselves and
12 somebody that's half the size of themselves.

13 Q. Didn't Mr. Trautman say that if the
14 responses of one respondent were removed from
15 the Horowitz results each year, the 2010-'13
16 average Horowitz PTV allocation would decline
17 by almost 5 percentage points?

18 A. He said that.

19 Q. And what's your response to that?

20 A. You know, it's a statistic that I saw
21 how he created, and it's not -- you know, he
22 didn't make it up. But it's not the relevant
23 statistic for this survey.

24 This is a weighted survey. His
25 5 percent did not include any weights. If we

1 removed the AT&T responses, all of them -- you
2 can't just remove the ones that say PTV, right?
3 If you remove all the AT&T responses from the
4 Horowitz survey, the survey percentage would go
5 down for PTV but it would go down by about 2
6 percentage points.

7 Q. Thank you.

8 MR. DOVE: I have no further
9 questions.

10 JUDGE BARNETT: Cross-examination?

11 MR. GARRETT: Yes, ma'am.

12 JUDGE BARNETT: Mr. Garrett.

13 CROSS-EXAMINATION

14 BY MR. GARRETT:

15 Q. Good morning, Ms. McLaughlin.

16 A. Good morning, Mr. Garrett.

17 Q. I'm Bob Garrett on behalf of the Joint
18 Sports Claimants. Good to see you again.

19 A. You too.

20 MR. GARRETT: Your Honor, a couple of
21 housekeeping matters before we begin here.

22 We have filed a number of exhibits
23 that we plan to use with Ms. McLaughlin. I
24 canvassed the parties. I think we are in
25 agreement on all but one of them. And for the

1 one that we don't have agreement, I will just
2 simply not move the admission of.

3 JUDGE BARNETT: All right.

4 MR. GARRETT: But with the Judges'
5 permission, I'd like to give Ms. McLaughlin a
6 binder with the exhibits, as well as other
7 material that we're going to be referring to
8 today. And then I'll move for the admission.

9 JUDGE BARNETT: Thank you. We just
10 need to be sure the numbers get on the record.

11 MR. GARRETT: Yes, ma'am. May I
12 approach the witness?

13 JUDGE BARNETT: Yes.

14 MR. GARRETT: Your Honor, the exhibits
15 are Numbers 1096 through 1104 inclusive. And I
16 believe we have no objections to any of those
17 exhibits with the exception of 1102.

18 JUDGE BARNETT: So you're not offering
19 1102?

20 MR. GARRETT: I will not offer 1102.
21 I will offer the others and ask that you admit
22 them.

23 JUDGE BARNETT: Thank you. Then
24 Exhibits 1096 through 1101, inclusive, and 1103
25 through 1104 inclusive are admitted.

1 (Exhibit Numbers 1096 through 1101,
2 1003, and 1004 were marked and received into
3 evidence.)

4 JUDGE BARNETT: And are you
5 withdrawing 1102 or do you want --

6 MR. GARRETT: I think I will use it
7 with her to see what I can get out of it.

8 JUDGE BARNETT: Far be it for me --

9 MR. DOVE: We're going to object to it
10 when it happens.

11 JUDGE BARNETT: Oh, I would be
12 disappointed if you didn't.

13 Go ahead, Mr. Garrett.

14 MR. GARRETT: All right. Thank you,
15 Your Honor.

16 BY MR. GARRETT:

17 Q. So, Ms. McLaughlin, what I've given
18 you are two binders. One contains -- in the
19 smaller one are the exhibits that I just
20 referenced. And at various points during the
21 morning here, we'll refer to some of those
22 exhibits.

23 The other contains some of the
24 material that you had in the binder from
25 Mr. Dove, your testimony, as well as the

1 testimony of some others that we will refer to
2 today such as the Bortz report, as well as
3 possibly some of the prior determinations of
4 the Judges and their predecessors in these
5 proceedings. Okay?

6 A. Okay.

7 Q. Let me -- before I begin here, let me
8 just go back to some of your answers to the
9 final group of questions here. You identified
10 Verizon systems as those that were not included
11 in the Bortz reports, correct?

12 A. Well, I don't think I said they were
13 not included at all. I think there might have
14 been two, right?

15 Q. Right. There were two respondents --

16 A. Right.

17 Q. -- of Verizon here. But they were
18 respondents from Verizon in the Horowitz
19 report, correct?

20 A. Yes, there were.

21 Q. Did you check to see what the average
22 allocation those Verizon systems gave for
23 Public Television in the Horowitz report?

24 A. I did look at that.

25 Q. And do you know how that average

1 allocation compared to the average allocation
2 given by other Horowitz respondents who had
3 Public Television programming?

4 A. It was higher in some cases and, you
5 know, lower in others. I mean --

6 Q. I'm looking for just an overall
7 average.

8 A. Oh. To compute the overall average?
9 I did not compare Verizon's overall average
10 with the Horowitz respondents.

11 Q. Is it possible that the overall
12 average of those Verizon respondents was lower
13 than it was for the other Horowitz respondents?

14 A. You know, I remember that the
15 comparison I did, I compared -- I looked at
16 their responses in three of the years. I have
17 a lot of trouble with the 2010 data from the
18 Horowitz report. I mean, trying to match up
19 who was who. So I didn't look at that.

20 But in the other years, they were
21 higher than the numbers that were in the Bortz
22 report. So I saw that they would have -- they
23 would have -- they would have, on average,
24 raised the Bortz PTV response if they had been
25 included.

1 Q. Do you know what the average
2 allocation was for Public Television in the
3 Bortz reports in the years in question?

4 A. Well, in the augmented Bortz, I have
5 it, if I can look back at the testimony.

6 Q. Certainly.

7 A. You know, I don't think I have the
8 year by -- I don't think I have the year by
9 year in my report. So -- but the -- I just had
10 the overall. So I don't know that I could -- I
11 could say what the average was, but I -- for
12 2010 to '13, it was 6.1 to 6.2 percent. So in
13 the years that I looked at, I know that it was
14 -- they were higher than 6.1 to 6.2 percent.

15 Q. Okay. And you also referenced the
16 AT&T respondents in the -- in the Horowitz
17 surveys, correct?

18 A. Yes.

19 Q. And that was a single respondent who
20 answered on behalf of 60 different systems,
21 correct?

22 A. You know, I know that Mr. Trautman
23 said that. I did not check that. I don't know
24 one way or the other. But I have no reason to
25 disbelieve it, but I didn't check it.

1 Q. Well, the information is in the
2 Horowitz report, isn't it?

3 A. I don't think it's in his report -- it
4 may be in his report, but I don't remember it
5 being in the report. It might be in the
6 backup.

7 Q. Okay. So let me just kind of go back
8 to the beginning here. When were you first
9 retained by the Public Television Claimants?

10 A. I'm not sure, but I think it might
11 have been in 2014.

12 Q. Okay. And your assignment was to
13 determine the relative market value of Public
14 Television programming during 2010 through '13
15 on distant signals?

16 A. Yes.

17 Q. Okay. And in order to make that
18 determination, is the only thing that you
19 looked at the change in the distant subscriber
20 instances, initially?

21 A. Initially -- well, no. I looked at
22 the change in other measures, but only in other
23 measures that were available from CDC. So, you
24 know, I looked at the change, you know, in --
25 other kinds of measures that you could get from

1 CDC, but not like in -- in DSEs or in fees gen
2 or something like that, so I looked at all of
3 those things, but not in -- but I didn't look
4 beyond that initially.

5 Q. Okay. And so you filed your initial
6 testimony here in December of 2016, correct?

7 A. Yes.

8 Q. And in that testimony, the only
9 analysis, the only study that you presented was
10 your change in distant subscriber instances
11 study, correct?

12 A. Yes.

13 Q. And that was the one that you showed a
14 9.9 percent increase in the relative market
15 value of Public Television programming,
16 correct?

17 A. It was the 32 percent increase but
18 would yield a 9.9 percent share of relative
19 value.

20 Q. All right. And then a couple of
21 months later after you had a chance to look at
22 the studies of all the other parties, you filed
23 amended testimony, correct?

24 A. Yes.

25 Q. And --

1 A. That's the testimony we were talking
2 about.

3 Q. That's Exhibit 3 --

4 A. Right.

5 Q. -- 3012 that we were discussing this
6 morning, correct?

7 A. Yes.

8 Q. All right. And so what you did in
9 that study was to -- I'm sorry, in that
10 testimony was to review the studies that had
11 been put in by the other parties, correct?

12 A. Yes.

13 Q. And based upon the studies put in by
14 all the other parties, you then came up with a
15 range of 9.9 percent to, what was it,
16 20.6 percent; is that correct?

17 A. Yes.

18 Q. And within that range, do you have an
19 opinion as to what the fair market value of --
20 relative fair market value of Public Television
21 programming is?

22 A. My -- I don't have a specific number.
23 I just have that it should be greater than the
24 9.9 percent based on the fact that three of the
25 four value studies showed that it was higher,

1 that the value increased to a greater extent,
2 and one of the studies showed the price
3 increased of a minute of PTV programming.

4 Q. So, basically, what you've done here
5 is you've looked at the bottom-line numbers for
6 Public Television in the studies put on by all
7 the other parties here, and just showed what
8 that value is for Public Television, correct?

9 A. Well, I did study -- I did -- in my
10 chart 3, I put in what the -- I put in what
11 values they said, four of the people said, the
12 two survey people and the two regression
13 people, but I looked at the change from '04-'05
14 to 2010-'13 in these other studies by comparing
15 them back to the Waldfogel and the augmented
16 Bortz in that time -- earlier time period and
17 the viewing of Lindstrom.

18 Q. But the range that you have here,
19 between 9.9 percent and the 20.6 percent here,
20 that range is established solely by the studies
21 of the other parties plus your distant
22 subscriber instances analysis, correct?

23 A. If you count the -- in the sourcing
24 for that, you would have to count the Waldfogel
25 and the earlier augmented Bortz, as well as

1 the -- you know, the determination by the
2 Judges.

3 Q. All right. But these are all studies
4 that have been done by other parties?

5 A. Yes.

6 Q. And not by you?

7 A. Yes, yes, exactly. Exactly.

8 Q. All right. And when you got the
9 evidence or the studies from all the other
10 parties, you did your augmentation of Bortz,
11 correct?

12 A. Yes.

13 Q. And the number that you got when you
14 did your Bortz augmentation, was it 9.3 to
15 9.9 percent? Is that correct?

16 A. You're saying the number that you're
17 referring to would be what the -- what the
18 relative value of PTV would be in 2010-'13,
19 9.9 percent based on the change the
20 circumstances method, using just -- using
21 augmented Bortz, and 9.3 percent just looking
22 at the 2010-'13 numbers, yes.

23 Q. All right. So very close to what it
24 was that you first came up with your distant
25 subscriber instances analysis?

1 A. Yes, showing the value increased the
2 same as the subscribers.

3 Q. Okay. Let me just turn -- you talked
4 about your use of the CDC data. You're quite
5 familiar with CDC, I take it.

6 A. I've used the CDC data before.

7 Q. Okay. So let me pull up Exhibit 1096,
8 John.

9 Ms. McLaughlin, this is a spreadsheet
10 that was produced by your counsel in discovery
11 here. And it was represented that it underlies
12 the calculations that you did in the distant
13 subscriber instances analysis?

14 A. Yes.

15 Q. Okay.

16 JUDGE BARNETT: Mr. Garrett, this is
17 marked as a restricted document.

18 MR. GARRETT: Yeah, I'll -- I'm sorry,
19 Your Honor. This was another thing we had
20 discussed. I think it's restricted -- well,
21 first of all, I don't believe the Public
22 Television Claimants have any objection to
23 keeping the room open here while it's
24 restricted.

25 And I think it's restricted here

1 because this was part of a larger database that
2 CDC has, and they don't want the entire
3 database out in the public domain here.

4 JUDGE BARNETT: Well, CDC is not here
5 to tell us that. If there is anyone in the
6 room who is not -- has not signed a
7 nondisclosure agreement or who is not privy to
8 this information, could you please wait outside
9 while we discuss this document.

10 (Whereupon, the trial proceeded in
11 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. GARRETT:

3 Q. Ms. McLaughlin, right before the break
4 we were talking about partially distant
5 signals. Do you recall?

6 A. Yes.

7 Q. And a signal -- a Public Television
8 station as a local signal is eligible for the
9 must-carry rules, correct?

10 A. The local would be eligible, yes.

11 Q. So you're familiar with the must-carry
12 rules?

13 A. I'm not familiar with the details of
14 it, but I know that there are must-carry rules
15 and that they are -- that they apply to Public
16 Television.

17 Q. So could a Public Television station
18 go to a cable system, say, look, I'm a local
19 Public Television station and under the FCC
20 rules you must carry me, correct?

21 A. For the primary signal, I believe that
22 that's true.

23 Q. You are absolutely right. It does not
24 apply to the multi-cast signals, correct?

25 A. Right.

1 Q. So a Public Television station can
2 become a must carry on a particular cable
3 system in certain areas and the cable system
4 might branch out in other areas where it now
5 becomes a distant signal, correct?

6 A. Well, if they carried it, it would be
7 a distant signal in other areas, yes.

8 Q. Okay. And if they carried in those
9 other areas here, they might be carrying them
10 for reasons other than the fact that they
11 value, that is, that the cable operator values
12 the signal, correct?

13 A. They might be carrying -- I think I
14 said in the testimony that you were pointing me
15 to before that it might -- they might want to
16 just have uniform carriage throughout and, you
17 know, that they are devoting a signal, you
18 know, they have to pay a price, and they --
19 both -- both in the signal, but especially this
20 would be the case of a system that was
21 configured so that it would, you know, would
22 have one headend.

23 It would, you know, so it would be
24 costly for them to do things differently,
25 probably not -- that probably wouldn't apply to

1 some of the very large systems that have
2 multiple headends and carry different stations
3 in different parts, both locally and distant.

4 Q. Okay. So in your 2000 to 2003
5 testimony, which was that Exhibit 3003, you
6 state there on page 3 --

7 A. This is 3003?

8 Q. Yes.

9 A. Um-hum.

10 Q. Page 3.

11 A. Yes.

12 Q. In that top paragraph, I think it is
13 the penultimate sentence. "For example." Do
14 you see that?

15 A. Yes.

16 Q. It says, "may retransmit one partially
17 distant signal only for the purpose of carrying
18 the same broadcast stations and other channels
19 throughout its system in order to save on
20 marketing and technical cost."

21 A. Yes, I see that.

22 Q. And that's what you are referring to?

23 A. Yes, exactly.

24 Q. Did you do any -- look at any CDC data
25 that show how often -- well, let me, before I

1 do that, so you have, when we see in your
2 distant subscriber instance analysis, we see
3 that a signal has been carried to one
4 particular subscriber.

5 We can't tell from that alone whether
6 the cable system really valued the distant
7 signal enough to bring it to these other areas
8 or whether it is doing it for these other --
9 other --

10 A. Right, it's not that it has no value.
11 It has the -- it has the market, you know, it
12 has the value that it makes it easier to market
13 the system.

14 Q. Okay.

15 A. I was just giving it as an example.
16 So I don't mean it has no value. I am just
17 saying that it could be -- it could be that
18 they want the signal just so everything is the
19 same throughout.

20 My, you know, my general experience is
21 that larger systems don't have everything the
22 same throughout, but, you know, that they might
23 -- they have -- they might have the same --
24 some the same and some different.

25 Q. Okay. So did you look at any CDC data

1 to get a sense of how often Public Television
2 signals are carried, that is, Public Television
3 distant signals are carried as partially
4 distant signals?

5 A. I didn't actually think partially
6 distant applied now. I thought it was only
7 subscriber groups.

8 But if that's what you -- is that what
9 you mean by partially distant or as a -- as a
10 percent of the system because the subscriber
11 group gets it?

12 Q. You looked at the number of distant
13 subscriber instances in the analysis that you
14 did, correct?

15 A. Right.

16 Q. And some of those distant subscriber
17 instances are going to be -- are going to
18 reflect a signal that is distant to some
19 subscribers of a system and local to others.
20 Correct?

21 A. That's right.

22 Q. And the reason they might be local to
23 the system is because that system received a
24 must-carry request from the Public Television
25 station?

1 A. Or they just want to -- the local,
2 they just want to carry the local public
3 station, whatever it is.

4 Q. Sure. They might want to carry the
5 local Public Television station. But Public
6 Television stations also have the option of
7 existing on carriage in a particular area?

8 A. I think all stations, local stations
9 have the option of insisting on carriage. No?

10 Q. Well, for commercial stations, most of
11 them don't insist upon a must carry. They opt
12 for retransmission consent, don't they?

13 A. I didn't say what -- whether they
14 opted for it or not. I just said that they
15 have the, you know, you could either pay me or
16 I could demand that I be carried.

17 Q. Okay. Would it surprise you to learn
18 that during the period 2010 through '13, that
19 somewhere between 60 and 80 percent of the
20 distant subscriber instances that you looked at
21 there reflected carriage of partially distant
22 signals?

23 A. I don't know that that's true or not,
24 but it would not surprise me. I know that it
25 is very often the case that systems are only

1 carried -- if by that you mean in a -- in a
2 part of the area, so you have a system and
3 5 percent of the area is getting -- 5 percent
4 of the subscribers, in other words, are getting
5 this station as a distant signal.

6 Q. And that would be a partially distant
7 signal in that case?

8 A. Under that definition, it wouldn't
9 surprise me. I don't know that the number is
10 correct or not.

11 Q. Okay. Let's go to your current
12 testimony here which is 3012. Go to page 9.
13 We will put it up on the screen, but if you
14 want the, you know.

15 A. I actually like reading it on a piece
16 of paper better.

17 Q. Fair enough.

18 A. Okay. And what page?

19 Q. 9, note 16.

20 A. Okay.

21 Q. So this is the -- actually I guess you
22 referred to this footnote earlier in your
23 testimony this morning.

24 A. Yes.

25 Q. Talking about the growth in the use of

1 multi-cast signals.

2 A. Yes.

3 Q. And you say there, "of these
4 multi-cast signals, most are PTV multi-cast
5 signals. Out of the 14 million total
6 multi-cast subscriber instances per half year
7 period, 87 percent"?

8 A. Right.

9 Q. Are you saying that there were --

10 A. These are distant. We're talking
11 about distant. If I didn't say it in the
12 footnote, I was talking about distant
13 multi-cast.

14 Q. Are you saying that there are 14.9
15 million distant multi-cast subscriber instances
16 for each accounting period during 2010 through
17 '13?

18 A. On average, yes.

19 Q. Okay. Let me -- let's just go to
20 Exhibit --

21 A. Well, maybe I -- maybe -- did I mean
22 total or average? I can't -- I can't tell just
23 reading it. It might have been total.

24 Q. Let's go to the next exhibit just to
25 clarify this here, which is 1100. Do you

1 recognize Exhibit 1100?

2 A. Yes.

3 Q. Can you tell us what that is?

4 A. That is the total distant -- that is
5 total distant multi-cast subscriber instances.

6 Q. Now, if we go to the far right column
7 under Total --

8 A. Right.

9 Q. -- we see there the total number of
10 multi-cast --

11 A. Yeah, so it shows that the 14 million
12 is the -- is the total of all the accounting,
13 you know, adding up all the accounting periods,
14 yes.

15 Q. Right.

16 A. But the point was to get some way to
17 get the 87, you know, it would -- the
18 87 percent was the important number in the --
19 in the footnote.

20 Q. Right. And so if I can go to slide 5,
21 Geoff. Now, just so the record is clear here,
22 in 2010-'13, based upon the Exhibit 1100, there
23 are about 1.6 million PTV multi-cast distant
24 subscriber instances on average, correct?

25 A. That looks right because that's the 11

1 million number that we looked at before that I
2 mentioned it in my testimony, right, and I know
3 that about half of the increase between '04-'05
4 and 2010-'13 was due to increased carriage of
5 the -- or carriage of the -- carriage of the
6 distant multi-cast just didn't -- wasn't
7 carried at all before.

8 Q. Right.

9 A. Didn't exist.

10 Q. Right. But looking over the entire
11 period of the multi-cast, distant subscriber
12 instances for PTV amounted to about 14 percent
13 of your total distant subscriber instances,
14 correct?

15 A. Yes.

16 Q. Okay.

17 A. Half of the growth and 14 percent of
18 the total.

19 Q. All right. Let me go back here again
20 to this hypothetical marketplace. If we had
21 the hypothetical marketplace for distant
22 signals in 2010 through '13, would the
23 must-carry rules be in place or would they be
24 eliminated, in your opinion?

25 A. I guess I'm -- let me reread the

1 testimony that we're referring to because, you
2 know, it could be any hypothetical marketplace.

3 Q. Sure.

4 A. You are talking about hypothetical
5 negotiations in terms of setting the -- in
6 terms of coming up with relative value, if we
7 -- if we were -- if we were trying to do this
8 in a hypothetical marketplace, we would -- we
9 would have people who were cable operators
10 bargaining with television, local television
11 stations about importing them.

12 Q. And the stations would be negotiating
13 with the copyright owners of the television
14 programming, correct?

15 A. Right. So -- right. But it -- right,
16 at this point it would be -- I was picturing it
17 as being the stations, right, the stations on
18 behalf of the copyright owners bargaining with
19 the cable operators.

20 So they would -- all right. Now I
21 have the -- now I have the hypothetical in
22 mind. I'm sorry. Could you repeat the
23 question?

24 Q. Well, in that hypothetical marketplace
25 that you're envisioning, would the must-carry

1 rules be in place? Would local Public
2 Television stations have the right to insist
3 upon carriage?

4 A. Well, and local other stations would
5 have the right to insist on carriage.

6 Q. So those regulations would remain in
7 place in the hypothetical marketplace that you
8 envision?

9 A. Because -- yes, because without that,
10 it wouldn't be the same market, you know, it
11 wouldn't -- it wouldn't be the same, yes.

12 Q. Would the cable operators -- you know
13 under the current law cable operators cannot
14 substitute advertising on broadcast signals,
15 correct?

16 A. Correct.

17 Q. In the hypothetical marketplace, would
18 they be able to substitute advertising?

19 A. No, because otherwise it wouldn't be
20 the same marketplace.

21 Q. It wouldn't be the same marketplace as
22 which?

23 A. As what we're -- as what we care
24 about, the distant retransmission of whole
25 signals.

1 Q. Right.

2 JUDGE STRICKLER: You wouldn't
3 hypothesize a change in that regard since you
4 are constructing a hypothetical market?

5 THE WITNESS: Well, well, we could,
6 but then it wouldn't help us figure out what
7 the price -- what the price would be for the
8 marketplace that we are looking at.

9 JUDGE STRICKLER: I want to go back to
10 something, a little more of your answer, it
11 sparked a more general question.

12 You said that in this hypothetical
13 marketplace you conceive of the stations
14 negotiating, I think you said, on behalf of the
15 copyright owners?

16 THE WITNESS: Yes.

17 JUDGE STRICKLER: What is the
18 incentive, I mean, marketplace negotiations
19 occur because there is incentives to maximize
20 something, profits, revenues, minimize costs,
21 what have you.

22 THE WITNESS: Um-hum.

23 JUDGE STRICKLER: What is the
24 incentive in this hypothetical marketplace for
25 a station to negotiate on behalf of the

1 copyright owners to get higher royalties if
2 none of that is going into the pockets of the
3 station itself? Why are they a faithful agent
4 in that regard?

5 THE WITNESS: Oh, well, usually the
6 station would have some of its own programming
7 as well as some programming that it had bought.

8 You know, for example, the, you know,
9 the news programming on a -- on a local
10 commercial station, say, would be done by
11 itself.

12 And I think that would be generally
13 true of television stations, that some of the
14 programming is theirs and some of the
15 programming they purchased from others.

16 JUDGE STRICKLER: So that's the hook
17 that gives them the same incentive as the other
18 copyright owners, was programs are bundled
19 together on the station?

20 THE WITNESS: Right. And sometimes
21 they would be in competing -- in competing --
22 it could be in competing with other stations.
23 It would depend on the type of programming and
24 how -- but this -- this is the way I was
25 envisioning the hypothetical market being.

1 JUDGE STRICKLER: Thank you.

2 BY MR. GARRETT:

3 Q. So going back to inserting
4 advertising, your view would be that in a
5 hypothetical marketplace that you envision ads
6 would not be able to be inserted by cable
7 operators?

8 A. Well, not if we wanted to see what
9 would happen in a -- in other words, the reason
10 for using the hypothetical is to see how to --
11 how to distribute funds that are collected in
12 the current marketplace.

13 So we would want it to be similar to
14 the current marketplace.

15 Q. In the current marketplace there is a
16 prohibition on substituting ads?

17 A. I think so.

18 Q. Assume for a moment that it was
19 changed so that you could now substitute ads.

20 A. Okay.

21 Q. With that assumption, would you be
22 able to substitute for infomercials, which
23 essentially are program-length commercials?

24 A. I don't know. It's your hypothetical.

25 (Laughter.)

1 BY MR. GARRETT:

2 Q. Well, I have ideas, but they don't let
3 me testify here.

4 All right. So you don't have an
5 opinion on whether --

6 A. No.

7 Q. Because you just don't think that you
8 could substitute?

9 A. Well, no, I'm sure -- I'm sure a
10 different marketplace could happen, but it
11 wouldn't -- it is not really of interest here,
12 I don't think.

13 Q. Right. Because the royalties that
14 have been paid for 2010 through 2013 were paid
15 by cable systems who could not substitute
16 advertising?

17 A. That's why I said that, yes.

18 Q. Okay. So let me ask you this
19 hypothetical here: Assume that there was
20 absolutely conclusive evidence to you that
21 during 2010 to 2013, that program category A
22 had a relative marketplace value of 50 percent.
23 Are you with me?

24 A. Um-hum.

25 Q. Okay. And assume that there is also

1 conclusive evidence that in a marketplace --
2 I'm sorry, I have to do this again because I
3 have now forgotten what I just said.

4 A. I wrote it down.

5 (Laughter.)

6 BY MR. GARRETT:

7 Q. Would you ask the question?

8 A. A had 50 percent.

9 Q. A had 50 percent in a marketplace, the
10 hypothetical marketplace where you could
11 substitute advertising. Got that?

12 A. Um-hum.

13 Q. But there was also conclusive evidence
14 that in a marketplace where you can't
15 substitute advertising, which is the
16 marketplace we're actually dealing with, the
17 relative market value was 25 percent. Have you
18 got that?

19 A. Um-hum.

20 Q. So in your hypothetical marketplace,
21 where do you set the value? Is that at
22 50 percent or 25 percent?

23 A. If we're trying to apply it to the
24 situation that we care about here, we would use
25 where it had -- where A's value relative to the

1 other people was 25 percent and where you
2 couldn't substitute advertising.

3 Q. Okay. Thank you.

4 Oh, in this hypothetical marketplace
5 that you envisioned, would the syndicated
6 exclusivity rules still be operative?

7 A. You know, I really haven't given a lot
8 of thought to that. I see that the syndicated
9 exclusivity doesn't seem to amount to a very
10 big part of the royalty pool, .01 percent.

11 So I didn't, I mean, I just don't -- I
12 don't know that it makes a difference. Perhaps
13 it does, and perhaps that's why. It is so
14 little because there is a rule and nobody wants
15 to pay, I don't know, but I haven't thought
16 about it.

17 Q. All right. I wasn't really referring
18 to the Syndex surcharge. I was referring to
19 the FCC syndicated exclusivity rules
20 themselves, as to whether or not those rules
21 would be operative in the hypothetical
22 marketplace that you envision, or if you
23 haven't thought about it, that's fine.

24 A. I haven't thought about it.

25 Q. Okay. All right.

1 Now, let me go to page 18 of your
2 current written direct testimony, which is
3 3012. And this is where you discussed the
4 regression analyses presented by Drs. Crawford
5 and Dr. Israel.

6 A. Waldfogel and Crawford.

7 Q. I'm sorry, here it's Waldfogel and
8 Crawford. And if I switch over here to page 25
9 of your testimony.

10 A. Yes.

11 Q. You see there in Table 3, the Crawford
12 regression, that's the one that gives you
13 19.7 percent, do you see that?

14 A. Yes.

15 Q. And that's what we talked about
16 earlier. You also have a way of getting it to
17 20.6 percent, too, correct?

18 A. Yeah, if you look at -- if you look at
19 my footnote 34 on page 18, I explain that in
20 the -- in the 2010 to 2013 period on that chart
21 that we're -- that comes next, the
22 Waldfogel/Crawford chart, that I used
23 Dr. Crawford's initial estimate which doesn't
24 adjust for duplicative programming because
25 that's comparable to Waldfogel, and -- but to

1 make, you know, to make it comparable.

2 But I also, you know, explained that
3 Crawford in the -- in the footnote above I say
4 that Crawford also supplied his preferred
5 estimate, which accounted for duplicative
6 programming, and the PTV share by this measure
7 is 17.0 percent instead of 18.8.

8 Q. Okay. So a difference of almost 2
9 percentage points depending on which Crawford
10 analysis?

11 A. Yes, exactly, his preferred regression
12 is the other one. But I couldn't use that in
13 the chart because it wasn't the same, you know.

14 Q. All right. But in either case this is
15 what would give Public Television the highest
16 relative market value, correct?

17 A. Of the different measures that I show,
18 yes.

19 Q. Okay. Let me go back to page 18 of
20 that testimony.

21 A. Yes.

22 Q. And this is where you note, again, it
23 is the penultimate sentence of that paragraph,
24 "the value of an additional distant minute of
25 Public Television programming."

1 A. Yes, I see that.

2 Q. You said it went up from 4.2 cents to
3 5.1 cents.

4 A. Yes.

5 Q. Okay. And so how did that additional
6 minute of Public Television programming compare
7 to the other minutes of programming of the
8 different categories; do you recall?

9 A. You mean, what was the -- what was the
10 cents for the units?

11 Q. Well, let me just skip here to slide
12 6. And you can check, but we have simply taken
13 the -- well, you see there the PTV role?

14 A. Yes.

15 Q. That's your 5.4 cents?

16 A. Right. And you are showing the other
17 -- the other cents, right?

18 Q. Exactly. Taken straight out of
19 Crawford there.

20 A. Right.

21 Q. So the value of that additional minute
22 according to Crawford --

23 A. Right.

24 Q. -- is just slightly above that of an
25 additional devotional minute, correct?

1 A. Right. And slightly below that of
2 additional Program Suppliers, right.

3 Q. Actually very close to the Program
4 Suppliers' minutes here.

5 A. Right. PTV has a lot of minutes.

6 Q. Yeah.

7 A. The sports -- you had -- you had a
8 graph up before that showed 87 percent of
9 subscribers get WGN.

10 Q. Yes.

11 A. But WGN has -- a lot of the
12 programming on WGN is not compensable. So that
13 accounts for why the sports could have a big
14 value for the -- for a marginal, big marginal
15 value for an extra minute, but it doesn't have
16 that many minutes.

17 And so when they multiply it out, even
18 having a much higher value, when you multiply
19 it by the minutes, it -- the percent -- we're
20 not looking at the percents here but I'm just
21 trying to explain how you could come up with
22 something that has a PTV, a price for an
23 additional minute of 5 cents, which seems kind
24 of low on this, and yet that be 20 percent of
25 the 18, you know, 18.8 percent of the value.

1 So the reason is because you multiply
2 the price times the minutes to get the --

3 Q. Understood. But the 5, the low 5.4
4 cents might also reflect other factors, like
5 availability of a lot of local -- a lot of
6 Public Television programming available on a
7 local basis?

8 A. Yes, yes.

9 Q. Okay. So you think --

10 A. It should reflect everything, because
11 they have -- they count local stations. They,
12 you know.

13 Q. Okay. And the reason you get to the
14 17 or 19 percent mark in the Waldfogel -- I'm
15 sorry, in the Crawford regression is because,
16 as you said, Public Television has a lot of
17 time?

18 A. Yes.

19 Q. If we just go for a second here,
20 Geoff, to Exhibit 1087, which is the Israel
21 written rebuttal testimony. And go to page 19,
22 Table 5.

23 Do you see that up on the screen
24 there? We didn't put Israel's testimony in
25 your binder. We do have a copy here if you

1 want to see the whole thing. But I am really
2 just focusing on --

3 A. This is Ducey and Crawford?

4 Q. Yes.

5 A. Oh, you mean this is a chart from
6 Israel's report? Is that what you are saying?

7 Q. Written rebuttal testimony. Did you
8 review that?

9 A. I did.

10 Q. Okay. And Ducey was the gentleman who
11 actually categorized and calculated the
12 different minutes for the Waldfogel study in
13 the 2004-'05 proceeding. Right?

14 A. Right.

15 Q. Okay. So I want to focus for a moment
16 on Crawford, who simply takes this information
17 directly from -- I'm sorry.

18 A. Israel takes the information from
19 Crawford?

20 Q. Exactly. Do you want to do this?

21 (Laughter.)

22 BY MR. GARRETT:

23 Q. And we see that your share of minutes
24 is 36.3 percent. By your, I mean Public
25 Television's share.

1 A. Yes.

2 Q. Okay. And that is, in fact, the
3 highest share of minutes in the -- of any of
4 the categories, correct?

5 A. According to this table. I mean, I
6 know it's high. I've seen things that -- I
7 know it is one of the higher categories. Let
8 me put it that way. If it's not the highest,
9 it's very close.

10 Q. All right. I mean, this is sort of a
11 share, a volume share, would you agree?

12 A. Yes. So I didn't look at minutes. I
13 looked at -- I looked at change in subscriber
14 instances.

15 For PTV standing by itself, it
16 shouldn't really matter if there are more
17 subscriber instances or more minutes because
18 there are there 24 hours, for the most part,
19 you know, of programming, for the most part.

20 But for other categories of
21 programming, first of all, they could be within
22 the -- and Canadian, that would be the -- that
23 would be the same. All right?

24 But for other categories it would be
25 the percent compensable. And then within that

1 compensable, there could be like more sports
2 and less Program Suppliers or vice versa or
3 something. Right?

4 So I believe the compensable minutes,
5 the percent of the time that's compensable for
6 WGN went down over the two periods, so I don't
7 think it is so much that PTV is at a higher
8 share. It is that the other people are, you
9 know, the total went down because of that.

10 Q. So Public Television, you are
11 basically getting 24 hours of programming a day
12 and a lot of which kind of repeats itself,
13 correct?

14 A. A lot of all programming repeats
15 itself to some extent.

16 Q. Well, not sports. Okay? I mean,
17 people only watch that once. Right?

18 A. You know, sometimes they -- I mean, at
19 least -- well, maybe this is only true of cable
20 channels, but the Yes Channel repeats the
21 Yankee games. I don't know.

22 (Laughter.)

23 THE WITNESS: So, you know, if you
24 missed it, you could watch it.

25 BY MR. GARRETT:

1 Q. I'm not sure. If it's not a Cubs
2 game, I don't watch it.

3 A. I am not a Yankees fan.

4 Q. Good for you. Good for you. I hope I
5 didn't offend anybody.

6 (Laughter.)

7 BY MR. GARRETT:

8 Q. But your share of time in these
9 regression analyses that you were comparing
10 went up between '04-'05 and 2010 through '13,
11 correct?

12 A. Yes.

13 Q. And at the same time the Program
14 Suppliers went down from about 50.1 percent in
15 '04-'05 to 33.3 percent?

16 A. Right. I'm assuming these numbers are
17 correct. If they are not, you know, they are
18 not. But that's what -- that's what these
19 numbers show.

20 Q. Okay. All right. The bottom line,
21 though, is that if we look at just Public
22 Television for a moment, your, call it value
23 share, in Crawford is about half of your volume
24 share. Does that sound right?

25 A. You are saying 9.9 percent is half of

1 20.8 percent?

2 Q. No. I am saying that the share that
3 you get in Crawford, which you measured as
4 either 17 to almost 19 percent --

5 A. Oh, okay, yes, yes.

6 Q. -- that's roughly half of your volume
7 share of 36.3 percent?

8 A. Oh, I see, oh. Well, yes, um-hum,
9 because -- because of the five -- because of
10 the five cents compared to the others, right,
11 as you just showed. Right? That's how you --
12 that's how you get the -- yeah.

13 Q. Understood. You have got a lot of
14 programming that has a marginal value that is
15 down near the bottom of the different
16 categories.

17 A. Right. We have -- we have programming
18 only going to a portion of stations but there
19 is a lot of the programming and, in determining
20 the price in the regression, they put in all
21 the minutes.

22 And so, you know, that's -- the
23 relationship is the price to the -- to the
24 volume.

25 Q. And this programming, as we

1 established earlier, is going to only about
2 16 percent of all cable subscribers on a
3 distant signal basis, correct?

4 A. And Crawford is picking that up in his
5 regression because he is doing subscriber
6 growth.

7 Q. Understood.

8 A. So, in other words, even going to only
9 16 percent, it is getting a bigger, you know,
10 it is getting as big as Program Suppliers, sort
11 of implying that 16 percent of the programming
12 is compensable of Program, you know, Suppliers
13 if they went to 87 percent.

14 Q. Okay. Let me just go to slide 7,
15 Geoff. So you see here we just put your volume
16 share in Crawford, which is that 36.3 percent,
17 and then we showed the different value shares,
18 much like you have done in your testimony,
19 recognizing that in Crawford it is either 17 or
20 19 percent.

21 Do you see that?

22 A. Yes, I see you have the -- you used
23 the 17 percent, but that's his preferred
24 estimate.

25 Q. Exactly. And the bottom line, I mean,

1 you have looked at all these studies. Is it
2 fair to say that in all the studies --

3 A. I -- I did not use fee as gen.

4 Q. Well, we will. We will today, believe
5 me.

6 A. Okay.

7 Q. In the Crawford, Israel, Horowitz, and
8 adjusted Bortz studies, regardless of which one
9 you use, Public Television's share of relative
10 market value is going to be less than its time,
11 its volume?

12 A. Yes.

13 Q. Okay. Go back to the slide number 6.
14 And the situation with Public Television is
15 similar to that with Program Suppliers,
16 correct, you know, we see here that they also
17 have a relatively low marginal value according
18 to Crawford?

19 A. Yes.

20 Q. And, like you, they also have a
21 relatively large volume share?

22 A. PTV and Program Suppliers have larger
23 volume shares, right.

24 Q. And if we --

25 A. Wait. You have to understand the

1 regression uses those volumes.

2 Q. Understood.

3 A. Right, because otherwise if they use
4 different volumes, they would get different
5 marginal values. Right?

6 Q. But when they use volume and the value
7 for each of the categories, you come up with
8 your 17 to 19 percent, correct?

9 A. Right, Crawford comes up with that.

10 Q. And the Program Suppliers comes up
11 with a number of about, what is it, it looks
12 like 23, 24 percent?

13 A. It would be higher because you see
14 the, you know, the --

15 Q. Oh, but they have a little less time
16 than you.

17 A. Let's see. In Crawford, it was --
18 Program Suppliers was 24 percent by the, you
19 know, initial analysis.

20 Q. So if we use the Crawford study and
21 award Public Television the 17 to 19 or
22 20 percent, whatever you are asking for, the
23 appropriate award for Program Suppliers would
24 be about 24 percent, correct?

25 A. If you relied on -- if you relied on

1 Crawford and the changed circumstances method,
2 yes.

3 Q. Okay. Let's go back. You talked a
4 little earlier about the digital conversion
5 that took place in 2009. Do you recall that?

6 A. Yes.

7 Q. Okay. And you are aware that, you
8 know, prior to that time there were questions
9 about whether digital signals or the multi-cast
10 signals could be carried pursuant to the
11 Section 111 compulsory license?

12 A. I'm only vaguely aware of that, but.

13 Q. Okay. And you're aware that there
14 were issues as to whether or not the FCC
15 must-carry rules would apply to the carriage of
16 multi-cast signals?

17 A. I only know generally that it was --
18 there was a consideration of maybe changing
19 things due to digitization. I really did not
20 follow that debate.

21 Q. Okay. Were you aware that in the year
22 2005, before this conversion, that various
23 Public Television entities, such as PBS,
24 negotiated a deal with the National Cable
25 Television Association concerning the carriage

1 of multi-cast PTV signals?

2 A. I was not aware of that. I saw that
3 you had something, some paper to that effect,
4 but I don't know whether that was -- I didn't
5 know anything about it.

6 Q. So as part of your assignment here,
7 you did not look at the terms of that deal,
8 which was negotiated in the, you know, the
9 marketplace that existed, to determine what the
10 arrangements were between Public Television, on
11 the one hand, and the National Cable Television
12 Association?

13 A. I did not look at that, no.

14 Q. Do you think in trying to get an idea
15 of what would happen in a hypothetical
16 marketplace, that what happened in connection
17 with that negotiation would be instructive?

18 A. I don't know. It is possible. It
19 could be. But I didn't know about it and I
20 didn't look at it.

21 Q. Okay. Fair enough.

22 You're aware, are you not, that after
23 STELA was enacted in 2010, that cable operators
24 could carry multi-cast signals on a distant
25 basis, as well as local basis, without paying

1 any Section 111 royalty?

2 A. I think there was -- it was -- I
3 thought that there was a caveat to that, that
4 it had to be something, if they had done
5 something before and if they were indemnified
6 by the, by the television station, something --
7 something like that.

8 Q. Okay. Let go to Exhibit 1104, which
9 is a statement of account. Do you have that
10 there?

11 A. No. Give me a hint where.

12 Q. It is in the smaller binder. The one
13 that has --

14 A. Oh, I'm sorry. I was looking in the
15 bigger one. Got it.

16 Q. All right. You have seen statements
17 of accounts filed with the Copyright Office
18 before?

19 A. Yes, I have.

20 Q. Okay. And can you tell who filed this
21 particular one?

22 A. This is from Comcast of California.

23 Q. All right. And this is for, it says
24 San Francisco system, correct? Do you see
25 that?

1 A. Yes, that's San Francisco and
2 surrounding area.

3 Q. All right. So if we just go to --
4 keep it up on the full screen for a second,
5 Geoff, and we go to the second page.

6 Do you see the various legal entities
7 that it is filing on behalf of, correct?

8 A. Yes.

9 Q. And then we go to the next page, this
10 is where they list all the different
11 communities that they are --

12 A. Yes.

13 Q. -- serving?

14 A. Right.

15 Q. And I think there is a couple more
16 pages of communities. It says -- go ahead.

17 A. Yes, it looks like they have, you
18 know, seven different channel line-ups serving
19 these many different communities.

20 Q. All right. It's a huge number of
21 systems. It's a pretty large system, correct?
22 Well, go to the next -- go to the next page,
23 Geoff.

24 See it has got over a million
25 subscribers there? Do you see that in block

1 form?

2 A. Yes, oh, yes.

3 Q. All right. We skip to the next page,
4 this is where they start giving their channel
5 line-ups for all the different subgroups. Do
6 you see that?

7 A. Yes.

8 Q. And I think this one, channel line-up
9 A, continues to the next page?

10 A. Yes. Yes.

11 Q. And the thing to note is that, like
12 KQED, which is a Public Television station, is
13 actually a local signal on this channel
14 line-up, correct?

15 A. I think they are alphabetical. Yes.
16 Right. So they have KQED and some multi-casts
17 from them. They have another one, KRCB and KM
18 -- there are several Public Television stations
19 in this line-up, as well as multi-casts that go
20 along with them.

21 Q. And they are all local; the only
22 distant signal at least on this channel line-up
23 is WGN?

24 A. Yes.

25 Q. All right. And if we -- over the next

1 several pages they identify the different types
2 of channel line-ups.

3 A. Yes.

4 Q. We just looked at channel line-up AA,
5 correct?

6 A. That's right.

7 Q. And then they have channel line-up
8 AB --

9 A. Right.

10 Q. -- also has a lot of local signals,
11 including KQED, correct?

12 A. Right. That and another -- and two,
13 two or three, three other educational stations.

14 Q. All right.

15 A. Main ones.

16 Q. And WGN is its --

17 A. Yes.

18 Q. -- only distant signal? And I want to
19 skip ahead to their channel line-up AE. Do you
20 see that?

21 A. Yes.

22 Q. So here we see that KQED, which was
23 local in other areas, is actually distant on
24 whatever subgroups are served with channel AE,
25 correct?

1 A. That's correct. It has a local PTV,
2 KTEH.

3 Q. Right. If you look there at column 5,
4 Basis of Carriage, do you see that?

5 A. Yes.

6 Q. And the "O" signifies that KQED is
7 distant, correct?

8 A. Yes, or it's not exempt.

9 Q. Okay. And the E stands for exempt,
10 correct?

11 A. Yes.

12 Q. And if we go up to the instructions
13 there for column 5, do you see that?

14 A. Yes.

15 Q. And they explain there in the second
16 paragraph, and I'm just going to quote, "for
17 the retransmission of a distant multi-cast
18 stream that is not subject to a royalty payment
19 because it is the subject of a written
20 agreement entered into on or before June 30th,
21 2009, between a cable system or an association
22 representing the cable system and a primary
23 transmitter or an association representing the
24 primary transmitter, enter the designation E."

25 Do you see that?

1 A. Yes.

2 Q. So would it be your understanding that
3 the carriage of signals pursuant to an
4 agreement that might have been entered into
5 between Public Television entities and the
6 National Cable Television Association would be
7 exempt?

8 A. Well, or a cable system or, you know,
9 I take it that's what that language, system or
10 an association, an owner or whatever.

11 Q. Right.

12 A. If it was -- and it's so indicated,
13 and, you know, we didn't include the exempt
14 stations.

15 Q. They are not included in the CDC data?

16 A. No, not as distant signals, no.

17 Q. And you don't think they should be?

18 A. No.

19 Q. Good. Okay.

20 And if --

21 A. Because they didn't pay a, you know,
22 they didn't pay the royalty.

23 Q. And if questions were asked on a
24 survey about valuing those exempt distant
25 signals, that would not be a correct procedure?

1 A. Right. They should only be -- they
2 should only be included if they are -- if they
3 are valued. But I didn't see -- I didn't see
4 any extent to which they were included.

5 Q. Okay.

6 A. And valued.

7 Q. All right. Can you tell how many
8 distant signal equivalents the system had,
9 total?

10 A. I'm sure you can from the statement,
11 but it's -- I think you might have to do some
12 math.

13 Q. Well, you could also go to DSE
14 schedule, page 11 of this, which is about, you
15 know, a dozen pages from the end.

16 A. From the -- I'm sorry, from the end?

17 Q. Yeah. It is DSE schedule, page 11.

18 A. Oh, I see page 13. Wait. I'm close.
19 Yes.

20 Q. All right. So this particular system
21 had 1.25 DSEs, correct?

22 A. No. Oh, wait a minute. Is the -- the
23 part above is the example, right?

24 Q. Well, the block says "computation of
25 DSEs for category 0 stations."

1 A. Yes, but I think this might be unique
2 DSEs. I am not sure. I'm -- I'm just not -- I
3 see it says 1.25.

4 Q. Okay, if you are not certain. Let me
5 just ask you to turn to --

6 A. Okay, and the reason that I said that
7 is I think that they only include the KQED for
8 the subscriber groups that carry it as a
9 distant, you know, in some subscriber groups it
10 is 1.25 and in some it's 1.

11 Q. Right. But system-wide it would be
12 1.25 DSEs?

13 A. Well, not the way -- not the way it is
14 counted by CDC, I don't think.

15 Q. How does CDC count it?

16 A. I think they -- they count the -- if
17 they are showing -- they don't show it by
18 subscriber group so they would show all the
19 subscribers, the million something to the
20 system, and then they would say a
21 certain percent of them got the .25.

22 Q. Let me ask you just to turn to -- go
23 back to the primary form here on page 7. This
24 is the Space L copyright royalty fee.

25 A. Is this after all those stations?

1 Q. Yes, after all the channel line-ups.

2 A. Yes.

3 Q. Yeah, it is like the -- it is a couple
4 pages after that. But if you look on the
5 right-hand side, you will see Space L. That's
6 where I want to go to.

7 A. Oh, I see what you -- I'm sorry. I
8 will try to look at it on the screen.

9 Q. Okay.

10 A. Oh, I found it. I found it.

11 Q. All right. So you see the block 1
12 there talks about minimum fee, the minimum fee
13 for this system would be 1.775 million dollars?

14 A. Yes.

15 Q. But, in fact, when they look at the
16 base rate fee in block 3, it comes up with the
17 1.6 million dollars?

18 A. Yes.

19 Q. So by using these -- calculating it
20 through all the different subgroups, they
21 actually would be paying a base rate fee of
22 less than the minimum fee, correct?

23 A. No. It is showing -- I'm sorry. I
24 really -- I have worked with these statement of
25 accounts, but it takes a while to get back into

1 it. And I can't actually follow the
2 calculation part here. I see the million 775
3 and then I see a million 9, and I don't know
4 how -- I don't know how the 1597. It may be
5 some areas they didn't import WGN and they had,
6 so.

7 Q. Or in some areas they didn't import
8 KQED as a distant signal because it was already
9 available as a local signal.

10 A. Yes. No, no, I understand that. But
11 if they -- if they imported -- I'm just not
12 sure how you would get to the 1597 unless they
13 didn't import WGN in the whole system.

14 Q. Well, wasn't that the whole purpose of
15 STELA, to allow cable operators to create these
16 subgroups and calculate the royalties on a
17 subgroup basis as opposed to doing it on a
18 system-wide level?

19 A. Well, I don't know if that was the
20 whole purpose of STELA.

21 Q. Fair enough.

22 A. But that was something that happened,
23 yes.

24 Q. Okay. And isn't that what's being
25 done here?

1 A. I'm -- I'm at a loss to understand
2 this, I have to say.

3 Q. Okay. All right. Well, that's enough
4 of that then.

5 Let me ask you to turn to
6 Exhibit 1103.

7 JUDGE BARNETT: Before we go there,
8 Mr. Garrett, where are we? How much longer do
9 you have?

10 MR. GARRETT: We're on page 14 of 24.

11 JUDGE BARNETT: Then I think we should
12 take our noon recess before we change gears.
13 We will be at recess until eight after 1:00.

14 (Whereupon, at 12:08 p.m., a lunch
15 recess was taken.

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1 AFTERNOON SESSION

2 (1:13 p.m.)

3 JUDGE BARNETT: Please be seated.

4 Mr. Garrett.

5 MR. GARRETT: Thank you, Your Honor.

6 BY MR. GARRETT:

7 Q. Ms. McLaughlin, I'd like to turn to
8 another topic here and that's the Bortz
9 adjustment that you did.

10 A. Yes.

11 Q. And let me start by going to your
12 current testimony here at page 14, footnote 24.

13 A. Yes.

14 Q. Page 16, footnote 24.

15 A. 14, I think.

16 Q. I'm sorry, page 14, footnote 24. Now,
17 in that final sentence there you say, "In
18 2010-13, there were an average of 16 omitted
19 systems in each year."

20 A. Yes.

21 Q. And these were the systems that were
22 in the original Bortz sample that carried only
23 Public Television stations as a distant signal,
24 only Canadian television stations as a distant
25 signal, or a combination of Canadian and Public

1 Television signals?

2 A. True.

3 Q. Okay. And there were just 16 of them
4 in each of the years on average?

5 A. Yes.

6 Q. Okay. Now, you calculated your
7 adjustment based upon just those 16 omitted
8 systems in the -- from the sample, correct?

9 A. Well, based on the 16, but as I
10 explained, I used the estimated response rate
11 as part of that. So it would be fewer.

12 Q. I understand. I mean, but you started
13 with just the number of 16 in each year and --

14 A. Exactly.

15 Q. Right. And those were 16 that were
16 taken -- that were included in the original
17 sample that Bortz drew?

18 A. Right. An average of 16, yes.

19 Q. All right.

20 A. And we talked about one -- a specific
21 year earlier in my direct testimony.

22 Q. But you didn't go and take all of the
23 cable systems that would have carried only PTV
24 as distant signals or only Canadian as distant
25 signals during the years in question?

1 A. No.

2 Q. And why not?

3 A. Because I was trying to answer what
4 would happen to the Bortz results if they had
5 asked the people who carried -- you know, who
6 they picked up in their sample and they carried
7 only PTV and Canada. In other words, if they
8 hadn't thrown those out, this is the result
9 they would have gotten.

10 Q. Right. And if you had instead of
11 confining yourself to just those systems in the
12 sample and looked at all systems in the
13 universe that met these characteristics, the
14 adjustment would have been much higher for
15 Public Television, would it not?

16 A. If I added it in to only the people
17 who responded to the Bortz sample, yes.

18 Q. Yeah. And as you said, when you took
19 those 16 on average each year, you took account
20 of the response rate, right?

21 A. The response rate by strata, yes.

22 Q. By strata.

23 A. Um-hum.

24 Q. And there was a different response
25 rate for each of the four strata, correct?

1 A. In each year, yes.

2 Q. And you used --

3 A. But it was something along the lines
4 of 50 percent. I mean, very roughly.

5 Q. All right. But it wasn't 100 percent?

6 A. No.

7 Q. Okay. All right. Let me ask you to
8 turn to your chart 2 in your current testimony.

9 A. Okay, that's on page 11.

10 Q. Page 11, Geoff. Now, as I understand
11 it, what this chart shows is that in 2010-'13,
12 15.9 percent of the distant subscriber
13 instances consisted of Public Television
14 stations, correct?

15 A. Yes.

16 Q. And 69.2 percent consisted of
17 independent stations, correct?

18 A. Correct.

19 Q. And WGNA would have been included in
20 that 69.2 percent, correct?

21 A. Correct.

22 Q. And if we can just switch quickly here
23 to slide 12. So we've replicated the table
24 that you have here, chart 2, but broken the
25 independents down between WGNA and all other

1 independents. Do you see that?

2 A. The all other is the light yellow?

3 All other -- other independents?

4 Q. Yes.

5 A. Yes, I see that.

6 Q. So then if you add the -- we'll stay
7 with 2010 through '13 -- the 59 percent and the
8 10.2 percent, it comes up with, I think, the
9 69.2 percent?

10 A. Yes.

11 Q. All right, okay. And is that
12 consistent with your understanding that the
13 vast bulk of those distant subscriber instances
14 for independent stations comprised of carriage
15 of WGNA?

16 A. Yes.

17 Q. Okay. And so when you look at this
18 chart here, we see that -- and WGNA went from
19 being 50 percent share in 2004-'05, to a
20 59 percent of distant subscriber instances in
21 2013. Do you see that?

22 A. Yes, I do.

23 Q. And is that consistent with your
24 research and experience here?

25 A. I note that Mr. Trautman mentioned

1 that.

2 Q. Okay.

3 A. So, I mean, he mentioned the 50 to 59.
4 I didn't check that, but I thought, well, if
5 WGN went up, then the other independents must
6 have gone down, which you're showing.

7 Q. Yes.

8 A. So I don't know that this is correct,
9 but I have no reason to believe it isn't.

10 Q. All right. Well, it's based upon the
11 same data that underlies your chart 2, which is
12 in the record here. Assuming that it is
13 correct, the increase for WGNA between 2004-'05
14 and 2010-'13, amounted to 9 percentage points,
15 correct?

16 A. Correct.

17 Q. And so that's a little bit more than
18 double the amount of increase in the Public
19 Television distant subscriber instances,
20 correct?

21 A. Yes, it's not -- it's -- you're
22 looking at the delta between them. And I was
23 looking at percentage change. So it would be a
24 lower percentage change but a bigger delta.

25 Q. Because it started with a much higher

1 number?

2 A. Yes.

3 Q. Okay. But you discuss in your
4 testimony this notion of revealed preferences,
5 correct?

6 A. Yes.

7 Q. And you say that the increase for --
8 of distant subscriber instances of Public
9 Television stations kind of shows a revealed
10 preference of cable operators for Public
11 Television stations?

12 A. Yes.

13 Q. And you say the same thing about WGNA?

14 A. That they were carrying -- that they
15 were carrying more of it, yes. The only -- I
16 guess the only difference is with WGNA, since
17 the compensable percent went down, you don't
18 know, you know, which part of it.

19 Q. Right. That's the time-volume issue,
20 right?

21 A. Right. That's the part that has to be
22 separated out.

23 Q. Okay. That's fine.

24 Now, let me ask you, Geoff, to pick up
25 slide 13.

1 So here in slide 13, again working
2 with the same data, if you -- see the second
3 column there?

4 A. Yes.

5 Q. These are the different subscriber --
6 or the shares of distant subscriber instances
7 that are shown in your chart 2, correct?

8 A. The middle column?

9 Q. Yes.

10 A. Yes.

11 Q. All right. And so we see, again,
12 15.9 percent for Public Television, and this is
13 in the year 2010 through '13, of the
14 69.2 percent for independents. Do you see
15 that?

16 A. Yes.

17 Q. All right. So if we removed WGNA from
18 this mix here, Public Television would go up to
19 38.8 percent, correct?

20 A. Of the remainder.

21 Q. Yes.

22 A. But -- but the remainder is a mix of
23 different kinds of programming.

24 Q. Well, let's do it this way here: I
25 mean, you got 16 percent of 100 percent.

1 A. Yes.

2 Q. Right? And if you remove what was 59,
3 say, 60 percent, correct, then you're going to
4 have 16 percent of the remaining 40 percent,
5 correct?

6 A. Yes, yes.

7 Q. And that will amount to close to
8 40 percent, correct?

9 A. Yes.

10 Q. All right. So if you don't take
11 account of WGNA in your analysis here, it can
12 have a very significant effect on Public
13 Television, correct?

14 A. You mean if you use the bar on the
15 right? Or I guess I don't -- what does "if you
16 don't take account of WGN" mean?

17 Q. If you eliminate WGNA from the mix
18 here and simply look at the remaining carriage
19 here --

20 A. Right.

21 Q. -- Public Television share goes up
22 significantly?

23 A. Sure. And so does Canada -- you know,
24 so does everybody who is left, right, yeah.

25 Q. Right. Okay. And the share that we

1 end up getting for Public Television, excluding
2 WGNA, is about 38.8 percent. Do you see that?

3 A. Yes, because they were the next
4 biggest one, right, of the bars in my chart.
5 You know, there was 59 -- or 15.9 percent and
6 then 10.2 for network and then 3. -- you know,
7 since they were the biggest one outside of the
8 yellow bar, then they're going to be the
9 biggest one here.

10 Q. Okay. And so if I ask you now to turn
11 to your chart 7.

12 A. Yes.

13 Q. Do you have that? Which is on page
14 21.

15 A. Yes, I see it.

16 Q. This is where you show your share of
17 viewing in Dr. Gray's uncorrected study,
18 correct?

19 A. Yes.

20 Q. And your share of viewing there is up
21 to 33 percent; is that correct?

22 A. Yes.

23 Q. Okay. And so that's very close to
24 what would be shown if one just removed WGNA
25 from the whole mix here in looking at your

1 distant subscriber instances analysis, correct?

2 A. You mean it's close to that other bar,
3 the second bar that you put up?

4 Q. Yes.

5 A. Yes.

6 Q. Okay.

7 A. At least for the --

8 Q. Well, it's actually the third bar.

9 A. Well, the one on the right.

10 Q. The one on the right. Okay.

11 A. Yes. I don't know about the -- can we
12 flip back to that?

13 Q. Sure. Geoff.

14 A. But I don't know that that works for
15 everyone because Canada is 3.7 and it goes
16 to -- looking back in the other -- in the -- so
17 Canada here is 9, but on your new chart,
18 whatever one comes after this that you just had
19 up there, the -- it doesn't affect everyone the
20 same way. That's my point.

21 Q. Okay. But the point is that if you
22 don't properly take account of WGNA in these
23 kinds of analyses here --

24 A. Right.

25 Q. -- that are based upon subject time

1 measures, it can have a very significant
2 effect --

3 A. Yes.

4 Q. -- certainly at least on Public
5 Television?

6 A. Yes, yeah, I totally agree.

7 Q. Okay. And also you know that WGNA
8 converted from a broadcast station to a cable
9 network beginning like at some point in 2015,
10 correct?

11 A. I did not know that.

12 Q. All right. Well, assume that that is
13 the case and they are no longer being paid for
14 under the Section 111 royalty license.

15 A. Um-hum.

16 Q. Had they converted in, say, 2009, then
17 looking at your distant subscriber instances
18 analysis here, would have produced a share for
19 you -- that is, for Public Television -- of
20 around 38.8 percent?

21 A. You know, I don't know that that's
22 true because when TBS dropped out and became a
23 super-station -- you know, it was a
24 super-station and became a cable network, then
25 WGN kind of filled in. You know, first there

1 were a lot of people that didn't carry anything
2 and then WGN filled in.

3 So maybe, I don't know, if by 2018
4 people -- other people are starting to fill in.

5 Q. All right. We did have this
6 situation, though, in 1998 as you say with TBS
7 converting. Right? It went from a
8 super-station to a cable network, correct?

9 A. Um-hum.

10 Q. Correct?

11 A. Yes.

12 Q. And we also litigated the '98-'99
13 proceeding involving cable royalties, correct?

14 A. Yes.

15 Q. And, in fact, in that proceeding,
16 there was a substantial increase in Public
17 Television's share of distant subscriber
18 instances. Do you recall?

19 A. You know, I don't remember that. I
20 remember that there were a lot of people in
21 that -- cable operators, that didn't carry any
22 distant signals. That's what I remember from
23 that time.

24 Q. Okay. You don't recall that your
25 share of distant subscriber instances -- by

1 "your" I mean Public Television --
2 substantially increased?

3 A. You know, from before, I don't believe
4 I looked at before '98-'99. I think '98-'99 is
5 the first year I started looking at these
6 measures.

7 Q. All right. And the distant subscriber
8 instances analysis that you presented here was
9 presented as well in the 1998-'99 proceeding by
10 Public Television, correct?

11 A. I think it was a different analysis,
12 but I think there was one presented. Was it
13 Mr. Johnson, Dr. Johnson?

14 Q. Dr. Johnson. Remember him well.
15 Just --

16 A. But I think there was something about
17 subscriber instances, but I think it was a
18 different analysis than I did.

19 Q. As a point of CRB trivia here,
20 Dr. Johnson testified on a Saturday and to this
21 day holds the record for the longest answer to
22 any one question. It went on for almost 25
23 pages. And it was a Saturday.

24 (Laughter.)

25 JUDGE BARNETT: Enough said.

1 THE WITNESS: Can I ask what his first
2 name was? Is it -- it wasn't Leland?

3 BY MR. GARRETT:

4 Q. I didn't call him by his first name.

5 A. No. Does anybody know? There was
6 someone of some renown, Leland Johnson.

7 Q. Leland, yes. I think it was somebody
8 different.

9 But you don't recall how the --

10 A. No. I recall that it wasn't the same
11 analysis, but that it did include subscriber
12 instances.

13 Q. Okay. Let me ask you to turn now to
14 your testimony, your current testimony, at page
15 6.

16 A. Yes.

17 Q. And on this page is where you
18 reference fee generation? You discuss fee
19 generation in your --

20 A. Yes, yes, at the bottom of page 6 I
21 mention it.

22 Q. Okay. And you say that the analysis
23 has been found to be flawed.

24 A. Yes.

25 Q. "Because the fees generated by cable

1 retransmission distant signals do not depend at
2 all on the relative" -- and we go to the next
3 page --

4 A. -- market value of the signals.

5 Q. "But rather are a function of the
6 payment rules themselves, which are the result
7 of legislative compromise and are arbitrary."
8 And you cite footnote 10.

9 And in footnote 10, that's your
10 testimony in the 2000-2003 proceeding, correct?

11 A. Correct.

12 Q. And in that proceeding, the issue was
13 whether the Canadian Claimants could receive an
14 award that was based upon fee generation. Do
15 you recall that?

16 A. Yes.

17 Q. They had submitted a constant sum
18 survey and fee generation methodology and said
19 the combination of the two should result in
20 their award for 2000-2003?

21 A. Yes.

22 Q. And you testified in that proceeding
23 in opposition to the claim of the Canadian
24 Claimants, correct?

25 A. Yes.

1 Q. And is it fair to say that in the end
2 the Judges rejected your testimony and, in
3 fact, did award the Canadian Claimants a
4 royalty share commensurate with its fee
5 generation?

6 A. Yes, they said that the relationship
7 was wobbly, but of the choice that they had,
8 leaving the fee the same or using fees gen,
9 which they were -- the only two choices
10 available to them because -- somehow because of
11 the way the proceeding worked, that they
12 adopted the fees generated.

13 Q. Okay. And if we can just put up,
14 Geoff, the final determination of the Judges in
15 the 2000-2003 proceeding. And go to page
16 26804.

17 In the middle column down near the
18 bottom, do you see that it's highlighted?

19 A. Um-hum.

20 Q. It says, "We do conclude that the
21 1998-'99 CARP's fee generation approach should
22 be accorded deference, not as the methodology
23 to determine the relative marketplace value of
24 the Canadian Claimants' programming but as a
25 methodology to determine that value."

1 Do you see that?

2 A. Right. And then right below that, it
3 refers to the either/or choice.

4 Q. Right. But it is a fact that fee
5 generation has been used in proceedings over
6 the years here as a measure of relative market
7 value?

8 A. There have been many things that have
9 been used as a measure over the years; viewing,
10 fee generation. And some of them have later on
11 been, you know, not used.

12 Q. Okay. And if we look at -- pull up my
13 next chart here, which is on -- I'm sorry,
14 slide 8. We tried to compare here the awards
15 that the Public Television Claimants have
16 received in the 1998-'99 proceeding to fee gen.
17 The award was 3.6 -- I'm sorry, fee gen was 3.6
18 and they received 5.7. Do you see that?

19 A. Um-hum.

20 Q. And then in 2004-'05, fee gen was 4.1
21 and they received 7.6.

22 A. Yes.

23 Q. And in 2010 through '13, their fee gen
24 is 5.4 percent, right?

25 A. And are you saying they're receiving

1 14.9 or --

2 Q. I hope not.

3 (Laughter.)

4 BY MR. GARRETT:

5 Q. But that's what they're claiming,
6 right? That's what counsel claimed during the
7 opening statements here, 14.9 to 19.7.

8 A. I -- is there a question?

9 Q. Well, probably not.

10 (Laughter.)

11 BY MR. GARRETT:

12 Q. Can we go to the next slide. There's
13 probably not a question here either, but it
14 is --

15 (Laughter.)

16 BY MR. GARRETT:

17 Q. But it is fair to say that the
18 Canadian Claimants over the years have had
19 their awards tied pretty closely to fee
20 generation.

21 A. Their award was less than fee
22 generation -- I'm confused by the colors. The
23 green is the fee gen, fee generation numbers?

24 Q. Yes.

25 A. Okay. Well, they were specifically

1 tied, you know, in one way, and then in another
2 they were -- in 2004-2005, I think that they
3 started with the survey but as the floor and
4 used the fee gen as the ceiling and came to
5 something in the middle. I don't remember in
6 the other...

7 Q. That completes your answer?

8 A. Yes.

9 MR. GARRETT: That completes my
10 cross-examination. Thank you very much,
11 Ms. McLaughlin.

12 JUDGE BARNETT: Thank you,
13 Mr. Garrett.

14 Any other cross-examination for this
15 witness? Will this be by Ms. Plovnick or
16 Ms. Dominique?

17 MS. DOMINIQUE: Me.

18 JUDGE BARNETT: Thank you.

19 CROSS-EXAMINATION

20 BY MS. DOMINIQUE:

21 Q. Good afternoon. My name is Alesha
22 Dominique and I represent Program Suppliers.

23 The 2010 through '13 Bortz surveys
24 excluded from their eligible samples cable
25 systems that carried distant signals only in

1 the PTV and/or Canadian category, correct?

2 A. Right.

3 Q. Now, the 2010 through '13 Horowitz
4 surveys did not exclude from their sample cable
5 systems that carried distant signals only in
6 the PTV and/or Canadian categories, right?

7 A. Right, they included them. Horowitz
8 included them.

9 Q. Would you agree that as between the
10 2010 through '13 Bortz surveys and the 2010
11 through '13 Horowitz surveys, that it was
12 better to include cable systems that carry
13 distant signals only in the PTV and/or Canadian
14 category than to simply exclude these cable
15 systems?

16 A. Right. The Bortz as submitted and the
17 Horowitz, yes, it's better to include them.

18 Q. And PTV gets a higher value allocation
19 in the Horowitz survey than in the Bortz
20 survey, correct?

21 A. Oh, you mean the final answer?

22 Q. Correct.

23 A. Yes.

24 Q. So when systems carrying distant
25 signals only in the PTV and/or Canadian

1 categories are included, as they are in the
2 Horowitz survey, and the PTV gets a higher
3 value allocation?

4 A. Well, yes, but, you know, in the
5 augmented Bortz, they are included too. So the
6 Horowitz survey gave an even higher value than
7 the augmented Bortz. So it wasn't just the
8 inclusion of PTV potential respondents. I
9 mean, in other words, Bortz threw them out. I
10 put them back in. And so the augmented Bortz
11 has those people back in. And Horowitz had
12 them in originally.

13 So I don't think the only reason that
14 the Horowitz survey is producing higher values
15 for PTV is because it included those
16 particular -- you know, those kind of
17 respondents that were ex'd out of the original
18 Bortz study.

19 Q. Now, in the augmented Bortz survey,
20 you assumed a response rate that was consistent
21 with the response rate for the Bortz survey?

22 A. Yes.

23 Q. But because those systems, those
24 PTV-only and Canadian-only systems, were not
25 actually surveyed in the Bortz reports, you

1 don't know what the actual response rate would
2 have been?

3 A. That's right. It could have been
4 higher. I -- you know, I didn't want to
5 include all of them. Some of them surely would
6 not have, you know, responded, but I did -- I
7 did -- you know, I didn't really have a choice
8 with the -- I didn't know what the response
9 rate was, so I just assumed they would be the
10 same as the other people in the strata.

11 In Horowitz, how they responded is how
12 they responded.

13 Q. Right. So Horowitz used the actual
14 response rates?

15 A. Yes, exactly.

16 Q. Okay. And that's unlike what you did
17 in the augmented Bortz survey?

18 A. Right. I had to assume a response
19 rate.

20 Q. Would you agree that as between the
21 Horowitz survey and the augmented Bortz survey,
22 that the Horowitz survey presents a better
23 basis for allocating shares to PTV?

24 A. Between the Horowitz survey and the
25 augmented Bortz?

1 Q. Yes.

2 A. I don't know. I did see that when I
3 looked at that one measure of potential bias as
4 to PTV in the rebuttal report, that the percent
5 of carriage of PTV, you know, how much PTV the
6 people who carried it carried, I found that the
7 Bortz survey was low, was on the low side, it
8 seemed to under-represent having a lot --
9 having a normal level of PTV, an average level
10 of PTV carriage, but the Horowitz had a higher
11 percentage of PTV carriage than the universe.

12 The Horowitz increase wasn't as high
13 as the decrease was lower, but they were --
14 they both had this type of participation bias
15 in the opposite direction. So I didn't really
16 -- I didn't reach the question, you know, was
17 one definitely better than the other. I saw
18 that on this particular measure, Horowitz was
19 closer to the universe, but in the -- you know,
20 but in the other direction.

21 I'm just saying I didn't really choose
22 between them. I saw that they each had -- they
23 each would have a potential bias.

24 Q. So would it be your opinion that PTV
25 should fall somewhere in the middle?

1 A. If that measure is -- if that -- if
2 that's relevant and it looked to me like at
3 least part of it was explained by the rise in
4 system, I don't know whether -- it should be
5 someplace in between. Whether it's the middle
6 or not, I don't know.

7 And there are other -- you know, there
8 have been other criticisms of both surveys for
9 other factors, so I don't -- I didn't really
10 fully analyze that because the criticisms
11 didn't come out until the rebuttal report time
12 and they were in areas that I would have to
13 talk to somebody else to fully -- you know, to
14 get a full picture of, you know, the way the
15 question was asked or examples of programs, you
16 know, those kinds of criticisms.

17 Q. So as between the Bortz survey and the
18 Horowitz survey, which survey has less bias?

19 A. The augmented Bortz and the -- I
20 didn't look at plain Bortz, but --

21 Q. Sure. As between the augmented Bortz
22 and the Horowitz.

23 A. On that measure -- because I'm just
24 looking at PTV.

25 Q. Sure. So as it relates to PTV --

1 A. Right. Yes.

2 Q. -- which survey has less bias?

3 A. Horowitz.

4 Q. Would you agree that a survey that has
5 less participation bias is preferable to one
6 that has more participation bias?

7 A. Yes. I mean -- yes, yes.

8 Q. Now, I want to shift gears a bit. Do
9 you recall speaking with Mr. Garrett about
10 PTV's share? Well, I actually think it was
11 Mr. Dove, discussing with Mr. Dove PTV's share
12 of the basic fund?

13 A. Yes.

14 Q. Okay. Let's take a look at Table 3 on
15 page 25 of your direct testimony, which, again,
16 is, I believe, Exhibit 3012.

17 A. Yes. Table 2 or Table 3? I think you
18 said 3, but 2 is on the screen.

19 Q. I said -- let me get there with you --
20 I think it's Table 3.

21 A. There it is on the screen.

22 Q. Okay. So for PTV's share of the basic
23 fund for 2010 through 2013 based on surveys and
24 regressions, you have a column titled Horowitz
25 survey.

1 A. Yes.

2 Q. And for 2010, you list 8.8 percent.
3 For 2011, it's 15.6. For 2012, it's 17.6. And
4 for 2013, it's also 17.6.

5 Are these numbers -- these numbers are
6 not from the Horowitz survey, correct?

7 A. It's the -- it's derived from the
8 Horowitz survey. So if you take the numbers in
9 the -- in the Horowitz survey as PTV's share of
10 total royalties and divide that by the basic
11 fund share of total royalties, which is
12 approximately 86 percent, you get these
13 numbers.

14 Q. Okay. So let's take a look at the
15 Horowitz report, which is Exhibit 6012. There
16 should be a binder right next to you.

17 A. With a green cover?

18 Q. With a green cover, correct.

19 MS. PLOVNICK: If I may approach, I
20 can just hand her if that would be faster.

21 BY MS. DOMINIQUE:

22 Q. If it's faster, co-counsel can hand
23 you a copy.

24 MS. PLOVNICK: You may already have
25 it.

1 THE WITNESS: This one?

2 MS. PLOVNICK: There's so many
3 binders.

4 THE WITNESS: Thank you.

5 BY MS. DOMINIQUE:

6 Q. And if you take a look at Table 3.2,
7 which is on page 16.

8 A. Yes.

9 Q. So this table reflects Horowitz's
10 weighted values for non-network programming
11 carried by distant signal stations in 2010
12 through '13 royalty years, correct?

13 A. That's right.

14 Q. So the numbers that appear in Table
15 3.2 are not the same as the numbers that appear
16 in your Table 3?

17 A. No, in other words -- right. In
18 Horowitz shows his results as what percent of
19 all royalties because he used all royalties
20 to -- as his weights for the -- to the answers
21 in his survey.

22 What percent turned out to be PTV, so
23 that if PTV got, you know, 7.69 percent in 2010
24 of total royalties, since they're only
25 collecting from the basic fund, they have to

1 get a bigger share of the basic royalties in
2 order to get the same dollars.

3 Q. Okay. So just to be clear, you're not
4 suggesting that the values that you calculated
5 in Table 3 and the values that appear in the
6 Horowitz report at Table 3.2 are the same?

7 A. No, no. One is -- I made this
8 adjustment, right. And I think I explained it
9 in the testimony. I intended to, if I didn't.

10 Q. Do you recall discussing with
11 Mr. Garrett just a few minutes ago, or maybe it
12 was before lunch, the hypothetical market?

13 A. Yes.

14 Q. Okay. And you analyzed the
15 hypothetical market in the 2010 -- or 2000-2003
16 proceeding?

17 A. No, I didn't actually analyze the
18 hypothetical market. I was just setting up,
19 you know, what would happen in a hypothetical
20 market and how that relates to what we were
21 trying to do and why demand is what's
22 important, that, you know, it was really the
23 theoretical setup of why we're doing what we're
24 doing.

25 Q. For purposes of this proceeding, did

1 you analyze the hypothetical market?

2 A. We looked at -- we discussed different
3 ways that people do things, both -- I mentioned
4 again, both the concept of demand is what's
5 important and that sometimes you could use a
6 benchmark but we didn't find any here. It's
7 only in that context, possibly considering, you
8 know, bargaining values, but we didn't see how
9 that would work, and so it was really just sort
10 of setting the stage approach.

11 Q. So --

12 A. In both -- in both times.

13 Q. Understood. So in your discussion
14 with Mr. Garrett, I believe you testified that
15 your assumption, notwithstanding what you
16 actually did here, that -- excuse me -- your
17 assumption was that a hypothetical market would
18 still be regulated?

19 A. No, all right. So I think maybe that
20 -- I don't know if that was confusing to -- I
21 didn't mean it to be confusing. I was saying
22 how could we -- putting myself back in the --
23 into that time period that I was analyzing
24 then, how could we approach this? Well,
25 hypothetically, if there was a real market, we

1 would have, you know, cable operators
2 bargaining, say, with the stations, and if we
3 did have that occurring, how would it take
4 place? It would only be relevant for us if it
5 took place under the same circumstances now,
6 but all of this is hypothetical. Do you know
7 what I mean?

8 There is no -- we never saw that. So
9 it's more of a way to think about things, that
10 if we were to use some benchmark or some way of
11 thinking about it, the way of thinking about it
12 should be -- should reflect what it is we're
13 trying to do here. That's all I meant.

14 Q. So do you have an opinion of what a
15 hypothetical market, for purposes of these
16 proceedings, could look like?

17 A. You know, not -- I mean,
18 hypothetically what it could look like? It --
19 you know, not really. I mean, I didn't -- I
20 think I -- I thought the introduction was
21 better this time than before in the sense that
22 I thought it was a clearer way of explaining
23 things. And maybe that's why I didn't use
24 those words "hypothetical market," but I was --
25 I was -- I was just trying to think how would

1 we -- do we approach trying to come up with a
2 relative market value when we don't have an
3 actual market? That's all I meant.

4 Q. Would you assume that the current
5 prohibition on the insertion of advertising
6 would still exist?

7 A. If we were -- if we were looking for
8 something that would help us understand what
9 we're trying to do here, you would have to have
10 a prohibition on the insertion of advertising
11 because we have -- we had in 2010 to 2013 a
12 prohibition on the insertion of advertising.

13 So we wouldn't want to look at
14 something that was different in a major way
15 than what it is we're trying to analyze.

16 Q. So that's the regulation. Would you
17 presume some regulation then in the
18 hypothetical market?

19 A. For a hypothetical market to be useful
20 to analyzing what we're trying to do here, it
21 would have to look in some way like what we're
22 trying to do, so there would -- having that
23 restriction. You know, whether -- whether it
24 -- in the satellite rate proceeding, I looked
25 at cable networks in part as a benchmark for

1 what the rate should be for satellite signals,
2 but in those cases, the rate that I used was a
3 rate for people who did not insert the
4 advertising because I wanted it to be similar.
5 Maybe that example helps.

6 Q. So, essentially, you think that the
7 hypothetical market would still be a regulated
8 market?

9 A. Yes, or subject to the same
10 restrictions.

11 JUDGE STRICKLER: I have a question
12 for you in that regard, if we go to page 4 of
13 your -- I guess it's your direct testimony in
14 this case, so that's Exhibit 3012.

15 THE WITNESS: Yes.

16 JUDGE STRICKLER: In your first
17 paragraph under section B, relative marketplace
18 value. Do you see that?

19 THE WITNESS: Right.

20 JUDGE STRICKLER: In the last sentence
21 there, you write, "In past proceedings, the
22 CARP has noted that" -- and then a quote within
23 your quote, quoting the CARP determination --
24 "'relative marketplace value is the sole
25 relevant criterion that should be applied'" --

1 so that's the end of the CARP quote -- "and
2 this standard" -- CARP quote again -- "to
3 'simulate market valuation'" -- end CARP quote
4 -- "as if there were no compulsory licensing
5 regime -- was adopted and has been carried
6 forward by the CRJs."

7 That's the end of your quote. Do you
8 see that?

9 THE WITNESS: Right, yes.

10 JUDGE STRICKLER: So it sounds to me
11 at least, and correct me if I'm wrong, that
12 your understanding is that the legal guideposts
13 from the CARP and carried forward by the Judges
14 has been a marketplace in which there is no
15 compulsory licensing regime, which sounds close
16 to what counsel was asking you about, as to
17 whether or not there would be any regulation.

18 At least your phrase "as if there were
19 no compulsory licensing regime" at least
20 suggests that you meant no regulation at all.
21 First let me ask you that.

22 THE WITNESS: Yeah.

23 JUDGE STRICKLER: Is that what you
24 meant, no regulation at all by no compulsory
25 licensing regime?

1 THE WITNESS: Well, whether -- whether
2 it would be by regulation or by other -- other
3 factors, it should be something that wouldn't
4 have one difference about it, that advertising,
5 say, was inserted and that it was a big -- so
6 let me explain.

7 That suppose I said, well, here are
8 other signals that somehow mirror exactly what
9 we're looking at. And I can see that the price
10 charged for them, was, you know, 2 dollars a
11 subscriber, and it was split up 50/50 in some
12 way.

13 So now we have a relative market
14 value, 50 for this side and 50 for the other.
15 Well, but then it turns out that, in this
16 benchmark, there's -- in addition to the price
17 that they pay, they get to insert advertising.
18 So -- and maybe one of the two gets to insert a
19 lot more advertising, and so the relative price
20 wouldn't -- wouldn't work as translated into a
21 regime where you're not allowed to insert
22 advertising.

23 JUDGE STRICKLER: I understand that.
24 That is a helpful way of restating what you
25 said before, so I appreciate that.

1 But it sounds like what you're saying
2 is actually that we can't use an unregulated
3 marketplace as our, for lack of a better word,
4 benchmark, to apply in this case because it
5 would be so different that the standard has to
6 be something else. And then you go on after
7 you've basically made the same statement.

8 THE WITNESS: Right.

9 JUDGE STRICKLER: In the next
10 paragraph, you say you look at possible
11 solutions for overcoming them, meaning --
12 "them" meaning the challenges relating to
13 the --

14 THE WITNESS: Right.

15 JUDGE STRICKLER: -- absence of a
16 marketplace. So it sounds like you're really
17 saying the standard itself as enunciated by the
18 CARP and as carried forward by the Judges
19 really doesn't work because you're not going to
20 -- the unregulated marketplace is so different,
21 if I'm understanding your testimony
22 correctly --

23 THE WITNESS: Right.

24 JUDGE STRICKLER: -- is that we can't
25 apply that standard in this allocation case

1 because they're just too discordant.

2 THE WITNESS: Well, that's -- I think
3 that's what's happened in actuality because in
4 the unregulated marketplace, there are things
5 like the insertion of advertising that make a
6 difference.

7 And that's why that I haven't seen
8 people point to that as a possible benchmark in
9 this case. You know, there have been -- there
10 are other cases where there is some kind of a
11 licensing regime and maybe under the judge, you
12 as well, where advertising isn't an issue and
13 people do point to benchmarks. And the
14 benchmarks may well be valid.

15 So I don't think that it means that
16 you shouldn't look for an unregulated market
17 without compulsory licensing, but that
18 unregulated market has to have the similar
19 characteristics to this one.

20 JUDGE STRICKLER: Thank you.

21 BY MS. DOMINIQUE:

22 Q. So I'm going to move on to another
23 topic here. Excuse me. Do you recall your
24 discussion with Mr. Garrett about each claimant
25 group's share of compensable minutes?

1 A. Yes.

2 Q. Okay. You did not calculate
3 compensable program minutes in this proceeding,
4 did you?

5 A. No, I did not.

6 Q. Okay. So you don't know whether each
7 claimant group's share of compensable program
8 minutes changes if one were to weight those
9 minutes by subscribers as opposed to not
10 weighting by subscribers?

11 A. I don't know.

12 Q. Let's take a look at Dr. Israel's
13 rebuttal testimony. It's Exhibit 1087. If you
14 don't have it in front of you, I can get you a
15 copy.

16 A. These all seem to start with 6.

17 Q. Or you can look at the screen.

18 A. Okay.

19 Q. Okay. Take a look, please, at page
20 19, Table 5. Okay, Table 5 is entitled Share
21 of Compensable Minutes by Claimant Group
22 Weighted by Subscribers.

23 A. Yes.

24 Q. And do you see for the column that's
25 labeled 2010 through 2013, we have shares for

1 Sports, Program Suppliers, CTV, PTV,
2 Devotional, and Canadian ranging from 2.3 to
3 36.3 percent?

4 A. Yes.

5 Q. And consistent with the title of the
6 table, these shares are weighted by
7 subscribers. Is that your understanding?

8 A. Yes. And I hadn't really focused on
9 that when Mr. Garrett was asking me the
10 question. They could be weighted by other
11 things. And royalties or, you know, and --
12 which may give different results.

13 Q. Okay. But these are weighted?

14 A. These are weighted by subscribers.

15 Q. Okay.

16 A. And thanks for pointing that out.

17 Q. Okay. And these are what Mr. Garrett
18 discussed with you?

19 A. Yes.

20 Q. Okay. Let's take a look at -- have
21 you reviewed Dr. Gray's written direct
22 testimony in this case?

23 A. Yes.

24 Q. Okay. Let's take a look at Dr. Gray's
25 written direct testimony. It's Exhibit 6036,

1 page 16, Table 1.

2 Dima, if you could pull that up.

3 A. Yes.

4 Q. Okay. Now, are you aware that
5 Dr. Gray calculated each claimant's share of
6 compensable minutes in a manner that was not
7 weighted by subscribers?

8 A. I'm aware that there were criticisms
9 of Dr. Gray's weighting of the compensable
10 minutes, but I did not focus on that it was a
11 subscriber weight, which is why I -- on that
12 other chart, I had not noticed that it said
13 weighted by subscribers.

14 Q. Right. And just to be clear, I can
15 represent that Dr. Gray did not weight here.

16 A. No. I know there was a criticism of
17 his weighting, yes.

18 Q. All right. So taking a look at Table
19 1 on page 16 of Exhibit 6036, the title is
20 Levels and Shares of Retransmissions and Volume
21 by Royalty Year.

22 If we look at the final column, the
23 share of all volume, we see Dr. Gray's
24 unweighted valuations of the share of
25 compensable minutes of retransmissions.

1 If you compare Table 1, the final
2 column, to the table that Mr. Garrett discussed
3 with you, is there a difference in the volumes?

4 A. Yeah. Actually, if I can turn to the
5 -- I can turn to page 16 here, if you could
6 pull up that other table because I don't think
7 I have Dr. Israel's.

8 Q. Sure.

9 MS. DOMINIQUE: Permission to
10 approach.

11 JUDGE BARNETT: Certainly.

12 THE WITNESS: No, no, I see it here.

13 BY MS. DOMINIQUE:

14 Q. Okay. All right.

15 A. I mean, if you pull up that and then I
16 have this one here, if that works for others.

17 Q. I understand. Okay.

18 A. Yeah, I see that the -- I see that the
19 numbers -- well, they're in different orders,
20 but the numbers are quite different.

21 Q. Okay. Is so if one were to weight by
22 subscribers, you get different numbers than if
23 you do not weight by subscribers, correct?

24 A. Yes. I mean, it's a little bit hard
25 because this is an average for the whole time

1 period and these are, you know, one year at a
2 time, but I know if you look at certain ones, I
3 see that they are -- I can see that they're
4 different.

5 Q. Okay.

6 A. So I'm not really sure. I know there
7 was another problem with Dr. Gray's study that
8 I can't discuss.

9 Q. Okay.

10 A. So I don't know to what extent the
11 other problem is -- or the weighting is the
12 result of the difference. I hope that was all
13 right to say.

14 Q. Thank you.

15 MS. DOMINIQUE: No further questions.

16 JUDGE BARNETT: We're all aware of the
17 circumstances, so it's fine.

18 CROSS-EXAMINATION

19 BY MS. NYMAN:

20 Q. Good afternoon, Ms. McLaughlin.

21 A. Good afternoon.

22 Q. My name is Jessica Nyman, and I
23 represent the Devotional Claimants in this
24 matter.

25 So you mentioned on your direct that

1 you are currently an affiliated consultant at
2 NERA; is that correct?

3 A. Yes.

4 Q. And prior to that, you were a senior
5 VP, correct?

6 A. Yes.

7 Q. Well, I guess there was the
8 retirement.

9 A. Yes.

10 Q. But you were a senior VP and, in fact,
11 had worked at NERA since 1974; is that correct?

12 A. Yes.

13 Q. So you would agree that NERA is well
14 regarded for the quality of its experts,
15 publications, and studies; is that right?

16 A. You know, I'm aware of my work and the
17 people that I work with. I'm aware of other
18 people. Right now I'm less aware of some of
19 the other people who are there. I'm not saying
20 anything bad about NERA. I'm just saying
21 I'm -- you know, we're -- it's not like a
22 committee approves what goes out.

23 There are people who look at -- who
24 look at things, but sometimes, you know, I've
25 seen things go out that I wasn't happy with.

1 Q. If I could pull up onto the screen
2 what has been marked as Exhibit 5033, please.
3 If we can't, then put it on the ELMO. Okay.
4 Do you see that on your screen?

5 A. Yes.

6 Q. And does that bear the markings of a
7 NERA Economic Consulting white paper?

8 A. Yes. I don't really -- I have to say
9 Dr. Eisenach joined NERA after I retired, and I
10 don't -- I don't think I've actually ever met
11 him. So I don't -- you know, I can't really
12 opine about his work.

13 Q. Sure. If we turn to the second page,
14 though, it says Dr. Eisenach is senior vice
15 president and cochair of NERA's communications,
16 media, and Internet practice. Do you see that?

17 A. Yes, I do.

18 Q. Do you have any reason to think that
19 NERA would have a senior vice president and
20 cochair of the communications, media, and
21 Internet practice that wasn't qualified or
22 knowledgeable in the field of communications,
23 media, and Internet practice?

24 A. I am sure that Dr. Eisenach is a
25 qualified economist. You know, I'm not

1 doubting that.

2 MS. NYMAN: Move to admit Exhibit 5033
3 into the record.

4 MR. STEWART: Objection, Your Honor.
5 There has been no foundation for the admission
6 of this document, which is by another economist
7 whom we have no opportunity to cross-examine so
8 that we understand this exhibit, and the
9 witness has already said she is not familiar
10 with it or him.

11 MS. NYMAN: I plan to just use this to
12 show a couple things and ask whether the data
13 that's presented in here is consistent with her
14 understanding of certain trends in the
15 retransmission consent to the marketplace.

16 JUDGE BARNETT: I don't think that's
17 going to be very elucidating for us, so the
18 objection is sustained.

19 BY MS. NYMAN:

20 Q. So ignoring that then, do you remember
21 your conversation a few minutes ago with
22 Mr. Garrett on must-carry and retransmission
23 consent?

24 A. Yes.

25 Q. And you're aware that retransmission

1 consent is a legal obligation for the stations
2 that elect -- or is a legal obligation separate
3 from the compulsory license that requires cable
4 systems to obtain consent from commercial
5 broadcasters that elect retransmission consent
6 prior to being able to retransmit their
7 signals; is that correct?

8 A. Well, when you say it's separate, I
9 did study this at one time, not in the most
10 recent time period, but I saw that it was a
11 kind of a -- must-carry cannot really be
12 separated from retransmission consent because
13 if you -- it would be one thing to say -- to
14 say in terms of bargaining, the station says I
15 want 100 million dollars or you can't carry me,
16 and the cable system -- and the cable system
17 says, well, I won't carry you; I'll carry
18 somebody else instead.

19 Q. And let me rephrase that because I
20 don't think I was clear. I'm not talking about
21 the separation of must-carry from
22 retransmission consent. I'm just saying that
23 the concept of retransmission consent and the
24 fees that may be paid under retransmission
25 consent are separate from the copyright

1 compulsory license and the fees that are paid
2 to the copyright owners for the --

3 A. Yes, I understand that they are
4 separate. I just meant that, you know, the
5 fact that you could fall back on must-carry,
6 you know, limits the bargaining power of the
7 other side.

8 Q. Right. So would you agree that for
9 those broadcasters that do elect retransmission
10 consent instead of must-carry, that those
11 broadcasters expect to be compensated for the
12 rights to retransmit their broadcast signals?

13 A. I assume that they are getting
14 something, but -- and I know in some cases, and
15 mostly I'm familiar with local retransmission
16 consent, and there are some people that have
17 expected a lot, but I don't -- I don't -- you
18 know, I don't really know any more than that.

19 Q. Right. But --

20 A. I don't know that everyone gets money.

21 Q. Sure. But -- so you would agree that
22 in a local market, for example, where a big
23 broadcaster maybe a Nexstar or, you know --

24 MR. DOVE: Your Honor, this seems --
25 this line of questioning seems to be going

1 beyond the scope of Ms. McLaughlin's direct
2 testimony and rebuttal testimony in the case.
3 I don't see the connection.

4 MS. NYMAN: It's going to be going to
5 changed circumstances, which is directly
6 related to what she testified to, Your Honor.

7 JUDGE BARNETT: I'll give you a chance
8 to make that connection. Overruled, Mr. Dove.

9 BY MS. NYMAN:

10 Q. Sure. So on that point, are you aware
11 that in the time period -- you testified to
12 changed circumstances between the time period
13 of 2004 and 2005 and the time period that we're
14 discussing here, which is 2010 to 2013,
15 correct?

16 A. Yes.

17 Q. Were you aware that in the time period
18 of 2004 and 2005, by and large broadcasters
19 were not receiving cash compensation for the
20 rights to retransmit their signal?

21 A. Distant signals?

22 Q. No, no, local or distant, but just in
23 general, retransmission consent rights.

24 A. You know, I don't remember when
25 retransmission consent -- I mean, I know that

1 it didn't happen and then it happened, but I
2 don't -- I really don't know the date.

3 Q. Are you generally familiar with the
4 trend, which has been since about 2005 or 2006,
5 there has been an upward trend in the fees
6 charged by broadcast stations to cable
7 operators for the rights to retransmit their
8 signals?

9 A. Only -- I haven't seen data on that.
10 I've only -- I've seen -- I've seen, you know,
11 general newspaper articles. That's all.

12 Q. All right. I believe in your NERA
13 biography, you listed as one of your areas of
14 specialty cable and broadcast rights and that
15 you've analyzed proposed U.S. FCC rules
16 concerning cable and broadcast television and
17 retransmitted television station rights. Is
18 that correct?

19 A. Yes.

20 Q. And you.

21 Re saying you're not familiar with --

22 A. No, I'm --

23 Q. -- any trends in retransmission?

24 A. Right. I'm saying that between the
25 time periods that you -- that you refer to,

1 that I did not study the trends in
2 retransmission payments.

3 Q. Okay. Are you aware then that
4 retransmission consent applies only to
5 commercial stations and that Public Television
6 stations are not eligible for retransmission
7 consent fees?

8 A. Yes, I am.

9 Q. And that's why for -- Public
10 Television stations choose -- well, they elect
11 must-carry or they are must-carry stations and
12 you alluded earlier to commercial broadcasters
13 could choose must-carry, but they also could
14 choose retransmission consent?

15 A. Locally, yes.

16 Q. And retransmission consent applies to
17 distant signals as well, doesn't it?

18 A. I only -- the only time that I looked
19 at retransmission consent, I was only looking
20 at it in terms of local.

21 Q. If it were the case that
22 retransmission consent applied to distant
23 signals and, like in the local market, only
24 applies to commercial broadcasters, would you
25 agree then that a commercial or a cable system

1 would have to pay their compulsory copyright
2 fee and, in addition to that, negotiate with
3 the broadcaster for a commercial signal? Would
4 you agree with that?

5 A. If -- if -- not if that isn't a
6 tautology. You know what I mean? If you're
7 saying if we assume it, then it would happen?

8 Q. Well, I'm just saying the difference
9 between commercial and public. So
10 retransmission consent applies to commercial
11 stations, not to public stations, correct? In
12 the local market?

13 A. Yes.

14 Q. And if we apply to the distant market?
15 Just assume now that it does apply to the
16 distant market.

17 A. But are you suggesting that in the
18 distant market, that there are commercial
19 stations that pay -- that get paid by cable
20 systems to be carried distantly, you know,
21 outside of their local area, and those stations
22 -- and those cable operators also pay into
23 retransmission consent? I mean, into this
24 fund?

25 Q. Correct. There are two separate

1 obligations. There is the copyright fee that
2 goes to the copyright owners, and the
3 retransmission consent fee that goes to the
4 broadcaster for the right to retransmit their
5 signal.

6 A. I'm -- the only thing that -- is this
7 like what happened with WTBS, that they were --
8 they were paid a fee for the satellite -- for
9 retransmission via satellite while -- that was
10 separate from the other -- I'm not really --
11 I'm lost.

12 Q. Would you agree that being required to
13 do something can be different than choosing to
14 do something?

15 A. Yes.

16 Q. And on page 8 of your written
17 testimony, you testified that if a CSO chooses
18 to add a distant PTV station rather than
19 carrying other distant stations, this reveals
20 that the CSO expects to create more value for
21 itself and its subscribers by carrying that PTV
22 station?

23 A. Right. And the same would apply
24 for -- if you take out PTV and put something
25 else in. Whatever they choose, they are

1 revealing that they prefer one over the other.

2 Q. Right. And I believe you testified
3 earlier that -- with Mr. Garrett, that
4 sometimes there is no local PTV station, where
5 a cable operator is importing a distant PTV
6 station; is that correct?

7 A. Sometimes that is true, yes.

8 Q. Are you aware that where there is no
9 local PTV station, the FCC requires the cable
10 system to import a distant signal? A distant
11 PTV signal?

12 A. You know, I know there are rules on
13 this, but I don't think that those rules -- I
14 don't think they require them to import the
15 distant signal and pay the -- pay the royalty
16 for this. I didn't think that was the case.

17 Q. So your understanding is that the
18 cable operators don't have to pay to import a
19 distant PTV signal if there is no local signal?

20 A. I don't know the rules exactly, but I
21 thought that they were not -- I thought that
22 there was a -- that there was something about
23 -- I don't think this is what you're talking
24 about -- I thought there was something about
25 what was local for PTV was different in terms

1 of the rule -- in terms of what's local for
2 this.

3 Q. Correct. And there's local PTV rules
4 that are --

5 A. So there's the -- what used to be
6 called the grade B contour and 35-mile radius,
7 that. That's the only part that I was -- I was
8 aware of, and I thought in those circumstances
9 that there wasn't an extra fee, but the rules
10 are what they are.

11 Q. And you may be talking there about a
12 qualified local NCE, FCC's lingo for a PTV
13 station, non-commercial, but this is actually a
14 separate concept of the distant PTV station
15 where there is no qualified local NCE.

16 A. Okay. I'm not -- I'm not aware of
17 that.

18 Q. Do you think that in evaluating
19 changed circumstances from 2004 and 2005 to
20 2010 to 2013, it would have been important to
21 understand disparate retransmission consent
22 obligations between PTV stations and other
23 stations or mandatory carriage requirements
24 between PTV stations where they don't exist for
25 commercial stations?

1 A. On the carriage requirements, the one
2 that you mentioned about PTV, if there was a
3 distant brought in where there is no local,
4 that would not have -- there would not have
5 been fewer local stations in the area served by
6 cable between the two time periods that we're
7 talking about.

8 It wasn't that there were -- I would
9 be very surprised to see that. So I did not
10 look at -- I did not look at that.

11 On the other part, I'm -- I did not
12 look into the -- what the retransmission
13 consent things that you were talking about or
14 the -- or the other topic.

15 Q. Do you think that would have been
16 important to look at?

17 A. I did not -- I didn't think they were
18 important, and if they are, someone could point
19 them out.

20 Q. So just to clarify that, it wouldn't
21 be important to know whether it was much more
22 expensive, even separate from the compulsory
23 copyright licensee, for a broadcaster to carry
24 a commercial station and free, aside from the
25 compulsory license fee, to carry a PTV station?

1 A. I just don't understand the question.
2 I mean, I don't -- I don't understand -- I
3 don't understand what it is that you're
4 positing that there are -- there are payments
5 for carrying just a distant? I'm -- I want to
6 carry a distant station, commercial station
7 from Boston and I'm in Washington.

8 Are you saying -- are you saying
9 hypothetically that in order to do that, first
10 I have to pay the Boston station? And it's not
11 just for the getting it here; it's the -- it's
12 for the --

13 Q. For the right to carry that signal.

14 A. And, in addition, I have to pay for
15 this?

16 Q. You have to pay the copyright owners
17 or the compulsory licensee to compensate the
18 copyright owners.

19 A. And that would apply to every station
20 that I wanted to carry that was commercial?

21 Q. There are certain exceptions for
22 super-stations, so setting aside WGN, but for
23 the most part, um-hum.

24 A. Well, I was not aware of that, and I'm
25 not sure whether it would affect the analysis

1 or not.

2 Q. So, hypothetically, I'm a CSO and I'm
3 paying the minimum -- you're aware that there
4 is a minimum compulsory license fee that --
5 regardless of whether you import a distant
6 signal or not, correct?

7 A. Yes.

8 Q. So if I'm a CSO and I have to pay a
9 minimum fee regardless of if I import or not, I
10 could choose to carry a PTV signal for free,
11 there's no separate retransmission consent fee,
12 or I could elect to carry a commercial
13 broadcast station but would presumably have to
14 pay a little extra for that one?

15 A. Except if it was WGN.

16 Q. Unless it was WGN.

17 A. Okay. Well, it's possible that that
18 explains, in part, why WGN went up and PTV went
19 up but not why PTV went up more than WGN.

20 Q. And then if, though, from 2004 to
21 2005, those retransmission consent fees that
22 are paid to commercial broadcasters went from,
23 say, 215 million in the aggregate to 3.3
24 billion or some other comparable dramatic
25 trend --

1 A. For distant imports, 3 and a half
2 billion?

3 Q. For retransmission consent, both
4 distant and local.

5 A. Well, but -- but how much of is that
6 is distant? I mean --

7 Q. Do you know?

8 A. I don't know.

9 Q. But if it -- if it went up
10 commensurate with local, wouldn't that possibly
11 suggest a reason why more PTV is being carried
12 rather than -- and less commercial stations are
13 being carried? Fewer commercial stations are
14 being carried?

15 A. Yes, but it wouldn't -- I don't see
16 how it would affect the division of the royalty
17 pool because we're looking at what people are
18 paying for what they're carrying, not what
19 they're not carrying.

20 Q. But if we're talking about revealed
21 preference, it's not necessarily a -- if it's
22 between carrying something for free and
23 carrying something that's going to cost a lot
24 more and you have to pay that minimum fee no
25 matter what, do you think that affects the

1 revealed preference?

2 A. It would affect the carriage
3 decisions. But it wouldn't affect the -- if
4 they don't carry it, then it wouldn't affect
5 the distribution of the royalties for what they
6 didn't carry.

7 Q. Let's turn to Dr. Gray's viewing
8 study. So you testified that increases in
9 relative viewing of the category can indicate
10 that subscribers value it to a greater extent.
11 Is that correct?

12 A. Yes.

13 Q. On page 8.

14 A. Yes.

15 Q. This assumes that Dr. Gray's viewing
16 measure is reliable, correct?

17 A. To the extent that -- right, it's --
18 the -- the example is true, whether or not, but
19 if --

20 Q. Your citation to Dr. Gray's viewing
21 study is a suggestion that viewing has
22 increased?

23 A. Right. Right, if his viewing study is
24 incorrect, then it's not showing what it's --
25 originally showed.

1 Q. And you haven't independently assessed
2 the reliabilities -- reliability of Dr. Gray's
3 viewing hour estimates, have you?

4 A. No.

5 Q. And you also testified on page 21
6 that, based on Dr. Gray's data, PTV's share of
7 distant compensable viewing increased from
8 19.8 percent in 2004 to 27.1 percent in 2010 to
9 2013, an increase of 31 percent. Do you see
10 that?

11 A. What page?

12 MR. DOVE: Objection, Your Honor. We
13 think this is the wrong version of the -- of
14 Ms. McLaughlin's testimony on the screen.

15 MS. NYMAN: It should be 3112.

16 THE WITNESS: Yes, that is the version
17 that we're not using.

18 JUDGE BARNETT: Thank you, Mr. Dove.
19 We'll fix that.

20 Right, Ms. Nyman?

21 MS. NYMAN: Yes.

22 BY MS. NYMAN:

23 Q. Okay. We've got 3012 up on the
24 screen.

25 A. Yes.

1 Q. So let's be precise here. When you
2 say that there was an increase in viewing, we
3 mean viewer hours, not number of viewers,
4 correct?

5 A. Right. It could be the same viewer
6 viewing it all those thousands of hours but,
7 you know, yes, it was viewers, but it was more
8 -- it doesn't count different viewers. It's
9 viewing hours.

10 Q. And looking at this chart, devotional
11 viewing share also increased; is that correct?

12 A. Yes.

13 Q. But the data and estimation
14 methodologies in 2004 and 2005 are very
15 different from what was used in this
16 proceeding; isn't that right?

17 A. After Dr. Gray submitted this report,
18 there were criticisms of his -- of his viewing
19 hours. And before those criticisms, it wasn't
20 clear that they're -- you know, they purported
21 to be comparable.

22 Q. But, for example, Dr. Gray's now using
23 National People Meter data instead of sweep
24 data? Were you aware?

25 A. Yeah, well, I'm not sure what Dr. Gray

1 is actually -- is using now, but, you know,
2 there are differences between people meter data
3 and sweeps data, but it's -- it's not that
4 they're irreconcilable.

5 Q. Well, for example, National People
6 Meter data doesn't cover all geographical
7 markets for either distant or local viewing,
8 correct?

9 A. That's correct.

10 Q. And in contrast, sweeps data does
11 cover all markets and it's weighted to estimate
12 market-level viewing, correct?

13 A. Yes, but there is always a difficulty
14 in getting measures of viewing of distant
15 stations, you know, viewing of the stations in
16 the places where they're distant. And that has
17 been the case no matter which measure was used.

18 Q. So you acknowledge that they're
19 different, that the data that's being used in
20 the 2004 and '05 and --

21 A. Yes, but I don't know that that
22 problem is of particular importance.

23 Q. Earlier you acknowledged also that you
24 were aware that Dr. Gray's viewing data in this
25 proceeding -- sorry, strike that.

1 Were you aware that the viewing data
2 in this proceeding doesn't include WGNA?

3 A. I -- only because of something that I
4 don't think I'm supposed to talk about.

5 Q. I believe we're allowed to acknowledge
6 the fact that a correction was submitted. We
7 just won't elaborate on, you know, the contents
8 of what was done afterwards.

9 A. I didn't know we could talk about the
10 reason why the correction was made. But I am
11 -- I read the corrected report, so I am aware
12 of it.

13 Q. And there's no PTV on WGNA; is that
14 correct?

15 A. That's correct.

16 Q. Lastly, you also cite to the Crawford
17 and Israel regression methodologies to show
18 growth -- you cite to the Crawford and Israel
19 methodologies to show a growth in PTV's
20 relative value?

21 A. Yes, I do.

22 Q. But similar to the Gray viewing hour
23 study, you haven't independently examined
24 whether the Crawford or Israel regressions are
25 reliable, have you?

1 A. I mean, I've looked at them, but I
2 have not -- right. I -- I am not saying, you
3 know, this is the right way to do it. I've
4 looked at other -- I've seen the criticisms
5 that were made and also the, you know, slight
6 changes that were made, and none of them, none
7 of those things made me say like, you better
8 not -- you know, you better not rely on these.

9 Q. But you didn't look at the data and
10 run your own tests?

11 A. I did not run my -- I did not run a
12 separate regression, no.

13 Q. And you didn't independently conduct
14 any tests on the sensitivity, did you?

15 A. No.

16 Q. Thank you.

17 MS. NYMAN: No further questions.

18 JUDGE BARNETT: Additional
19 cross-examination?

20 MR. ERVIN: One more, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. ERVIN:

23 Q. Good afternoon, Ms. McLaughlin. My
24 name is Dave Ervin and I'm here on behalf of
25 the Commercial Television Claimants.

1 A. Okay.

2 Q. I want to go back to your changed
3 circumstances method that you've applied. I
4 think it is represented in your direct
5 testimony and followed up in your rebuttal
6 testimony. Is that an accurate statement?

7 A. I don't think that -- I don't think
8 the changed circumstances was followed up in
9 the rebuttal, but it is represented in the
10 direct testimony.

11 Q. So to do, that let's look at your
12 direct testimony, which is Exhibit 3012, and on
13 page 2. And as I understand it, as you
14 described it, you need a starting point to do
15 the changed circumstance analysis; is that
16 fair?

17 A. Yes.

18 Q. Okay. And at page 2, I think you said
19 the appropriate method for determining the
20 relative marketplace value of distant PTV
21 stations is to adjust the results of a 2004-'05
22 average share awarded.

23 A. Yes, I say that's an appropriate -- an
24 appropriate method.

25 Q. Okay. And that's the starting point

1 that you use and it's referenced in both your
2 Table 1 and your Table 2, which we'll get to in
3 just a minute, but that's the starting point?

4 A. Exactly.

5 Q. Okay. And then further down, also on
6 page 2, you talk about the relative increase in
7 carriage of distant PTV stations, the distant
8 subscriber instances. Right?

9 A. Yes.

10 Q. And you say that that indicates that
11 the relative marketplace value of distant PTV
12 signals has increased. That's kind of like the
13 starting point for determining if there's a
14 change of circumstance?

15 A. Well, it was my starting point because
16 that was the first thing that I saw, and it
17 seemed -- I had looked at changed circumstances
18 before, and there was less of a change and this
19 seemed to be a bigger change.

20 So I -- but it would -- you know,
21 anything could be the starting point. That's
22 just where I started.

23 Q. Okay. And at the bottom of 2,
24 continuing to 3, also the same exhibit, the
25 bottom there where it begins the relative

1 increase, here you're talking about the
2 relative increase in the distant instances for
3 PTV signals can provide -- the relative
4 increase in carriage alone can provide the
5 basis for determining the increase in the PTV
6 value. Is that right?

7 A. That's not what the sentence says. It
8 says based on this increase in carriage alone,
9 based on this alone, this is what happens.
10 It's not --

11 Q. Okay.

12 A. -- that the -- that you could base it
13 on that alone. I would -- since it's a unit
14 measure, I would always want to check to see if
15 there's anything that indicated that the value
16 went down even though the units went up or
17 didn't go up as much. It would be odd for it
18 to go down while the units went up, but I
19 suppose that's theoretically possible.

20 Q. Okay. Let's go to page 12, also in
21 your direct testimony, Exhibit 3012. And
22 there's -- on page 12 there's a passage that
23 begins -- we'll wait for it up here for you --
24 "based solely on this measure." Let me find it
25 for you on here. Yeah. Thank you, Bob.

1 "Based solely on this measure" --

2 A. Right.

3 Q. -- and the measure being the distant
4 carriage increase --

5 A. Right.

6 Q. -- for PTV?

7 A. Right.

8 Q. And that's comparing '04-'05 to
9 2010-'13?

10 A. Correct.

11 Q. So based solely on this measure,
12 assuming there were no other evidence of
13 changes in the relative value, an appropriate
14 distribution for 2010 through 2013 for PTV
15 would be to increase its share of the basic
16 fund in proportion to its growth in distant
17 subscriber instances.

18 A. Right. In other words, that's just
19 what I said before, if we base it just on this,
20 and assuming there's no other evidence of
21 changes, that nothing else changed, that that
22 would happen.

23 Q. Okay. And as for -- the first part, I
24 want to come back to, but in proportion to the
25 growth in the distant subscriber instances,

1 that's all we're talking about so far at this
2 point in your report, right?

3 A. Right.

4 Q. Okay. If I could look at Table 1,
5 which is on page 13 of Exhibit 3012.

6 A. Yes.

7 Q. Which is your first table. And here
8 we start with the 7.55 percent, which is the
9 share that was awarded to Public Television in
10 the '04-'05 case, right?

11 A. Yes.

12 Q. And then you've calculated for each of
13 the relevant years here, 2010, '11, '12, and
14 '13, the relative percentage increase of
15 distant subscriber instances, right? That's
16 the 23 percent?

17 A. Yes, the --

18 Q. 35 --

19 A. Yes, based on -- right, based on PTV's
20 share of distant subscriber instances.

21 Q. Okay. And then you've applied that
22 increase, the '04-'05, to 2010-'13 increase in
23 each year, to the 7.55 share from '04-'05?

24 A. Yes, mathematically.

25 Q. Right. Mathematically, right? And

1 that gets the updated shares that are there --

2 A. Yes.

3 Q. -- right? And no other change has

4 been made? No other --

5 A. No. It --

6 Q. -- consideration has been applied to

7 that yet?

8 A. To that calculation, no. That's what

9 it is.

10 Q. Okay. So I want to see -- I thought

11 there might have been a couple of

12 qualifications in your direct testimony that I

13 just wanted to just confirm. The first one

14 would be footnote 18 on page 11, also of

15 Exhibit 3012. And this is the part when -- if

16 you're at it, Ms. McLaughlin, yourself.

17 A. Yes, I am.

18 Q. Okay. This is the part where you

19 reference multi-cast signals.

20 A. Yes.

21 Q. It's Exhibit 3012 where we just were.

22 It's page 11, footnote 18. Okay.

23 And I believe you were having a

24 conversation with Mr. Garrett before about

25 multi-cast signals. And I just want to ask

1 about a specific reference you make there where
2 it says, "The use of multi-cast signals is
3 responsible for some of the increase in the use
4 of distant PTV signals."

5 A. Yes.

6 Q. What did you mean by that?

7 A. I mean that that increase in
8 subscriber instances from, I think it was 12.1
9 to 15.9 percent, part of that change, the
10 change in between the two, part of the
11 3.8 percent point increase is multi-cast, which
12 didn't exist before, being imported.

13 And the other part is not multi-cast.
14 It's just a regular PTV station.

15 Q. Okay. And does that -- in your view,
16 did that do anything to or make you look at the
17 percentage change calculation that you had made
18 in distant subscriber instances?

19 A. No, it was -- it was just that, you
20 know, here's something new that's being
21 carried.

22 Q. Okay.

23 A. So it was kind of a reason why there
24 might be an increase. Something new existed,
25 and people were carrying that.

1 Q. Okay. And if we could go to page 17,
2 also in Exhibit 3012, there's another reference
3 to this same issue that I just want to confirm
4 with you. You're discussing at this point the
5 cable operators surveys, but you make a
6 notation there near the bottom where it reads,
7 "we noticed several large systems with PTV
8 multi-cast stations -- a major factor
9 underlying the increase in relative PTV
10 carriage."

11 Do you see that?

12 A. Yes.

13 Q. My first question is it some or is it
14 major?

15 A. It's half.

16 Q. Half? Okay. And, again, you're
17 noting that it was something that contributed
18 to the increase in the PTV signal carriage?

19 A. Right. Right, and it was -- it was --
20 this was something that didn't exist before,
21 exists now. It was part -- it was -- as far as
22 the change goes, it was, you know, half of the
23 change and these -- the large systems that were
24 carrying regular PTV but also multi-cast that
25 weren't in the Bortz survey, but were in the

1 Horowitz. That's what I found.

2 Q. Okay. And then if we could go back to
3 page 12, also in Exhibit 3012, and this is the
4 reference that we were talking about before.
5 There was one other -- what I think was a
6 qualification to the use of the increase.
7 Let's wait until we get there.

8 A. Based solely on this measure?

9 Q. Yes, that sentence right there. Based
10 solely on this measure, assuming there were no
11 other evidence of changes in the relative value
12 of PTV programming.

13 A. Right.

14 Q. And by that, is it -- that's the
15 second part of your direct testimony, right,
16 where you're examining the expert --

17 A. Right. So first I look just at the
18 units and say pretty big, you know, change
19 here, but what happened to the value? And then
20 I look at these value measures.

21 Q. Okay. Now, had you -- was that part
22 of your consideration before you had looked at
23 the expert reports that were submitted by the
24 other claimants or was it after?

25 A. Well, I didn't have the evidence of

1 value until after I got the other people's
2 expert reports. But then -- but the -- but the
3 sentence would have applied had I not gotten
4 it, assuming that -- if you know what I mean.

5 Q. I think I do, but let me make sure.

6 So the other expert reports that you
7 talk about in your direct testimony, and it's
8 in here in your direct, your written direct
9 testimony, you're talking about the receipt of
10 those, the review of those, and now in your
11 changed circumstances method, using them as a
12 basis to establish a value measure --

13 A. Right. First is the --

14 Q. -- I think is the word you used
15 before, right?

16 A. First using them to see that the value
17 went up, at least as much as the units.
18 Because it might not have. And then looking at
19 them to see, you know, how much it did go up by
20 these different value measures.

21 Q. Okay. I think I've heard through your
22 direct and through some of the other
23 questioning and having read this that there's
24 not another basis that you're relying on, other
25 than what's discussed in your direct testimony,

1 which is your review of the various other
2 studies. Is that accurate?

3 A. In terms of whether or not there's
4 other evidence of changes in relative value of
5 PTV programming, besides that?

6 Q. Exactly.

7 A. Right. So that if I didn't have the
8 other studies, all I would be able to say is,
9 based on changes in measures that I could get
10 from CDC, particularly units measures, but, you
11 know, any other measures that they had, the
12 changes in those measures would have shown an
13 increase of, you know, at least 32 percent or,
14 you know, in that range, but I think that then
15 my report would be of more limited use because
16 it would -- it would have been subject to,
17 well, do you know whether the value changed?
18 Well, you know, I don't.

19 So I don't know it did. I don't know
20 it didn't. But it would be up to some -- you
21 know, it wouldn't be as strong as having these
22 other measures of value.

23 Q. Okay. Let me ask -- I want to ask you
24 a couple questions about your discussion of the
25 other measures of value. So the first one

1 would be on page 15 of Exhibit 3012. And this
2 is the part where you're talking about the
3 cable operator surveys.

4 A. Yes.

5 Q. And you're specifically making an
6 observation about the augmented Bortz results
7 that you had calculated and that you've already
8 talked about today, right?

9 A. Yes.

10 Q. Okay. And, specifically, you're
11 talking about here a comparison and you're
12 noting that the increase in the augmented Bortz
13 results from '04-'05 to 2010-'13 show an
14 increase that ranges between 24 and 37 percent
15 or about 31 percent on average and that "this
16 is in line with the 32 percent change due to
17 the increase in distant PTV subscriber
18 instances alone."

19 A. Right.

20 Q. Right? So that observation that you
21 noted there, what did that do for you? Did it
22 confirm that your calculation was -- on the
23 distant subscriber instances was accurate? Was
24 it --

25 A. No, what it did for me was to show

1 that when you -- when you have a value measure,
2 that the value went up about the same as the
3 units; therefore, the unit -- the value didn't
4 go down. Like from that other sentence you
5 were asking me about, you know, assuming no
6 change in value, well, this one is basically
7 saying there's no change in value; it's just --
8 in the value by itself, the value didn't go up
9 more or less than the units.

10 Q. I mean, what I'm wondering is if --
11 is -- does the alignment confirm for you when
12 you were doing your analysis that the augmented
13 Bortz results right there, they're reflecting
14 the increase, or because it aligns, or are you
15 just using that as a reference point to say,
16 oh, I'm on the right track?

17 A. No, it's because it aligns and it's
18 also because the other ones are higher that I
19 know that the value went up at least as much as
20 the units.

21 Q. And by "the others," you mean the
22 other value measurements that you were talking
23 about?

24 A. The other value measurements, yes.

25 Q. Okay. Let's talk about -- for a

1 moment about your discussion on the econometric
2 studies. So if we could turn to page 18, also
3 still in Exhibit 3012. And here you're talking
4 about the econometric studies from Drs.
5 Waldfogel and Crawford. And you start out with
6 a reference that they supplied analysis on a
7 seemingly comparable basis. Do you see that?

8 A. Yes.

9 Q. Okay. Now -- and you just were asked
10 a question about sort of how you carefully
11 reviewed them. But did you review them at a
12 level to become familiar with how they might be
13 different and how they might be similar?

14 A. Yeah, and I particularly noted that
15 Dr. Crawford said he did pretty much the same
16 thing but he made three changes. But the
17 changes were generally like instead of using
18 only minutes based on some short period of
19 time, he used all the minutes. Instead of --
20 there were three changes and I'm going to lose
21 them, but two, at least two of them were just
22 greater precision in measurement. And I think
23 the other one was subscriber groups. But in
24 Waldfogel, he used -- he used distant,
25 partially distant as a -- he considered partial

1 distant.

2 So subscriber groups and partial
3 distant kind of relate to each other.

4 Q. Right, okay. If we stay on page 18
5 there, right, I guess where we are, I think
6 right there, yeah, really the next sentence, it
7 reads -- you're making a reference to the value
8 of each minute of programming. Right? So
9 you've had some questions today -- you're
10 talking about this value measure being used in
11 your changed circumstances model, right?

12 A. Right.

13 Q. And, again, you're comparing the PTV
14 share from '04-'05 against the estimations that
15 are coming out of, in this case, Dr. Crawford's
16 regression, right?

17 A. Crawford compared to Waldfogel.

18 Q. Compared to Waldfogel, right.

19 A. Right.

20 Q. And, specifically, one of those things
21 that you're comparing is the marginal value per
22 minute that's estimated for both?

23 A. Right. I looked at the marginal value
24 per minute, right.

25 Q. Okay.

1 A. And that was a direct indicator of
2 value by itself as opposed to a mix of -- I
3 mean, it was a direct -- it was on the price
4 side as opposed to the quantity side where the
5 value is, you know, a quantity times a price,
6 right?

7 So when other people -- like in the
8 surveys, you only have a value percent. You
9 don't have a price percent and a units percent,
10 right? It's sort of built in underneath, but
11 they're splitting it out.

12 In the comparison between Waldfogel
13 and Crawford, he has his -- he specifically
14 states a price at a level that's comparable to
15 Waldfogel.

16 Q. Okay. And when you were doing your
17 review, did you look to the level of detail to
18 determine if those marginal values were
19 statistically significant under both Waldfogel
20 and Dr. Crawford?

21 A. The -- Waldfogel's value was not
22 statistically significant but Crawford's was.
23 And so -- and Crawford's, I believe that the
24 outside limit at the bottom for Crawford would
25 have been like just barely touching the

1 4.2 percents that Waldfogel said, so do you
2 know what I mean? Like the 5.1 would go from
3 something like 4 to 6. I mean, approximately.
4 Something in that range.

5 Q. Yeah. Actually, I first want to look
6 at it the other way. So if you --

7 A. If you looked at it the other way,
8 since Dr. Waldfogel's cents measure was not
9 significant, then it would -- the 5.1 cent
10 would be within the bounds on the 4.2, which
11 could go from 0 to 8, something like that.

12 Q. Right, yes. So you did read it to
13 that level of detail.

14 A. Yes.

15 Q. Okay. So then it would be accurate to
16 say then that the value that's estimated under
17 Dr. Crawford's model for PTV is within those
18 confidence intervals from Dr. Waldfogel's
19 estimates from the '04-'05 case?

20 A. But not vice versa, depending on the
21 level of significance that you went to.

22 Q. And so -- and then if I'm -- if we're
23 on the same page there, would you agree that
24 there's no statistical basis for us to be able
25 to assert that those two numbers are different

1 from each other for the purposes that you're
2 using them here, right?

3 A. Certainly if you start with Waldfogel,
4 that's true. If you start with Crawford,
5 there's a high probability that they're
6 different. So -- but I was just using them as
7 a point estimate and as something that showed
8 that there was an increase in the price
9 variable.

10 If we didn't have that information, we
11 could just say, well, there's an increase in
12 the value, so we can -- and just go with that.
13 We didn't have to have the price change. I
14 just liked the fact that here's somebody who
15 estimated just the other piece that I didn't
16 have any -- any chance to look at. In
17 subscriber instances.

18 Q. Okay. Let's take a look at your Table
19 2, which is on page 24 of Exhibit 3012.

20 A. Yes.

21 Q. And I'll wait until we get there.

22 I just wanted to note, as we did on
23 Table 1, so we're starting -- you're starting
24 with the PTV share from '04-'05 all the way
25 across the top, right?

1 A. Yes.

2 Q. 7.55. And then the percentage
3 increases that you're showing in the growth in
4 PTV share, the way you've already described
5 subscriber instances because that's your Table
6 1, right?

7 A. Right.

8 Q. And then the rest of them that you do
9 there, you're calculating the percentage
10 increase year to year and then expressing it
11 down below on what's called the updated share?

12 A. Yes.

13 Q. Right?

14 A. Right. So that -- so that, say, you
15 were looking at Crawford, so on the top line
16 under Crawford is 7.55 percent. That was the
17 share from '04-'05. For the whole period,
18 there was a 176 percent increase. So if you
19 multiply 7.55 times 2.76, to get the whole
20 increase in, you come to 20.8.

21 Q. Okay. And the calculations that
22 you've made are only those, right? As you're
23 applying the percentage change that you
24 calculated in expressing it in the share
25 percentage, right?

1 A. Yes.

2 Q. Okay. I think you had testified,
3 maybe in your direct, that your opinion was
4 that the Public Television share would be at
5 least 9.9 percent but probably greater than
6 that based on other value measures.

7 A. Right.

8 Q. I think I heard you right; is that
9 right?

10 A. Yes.

11 Q. And by "other value measures," you
12 mean your calculations here that you've
13 provided for the Judges; is that right?

14 A. Right. Based on -- right. Yes.
15 Horowitz, Crawford, and Israel.

16 MR. ERVIN: I have no further
17 questions. Thank you very much,
18 Ms. McLaughlin.

19 JUDGE BARNETT: Cross-examination by
20 the Canadian Claimants group?

21 MR. SATTERFIELD: No, ma'am.

22 JUDGE BARNETT: Redirect, Mr. Dove?

23 MR. DOVE: No, Your Honor.

24 JUDGE BARNETT: Anything further for
25 this witness? Thank you very much,

1 Ms. McLaughlin. You may be excused.

2 THE WITNESS: Thank you.

3 JUDGE BARNETT: Here we are again. I
4 think by agreement, Dr. Erdem will appear
5 tomorrow?

6 MR. MacLEAN: Yes, Your Honor.

7 JUDGE BARNETT: And my surmise is that
8 his testimony will last all day. Anybody have
9 any contrary surmising? All right.

10 And this is a week we do not have
11 Friday session. So we'll see you all tomorrow.
12 We'll see if we can get through Dr. Erdem
13 tomorrow and go from there.

14 Thank you very much. We're at recess
15 until 9:00 o'clock in the morning.

16 (Whereupon, at 2:58 p.m., the trial
17 recessed, to reconvene at 9:00 a.m. on
18 Thursday, March 8, 2018.)

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I. Qualifications and Summary

I am an economist and a Special Consultant at National Economic Research Associates, Inc. I have conducted research on entertainment and media industries for over 30 years. I have analyzed marketplace prices paid for copyright licenses, reasonable rates for such licenses, and the distribution of fees collected to individual rights owners in a variety of media, including cable networks, broadcast stations, television programs, motion pictures, books, music compositions and recorded songs. I have submitted reports to and/or testified before the Copyright Royalty Judges and Copyright Arbitration Royalty Panel (CARP) concerning the distribution of cable royalty funds, the distribution of satellite royalty funds, the compulsory license fee for satellite-retransmitted broadcast stations, and the costs and revenues of the record labels affiliated with the major U.S. record companies. In addition, I have submitted reports to the Federal Communications Commission and the Federal Trade Commission, and have testified before state and Federal courts and arbitrators concerning entertainment market issues. A detailed statement of my qualifications is attached as Appendix 1.

Counsel for the Public Broadcasting Service asked me to address two issues relevant to the relative value of distant Public Television (PTV) stations imported by cable operators in 2004-05: whether there has been a major change in the factors that would affect relative marketplace values between 1998-99 and 2004-05 and what the outcome of the Bortz survey would likely have been had the survey not omitted systems that imported only distant PTV and/or Canadian stations.

In summary, I conclude:

- There was no major change in the factors that would affect relative marketplace value in 2004-05. Available data indicate that there was no decrease in demand for imported PTV programming. If anything, there was a slight increase in such demand.
- Had all systems with distant signals been considered eligible, the Bortz survey would have been expected to find that cable operators attributed to PTV about 6 percent of the fixed dollar amounts they spent on the distant signals they actually imported to attract and retain subscribers in 2004-05.

II. No Substantial Changed Circumstances Between 1998-99 and 2004-05

A. Background

In 1998-99, the CARP awarded PTV 5.5 percent of the cable operator basic royalty fund. It reached its decision based on a prior percentage allocation to PTV and a finding of no changed circumstances since that time that affected PTV's share.¹

According to previous CARP proceedings and related court decisions, the standard for determining the distribution of the royalties for cable-retransmitted distant signals among the claimant groups that supply the compensable programming is relative marketplace value. The hypothetical marketplace negotiations over such programming would occur between cable operators and broadcasters (as intermediaries for copyright owners) for the rights to retransmit entire broadcast signals.² Only demand is relevant in such negotiations—the demand by the cable operators for the distant signals they choose to import. Demand for distant signals depends on the prices and quality of the available substitutes—the local stations, cable networks and other services offered by cable operators—the additional cost (if any) of bringing the distant station to the cable system headend, and the income and taste of the cable system subscribers and potential subscribers.

B. Carriage

Cable operators have a choice whether or not to carry distant signals. All systems must pay a minimum fee covering one distant signal equivalent (DSE). That is, a cable system could carry one independent station (equal to one DSE), four PTV stations or four major network affiliates (each PTV and affiliate station equals one-quarter DSE) without paying additional royalties.³ Although one DSE is “free” with the minimum payment in terms of cable royalties, the distant signal(s) use bandwidth that the operator may prefer to use for cable networks or other services. As a result, many systems import no distant signals, and still others carry only a

¹ Program Suppliers v. Librarian of Congress, 409 F.3d 395 at 399-400, 403-404 (D.C. Cir. 2005).

² CARP Report, Cable Royalties for the Years 1990-92, Docket No. 94-3 CARP CD-90-92, May 31, 1996, pp. 22-24; Report of the CARP to the Librarian of Congress, In the Matter of the Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2001-8 CARP CD 98-99, October 21, 2003, pp. 9-11.

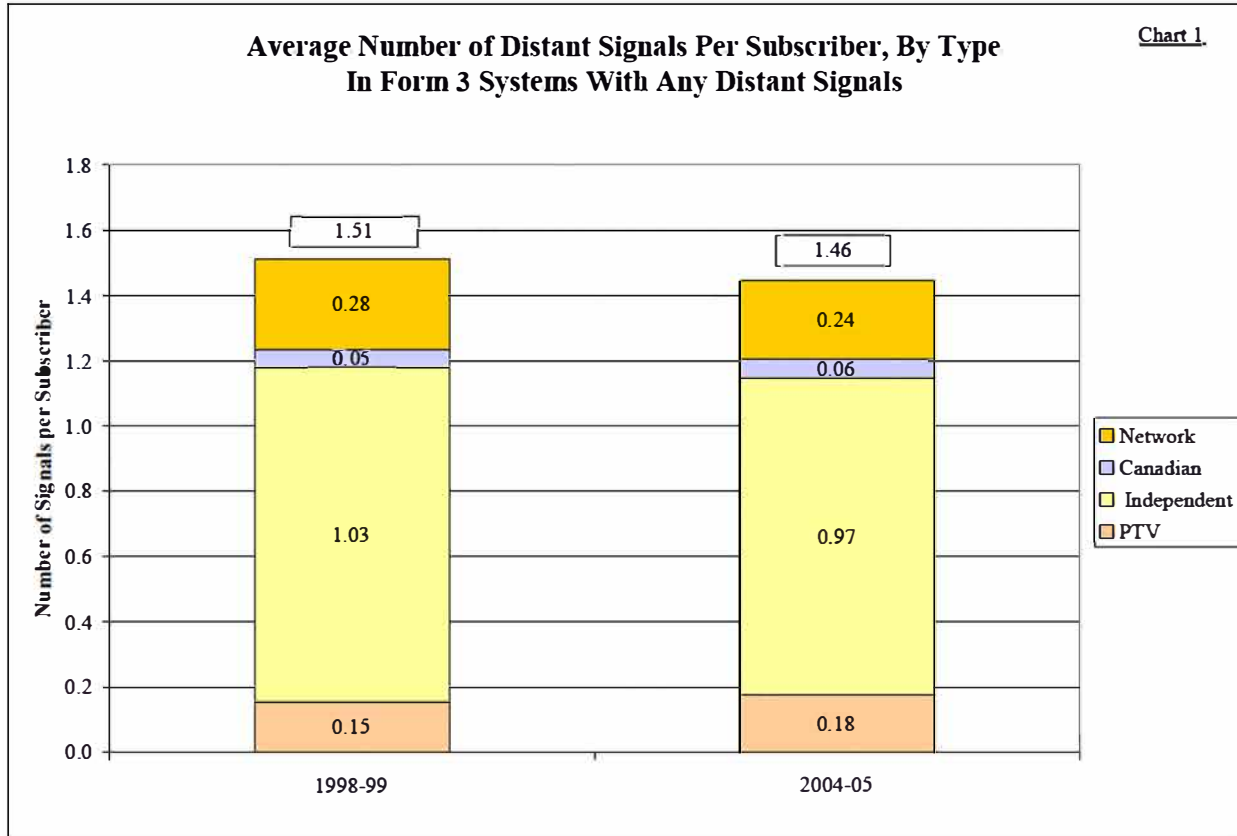
³ 17 U.S.C.A. Sect. 111(f) (2008).

fractional DSE. In 1998-99 and 2004-05, Form 3 systems covering about 30 percent of subscribers imported less than one DSE and paid the minimum fee—about 20 percent carried no distant signals and about 10 percent carried only a fractional DSE.⁴ For these systems, the value of a distant signal (or an additional fractional DSE) is apparently less than the value of an alternate use of the bandwidth the signal would occupy. In contrast, those systems that do choose to carry distant signals reveal by their behavior that they value the chosen signals more than alternate uses. As a result, a substantial change in the particular signals cable operators choose to carry can be a meaningful indicator of a change in cable operator demand.

Slightly more subscribers were in cable systems that chose to carry distant signals in 2004-05 (82 percent) than in 1998-99 (76 percent). On average, cable operators that carried distant signals chose to carry about the same number of distant signals per subscriber: 1.51 in 1998-99 and 1.46 in 2004-05. The composition by type of signal also remained relatively the same. For example, the average subscriber with distant signals received 0.15 PTV stations in 1998-99 and 0.18 PTV stations in 2004-05. See Chart 1.⁵

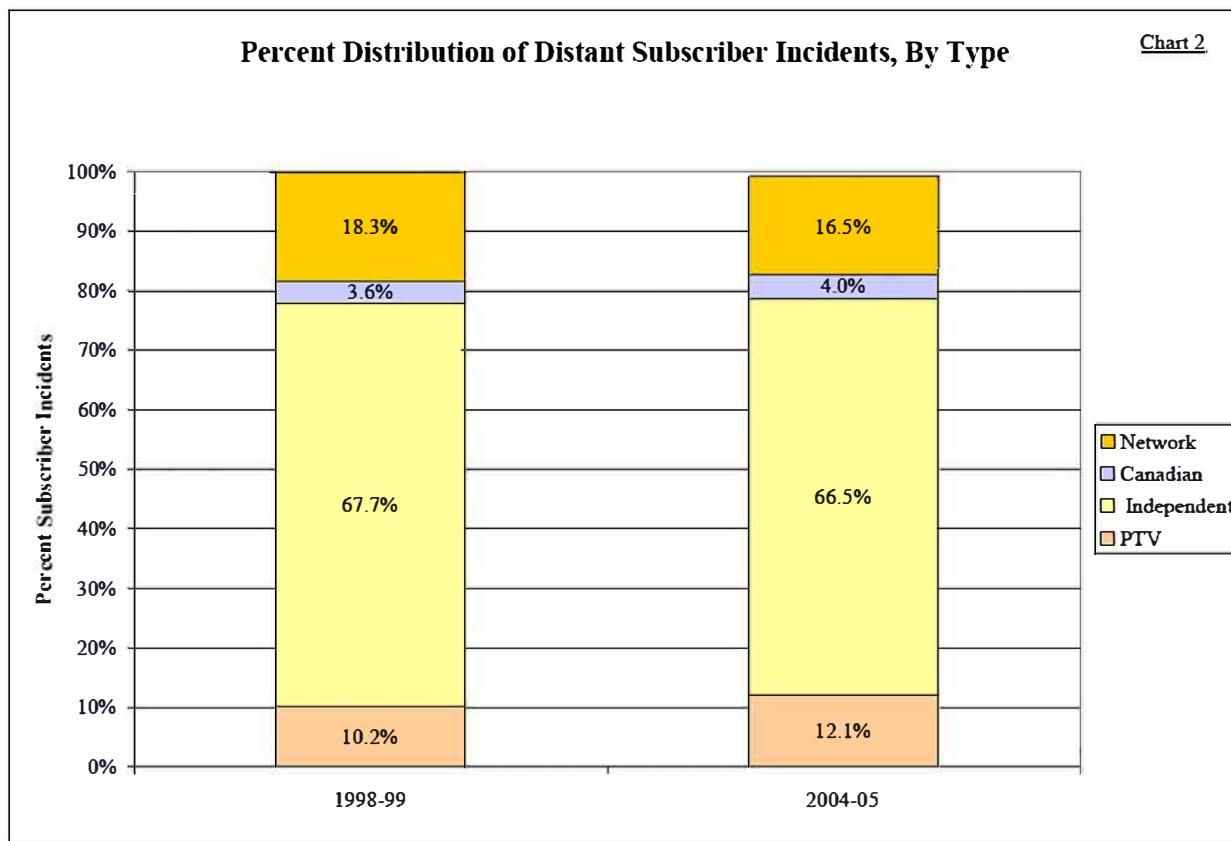
⁴ Based on data supplied by Cable Data Corporation (CDC). These and other data in my report represent data supplied by Form 3 systems. Form 3 systems accounted for 91 percent of subscribers in 1998-99 and 94 percent in 2004-05; they paid 96 percent of royalties in 1998-99 and 97 percent in 2004-05. The CDC data used in my analyses are described in the Direct Testimony of Jonda K. Martin, also submitted in this proceeding.

⁵ Based on data supplied by CDC. The total includes Low Power and Mexican, which averaged 0.01 signal per subscriber or less.



Another way to see that the composition of the distant signals carried remained approximately the same in 1998-99 and 2004-05 is to look at the percentage distribution of distant subscriber incidents. (One distant subscriber incident is one subscriber receiving one distant signal.) Total distant subscriber incidents increased slightly from 68.0 million in 1998-99 to 70.7 million in 2004-05. The number of distant PTV subscriber incidents increased from 7.0 million in 1998-99 to 8.5 million in 2004-05. PTV accounted for 10 percent of the distant

subscriber incidents in 1998-99 and 12 percent in 2004-05.⁶ The percent of distant subscriber incidents for other types of signals was even more stable over the two periods. See Chart 2.⁷



⁶ PTV also achieved similarly small increases by other measures. PTV accounted for 0.039 DSEs out of a per-subscriber average of 1.190 DSEs in 1998-99 and 0.044 out of 1.145 in 2004-05. PTV accounted for 3.2 percent of fees generated in 1998-99 and 3.4 in 2004-05. [Data provided by CDC.] Compared to subscriber incidents, however, PTV accounts for a smaller percentage of average DSEs per subscriber and of fees generated due to the arbitrary designation of PTV signals at one-quarter of a DSE. As I explained in an earlier report, fees generated reflect the payment framework of the compulsory license and attribution methods, rather than the value of the programming on the retransmitted stations. See Testimony of Linda McLaughlin, In the Matter of Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-2003, January 30, 2009, PTV 04-05 Ex. 9.

⁷ Based on data supplied by CDC. Low Power and Mexican stations accounted for less than 1 percent of subscriber incidents.

C. Unadjusted Bortz Survey

Each year, Bortz Media & Sports Group, Inc. (Bortz) conducts a survey of a random sample of cable operators.⁸ The cable operators are asked how they would allocate a fixed budget among the different programming categories on the distant signals they actually carried in the preceding year. The survey results reflect the collective valuations made by the eligible respondents. Certain potential respondents, however, are deemed ineligible: those that carry distant signals only in the PTV and/or Canadian category. For this reason, Trautman acknowledges that the survey results for PTV and Canadian program categories require adjustment.⁹ Nevertheless, the reported survey results can provide useful information about any substantial changes in relative value between 1998-99 and 2004-05 for two reasons. First, the ineligible potential respondents are similar in the two time periods.¹⁰ Second, many of the eligible survey respondents import distant PTV and/or Canadian signals along with independents and network affiliates.¹¹

The unadjusted Bortz survey shows no substantial change in cable operators' relative values of the different types of programming. For example, in 1998-99, the surveyed cable operators attributed 2.9 percent of the value of the distant signals they imported to PTV programming in 1998 and 1999; the surveyed group attributed 3.5 percent to imported PTV programming in 2004 and 3.7 percent in 2005.¹² Changes in other categories between 1998-99 and 2004-05 are of similar magnitude. See Chart 3.¹³

⁸ Testimony of James M. Trautman, Bortz Media & Sports Group, Inc., Cable Operator Valuation of Distant Signal Non-Network Programming, June 1, 2009 (Trautman, 2009).

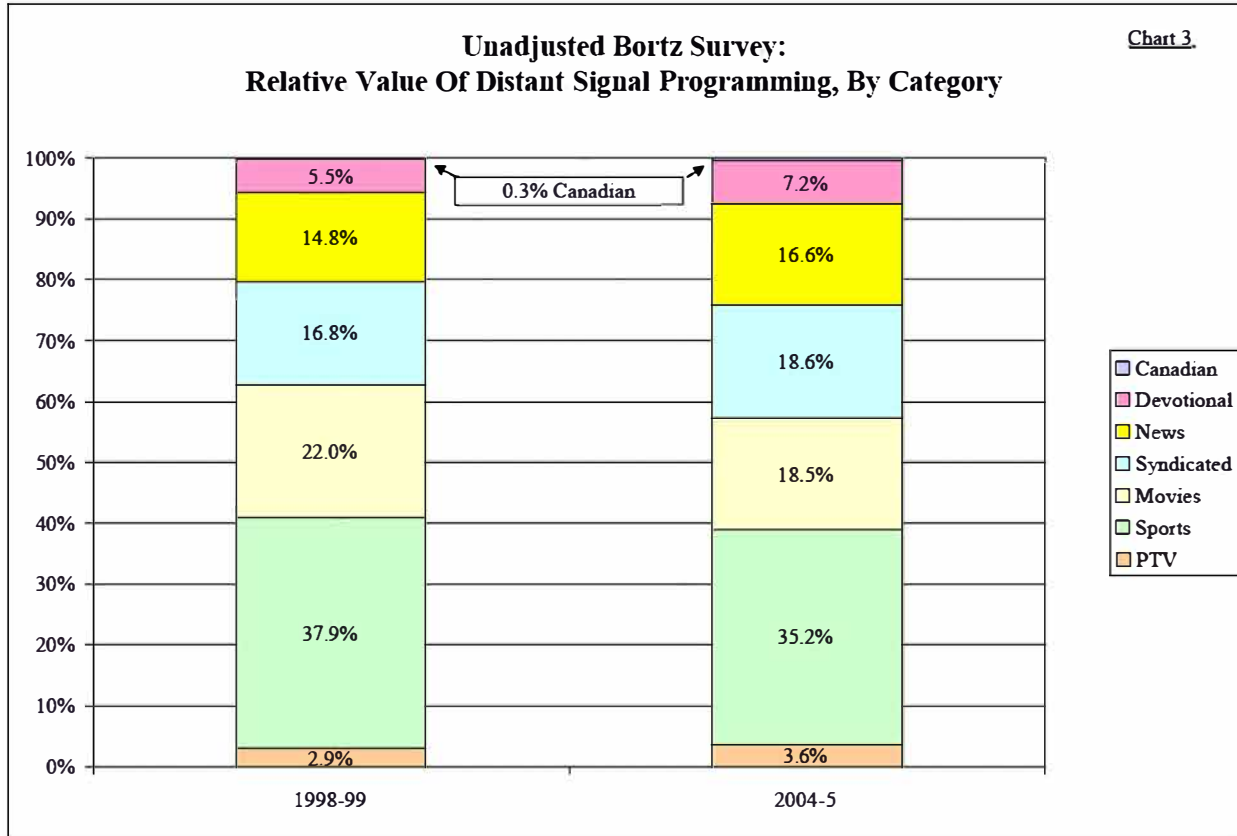
⁹ Trautman, 2009, pp. 7-8.

¹⁰ Including the omitted systems that carry only PTV and Canadian distant signals would have increased the size of the eligible sample by 6 to 8 percent in 1998-99 and 4 percent in 2004-05.

¹¹ For example, in 2004, 59 of the 162 eligible respondents carried distant PTV signals and 11 carried distant Canadian signals (Trautman, 2009, pp. 15-16).

¹² The observed increase is within the range of sampling variation.

¹³ Trautman, 2009, p. 6, Table I-2. Detail may not sum due to rounding.



Based on both carriage data and the unadjusted Bortz survey, there was no substantial change in the relative demand of cable operators for imported programming between 1998-99 and 2004-05. The small changes that occurred were generally in favor of PTV programming.

III. Augmented Bortz Survey Results

Available information allows me to compute the values the 2004 and 2005 Bortz surveys likely would have found had they not excluded from the original samples cable operators that carried only distant PTV and/or Canadian signals. I refer to the larger sample as the augmented Bortz survey.

A. Background

The Bortz survey asks cable operators to estimate the relative value of the different programming types broadcast by the particular distant signals they carry. Specifically, the 2004 survey asked:

Now, I would like you to estimate the relative value to your cable system of each type of programming actually broadcast by the stations I mentioned during 2004 [as those your system carried from other cities], other than any national network programming from ABC, CBS and NBC. That is, how much do you think each such type of programming was worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers. We are only interested in [repeat list of distant stations carried].

Assume you had a fixed dollar amount to spend in order to acquire all the programming actually broadcast during 2004 by the stations I listed. What percentage, if any, of the fixed dollar amount would you spend for each type of programming? Please write down your estimates, and make sure they add to 100.¹⁴

The Bortz survey uses seven program categories, five of which appear on U.S. independent stations and network affiliates—movies, live professional and college sports, syndicated shows, news/public affairs and devotional/religious programming—and two of which are specific to a station type—PTV and Canadian stations.¹⁵

But for two factors, the Bortz survey results would show how the cable operators themselves would have allocated the compulsory licensing royalties they paid to carry that programming. The first factor is the omission of cable operators selected in the sample but deemed ineligible to respond because they import only PTV or Canadian distant stations. As a result of this omission, the value given for PTV and Canadian programming is a floor.¹⁶ Had these omitted operators been included, they would have been restricted to “dividing the value” among only one programming category, PTV or Canadian, respectively. As a result, it is self-evident what these omitted operators would have replied, if they had been included and had followed the survey instructions: those that carried only PTV would be required to say 100 percent for PTV programming and, similarly, those that carried only Canadian stations would be

¹⁴ Trautman, 2009, Appendix B, 2004 System Operator Programming Questionnaire, 4a. A similar question was asked for 2005.

¹⁵ The programming category specifically includes all programming on these station types. For PTV the category is: “PBS and all other programming broadcast during 2004 by U.S. noncommercial station ____ [the PTV station(s) carried by the cable operator].”

¹⁶ Trautman, 2009, pp. 7-8; Report of the CARP to the Librarian of Congress, In the Matter of the Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2001-8 CARP CD 98-99, October 21, 2003, pp. 25-26.

required to say 100 percent for programming on Canadian stations.¹⁷ I added these omitted systems back into the Bortz survey. The results of the augmented Bortz survey provide an estimate of the PTV value, not a floor.

The second factor is the implied inclusion of certain noncompensable programming. In general, two categories of programming contained on some imported signals are not compensable: (1) ABC, CBS and NBC network programming and (2) certain programming, particularly movies, syndicated and devotional programming, not retransmitted from the programming broadcast by the television station WGN but inserted into the satellite-delivered WGN signal.¹⁸ The survey instructs respondents to ignore the value of the noncompensable network programming but not the value of the noncompensable WGN programming. As a result, the values cable operators that import WGN ascribe to movies, syndicated series and devotional programming are likely to include both compensable and noncompensable programming, which would overstate the values of the compensable programming in these categories.

B. Calculation of Augmented Bortz Survey Results

I received information identifying the cable operators picked to be surveyed but excluded because they carried only PTV or Canadian distant signals. I recalculated the survey results, assuming that these systems were eligible. I further assumed that these omitted systems would have a response rate similar to those that were eligible and that they would have followed the

¹⁷ An omitted cable operator with distant PTV and Canadian stations, but no other distant stations, would have been asked to divide the value among the two programming types. For such cable operators, the split in the relative value between PTV and Canadian station programming would not be self-evident. No such cable operators were omitted from potential respondents in 2004 and only two such operators were omitted in 2005.

¹⁸ Statement of Richard V. Ducey, June 1, 2009, also submitted in this proceeding.

survey instructions. A simplified version of the recalculation for 2004 is set out below. It produces an augmented survey result of 6.8 percent for PTV in 2004.¹⁹

- 162 respondents, 64.5 percent of those eligible, gave PTV a relative value of 3.5 percent.
- Nine systems were drawn in the original sample but deemed ineligible because they carried only PTV distant signals. Had they been eligible, we would expect 64.5 percent of the 9 to respond, or 5.8 respondents, all of which would have assigned PTV stations 100% of the relative value.
- One system was in the original sample but was ineligible because it carried only a Canadian distant station. Had it been eligible, we would expect 64.5 percent of the 1 to respond, or 0.6 respondents, which would have assigned PTV stations 0% of the relative value.
- $[(162 \times 3.5\%) + (5.8 \times 100\%) + (0.6 \times 0\%)] / [162 + 5.8 + 0.6] = 6.8\%$

The actual process is more complicated due to the stratification and weighting process used by the Bortz survey. (See Appendix 2.) Nevertheless, the simplified result is similar to the augmented survey result I obtained from the more complete process: 6.2 percent for PTV.

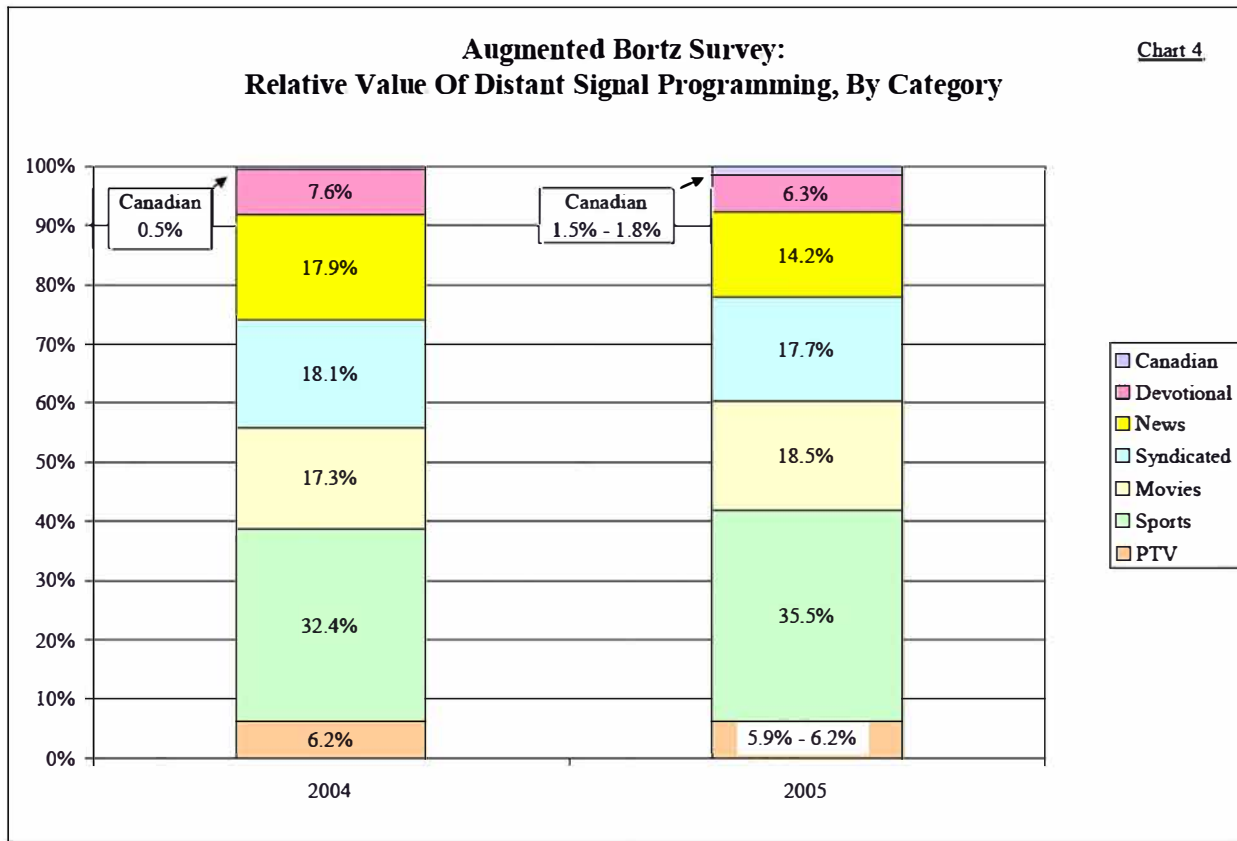
I undertook the same steps for the 2005 survey, with one exception. Among the original sample of cable operators, there were not only those deemed ineligible because they carried only PTV distant signals (seven systems) or only Canadian distant signals (one system), but also two

¹⁹ The relatively small size of the augmented result for PTV, like the size of the original PTV result, reflects the fact that only about 30 percent of Form 3 systems and about 25 percent of Form 3 subscribers receive a distant PTV signal (based on CDC data). The value given to PTV by respondents to the original 2004 survey for systems that carried PTV was 11 percent, a value higher than those given to Canadian and devotional programming, but less than other programming types (Trautman, 2009, p. 16, Table II-2). The augmented survey, if restricted to those that carried distant PTV stations, would give PTV a value of about 19 percent in 2004, a value in the same range as news, syndicated programming and movies, and greater than the values given to devotional and Canadian programming.

It is not surprising that distant PTV programming is highly valued by those that carry it. In 2004-05, virtually all subscribers received a local and/or distant PTV signal. A substantial portion of those with a distant PTV signal had no local PTV signal. In 2004-05, 27 percent of Form 3 subscribers with a distant PTV station had no local PTV station. [Data provided by CDC.] For such subscribers, a distant PTV signal is the only way they can receive PTV programming.

ineligible systems that carried both PTV and Canadian distant signals. Because it is unclear how respondents in the last group would have split their relative values between PTV and Canadian station programming, I used a range of responses: the extremes of 100 percent PTV/0 percent Canadian and 0 percent PTV/100 percent Canadian. My estimate for the augmented Bortz survey in 2005 is a range depending on the assumed answer of the last group: 5.9 to 6.2 percent.

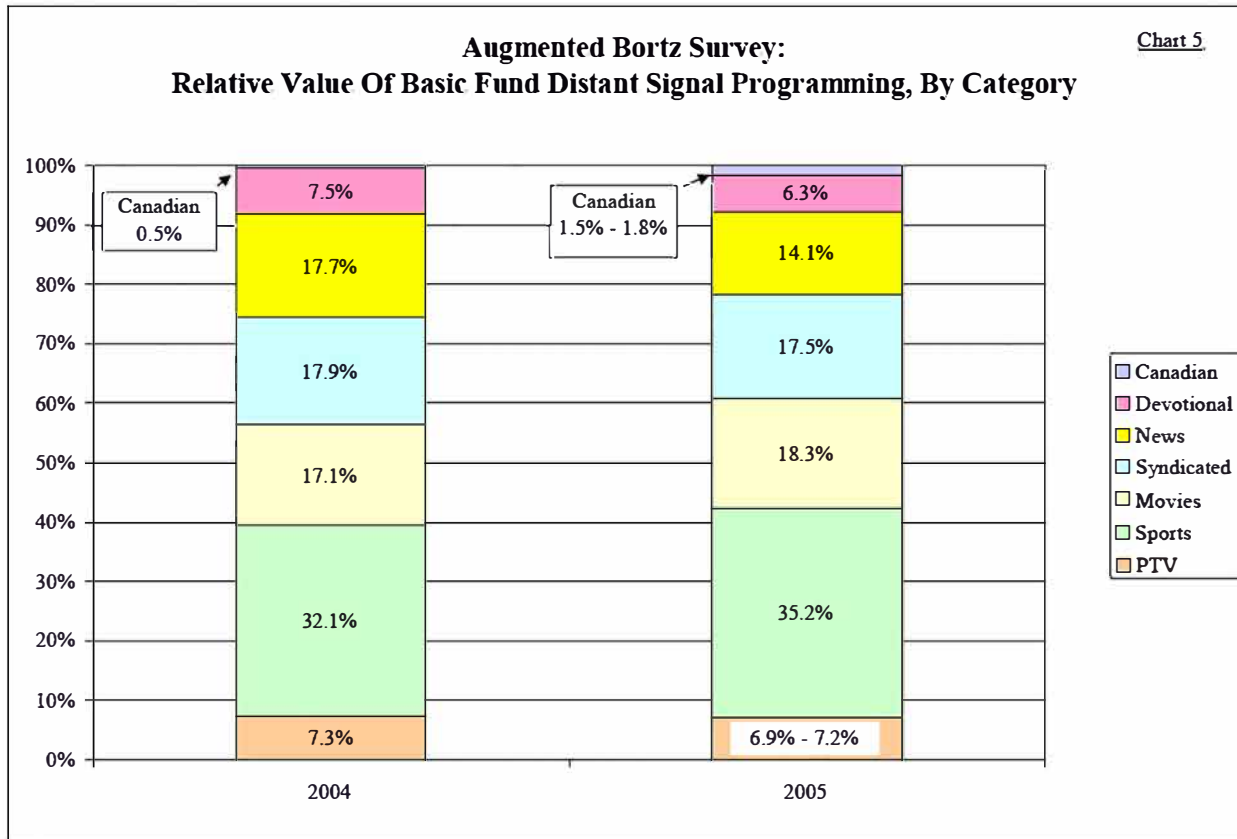
When the ten omitted systems that carried only PTV and/or Canadian distant signals are added to each year's survey, the estimated values for PTV and Canadian programming increase and the estimated values for the five other categories decrease. The augmented results for 2004-05 for each of the seven programming categories are summarized on Chart 4.²⁰



Both the unadjusted and augmented Bortz survey results show the percentage value of all royalties —basic, 3.75 and syndex royalties—paid by the surveyed cable systems that the respondents assign to each programming type. Since PTV receives payments from only the

²⁰ Methodology and sources are described in Appendix 2. Detail may not sum due to rounding.

basic fund, an adjustment to the augmented survey results is needed to produce PTV's share of the basic fund.²¹ This adjustment divides the augmented PTV results by the percent of all Form 3 royalties in the basic fund: 85.0 percent in 2004 and 85.9 percent in 2005.²² The adjusted PTV results equal about 7 percent. See Chart 5.²³



²¹ Report of the CARP to the Librarian of Congress, In the Matter of the Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2001-8 CARP CD 98-99, October 21, 2003, p. 26, fn. 10.

²² Based on data provided by CDC.

²³ Based on Chart 4 and data supplied by CDC. Since only syndicated programming participates in the syndex fund, the other categories are also adjusted for their fund participation. (The nonsyndex adjustment factor, 99.97 percent in 2004 and 2005, produces virtually no change.) All categories other than PTV are adjusted for the increase in PTV's share. Detail may not sum due to rounding.

IV. Conclusion

In summary, I conclude:

- There was no major change in the factors that would affect relative marketplace value in 2004-05. The relative number of subscribers receiving distant PTV and other signals and the Bortz survey results indicate that there was no decline in the demand for imported PTV programming. In fact, there were slight increases in these values.
- The augmented Bortz survey, which includes systems that carried only PTV or Canadian distant signals, would have been expected to find that cable operators attributed to PTV about 6 percent of the fixed dollar amounts they spent on the distant signals they actually imported to attract and retain subscribers in 2004-05.

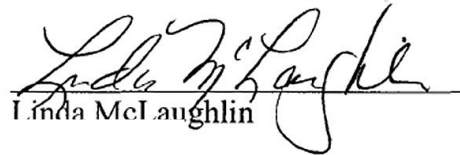
**Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

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In the Matter of)
)
Distribution of the)
2004 and 2005)
Cable Royalty Funds)
_____)

Docket No. 2007-3 CRB CD 2004-2005

DECLARATION

I, Linda McLaughlin, declare under penalty of perjury that the testimony of Linda McLaughlin presented in the 2004-2005 Cable Copyright Royalty Distribution Proceeding is true and correct to the best of my knowledge, information and belief.


Linda McLaughlin

Executed on: 5/29/2009

)

LINDA McLAUGHLIN
SPECIAL CONSULTANT

Ms. McLaughlin specializes in antitrust and trade regulation. She has prepared studies of relevant product and geographic markets, market structure and performance, the impact of mergers and acquisitions, vertical and horizontal arrangements, and pricing and purchasing practices. These studies have focused on various consumer and producer industries, with particular emphasis on media and insurance.

Her work in the media and entertainment industries also includes: analyses of proposed US Federal Communications Commission rules concerning cable and broadcast television; pricing of music copyrights and retransmitted television stations rights; evaluation of motion picture talent contracts; the impact of a new magazine introduction; the reasonableness of cable, home satellite, and recorded music projections; and the value of cable systems, cable networks, and newspaper distributors.

In the area of insurance, she has also studied the effect of state rate regulation and deregulation of large commercial transactions, as well as the causes of the liability insurance crisis and its effect on reinsurers.

In addition, Ms. McLaughlin has performed studies of impact and damages in connection with antitrust, contract, trademark, and other litigation. The firms involved in these studies have included: manufacturers of consumer electronics products, fertilizers, windows, paint, and pharmaceutical products; distributors of chemicals, steel, beverages, and telecommunications services and equipment; tobacco growers; and satellite and internet service providers.

Education

University of Pennsylvania

M.A., Economics, 1970

Marquette University

B.S., *cum laude*, Mathematics, 1968

Professional Experience

- 1974- **NERA Economic Consulting**
Special Consultant (since 2009)
Specialization: antitrust and trade regulation, intellectual property, economic damages.
Primary industries studied: media and entertainment, including broadcast, cable and satellite television, broadcast and satellite radio, motion pictures, recorded music, music publishing, advertising, newspapers, magazines and internet; and property-casualty and health insurance.
Other industries studied: telecommunications, photographic supplies, consumer electronics products, fertilizers, paint, windows, window coverings, pharmaceutical products, building products, hardware, chemicals, glass, steel, breakfast cereal, beverages, and tobacco.
- 1970-1974 **Hofstra University**
Instructor
Taught introductory economics, intermediate microeconomics, and the application of mathematics to economics.

Professional Activities

Member, American Economic Association and Committee on the Status of Women in the Economics Profession.

Testimony, Reports, and Publications

IDT Telecom, Inc., et al. v. CVT Prepaid Solutions, Inc., et al. (D.N.J.), a Lanham Act case. Report, April 2009; deposition testimony, May 2009.

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May 2009

Appendix 2

Augmented Bortz Survey Sources and Methods

The Bortz survey draws a stratified random sample of cable operators, with the stratification into four groups (or strata) based on the size of the system's cable royalties. It then eliminates ineligible systems (for example, those carrying no distant signals and those carrying only PTV or Canadian distant signals)¹ and attempts to interview the remaining, eligible systems. Interviews were completed with 64.5 percent of the eligible sampled systems in 2004 and with 68.1 percent of those in 2005.² In order to arrive at survey estimates from the interview responses concerning valuation by program category for the total population (including those interviewed and not interviewed), Bortz used a ratio estimation methodology that weights responses based on (1) the total royalty of each respondent's system, (2) the total royalties of all respondents' systems in that same stratum, and (3) the total royalties of all (sampled and nonsampled) systems in that stratum.³

I obtained the augmented survey results based on the following data: for each of the ten omitted systems that carried PTV and/or Canadian distant signals in each year, 2004 and 2005, I received information, including the royalty, the stratum and the type of signals carried. I also received, from CDC, summaries of the original Bortz survey results for each of the four strata for 2004 and 2005, including the number of respondents, their royalties and their total value for each of the program categories.⁴ In addition, Trautman, 2009 (p. 46, Table A-1) supplied the eligible sample and the distribution of total royalties for the four strata.

I obtained the augmented survey results by undertaking the following steps analogous to the original Bortz survey:

First, I determined which of the ten systems drawn in the original Bortz survey in 2004 and 2005 but ineligible due to carrying only PTV and/or Canadian distant signals would be likely

¹ Trautman, 2009, p. 46, Table A-1.

² Trautman, 2009, pp. 47-48.

³ Trautman, 2009, pp. 49-50.

⁴ These summaries gave a single figure for each programming category in a particular strata; individual responses were not provided.

respondents. The ten systems covered all four strata. To determine the likelihood of each responding, I used the response rates specific to each stratum as the probability of an omitted system in an individual stratum being included in the overall results.⁵

Second, I determined the responses of each system to the valuation question. For the excluded systems importing only PTV signals or only Canadian signals (all ten of the omitted systems in 2004, and eight of the ten in 2005), each was assumed to have 100 percent of its fixed dollar amounts allocated to PTV or Canadian, in accordance with the respective PTV or Canadian distant signal the system carried and 0 percent for all other program categories. In 2005, two systems carried both Canadian and PTV. I have assumed different distribution amounts for these systems to represent the extremes (i.e. 0 percent Canadian and 100 percent PTV, or 100 percent Canadian and 0 percent PTV). These extremes represent the ceiling and floor of possible outcomes for these systems.

Third, I calculated the likely augmented Bortz survey results considering the following factors: (1) the probability of responding for each omitted system in each stratum, (2) the valuation response for program category x for the omitted system in each stratum, (3) the valuation response for program category x for the original respondents (as a group) in each stratum, (4) the royalty weight of each omitted system in each stratum, (5) the royalty weights for the original respondents (as a group) in each stratum, (6) the royalty weights for total royalties of all (sampled and nonsampled) systems in that stratum. The calculation is made according to the formula for the total value of program category x in the Trautman report (Trautman, 2009, pp. 49-50) with the omitted systems given both a probability weight and a royalty weight.

⁵ I considered running a simulation, that is, a series of independent, random trials such that the share of trials with the system included would match the overall probability for its stratum. Over a large number of trials, this method would produce a result similar to the estimation method used and would not add precision.

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BEFORE THE COPYRIGHT ROYALTY JUDGES

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In the Matter of:) Docket No:
Distribution of the) 2007-3 CRB CD 2004-2005
2004 and 2005) Volume II
Cable Royalty Funds) Pgs. 309 - 603

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Washington, D.C.

Wednesday, October 7, 2009

The following pages constitute the continued proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Cindy L. Sebo, RMR, CRR, CSR, RPR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 9:32 a.m.

Oct. 7, 2009 McLaughlin Testimony - 1

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<p>1 exhibits pursuant to this Court's September 21st 2 order. The parties have waived Mr. Wilson's live 3 appearance. 4 I have marked the binder containing 5 Mr. Wilson's direct case testimony and exhibits as 6 Settling Parties Exhibit 5. 7 May I approach? 8 CHIEF JUDGE SLEDGE: Yes. 9 (Settling Parties Exhibit No. 5 was 10 marked for identification.) 11 CHIEF JUDGE SLEDGE: Any objection to 12 Exhibit 5? 13 (Pause.) 14 CHIEF JUDGE SLEDGE: Without objection, 15 it's admitted. 16 (Settling Parties Exhibit No. 5 was 17 admitted into evidence.) 18 MR. DOVE: At this time, Your Honor, 19 the Public Television Claimants would like to call 20 Linda McLaughlin to the stand. 21 22</p>	<p>1 A. In February of this year. 2 Q. What was your prior position at NERA? 3 A. I was a senior vice president. 4 Q. Now, how long have you been with NERA? 5 A. Thirty-five years. 6 Q. What is your educational background? 7 A. I have a Bachelor's of Science from 8 Marquette University, where I majored in math, and 9 a Master's degree in economics from the University 10 of Pennsylvania. 11 Q. At NERA, in general, what kinds of work 12 do you do? 13 A. I do economic analysis, applied work on 14 industries, particularly addressing questions of 15 competition, intellectual property and valuation 16 and often in contested matters like this one. 17 Q. Are there particular industry areas in 18 which you concentrate? 19 A. Yes. 20 Q. And what are they? 21 A. In media and entertainment, 22 particularly.</p>
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<p>1 WHEREUPON, 2 LINDA McLAUGHLIN 3 was called as a witness and, having been first 4 duly sworn, was examined and testified 5 as follows: 6 CHIEF JUDGE SLEDGE: Thank you. 7 Please be seated. 8 EXAMINATION ON QUALIFICATIONS 9 BY MR. DOVE: 10 Q. Good morning, Ms. McLaughlin. 11 A. Good morning. 12 Q. Would you please state your name for 13 the record? 14 A. Linda McLaughlin. 15 Q. And what is your business address? 16 A. 1166 Avenue of the Americas, New York, 17 New York 10036. 18 Q. What is your current position? 19 A. I'm the special consultant at NERA, 20 National Economic Research Associates. 21 Q. And when did you begin in that 22 position?</p>	<p>1 Q. And for approximately how many years 2 have you concentrated in media and 3 entertainment -- in the media and entertainment 4 field? 5 A. For over 30 years. 6 Q. Have you previously testified or filed 7 reports as an economic expert regarding the 8 economic attributes of entertainment and media 9 markets? 10 A. Yes, I have. 11 Q. Would you please provide a few 12 examples? 13 A. Sure. 14 I testified before an arbitrator in a 15 matter for NBC. It had a dispute with Paxson over 16 the selling of a TV station ad time, and I 17 examined the local television station markets for 18 audiences and advertisers in that case. 19 In another case, I testified before a 20 panel of arbitrators for Cablevision, and that was 21 a suit that involved a sports network and what 22 tier it should be carried on and -- and the price.</p>

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<p>1 And I testified as to the effect of -- 2 the tier carriage would have on the revenue -- ad 3 revenue for the sports network given the 4 difference in -- in potential viewership. 5 And then I filed expert reports, 6 including -- as an economist, of course, for 7 the -- before the FCC in the -- in a matter that 8 was concerned with the determination of cable 9 rates and the effect of competition on cable 10 rates. 11 Those are just some examples. There 12 are others. 13 Q. Ms. McLaughlin, have you previously 14 testified or filed reports as an economic expert 15 regarding copyright licensing or the valuation of 16 copyrighted works? 17 A. Yes. 18 Q. And would you please provide a few 19 examples of that? 20 A. Yes. 21 Well, as you stated in here -- just 22 earlier, I testified in the 2000 to 2003 cable</p>	<p>1 surveys of viewing. 2 And in my testimony for NBC, again 3 looking at viewing, the cable rate analysis that I 4 described was based on surveys of cable operators, 5 and how to weight those surveys was an important 6 question. 7 In the music licensing case, I also 8 looked at surveys there, surveys of the actual 9 music use and the amount of music use on different 10 radio stations and how -- and the appropriate way 11 to weight that up to talk about industrywide music 12 use. 13 Q. Thank you. 14 MR. DOVE: Your Honors, at this time, 15 we offer Ms. McLaughlin as an expert economist 16 with experience in the economic attributes of 17 entertainment and media markets and the valuation 18 of copyrighted works in those markets. 19 Ms. McLaughlin was previously qualified 20 as an expert in these areas in the 2000 to 2003 21 proceeding. 22 CHIEF JUDGE SLEDGE: Valuation of what?</p>
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<p>1 distribution proceeding earlier this year. 2 I also testified in -- before the 3 Copyright Arbitration Panel in -- in a fee setting 4 for satellite retransmitted broadcast stations. 5 I've testified in Federal Court for HBO 6 on a matter that had to do with closed circuit 7 rights and pay-per-view rights for a sporting 8 event. 9 And I filed expert economic report on 10 the reasonableness of the proposed music licensing 11 fees for radio stations. 12 Q. In the course of your work, have you 13 analyzed surveys and other statistical studies? 14 A. Yes. 15 As -- part of my work, as -- as with 16 other economists, particularly in the media and 17 entertainment field, surveys are very important, 18 not only just taking the surveys, but putting them 19 into the context of the question that is being 20 addressed. And I -- I certainly did that in the 21 case of -- in my testimony on the Cablevision 22 case, where I -- I relied upon Nielsen and other</p>	<p>1 MR. DOVE: As an expert economist with 2 experience in the economic attributes of 3 entertainment and media markets and the valuation 4 of copyrighted works in those markets. 5 CHIEF JUDGE SLEDGE: Any objection? 6 (Pause.) 7 MR. OLANIRAN: No objection, 8 Your Honor. 9 CHIEF JUDGE SLEDGE: We'll recess to 10 discuss the proffer. 11 (The Judges confer in Chambers.) 12 CHIEF JUDGE SLEDGE: Thank you. We'll 13 come to order. 14 Without objection, the proffer is 15 accepted. 16 MR. DOVE: Your Honors, I have marked 17 as Settling Parties Exhibit 6 a document entitled, 18 Testimony of Linda McLaughlin dated June 1st, 19 2009, corrected September 30th, 2009, which has 20 been previously provided to counsel for the 21 various parties. 22 (Settling Parties Exhibit No. 6 was</p>

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<p>1 marked for identification.) 2 MR. DOVE: May I approach the witness 3 and Your Honors? 4 DIRECT EXAMINATION 5 BY MR. DOVE: 6 Q. Ms. McLaughlin, I've handed you a copy 7 of what has been marked Settling Parties 8 Exhibit 6, and I ask that you please examine it 9 and tell me whether this is your written testimony 10 as corrected on September 30th, 2009. 11 (The witness reviews the document.) 12 THE WITNESS: Yes. 13 BY MR. DOVE: 14 Q. Would you please identify the 15 correction that has been made on Page 5 of this 16 exhibit? 17 A. Sure. 18 It's in Footnote 6 in the third 19 sentence, and it's the numbers that were given for 20 PTV's shares of fees generated in '98-'99 and in 21 2004-2005. 22 There was an error in the original</p>	<p>1 Settling Parties Exhibit 6? 2 A. No. 3 Q. Sitting here today, do you declare that 4 Settling Parties Exhibit 6 is true and correct? 5 A. Yes, I do. 6 MR. DOVE: Your Honors, I would move 7 for admission of Settling Parties Exhibit 6 into 8 evidence. 9 CHIEF JUDGE SLEDGE: Any objection to 10 Exhibit 6? 11 (Pause.) 12 CHIEF JUDGE SLEDGE: Without objection, 13 it's admitted. 14 (Settling Parties Exhibit No. 6 was 15 admitted into evidence.) 16 BY MR. DOVE: 17 Q. Ms. McLaughlin, on whose behalf are you 18 appearing here today? 19 A. Public Broadcasting Service. 20 Q. Which questions were you asked to 21 address? 22 A. I was asked to address two questions:</p>
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<p>1 numbers, and these are the corrected numbers. 2 Q. Were there any other corrections that 3 you made to your original testimony dated 4 June 1st, 2009? 5 A. No. 6 Q. Turning to Appendix 1 of 7 Settling Parties Exhibit 6, is this a description 8 of your experience and qualifications? 9 A. Yes. 10 Q. Turning to Appendix 2 of 11 Settling Parties Exhibit 6, is this an explanation 12 of your methodology and sources for the augmented 13 Bortz survey? 14 A. Yes. 15 Q. And then, turning to the final 16 attachment of Settling Parties Exhibit 6, is this 17 a copy of your written direct testimony in the 18 2000 to 2003 proceeding which you cite in your 19 written testimony in this case as 20 Public Television Exhibit 9? 21 A. Yes, it is. 22 Q. Do you have any corrections to</p>	<p>1 First, whether there were any major changes in the 2 factors that would affect the relative marketplace 3 demand, particularly as to Public Broadcasting 4 Service; and second, I was asked to figure out 5 what the Bortz survey would've found -- would have 6 been expected to find if it had not excluded cable 7 systems from their sample that carried only 8 distant PTV or Canadian stations. 9 Q. Did you reach any conclusions as to the 10 questions you were asked to address? 11 A. Yes. 12 Q. And what are those conclusions? 13 A. My conclusion as to the first question 14 is there were no major changes. As to the second, 15 it's that the Bortz survey would've shown a 16 6 percent value for the cable -- for PTV from the 17 cable operators if it had been -- not excluded 18 those other systems. 19 Q. Let's turn to your -- first to your 20 analysis of whether there were any significant 21 changes between 1998-'99 and 2004-2005 in the 22 distant signal marketplace as it relates to</p>

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<p>1 public television. 2 What did you review or consider in 3 addressing that issue? 4 A. I looked at data compiled by Cable Data 5 Corp. from the cable operator statements of 6 accounts and particularly at distant subscriber 7 incidents. 8 In addition, I looked at the testimony 9 of Mr. Troutman, which contained the Bortz survey 10 results. 11 Q. And what specific steps did you take to 12 analyze the question? 13 A. For the first part of the question, I 14 looked at various measures of distant subscriber 15 incidents. 16 I looked at the total numbers for 17 people who -- first of all, I looked at the total 18 subscribers of people who didn't carry -- receive 19 any signals. Then I looked at the ones that did 20 receive signals, how -- of each type of signal, a 21 public television, Canadian, independent and 22 network in each of the time periods, and I</p>	<p>1 signals. And it -- and on average, they get about 2 1 and a half distant signals in both '98-'99 and 3 2004-2005, and the public television part of that, 4 they get, on average, .15 public television 5 stations in '98-'99 and .18 in 2004-2005. 6 Of course, these are averages, 7 including people who don't get it at all. 8 Q. And how about your Chart 2? What does 9 that show? 10 A. Chart 2 looks at the percent 11 distribution of the distant subscriber incidents, 12 but -- for the same types of stations. And it 13 shows that PTV had 10 percent of the -- of the 14 distant subscriber instances in '98-'99 and 15 averaged 12 percent in 2004-2005, slightly higher, 16 but not a large change. 17 Q. Then, finally, how about Chart 3? What 18 does that show? 19 A. Chart 3 shows the results of the Bortz 20 survey as it appeared in Mr. Troutman's testimony. 21 And it shows that there was 2.9 percent for PTV in 22 '98-'99 on average and 3.6 percent in 2004-2005, a</p>
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<p>1 compared the data for '98-'99 with 2004-2005. 2 And then I looked at various other 3 average measures for the two periods. 4 For the second question on Bortz, I 5 looked at not only the results for 6 public television and the confidence intervals 7 between '98 and '99 and 2004-2005, but also the 8 extent to which systems were excluded in both 9 periods for carrying public television stations 10 only. 11 Q. And what did you conclude? 12 A. I concluded that there was no major 13 change. 14 Q. Now, are these conclusions illustrated 15 anywhere in your written testimony? 16 A. Yes. 17 Q. And where would that be? 18 A. I have three charts that show some 19 summaries of the data. Chart 1 is on Page 4. 20 Q. And what does Chart 1 show? 21 A. Chart 1 looks at the Form -- the 22 subscribers in Form 3 systems with any distant</p>	<p>1 slightly higher number, but the 2004 and 2005 2 numbers are within the confidence intervals of the 3 '98 and '99 estimates. 4 Q. Thank you. 5 Let's now turn to your adjustment to 6 the Bortz survey -- 7 JUDGE ROBERTS: Before we do that, 8 Mr. Dove -- 9 MR. DOVE: Sure. 10 JUDGE ROBERTS: -- Ms. McLaughlin, in 11 comparing '98-1999 to the 2004-2005 period, did 12 you compare or do any investigation or analysis 13 into the type of programming that was available on 14 distant signals in the '98-'99 period relative to 15 the 2004-2005 period? 16 THE WITNESS: Well, by "type of 17 programming," you mean programming like sports and 18 movies and so forth? 19 JUDGE ROBERTS: The various programming 20 categories that we have in this proceeding. 21 THE WITNESS: Right, right. 22 Well, for the most part, I was focused</p>

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Page 414	1 on -- on PTV compared to everyone else. So for 2 PTV, it's the station itself and the -- everything 3 that's on the station is the type -- is the type 4 of programming. 5 So I didn't particularly look at the 6 types of programming, although I'm -- I'm aware of 7 the types of programming as part of my, you know, 8 ordinary work in following -- in following media. 9 JUDGE ROBERTS: If there was a 10 difference between the types of programs that were 11 available on distant signals in '98-'99 and the 12 2004-2005 period, would you conclude that that 13 could be a changed circumstance during that period 14 that might be relative or important to a 15 determination of relative value? 16 THE WITNESS: Again, by "type of 17 program," you mean -- let's say if there were more 18 movies or less, you know -- 19 JUDGE ROBERTS: Let's say, for 20 instance, there was less sports programming on 21 distant signals in the 2004-'05 period than there 22 was in the '98-'99 period.
Page 416	1 THE WITNESS: I didn't do a specific 2 comparison, but I would say that I'm generally 3 familiar with the types of programming that are on 4 both public television and -- and on the other 5 channels. 6 And just as an example, I noticed that 7 there has been a trend in some channels that have 8 programming that you might think would be the same 9 type as on public television, say, nature 10 programming. 11 JUDGE ROBERTS: Yes. 12 THE WITNESS: So that nature 13 programming on the Discovery Channel has moved 14 more toward reality TV. I think the 15 Deadliest Catch was introduced in 2005, and that's 16 one of their very popular programs, but it's not 17 at all the kind of nature program that would be on 18 public television; that they -- the -- on -- on 19 Animal Planet, they introduced, in the early maybe 20 2002-2003, the show Animal Cops, about people, you 21 know, arresting people for mistreating their pets. 22 And, again, that's not the kind of nature show
Page 415	1 Is that something that you would feel 2 would be a changed circumstance that might impact 3 the relative value of sports programming? 4 THE WITNESS: It might impact the 5 relative value of sports programming, and 6 that's -- that's the type of question that I would 7 think that -- that -- that the Bortz survey could 8 get at. 9 It wouldn't -- I couldn't get at it 10 from looking at the subscriber incidents, because 11 I don't -- that's not my type of programming. 12 But, yes, it could -- the differences 13 in the amount that's available could influence the 14 value of the total amount that was actually 15 imported. 16 JUDGE ROBERTS: In looking at the 17 Public Television category that you considered in 18 your testimony here, did you do any comparison 19 between the types of programs that were available 20 on public television in the '98-'99 period and the 21 types of programs that were offered in the '04-'05 22 period on other cable networks?
Page 417	1 that would be on public television. 2 So I've noticed this trend on the cable 3 networks, that there's more of a shift to 4 reality-based programming, which is less of the 5 type that's on public television. 6 JUDGE ROBERTS: If there were more 7 programs, more science programs, more nature 8 programs, more music programs, more documentary 9 programs, more news programs available on cable 10 networks in the '04-'05 period than there were in 11 the '98 and '99 period, in your expert opinion, 12 would that be a possibility of a changed 13 circumstance that would warrant investigation? 14 THE WITNESS: It's a possible changed 15 circumstance, but you'd have to consider not just 16 the quantity, but the quality. 17 And so I've noticed this in looking 18 just among cable programs, putting aside the 19 broadcast programs, that there's a -- there's a 20 core of cable networks that has a certain amount 21 of viewing, and it's pretty much retained its 22 viewing as some -- as many, many, many channels

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<p>1 have been introduced with very, very tiny viewing, 2 just -- just looking at viewing as an aspect. 3 Another aspect would be the -- the 4 value of the cable programming, how much the cable 5 license fees are compared to the total. 6 So, obviously, there -- not 7 obviously -- sometimes there isn't anything paid 8 for some of the cable -- newer cable networks, but 9 although there are more of them, the amount paid 10 for the core group is -- it stands up pretty well 11 in proportion. 12 Even though there's a -- you know, a 13 greater quantity, the value of the extra quantity 14 isn't necessarily as much. 15 Now, that doesn't have to be -- you 16 know, it doesn't have to be diluted quality. 17 Some of the quality is very good, and cable 18 network quality has been coming up. 19 JUDGE ROBERTS: How would you measure 20 quality then? 21 THE WITNESS: Well, among the cable 22 networks, you could be -- you could measure it in</p>	<p>1 CHIEF JUDGE SLEDGE: It's so different 2 that you started to call it the same thing. 3 Mr. Dove. 4 BY MR. DOVE: 5 Q. Let's turn, Ms. McLaughlin, to your 6 adjustment to the Bortz survey contained on 7 Pages 7 through 12 of your written testimony, 8 Section III. 9 I guess my first question is, why did 10 you decide that you needed to augment the Bortz 11 survey? 12 A. Because the Bortz survey does not show 13 the value that cable operators give the distant 14 signals they carry. It limits itself to cable 15 operators that carry a U.S. commercial station. 16 Now, if they carry PTV or Canada, 17 that's fine, too; they will be included. But 18 it -- it rules as ineligible the cable -- a group 19 of cable systems, that is, cable systems that 20 carry only public television or only Canada. 21 And if you're only carrying one signal, 22 then the value you're going to give to that signal</p>
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<p>1 terms of the revenues that it -- that they bring 2 in from -- from their various sources. But 3 it's -- in terms of -- I don't know -- I don't 4 know that I have a good -- you could look at the 5 amount spent on programming, the programming 6 budgets. 7 I'd have to think more about the 8 question of -- of how to measure program 9 quality. 10 JUDGE ROBERTS: Thank you. 11 CHIEF JUDGE SLEDGE: Did you notice a 12 large drop in subscribers when public television 13 dropped Masterpiece Theatre? 14 THE WITNESS: There -- I didn't see 15 that there was a drop in -- in the subscriber 16 incidents. In fact, it has been generally going 17 up. 18 CHIEF JUDGE SLEDGE: That's surprising. 19 Although they claimed they haven't dropped 20 Masterpiece Theatre, but they did. 21 THE WITNESS: I didn't think they did, 22 but it's -- it's different.</p>	<p>1 is much greater than if -- or certainly likely to 2 be greater than if you're carrying several and 3 you're going to be dividing it up, potentially, 4 among certain program types. 5 Q. How many cable systems were excluded 6 from the Bortz survey even though they imported a 7 Canadian or a public television distant signal? 8 A. In 2004, there were 10 that were 9 excluded. Nine of them carried public television 10 and one Canada. 11 In 2005, there were also 10 that were 12 excluded. And here, nine of them carried 13 public television, two -- two of those nine also 14 carried Canada -- Canada stations and one carried 15 only Canada. 16 Q. What was the first step that you took 17 in augmenting the Bortz survey results? 18 A. The first step was to make two 19 assumptions. These cable operators were -- 20 were -- 21 JUDGE ROBERTS: I have a question, 22 Mr. Dove, before you go on with that.</p>

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1 THE WITNESS: Oh, sure.
2 JUDGE ROBERTS: Ms. McLaughlin, in your
3 opinion, is it appropriate for the Bortz survey to
4 exclude a cable system that only carries a distant
5 public television system? In other words, the
6 fact that they only carry a distant
7 public television system, does that mean that they
8 can't answer the questions that are posed by the
9 Bortz survey, which is how do you value sports?
10 how do you value movies? how do you value
11 syndicated series?
12 THE WITNESS: No. In fact, they can
13 answer the question, and we know how they would
14 answer the question.
15 I -- I repeat the question in my
16 testimony, and it says you're supposed to look at
17 the programming that you bring in and -- other
18 than national network programming from ABC, NBC
19 and CBS, and say how much value you give to each
20 type of program and make sure the numbers add up
21 to 100 percent.
22 So if you carry only a

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1 public television station and you followed the
2 instructions, you would say 100 percent for
3 public television.
4 Now, it's not necessary to ask the
5 people that. You could just say that's what they
6 would say, we'll skip over and just write down
7 100 percent for those people or for Canada the
8 same.
9 But what I think is wrong is not -- you
10 could ask them or you could not ask them and --
11 and just write down the number, you know, the
12 100 percent is -- which is what they should say.
13 But you should include them in the aggregation or
14 else you're not aggregating the value of
15 everything -- you know, of the -- all the distant
16 signals. You're only aggregating the value for
17 people who import U.S. commercial stations.
18 JUDGE ROBERTS: Now, what about the
19 cable systems that only carry WGN? You got -- we
20 received testimony yesterday that there are
21 apparently quite a few cable systems that only
22 have WGN and, when they supply their Bortz

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1 results, of course, they're not going to be saying
2 anything about the value of public television, but
3 they're included in the study.
4 In your expert opinion, is that
5 appropriate?
6 THE WITNESS: I -- I -- I -- I don't
7 think they're even given a choice to say
8 public television. I thought that they were
9 only -- I could be confused on that, but I thought
10 that -- that they limited the choices of what --
11 of your answers to what it was that you carried.
12 So they didn't -- they didn't give you
13 a box for Canada or a public television if you
14 didn't carry that, I thought.
15 JUDGE ROBERTS: That means they're
16 going to answer zero, effectively, one way or the
17 other. If there's a blank there, they're going to
18 say zero --
19 THE WITNESS: Yes --
20 JUDGE ROBERTS: -- if it's not there,
21 it's automatically zero?
22 THE WITNESS: Right. But -- but as it

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1 should be, if you're looking at the value of what
2 they did carry, the value of what they did carry
3 is nothing for public television because they
4 didn't carry it.
5 JUDGE ROBERTS: Okay. But my question
6 to you is, why is it appropriate that in that
7 instance, those results should be tabulated and
8 taken into account, but in the -- in the instance
9 where it's a public television station only, that
10 should be excluded?
11 THE WITNESS: Well, because you're
12 trying to get the picture of -- of everything --
13 of -- for all these cable systems, whatever they
14 carried, what value do they give to it.
15 So if you -- if you were to leave out
16 the stations that carried only WGN, you wouldn't
17 know what value they were putting on the WGN
18 programming. And if you left out the stations
19 that carried only PTV, you -- you wouldn't know
20 what value they were -- they were giving -- you
21 know, you wouldn't -- you wouldn't be including
22 them in the -- in your total.

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1 In other words, my objection is really
2 with the total result, not with the -- with so
3 much the splitting up. I don't have a problem
4 with how the WGN people would split up their
5 answers.
6 I -- I -- it just -- it's just that I
7 think you want to count -- remember, this is a --
8 this was done in -- in a random sampling way. So
9 you've got the people who are carrying WGN should
10 be basically based on how many of them are
11 carrying it and the people who are carrying PTV
12 and other things, basically, according to the
13 proportion that they are being carried in your
14 sample.
15 So --
16 JUDGE ROBERTS: Which is why you
17 provide your augmented Bortz results survey; is
18 that correct?
19 THE WITNESS: Yes.
20 CHIEF JUDGE SLEDGE: I think you just
21 said this, but let me phrase it the way I'm
22 hearing it to make sure I'm understanding

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1 correctly.
2 You're saying that to be consistent
3 with counting WGN results -- WGN only distant
4 signal results, that you should also carry the
5 only public television or only Canadian distant
6 signal results, otherwise it would be
7 inconsistent?
8 THE WITNESS: I am saying that. And
9 I'm -- I'm actually even saying more than that. I
10 think you should count the people who carry
11 multiple types, the people -- and the people who
12 carry only one type, and you should count all of
13 them if what you want to look at in your results
14 is the value for all the things that were actually
15 carried.
16 BY MR. DOVE:
17 Q. Ms. McLaughlin, I believe you were
18 beginning to explain what -- what -- the kind of
19 fundamental assumptions that went into your
20 augmenting the Bortz results.
21 A. Right.
22 The first assumption is these -- these

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1 systems that were ineligible, they weren't called
2 to find out what they -- what they would say, but
3 other systems were. And not everybody answered.
4 So there's a response rate.
5 So the first assumption I have to make
6 is what the response rate of these people would be
7 if they had been included. And I assume that it
8 would be the same as for everybody else, for the
9 people who were included.
10 So the -- the -- in 2004, there was a
11 64 percent response rate for everybody, basically
12 assuming that there was a 64 percent response rate
13 for the excluded systems. So you wouldn't have 10
14 of them in your final sample; you would only have
15 about six of them in your final sample, a little
16 over six.
17 And then the second assumption is one I
18 just discussed in answer to your question,
19 Judge Roberts, that I'm assuming they would follow
20 the survey correctly. And if they were -- if they
21 had been asked and if they only carried
22 public television, they would give 100 percent to

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1 public television. And if they only carried
2 Canadian, they would give zero percent to
3 public television and 100 percent to Canadian.
4 So these two assumptions really form
5 the basis of my adjustment.
6 Q. Would you please explain, in the most
7 simplified form possible, how you went about
8 augmenting the Bortz results?
9 A. I have a simplified explanation on
10 Page 10 of my testimony. It gets the gist of what
11 I did without talking about the -- a lot of the
12 details.
13 I begin with the respondents to the
14 survey. My example is from 2004. There were 162
15 respondents in the survey, and they gave PTV
16 3-1/2 percent.
17 Then there were the nine systems that
18 were ineligible, and I assumed they would have the
19 same response rate as the -- the 162 respondents.
20 That was 64-1/2 percent, so that there would be
21 about a little less than six of them on average
22 would be expected to respond and that all of them

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<p>1 would say 100 percent for PTV. 2 And then the third component is I look 3 at the one Canadian system that was ineligible. I 4 assume it, too, would have had the 64 percent 5 response rate. So it would be expected to come in 6 about .6 respondents, and it would give PTV 7 zero percent. 8 And then I -- I -- I aggregate the -- 9 in the simplified example, I would aggregate them 10 up 162 times the 3-1/2 percent, the -- the -- a 11 little less than six times the 100 percent, the 12 less than one times zero percent, and then divide 13 it by the sum of those systems. 14 Q. Now, the actual process that you went 15 through to recalculate the Bortz survey results 16 was a little more complicated than the simplified 17 form that you just described; is that right? 18 A. Yes, it is. 19 Q. And what else did you do -- did you 20 have to do to augment the Bortz survey results? 21 A. The difference is principally in two 22 areas. One, the Bortz survey is stratified</p>	<p>1 stratification and weighting process described 2 anywhere in your written testimony? 3 A. Yes. They're in Appendix 2. 4 Q. Ms. McLaughlin, what was the augmented 5 Bortz survey result for public television in 2004? 6 A. 6.2 percent. 7 Q. And what was the augmented Bortz survey 8 result for public television in 2005? 9 A. 5 -- 5.9 to 6.2 percent. 10 Q. And why is there a range for 2005, but 11 not for 2004? 12 A. Well, in 2005, as I mentioned earlier, 13 some of the omitted systems, two of them, had both 14 a Canadian station and a public television station 15 as distant. 16 So for those systems, you wouldn't know 17 what they would say in terms of how they would 18 split, how much they would give to 19 public television. 20 So I took the two extremes, 21 zero percent to public television and 22 100 Canadian, or 100 percent to public television</p>
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<p>1 survey, so it's -- it has small, medium, large and 2 very large strata based on royalty size. And so I 3 examined the omitted system based on the -- based 4 on which stratum they each fell in. 5 And then -- and I also used -- the 6 different strata had slightly different response 7 rates. So I said if you were in Strata 1, you 8 would have the response rate of the Strata 1 9 people and so forth. 10 And the second thing the Bortz survey 11 does is weight, not by how many systems there are, 12 that you get one vote because you're one system, 13 but based on the total royalties of the system. 14 So I did both the total royalties of 15 the system, the relative -- relative to the total 16 royalties of all the systems in the strata and 17 relative to all of the omitted and included, that 18 is, sampled and nonsampled systems, the whole 19 population. 20 So I considered all of those factors 21 doing it the same way that the Bortz survey did. 22 Q. And are the details of the</p>	<p>1 and zero percent Canadian. And I just expressed 2 the extremes without making any judgment where it 3 would fall. 4 So the 5.9 is if those two systems gave 5 zero percent to public television, and the 6.2 in 6 2005 is if they gave 100 percent. 7 So the -- the correct answer would have 8 to be someplace in between. 9 Q. Did you review any other information 10 that would help put these results in perspective? 11 A. Yes. I looked at something else that 12 was in the -- in the Bortz survey about people 13 who -- the results, if you exclude -- all right. 14 They left out the PTV only people. They were 15 only -- they only had people with U.S. commercial 16 stations. But some of the people with U.S. 17 commercial stations also had PTV. So they -- 18 Mr. Troutman summarized the results for those. 19 And this was in line with the -- with 20 data compiled Cable Data Corp. that shows maybe 21 30 percent or so of the systems don't -- have 22 public television -- distant public television and</p>

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1 the rest don't.
2 So I looked at the -- at -- at the
3 smaller subgroup that was reported in
4 Mr. Troutman's report, and it showed -- in 2004,
5 for example, it showed that -- the value that they
6 gave to PTV.
7 Now, all of these people are carrying
8 PTV. They gave a value of 11 percent to PTV.
9 Now -- but all of these people are also
10 carrying commercial stations. They didn't -- you
11 know, the PTV onlys aren't in.
12 If I did sort of a rough version, the
13 way I explained without the weighting and
14 stratification, and added in the PTV onlys to that
15 group, the 11 percent would go up to something
16 like 19 percent.
17 So, I mean, I think that gives you an
18 idea of -- of why the PTV number is 6 percent, for
19 example, and -- and not some -- you know, why
20 isn't it bigger. Well, because a lot of people
21 don't carry PTV, and those who do carry PTV rate
22 it more.

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1 Q. Ms. McLaughlin, just a couple more
2 questions.
3 First, could you turn your attention to
4 Page 11 of your written testimony? And on that
5 Page 11, there's a Chart 4.
6 Would you please just explain what
7 Chart 4 shows?
8 A. Chart 4 shows the -- the values from
9 the augmented Bortz survey for 2004 and 2005, not
10 only the 6.2 percent and -- and the 5.9 to
11 6.2 percent for public television, but also the
12 values for Canada with the augmented result and
13 everyone else, because everyone else's results
14 change when the -- these extra systems are
15 added.
16 Q. And then, turning your attention to
17 Chart 5 on Page 12, what does that chart show?
18 A. Chart 5 is really -- comes entirely out
19 of Chart 4 and -- and the concept that if PTV
20 would only get money from the -- the basic fund,
21 rather than the total.
22 The Bortz survey looks -- weights by

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1 the total royalties of all the systems, and that's
2 the -- the fixed sum that the Bortz survey
3 respondents are -- are effectively dividing.
4 So since -- if you want to know how
5 much 6.2 percent of the total for PTV would
6 translate to if PTV doesn't get any of the 3.75
7 fund but only gets the basic fund, that would be
8 7.3 percent.
9 So it's just -- it's a pure translation
10 based on the size of the 3.75 fund relative to the
11 basic fund.
12 MR. DOVE: Thank you, Ms. McLaughlin.
13 I have no further questions.
14 JUDGE ROBERTS: I have a question for
15 you, Ms. McLaughlin.
16 If you were shown a response -- a Bortz
17 survey response from a cable operator that carried
18 several distant signals, one of which was a
19 public television system, and that respondent in
20 the public television system category assigned a
21 zero value to PTV even though they did carry a
22 distant signal, what would that tell you about

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1 that response?
2 THE WITNESS: Well, by itself, it -- it
3 would -- I would have expected it to be greater
4 than zero, not zero, since they are taking up the
5 space for the channel at the very least.
6 But maybe -- you know, sometimes people
7 answer surveys -- and I have to say I'm speaking
8 now -- I use -- I use survey results, but I'm not
9 a -- you know, a survey design person. But I do
10 know that sometimes survey design people say that
11 people answer in round numbers, and so -- you
12 know, like 5, in -- instead of giving 63 percent
13 or 2 percent for something, they might say zero
14 for something and 5 -- you know, when it's between
15 zero and 5 or zero and 10.
16 So it could be that, that it's
17 essentially, you know -- you know, a rounding
18 down, but that's the only thing that -- that I
19 could say about it.
20 Or, you know, the person is just, as
21 with -- with survey responses, there's some
22 variability here. And you're asking -- you try to

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1 ask a relatively large number of people, because,
2 you know, there could be, you know, sports in the
3 answers that --
4 JUDGE ROBERTS: Would you conclude
5 that -- if you saw a survey like that where PTV
6 was carried but was assigned a zero value, would
7 you conclude that that survey had to be wrong and,
8 therefore, excluded?
9 THE WITNESS: You mean that particular
10 response?
11 JUDGE ROBERTS: Yes.
12 THE WITNESS: You know, again, I think
13 this is really a question for someone who's expert
14 at surveys.
15 I don't know whether you're supposed
16 to, because if you go through and you picked
17 out -- you -- you omitted certain ones, I don't
18 know -- you could have a rule like that. Like, if
19 a person answers in a way that is inconsistent
20 with some -- some other expectation, you could
21 toss it out.
22 But I don't know whether -- I don't

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1 know what that does to the survey, you know,
2 validity. It -- if you do that.
3 I know, sometimes, in analyzing
4 datasets, I would leave out outliers and -- but
5 I -- there are other reasons for, you know, why
6 you shouldn't do that.
7 So I think this is a question really
8 outside of my area.
9 JUDGE ROBERTS: Well, given your
10 approach that for those systems that carry a -- a
11 PBS distant signal only and that they would have
12 to, of course, assign it a value of 100 percent
13 because that is indeed what they carry, given that
14 that is your -- your approach with respect to the
15 PTV station only, wouldn't you have to somehow
16 respond to those Bortz survey results that show a
17 zero where PTV was, in fact, carried?
18 THE WITNESS: Well, I would -- yes, as
19 long as it's not a sort of rounding up/rounding
20 down issue. I mean, I would want to get some
21 advice on that, I think, from -- from a survey --
22 someone who is a -- a question design person in

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1 surveys and who is evaluating the validity of the
2 responses.
3 That's -- just -- just to say my first
4 answer -- thought to that is, oh, yes, if they're
5 violating the -- you know, the rules that would
6 have to be true, you should leave them out. But
7 if it were the case that it's a
8 rounding up/rounding down, then you're leaving out
9 the person who is rounding down, but not the
10 person who is rounding up.
11 So I'm, you know -- I'm not sure what
12 the right answer is in that. I think it just
13 requires more expertise than I have on the topic.
14 JUDGE ROBERTS: I'm asking you this
15 question because the Bortz survey, of course,
16 purports to show what the value is to the cable
17 operator. And if the cable operator responding
18 zero when, in fact, it does carry a distant PTV
19 station, that could be that indeed, the cable
20 operator does believe it is of zero value.
21 Apparently, though, it could mean
22 something else, because in your augmented Bortz

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1 survey, you're presuming that it would have to be
2 100 percent for the system that is carrying only
3 the distant PTV station and that it couldn't be
4 something less than 100 percent. It couldn't be,
5 well, I only carry one distant public television
6 station, but I give it an 80 percent value or a
7 50 percent value.
8 THE WITNESS: Um-hum.
9 JUDGE ROBERTS: You're assuming
10 100 percent because they carry it?
11 THE WITNESS: Because that's the way
12 the question is, right, exactly.
13 They -- I -- I think that when you only
14 have a single category, it's a lot easier to see
15 what the value is and -- whereas with the
16 multiple -- with multiple categories that you
17 actually are carrying, I think it's more difficult
18 to answer the question. And you might've -- it
19 might've been just a rounding up/rounding down
20 answer.
21 JUDGE ROBERTS: And just to conclude
22 this and looking, again, at that system that

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<p>1 reported the zero when it did, in fact, carry a 2 distant public television station, does that, in 3 your view, suggest that the cable operator's 4 response really is that I didn't put any value on 5 it or that there must be some mistake or error in 6 the response, or you don't know? 7 THE WITNESS: I guess I don't know for 8 that particular -- you know, I think you have to 9 ask the particular cable operator. 10 JUDGE ROBERTS: Okay. Thank you. 11 CHIEF JUDGE SLEDGE: We'll recess till 12 1 o'clock. 13 (Whereupon, at 12:05 a m., a 14 luncheon recess was taken.) 15 16 17 18 19 20 21 22</p>	<p>1 Page 12, and the second conclusion in her 2 testimony. 3 And let me just briefly explain the 4 grounds. 5 CHIEF JUDGE SLEDGE: All right. Let's 6 take them one at a time. 7 What's the first thing? 8 MR. LUTZKER: The first thing is on 9 Page 1, the summary -- in summary, I conclude 10 there are two bullet points. It's the second 11 bullet point. 12 CHIEF JUDGE SLEDGE: All right. 13 MR. LUTZKER: And then, starting on 14 Page 7, under III, Augmented Bortz Survey 15 Results -- 16 CHIEF JUDGE SLEDGE: All right. 17 MR. LUTZKER: -- through Page 12, which 18 would be the entire section dealing with Augmented 19 Bortz Survey Results. 20 And then, again, the -- Page 13, the 21 second paragraph, which repeats -- the second 22 bullet point, which is discussing the augmented</p>
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<p>1 AFTERNOON SESSION 2 (1:01 p.m.) 3 WHEREUPON, 4 LINDA McLAUGHLIN 5 was called for continued examination and, having 6 been previously duly sworn, was examined and 7 testified further as follows: 8 CHIEF JUDGE SLEDGE: Thank you. We'll 9 come to order. 10 Cross-examination? 11 MR. LUTZKER: Your Honor, before we 12 begin cross-examination, I have a motion I would 13 like to raise. 14 CHIEF JUDGE SLEDGE: Yes. 15 MR. LUTZKER: Should I come to the 16 podium? 17 Your Honor, I would move to strike 18 portions of Ms. McLaughlin's testimony, 19 particularly on Page 1, the second paragraph of 20 her summary statement at the bottom of the page, 21 and Pages 7, entitled, Augmented Bortz Survey 22 Results, through -- where is it Steve? -- through</p>	<p>1 Bortz survey. 2 And briefly, this morning, during the 3 examination of the witness and I believe it was in 4 particular questions posed by Judge Roberts and 5 responses elicited by the witness indicated -- and 6 I wrote it down, because I was really surprised at 7 the statement -- I'm not a survey design person, 8 which I understood the witness to mean that she 9 has no expertise in survey design. 10 And then, further, in commentary, 11 again, in colloquy with Judge Roberts -- and I 12 don't have the exact quotations, but it was in 13 regard to the zero -- potential zero share for a 14 PTV station, how could you explain that. And the 15 witness indicated that, well, she would have to 16 turn to a design survey person or get further 17 expertise to further explain the -- the result, 18 which, in a sense, she didn't believe would likely 19 happen, but she wasn't able to explain it. 20 As the witness was qualified -- and, 21 again, I wrote down Mr. Dove's description of her 22 qualifications as an economist with expertise in</p>

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Page 446	1 the economic aspects of the media and 2 entertainment and the valuation of copyrighted 3 works in those markets. 4 The nature of the expertise and the 5 discussion of the Bortz survey results, which deal 6 with the relative market value, are certainly 7 consonant with her level of expertise. 8 However, as she explained -- again, for 9 the first time, I was -- I was really quite 10 stunned to understand this -- that her expertise 11 in design is nonexistent, and yet, the substance 12 of the paragraphs that I've asked to be stricken 13 all involve a redesign of a survey and a 14 reinterpretation of the survey results, obviously, 15 to the, you know, benefit of a particular 16 claimant. 17 But the -- the bottom line is the 18 absence of expertise to make these critical 19 determinations about which she is testifying. 20 I know -- before we begin, you know, 21 further examination of -- of the witness, I -- I 22 felt it, you know, urgent to sort of raise the	Page 448	1 is a Canadian signal. And they have chosen to 2 exclude those from their survey design. 3 They -- they have designed the survey. 4 The results, they feel, prejudice the results of 5 their survey for some reason. 6 I mean -- and he explains and the -- 7 the merits of that can be separately addressed, 8 but you need to understand the relationship of the 9 questions that are asked, the data that's being 10 solicited, the manner in which the responses are 11 being tabulated to understand the relevance of the 12 decision to include or exclude any survey 13 information. 14 And it is certainly within the 15 expertise of survey design experts to comment on 16 another survey's failings or reinterpretation of 17 data or questioning or alternative questions, 18 but this is not the expertise -- with all due 19 respect, it's not the expertise of this witness. 20 This witness is an expert in copyright 21 valuation, but she has testified that she does not 22 have survey design expertise. And to modify, to
Page 447	1 matter, because it was based on this -- this 2 colloquy and conversations that were had. 3 And as a result of that, I believe the 4 testimony that she has presented this morning is 5 outside the scope of her expertise, is without 6 foundation based on her expertise and, therefore, 7 should not be considered in -- in this record. 8 And so I move to strike. 9 CHIEF JUDGE SLEDGE: The jump you're 10 making that I didn't follow is why does the 11 testimony for the adjustment to the Bortz survey 12 require survey questionnaire design? 13 MR. LUTZKER: The -- yesterday, 14 Mr. Troutman testified about the -- and he is a 15 design -- a survey design expert -- testified as 16 to the design and mechanism of the Bortz survey. 17 He made and the Bortz group has made -- 18 and they've done this previously -- decisions that 19 certain -- the questions that they are asking and 20 the organization of the survey that they have set 21 up is somehow prejudiced in a situation in which a 22 single signal is a PTV signal or a single signal	Page 449	1 augment, to change, to reinterpret these results 2 without that level of expertise renders her a 3 layman, not an expert with respect to the material 4 that she is presenting. 5 To the extent her report is an expert 6 report -- and that's -- that's what I'm judging 7 this on. She's the expert, and I want to be able 8 to depend on her expertise and evaluate it. 9 She's not an expert in that. 10 And I think the Panel -- excuse me -- 11 the Judges cannot rely on this and, as a result, 12 to have it in the record would be a confusing -- 13 it could create concerns on appeal if it becomes 14 part of a decisionmaking process where her 15 expertise -- she's not been qualified for this; 16 she's self-professed not to have the expertise; 17 and, yet, she is tinkering with the design of 18 someone else's survey, and, I would add, doing so 19 in a way that is to the material advantage of one 20 of the Claimants in ways that, frankly, are 21 confusing. 22 But, I mean, that's -- that goes to the

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<p style="text-align: right;">Page 450</p> <p>1 essence of the problem. 2 CHIEF JUDGE SLEDGE: Any response to 3 the motion? 4 MR. DOVE: Yes, Your Honor. 5 CHIEF JUDGE SLEDGE: Go ahead. 6 Give up the mike. 7 MR. LUTZKER: Sure. 8 MR. DOVE: As an initial matter, 9 Your Honor, the testimony -- the written testimony 10 of Ms. McLaughlin, you know, has already been 11 admitted with -- into evidence without objection. 12 There was an opportunity to voir dire the witness 13 after she was qualified or before she was 14 qualified as an expert. 15 I did -- Ms. McLaughlin did respond to 16 questions about her use of surveys in her past 17 work and, despite all those opportunities, no 18 objection was made at that time. 19 It is our position that testimony -- 20 that the adjustment testimony that Ms. McLaughlin 21 gives does not require that specialized expertise 22 in survey questionnaire design.</p>	<p style="text-align: right;">Page 452</p> <p>1 So I guess that's -- 2 CHIEF JUDGE SLEDGE: Mr. Dove, let 3 me -- I think you've answered this already, but 4 let me press you a little bit. 5 I do not recall the Bortz witness to 6 say -- to refer at all to this testimony or to 7 affirm any support of this testimony when he said 8 that there should be an adjustment; is that 9 correct? 10 MR. DOVE: That's correct, Your Honor. 11 That is correct, Your Honor. 12 And I guess my last point is certainly 13 that Mr. Lutzker is free to cross-examine, here in 14 a moment, Ms. McLaughlin regarding her -- you 15 know, any of the points he wants to make regarding 16 her expertise or knowledge in survey questionnaire 17 and whether she's, in fact -- you know, it goes to 18 the weight of the -- of her testimony and -- and 19 what weight the Judges should give that 20 testimony. 21 But I don't believe, under these 22 circumstances, that the -- you know, her testimony</p>
<p style="text-align: right;">Page 451</p> <p>1 Mr. Troutman, the person who has that 2 expertise, conceded on the stand that his survey 3 did not -- needed to be adjusted to account for 4 the fact that public television -- that signal -- 5 that cable systems had only carried 6 public television or only carried Canadian 7 signals, that that survey needed to be adjusted. 8 And what Ms. McLaughlin has done, based 9 on her years of expertise in -- in copyright 10 valuation, is she has made those mechanical 11 adjustments to the results of the survey if you 12 were to essentially just follow the survey 13 questions as she testified. 14 You know, she has been qualified as an 15 expert on the valuation of copyrighted works. 16 That's what that is. It's an adjustment of the 17 Bortz survey that gets to the question of how do 18 you measure the relative value of these different 19 categories, in particular, the public television 20 signal, which, as the survey expert conceded 21 yesterday, needed to be adjusted for -- to 22 accurately reflect public television's share.</p>	<p style="text-align: right;">Page 453</p> <p>1 should be stricken. 2 JUDGE ROBERTS: Mr. Dove, what do you 3 think about withdrawing her classification, or 4 should we terminate her classification as being an 5 expert in the valuation of copyright royalties? 6 MR. DOVE: Well, I guess, you know, 7 from my perspective -- 8 JUDGE ROBERTS: I think I heard 9 Mr. Lutzker saying, while he was moving to strike, 10 he was more concerned about her expertise and the 11 fact that she was qualified as an expert. 12 MR. DOVE: Our position is that 13 Ms. McLaughlin is eminently qualified to -- to -- 14 to testify on copyright valuation. But if -- if 15 the deciding factor is -- is whether -- you know, 16 whether some formal qualification is necessary, 17 that's not really -- you know, I wouldn't want the 18 record to reflect that we don't believe she's 19 qualified. We -- we do. 20 But if that's the issue of concern 21 that, you know, her qualification -- you know, her 22 formal qualification as an expert on copyright</p>

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1 valuation, you know, I must say that she's been
2 qualified on, you know -- on using those exact
3 terms in the 2000 to 2003 proceeding both in the
4 rebuttal phase and the direct phase and -- and,
5 you know, in the various matters that she has
6 testified in the past.
7 So our position is she is an expert in
8 copyright valuation. But if that is the -- an
9 issue of concern to the Judges, that
10 qualification, you know, versus just letting her
11 testify, you know, our concern is that her
12 testimony be allowed and permitted and be
13 considered by this -- by this Panel.
14 CHIEF JUDGE SLEDGE: Thank you.
15 Any other response?
16 MR. OLANIRAN: Greg Olaniran for
17 Program Suppliers.
18 We also have --
19 CHIEF JUDGE SLEDGE: Come on up.
20 MR. OLANIRAN: Good afternoon,
21 Your Honor. Greg Olaniran for Program Suppliers.
22 We also have a concern with the -- with

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1 the adjustment that Ms. McLaughlin has made to the
2 Bortz survey results.
3 In addition to the question about -- to
4 the concern about the survey design question,
5 there is also a question of what happens to the
6 sample.
7 And if I understand her testimony
8 correctly, she -- she has said that she is not
9 qualified to interpret the results of the Bortz
10 survey. And --
11 CHIEF JUDGE SLEDGE: I'm sorry. Say
12 that again.
13 MR. OLANIRAN: She's not qualified to
14 interpret the results of the Bortz survey, if I
15 understand her testimony correctly.
16 When Judge Roberts asked her what she
17 would -- how she would interpret a zero value
18 assigned by a cable operator to a
19 public television signal when other signals are
20 present on that system, she said she would have to
21 look to someone else who is an expert.
22 She gave a couple of answers, she said

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1 maybe this a rounding issue, perhaps, outliers;
2 but, ultimately, she was not willing to embrace or
3 to interpret the result what that zero value
4 means.
5 So what that suggests is that she does
6 not fully understand -- she cannot interpret the
7 results. And if she's going from taking the Bortz
8 results and then moving forward with augmenting or
9 adjusting a result which she has -- she concedes
10 she cannot understand, then that would be an
11 inappropriate adjustment.
12 And for that reason, we support the
13 motion to strike also.
14 Thank you.
15 CHIEF JUDGE SLEDGE: Any other
16 response?
17 MR. DOVE: May I respond briefly to
18 what Mr. Olaniran said, just very briefly?
19 CHIEF JUDGE SLEDGE: All right.
20 MR. DOVE: Just two things,
21 Your Honors. First is the witness never testified
22 that she wasn't qualified to interpret the results

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1 of the -- of the Bortz survey. You know, she
2 is -- you know, she is augmenting those results,
3 and she's doing exactly -- I'm reading now from a
4 transcript from yesterday's proceeding of
5 Mr. Troutman.
6 We have acknowledged that there needs
7 to be some adjustment for the fact that our
8 methodology doesn't really allow us to survey
9 systems that only carry public television signals
10 or only carry Canadian signals.
11 Ms. McLaughlin has attempted to do
12 that.
13 Our view is that both of these counsel
14 are free to cross-examine her on that point or to
15 put in rebuttal testimony at a later phase, which,
16 you know, comes up with a different sort of
17 adjustment, but that a motion to strike is not
18 proper.
19 MR. LUTZKER: May I?
20 CHIEF JUDGE SLEDGE: All right,
21 Mr. Lutzker.
22 MR. LUTZKER: Thank you.

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<p>1 When Mr. Troutman was on the stand, he 2 was the perfect witness in my view -- maybe not in 3 the other parties' view -- to follow up and 4 understand what adjustments would be made to his 5 survey. Other survey experts, design survey 6 experts, people whose careers are predicated upon 7 working with surveys, are the right people to 8 comment on the flaws of another survey. 9 I have no doubt -- and I did not move 10 to strike Ms. McLaughlin's commentary about the 11 Bortz survey because I accept her qualifications 12 in copyright valuation based upon her long and 13 experience -- long experience and career. 14 However, the adjustments that she is 15 making to the Bortz survey go beyond that 16 qualification and that expertise and for -- as I 17 said, to my surprise and for the first time, 18 understood her to say she is not a survey design 19 expert. 20 That is the critical acknowledgment 21 that underscores the inherent error, if you will, 22 in -- in leaving her testimony in the guise of</p>	<p>1 areas, and they have economic expertise as well as 2 survey design expertise. And they would be 3 perfectly qualified to comment on, to restructure, 4 to reinterpret and revisit someone else's survey. 5 What Ms. McLaughlin has presented is 6 her credentials, such as they are, and they're 7 deep and they're broad, but she acknowledges on 8 the stand I'm not a survey design expert. That's 9 the critical concession that impels me to -- you 10 know, to ask -- to strike this portion. 11 I don't ask to strike the Bortz' 12 portion because I think she has the expertise to 13 look at someone else's survey and comment on the 14 results in relative valuation. But to redesign 15 the survey and then reinterpret it -- and as she 16 said, she made a number of assumptions. 17 JUDGE ROBERTS: How is she redesigning 18 the survey? Isn't she just taking the results of 19 the Bortz survey and -- and making some 20 mathematical calculations as to how they should be 21 adjusted? 22 MR. LUTZKER: No; because the -- the</p>
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<p>1 expertise when she has none. And so I just -- 2 and -- 3 JUDGE ROBERTS: Mr. Lutzker, let me ask 4 you the same question I did with Mr. Dove. 5 Is your qualms here with 6 Ms. McLaughlin's testimony that it's being given 7 as an expert or do you move to strike the 8 testimony? But is it more devoted towards the 9 fact that she's qualified as an expert in giving 10 this testimony? Couldn't she give this testimony 11 as an economist? 12 MR. LUTZKER: No, I don't think she can 13 give this testimony as an economist, because what 14 she is doing -- and by her acknowledgment -- let 15 me back up. 16 There are some economists who may be 17 able to give this, you know, credible testimony in 18 this area if you have the expertise that underlies 19 it as well as -- as part of your economic 20 expertise. 21 I mean, I've worked with survey design 22 experts in the -- in the trademark and other</p>	<p>1 Bortz survey does not go to asking the questions 2 of the participants when they have just -- just a 3 single PTV signal or -- or a Canadian signal. 4 They don't -- they exclude those from the survey. 5 She makes the assumption that 6 100 percent would be allocated. 7 Bortz has made the assumption that we 8 can't use that data. It's a flaw in their system. 9 They acknowledge it. They don't know what to do. 10 She has made an assumption, I know what 11 to do, which is a design -- a redesign, in my 12 view, of that survey. 13 JUDGE ROBERTS: Wouldn't we have had 14 the problem here if she had said, well, I thought 15 the survey instrument here of Bortz was flawed and 16 it should have been these particular questions 17 instead should have been asked, and that's what I 18 went out and did and I got a different result? 19 Isn't then there is a problem because she doesn't 20 have expertise in the survey? 21 MR. LUTZKER: Absolutely. 22 JUDGE ROBERTS: But instead, she's</p>

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<p>1 taking the results that came out of here and is, 2 again, making a mathematical adjustment to them 3 and is not changing the survey instrument at all. 4 And what's wrong with that? 5 MR. LUTZKER: Well, she is, in fact, 6 changing the survey instrument, because the 7 survey, as set forth by Mr. Troutman and the Bortz 8 group, made decisions as to whose responses would 9 be incorporated in the survey. 10 So it is -- it -- she has, in a sense, 11 taken the survey instrument and said, if there's 12 only a PTV signal, the only question you ask is 13 how do you value PTV. That's -- that's 14 essentially what she's done with her -- with her 15 analysis. 16 And that's not the Bortz survey; that's 17 her survey. 18 JUDGE ROBERTS: It seems to me she 19 could take the numbers of the Bortz survey and 20 through -- if she so desired, through mathematical 21 manipulation, come out with the price of hot 22 dogs.</p>	<p>1 new assumptions and have changed it. 2 That's -- that's what I see. And I -- 3 you know, again, this comes as -- you know, based 4 on her own acknowledgment in testimony. 5 JUDGE WISNIEWSKI: Mr. Lutzker, do you 6 recall Mr. Troutman's rationale for excluding 7 these particular stations in his results? 8 MR. LUTZKER: I'd have to go back to 9 the record. 10 I do know that -- that the very same 11 issue was raised in 1998 and '99 when Mr. Troutman 12 was on the stand. That issue was posed -- 13 CHIEF JUDGE SLEDGE: Your answer is 14 going beyond the question. You're purporting to 15 present testimony. 16 MR. LUTZKER: I will withdraw that. 17 Thank you. 18 CHIEF JUDGE SLEDGE: I guess you can 19 tell him to do that, but . . . 20 All right. Thank you. 21 We'll recess. 22 (The Judges confer in Chambers.)</p>
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<p>1 Now, we may not find that persuasive, 2 but I don't see where she has changed the 3 underpinnings of the survey itself. She's just 4 taking the data from it, manipulating it and 5 coming up with a result, obviously, that is 6 advantageous to the Public Television, perhaps, 7 but, nevertheless, is just an interpretation, not 8 a redesign. 9 MR. LUTZKER: Well, that -- in my 10 opinion -- and that's why I sort of present the 11 motion -- she is redesigning, because it -- 12 Mr. Troutman said, there are flaws in our survey. 13 PTV is not adequately addressed. We need to 14 readdress this. 15 How would he do it? That question was 16 not posed. That would have been an essential 17 question to sort of guide. 18 But the issue is, if you take his -- 19 his survey and include Ms. McLaughlin's analysis 20 in an area she acknowledges she's not an expert, 21 you have redesigned the totality of the survey, 22 you have presented a new database, new results,</p>	<p>1 CHIEF JUDGE SLEDGE: Thank you. We'll 2 come to order. 3 The objection by the 4 Devotional Claimants raises very difficult 5 problems with the testimony identified in the 6 objection for the expertise that Ms. McLaughlin 7 has been qualified. 8 While it seems like a very close 9 question, we conclude that the testimony is an 10 economic analysis of the survey conducted by 11 Bortz, and the matters raised in the objection 12 address the weight to be given to her testimony, 13 but not a submission. 14 The motion is denied. 15 Mr. Lutzker, do you want to proceed on 16 cross now? 17 MR. OLANIRAN: I will proceed on cross. 18 CHIEF JUDGE SLEDGE: You will? 19 MR. OLANIRAN: Yes. 20 May I proceed, Your Honor? 21 CHIEF JUDGE SLEDGE: Yes, sir. 22</p>

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<p>1 CROSS-EXAMINATION 2 BY MR. OLANIRAN: 3 Q. Good afternoon, Ms. McLaughlin. My 4 name is Greg Olaniran. I'm counsel for 5 Program Suppliers. 6 According to your testimony, you were 7 asked to address two issues relevant to the 8 relative value of public television signals; is 9 that correct? 10 A. Yes. 11 Q. Okay. And the first was whether there 12 has been a major change in the factors that would 13 affect relative marketplace values between the 14 '98 and '99 time frame and the '04-'05 time frame; 15 is that correct? 16 A. That's correct. 17 Q. And the second was to propose an 18 adjustment to the Bortz survey results for the 19 '04-'05 survey time period, correct? 20 A. Yes. 21 Q. On the first issue, you looked at 22 essentially a carriage; is that correct?</p>	<p>1 public television signals, correct? 2 A. Yes, as well as -- beyond -- after the 3 first sentence, that is what it addresses, yes. 4 Q. Okay. 5 Okay. Now, you concluded on that -- in 6 that testimony on -- on Page 2, you concluded that 7 distant signals per subscriber overall remained 8 relatively stable, correct? 9 A. That's right. 10 Q. And you also concluded, specifically 11 with respect to public television, that that 12 remained stable, correct? 13 A. That's right. It was a slight increase 14 in one and a slight decrease in the other, but it 15 was pretty -- pretty much the same, yes. 16 Q. Now, is your calculation in this regard 17 intended to be evidence of relative marketplace 18 value for public television signals? 19 A. Not the percent of value, but whether 20 there was a change in the value. 21 Q. So you're -- you're asking that the 22 fact that there was no change or there was little</p>
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<p>1 A. Well, that was, in part, the first part 2 of the first issue, that is, the subscriber 3 incidents part. 4 I also looked at the original Bortz 5 survey. 6 Q. Right. 7 You analyzed the per subscriber distant 8 signal carriage, correct? 9 A. That was one part of my analysis, 10 yes. 11 Q. And you also looked at the distant 12 subscriber incidents; is that correct? 13 A. Maybe -- I think I misunderstood your 14 first question. 15 Could you just repeat that? I 16 thought -- I thought you said the same thing 17 twice, but I'm sure you didn't. 18 Q. Well, on Page 2 of your testimony -- 19 I'm sorry -- on Page 3 of your testimony in the 20 first full paragraph, you are looking there at 21 the -- the -- the average distant signals per 22 subscriber both in general and with respect to</p>	<p>1 change be considered evidence that the marketplace 2 value for public television has not changed? 3 A. It did not change much between '98-'99 4 and 2004 and 2005. 5 Q. So, in fact, you're asking for some -- 6 for an inference with regard to relative 7 marketplace value with regard to this analysis, 8 are you not? 9 A. In terms of a change in it, not in 10 terms of the level. 11 Q. You also looked at distant subscriber 12 incidents; is that correct? 13 A. That's correct. 14 Q. And you concluded that the -- that 15 public television's share of distant subscriber 16 incidents also remained stable between the '98 and 17 '99 time frame and the '04-'05 time frame, 18 correct? 19 A. Yes. It increased a little, but it was 20 not a major change. 21 Q. And, again, my question is very 22 similar.</p>

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<p>1 Should we conclude, from your 2 observation in that regard, that there has not 3 been a change in public television signals' 4 marketplace value? 5 A. Compared to '98-'99? 6 Q. Yes. 7 A. Yes -- well, at least there was no 8 major change. If anything, it was an increase, 9 not a decrease. 10 You could conclude there was not a 11 decrease and that there was no major increase. 12 Q. My question is, because there was no 13 decrease or because there was a slight change, is 14 that, in and of itself, evidence of marketplace 15 value or evidence of a change in marketplace value 16 of public television? 17 A. Of the lack of the change of 18 marketplace -- of marketplace value or lack of a 19 big change in marketplace value, yes. 20 Q. So you're asking, then, that we look to 21 distant subscriber incidents to determine whether 22 or not there has been a change in</p>	<p>1 A. That's correct. 2 Q. And my question is -- I understand 3 you're not saying it should be used to determine 4 relative marketplace value, but you are saying 5 that it should be used to determine whether there 6 has been a change. So I'll ask my question again. 7 Are you aware of whether or not 8 public television has used this evidence -- this 9 type of evidence to determine a change in the 10 relative marketplace value? 11 A. I'm not sure if it was 12 public television. I do remember that -- in terms 13 of a change in marketplace value, no. 14 I think, at one time, there was a 15 witness -- in the past, there was a witness who 16 used it as evidence of the absolute amount of 17 marketplace value. And I'm not sure if that was a 18 public television witness or not, but someone in 19 the past, and not me. 20 Q. Do you recall that proceeding? 21 A. I don't recall which. 22 Q. Would you please turn to Page 9 of your</p>
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<p>1 public television's relative marketplace value? 2 A. That's one of the factors, yes. 3 Q. Are you aware of whether or not 4 public television has actually used this type of 5 evidence as a basis for either market -- 6 determining relative marketplace value or a change 7 in marketplace value? 8 A. Well, I don't think it can be as -- I 9 just want to be clear about my testimony. I'm not 10 using it to say you can use it to determine the 11 level of marketplace relative value. In other 12 words, I'm not saying a 10 percent share of 13 PTV should get 10 percent of -- or has 10 percent 14 of relative market value. 15 I'm just saying you can use it as 16 evidence -- as evidence of whether they are -- 17 there's been a big change or not. 18 Q. You're saying if it hasn't changed, if 19 it remained relatively the same, that should be 20 something that should count towards whether or not 21 the relative marketplace value of 22 public television signals has changed?</p>	<p>1 testimony? 2 CHIEF JUDGE SLEDGE: Ms. McLaughlin, 3 you're answering in response to the way the 4 question is phrased, but when you say 5 "marketplace" -- "marketplace value," are you 6 intending to say relative marketplace value? 7 THE WITNESS: Yes, I am. 8 BY MR. OLANIRAN: 9 Q. Are you on Page 9, Ms. McLaughlin? 10 A. Yes, I am. 11 Q. I wanted to talk to you about the first 12 full paragraph. And in that paragraph, you 13 testified that the Bortz respondents were not 14 asked to ignore the substitute programs on WGN's 15 satellite feed, correct? 16 A. The noncompensable programming, yes. 17 Q. Right. 18 And that the Bortz respondents were not 19 asked to ignore the -- the so-called 20 noncompensable portion of WGN's satellite feed? 21 A. Right. 22 They were asked to ignore the</p>

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<p>1 noncompensable part of the network stations 2 affiliates, but not the noncompensable part of 3 WGN. 4 Q. And -- and you state that as a result 5 of that, the values assigned by the Bortz 6 respondents overstated syndicated series and 7 movies and devotional programming, correct? 8 A. Both syndicated series, movies and 9 devotional programming is part of that 10 noncompensable. So to the extent they gave any 11 value to it, that would be giving more value to 12 that and overstating it. 13 Q. So the answer to my question, then, 14 is -- is that Bortz respondents have, in fact, 15 overstated syndicated series, movies and 16 devotional programs to the extent you deem them 17 noncompensable on -- they have been determined to 18 be noncompensable on the WGN satellite feed, 19 right? 20 A. Yes, to the extent they did give it any 21 value. And you would expect that somebody 22 would've given some of it some value.</p>	<p>1 programming that we're talking about, is it not? 2 A. Well, what you want to adjust is 3 whatever value, you know, the -- the -- the person 4 who is asked in the survey. 5 To the extent that person gave value in 6 answering the question, let's say, for programs -- 7 for movies or in answering that question for 8 devotional programming, if the respondent gave 9 it -- was considering the -- you know, the bigger 10 group of programming, and there was no reason to 11 think that they wouldn't be since they weren't 12 asked not to, whatever extra value they gave due 13 to that, that's what you would want to take out. 14 Q. But the sole basis -- the sole basis 15 for -- for the suggestion there should be an 16 adjustment is because you deem some volume on 17 WGN -- WGN satellite feed, you deem some volume 18 of programming on that signal as noncompensable? 19 A. Well, I understand that -- that when 20 you say I deem it as noncompensable, I really 21 base -- as my footnote says, I -- the -- the -- 22 the noncompensable part of that programming, I got</p>
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<p>1 Q. Do you know whether or not they gave it 2 value? 3 A. I don't know. 4 Q. To the extent they did, you think they 5 have been overstated? 6 A. Yes. 7 Q. Okay. And the reason you believe 8 they're overstated is because you believe the 9 operators would have -- would have been assigning 10 values to programs that were not retransmitted 11 because they're substitute programs? 12 A. They were not retransmitted; they were 13 just transmitted, exactly. 14 Q. By extension of that logic, then, the 15 values ascribed to syndicated series or movies and 16 devotional programming by the respondents should 17 somehow be adjusted for that noncompensability 18 of -- of minutes? 19 A. Well, I don't know about minutes, but 20 that non -- about the fact that there was some 21 noncompensable programming. 22 Q. But it's -- it's a volume of</p>	<p>1 from a statement of Mr. Ducey. 2 Q. So you don't know for yourself -- you 3 cannot verify whether they're, in fact, 4 noncompensable? 5 A. Well, I do know, just as someone 6 familiar with the industry, that there are -- 7 that -- that there is programming that is inserted 8 in the signal that is not retransmitted by the 9 satellite carrier. And I know that -- that to be 10 the case. I don't know how much there is. 11 Q. Let's assume that is the case. I just 12 want to get at what the foundation would be for 13 adjusting the value, which you seem to be 14 suggesting. 15 You don't actually propose an 16 adjustment -- 17 A. No. 18 Q. -- right? 19 And the sole basis for suggesting an 20 adjustment is the fact that when you look at the 21 entire WGNA and according to what -- your 22 understanding of what Dr. Ducey is saying, when</p>

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1 you look at the entire WGNA, some volume of
2 what -- what the subscriber receives is not
3 compensable -- is not retransmitted programming,
4 simply transmitted?
5 A. That's correct, that's the basis, the
6 fact that there's noncompensable programming.
7 Q. So it's a volume that gives rise to the
8 applied adjustment?
9 A. It's not the -- it's not the volume of
10 the programming. If it was -- if it was really
11 tiny, you could say, well, you could -- you know,
12 you could ignore it. But since it's not --
13 unless -- unless there was something about the
14 tiny program that was, you know, really well
15 valued by the cable operators.
16 It's the value the cable operators are
17 giving it is the reason for the adjustment, not
18 the volume of the programming itself. In other
19 words, it's -- if there are a lot of minutes and
20 it was valued small -- a small amount, then it
21 would be a small adjustment. And if there were
22 few minutes and it was valued a large amount, it

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1 would be a large adjustment.
2 Q. When you say if it was tiny, perhaps an
3 adjustment would not be required, should we be
4 going about making adjustment depending on the
5 size?
6 A. Well, the only reason -- only reason I
7 said about tiny, if it was some de minimus amount
8 that could basically be ignored.
9 But I even thought, well, even if it
10 was small in amount, it could be big in value, you
11 know, like some program that everybody wants to
12 watch that is only one program, but is very --
13 valued highly by subscribers.
14 Q. If I told you, for example, that on
15 WGN, sports programming is five times -- the
16 Program Suppliers' programs on WGN is five times
17 more than the amount of sports on that same
18 signal, does that tell you anything?
19 A. No.
20 Q. So we really can't look at the volume,
21 can we?
22 A. That's what I said. It's not the

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1 volume of the programming; it's the -- it's the
2 values that the cable operators are given --
3 giving to it.
4 Q. But the basis, again, is the volume.
5 The basis for the adjustment that you're asking
6 the Judges to make or that you're suggesting is
7 the volume.
8 MR. DOVE: Objection, Your Honor. I
9 just believe this has been asked and answered
10 several times now.
11 MR. OLANIRAN: I'll move on.
12 BY MR. OLANIRAN:
13 Q. When you were responding earlier to
14 Judge Roberts' questions, you indicated that Bortz
15 survey respondents would know if there was less
16 sports programming. I believe you were talking --
17 speaking in reference to WGN or perhaps another
18 signal.
19 Do you recall that?
20 A. That doesn't sound exactly right.
21 I recall something generally about
22 that, but I -- I didn't think that it was whether

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1 the -- I think he asked if -- if there were a
2 change in the amount of programming, could that
3 affect the value of the program. And I said, yes,
4 it could. It would depend on the quality of the
5 program, not just the amount.
6 Q. Okay. I guess -- perhaps, I misheard.
7 Well, let me put the question to you
8 this way: Is it your testimony that cable
9 operators that are responding to the Bortz survey
10 are not aware of the program substitution on WGN
11 at the satellite level?
12 A. I think cable operators -- I don't know
13 for sure that they would all know, but I think
14 that cable operators certainly might be aware of
15 the substitution.
16 That -- you know, but that doesn't
17 necessarily influence their answer to the
18 question; that is, they weren't asked the question
19 about the -- if they were aware of it and the
20 question just said, I want you to value the
21 programming, but not the extra programming that's
22 put in, then the ones who knew about it would be

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<p>1 able -- you know, would be able to do that if they 2 knew exactly which programming was which. 3 But the question doesn't even ask that. 4 They just say value the programming on the channel 5 that you transmitted. 6 Q. Do you know for a fact -- the fact 7 that -- that the cable operators, in responding, 8 were not aware -- were not influenced by the fact 9 that there was substitution on the satellite feed? 10 A. I don't know for a fact how -- what 11 they were influenced by. Each -- each person 12 could be influenced by whatever. 13 Q. I'm sorry. Are you -- did you finish? 14 A. Yes. 15 Q. But, in your experience, you think most 16 cable operators know that the substitution exists? 17 A. I certainly think large cable operators 18 would know that substitution exists. 19 Q. Okay. And we have no reason to believe 20 that in responding to the Bortz survey, that they 21 did not consider the substitution? 22 A. Well, they weren't asked to. I -- and</p>	<p>1 point of view, but the quality in terms of its 2 value to the cable operator of having that 3 retransmitted program. 4 Q. That quality that you're speaking of 5 sounds like something much more objective than -- 6 not a determination of whether it's a good program 7 or a bad program or whether you like it 8 personally. It's a question of really what's 9 going to attract and retain subscribers? 10 A. Yes, exactly. 11 Q. Aside from the carriage analysis that 12 you did and your analysis of the -- of the Bortz 13 survey results, public television has -- you have 14 not presented an independent analysis of what the 15 marketplace value of public television should be 16 in this proceeding, have you? 17 A. Well, aside from those -- I mean, 18 that's -- no, aside from my testimony, I haven't. 19 The only -- the only -- as I told you, 20 the first part goes to the change, all right, and 21 where I said that my conclusion was no major 22 change.</p>
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<p>1 they weren't even asked in a vague way to. 2 So I -- I wouldn't expect them to, but 3 I really -- I -- I really wouldn't expect them to 4 consider that. 5 Q. Also, in response to one of the 6 questions that was posed to you by Judge Roberts, 7 you indicated -- and I don't recall the specific 8 question, but I recall that you mentioned quality. 9 And the response -- you said, in terms of the 10 reduction in the amount of a certain program type, 11 that you'd have to consider not just the quantity, 12 but the quality; is that right? 13 A. Yes. In fact, that's what I just 14 referred to in one of my answers to you earlier. 15 Q. Okay. And my question to you is that 16 in the determination of marketplace value, is it 17 your understanding that quality of the program 18 should be a factor? 19 A. Well, by "quality," I mean the quality 20 in terms of -- of attracting and retaining 21 subscribers, the quality in terms of -- from -- 22 not from an aesthetic point of view or an art</p>	<p>1 The second part on the augmented Bortz 2 results, I think I describe that right at the 3 beginning as what the cable operators would have 4 attributed to PTV of the dollars they spent on 5 the -- on the signals they imported. So that 6 would be the cable operators relative marketplace 7 value. 8 Q. My question was whether you conducted 9 an independent analysis of what PTV's marketplace 10 value should be. 11 You looked at the Bortz survey, 12 correct, and you augmented the Bortz survey? 13 A. Right. 14 Q. But that's not exactly independent, 15 because you relied on a survey that had already 16 been established. 17 Is that fair? 18 A. Right. If you want to say did I -- did 19 I start from scratch to do it, no. I started with 20 the Bortz survey and augmented it. 21 Q. My question was whether you made an 22 independent analysis.</p>

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1 A. No, not completely independent, no.
2 Q. Okay.
3 MR. OLANIRAN: That's all I have,
4 Your Honor.
5 CHIEF JUDGE SLEDGE: Any further cross?
6 CROSS-EXAMINATION
7 BY MR. LUTZKER:
8 Q. Ms. McLaughlin, at Page 6 of your
9 testimony, you indicate that the sheer change of
10 PBS in the Bortz study from 2.9 to 3.5 is not
11 substantial; is that correct?
12 A. Yes. I say that -- that it was -- that
13 there was no substantial change, yes.
14 Q. What's your definition of "substantial
15 change"?
16 A. Well, what I considered in -- in
17 this -- it includes both the magnitude, but also
18 what -- really what informed my statement here is
19 that -- and I think I mentioned this in my
20 testimony -- that the -- the values in 2004 and
21 2005 were within the confidence intervals of
22 2000 -- of '98 and '99 for PTV.

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1 And also, the omitted systems were --
2 were -- for PTV were a similar percent of the
3 total in both years. So they would be equally
4 affected by the omission of the PTV signals --
5 systems with PTV only.
6 Q. If the results were outside the range
7 of the confidence intervals, would that then be
8 indicative of the substantial change?
9 A. If -- if it was the case for both 2004
10 and 2005 relative to both '98 and '99, yes.
11 Q. If a Bortz category went from a 3.6 to
12 a 7.8, recognizing, you know, the reasonable
13 ranges that Bortz would have for confidence
14 intervals, do you think that would constitute a
15 substantial change?
16 A. I think that -- I mean, you would have
17 to look at the -- you'd have to look at it. It
18 might be. It certainly might be.
19 Q. Okay. PBS does subscribe to the Bortz
20 survey, correct? Subscribe in the sense that you
21 believe it is a way to determine relative
22 marketplace value subject to your adjustment,

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1 but --
2 A. Yes --
3 Q. -- including the adjustment.
4 A. -- including the adjustment, yes.
5 Q. It's true, is it not, that the purpose
6 of the Bortz survey is to determine what cable
7 systems would have paid on a relative basis for
8 different types of nonnetwork programming on
9 distant signals that they carried and, in fact,
10 had they been required to negotiate in the open
11 marketplace?
12 A. Not quite. Almost, but not quite.
13 Q. Then -- then --
14 A. If you take any given cable operator,
15 you're looking at the amount that they actually
16 did pay, and then you're asked -- then they're
17 dividing that up.
18 In the -- in the open marketplace, some
19 cable operators -- remember, some people had to
20 pay this just as part of the minimum fee, so it
21 wasn't really indicative of what they were -- the
22 value of -- for the system -- stations that they

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1 were importing.
2 And, also, some could have gotten --
3 they could have been willing to pay less or
4 willing to pay more. And by "less," I mean if
5 they had to pay the minimum fee.
6 So that's the difference. It doesn't
7 show the value that they would have paid if they
8 were -- even for buying the exact same signals if
9 it was in open negotiations. It just shows how
10 they distribute the value among the amount they
11 did pay.
12 Q. Okay. Thank you for that.
13 Is it fair to say that the assumption
14 behind your augmented Bortz analysis is that the
15 Bortz survey makes sense whether all program
16 categories are valued as well as when only one
17 program category is carried by the system and thus
18 valued?
19 A. Well, it may not make sense to ask the
20 person the question if you know what the answer is
21 going to be, but I think that it makes sense to
22 apply -- if you're going to apply the methodology

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1 of -- if -- if you ask someone who carries, let's
2 say, a U.S. commercial station, they could give
3 all of the value to one category or they could
4 divide it among the categories of the programming
5 that they have.
6 So the reason for asking is to find out
7 how they would divide it, right?
8 But if the concept behind the survey is
9 to take whatever -- whatever that value is and
10 then, you know, add it together in the way that
11 they do, that's -- that's the concept -- that
12 concept is what I've -- I've used.
13 Q. But, in other words, what I'm asking
14 is, is the assumption behind Bortz that they can
15 inquire of these cable operators how to allocate
16 relative value among these categories, that that
17 assumption that Bortz is applicable even if only
18 one program category applies? Is that your
19 assumption in doing the augmented survey?
20 A. Well, let's -- let's put it this way:
21 It's my assumption that the instructions would
22 be -- would be followed. And that's what I

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1 stated, that -- that you can -- if you only have
2 one category and you're trying to divide it among
3 one category, the answer is all of it for the one
4 category.
5 Q. If the seven categories were listed,
6 but only one signal was carried, is it your
7 assumption that only one category would receive a
8 share?
9 A. If they followed the -- the
10 instructions, which was my assumption.
11 CHIEF JUDGE SLEDGE: Now, wait a
12 minute. The question left an opportunity that's
13 inconsistent with your answer. One signal can
14 have more than one category in its programming.
15 MR. LUTZKER: I'm going to get -- I
16 will get to that.
17 THE WITNESS: Oh, I'm sorry. I was
18 thinking of a -- of a signal like PBS or Canada,
19 where there would only be one category for the --
20 for the programming.
21 I -- I'm sorry if I misunderstood your
22 question.

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1 BY MR. LUTZKER:
2 Q. Is there only one category of
3 programming on Public Broadcasting?
4 A. For purpose -- for this purpose, yes.
5 I mean, there are different types of
6 programming, but for the purpose of the question,
7 it -- you know, it says that there's a -- when it
8 lists the categories, it -- it says PBS and all
9 other programming broadcast by the educational
10 station that you carry is to be -- go in this
11 category.
12 Q. If there's a movie on PBS, how would a
13 participant identify that?
14 A. It -- if they followed the
15 instructions, they would identify it -- and they
16 were trying to value that, they would identify
17 that as public television.
18 Q. When you're saying "if they followed
19 the instructions," is it the survey givers or the
20 survey -- is it the Bortz people that are asking
21 the questions or the cable operators?
22 A. Oh, no. The cable operators, who --

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1 these are the instructions to the cable operators
2 that I'm discussing.
3 Q. And, in your experience, do the
4 participants, the cable operators in this case,
5 always follow instructions?
6 A. I -- I didn't examine individual
7 responses to the -- to the survey. I don't know
8 whether they always follow instructions.
9 That's why I made specific my -- my
10 assumption that they would follow the
11 instructions.
12 Q. But that is your assumption, it's
13 not --
14 A. As to PTV, that is my assumption, yes.
15 Q. -- and it's not something that you
16 know, whether as to PTV or any other entity or
17 categories?
18 A. Whether they did follow the
19 instructions?
20 I -- I think you -- no. I -- I would
21 have to check the individual responses, plus I
22 would have to -- you know, probably, in order to

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1 tell, you would also have to, you know, ask more
2 questions of the cable operator.
3 Q. Well, let me first ask you, have you
4 ever seen the Bortz survey results, the raw data
5 results, the filled out forms?
6 A. No.
7 Q. Have you ever asked to see them?
8 A. I asked for -- I didn't specifically
9 ask for the raw survey results. I was -- I was
10 told that there were confidentiality issues about
11 the -- about the raw results and that they were --
12 I had to sign a special confidentiality agreement
13 even to get the summary results.
14 Q. But you didn't try to see redacted --
15 if there's confidential, a name might be
16 confidential, an address or a phone number.
17 But you didn't ask to see
18 nonconfidential information that might be
19 contained within the survey results.
20 Is that what you're saying?
21 A. I -- I didn't ask for it. I didn't
22 actually think that it was available -- it would

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1 have been available had I asked for it. But --
2 but I did not ask for it.
3 Q. Why is it that the Bortz survey is
4 equally applicable if only PBS is carried as a
5 signal, as opposed to other broadcast stations
6 that have all the other categories of programming?
7 Why is it equally applicable? Should a different
8 question be asked in that situation?
9 A. I think that the difficulty I have with
10 your -- your question is whether or not you have
11 to ask the question in -- in the second
12 circumstance.
13 The -- I think that the point of the
14 Bortz survey going all the way back was to find
15 out how cable operators would divide something
16 that had to be divided. And a lot of the
17 programming, of course -- a lot of the signals, of
18 course, have multiple kinds of programming and do
19 have to be divided.
20 I think that if -- if it's the case
21 that there is a U.S. commercial -- you know,
22 commercial station that happens to have only one

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1 category of programming, of which there are
2 some -- I mean some such broadcast stations. I
3 don't know if they were distant signals that were
4 captured in the survey -- that those would be
5 included as well, because they weren't specially
6 exempted.
7 But that was sort of the point of it,
8 that you needed a question in order to get cable
9 operators to break it apart. You couldn't just
10 say, well, this is an independent station or an
11 affiliated station or a PTV station as to all of
12 the kinds of stations.
13 So I think that's -- that was really
14 the point of the Bortz survey. But then the
15 resulting use of the Bortz survey to represent the
16 relative market value, I think you have to include
17 the singleton, so to speak, that -- the people who
18 have only one type of programming, or you're not
19 going to get the totality.
20 Q. Isn't it true, when a survey designer
21 creates the survey and chooses the universe for
22 the sample and so forth, that they take into

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1 consideration responses, nonresponses? I mean,
2 you had indicated 64 percent are responding.
3 The warts and all, problems and all
4 become embraced within a total survey. Wouldn't
5 that not be true?
6 A. Yes; but there are -- but there are
7 different questions and -- and some of it has to
8 do with what you -- a way to get a more robust
9 result out of asking fewer people, and
10 stratification is one of the tools that is used
11 for that.
12 Really, it doesn't -- it really
13 wouldn't matter if you were asking a different
14 kind of question of cable operators.
15 Stratification could still be the answer to that
16 if you were asking them about their costs or some
17 other -- other question completely different from
18 what you're asking now.
19 Stratification in the way that the
20 Bortz survey was done would still be a useful tool
21 for that. It's not that each part of the -- the
22 survey automatically gets adjusted for the other

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<p>1 part of the survey; I mean -- that is, if you have 2 this kind of a question, then you would have a 3 different sampling design, not necessarily. 4 Q. It is true, is it not, that Bortz 5 doesn't include the single PTV categories? 6 A. That's true. 7 Q. Is it rigorous, from an economist's 8 perspective, to take the data that Bortz deemed 9 unusable and then use it for your augmentation? 10 A. Can you -- 11 MR. DOVE: Objection. Objection. 12 You're mischaracterizing what Bortz deemed certain 13 data unusable, when Mr. Troutman testified that an 14 adjustment was required. Just objection for 15 mischaracterization. 16 CHIEF JUDGE SLEDGE: It appears to be a 17 correct characterization from my observation. 18 Overruled. 19 THE WITNESS: I -- the -- I'm putting 20 back in people he determined were ineligible, and 21 they were ineligible because he was looking to 22 have people break things down that needed to be</p>	<p>1 operator carrying only PTV -- PTV signal could not 2 put 100 percent down for PTV? 3 A. Say that again. I missed -- 4 Q. Do you consider it implausible -- 5 A. Right. 6 Q. -- that a cable operator answering the 7 Bortz survey where the only signal they carry is 8 PTV with a full list of the seven questions -- 9 A. Right. 10 Q. -- could only put down 100 percent for 11 PTV? 12 A. No, I don't consider that implausible 13 at all. He's only carrying PTV. He's instructed 14 to divide it all -- among the type of programming 15 that he does carry. He was just read the list of 16 what he does carry. And so it wouldn't be 17 implausible for him to say it was all -- the 18 category that he was told to put it in. 19 Q. With respect to your adjustments, what 20 impact does your analysis have on the robustness 21 of the Bortz study? 22 A. It -- it changes the Bortz study from a</p>
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<p>1 broken down. 2 That's my understanding of -- of his 3 report. 4 BY MR. LUTZKER: 5 Q. No. I understand what you did. 6 I'm asking, from an economist's 7 perspective, is it a rigorous economic 8 specialist's approach to take data that 9 Mr. Troutman decided should not be included in his 10 study in the final results and then use it to 11 augment those results? 12 A. Given the reason that he decided to 13 deem it ineligible, yes. 14 Q. And why is that? 15 A. Because -- they were ineligible just 16 because they only had one type of programming, and 17 his survey was dividing -- was asking people to 18 divide the types of programming. 19 Q. Should he have asked a different 20 question? 21 A. No. 22 Q. Do you find it implausible that a cable</p>	<p>1 study of cable operators that carry U.S. 2 commercial stations into cable operators that 3 carry distant stations. So in that -- any distant 4 station. 5 And so in that respect, it's not -- 6 it's not comparable -- it's two different 7 universes, so it's not comparable in terms of 8 robustness. 9 The only thing that I would say is -- 10 as to the second -- those that I added, the people 11 who were chosen in the survey who carry only PTV, 12 not only would -- should they say 100 percent, but 13 the people who weren't chosen in the survey that 14 they're representing would also say -- should also 15 say 100 percent. 16 Whereas, for the cable operators that 17 are in the group that Bortz does survey, two 18 people may carry the same channel and -- and one 19 of them is in the survey and one is not, and they 20 could have different values -- different 21 percentage values. So there's more variability in 22 the group that Bortz surveys than in the group</p>

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<p>1 that I add.</p> <p>2 Q. Have you calculated what changes in the</p> <p>3 standard errors your adjustments would make to the</p> <p>4 Bortz survey?</p> <p>5 A. No, I haven't, because since this is</p> <p>6 a -- an expected result, the -- well, first, they</p> <p>7 wouldn't be comparable because it's two different</p> <p>8 groups, as I explained.</p> <p>9 But second, they would be -- it would</p> <p>10 be possible to calculate confidence intervals, but</p> <p>11 they would be virtual; that is, they would be</p> <p>12 based on the assumption, based on trial and error</p> <p>13 of when you pick, out of the 10, how often you get</p> <p>14 the one Canadian versus -- you know, in terms of</p> <p>15 the response rate compared to -- you know, you</p> <p>16 have to get a whole system -- how often you get</p> <p>17 the one Canadian and -- and say, you know, five</p> <p>18 others or six others.</p> <p>19 That would affect the variability, but</p> <p>20 it would be a bootstrapped or virtual confidence</p> <p>21 intervals, not an actual, because they weren't</p> <p>22 actually surveyed.</p>	<p>1 you -- if we restrict our universe to those people</p> <p>2 who do carry PTV and not a U.S. commercial</p> <p>3 station, this is the results.</p> <p>4 Q. And do you recall where in the Bortz</p> <p>5 study, because I just --</p> <p>6 A. Yes, I can tell you from my -- from my</p> <p>7 footnote.</p> <p>8 It should be on Page 16 in Table II-2.</p> <p>9 JUDGE ROBERTS: What footnote?</p> <p>10 THE WITNESS: My Footnote 19.</p> <p>11 BY MR. LUTZKER:</p> <p>12 Q. And in terms of -- was this part of the</p> <p>13 popularity question?</p> <p>14 A. No, no. This is on the question -- the</p> <p>15 question that we've been talking about, the</p> <p>16 relative market value question, at Question 4.</p> <p>17 Q. This is excluding -- this is the</p> <p>18 results with only PTV stations?</p> <p>19 A. Only systems that carry PTV and a U.S.</p> <p>20 commercial station.</p> <p>21 Q. And what percentage of the universe</p> <p>22 does that embrace?</p>
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<p>1 Q. Do I understand your answer as no?</p> <p>2 A. I did not calculate that, no.</p> <p>3 Q. Do you have any other empirical</p> <p>4 evidence to support the appropriateness of your</p> <p>5 adjustment?</p> <p>6 A. Well, in part, that -- there was a</p> <p>7 footnote in my testimony that looked at the value</p> <p>8 that people who carry PTV and a U.S. commercial</p> <p>9 station give that was taken from Mr. Troutman's</p> <p>10 testimony that showed that those people value PTV</p> <p>11 more highly than the group as a whole, so that</p> <p>12 somebody that would have PTV only would also be</p> <p>13 expected to value PTV more highly than the group</p> <p>14 as a whole, many of which don't carry PTV at all.</p> <p>15 Q. That adjustment, that -- that sort of</p> <p>16 empirical evidence is already incorporated into</p> <p>17 the Bortz study in the final numbers that it</p> <p>18 allocates to PTV, is it not?</p> <p>19 A. No. This was a separate -- a separate</p> <p>20 table in Mr. Troutman's testimony that -- there</p> <p>21 were two of them. One focused on Canada and one</p> <p>22 focused on public television. And it said if</p>	<p>1 A. Well, it's 50 -- it includes -- it's</p> <p>2 something in the 30 percent area.</p> <p>3 Q. So, in other words, this is -- this is</p> <p>4 a snapshot of a 30 percent universe -- we're</p> <p>5 obviously dealing with 100 percent universe, but</p> <p>6 this is a 30 percent universe?</p> <p>7 A. Well, when you say "100 percent</p> <p>8 universe," the Bortz universe isn't 100 percent of</p> <p>9 everybody who's -- who is importing a distant</p> <p>10 signal. It's a sample and it's a sample</p> <p>11 restricted to those who have U.S. commercial</p> <p>12 stations.</p> <p>13 Q. But the -- the Table II-2 on Page 16</p> <p>14 that you're referring to --</p> <p>15 A. Right.</p> <p>16 Q. -- is drawing data on PBS, and PBS'</p> <p>17 carriage in '04-'05 is approximately at a</p> <p>18 30 percent level?</p> <p>19 A. Thirty plus, right.</p> <p>20 Q. Okay. All right.</p> <p>21 In your augmented analysis, you explain</p> <p>22 an additional anomaly where there are two systems,</p>

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1 one that carries -- that carried PTV and the
2 Canadians, and you do this sort of
3 100-zero/zero-100 allocation between the two.
4 Do you know what the impact of that
5 analysis is on the relative shares -- just of
6 those two -- taking those two systems, making
7 those two assumptions, what is the net impact for
8 PTV and for the Canadians?
9 A. Well, it goes from 6.9 to 7.2.
10 So if -- when those -- when they are
11 included at zero for PTV, PTV's value is 6.9. And
12 if they're included at 100 percent for PTV, its
13 value is 7.2.
14 So it's .3 percentage points. And, of
15 course, it's the same .3 on the Canadian side
16 because they're moving over.
17 So the Canadian number -- when the PTV
18 is 6.9, the Canadian is 1.8. And then the other
19 side, they go -- ones goes up .3 and the other
20 goes down .3.
21 Q. But, in other words, by making that
22 adjustment, it gives about a 5 percent boost to

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1 PTV and about a 17 percent boost to Canadians?
2 A. Well, I would say a .3 percentage point
3 boost is the way I would look at it.
4 Yes, you --
5 Q. In other words, you're going from 5.9
6 to 6.2. That's .3. But, in other words, if --
7 A. No; from 6.9 to 7.2. Oh, I'm sorry.
8 I'm saying the wrong -- I'm sorry. I'm looking at
9 the wrong chart.
10 From 5.9 to 6.2, yes.
11 Q. And that's roughly about 5 percent?
12 A. Yes; but that is -- you know, it's
13 still within -- it -- I don't regard that as being
14 a large change.
15 Q. The --
16 A. It's only .3 percent is my point. It's
17 a small number.
18 Q. I mean, do you have -- you haven't done
19 any statistical analysis of the implications of
20 that for the overall Bortz or for other parties in
21 Bortz?
22 A. No, I have not.

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1 Q. Okay. Let me turn -- and I know you
2 had some discussion with Mr. Olaniran about the
3 WGN situation. Let me just confirm one or two
4 points.
5 You've indicated you have not looked at
6 any survey instrument results, in other words,
7 the -- the actual Bortz reports, the -- the
8 survey -- the raw survey documents as completed?
9 A. You mean what people said?
10 Q. Yes.
11 A. No.
12 Q. If you had and if you had seen survey
13 results where Devotional Claimants in a situation
14 where WGN is the only distant signal carried -- so
15 that's the universe we're working with --
16 A. Okay.
17 Q. -- only WGN, Devotional Claimants get
18 zero on that -- from that cable operator --
19 A. Right.
20 Q. -- what does that do to your WGN
21 analysis?
22 A. If we're talking about only devotional

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1 programming --
2 Q. I'm only talking about devotional
3 programming.
4 A. -- and we're -- and we're saying
5 what -- what is the effect, it would -- if all of
6 the people who had only WGN gave zero to
7 devotional, then I would say that as to the
8 devotional -- noncompensable devotional
9 programming, they didn't give it any value. So
10 that would be the case.
11 But if one person gives it a zero, that
12 doesn't really say anything, except that that --
13 that one response didn't over -- you know, didn't
14 overstate it as to devotional.
15 Q. If you are aware that there is
16 devotional programming on WGN, does that change
17 any of your response?
18 A. No. There could be devotional
19 programming on WGN that was compensable or
20 noncompensable, and it could be valued at -- at
21 nothing by a particular cable operator.
22 Q. It could be, and if it -- and if there

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<p>1 is programming, it could have some value. 2 But to the extent there are respondents 3 that give a zero value, have they not already 4 fully accounted for what you would consider to be 5 potentially noncompensable content? 6 A. Well, just as to the devotional part of 7 that. 8 Remember, I'm looking at this from 9 PTV's perspective -- there are lots of other 10 programming, right, as well as the programming -- 11 Q. I'm looking it from the devotional. 12 A. Yes, from the point of view of 13 devotional, for a person who responded with a zero 14 value, that person did not overcompensate due to 15 the noncompensable programming -- 16 Q. And -- 17 A. -- just that person. 18 Q. -- and even if they gave a compensable 19 number to the extent there was compensable 20 content, you are not in a position to alter that 21 analysis, are you? 22 A. Well, I -- I haven't given that thought</p>	<p>1 CROSS-EXAMINATION 2 BY MR. SATTERFIELD: 3 Q. Hello, Ms. McLaughlin. I just have a 4 couple of questions that I want to clarify a 5 point. 6 Could you turn to Page 11 of your 7 testimony, please? 8 A. Yes. 9 Q. And in looking at Chart 4, in the 2004 10 column, at the top, it shows the augmented results 11 of the Canadian system at .5? 12 A. Yes. 13 Q. And this reflects the addition of one 14 cable system; is that correct? 15 A. Well, the inclusion as eligible of one 16 cable system, yes, that carried Canadian only. 17 Q. Now, looking next to that at the chart 18 for -- the column for 2005, at the top, it has a 19 box for the Canadian, and it shows a range of 1.5 20 to 1.8. 21 Now, is it my understanding that the 22 1.5 reflects the addition of one cable system</p>
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<p>1 about altering it, but you would have to figure 2 out some way of how much they would've valued it 3 had they considered only the noncompensable 4 program. 5 Q. So your answer no? 6 A. I haven't done it. 7 MR. LUTZKER: Okay. Thank you. 8 CHIEF JUDGE SLEDGE: Any other 9 cross-examination? 10 MR. SATTERFIELD: Just a couple of 11 questions. 12 CHIEF JUDGE SLEDGE: Then I think -- if 13 there is other cross, let's go ahead and take a 14 10-minute break now. 15 MR. SATTERFIELD: Okay. 16 (Whereupon, a brief recess was taken 17 from 2:44 p.m. to 2:56 p.m.) 18 CHIEF JUDGE SLEDGE: Thank you. We'll 19 come to order. 20 Cross-examination. 21 MR. SATTERFIELD: Kendall Satterfield 22 for the Canadian Claimants Group.</p>	<p>1 only? 2 A. The 1 -- the 1.5, yes, reflects only 3 one cable system. 4 Q. Now, why does the addition of one cable 5 system to both 2004 and 2005 result in such a 6 different increase? 7 A. Because of the -- the way the Bortz 8 survey is designed with weighting and 9 stratification, it depends which strata you're 10 in -- which stratum you're in and, also, what -- 11 how your value will translate into the total 12 relative value. 13 And it also depends on what the -- 14 your -- your royalty -- I mean -- the reason it 15 depends on which stratum you're in is it depends 16 on, for that stratum, your royalties, the 17 royalties of the other people in the stratum and 18 the royalties of the whole population in the 19 stratum -- that would fall into the stratum that 20 had sampled or not sampled. 21 Q. So the difference is that in '04, the 22 omitted system happened to be -- it must have been</p>

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Page 514	1 a much smaller system than the omitted system in 2 the '05 survey? 3 A. Yes, or at least relative to the other 4 people. But, yes, in general, yes. 5 Q. Right. 6 But just -- so the random selection of 7 this one system that was then declared ineligible 8 caused a 1 percentage point difference between the 9 two years? 10 A. Yes. 11 Q. Now, for public television, did the 12 ratio of omitted systems -- did it reflect the 13 overall ratio of cable systems that carried only a 14 public television station? 15 A. I didn't look at the question that way. 16 I looked at -- but -- and let me see if this -- if 17 you find this relevant or not. I don't want to 18 answer a question you didn't ask. 19 I did look at the ratio of cable 20 systems with carriage of public television in 21 total and the total augmented PTV carrying cable 22 systems in the sample versus the -- you know,	Page 516	1 Q. But wouldn't it possibly -- wouldn't it 2 necessarily be the case that if you were going to 3 augment the Bortz results, that you would want to 4 make sure that public television -- the number of 5 cable systems that carried only public television 6 systems was accurately reflected in this ratio? 7 A. No. I think you'd want to make sure 8 that the original sample, which was a sample of 9 the whole -- you know, of the population, was -- 10 was -- was more or less representative, not -- not 11 the -- not the extra group. 12 Because if the extra group -- if the 13 original sample is representative and the extra 14 group is underrepresented, then it must be that 15 the included group was overrepresented, and so, 16 together, they're just right. 17 Do you see what I mean? And that's 18 what I'm trying to get, a together result. 19 MR. SATTERFIELD: I don't think I have 20 any further questions. 21 CHIEF JUDGE SLEDGE: Any further cross? 22 Any redirect?
Page 515	1 versus the big total -- the total of everyone. 2 Q. But you don't know what percentage of 3 cable systems in, say, 2005, in the whole universe 4 carried only public television stations? 5 A. No, I don't know that. 6 Q. So you don't know whether or not the 7 sample of systems selected through the Bortz 8 stratified random sampling process actually 9 captured a re- -- a sample of public television 10 systems that reflected whether -- the -- the 11 number of systems that carried only 12 public television stations? 13 A. I only know that the number that they 14 picked for public television in total when they 15 started, all right, and before they started 16 deeming things ineligible. That number 17 represented the -- the -- in general, the portion 18 that were carried on -- in the population as a 19 whole. 20 It is PBS' share of the initially 21 selected ones corresponds to PBS' share of the -- 22 in the population, systems carrying PBS.	Page 517	1 MR. DOVE: No, Your Honor. 2 CHIEF JUDGE SLEDGE: Questions from the 3 Bench? 4 JUDGE WISNIEWSKI: Yes. Just one or 5 two. 6 Ms. McLaughlin, would you turn to 7 Page 2 of your written statement? 8 In describing the -- the background to 9 what you did here, you make a few statements in 10 the second full paragraph there. In the second 11 sentence of the second full paragraph, you say, 12 The hypothetical marketplace negotiations over 13 such programming would occur, and so forth. 14 THE WITNESS: Um-hum. 15 JUDGE WISNIEWSKI: And you follow that 16 with the sentence that Only demand is relevant in 17 such negotiations. 18 Could you explain why that's so? 19 THE WITNESS: Because when you have a 20 secondary product, like retransmitted stations, 21 that is, they're already in existence and they're 22 not going to get used up by being retransmitted,

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<p>1 so they are -- a price in that circumstance is 2 based on demand. 3 It's the same thing with a syndicated 4 program that has previously aired, like a Seinfeld 5 on television -- on network television and, now, 6 it's going to be sold into the syndication market. 7 It already exists. We already have the episodes. 8 In that case, it's not the -- the 9 cost -- you know, putting aside any negotiation 10 cost on that side, it's not the cost; it's the 11 demand. 12 JUDGE WISNIEWSKI: Would the copyright 13 owners, however, in making their initial decision 14 to provide the programming for the -- let's call 15 it the primary market -- 16 THE WITNESS: Yes. 17 JUDGE WISNIEWSKI: -- have taken into 18 account the fact that, indeed, it may have a 19 secondary market value? 20 THE WITNESS: Yes, that does happen. 21 This is something I actually addressed in my 22 initial testimony that's attached here, that if --</p>	<p>1 JUDGE WISNIEWSKI: And in the first 2 statement there, this whole process that you just 3 described would take place not in the actual 4 marketplace, but in the hypothetical marketplace 5 that you're trying to reconstruct it? 6 THE WITNESS: Yes, for the signals that 7 were actually retransmitted; that's right. 8 JUDGE WISNIEWSKI: Thank you. 9 MR. OLANIRAN: Your Honor, may I have 10 one or two follow-up questions? 11 CHIEF JUDGE SLEDGE: Yes. 12 RECROSS EXAMINATION 13 BY MR. OLANIRAN: 14 Q. For the record, again, Ms. McLaughlin, 15 my name is Greg Olaniran. 16 I just want to make sure I understood 17 the exchange you just had with Judge Wisniewski 18 with respect to why demand side is the only 19 relevant consideration. 20 You stated that with shows like 21 Seinfeld or reruns of programs, essentially, we 22 already know what it is, and that's why we</p>
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<p>1 if -- let's say with a movie, they know that 2 they're likely to receive, if they're going to get 3 revenues from it, if it's going to be a success, 4 not only from theoretical showing, but from -- 5 from DVD rentals, say, and that could be quite a 6 large market. 7 And they might be thinking, well, we 8 know what kind of movies do well in DVD rentals, 9 or we know what kind of movies do well in some 10 other secondary markets. 11 And so that can be considered -- 12 JUDGE WISNIEWSKI: Which would lead 13 them to invest more money in the product? 14 THE WITNESS: Exactly, exactly. 15 But in terms of setting the -- the 16 price for the particular DVD, in that case, or 17 foreign rental or something like that, once it is 18 produced and, now, we're -- now, we're saying how 19 much -- how much should we charge you in France, 20 well, we're going to charge you based on what you 21 would pay; and over in England, we'll charge you 22 based on what you will pay.</p>	<p>1 don't -- I'm not sure I understand your answer 2 there. 3 A. No, not that we know what it is, but it 4 has already been produced. 5 Q. Okay. 6 A. It's "in the can," so to speak, is the 7 industry term. It's -- it's -- you know, it's 8 already produced. We've expended the money for 9 the stars. 10 Now, I'm not saying that they're -- 11 there can be, depending on contracts and how 12 they're written, if there's -- if there is some 13 extra payment that's due for other markets, that 14 could be considered. 15 But I'm just saying, generally 16 speaking, that once a program is -- is already 17 produced or transmitted, in this case, to the 18 local broadcast market, then, afterwards -- then 19 any resale of that type program would be -- in 20 this retransmission would be based on demand, not 21 on the cost of the program, which has already 22 sunk.</p>

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<p>1 Q. Are you assuming the same -- the same 2 economic model for programs -- are you talking 3 about programs that were on network first and then 4 sort of -- or are you talking about all syndicated 5 programs? 6 A. No. I was talking about programs that 7 are preexisting. It wouldn't have to be network 8 or -- they would have already had to be in first 9 run, not starting over, not a program, like 10 Oprah Winfrey, that is produced anew each day. 11 All right? 12 I'm talking about a program that 13 already exists, like a movie that was already 14 made, a TV show that was already made. Whether it 15 was first shown on -- on the network or on HBO, it 16 was already made. 17 Q. So you're saying that comment, then, 18 would not apply to first-run syndication? 19 A. In -- in selling the first-run 20 syndication product, but it would apply in a re -- 21 to all programming -- for all retransmitted 22 programming.</p>	<p>1 I will spend just a few minutes 2 introducing our particular witnesses and 3 explaining how our evidence will fit within the 4 overall case of the Settling Parties. 5 Our evidence will support the use of 6 the Bortz -- of the Bortz studies to measure the 7 relative value -- relative market value of distant 8 signal programs. 9 In addition, we hope to provide 10 information about our own programming and about 11 the cable distant signal marketplace that will 12 ultimately corroborate the Bortz shares. 13 CTV is presenting the testimony of four 14 witnesses. Our first witness will be 15 Rick Ducey -- Richard Ducey, the chief strategy 16 officer for BIA/Kelsey who has been performing 17 research and analysis in the television and cable 18 industries for over 25 years. 19 Dr. Ducey will present three studies, 20 the first showing the cable distant signal 21 programming marketplace; the second showing the 22 relative amounts of nonnetwork programming that</p>
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<p>1 MR. OLANIRAN: Okay. Thank you. 2 CHIEF JUDGE SLEDGE: Thank you, ma'am. 3 THE WITNESS: Thank you much. 4 CHIEF JUDGE SLEDGE: Commercial 5 Television? 6 OPENING STATEMENT ON BEHALF OF 7 COMMERCIAL TELEVISION CLAIMANTS GROUP 8 MR. STEWART: Good afternoon, 9 Your Honors. I'm John Stewart, and I'm 10 representing Commercial Television Claimants 11 Group in this proceeding, sometimes referred to as 12 "CTV." 13 CTV represents all of the U.S. 14 commercial television stations that are 15 retransmitted as distant signals in the 16 United States in connection with claims for their 17 own programs. 18 With me today are my colleagues from 19 Crowell & Moring, Jennifer Burdman and Ann Mace. 20 Now, the Commercial Television 21 Claimants, as you know, are part of the 22 Settling Parties Group.</p>	<p>1 are retransmitted in the distant signal 2 marketplace; and, third, he will provide 3 information, a study that shows the geographic 4 clustering of the carriage of distant signals. 5 Now, he provides this information both 6 for 2004 and 2005, but also as compared with the 7 similar studies, comparable studies that have been 8 presented in prior proceedings so as to provide a 9 basis for comparison about changes in the cable 10 distant signal marketplace over these periods of 11 time. 12 The periods of time he's going to cover 13 are the ones that -- about which we've litigated, 14 because those are the ones that studies have been 15 done for. 16 Now, the purpose of Dr. Ducey's studies 17 is not to present you with yet another alternative 18 measure of relative market value. Instead, they 19 will provide you descriptive context which we hope 20 will help in understanding and evaluating the 21 relevant measures of relative marketplace value, 22 in particular, the Bortz study.</p>

Proof of Delivery

I hereby certify that on Friday, December 19, 2025, I provided a true and correct copy of the 2018-2021 CD - PTV WRS Volume II of II (PUBLIC) to the following:

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Program Suppliers, represented by Lucy H Plovnick, served via E-Service at lhp@msk.com

SESAC Performing Rights, LLC, represented by Christos P Badavas, served via E-Service at cbadavas@sesac.com

Signed: /s/ Dustin Cho