Before the
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In the matter of **Distribution of the 2004-2005 Cable Royalty Funds**	**Docket No. 2007-03 CRB CD 2004-2005**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

CANADIAN CLAIMANTS GROUP

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Before the
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In the matter of **Distribution of the 2000-2003 Cable Royalty Funds**	**Docket No. 2008-2 CRB CD 2000-2003**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CANADIAN CLAIMANTS GROUP

Pursuant to the scheduling orders of the Copyright Royalty Judges, dated November 16, 2009 and March 5, 2010, the Canadian Claimants Group ("CCG") submits these proposed findings of facts and conclusions of law in support of its request for an award. The CCG seeks a total Phase I award from the Cable Compulsory License Royalty Funds of at least the following, as shown in Table 1, below:

Table 1: Claim of Canadian Claimants Group

Year	Basic Fund	3.75% Fund
2004	2.365%	1.586%
2005	2.499%	1.308%

Pursuant to 17 U.S.C. § 111 (d)(3)(A), the CCG asserts a claim on behalf of non-U.S. programming on Canadian stations distantly retransmitted by U.S. cable systems. The CCG does not assert, and the above percentages do not include, a claim for Phase I royalties based upon programming on Canadian stations claimed by the Joint Sports Claimants or the Program Suppliers.[1]

[1] The other Phase I claimants in this proceeding are Program Suppliers ("PS"), Devotional Claimants, and "Settling Parties" made up of Joint Sports Claimants ("JSC"), Public Television Claimants ("PTV"), Commercial Television Claimants ("CTV"), and Music Claimants. National Public Radio ("NPR") previously settled its claims in full with all Phase I parties and is not a party to this proceeding.

Attached to these Proposed Findings of Fact and Conclusions of Law are two appendices that detail calculations that the CCG believes the Judges should use in determining awards for the CCG and for combining those awards with the awards of the other parties.

Appendix A explains the process for calculating the CCG's Basic Fund and 3.75% Fund awards using the fee gen methodology accepted in the last three cable royalty distribution proceedings coupled with a process for combining all of the claimants awards to 100% of royalties. Pursuant to this approach, the CCG's award is calculated by applying the Ford /Ringold survey valuation to the royalties paid for the carriage of Canadian distant signals. The CCG uses shares for the other claimant groups identified below in these Proposed Findings of Fact and Conclusions of Law. The proposed awards for these claimants are reasonable recommendations based on the written testimony submitted by the claimants and the facts adduced in the hearings on this matter. The CCG's process for combining awards can be used whether the Judges accept the CCG's proposed methodologies for calculating the other claimants' awards or determine that the claimants' awards should be calculated based on other facts or methodologies.

Appendix B explains the process for calculating the CCG's Basic Fund and 3.75% Fund awards using the methodology accepted in the last three cable royalty distribution proceedings, but excludes the additional step of combining the CCG's award with other claimants' awards.

I. INTRODUCTION AND SUMMARY OF CASE

In this proceeding, the Canadian Claimants Group once more presents the fee generation approach as the best available method for measuring the relative market value of CCG programming. The fee generation approach captures and quantifies the essential market based information relevant to determining an award in these proceedings: that cable operators specifically selected Canadian signals from the hundreds available, paid

substantial royalties for those signals, and attributed 60% of the value on those signals to Canadian programming

The irony in this proceeding is that, if changed circumstances are found, the fee gen method produces a slightly *lower* royalty award for the CCG for 2004 and 2005 as compared to the years 2002 and 2003. The changed circumstances that could be found to affect the CCG's claim in this proceeding consist of a slight decline in the relative proportion of royalties attributable to Canadian distant signals compared to all distant signals. This decline, though disappointing to the CCG, would be an acceptable finding because the CCG's goal in these proceedings is not an ever-increasing share of royalties, but rather a "fair share of the royalties collected" based on an accurate and reliable methodology that is tied closely to important market actors (cable operators). The change over time of the CCG award based on fee gen is a realistic outcome and reflects the ups and downs inherent in any market.

To establish its claim in this proceeding, the CCG has presented evidence and arguments consistent with those presented to the Copyright Royalty Arbitration Panels in the 1990-92 and 1998-99 distribution proceedings and to the Copyright Royalty Judges in the recent 2000-20003 proceeding. The CCG believes that those prior proceedings firmly support reliance on fee gen for 2004-2005. In each of those prior proceedings, the fee gen methodology was challenged by the other parties and evaluated by the Judges or CARPs. In the CARP proceedings, the method was contrasted to and vetted against alternative methods for valuing the CCG's claim. In the last proceeding, the Judges tested the viability the fee gen methodology as the central issue of the proceedings. In each of those past proceedings, the merits of the fee gen methodology were upheld.

In the 1990-1992 Distribution Proceeding, Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Oct. 28, 1996) (hereinafter 1990-1992 Proceeding), the CCG was awarded 0.955% of the Basic Funds and 0.18718% of the 3.75 Funds. In response to a review of the award by the Librarian regarding the CARP's use of fee generation, the CARP responded that "[w]hile we tried to distance ourselves from the fee generated [sic] method ... we certainly used that method in reaching our conclusions." 61 FR 55654, 55667 (October 28, 1996).

In the next proceeding, the 1998-1999 CARP not only accepted the CCG's approach, but established a formulaic process in calculating the award to the CCG. In reviewing the CARP's decision, the Librarian summarized the core steps of that process as follows:

> Next, the Panel focused on Canadian Claimants using the fee generation approach and determined the amount of the Basic Fund for 1998 and 1999 that was generated by cable systems paying for distant Canadian signals. Within the percentage for each year, the Panel identified the amount of fees attributable to Canadian Claimants' programming, Program Suppliers' programming and Joint Sports Claimants' programming based upon a survey presented by Dr. Debra Ringold. Since Dr. Ringold did not analyze the fees generated by the other parties in this proceeding, the Panel excluded them and adjusted her numbers to equal 100%.

Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3611 (Jan. 26, 2004) (footnote omitted) (hereinafter 1998-1999 Proceeding). The Librarian also explained fee generation: "[o]nce again, the 'fee generation' approach examines the royalty fees actually paid by cable systems for Canadian programming carried on distant broadcast signals." 1998-1999 Proceeding, 69 Fed. Reg. at 3611 n. 22. The CARP established "[a]n assessment of changed circumstances, based upon an approximate doubling of the relative fees, implicates a substantial increase from the last award – when the Canadians' award was determined based upon share of fees generated." 1998-99 CARP Report at 14 (emphasis in original).

The March 3, 2010 Distribution Order from the Judges again reiterated the viability of the fee generation methodology in assessing the relative marketplace value of the CCG's programming. The Judges described fen gen as "sufficiently vetted in both the 1990-1992 and 1998-99 proceedings" and noted that the methodology had already "endured the scrutiny of litigation and review not just once, but twice," thus entitling fee gen to "deference." 2000-2003 Order at 25-26. The Judges concluded that "the 1998-1999 CARP's fee generation approach should be accorded deference." *Id.* at 25.

Having had its awards determined by application of the fee gen approach in the past three proceedings, the CCG now presents factual evidence related to the 2004-2005 period that can be used with the fee gen methodology to determine the CCG's awards in this proceeding. The essential relevant facts are: (1) the relative share of royalties paid for

Canadian distant signals using CDC's standard allocation as adjusted to remove potential arbitrariness in the 3.75% fee allocation (based on the testimony of Janice de Freitas and Jonda Martin), and; (2) the results of the Ford / Ringold cable operator study (based on the testimony of Debra Ringold). These numbers alone would allow the Judges to calculate the CCG's 2004-2005 awards using the fee generation methodology. These calculations are presented in Appendix B.

The CCG also has introduced other evidence in support of its claim. First, through the testimony of Ms. de Freitas, Alison Smith, and Joan Fisher, the CCG introduced evidence to objectively and subjectively corroborate the fee gen methodology. Second, the CCG introduced evidence, through Drs. Gary Ford, Brian Ratchford, and John Calfee, and through Jonda Martin demonstrating the inability of other methodologies (such as the Bortz Study, the Gruen Subscriber Study and the George Ford Advertising Study) to reliably and accurately measure the value of Canadian programming retransmitted by U.S. cable systems. Finally, supplementing its own evidentiary proffering, the CCG has marshaled the substantial evidence adduced by other parties to corroborate the fee gen approach and refute the competing methodologies.

In addition to making its own claim, the CCG also recommends awards for each of the other claimant groups and proposes a method for combining those awards. The method proposed by the CCG has similarities to the method used by the 1998-99 CARP. However, whereas that previous method maintained the relative relationship of the claims of certain groups (e.g., Program Suppliers, Joint Sports and Commercial Television relative to each other), it offered no means for maintaining the relative relationship of those groups to Public Television, the Devotionals and the CCG. The approach recommended by the CCG in this proceeding maintains a relationship between the awards to all the parties, resulting in both a reliable determination of individual awards and an equitable combined distribution of 100% of the royalties. The proposed methodology is discussed in the CCG's Conclusions of Law and the calculations are detailed in Appendix A.

Based on the evidence and argument presented herein, the CCG requests awards from the Basic and 3.75% Funds of at least those presented in Table 1, above.

II. PROPOSED FINDINGS OF FACT

A. The Factual Elements of The CCG's Claim

1. The CCG's Claim Encompasses a Broad Variety of High-Quality Programming Broadcast on Canadian Signals in 2004-2005 that Held Significant Appeal to U.S. Cable Operators

i. CCG Members are Copyright Owners Whose Works were Carried on Distant Signals Retransmitted by U.S. Cable Systems in 2004 - 2005

1. The CCG is comprised of the Canadian Broadcasting Company ("CBC"), private Canadian broadcasters and affiliated broadcast stations, as well as Canadian film and television producers and distributors. (*See* Ex. CDN-1: Written Direct Testimony of Janice de Freitas at 3 (hereinafter *de Freitas Dir.*).)

2. The CCG is a continuously changing *ad hoc* claimant group which was comprised of 75 members in 2004 and 68 members in 2005. (*See* de Freitas Dir., Tab B (listing each of the members for 2004 and 2005); Tab C (providing a profile for each of the members).)

3. The CCG's Phase I claim encompasses *all* non-U.S. programming shown on Canadian television signals that were distantly retransmitted in the U.S. during 2004 through 2005 by U.S. cable systems. (de Freitas Dir. at 2.)

4. The members of the CCG all have programming that was carried on Canadian signals retransmitted in the U.S. by Form 3 cable systems during 2004 and 2005. (de Freitas Dir. at 2.)

5. Canadian stations may only be retransmitted within the compulsory licensing zone ("Compulsory Zone"). (*See* de Freitas Dir, Tab A); 17 U.S.C. § 101 (c)(4)(A). The Compulsory Zone is (approximately) the northern quarter of the United States. *See id.* U.S. cable systems outside of the Compulsory Zone may not retransmit Canadian stations under the compulsory licensing scheme. *See id.*

ii. Canadian Distant Signals Consist Primarily of Programming Owned by CCG Members

6. The programs on Canadian signals belong to only three Phase I claimants: the CCG, the Program Suppliers, and the Joint Sports Claimants. (de Freitas Dir. at 4.)

7. Since the programming on CCG signals is divided among three different claimants, the CCG's claim differs from that brought by the Public Television Claimants. (*See* de Freitas Dir. at 4.).

8. As a general rule, a large majority of the programming broadcast by the English and French-language CBC television signals falls within the claim of the CCG. (*See* de Freitas Dir. at 7.) U.S. programming content on Canadian distant signals consists of a small percentage of Joint Sports Programming and a larger percentage of non-sports U.S. programming attributable to Program Suppliers. (*See* de Freitas Dir. 6-7, 10, Tabs G & L.)

9. The reason a large majority of CBC programming falls within the claim of the CCG is because both the French- and English-language networks operate under the mandate of Canada's 1991 Broadcasting Act. (de Freitas Dir. at 5.) Enacted in response to

concerns that Canadian culture would be drowned out by a flood of American broadcasts, the Act requires that:

> [T]he Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;
>
> [T]he programming provided by the Corporation should:
>
> i. be predominantly and distinctively Canadian,
>
> ii. reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
>
> iii. actively contribute to the flow and exchange of cultural expression,
>
> iv. be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
>
> v. strive to be of equivalent quality in English and French,
>
> vi. contribute to shared national consciousness and identity,
>
> vii. be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
>
> viii. reflect the multicultural and multiracial nature of Canada.

(de Freitas Dir. at 5-6; *see* Ex. CDN-2: Written Direct Testimony of Alison Smith at 1 (hereinafter Smith Dir.))

10. As shown by the programming schedules, most of the programming shown on the most frequently carried Canadian distant signals are Canadian in origin. (de Freitas Dir. at 6-7, Tab G, Tab L.)

iii. Canadian Programming on Canadian Distant Signals Provides Diverse and Distinctive Programming Which Fills a Unique Niche in the Channel Line-Up Offered by U.S. Cable Systems Along the Canadian Border

11. During the 2004-2005 period, distantly retransmitted Canadian stations showed every type of programming found in this proceeding, including network and local programs, sports programs, entertainment programs, children's programming and news and public affairs programs. (*See* de Freitas Dir. Tab G, Tab L; Smith Dir. at 3; Ex. CDN-3: Written Direct Test. of Joan Fisher at 2 (hereinafter *Fisher Dir.*).) These types of programming often have a distinctly Canadian slant or flavor. (*See* Smith Dir. at 1, 3.)

12. The popularity of Canadian programs in the U.S. is demonstrated in part by the success of Canadian program suppliers in licensing their products into the U.S. television market. (*See* de Freitas Dir. at 4-5, Tab D.) The quality and appeal of Canadian programming is not just limited to North America, as Canadian program suppliers license their programming throughout the world. (*See* de Freitas Dir. at 4-5.)

13. The success of Canadian program suppliers in licensing their products in the U.S. comes despite the harm Canadian program suppliers experience from retransmission by U.S. cable systems. (*See* Ex. CDN-R-3 2004-05 Written Rebuttal Test. Of John E. Calfee App. B, Written 2000-03 Rebuttal Test. Of John E. Calfee (hereinafter Calfee 2004-05 Reb. App. B.) (quoting H.R. Rep. No. 94-1476 at 5704-05 (2009) reprinted in 17 U.S.C.A. § 111, Historical and Statutory notes (hereinafter H.R. Rep. No. 94-1476) ("By

contrast, their retransmission of distant non-network programing [sic] by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed.")) The retransmission of any distant signal, including Canadian signals, by U.S. cable systems harms copyright owners on those signals by compromising their ability to license their products on an exclusive basis in the U.S. or Canada. (*See id.* ("Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market.").)

14. Canadian programming has received numerous awards, underscoring its high quality. (*See* de Freitas Dir. at 5, Tabs E, I, K; Smith Dir. at 1, Tab A; Fisher Dir. at 2, Tab A.)

15. The CBC's English-language television network offers a unique programming alternative to U.S. viewers. (*See* de Freitas Dir. at 6.) In 2004-2005, the English television network was composed of 27 stations, 15 CBC owned and operated stations and 12 affiliate stations located coast-to-coast across Canada. (De Freitas Dir. at 6; Tab-F (providing a list of CBC stations on page 1).)

16. CBC programming was conceived with the need to be distinct from American services and are by mandate, predominantly and distinctively Canadian. As a consequence, CBC programming offers unique programming alternatives such as distinctive original drama programs that it produces, co-produces, develops or licenses. (de Freitas Dir. at 7-8 (providing examples of the CBC's numerous special broadcasting events), Tab I (providing examples of CBC programming).)

17. CBC news programs offer different viewpoints of American and world affairs. (de Freitas Dir. at 7; Smith Dir. at 1-3.) It also informs viewers of events in Canada that are of interest to many Americans, particularly those living along the Canadian border, where such signals are retransmitted. (de Freitas Dir. at 7; Smith Dir. at 3.)

18. The CBC offers sports programs not ordinarily available on conventional television in the U.S., such as curling, soccer, Canadian football, show jumping, and international amateur sports competitions which often involve American athletes. (de Freitas Dir. at 7.)

19. CBC's children's programming is distinctive for its commercial-free nature and non-violent content. (de Freitas Dir. at 7.)

20. The CBC offers a greater array of art and cultural programming such as ballet, operas, operettas, etc., than U.S. commercial television. (de Freitas Dir. at 7.)

21. The CBC also broadcasts multiple long-running, award-winning documentary series, as well as featured long-form in-depth documentaries. (de Freitas Dir. at 7.)

22. The CBC is known for its exceptional coverage of the Olympics. (de Freitas Dir. at 8.) The CBC broadcast almost 300 hours coverage of the 2004 Olympic Games in Athens, Greece, plus the Paralympics. (*Id.*) CBC's Olympic coverage is popular with American viewers who like "live event" coverage, and a focus on sporting event over commentary. (*Id.*) CBC Television has received four IOC Golden Rings awards for broadcasting excellence, most recently for its equestrian coverage in Beijing. (*Id.*)

23. Beyond the variety of programming the CBC offers, 100% of the CBC Television network is closed-captioned and an ever-increasing number of programs are broadcast with "described video." (de Freitas at 8.) Described video, also known as descriptive audio, is intended to make television accessible to blind or vision-impaired audiences. (*Id.*) Through this process relevant action scenes and on-screen text in video programming, such as credits, are described and read by a narrator. (*Id.*)

24. U.S. cable system operators also distantly retransmitted signals from Canada's French-language public television network, Radio-Canada. (de Freitas Dir. at 9.) In 2004-2005, Radio-Canada was composed of eight owned and operated stations and five affiliate stations located across Canada. (de Freitas Dir. at 9, Tab F (providing a list of Radio-Canada stations on page 2).) Radio-Canada operates entirely in French and broadcasts a wide variety of entertainment, arts, sports and news and public affairs programming. (de Freitas Dir. at 9, Tab L.)

25. French-language Canadian stations are distantly retransmitted in areas of the U.S. – such as New York, Vermont, Maine, New Hampshire and Massachusetts – that have a significant proportion of residents with French-Canadian ancestry. (de Freitas Dir. at 9, Tab A, Tab J.)

26. Collectively, cable system operators paid on average over $450,000 each accounting period in each accounting period of 2004 and 2005 just to retransmit French-language Canadian stations. (de Freitas Dir. at 4, Tab H, Tab Q.)

27. Cable systems seek to provide different programming on their systems to retain subscribers and attract new ones. (Ex. CDN-R-5 Transcript of 2000-03 Oral Direct Testimony of Linda McLaughlin 693:19-694:2-4 (June 11, 2009) (hereinafter *McLaughlin* 2000-03 Tr.).)

2. Statement of Account Data Compiled by Cable Date Corporation Show Significant Changes in Royalties for Canadian Distant Signals

i. Cable Operators Pay for Distant Signals Under an Elaborate and Complex Compulsory Licensing Scheme

28. U.S. cable system operators must pay cable royalties and file a Statement of Account ("SOA") document twice a year. (Ex. PS 5 Written Direct Test. of Marsha E. Kessler at 8-9 (hereinafter *Kessler Dir.*); MEK-3; MEK-4.) By completing an SOA, each

cable system can calculate the royalties that it owes and document the distant signal carriage data upon which the calculation is based. (Kessler Dir. at 8-10.)

29. Cable Data Corporation ("CDC") is a company that specializes in the collection, reporting, and analysis of Statement of Account ("SOA") data as filed by cable and satellite systems with the Licensing Division of the U.S. Copyright Office. (Kessler Dir. at 13; de Freitas Dir. at 10; Transcript of 2004-2005 Oral Rebuttal Test. of Jonda K. Martin Tr. 2913:19-22, 2914:20-2915:4 (Feb. 3, 2010) (hereinafter *Martin 2004-05 Reb. Tr.*).)

30. CDC is the only company that does this work and all parties in this proceeding rely on CDC for the SOA data. (*See* Ex. CDN-R-1 2004-2005 Written Rebuttal Test. of Jonda K. Martin at 1 (hereinafter *Martin 2004-05 Reb.*) ("I have also sponsored written direct testimony in this proceeding on behalf of other claimant groups but was not called to testify."); Ex. SP 7 Written Direct Testimony of Jonda K. Martin, App. A, p. 2 (hereinafter *Martin 2004-05 Dir.*); de Freitas Dir. at 10.)

31. When a cable system in the same geographic area as a TV station retransmits a signal, that signal is referred to as "local." (*See* Kessler Dir. at 7.) When a cable system retransmits a signal that originates in another geographic area, that signal is referred to as "distant." (*See id.*)

32. Program owners license their shows to TV stations for broadcast within a certain geographic area. (*See* Kessler Dir. at 7.) When a cable system retransmits the station to distant cable subscribers located outside the station's local broadcast market, the programs become available to an audience for which the program owner has not been compensated. (*See id.* at 7-8.) It is the purpose of section 111 to compensate the program owners for the increased exposure of their works beyond the area in which it was originally licensed. (*See id.* at 8.)

33. Cable systems pay royalties based on their gross receipts. (Kessler Dir. at 12.) In the accounting periods 2004-1 through 2005-1, the smallest systems, (known as "Form 1" systems) with gross receipts of $98,600 or less for each six-month period, paid a flat fee of $37 every six months for the right to carry distant signals, regardless of how many signals they carried. (*Id.* at 12.) Commencing in 2005-2, the gross receipts thresholds and rates increased and Form 1 systems were classified as systems with gross receipts of $137,000 or less for each six-month period. (*Id.* at 12.) Starting with 2005-2, Form 1 operators paid a flat fee of $52 every six months for the right to carry distant signals, regardless of how many signals they carried. (*Id.* at 12-13.)

34. In the accounting periods 2004-1 through 2005-1, mid-size systems (known as "Form 2" systems) with gross receipts of between $98,600 and $379,600, paid royalties of 0.5% of the first $189,800 in gross receipts for each six month period and 1.0% of gross receipts above $189,800 but less than $379,600. (Kessler Dir. at 12.) Commencing in 2005-2, the gross receipts thresholds increased and Form 2 systems were classified as systems with gross receipts of between $137,100 and $527,600 for each six-month period. (*Id.* at 12.)

35. The largest systems, those with gross receipts of $379,600 or more in the accounting periods 2004-1 through 2005-1, are referred to as "Form 3" systems. (Kessler Dir. at 12.) Commencing in 2005-2, the gross receipts thresholds increased and Form 3 were classified as systems with gross receipts of $527,600 or more. (*Id.* at 12.) Royalties from Form 3 systems are broken into four categories: Minimum Fee, Basic Fee (also known as the Base Rate Fee), 3.75 Fee and Syndex Fee. (*See Id.* at 16-22 and App. E.)

36. During these distribution proceedings, the parties focus on SOA data from Form 3 cable systems carrying signals for two reasons: (1) Form 3 systems are the only systems that report carriage information with enough detail to allow a determination of which types of signals and programming are responsible for generating the royalties, (de Freitas Dir. at 11), and; (2) Form 3 systems pay 94-97%% of the royalties each accounting period. (*See* Kessler Dir. at 14, App. B; de Freitas Dir. at 11.)

37. Under the royalty scheme, distant signals are assigned a value called a Distant Signal Equivalent ("DSE"). (Kessler Dir. at 15). Independent signals, which include Canadian and Mexican signals, have a value of 1 DSE. (*Id.* at 15-16.) Educational and Network signals have a value of 0.25 DSEs. (*Id.*)

38. The determination of DSE weights was done legislatively with informed input of the interested industry parties of such central issues as the extent of duplicative programming among distant and local signals. (*See* Calfee 2004-05 Reb. App. B. at 3-4, Ex. SP 6 Written 2000-03 Direct Testimony of Linda McLaughlin at 3 (hereinafter *McLaughlin 2000-03 Dir.*).)[2]

39. Form 3 cable systems are required to pay a Minimum Fee equal to the cost of retransmitting a distant signal as the first full DSE on the Basic Royalty fee payment scale. (Kessler Dir. at 15.) For example, if, on a distant basis, a Form 3 system carries just one educational signal (assigned 0.250 DSE under the compulsory licensing scheme) and one Network signal (also 0.250 DSE), the system has a total of 0.500 DSEs of distant signals. Nevertheless, it must pay the Minimum Fee as if it were carrying a full DSE of distant signals. (*See* Kessler Dir. at 15-16 (calling the minimum fee the base rate fee))

40. Under 17 U.S.C. § 111(d)(1)(B)(i) the minimum fee is "to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv)." Subparagraphs (ii) through (iv) establish the Basic Royalty fee. *Id.* The Code of Federal Regulations clarifies this language to indicate that the both the Base Rate and the 3.75% Rate royalties are applied against the Minimum Fee. 37 CFR § 256.2(a)(1)(c) (2005). Thus, the fee is the minimum the system must pay but, if the system carries one or more full DSEs worth of distant signals, the Minimum Fee is applied against whatever is due as Basic Royalty or

[2] Note: Ms. McLaughlin's 2000-2003 direct written testimony was attached to her 2004-2005 written testimony as Public Television Ex. 9 and not as an appendix. (*See* Oral 2004-2005 Direct Test. of Linda McLaughlin, Tr. 407:15-20.(Oct. 7, 2009) (hereinafter *McLaughlin 2004-05 Tr.*) To avoid confusion with exhibit numbers the CCG will refer to the attached testimony as the McLaughlin 2000-03 Direct.

3.75% Rate fees. *Id.*; Cable Compulsory Licenses: Application of the 3.75% Rate, 63 Fed. Reg. 39738, at 39739 (July 24, 1998).)

41. Base Rate royalties are calculated as a percentage of each cable system's Gross Receipts. (*See* Kessler Dir. at 16-17; Ex. CDN-R-5 Linda McLaughlin Stipulated 2000-03 Tr. 687:8-21 (hereinafter *McLaughlin 2000-03 Tr.*) (stating basic royalties are paid from the gross receipts of the tier of cable carrying the distant signals.) The cumulative percentage increases as the cable system carries more distant signals, although the statutory rate for each signal decreases. (*See* Kessler Dir. at 17-18.)

42. Base Rate royalties are based on a sliding rate scale, where cable systems pay a higher rate for the first DSE, slightly less for the second through fourth DSE, and a lower rate for DSEs over 4.0. (Martin 2004-05 Reb. Tr. 2918:9-16.) The DSE rates in effect during this proceeding are as shown in Table 2, below:

Table 2: Base Rate Fee Schedule
(Martin 2004-05 Reb. at 2)

	Percentage of Gross Receipts		
	First	**Second through Fourth**	**Fifth and Beyond**
Percentage of Gross Receipts for 2004-1 through 2005-1	.956%	.630%	.296%
Percentage of Gross Receipts for 2005-2	1.013%	.668%	.314%

43. CDC allocates the Base Rate royalties paid by each cable system to the signals specifically carried on a distant basis by that cable system. (Martin 2004-05 Reb. at 2.) Royalties are allocated pro rata among each of the signals based on the signal's DSE. (*See id.*; Martin 2004-05 Reb. Tr. at 2920:13-2921:5.) These apportioned royalties are known as "fees-generated" or "fees-gen," a method that has been generally the same since the CDC started. (*See* Martin 2004-05 Reb. at 2; Martin 2004-05 Reb. Tr. 2926:11-21.)

44. After WTBS converted to a cable network and the effect on payment of minimum fees became apparent, CDC modified its allocation methods to account for the change in the amount of Minimum Fees paid by cable systems. (Martin 2004-05 Reb. Tr. 2926:15-21.) Under the updated allocation method, the Minimum Fees not attributable to specific distant signals are separately allocated to a category called "minimum fees" in CDC's reports. (*Id.* 2926:22-2927:10.)

45. The 3.75% Fee is paid by cable systems for distant signals that are deemed "non-permitted" because the system could not have carried the signal prior to June 24, 1981, the date on which the Federal Communications Commission eliminated its rules limiting the number of distant signals that cable systems were permitted to retransmit. (Kessler Dir. at 18-19.) A cable operator pays 3.75% of its Gross Receipts for each signal that it identifies as non-permitted under those rules. (*Id.* at 19.)

46. Finally, Form 3 cable system operators located in the top 100 markets may also be liable for Syndex fees to compensate the copyright owners of programs subject to syndicated exclusivity rules. (Kessler Dir. at 20-21.)

ii. While the Minimum Fee Complicates the Issue, it Does Not Change the Conclusion that Fees Generated are Meaningful Tools for Assessing Relative Market Value

47. At the end of 1997, only 40 Form 3 systems reported no distant signals. (de Freitas Dir., Tab O). In 1998, the Minimum Fees paid by systems with no distant carriage became a much more significant component of the cable royalty fund. (*See* McLaughlin 2000-2003 Tr. 701:18-22 (stating it was unusual for stations to only pay the minimum fee).) After the conversion of WTBS to a cable network, the number of systems carrying no distant signals increased from 40 to 459, or about 20% of all Form 3 systems. (*See* Ex. CDN-R-4 John. E. Calfee Stipulated 2000-03 Tr. 903:5-904-8 (hereinafter *Calfee 2000-03 Tr.*) (explaining that WTBS disappeared in 1998); de Freitas Dir., Tab O (showing the

increase in the number of systems with zero distant stations between 1997-2 and 1998-1)). The Minimum Fees paid by systems with no distant carriage surged from about $329,000 to about $10,000,000 in one accounting period (from 1997-2 to 1988-1). (de Freitas Dir., Tab O) Since then, however, the amount of Minimum Fees paid by systems with no distant carriage has remained at the same level of approximately $9-11 million. (*Id.*) While the number of systems with no distant signals has declined since 1998-1, the number of systems with no distant signals is still an order of magnitude greater than in 1997-2 or earlier. (*Id.*)

48. The change in payment of minimum fees in 1998 was due in large part to WTBS's transition from a broadcast signal to a cable channel in 1998. (*See* CDN-R-4 John E. Calfee Stipulated 2000-03 Tr. 901:22-902:9 (hereinafter Calfee 2000-03 Tr.); Martin 2004-05 Reb. Tr. 2926:15-2927:10.) Generally, this transition resulted in substantial reductions in royalty payments because almost every Form 3 cable system had carried WTBS on a distant basis. (*See* Calfee 2000-03 Tr. 901:22-902:9.) Conversely, dropping WTBS left many systems with no distant signals, resulting in a sharp increase in the payment of the Minimum Fee. (*See* Calfee 2000-03 901:17-902:9, 903:5-904:8.)

49. The CDC data show that in the period 1997-2, just before the WTBS switch, more than 95% of cable systems carried WTBS, which was a 1.0 DSE signal. (*See* Calfee 2000-03 Tr. 901:22-902:9.) Systems that also carried a Canadian distant signal had to pay at least the base fee of 0.956% plus 0.563% (the fee for a second DSE, as well as the third and fourth DSE) of gross receipts. (Calfee Reb. App. B at 11; Calfee 2000-03 Tr. 907:20-908:2 ("...we know they were paying on the order of .6 percent for that Canadian signal); 958:3-960:22 (acknowledging that the fee for the second DSE likely was 0.563%).) This indicates that for a typical system, the first Canadian distant signal was worth at least the second DSE rate. If the Canadian signals were valued at less than the second DSE rate, they would not have been carried. (Calfee Reb. App. B at 10-11; *see* Calfee 2000-03 Tr. 898:8-17 (stating that if Canadian signals had a value of less than the second DSE, the cable systems would not have carried those Canadian signals before the TBS switch).)

50. Table 3, below, presents data on Form 3 systems for periods 1990-1 through 2003-2. During 1990-1 through 1997-2 periods, during which WTBS was classified as a distant signal, only 2 systems at the most carried only a Canadian signal and no other distant signal – reflecting the fact that nearly all systems already carried WTBS at 1.0 DSE. (*See* Calfee 2000-2003 Reb. App. B at 13.) This means that practically all systems importing a Canadian distant signal incurred a fee equal to the second DSE rate. (*Id.* at 11-12.) Between 61 and 68 systems carried one or more Canadian distant signals, along with one or more other distant signals. (*See id.* at 13.) Of those, between 47 and 51 carried exactly one Canadian distant signal. (*See id.* at 13.)

Table 3: Canadian Distant Signal Carriage by Form 3 Systems
(Calfee 2004-2005 Reb. App. B at 13, Table 3.)

Accounting Period	Total Num. of Systems	Systems with ZERO DSEs		Systems with Canadian Distant Signals			
		Number	As % of Total	1 or more Canadian Distant Signals	only 1 Canadian Distant Signals	2 or more Canadian Distant Signals	only Canadian Distant Signals
1990-1	2,105	16	0.760%	68	50	18	0
1990-2	2,124	12	0.565%	67	48	19	0
1991-1	2,200	13	0.6%	68	48	20	0
1991-2	2,202	12	0.5%	63	46	17	0
1992-1	2,250	14	0.6%	65	47	18	0
1992-2	2,271	16	0.7%	66	48	18	1
1993-1	2,347	14	0.6%	66	47	19	1
1993-2	2,287	15	0.7%	68	49	19	2
1994-1	2,241	10	0.4%	66	49	17	2
1994-2	2,213	14	0.6%	63	49	14	1
1995-1	2,242	12	0.5%	64	50	14	1
1995-2	2,301	12	0.5%	63	49	14	2
1996-1	2,343	15	0.6%	61	47	14	2
1996-2	2,383	26	1.1%	61	48	13	2
1997-1	2,334	36	1.5%	62	48	14	2
1997-2	2,346	40	1.7%	65	51	14	2
1998-1	2,344	459	19.6%	66	51	15	25
1998-2	2,363	437	18.5%	65	51	14	25
1999-1	2,312	382	16.5%	59	45	14	20
1999-2	2,296	378	16.5%	62	48	14	22
2000-1	2,307	380	16.5%	63	48	15	22
2000-2	1,898	311	16.4%	58	47	11	22
2001-1	1,853	325	17.5%	60	49	11	21
2001-2	1,818	312	17.2%	65	53	12	20
2002-1	1,759	306	17.4%	62	50	12	17
2002-2	1,723	308	17.9%	65	48	17	18
2003-1	1,687	300	17.8%	63	50	13	21
2003-2	1,648	272	16.5%	62	49	13	22

51. The value of individual Canadian distant signals naturally varies among cable systems, as reflected in the frequent decision to carry more than one signal. While it is unlikely that each system importing a single signal happened to value it at exactly the

second DSE rate, it can be presumed that the signal was worth at least the second DSE rate. (*See* Calfee 2000-03 Tr. 907:17-908:2, 908:18-909:3.) Similar reasoning applies to the additional signals in systems that imported more than one Canadian distant signal. (Calfee 2004-05 Reb. App. B at 11-12.)

52. In 1998-1, immediately after the WTBS switch, 51 systems carried a single Canadian signal. (*See* Calfee 2004-05 Reb. App. B at 12.) During 2000-2 through 2003-2, between 47 and 53 systems carried a single Canadian signal. (*Id.*) Because roughly the same number of systems continued to carry a single Canadian signal before and after the WTBS switch, it is clear that the WTBS switch had virtually no impact on cable operators' decisions to carry Canadian distant signals–both as to the number of systems importing a single Canadian signal and as to the number importing more than one Canadian signal. (*See* Calfee 2000-03 Tr. 901:17-902:9.) These numbers strongly indicate that even in systems paying the minimum carriage fee, Canadian signals provided significant value, equal to or exceeding the value of the second DSE. (Calfee 2004-05 Reb. App. B. at 12; Calfee 2000-03 Tr. 906:17-21; 908:18-20 ("So history tells us that those signals had value to those systems and they probably continue to have value to those systems."); *see also* McLaughlin 2000-03 Tr. 702:9-17 (conceding it at least showed the value at the time of carriage with WTBS).)

53. Significantly, the first DSE worth of distant signals is not fairly characterized as "free" because there are costs associated with the carriage of distant signals beyond just royalty payments. (*Cf.* Calfee 2000-03 Tr. 904:3-7 (there are costs associated with carriage) *with* McLaughlin 2000-03 Dir. at 7-8 (incorrectly implying there are no costs other than royalty fees).) Thus, the decision to carry a signal is an indication of cable operator preference. In fact, systems used to carry Canadian signals as one of many distant signals and over time dropped the other signals and retained the Canadian, suggesting a strong valuation for Canadian signals. The fact that a cable system presently pays a royalty equal to the Minimum Fee does not mean that the Canadian signal is suddenly less valuable than it had been in the past. (Calfee 2004-05 Reb. App. B at 11-12.)

iii. The CCG's Share of Royalties Paid by Cable Operators has Increased as a Proportion of the Entire Fund

54. The CCG has used CDC's Statement of Account data to introduce evidence showing the breakdown of royalties by fee and signal type. (*See* de Freitas Dir. at 11-17, Tabs M –V.)

a. Base Rate Royalties

55. Cable system operators paid more in Base Rate royalties for Canadian distant signals in 2004 -2005 than they did in the 1998-1999 period, as shown by the CDC allocations in Table 4, below. As reflected in Tables 4 and 5, royalties grew sharply for Canadian signals beginning in 2002 but then stayed relatively level, with a dip in 2004. Notably, the rate of growth of Base Rate royalties for Canadian signals has generally matched or exceeded the rate of growth of all other signal types.[3]

[3] In assessing the change in royalties for Canadian distant signals, the periods of comparison are the 1998-99 period and the 2004-05 period. As the Copyright Judges and the parties are aware, the litigation relating to this 2004-2005 period largely overlapped with the litigation relating to the 2000-2003 period. On March 3, 2010, the Copyright Judges issued a Distribution Order setting out the awards relating to the 2000-03 period. *In re Distribution of the 2000-2003 Cable Royalty Funds*, Dkt No. 2008-2 CRB CD 2000-2003, Distribution Order (Mar. 3, 2010). The evidence and data presented in this 2004-2005 proceeding could not and did not refer to or incorporate the 2000-2003 findings and conclusions contained in the March 3, 2010 Order. Regardless of these timing issues, the methodology and data presented by the CCG in this proceeding, as well as the royalty award requested for the 2004-05 period, remains unchanged.

Table 4: Summary of Base Rate Royalties
(de Freitas Dir. Tab P.)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$2,230,717	$67,387,814	3.31027%
1999	$2,585,328	$70,967,638	3.64297%
2000	$2,847,858	$74,082,435	3.84417%
2001	$3,058,354	$75,273,898	4.06297%
2002	$3,817,598	$79,397,334	4.80822%
2003	$3,835,003	$80,975,978	4.73598%
2004	$3,435,724	$82,719,673	4.15345%
2005	$3,862,437	$88,517,711	4.36346%

Table 5: Relative Growth Base Rate Royalties Compared To 1998-1999
(de Freitas Dir. Tab M at 2.)

Year	Base Rate Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*$2,408,023*	*$66,769,704*		
2000	$2,847,858	$71,234,577	18%	7%
2001	$3,058,354	$72,215,544	27%	8%
2002	$3,817,598	$75,579,736	59%	13%
2003	$3,835,003	$77,140,975	59%	16%
2004	$3,435,724	$79,283,949	43%	19%
2005	$3,862,437	$84,655,274	60%	27%

56. In the rebuttal phase of this proceeding, Jonda Martin testified that she had undertaken a detailed analysis of the minimum and maximum Base Rate royalties that could have been paid for the carriage of distant Canadian signals ("Min/Max" analysis). (*See* Martin 04-05 Reb. at 2-3; Martin 2004-05 Tr. 2197:20-2918:8 (describing the purpose of the analysis) (hereinafter Martin Reb. Tr.).) The Base Rate royalties are calculated on a

sliding scale based on the number of DSEs a cable system carries. (Martin 2004-05 Reb. at 2.) All data used in the Min/Max analysis by the CDC was calculated using the allocation method that was updated following the WTBS conversion. The updated method was also used to calculate the data presented by the CCG from 1998-1999 for comparison purposes. (*See generally* Martin 2004-05 Reb. Tr. 2927:11-15 (stating the 2004-2005 data reflected the new protocols.)) CDC's allocation method uses the DSE of each signal as a bridge to correlate the royalties paid by a system to the signals carried by that system. (Martin 2004-05 Reb. Tr. 2917:20-2918:8.)

57. The technique used to calculate the Min/Max Base Rate royalties for a signal type is straightforward. To calculate the maximum for the Canadian stations using the royalties a cable system would have paid based on the SOA, the Canadian stations are treated as if they were paid at the first base rate and the second signal at the second rate. (Martin 2004-05 Reb. at 3.) This is the maximum fees possible for the Canadian station because it applies the higher DSE rates and greatest the highest Base Rate royalties. (*See* Martin 2004-05 Reb. at 2-3.)

58. To calculate the minimum for a single system, the Canadian stations are treated as if they were the last distant signals carried. (Martin 2004-05 Reb. at 3.) This is the minimum fees possible for the Canadian station because it applies the lowest possible DSE rates and generates the lowest Base Rate royalties. (*See* Martin 2004-05 Reb. at 2-3.)

59. The sum of all of the royalties based on treating the Canadian signals as the first signals provides the maximum royalties that might have been paid for Canadian signals. (*See* Martin 2004-05 Reb. at 3-4.) The sum of all the royalties based on treating the Canadian signals as the last signals provides the minimum Base Rate royalties that might have been paid for Canadian signals. (Martin 2004-05 Reb. at 3-4.)

60. The Min/Max analysis presented in these proceedings is identical in protocol to the Min/Max analysis presented in the 2000-2003 proceeding. (*See* Martin 2004-05 Reb. at 2-4.) This Min/Max analysis, together with the CCG's 3.75% analysis

(described below and also identical in protocol to the 3.75% analysis presented in the 2000-2003 proceeding), have already been found by the Copyright Judges to "corroborate the reasonableness of the [fee gen] approach and fall within the 'zone of reasonableness' that guided the Librarian's hand in his analysis of fee generation in the 1990-92 proceeding." 2000-2003 Order at 26 (citing 61 FR at 55663).

61. Table 6, below, shows the results of this Min/Max analysis conducted for Base Rate royalties paid for the retransmission of all Canadian signals carried on a distant basis by Form 3 U.S. Cable systems for 2000 through 2003:

Table 6: Min/Max Analysis for Canadian Distant Signal Base Rate Royalties 2004-2005
(Martin 2004-05 Reb. at 4.)

Year	Minimum Canadian Base Fees	Standard CDC Canadian Fees Gen	Maximum Canadian Base Fees	Min Base Fee As % of Actual	Max Base Fees As % of Actual
2004	$3,253,644	$3,418,469	$3,610,509	95.18%	105.62%
2005	$3,674,384	$3,838,746	$4,033,266	95.72%	105.07%

62. Similar calculations were undertaken in the 1990-1992 Proceeding, the 1998-1999 Proceeding, and the 2000-2003 Proceeding. In 1990-1992 and 1998-1999, however, only two accounting periods were done because of the effort involved. (Calfee 2000-2003 Reb. at 8-9.) Those results are shown in Table 7 below:

Table 7: Base Royalty Fee Min/Max Calculation, 1991-2, 1992-2, 1998-2, and 1999-2, 2000-2003
(Calfee 2004-05 Reb. App. B at 8-9)

Accounting Period / Year	Minimum Canadian Base Rate Royalties	Standard CDC Allocation of Base Rate Royalties	Maximum Canadian Base Rate Royalties	Min Base Fee As % of Actual	Min Base Fee As % of Actual
1991-2	$1,010,951	$1,262,459	$1,573,058	80.08%	124.60%
1992-2	$1,072,095	$1,337,176	$1,654,633	80.18%	123.74%
1998-2	$1,050,862	$1,097,286	$1,183,725	95.77%	107.88%
1999-2	$1,293,624	$1,317,249	$1,428,206	98.21%	108.42%
2000	$2,649,851	$2,760,030	$2,899,995	96.01%	105.07%
2001	$2,712,491	$2,815,634	$2,955,502	96.50%	104.75%
2002	$3,298,580	$3,456,589	$3,660,761	95.43%	105.91%
2003	$3,622,282	$3,800,001	$4,019,290	95.32%	105.77%

63. The CDC allocation of Base Rate royalties for Canadian distant signals is in a narrow range of what cable operators might have paid if they could assign a priority to the distant signals they carry. Indeed, the allocation is slightly closer to the low end of the range. While it is impossible to know whether a cable operator considered a certain signal to be the one paid for at the highest DSE rate or the lowest DSE rate, the range of those rates can be determined. (*See* Calfee 2004-05 Reb. App. B at 11-12)

64. The Min/Max analysis makes clear that, during 2004-2005, as in 1998-1999, fee generation as reported by CDC is quite robust with respect to the assignment of the order of signals and their sliding fees. (*See* Calfee 2004-05 Reb. App. B. at 8-9 (making a similar analysis with similar figures in 2000-2003).) The sliding scale fee schedule demonstrates that superficial anomalies in compulsory licensing can actually have little practical importance. (*See* Calfee 2004-05 Reb. App. B at 8.)

b. 3.75% Royalties

65. As allocated by CDC, cable system operators paid more in 3.75% royalties for Canadian distant signals in both years of the 2004-2005 period than in the 1998-1999 period, as shown in the Table 8, below:

Table 8: Summary of 3.75% Royalties
(de Freitas Dir. Tab 1-P.)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$24,539	$9,671,797	0.25372%
1999	$65,555	$10,408,844	0.62980%
2000	$70,077	$12,018,489	0.58308%
2001	$279,779	$13,472,358	2.07669%
2002	$549,960	$16,339,148	3.36590%
2003	$698,567	$16,714,091	4.17951%
2004	$679,898	$19,419,520	3.50111%
2005	$560,260	$17,346,106	3.22989%

66. With respect to the 3.75% Fund, the amounts of royalties paid for Canadian distant signals grew at a greater rate since 1998-1999 than the rate for all other distant signals combined, as shown in the Table 9, below:

Table 9: Relative Growth 3.75% Fund Royalties Compared To 1998-1999
(de Freitas Dir. Tab 1-N at 3.)

Year	3.75% Fund Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	**Total All Other Signal Types**	**Canadian Signals**	**Total All Other Signal Types**
1998-1999 Annual Average	*$45,047*	*$9,995,274*		
2000	$70,077	$11,948,412	56%	20%
2001	$279,779	$13,192,579	521%	32%
2002	$549,960	$15,789,188	1,121%	58%
2003	$698,567	$16,015,524	1,451%	60%
2004	$679,898	$18,739,622	1,409%	87%
2005	$560,260	$16,785,846	1,144%	68%

c. Reallocation for Ambiguity on 3.75% Fee Signal Designation

67. CDC allocates the 3.75% royalties to whichever signal is designated as the "permitted" signal on the SOA by the cable system operator. In those situations where more than one signal could have been designated as the "permitted" signal, the designation can be considered arbitrary. (Martin 2004-05 Reb. at 4-5; McLaughlin 2000-03 Dir. Tr. 689:22-690:5.) However, the CCG's reallocation of both base and 3.75% Fees is a reasonable approach to eliminating any claimed ambiguity on this issue. (Calfee 2004-2005 Reb. App. B at 7.)

68. CDC conducted an analysis of cases where cable systems pay a 3.75% fee because they carry Independent stations that exceed the FCC "market quota." The criteria for inclusion in this analysis were: (1) Form 3 systems that paid a 3.75% fee, and (2) reported at least one U.S. Independent station and at least one Canadian station of which one was "permitted" on a market-quota basis. (Martin Reb. at 4.) In these carriage

instances, it may be arbitrary as to which of the stations are indicated as "permitted" by the cable system and which are not. (*See* Martin 2004-05 Reb. at 4; Martin 2004-05 Reb. Tr. 2921:7-2922:18.) This analysis attempts to eliminate any arbitrary effect on fees-generated by reallocating the 3.75% fees and base fees paid for these carriage instances on a proportional DSE basis. (*See* Martin 2004-05 Reb. at 4; Martin 2004-05 Tr. 2921:7-2922:18.) In this case, all stations are independent stations. (Martin 2004-05 Reb. at 4.)

69. In the 2000-2003 proceedings, the Copyright Judges found this same 3.75% analysis, along with the Min/Max analysis, corroborative of the reasonableness of the fee gen approach. 2000-2003 Order at 26.

70. CDC applied this reallocation protocol to every qualifying U.S. and Canadian independent station in the category above. The results are shown for base, 3.75% and total royalties in Table 10, below:

Table 10: 3.75% Fee Reallocation for Systems Carrying Canadian Distant Signals
(Martin 2004-05 Reb. at 5, Table 3.)

		CDC's Standard Allocation Method			Adjusted Reallocation Method			
Year	**Station Type**	**Total**	**Base Rate**	**3.75% Rate**	**Total**	**Base Rate**	**3.75% Rate**	**Total Difference**
2004	Canadian	$548,811	$50,671	$498,140	$433,638	$79,828	$353,810	($115,173)
2004	US-Independents	$738,657	$186,041	$552,616	$853,803	$156,884	$696,946	$115,173
2005	Canadian	$578,505	$18,417	$560,088	$447,819	$56,544	$391,275	($130,686)
2005	US-Independents	$517,283	$132,037	$385,246	$647,969	$93,910	$554,059	$130,686

71. This reallocation can be applied by adding the difference between CDC's adjusted and standard allocation to the Canadian royalties shown in Tables 4 and 8 above. The total royalties remain the same. For base rate royalties, the results applied to 2004 through 2005 are as shown in Table 11, below:

Table 11: Adjustment of Base Rate Royalties for Base Fee Signal Designation
(de Freitas Dir. Tab 1-N; Martin 2004-05 Reb. at 5.)

Year	Canadian Signals	Canadian Royalties Subject to Adjustment			Adjusted Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
		CDC's Standard Allocation Method	Adjusted Reallocation Method	Adjustment			
2004	$3,435,724	$50,671	$79,828	$29,157	$3,464,881	$82,719,673	4.189%
2005	$3,862,437	$18,417	$56,544	$38,127	$3,900,564	$88,517,771	4.407%

72. For 3.75% Royalties, the adjustment results for 2004 to 2005 are as shown in Table 12, below:

Table 12: Adjustment of 3.75% Rate Royalties for 3.75% Fee Signal Designation
(de Freitas Dir. Tab 1-N; Martin 2004-05 Reb. at 5.)

Year	Canadian Signals	Canadian Royalties Subject to Adjustment			Adjusted Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
		CDC's Standard Allocation Method	Adjusted Reallocation Method	Adjustment			
2004	$679,898	$498,140	$353,810	($144,330)	$535,568	$19,419,520	2.758%
2005	$560,260	$560,088	$391,275	($168,813)	$391,447	$17,346,106	2.257%

3. The Canadian Survey of U.S. Cable Systems Carrying Canadian Distant Signals Provides an Accurate Measure of the Minimum Relative Value of Canadian Programming on those Signals

i. The Canadian Survey was Designed to Estimate the Value of Canadian Programming on Canadian Distant Signals

73. In the years 2004 through 2005, marketing and survey research experts Drs. Debra Ringold and Gary Ford conducted a constant sum survey of the eligible population of Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signal. (Ex. CDN-4-A: Written Direct Testimony of Debra J. Ringold at 2 (hereinafter *Ringold Survey*)).

74. The survey was entitled "The Value of Canadian Programming to Cable Systems in the United States: 2004-2005" ("Canadian survey"). The Canadian survey examined entire populations rather than samples drawn from these populations. (Ringold Survey at 2, 5; Oral Direct Test. of Debra Ringold Tr. 1302:17-1303-9 (Oct. 14, 2009) (hereinafter *Ringold Tr.*).) The primary objective of this research was to estimate the value of Canadian programming on distant Canadian signals retransmitted by Form 3 cable system operators in the United States. (Ringold Survey at 2; Ringold Tr. 1287:4-8.) The results of the Canadian survey can be used to allocate the fees paid for the carriage of Canadian distant signals. (*See* Ringold Tr. 1314:15-1315:9 (stating that Canadian programming constituted about 60 percent of the total programming value provided by imported Canadian signals.)

ii. The Research Methodology Used by Drs. Ford & Ringold was Rigorous and Designed to Accurately Gauge Value While Avoiding Significant Bias or Error

75. The constant sum technique has been well studied and is considered a sound and reliable tool for measuring relative values. (Ringold Tr. 1298:17-1300:11.) It is well suited to the task of determining a cable operator's valuation of programming on a single distant signal. (Ringold Tr. 1298:17-1300:11.)

76. Significantly, the Canadian survey was not a sample survey. Rather, the Canadian survey was taken of the entire population of eligible systems. (Ringold Tr. 1302:17-1303-9.) A diligent effort was made to reach every cable system in the eligible population. An eligible system is defined as a Form 3 U.S. cable system that carried one or more Canadian signals on a distant basis in either accounting period of the survey year, and where the individual respondent could not participate in more than two interviews. (Ringold Survey at 6.) Several steps were taken to increase response rates: (1) the systems were initially contacted to obtain the identity of the qualified respondent for the system; (2) the respondent was faxed a notification; (3) the respondent also was offered an honorarium to participate; (4) the survey company continued efforts to reach the respondent until the survey was completed or the respondent expressly refused to participate; and (5) the survey company used the same interviewer for both years for consistency and experience with only one minor exception. (*Id.* at 6; Ringold Tr. 1303:12-1306:1.)

77. The Canadian survey asked about the value of seven different types of programming carried on a single Canadian signal randomly chosen from those Canadian signals retransmitted by the cable system. The seven types of programming were: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian-produced news, public affairs, religious, and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis, and auto racing; (5) Canadian-produced series, movies, arts and variety shows, and specials; (6) Canadian-produced children's programming; and (7) other programming. (Ringold Survey at 8; Ringold Tr. 1300:13-1301:12).

78. Similar categories of programming shown on a randomly chosen superstation and a randomly chosen U.S. independent station carried by the respondents' systems were also evaluated to reduce the chances that respondents would guess the survey purpose or sponsor. (Ringold Survey at 7-8.) The wording of the survey was adjusted to account for those systems which carried TBS as a cable network. (*Id.* at 3, 7-8.)

79. Response bias occurs when survey respondents know the purpose of the survey and unconsciously or consciously modify their responses in a way that affects the outcome. (*See* Ringold Survey at 5 (explaining the survey's methodology).) In the Canadian survey, response bias was substantially reduced by: (1) making the survey double blind so that neither the respondent nor the interviewer were told the purpose of the survey; (2) limiting multiple respondents; (3) using similarly-worded questions about U.S. independent stations as foils, and; asking about the value of a variety of specific types of programming on each signal. (Ringold Survey at 2-3, 8-9; Ringold Tr. 1296:18-1298:4.)

80. The Canadian survey was conducted with the persons responsible for deciding which distant signals their cable systems retransmit ("respondents"). On average, each respondent was in this position at his or her cable system for six years and thus, was experienced at making these decisions. (*See* Ringold Survey 2, 14, Table 4.) Respondents were also queried as to their program budget responsibilities. (Ringold Survey at 2; *see* Ringold Tr. 1337:18-20.) Ninety-five percent of the respondents identified themselves as the individual responsible for making program budget decisions or recommendations. (Ringold Survey at 2.)

81. The response rate for the Canadian survey—which garnered response rates of 54% and 62% for years 2004 and 2005, respectively—bias are adequate to reduce the likelihood of non-response bias. (Ringold Dir. at 7; Ringold Tr. at 1306:2 – 1307:1, 1308:8-12.)

iii. The Results of the Canadian Survey Indicate that Canadian Programming was the Predominate Source of Value on the Canadian Distant Signals

82. The results of the Canadian survey are summarized in Table 14, below:

Table 13: Summary of Results for Canadian Signals
(Ringold Survey at 11-12, Table 1.)

Programming Category	2004	2005
Canadian-produced programming	59.94%	60.37%
Live professional and college team sports	27.16%	29.91%
U.S. syndicated series and movies	12.75%	9.56%
Other programming	0.16%	0.16%

83. While U.S. sports and U.S. series and movies on Canadian signals received approximately 40% of the relative value awarded by cable system operators (Ringold Survey at 4, 11-12, Table 1), on U.S. signals those combined programming categories were given between 61% and 81% of the relative value of all programming by the same cable system operators as follows:

a. On superstations (including WTBS), live professional and college team sports were valued at approximately 26% and 35%, respectively, for 2004 and 2005. (Ringold Survey at 12-13.) On independent stations, live professional and college sports were valued at approximately 22% and 26%, respectively, for 2004 and 2005. (Ringold Survey at 12-13.) Thus, on average, live professional and college team sports were valued at approximately 30% for superstations, 24% for independent stations, and 29% on Canadian signals. (Ringold Survey at 13.)

b. Syndicated shows, series, and specials other than children's or religious programs on the superstations were valued at approximately 21% and 21%, respectively, for 2004 and 2005. (Ringold Survey at 13.) For the same years, movies on superstations were valued at approximately 20% and 25%. (Ringold Survey at 13.)

c. On the independent stations, syndicated shows, series, and specials other than children's or religious programs were valued at approximately 23% and 23%, and movies were valued at approximately 16% and 12%, respectively, for 2004 and 2005. (Ringold Survey at 13.)

84. Based on the Ringold Survey there are substantial differences in the value of movies and syndicated series relative to other superstation, independent, and Canadian signal programming. (Ringold Survey at 14.) Cable operators perceive U.S. syndicated series and movies shown on Canadian television as providing much less value than the same type of programming shown on U.S. stations. (Ringold Survey at 14; Ringold Tr. 1314:15-1315-9 (stating "[t]he value of Canadian programming cannot -- constituted about 60 percent of the total programming value provided by imported Canadian signals.")

85. The Ringold Survey results suggest that the value of Canadian signals resides primarily in Canadian-produced programming. (Ringold Survey at 14.) To begin, the total value of Canadian-produced programming (on average, about 60%) exceeds the value of professional and college team sports (on average, about 29%) on Canadian signals. (*Id.*) Moreover, U.S. movies and syndicated series are valued, on average, at approximately 11% on Canadian signals as compared to 43% on the superstations and 37% on the independent stations. (*Id.*) This 11% value of U.S. movies and syndicated series is substantially lower than the 60% total value of Canadian-produced programming on Canadian signals and demonstrates that U.S. programming is not a substantial factor in cable system operators' decisions to import a Canadian signal. (*Id.*; Ringold Tr. 1314:15-1315-9.)

86. Dr. Ringold also conducted a longitudinal study of the Canadian survey entitled: "The Longitudinal Value of Canadian Programming to Cable Systems In the United States 1996 to 2005." The report reviewed 10 annual constant sum surveys of eligible Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signals. (Ex. CDN-4-B: Written Direct Testimony of Debra J. Ringold at 1(hereinafter *Ringold Longitudinal*).) The same study methodology was used in

each of the 10 studies. (Ringold Longitudinal at 3; Ringold Tr. 1316:16-21 (stating there are "10 time periods when we employed exactly the same methodology with exactly the same population over time....")

87. A longitudinal study involves analyzing data collected using the same methodology to ask the same population of respondents the same question(s) over time. (Ringold Longitudinal at 2; Ringold Tr. 1316:5-21.) It is useful in evaluating the stability and/or robustness of an estimate. (Ringold Longitudinal at 2.)

88. Stability is evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time. (Ringold Longitudinal at 2.) Stability is achieved when measures reveal consistent responses over time. (Ringold Longitudinal at 2; Ringold Tr. 1317:19-1318-9.)

89. Robustness is further evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time under differing conditions. (Ringold Longitudinal at 2-3; Ringold Tr. 1318:10-1319:2.) Thus, robustness of an estimate refers to stability over time despite changes in conditions such as economic/political circumstances, industry structure, survey research contractors, individual respondents, and survey response rates. (Ringold Longitudinal at 3; Ringold Tr. 1318:10-1319:2.) Robustness is achieved when measure(s) reveal consistent response(s) over time despite change. (Ringold Longitudinal at 3; Ringold Tr. 1318:10-1319:2.)

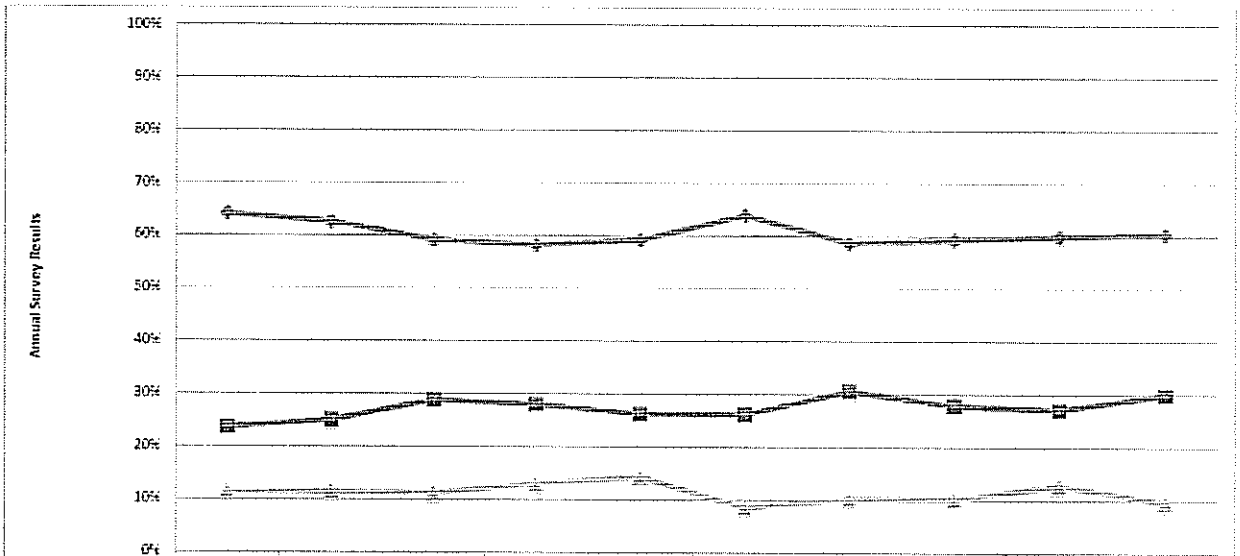
90. Longitudinal studies also permit the evaluation of error in an estimate. (Ringold Longitudinal at 3.) The differences between the (in this case, annual) observed values of a measure and the long-run average of the observed values in repetitions of the measurement are informative. (*Id.*) The smaller the difference between each (annual) estimate and the long-run average of the estimate, the less error associated with the estimate. (*Id.*)

91. During the years 1996 to 2005, economic and political circumstances varied and a number of Form 3 cable systems retransmitting a distant Canadian signal came under new ownership, were the object of mergers, and/or changed status with respect to these hearings. (Ringold Longitudinal at 3; Ringold Tr. 1321:4-1323:1.) Also during this period, a number of Form 3 systems retransmitting a distant Canadian signal changed individuals responsible for selecting distant signals for retransmission, and participated some years but refused in other years. (Ringold Longitudinal at 3.)

92. During the years 1996 to 2005, cable system operators who transmitted Canadian signals reported that Canadian programming constituted from 58% to 64% of the total programming value provided by imported Canadian signals. (Ringold Longitudinal at 3.) A weighted average of these results reveals that, for this period, Canadian programming constituted about 61% of the total programming value provided by imported Canadian signals. (Ringold Longitudinal at 3-4; Ringold Tr. 1325:11-18.) Inspection of Figure 1, below, reveals that the relative value of Canadian programming on distant Canadian signals to cable systems during the period 1996 to 2003 is remarkably stable, robust, and error free. (Ringold Longitudinal at 4; *see* Ringold Tr. 1320-2:13.)

Figure 1: The Longitudinal Value of Programming on Distant Canadian Signals Retransmitted by US Cable Systems 1996-2005

(Ringold Longitudinal, Figure 1)



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
CCG	64%	63%	59%	58%	59%	64%	59%	59%	60%	60%
JSC	24%	25%	29%	28%	26%	26%	31%	28%	27%	30%
PS	11%	11%	11%	13%	14%	8%	10%	13%	13%	10%
n	47	49	54	50	52	39	38	40	32	32
Response Rates	75%	72%	82%	82%	80%	60%	58%	63%	54%	62%

4. Corroborating Evidence of the CCG's Claim

i. Canadian Distant Signals were Available to More American Cable Subscribers in 2004-2005 than in 1998-1999

93. The relative percentage of subscriber instances attributable to Canadian signals has increased substantially on a relative basis since the 1998-1999 period. (de Freitas Dir. at 14-16, Tabs 1-R, 1-T.)

94. The number of subscriber instances attributable to Canadian distant signals has increased while the number of subscriber instances for U.S. distant signals has remained flat. (de Freitas Dir. 14-16, Tabs 1-R, 1-T.)

95. Table 14, below, summarizes the change in subscriber instances[4] attributable to the carriage of Canadian signals from the 1998-1999 proceeding to the present proceeding.

Table 14: Change in Subscriber Instances
(de Freitas Dir at 15, Tab 1-R at 1.)

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	**Total All Other Signal Types**	**Canadian Signals**	**Total All Other Signal Types**
1998-1999 Annual Average	*4,865,128*	*130,764,183*		
2000	5,254,398	133,795,743	8%	2%
2001	5,566,783	133,917,668	14%	2%
2002	5,743,710	138,170,878	18%	6%
2003	6,184,495	132,908,509	27%	2%
2004	5,374,795	137,867,895	10%	5%
2005	5,880,257	133,677,227	21%	2%

96. Tables 15 and 16 below show distant subscriber instances broken out by individual signal types.

[4] The number of subscribers presented in this table is cumulative. So, if a cable system has 10,000 subscribers and carries one Canadian and four independent signals on a distant basis in a given accounting period, CDC allocates 10,000 subscribers to the Canadian signal for that period and 10,000 to each independent signal. Though the total number of subscribers reported by CDC exceeds the number of people subscribing to cable in the U.S., the subscriber instances reported by CDC are an accurate depiction of the number of people who can see a particular distant signal in the U.S. and, in the aggregate, present a reasonable basis for comparing the relative reach of each signal type. (de Freitas Dir. at 15.)

Table 15: Distant Subscriber Instances by Signal Type
(de Freitas Dir at 15, Tab 1-R at 2.)

Accounting Period	Educational	Independent	Network	Canadian	Total (includes Low Power and Mexican)
1998-1	6,759,956	44,823,509	12,390,331	2,327,993	66,387,389
1998-2	6,675,840	46,354,662	12,295,766	2,444,712	67,827,998
1999-1	7,197,983	46,799,617	12,433,075	2,439,682	68,978,420
1999-2	6,906,145	46,170,112	12,370,674	2,517,869	68,064,814
2000-1	7,312,512	47,210,365	12,986,626	2,669,097	70,320,393
2000-2	7,378,205	46,296,435	12,362,361	2,585,301	68,729,748
2001-1	7,349,460	46,023,231	12,691,231	2,653,758	68,912,519
2001-2	7,631,906	46,997,906	12,673,984	2,913,025	70,571,932
2002-1	7,992,233	47,567,051	14,203,397	2,940,482	73,225,267
2002-2	8,105,654	46,888,038	12,299,893	2,803,228	70,689,321
2003-1	8,565,559	44,307,823	11,704,640	2,921,592	68,002,013
2003-2	9,363,059	45,278,929	12,531,801	3,262,903	71,090,991
2004-1	8,441,273	45,486,549	12,051,522	2,760,217	69,371,607
2004-2	8,731,210	48,863,780	13,086,987	2,614,578	73,871,083
2005-1	8,803,075	47,309,300	11,604,903	3,020,164	71,419,315
2005-2	8,220,169	46,412,769	9,859,156	2,860,093	68,138,169

Table 16: Percentages of Distant Subscriber Instances by Signal Type
(de Freitas Dir at 15, Tab 1-R at 2.)

Accounting Period	Educational	Independent	Network	Canadian	Total (includes Low Power and Mexican)
1998-1	10.18%	67.52%	18.66%	3.51%	100.00%
1998-2	9.84%	68.34%	18.13%	3.60%	100.00%
1999-1	10.44%	67.85%	18.02%	3.54%	100.00%
1999-2	10.15%	67.83%	18.17%	3.70%	100.00%
2000-1	10.40%	67.14%	18.47%	3.80%	100.00%
2000-2	10.74%	67.36%	17.99%	3.76%	100.00%
2001-1	10.66%	66.79%	18.42%	3.85%	100.00%
2001-2	10.81%	66.60%	17.96%	4.13%	100.00%
2002-1	10.91%	64.96%	19.40%	4.02%	100.00%
2002-2	11.47%	66.33%	17.40%	3.97%	100.00%
2003-1	12.60%	65.16%	17.21%	4.30%	100.00%
2003-2	13.17%	63.69%	17.63%	4.59%	100.00%
2004-1	12.17%	65.57%	17.37%	3.98%	100.00%
2004-2	11.82%	66.15%	17.72%	3.54%	100.00%
2005-1	12.33%	66.24%	16.25%	4.23%	100.00%
2005-2	12.06%	68.12%	14.47%	4.20%	100.00%

ii. Relative Change in Total Royalties Paid Per Subscriber Instance

97. In the 1998-1999 period, cable systems paid, on average, 51 cents in total royalties for each Canadian distant subscriber instance. By comparison, the average paid for all other distant signals was about 59 cents per subscriber instance. This is calculated by taking the total distant royalties paid for Canadian or all other distant signals as allocated by CDC and dividing it by the number of subscriber instances reported by CDC for those same signals. (de Freitas Dir. at 16, Tab U.)

98. By 2005, those cable systems were paying, on average, 75 cents for each Canadian distant subscriber instance and 76 cents for all other subscriber instances. For Canadian signals, this represented a 48% increase from 1998-1999 compared to the 29% increase for all other signal types over the same period. (de Freitas Dir. at Tab U.)

99. The relative change in total royalties paid per subscriber instance is shown in Table 17, below:

Table 17: Relative Change in Total Royalties Paid Per Subscriber Instance Compared To 1998-1999
(de Freitas Dir. at Tab U.)

Year	Total Distant Royalties per Subscriber Instance		Total Distant Royalties per Subscriber Instance	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*$0.5096*	*$0.5875*		
2000	$0.5701	$0.6220	12%	6%
2001	$0.6077	$0.6381	19%	9%
2002	$0.7604	$0.6615	49%	13%
2003	$0.7331	$0.7012	44%	19%
2004	$0.7657	$0.7113	50%	21%
2005	$0.7521	$0.7592	48%	29%

iii. Relative Change in Total Royalties Paid Per Instance of Carriage

100. In the 1998-1999 period, cable systems paid, on average, $14,979 in total royalties for each distant Canadian signal they carried. By comparison, the average paid for all other distant signals was about $9,272 per signal carried. This is calculated by taking the total distant royalties paid for Canadian or all other distant signals as allocated by CDC and dividing it by the number of instances of carriage reported by CDC for those same signals. (de Freitas Dir. at 17; Ex. CDN 1-V.)

101. By 2005, those cable systems were paying, on average, $34,552 for each distant Canadian signal and $14,426 for all other subscriber instances. For Canadian

signals, this represented a 131% increase from 1998-1999 as compared to the 56% increase for all other signal types over the same period. (de Freitas Dir. at Tab V.)

102. The relative change in total royalties paid per instance of carriage is shown in Table 18, below:

Table 18: Relative Change in Total Royalties Paid Per Instance of Carriage Compared To 1998-1999
(de Freitas Dir. at Tab V.)

Year	Total Distant Royalties Per Instance of Carriage		Total Distant Royalties Per Instance of Carriage	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*$14,979*	*$9,272*		
2000	$19,201	$10,675	28%	15%
2001	$21,684	$12,086	45%	30%
2002	$26,311	$12,551	76%	35%
2003	$28,693	$12,719	92%	37%
2004	$28,189	$12,950	88%	40%
2005	$34,552	$14,426	131%	56%

iv. Distant Signal Program Time Comparison

103. Dr. Richard Ducey was accepted as an expert in "research in and analysis of the cable and broadcast television industries, including television programming." (Transcript of Oral Direct Test. of Phillip V. Ducey at 536 (Oct. 7, 2009) (hereinafter *Ducey Tr.*).)

104. Dr. Ducey presented a comparison of program time in 2004 and 2005 for various programming types after excluding non-compensable programs on WGN. (Written Direct Test. of Phillip V. Ducey at 7 (hereinafter *Ducey Dir.*); Ex. SP 15, Subscriber Weighted Claimant Shares 2004 to 2005.)

105. In his comparison, Dr. Ducey followed essentially the same approach used by Dr. Mark Fratrik of BIA Financial Inc. in the 1998-99 cable royalty distribution proceeding: Dr. Ducey testified that following Dr. Fratrik, he weighted the respective program minutes from the various program categories on each station by the number of subscribers who received that station as a distant signal. In this way, Dr. Ducey arrived at a measure of the relative availability of the various program categories in the cable market place. (Ducey Dir. at 6; SP Ex. 15.)

106. Dr. Ducey testified that the analysis provides another way of assessing changes in the distant signal marketplace in 2004 and 2005 as compared with the years covered by prior proceedings. (Ducey Dir. at 6.)

107. Dr. Ducey testified that WGN had substitute programming on its retransmitted signal and, because the carriage of the substitute programs is not subject to the cable statutory license, he understood them to be non-compensable in this proceeding. Therefore, he excluded all of the substitute programs on WGN before calculating the relative shares of program time. (Ducey Dir. at 6.)

108. He merged his resulting comparison with the work done by Dr. Fratrik in the 1998-99 cable royalty distribution to produce the graph introduced as SP Ex. 16. In his testimony, Dr. Ducey emphasized the decline in the relative amounts of Program Suppliers' programming in the marketplace from 1992 through 1999 and from 2004 to 2005. He contrasted that with an increase in the proportion of the distant signal marketplace represented by the Commercial TV program category over the same period. (Ducey Dir. at 7; Ex. SP 16, Distant Signal Program Time Comparison.)

109. Finally, Dr. Ducey stated that "[p]ure time measures cannot be relied upon to determine the relative marketplace value of the program categories." He went on, however, to observe that the data show trends in the amounts of programming actually purchased in the distant signal marketplace over time. (Ducey Dir. at 7.)

110. According to SP Ex. 16, the amount of Canadian distant signal programming in the marketplace also showed a trend of steady increases over time as shown in Table 19, below:

Table 19: Distant Signal Program Time Comparison
(SP Ex. 16.)

Period	Proportion of Canadian Distant Signal Programming Relative to Other Programming Types
1992	1.0%
1998-1999	3.7%
2004-2005	4.5%

B. Other Proposed Measures of Relative Value Fail to Accurately Calculate the Relative Value of CCG Programming

1. The Bortz Cable Operator Survey

i. Summary of the Bortz Study and its Results

111. Settling Parties witness, James Trautman sponsored Exhibit SP-2, the Cable Operator Valuation of Distant Signal Non-Network Programming 2004-2005 by Bortz Media & Sports Group, Inc. (the "Bortz Study"). (Ex. SP 2 Written Dir. Test. of James Trautman at 2. (hereinafter *Trautman Dir.*))

112. The Bortz Study purports to measure the relative marketplace value to cable system operators of five different categories of programming and two types of distant signals. (SP Ex. 2 at 1-2.)

113. The Bortz Study was based on two surveys of Form 3 cable systems operators who had carried distant signals during the years 2004 and 2005. (SP Ex. 2 at 11.)

114. The Bortz Study attempted to identify appropriate individuals at the cable systems to respond to the survey by asking for the person "most responsible for programming decisions." (SP Ex. 2 at App. B.)

115. The surveys were conducted in 2005 to collect data regarding 2004 and in 2006 to collect data regarding 2005. (SP Ex. 2 at 47.)

116. The Bortz Study used a stratified random sample of Form 3 cable systems. (SP Ex. 2 at 45-46.) The stratification was based on the total amount of royalties paid as shown in Table 20, below:

Table 20: Bortz Sampling Strata
(SP Ex. 2 at 45-46.)

Strata	2004 Royalty Range	2005 Royalty Range
1	$0 - 20,628	$0 - 23,844
2	$20,629 - 59,628	$23,845 - 65,344
3	$59,629 - 207,129	$65,345 - 239,844
4	$207,130 or more	$239,845 or more

117. For 2004, the Bortz Study had a final eligible sample of 251 out of 1647 Form 3 cable systems. Of those 251, a total of 162 completed the survey for a response rate of 65%. (SP Ex. 2 at 12, 46, 48.)

118. For 2005, the Bortz Study had a final eligible sample of 251 out of 1382 Form 3 cable systems. Of those 251, a total of 171 completed the survey for a response rate of 65%. (SP Ex. 2 at 12, 46, 48.)

119. After the samples were selected, the Bortz Study disqualified systems from the sample that did not contain at least one U.S. independent or network signal. Therefore

systems with only distant Canadian signals, only distant educational signals, or only distant Canadian and educational signals were disqualified and no attempt was made to contact respondents for those systems. (SP Ex. 2 at 32.)

120. The central question in the Bortz Study was a constant sum question that asked respondents to allocate percentage of a "fixed dollar amount" for programming among five programming categories and two signal types. (SP Ex. 2 at 13, App. B at 4.a.)

121. The Bortz Study results are shown in Table 21, below:

Table 21: Bortz Study - Distant Signal Programming Valuation Studies, 2004-05
(SP Ex 2. at 14.)

Programming or Signal Category	2004	2005
Live professional and college team sports	33.5%	36.9%
Movies	17.8	19.2
Syndicated shows, series and specials	18.7	18.4
News and public affairs programs	18.4	14.8
Devotional and religious programming	7.8	6.6
PBS and all other programming on non-commercial signals	3.5	3.7
All programming on Canadian signals	0.2	0.3
Total*	100.0%	100.0%

*Columns may not add to total due to rounding.

ii. Adjustments to the Bortz Study

a. McLaughlin Adjustments to the Bortz Study

122. Economist Linda McLaughlin proposed adjustments to the Bortz Study's results for the value of the programming on the Canadian signals and the education signals. (Ex. SP 6 Written 2004-2005 Direct Test. of Linda McLaughlin at 9-12 (hereinafter *McLaughlin 2004-05 Dir.*).)

123. Ms. McLaughlin's adjustments were based on the Bortz Study's handling of systems that were part of the sample but which carried only distant Canadian signals, only distant educational signals or only distant Canadian and educational signals. The Bortz Study treated such systems as ineligible and no results for those systems were included in the Bortz Study's results. (McLaughlin 2004-05 Dir. at 8.)

124. Ms. McLaughlin's adjustments were premised on the concept that, had a system carrying only Canadian signals or only educational signals been asked to assign the relative value of those signals among all the categories in the constant sum question, the respondent logically would have awarded 100% of the value to that signal type. (McLaughlin 2004-05 Dir. at 8-9.)

125. In two instances in the 2005 survey where a system carried both a Canadian distant signal and an educational distant signal and no other U.S. commercial signal, Ms. McLaughlin could not make an assumption as to how the respondent would allocate the value between the two signal types and therefore calculated the results assuming 100% of the value to the Canadian signal and none to the educational signal and then reversing that assumption. This resulted in a range of results for the Canadian and education signals. (McLaughlin 2004-05 Dir. at 9 at n. 17, 10-11.)

126. Ms. McLaughlin weighted these adjustments to reflect the systems' royalties and the overall response rate within the strata that included each such system. (McLaughlin 2004-05 Dir. at 10 and App. 2.)

127. For 2004, Ms. McLaughlin identified ten systems carrying either a single Canadian distant signal or a single educational distant signal that were part of the Bortz Study's sample but not surveyed. (McLaughlin 2004-05 Dir. at 11-12.) Of those ten systems, only one was a Canadian system. (McLaughlin 2004-05 Tr. 512:6-16.) Ms. McLaughlin used all ten of these systems in her adjustments. (McLaughlin 2004-05 Dir. at 11-12.)

128. For 2005, Ms. McLaughlin identified eight systems carrying either a single Canadian distant signal or a single educational distant signal that were part of the Bortz Study's sample but not surveyed. Of those eight systems, only one was a Canadian signal. (McLaughlin 2004-05 Tr. 512:17-513:3.) Ms. McLaughlin also identified two systems carrying both a Canadian distant signal and a educational distant signal. She used all ten of these systems in her adjustments. (McLaughlin 2004-05 Dir. at 8-9.)

129. Ms. McLaughlin's results augmented Bortz Study results for 2004 and 2005, as shown in Table 22, below:

Table 22: Bortz Study - Augment Distant Signal Programming Valuation Studies, 2004-05
(McLaughlin Dir. at 11, Chart 4.)

Programming or Signal Category	2004	2005
Live professional and college team sports	32.4%	35.5%
Movies	17.3	18.5
Syndicated shows, series and specials	18.1	17.7
News and public affairs programs	17.9	14.2
Devotional and religious programming	7.6	6.3
PBS and all other programming on non-commercial signals	6.2	5.9 – 6.2
All programming on Canadian signals	0.5	1.5 – 1.8

130. The stark difference between the valuation of Canadian signals in 2004 and 2005 is that in 2004 a small system, carrying only a Canadian signal, was added to the results, while in 2005 a large system which only carried Canadian was added. (McLaughlin 2004-2005 Tr. 512:9-513:3.) In rebuttal Gary Ford testified that the 2004 augmented results were incorrect. Due to an error in the original sample, one system carrying only a Canadian distant signal, Comcast of Washington IV, should have been included in stratum four of the 2004 Bortz Study survey sample. (Ex. CDN-R-2 Written Rebuttal Test. of Dr. Gary Ford at 21 (hereinafter *Gary Ford Reb.*) This is because the Bortz survey intended to interview all stratum four signals, but omitted Comcast of Washington IV. (*Id.*) Had this system been included and Ms. McLaughlin done her augmentation including this system, the results for the category of all programming on

Canadian distant signals would have been 1.9%, not 0.5% as calculated by Ms. McLaughlin. (*Id.*)

b. Adjustments for Non-Compensable WGN Programming

131. Dr. Ducey was accepted as an expert in "research in and analysis of the cable and broadcast television industries, including television programming." (Ducey Tr. at 536.)

132. WGN is the most widely carried distant signal. (Ducey Dir. at 6; Martin 2004-05 Tr. at 2959:10.)

133. WGN has a local broadcast in the Chicago area and different signal, referred to as WGNA, which is specially prepared for the distant signal marketplace. (Ducey Dir. at 6.)

134. WGNA contains both programming that is compensable in these proceedings and programming that is not compensable in these proceedings. (Ducey Dir. at 6.)

135. Dr. Ducey provided an analysis that provided the minutes of programming on WGN and WGNA broken into the four claimant group programming categories available on that distant signal: Commercial, Devotional, Program Suppliers and Joint Sports. (Ducey Dir. at 6.)

136. Dr. Ducey matched the programming and reported the percentage of all WGNA programming that was compensable in each of the four accounting periods at issue in this proceeding. (Ducey Dir. at 6.) His data is shown in Table 23, below:

Table 23: WGNA Minutes by Claimant Category - "Matched" programming as a percentage of all WGNA programming
(SP Ex. 14.)

Period	Commercial	Devotional	Program Suppliers	Sports
2004_1	100.0%	10.2%	24.4%	100.0%
2004_2	100.0%	10.0%	24.9%	84.7%
2005_1	100.0%	10.0%	20.1%	100.0%
2005_2	100.0%	9.7%	17.6%	100.0%
Total	100.0%	10.0%	21.7%	95.5%

137. Dr. Ducey testified that the non-compensable nature of the WGNA programming should result in some adjustment to the Bortz Study results (Ducey Tr. 644:1-645:2; 646:1-6.)

138. The Bortz Study also recognized that the issue of non-compensable WGN programming suggests that the Bortz "survey allocations for these categories [program suppliers and devotional programming] represent a 'ceiling' on the relative value that should be assigned to each when considering the potential impact of substitution." (SP Ex. 2 at 41.)

139. Ms. McLaughlin makes the same point stating: "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." (McLaughlin 2004-05 Dir. at 9.)

iii. Failure of the Bortz Study to Accurately Measure the Relative Value of Canadian Signals

140. Dr. Gary Ford, a witness for the Canadian Claimants Group was accepted by the Judges as an expert in marketing survey research. (Gary Ford Tr. 2970:13-19.)

141. The CCG's criticisms of Bortz' sampling and questionnaire are CCG-specific and go towards the ability of the Bortz Study to measure the CCG's relative market value. (Gary Ford Tr. 3027:15-3029:5.)

a. The Sample of Canadian Systems was Inadequate

1. The Bortz Study Population would have to be Tripled in Order To Adequately Measure the Relative Value of Canadian Programming

142. In order for the Bortz Study to have had a sample size sufficient to have a confidence interval of 95% and have the value of Canadian signals plus or minus 5%, the survey would have to be tripled in size. (*See* Gary Ford Reb. Tr 2984:15-2985:9 (explaining the necessary confidence interval and that using "a very conservative assumption" Bortz would have to triple the size of his survey); 2985:21-2990:10 (responding to Judge Roberts' questions as to how many respondents would be needed in order get an adequate sampling of Canadian station importers in the Bortz Study); 3029:7-21 (explaining with the confidence interval, "in a population of 61, you would need a sample of 32.")

143. As it presently stands, if the results of the Bortz Study are extrapolated out to all 61 systems which imported Canadian signals in 2004, the relative market value would increase from 3% to 27%. (Gary Ford Reb. Tr. 3009:8-3010:17.) "So the effect of leaving out the people who only import a Canadian distant signal is substantial in terms of the value that people -- that would be assigned to that particular -- to those signals overall."

(*Id.* at 3010:17-21.) With such a large margin of error, the Bortz Study cannot be said to reliably or effectively measure the relative market value of CCG programming.

2. The Bortz Study's Stratification was Inconsistent with its' Objective

144. In stratifying its samples by royalty payments, the Bortz Study was inconsistent with its objective of seeking "to determine how cable operators valued, on a relative basis, the different categories of non-network distant signal programming that they carried in those years." (Gary Ford Reb. at 9.) Ideally, stratification should have taken place as a measure of programming types appearing on distant signals carried by cable systems. (*Id.*) Instead, Bortz oversampled relatively large systems and undersampled smaller systems. (*Id.* at 4-5, 9.)

145. The oversampling and undersampling was problematic for three reasons. First, smaller systems imported more Canadian signals than larger systems. (Gary Ford Reb. at 10-14.) This, in turn, resulted in the Bortz Study being unrepresentative of stations which import Canadian-English speaking stations or Canadian-French speaking stations. (*Id.* at 9).

146. In 2004, approximately 71% of the cable systems that imported Canadian distant signals were in Bortz strata 1 and 2. (Gary Ford Reb. at 12.) In 2005, that figure was 69%. (*Id.* at 12.) Since disproportionately more samples were taken from strata 3 and 4, the Bortz Study diminished the probability of reaching a representative sample of Canadian distant signals. (*Id.* at 12.) This diminished probability played out in the actual Bortz results.

147. The Bortz 2004 survey sampled and interviewed only one cable system operator who imported a Canadian French-language distant signal. In 2005, only four were interviewed with three respondents. The Bortz sample did not have a large enough

sample to draw any conclusions about the value of French-language signals. (Gary Ford Reb. at 13.)

148. Similarly, Canadian English-language distant signals were undersampled. In both 2004 and 2005, 66.7% of the cable systems importing English-language Canadian distant signals were in Bortz strata 1 and 2. (Gary Ford Reb. at 14.) However these same signals only made up 45% and 40% of the ending Bortz samples in 2004 and 2005 respectively. (*Id.*)

149. The Bortz Study's final sample in 2004 included less than 4% of the smallest cable systems but 44.4% of the largest systems. (Gary Ford Reb. at 10.) The Bortz Study's final sample in 2005 included less than 4% of the smallest cable systems but 56.4% of the largest systems. (*Id.* at 10-11.)

150. More striking, only 16.9% of all cable systems were in Bortz' two largest strata in 2004. (Gary Ford Reb. at 10-11.) That figure was 18% in 2005. (*Id.* at 10-11.) However, the two largest strata made up 54.9% and 59.7% of the respondents in 2004 and 2005, respectively. (*Id.* at 10-11.)

151. The second problem of the over/under sampling was that the larger systems typically imported more distant signals than smaller systems. (Gary Ford Reb. at 14-15.) Larger systems importing Canadian distant signals typically imported 5 or 6 signals on average of which only one or two would be Canadian. (*Id.* at 15.) As a result, there was a greater likelihood that the respondents on the oversampled larger systems would recall more programming on the U.S. commercial stations than on the Canadian stations. (*Id.* at 15). This issue became a problem when combined with the faulty design of the Bortz questionnaire. Because cable operators would be more likely to recall the most popular programming from the U.S. commercial stations when asked the key valuation question, operators would provide answers which would be consistent with their most popular programming answer but not necessarily in line with their actual valuation of the Canadian

niche programming. (*See* Gary Ford Reb. at 15-18; *see also infra*, CCG PFF § (II)(B)(iii)(b).)

152. The third problem of the over/under sampling was that the Bortz Study did not interview anyone who only imported a Canadian signal or a public television signal because of a belief there were not any questions they could ask about programming. (Gary Ford Tr. 2981:9-14.) Bortz' arbitrary exclusion effectively omitted a quarter of all of the Canadian signals imported. (Gary Ford Tr. 2981:15-17.) The exclusion had an "an impact on the value estimates that are obtained." (*Id.* at 2981:18-19.)

153. Had the Bortz Study been stratified by a measure of programming types appearing on distant signals carried by cable systems, it would have ensured that the surveys included a sufficient number of observations for each type of programming regardless of the size of royalty payments. (Gary Ford. Reb. at 9.) Otherwise, the researcher would not be guaranteed that there will be enough observations from signals carrying each type of programming to develop valid estimates of the relative value of each type of programming on the distant signals cable system operators buy. (*Id.*) Because cable systems that imported Canadian distant signals were smaller rather than larger, the disproportionate sampling plan used in the Bortz survey diminished the accuracy of the estimates of the relative value of CCG programming. (*Id.* at 9, 19.)

3. The Bortz Study Has Not Materially Improved Its Sampling since 1990-92

154. Dr. Ford, who testified in the 1990-1992 proceeding, noted that the undersampling and oversampling issues in the Bortz Study are the same in this proceeding as they were in the 1990-1992 proceeding. (Gary Ford. Tr. 2982:3-20)

155. Despite getting more respondents for 2004-2005, the survey still used the same methodology of sampling 100 percent of strata 4, which contains the largest systems,

and sampling disproportionately smaller amounts from stratas 3, 2, and 1. (Gary Ford Tr. 2982:21-2983:6.)

156. This flaw appears to be a conscious decision by Bortz. (Gary Ford Tr. 2983: 7-14.)

157. As a result, certain niche systems or niche type signals are still excluded. (Gary Ford Tr. 2983:14-20.)

b. The Questionnaire Design was Biased Against Niche Programming Categories

158. Questions 2a and 2b in the Bortz survey caused the cable system operator to focus on programming with the widest appeal, likely causing the operator to ignore other valuable (and profitable) programming which may have a smaller segment of subscribers. (Gary Ford Reb. at 15.)

159. Question 2a in the Bortz survey questionnaire listed all of the distant signals imported by the cable system. (Gary Ford Reb. at 15.) Question 2b then asked respondents an unaided recall question about the popularity of various types of programming. (Gary Ford Reb. at 15.) Since cable systems with more distant signals typically import more commercial stations (5 or 6 on average) than Canadian stations (1 or 2 on average), respondents were more likely to recall programming from the commercial stations. (Gary Ford Reb. at 15.)

160. Question 3a on the Bortz questionnaire asked whether programming on imported distant signals was "featured" in subscriber acquisition and retention advertising. (Gary Ford Reb. at 16.) With 87.0% in 2004 and 93.0% in 2005 of respondents answering no, the vast majority of respondents moved to the key question on relative value, question 4a, while thinking about the more popular programming they had just named. (Gary Ford Reb. at 16-17; Gary Ford Tr. 2994:13-2995:9.)

161. To provide internally consistent responses, respondents will state that the most popular programs have the highest relative value. (Gary Ford Reb. at 18.) Had respondents instead been asked about the segments for which they provide programming, they would have considered the value of all substantive segments to their systems – changing their responses to question 4a. (Gary Ford Reb. at 18.)

162. Furthermore, by eliciting top-of-the-mind awareness of the most popular distant signal programming in question 2b just before the relative value question, the question increased the likelihood that the cable system operator would ignore other categories of niche programming enjoyed by a smaller but still profitable subscriber segment. (Gary Ford Reb. at 5, 15.)

163. The likely bias introduced by Bortz Study questions 2a and 2b was exacerbated by the questionnaire design because, contrary to usual practice, there was no aided recall question asking about the popularity of the various other types of programming shown on imported distant signals that respondents may have inadvertently not mentioned. (Gary Ford Reb. at 15, 16.)

164. Indeed, it was the opinion of Gary Ford that the "most popular programming" question created considerable bias in the survey results by reducing the likelihood that cable operators will think about the value of niche programming, especially as respondents strive to provide internally consistent responses in the "zero sum" nature of the relative value question. (Gary Ford Reb. at 19; Gary Ford Tr. 2995:17-21; *see also* Gary Ford Tr. 2998:8-13.)

165. Even worse, the flaw in the Bortz questionnaire is a fundamental flaw which could have been avoided. (Gary Ford Reb. at 2995:10-16 ("It's a fundamental criterion in survey design is to think about whether the order or sequence of questions has a -- can have a biasing effect on subsequent questions"); 2996:15-2998:7 (providing three ways in which the flaw in the Bortz questionnaire could have been avoided)).

c. The Bortz Results are Economically Implausible

166. CCG witness Dr. John E. Calfee was accepted as an expert in the economics of competition in highly regulated markets. (Calfee 2004-05 Tr. at 3048:19-3049:3.) Dr. Calfee testified that he had extensive experience with the use of surveys in his work. (Calfee 2004-05 Reb. at 2; Calfee 2004-05 Tr. 3043:5-3045:8.)

167. While the Bortz results may make sense for most programming categories, they do not make economic sense for Canadian signals. (Calfee 2004-05 Reb. at 5.) In his rebuttal testimony, Dr. Calfee compared the results of the Bortz Study for systems carrying Canadian signals to the royalties paid by such systems. (*Id.* at 5-6.)

168. In two tables, one for each of the two years of the Bortz Study, Dr. Calfee compared the relative value provided by the respondent for all programming on each Canadian signal to the minimum amount of royalties that each system could have saved by dropping the Canadian signal. This was calculated by assuming the Canadian signal was the last signal; an assumption which substantially underestimated the actual savings. (Calfee 2004-05 Reb. at 7-8 (noting also that the calculations take account of whether eliminating Canadian signals would cause the system to pay the minimum fee); Calfee 2004-05 Tr. 3066:11-14("And so, for base rate, what the min-max analysis told me is the least amount that this system could have saved by dropping all Canadian signals for which they are paying base rates.")

169. Dr. Calfee's comparisons are shown in Tables 24 and25, below. (Calfee 2004-05 Reb. at 6.)

Table 24: Basic CCG Results from the Bortz Surveys, 2004-1
(Calfee 2004-05 Reb. at 6.)

From Bortz Data			Cable system's minimum potential savings as a % of total royalties	From Statements of Account	
Bortz ID	Tier	Canadian Share		Total Distant Signals	Canadian Distant Signals
319	3	0%	39%	2	1
363	4	0%	76%	8	4
301	3	0%	64%	6	1
309	4	5%	12%	20	1
374	3	5%	26%	6	1
312	3	5%	7%	6	1
426	2	5%	11%	4	1
427	2	5%	7%	5	1
314	4	5%	42%	9	1
382	3	5%	7%	8	1

Table 25: Basic CCG Results from the Bortz Surveys, 2005-1
(Calfee 2004-05 Reb. at 6.)

From Bortz Data			Cable system's minimum potential savings as a % of total royalties	From Statements of Account	
Bortz ID	Tier	Canadian Share		Total Distant Signals	Canadian Distant Signals
632	4	1%	21%	23	3
653	3	2%	61%	8	1
694	2	5%	39%	2	1
578	3	5%	43%	8	1
641	3	5%	37%	8	1
573	3	10%	49%	5	3
566	3	10%	42%	8	1
567	1	10%	25%	4	1
673	3	10%	39%	2	1
574	3	20%	7%	6	1
671	2	0%	49%	6	2
612	1	0%	31%	5	1

170. In 2004, three of ten systems, carrying 2, 6, and 8 signals, respectively, all allocated 0% value to Canadian signals. (Calfee 2004-05 Reb. at 7.) In 2005, two of twelve systems allocated 0% value to Canadian signals, five of twelve allocated 1%-5%, four of twelve allocated 10% and only one of twelve allocated 20%. (*Id.* at 6-7.) In no instance did a Canadian signal receive greater than 20% value. (*Id.* at 6-7.)

171. The above results illustrate the economic implausibility of the notion that the allocations of value for all programming on Canadian signals contained in the Bortz survey actually reflect the relative marketplace value of that programming. (Calfee 2004-05 Reb. at 7; Calfee 2004-05 Tr. 3063:4-9 ("And for the most part, the Canadian shares are simply absurdly low."); *see also* Calfee 2004-05 Tr. 3064:20-3065:3 (explaining that the 20% one Canadian signal received, compared to the other shares Canadian signals received "at least is not grossly disproportionate" to the other information.)) Systems were free to drop Canadian signals if their value was not worth its cost. (Calfee 2004-05 Reb. at 7.) In 2004, signals which gave 0% value to Canadian signals would have saved between 39% and 76% of their total royalties (at least) by not carrying the Canadians. (*Id.* at 6.) In 2005, signals which gave 0% value to Canadian signals would have saved between 31% and 49% of their total royalties (at least) by not carrying the Canadians. (*Id.*)

172. Dr. Calfee testified, "it makes no sense for the system to retain a signal whose reported value according to the Bortz survey is almost trivial compared to its costs. Indeed, there seem to be few if any systems in which the Canadian signal allocation bears a reasonable economic relationship to the fees actually paid for distant signals. I think we can reject the hypothesis that the Bortz survey provides even a very rough estimate of the relative value of Canadian signals, let alone the Canadian content on those signals." (Calfee 2004-05 Reb. at 7; *see also* Calfee 2004-05 Tr. 3069:17-22 ("To me, as an economist, it doesn't make sense to say that the Canadian signals are worth only 1 percent or 5 percent of the value of distant signals if, in fact, you could have saved 20 or 30 or 40 or 70 percent of your fees by dropping those same Canadian signals.")

173. These implausible results stem from the design of the constant sum question in the Bortz Study. The surveys were designed in a way that asked respondents to remove Canadian-specific content from basic program categories like movies and sports, and consider that content to be part of the Canadian signal. (Calfee 2004-05 Reb. at 8; Calfee 2004-05 Tr. 3070:1-3071:21.) In addition, respondents were asked to assess the relative value of movies, sports, and so on, but to do so only for the content that actually arrives from a group of distant signals. (Calfee 2004-05 Reb. at 8.) Respondents were tasked with distinguishing between "network" and "non-network" programming. (*Id.*) Further, they had to exclude the same types of programming that arrive from cable stations such as TBS or USA." (*Id.*) Considering the nature of these difficult mental exercises, it is likely that respondents simply allocated shares to the various programming categories according to the general "big picture" content of those categories. (*Id.*) Such an allocation left nothing or only a trivial amount for all the programming on an entire distant Canadian signal. (*Id.* at 9; Calfee 2004-05 Tr. 3070:1-3071:12.)

174. Since the Bortz Study cannot provide even a rough estimate of the value of CCG programming, accepting Bortz as it applies to the CCG would be to accept results not grounded in fact and which defy economic sense.

iv. The McLaughlin Adjustment Suffers from the Same Defect as the Bortz Study

175. McLaughlin's approach assumes that the Bortz Study's disproportionate sampling plan resulted in a sample that is representative of the underlying population of imported Canadian distant signals. (Gary Ford Reb. at 6.) However, that assumption is flawed because the Bortz Study undersampled cable systems that import Canadian distant signals. (Gary Ford. Reb. at 20); *see also* CCG PFF §(II)(B)(1)(iii)(a)(1)-(3).

176. In 2004, 24.6% of cable systems that imported Canadian distant signals (i.e., 15 of 61) only imported a single distant signal, and 86.7% of these (i.e. 13 of the 15) were in Bortz strata 1 and 2. (Gary Ford Reb. at 21.) In 2005, 27.5% of cable systems (14

of 51) only imported a single distant signal, and 85.7% of these (i.e. 12 of the 14) were in Bortz strata 1 and 2. (*Id.*) Since the Bortz sampling plan undersampled strata 1 and 2, it is not representative of the cable systems that (1) only import one distant signal, and (2) import that distant signal from Canada. (*Id.*); CCG PFF § (II)(B)(1)(iii)(a)(1)-(2).

177. Dr. Calfee provides an example of how the Bortz flaw turns up in the McLaughlin adjustment. (*See* Calfee 2004-05 Reb. at 9.) If Bortz properly sampled Canadian signals, the McLaughlin adjustments should only have had a minor effect because she added only one system to the 11 systems with Canadian signal carriage that were surveyed in 2004, and only 1 to the 13 systems surveyed in 2005. (*Id.*) Adding that single observation to the 2004 sample more than doubled the estimated relative value (from 0.2% to 0.5%).5 (*Id.*) Adding those three observations to the 2005 sample increased estimated relative value more than five-fold (from 0.3% to 1.5%-1.8%). (*Id.*) Why such small additions to the sample would have such large effects makes sense only if the sample results to which they were added were artificially low. (*Id.*) Thus, McLaughlin's augmentation methodology does not allow a reliable estimate of the relative market value of Canadian distant signals because, even with the adjustment to the Bortz data, it still under-represents the cable systems that only import a single (Canadian) distant signal. (Gary Ford Reb. at 21.)

178. In fact, McLaughlin's adjustment does not address the basis in the questionnaire which systematically underestimates the value of Canadian programming when respondents are asked about the Canadian signal. (Gary Ford. Reb. at 21; CCG PFF §(II)(B)(1)(iii)(b).) As previously discussed, the Bortz Study asks an unaided recall question of the "most popular" programming just before the key question on the relative value of programming on imported distant signals. This has the effect of reducing the likelihood that cable operators will think about the value of niche programming to their systems. (Gary Ford Reb. at 15-18; CCG PFF § (II)(B)(1)(iii)(b).) This is an ingrained flaw of the Bortz Study and one that the McLaughlin adjustment cannot cure.

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5 The addition of the Seattle Comcast system identified by Gary Ford increases the value to 1.9%. (Gary Ford Reb. at 21.)

v. If the Bortz Study Is Accepted, Both the McLaughlin Adjustment and the Ford Adjustment Must be Implemented

179. If the Bortz Study was applied by this Panel to determine relative market value of the Canadian distant signals, not only would the McLaughlin adjustment need to be applied, but so too would Dr. Gary Ford's adjustment to the McLaughlin adjustment.

180. Since the Bortz Study's constant sum scale methodology asked about the value of programming on commercial distant signals and about entire signals for PTV and the Canadians, the Bortz Study could not obtain estimates of programming for cable systems that did not import a commercial distant signal. (*See* Gary Ford Reb. at 20.) McLaughlin argues that since cable systems pay for PTV and Canadian distant signals, excluding them has an adverse effect on PTV and the CCG. (*See id.*) McLaughlin adds back the estimated values of PTV and Canadian distant signals in a way which does not incur the same questionnaire bias which affects the rest of the Bortz Study. (*See* Gary Ford Reb at 20; Calfee 2004-05 Reb. at 9 (explaining that the adjustments were performed manually, avoiding confusion among the program categories).)

181. Yet the adjustment noted by Dr. Gary Ford in his rebuttal also must be made to the McLaughlin adjustment in order to correct for a clerical error. In her methodology, McLaughlin underestimated the augmented royalties. (*See* Gary Ford Reb. at 21.) The Bortz Study's sampling plan omitted Comcast of Washington IV, a cable system which paid royalties on $688,245, and which should have been assigned to stratum 4 (the largest royalty stratum). (*See id.*)

182. Because the Bortz Study intended to interview all of the stratum 4 systems, and because Comcast of Washington IV only imported one distant signal, (the Canadian signal CBUT), it should have been included in McLaughlin's augmented estimate of royalties due the Canadians. (*See* Gary Ford Reb. at 21.)

183. With Dr. Gary Ford's correction, the augmented Canadian royalty increases by $392,994.17 (i.e., $688,256 in system royalties times 100% of value times 57.1% response rate) and the augmented Canadian percentage increases from 0.5% to 1.9% for 2004, using McLaughlin's methodology. (*See* Gary Ford Reb. at 21.) However, this is only applicable if the Judges use the Bortz Study to determine relative market value of the Canadian distant signals.

2. The Gruen Cable Subscriber Study

i. Summary of the Gruen Cable Subscriber Study and its Results

184. Program Supplier witness Dr. Arthur Gruen sponsored a pair of cable system subscriber surveys for years 2004 and 2005 (the "Gruen Surveys"). (*See generally* Ex. PS 12 Written Direct Test. of Arthur Gruen (hereinafter *Gruen Dir.*).)

185. The Gruen Surveys purport to "directly measure how cable subscribers value the programs delivered on distant signals." (Gruen Dir. at 5.)

186. The Gruen Surveys are similar in structure to the surveys used in the Bortz' study. (Gruen Dir. at 5.)

187. In both the 2004 and 2005 cable subscriber surveys, Dr. Gruen attempted to interview 1500 survey respondents across 100 cable systems. (Gruen Dir. at 11, 5.)

188. For the 2004 survey, a total of 90 cable systems and 89 markets were actually surveyed. (Gruen Dir. at 12 - 13.)

189. For the 2005 survey, a total of 90 cable systems and 89 markets were actually surveyed. (Gruen Dir. at 12 - 13.)

190. In 2004, five cable systems in the sample had only PBS distant signals and one cable system had only a Canadian distant signal. For those systems, there was only one program category available on distant signals. Consequently, respondents would give 100% of that value to the PBS claimant group in systems with only PBS distant signals and 100% to the CCG in systems with only Canadian stations. As there was no other information that could be gained by conducting interviews in those markets, Dr. Gruen decided not to conduct interviews of those subscribers to those systems. Instead, they were treated as virtual allocations. (Gruen Dir. at 12.)

191. In 2005, there were three PBS-only cable systems and one Canadian-only cable system in the 100 cable system sample. In addition, there was one cable system that carried both PBS and Canadian distant signals but no other signals. All five systems were eliminated from the sample but later given virtual allocations. (Gruen Dir. at 16 - 17.)

192. For the 2004 survey which took place in the second half of 2005, a total of 1,439 interviews were completed. (Gruen Dir. at 15 - 16.)

193. For the 2005 survey conducted in the second half of 2006, 1,510 interviews were completed. (Gruen Dir. at 18.)

194. The key valuation question on the survey was a constant sum question that asked respondents to allocate $10.00 "according to how **valuable** you feel each program category was in your home." (Gruen Dir. at 40 (emphasis in original).)

195. Respondent subscribers were asked to allocate value among six programming categories (news and community events, series programs, devotional programs, movies and specials, live team sports, and non-team sports) as well as two types of distant signals (PBS programs and programs on Canadian stations). (Gruen Dir. at 40 - 43.)

196. Immediately preceding the program evaluation questions, respondents were asked a series of questions that identified and defined the program categories, including using purported examples of programming. (Gruen Dir. at 33 - 34.) Also before the evaluation question were a series of questions intended to determine the popularity of varying programming categories. (Gruen Dir. at 35-39.)

197. Dr. Gruen reported unweighted survey results as shown below in Table 26.

Table 26: Gruen Survey Results - Unweighted Survey Results (Percent)
(Gruen Dir. at 19, Table 1.)

Category	**2004**	**2005**
Program Suppliers		
Series	22.30	21.59
Movies and Specials	21.14	20.63
Non-Team Sports	8.09	6.84
Program Suppliers Total	51.53	49.06
News and Community Events (NAB)	16.36	19.70
Devotional Programs (Devotional)	7.73	7.80
Live Team Sports (JSC)	18.85	17.96
PBS (PTV)	4.27	3.94
Canadian (CCG)	0.15	0.08
Other	1.10	1.45
Total*	99.99	99.99

*May not equal 100.00 percent due to rounding.

198. Dr. Gruen reported weighted survey results, which included virtual interviews and are shown below in Table 27.

Table 27: Gruen Survey Results - Survey Results Weighted by Contribution to Royalties and Including Virtual Interviews (Percent)
(Gruen Dir. at 22, Table 2.)

Category	2004	2005
Program Suppliers		
Series	20.96	20.45
Movies and Specials	19.83	19.01
Non-Team Sports	7.60	6.47
Program Supplier Total	48.39	45.93
News and Community Events	15.35	19.22
Devotional Programs	7.30	8.07
Live Team Sports	17.63	16.85
PBS†	9.52	6.72
Canadian‡	0.76	1.74
Other	1.05	1.46
Total*	100.00	99.99

†In 2005, this is the average of values that range from 6.39 to 7.05
‡ In 2005, this is the average of values that range from 1.42 to 2.07
*May not equal 100.00 percent due to rounding.

199. Finally, Dr. Gruen eliminated the "other" category and recalculated the results to total 100%, as shown below in Table 28.

Table 28: Gruen Survey Results - Normalized Distant Signal Relative Values (Percent)
(Gruen Dir. at 23, Table 3.)

Category	2004	2005
Program Suppliers		
Series	21.18	20.76
Movies and Specials	20.04	19.29
Non-Team Sports	7.68	6.57
Program Supplier Total	48.90	46.62
News and Community Events	15.51	19.51
Devotional Programs	7.38	8.19
Live Team Sports	17.82	17.10
PBS†	9.62	6.82
Canadian‡	0.77	1.77
Total*	100.00	100.01

†In 2005, this is the average of values that range from 6.49 to 7.16
‡In 2005, this is the average of values that range from 1.44 to 2.10
*May not equal 100.00 percent due to rounding.

ii. General Failures of the Gruen Cable Study to Accurately Measure the Relative Value of Programming

200. At the outset, the Gruen study fails to accurately measure relative market value because its' survey occurred in the wrong population. As Dr. Calfee testified:

> Subscribers face a very different situation from that faced by cable operators. Except when choosing among tiers, subscribers do not actually choose which distant signals to pay for. Thus, they do not allocate their cable payments toward various programming categories and have no reason to ponder the relative value of those categories. Given that the hypothetical marketplace at issue is one in which cable operators purchase bundles of programming, the results from the Gruen survey are too distant from cable system operator decision-making to provide a basis for estimating those operators' assessment of the relative value of programming bundles.

(Calfee 2004-2005 Reb. at 3.)

201. Additionally, Dr. Ratchford examined the Gruen Surveys to determine the ability of those studies to measure the relative value of programming on Canadian distant signals. (Ex. CDN-R-5 Written Rebuttal Test. of Brian T. Ratchford at 2-3 (hereinafter *Ratchford Reb.*).)

202. Dr. Brian Ratchford, a witness for the CCG, was accepted as an expert in survey research and survey design. (Transcript of Oral Rebuttal Testimony of Brian T. Ratchford at 3146, 3152-53 (Feb. 4, 2010) (hereinafter *Ratchford Tr.*).)

203. Dr. Ratchford explained that the Gruen Surveys were fatally flawed because they failed to qualify respondents by determining whether they actually viewed any distant signals:

> Q. All right. I think you said the qualification issue was the most important?
> A. Yes, by far.
> Q. Why is this the most important?
> A. Let's see. Well, there's two basic reasons. We don't know if the people have adequate knowledge of the distant signal stations in question to respond accurately to the survey. Okay. The second reason is

10 that everyone in the survey is given equal weight, and
11 there's no way to separate out, okay, those who
12 actually view the programs from those that don't and
13 those that actually value the programs highly from
14 those that don't.
15 Q. Okay. Let's step back a second. Does the
16 questionnaire ask the respondents if they watch the
17 distant signals in question?
18 A. No, it does not.
19 Q. Is that the qualification question you're
20 talking about?
21 A. Yes.
22 Q. And when you say it's the most important of
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1 these criteria, how important a criteria is it?
2 A. It basically makes it impossible to interpret
3 the results. Okay. So it's a fatal flaw, in my
4 opinion.

(Ratchford Tr. at 3164-65) (emphasis added).

204. Many respondents will likely have limited or no experience with the distant signals and their programming, requiring them to respond to the $10 allocation question based on other criteria. (Ratchford Reb. at 10.) Moreover, there is abundant research establishing evidence that respondents to a survey will answer questions even though they have no knowledge of the information sought in the question. (*Id.*) Also, the promised $25 payment gives incentive to all respondents, even those with limited or no experience with distant signals and their programming, to provide some response. The result is that many respondents may have supplied data of questionable validity. (*Id.*) The obvious solution to the problem would have been to qualify respondents by asking whether they view the distant signal stations in the survey, or at least asking a question referring to extent of viewership. (*Id.*)

205. Settling Parties Rebuttal witness, Jeffrey S. Berman, was qualified as an expert in survey research involving cable subscribers. (Oral Rebuttal Test. of Jeffery Berman Tr. at 2428, 2431 (Feb. 1, 2010) (hereinafter *Berman Tr.*).)

206. Mr. Berman also testified that, because the Gruen Surveys did not qualify the respondents, they failed a basic tenet of survey research: to make sure that respondents are knowledgeable enough to answer the questions being asked. (Ex. SP 53 Written Rebuttal Test. of Jeffrey Berman at 8 (hereinafter *Berman Reb.*).)

207. Another general flaw with the Gruen Surveys is that only one respondent is asked to answer for the entire household, regardless of whether that respondent is familiar with the viewing behavior or preferences of other household members. (Ratchford Reb. at 9.) Specifically, the instructions indicated that $10 was to be allocated according to "how valuable you feel each program category was in your own home." (*Id.*) Approximately two-thirds of the households in the surveys had two or more members. (*Id.*) Households typically have several TV sets located in different parts of the home. (*Id.*) These sets may be viewed at the same time by different household members. (*Id.*) In this case, it is unlikely that the respondent would know exactly what the other members are viewing at a given time. (*Id.*) Similarly, the respondent may do something else (work, shop, prepare dinner) while other members of the household are watching TV. (*Id.*) In such a case, it is again unlikely that the respondent would know what the others were watching. (*Id.*) Thus, it is questionable whether the respondent knows the viewing behavior of other household members and, more importantly, the strength of preferences of other household members. (*Id.*; *accord* Berman Dir at 11-12.)

208. Generally, subscribers have between 70 and 100 channels to choose from and concentrate on roughly a quarter of those channels. (Ratchford Reb. at 5; *see* Berman Reb. at 8. Because all viewers do not focus on all the same channels, it is unlikely that all survey respondents have a great deal of experience with programming on distant signals. (Ratchford Reb. at 5). Mr. Berman's Pilot Study demonstrates this principle, showing that nearly a third of those surveyed rarely watched the distant signal WGN, never watched WGN, or did not know if they watched WGN. (Berman Reb. at 9.) In the Gruen Surveys, respondents who rarely watched, never watched or did not know if they watched the relevant signals would be allowed to provide a survey response and, moreover, would have

their answer count as equally as someone who did watch such signals. (*See* Ratchford Tr. 3164:5-14; Ratchford Reb. at 7-8.)

209. Also, despite the fact that viewing behavior is likely related to gender, there was no question in the Gruen Surveys asking the gender of the respondent. If one gender is represented more frequently than another in the surveys, and members of that gender skew responses toward providing their own preferences, the results will be biased. (Ratchford Reb. at 9.) For example, if females are more prevalent among respondents, the results are likely to be biased in favor of programs watched predominately by females. (*Id.*) Unfortunately, because the Gruen Surveys failed to collect any information regarding the gender of respondents, there is no way to check for such biases in the survey data. (*Id.*; *accord* Berman Reb. at 9-11.)

210. In addition, although the Gruen Surveys are meant to apply to royalty proceedings for 2004 and 2005, they took place more than a year after the royalties in question were incurred. (*Id.* at 9.) Moreover, there is no reference to any specific time period in the allocation question in the questionnaire. (Ratchford Reb. at 9-10; Ratchford Tr. 3513:13-3154:8 (correcting his testimony.)) Behavior may have changed during this interim. (Ratchford Reb. at 9-10; *accord* Berman Reb. at 12-13.)

211. Dr. Ratchford also found the Gruen Survey's response rates to be much lower than the study implies. (Ratchford Reb. at 12-14.)

212. Dr. Gruen's report indicates that "of 1,497 respondents who were known to be qualified for the survey, only 10 refused to do so and only 48 were unavailable to complete the survey." (Gruen Dir. at 16.) Similarly, in his testimony about the 2005 survey, Gruen indicates that only one respondent who was known to be qualified to take the survey refused to do so, and only 15 were not available to complete the survey. (*Id.* at 18.) Thus, the Gruen Survey had a completion rate of 99.72 in 2004 and 99.93 in 2005. (Ratchford Reb. at 15.) Dr. Gruen does not otherwise report a response rate. (*See generally* Gruen Dir.)

213. In contrast, Dr. Ratchford calculated the response rates as being significantly lower – 15.83% and 27.17% respectively:

18	Q.	Okay. What did Gruen report as his response
19		rates?
20	A.	Gruen reported -- let's see -- it was
21		99 percent, roughly. Virtually everyone responded.
22		Okay. When I read the study, okay, that raised a
03167		
1		flag. It didn't make any sense to me. And I thought
2		that that was possibly misleading. And, actually, my
3		criticism in the report is really that his portrayal
4		of the response rate is likely to be misleading.
5	Q.	And did you recalculate his response rate?
6	A.	Yes.
7	Q.	And what did you get for a response rate?
8	A.	Let's see. It was about 16 percent in 2004
9		and about 27 percent in 2005.

(Ratchford Tr. at 3166-67.)

214. Comparing these response rates to the response rates of surveys commissioned by the Pew Internet & American Life Project (which are surveys directed at a representative sample of the U.S. population, and relate to media and therefore comparable in audience and content to the Gruen Surveys) suggests that the response rate to Gruen's 2004 survey was relatively low, and response to the 2005 survey was more or less in line with expectations. (Ratchford Reb. at 16, and n. 11.)

215. Non-response is defined as systematic differences in response between how non-respondents would have responded and the actual responses. With response rates of 16% and 27% for 2004 and 2005, respectively, "there is still plenty of room for bias due to non-response." (Ratchford Reb. at 16.)

216. There is evidence that non-response skewed the demographic composition of the sample. (Ratchford Reb. at 16.) Appendix H of the Gruen testimony indicates that the 50+ age group was over-represented in the surveys, indicating that the surveys were

more successful at reaching the older group. (Ratchford Reb. at 16.) While this issue of over-representation of the 50+ group can be corrected by weighting, what we do not know is the extent to which non-respondents in each age group would have given different answers than the respondents. (Ratchford Reb. at 16.)

iii. Specific Failure of the Gruen Cable Study to Accurately Measure the Relative Value of Canadian Signals

217. With regard to programming on Canadian distant signals, Dr. Ratchford testified that the survey questionnaire – as designed – worked against accurately measuring the value of programming on Canadian signals. (Ratchford Reb. at 8-11.)

218. Many respondents may not be familiar with the distant stations covered in the Gruen Surveys or the precise program type definitions, making the $10 dollar allocation exercise difficult. (Ratchford Reb. at 10; Ratchford Tr. 3177:22-3179:2.) A lack of experience with program definitions, the inclusion of programs and stations in the same allocation exercise, and the need to make comparison across eight categories were all likely to make it difficult to respond to the central allocation question and were likely to trigger response errors. (Ratchford Reb. at 11.)

219. Constant sum scales of the type employed in the Gruen Surveys are useful for determining relative importance, but can be taxing for respondents because of the large number of comparisons involved. (Ratchford Reb. at 10-11.) The complexity might lead respondents to use a subset of dimensions, especially when the categories are not independent. (*Id.* at 11.) Given that category definitions are likely to present some ambiguity to respondents, lack of independence is an issue in the Gruen Surveys. (*Id.*) For example, the questionnaire's distinction between live team sports and non-team sports, which appears to be an artifact of royalty proceedings, is likely to be fuzzy to many respondents. (*Id.*) Another possible source of overlap is that PBS and Canadian stations offer programs in many of the listed program categories. (*Id.*) Lack of consumer experience with the program definitions, the inclusion of programs and stations in the same

allocation exercise, and the need to make comparisons across eight categories are all likely to make it difficult to respond to the central allocation question, and is likely to trigger response errors. (*Id.*)

220. In asking questions about series types, examples of programming which would fit into that category were given to the respondent. (Ratchford Reb. at 5.) While this creates a potential inequality because no specific set of criteria were given for answering the question, the issue was particularly problematic with regards to Canadian programming. (*Id.*)

221. The Gruen Surveys used, as examples of Canadian programming, shows with which viewers were likely unfamiliar or which were not actually shown during the year at being studied. (Ratchford Reb. at 6-7.) The question for the Canadian stations was as follows:

> This category includes programs such as *Back of the House, Canada Now* and *Magic School Bus* shown only on [STATION(S)] from [CITY(IES)].
>
> Of the TEN dollars, what is the value to you, if any, of all programs shown on Canadian stations? (Gruen Written Direct, App. D, at 63) (emphasis omitted).

222. *Back of the House* was a comedy that was aired for only one 30-minute episode in 2004, and was not shown at all in 2005. *Canada Now* is a weekday news program produced by the CBC network. (Ratchford Reb. at 6.) *Magic School Bus* was a children's program that had 28 hours of re-runs on CBC in 2004, and was not shown at all in 2005. (*Id.*) These programs would be unfamiliar to non-viewers of Canadian television. (*Id.*) Indeed, since *Back of the House* and *Magic School Bus* were not shown at all in 2005, and only infrequently in 2004, such programs may not even have been familiar to frequent viewers of Canadian television. (*Id.*) Respondents, many of whom are likely unfamiliar with the programs provided as examples of Canadian television, would have no

basis for making an allocation of points to the Canadian stations. (*Id.*) However, because of their likely familiarity with the program types listed as examples for the other programming categories, even if they never viewed the stations airing the programming, those types of programming with well known shows as examples would have gained an advantage in attracting points in the constant sum question. (*Id.*) Again, there was nothing in the wording of the survey questions which required these program types to be actually viewed on the distant signal in question. (*Id.*)

223. In addition, Dr. Gruen testified that the sample size of systems with Canadian signals and response rates were too low. There is a strong possibility that non-response bias, combined with the small sample size of Canadian stations and respondents, may have skewed the composition of the sample to the detriment of the CCG. (Ratchford Reb. at 12.)

224. The representation of respondents with access (let alone knowledge) of Canadian distant stations in the Gruen Surveys is sparse. (Ratchford Reb. at 16.) In 2004, five systems carrying Canadian distant signals out of a population of 60 systems were selected for surveys, and four of these were surveyed while one was treated as "virtual" because the system's only distant signal was Canadian. (*Id.*) In 2005, four systems carrying Canadian distant signals out of a population of 49 systems were selected for surveys, and two of these were surveyed while the other two were treated as "virtual." (*Id.*) There were a total of 55 survey respondents in communities served by systems with a Canadian distant signal in 2004, and there were 31 such survey respondents in 2005. (*Id.*) However, 16 of the 31 responses to the 2005 survey were subscribers to a system where the three Canadian stations were only carried in a very small portion of the system. (*Id.* at 16-17.) Given the remote possibility that these subscribers even receive the distant Canadian signals, it is hard to conceive that they could provide an accurate picture of the value of the Canadian stations. (*Id.* at 17.) Therefore, there are only 15 effective responses that include a full Canadian distant signal in the 2005 survey. (*Id.*) These come from only one cable system. (*Id.*) Especially given the fact that the number of viewers of the relevant Canadian programs is likely to be a fraction of those sampled, these sample sizes

become too small to allow inferences about the whole population of viewers of these programs. (Ratchford Reb. at 17.)

3. The George Ford Advertising Study

i. Summary of the Advertising Study and its Results

225. Dr. George Ford, a witness for Program Suppliers, sponsored an advertising-viewing analysis that purported to measure the relative market value of distant signal programming. (*See generally*, Ex. PS 11 Written Direct Test. of George Ford (George Ford Dir.).)

226. The study did not attempt to provide an allocation of royalties for Music Claimants. (George Ford Dir. at 5, n.4.)

227. Dr George. Ford relied on two primary types of information for his analysis: viewing data with audience demographics ("to establish each program category's audience profile") produced by the Nielsen Company for the years 2004 and 2005, and advertising rate information from SQAD. (George Ford Dir. at 6, 18.)

228. Dr. George Ford used advertising rate data to assign a dollar value to the particular audience profiles of each of the claimants. In doing so, he adjusted, as appropriate, the unit price of certain program categories for gender, time of day (daypart) and market viability. (George Ford Dir. at 7, 17.)

229. Then Dr. George Ford calculated the total relative market value of the categories by applying each category's market unit price to the quantity consumed, as measured by relative viewership for the category. (George Ford Dir. at 7, 17.)

230. Dr. George Ford made adjustments to reduce the advertising rate for public television to reflect the notion that public television stations only devote about one-third of

their time to non-program content (advertising) as is found on commercial television stations. (George Ford Dir. at 37.)

231. Dr. George Ford also asserted that "economic logic and business practices indicate that devotional program has little, if any, market value, and should therefore receive a zero or near zero share of the royalty pool." (George Ford Dir. at 34 (original emphasis).) Dr. George Ford concluded that his methodology's results for devotional programming, approximately 0.76% on average over both years, was consistent with their prior approximately 1% awards. (George Ford Dir. at 35.)

232. Dr. George Ford's provided several sets of results but recommended his results which incorporated all available data, as shown in Table 29 below.

Table 29: George Ford -Relative Market Values Based on Marketplace Evidence
(George Ford Dir. at 39, Table 6 and 41.)

Claimant Group	Relative Share of Volume (%)	Relative Share of Viewership (%)	Relative Price of Viewership (Base = NAB)	Relative Market Value (%)
Year 2004	A	B	C	Norm (B.C)
NAB	7.514	7.852	$1.00	6.519
Program Suppliers	53.156	57.247	$1.44	68.283
Devotional	3.995	1.037	$1.39	1.194
Joint Sports Claimants	0.727	6.990	$2.39	13.843
PTV	30.140	25.424	$0.39a	8.237
Canadian	4.468	1.449	$1.60	1.924
Sum	100	100	...	1.00
Year 2005				
NAB	9.969	13.081	$1.00	10.181
Program Suppliers	56.350	69.038	$1.40	74.961
Devotional	5.392	0.474	$1.30	0.481
Joint Sports Claimants	0.708	5.670	$2.05	9.046
PTV	22.300	10.630	$0.48a	3.909
Canadian	5.281	1.378	$1.33	1.421
Sum	100	100	...	100

(a) Includes non-commercial adjustment.

ii. Failures of the Ford Advertising Study to Accurately Measure the Relative Value of Programming

233. Commercial Television witness Gregory Crawford was accepted as an expert economist with experience in the economic analysis of television programming markets, specifically including cable television programming markets. (Oral Rebuttal Test. of Gregory Crawford Tr. 2343 (Feb. 1, 2010) (hereinafter *Crawford Tr.*).)

234. Dr. Crawford expressed several criticisms of George Ford's analysis. (*See generally* Ex. SP 53 Written Rebuttal Test. of Gregory Crawford Reb. (hereinafter *Crawford Reb.*))

235. Dr. Crawford pointed out that carriage of distant signals by cable systems has no effect on the station's programming decisions because distant viewing is miniscule and distant signal audiences would have little or no advertising value. (Crawford Reb. at 4.)

236. Dr. Crawford stated that the current distant signal marketplace only generates revenues for cable systems through subscriber payments for bundles of signals. (Crawford Reb. at 11.) He also stated that even for non-broadcast cable networks which do generate some advertising income for cable operators, the great majority of cable operator revenue comes from subscriber fees. (*Id.* at 11-12.) Based on these two facts, its Dr. George Ford's basic assumption – that in the hypothetical marketplace the content would be supported only by advertising – is unsupportable. (*Id.* at 12.)

237. In addition, according to Dr. Calfee, George Ford's analysis is of little use in assessing the relative value of distant signal programming categories. (Calfee 2004-05 Reb. at 3.) Because cable systems do not receive advertising revenues from distant signals, there is no reason to think that cable system operators assess the relative value of distant signals, including those from the CCG, according to their value as advertising vehicles. (Calfee 2004-05 Reb. at 3-4.) George Ford's study relies on data too far removed from

actual cable operator decision making to provide useful information about the relative value of programming categories to cable operators. (Calfee 2004-05 Reb. at 4.)

238. Edwin Desser, a rebuttal witness for the joint Sports Claimants, was accepted as an expert in the licensing of sports telecasts. (Oral Rebuttal Test. of Edward Desser Tr. at 2592 (Feb. 1, 2010) (hereinafter *Desser Tr.*).)

239. Mr. Desser testified that, in his experience, George Ford's advertising analysis dealt with only a minority of the revenue picture because it did not take into account cable systems subscriptions. (SP 55 Written Rebuttal Test. of Edward Desser at 4 (hereinafter *Desser Reb.*).)

240. Mr. Desser also focused on the model's inability to accurately measure the value of sports programming because it failed to take into account other characteristics of sports programming that were important to networks and distributors. (Desser Reb. at 4-5.)

241. Mr. Desser concluded that George Ford's analysis does not provide a "reliable means of estimating the relative value of sports programming vis-à-vis other types of programming, and that conclusion is particularly true for syndicated programming that falls with the claim of the Program Suppliers." (Desser Reb. at 7-8.)

242. James Trautman also testified as a rebuttal witness on behalf of the Joints Sports Claimants. (*See generally* SP 57 Written Rebuttal Testimony of James Trautman (hereinafter *Trautman Reb.*)) Dr. Trautman had been qualified as an expert in market research, including survey research and valuation in the cable broadcast and television industry. (Transcript of Oral Rebuttal Test. of James Trautman Tr. at 2683 (Feb. 2, 2010) (hereinafter *Trautman Reb. Tr.*).)

243. Dr. Trautman analyzed the advertising model of George Ford by first applying it to programming on cable networks TBS and TNT and also the top 25 cable

networks. This analysis was intended to compare George Ford's theoretical relative market value for sports and non-sports programming on these cable networks to the actual reported relative market value on those networks based on published available information. (Trautman Reb. at 4-9.)

244. Dr. Trautman claimed that the George Ford approach predicted that JSC programming would be worth 4.25% and 3.51% of the relative market value for all programming on TBS in 2004 and 2005, respectively. He then showed that the actual reported relative market value was 24.08% and 24.65% respectively. (Trautman Reb. at 4-6.)

245. Dr. Trautman claimed that the George Ford approach predicted that JSC programming would be worth 8.6% and 7.0% of the relative market value for all programming on TNT in 2004 and 2005, respectively. He then showed that the actual reported relative market value was 46.15% and 45.06% respectively. (Trautman Reb. at 6-7.)

246. Dr. Trautman claimed that the George Ford approach predicted that JSC programming would be worth 2.8% and 2.1% of the relative market value for all programming on the top 25 cable networks in 2004 and 2005, respectively. He then showed that the actual reported relative market value was 20.12% and 17.35% respectively. (Trautman Reb. at 8-9.)

C. Evidence of Relative Value of the Claim of the Music Claimants

247. In the 1998-99 proceeding, the Music Claimants received a 4.00% share of royalties. 98-99 CARP Report at 92. That share was taken "off the top" – a reflection of the notion that the relative market value of Music does not differ based on the nature of the programming in which it is contained. 98-99 CARP Report at 89. Thus, Music's 4.00% share in the 1998-99 proceeding diminished all other claimants equally.

248. In this proceeding, while acknowledging that the formula that served as the basis for their 1998-99 award was conceptually reasonable, the Music Claimants nevertheless seek to adjust the formula "for each different category of television stations in the over-the-air broadcast market" as well as weight the results "to reflect the relative importance of the various stations carried by cable system operators in the distant signal market." (Ex. SP 27 Written Direct Test. of William Zarakas at 3-4 (hereinafter *Zarakas Dir.*).) These modifications results in a 30% and 15% increase, respectively, in the Music Claimants' awards. *Id.* (seeking 5.2% for 2004 and 4.6% for 2005).

249. In rebuttal, the Program Suppliers challenge the analysis presented by Mr. Zarakas, calling his criticisms of the method used in previous proceedings "not sufficiently important to disregard this approach." (Ex. PS 14 Written Rebuttal Test. of John Woodbury at p. 2 (hereinafter *Woodbury Reb.*).) Dr. Woodbury criticizes Mr. Zarakas' use of blanket license fees as a substitute for actual music rights payments, noting that "there is no reason to believe that the use of the blanket license fees is in fact a more 'accurate and reliable' measure of the actual music rights payments made by broadcast stations than the payments actually recorded by the PROs." (*Id.* at 4-5.) Dr. Woodbury concludes that (1) Mr. Zarakas' use of a blanket license fee overstates actual royalty payments; (2) the scheme for weighting royalty importance of a distant signal type according to cable subscriber instances is "flawed"; and (3) the assumption that the nationally-distributed distant signal WGN is analogous to a locally-distributed independent broadcast station casts doubt on the accuracy of Mr. Zarakas' estimates. (Woodbury Reb. at 8.)

250. Dr. Woodbury instead estimates the relative share for Music Claimants by calculating the ratio of actual music payments to the PROs divided by the total rights payments as reported by the U.S. Bureau of the Census. (Woodbury Reb. at 8.)

251. This methodology largely replicates the approach offered by Dr. []Schink in the 1998-99 CARP proceeding. (Oral Rebuttal Test. of John Woodbury Tr. at 3309:11-17 (Feb. 4, 2010) (hereinafter *Woodbury Tr.*).) Dr. Schink's methodology was accepted by

the Panel as a minimum measurement of the award to Music. (1998-99 CARP Report at 86-87.

252. Dr. Woodbury concedes that the calculations that he used were based on Census Bureau data that were later corrected. (Woodbury Tr. at 3332:11-14.)

253. If the original Census Bureau data in Appendix 3 to Dr. Woodbury's Rebuttal Testimony were replaced by the corrected data, the Music share percentage under that methodology for 2004 would equal $239 (millions) over $10,931 (millions), or 2.19%. The updated Music share percentage for 2005 would equal $234 (millions) over $10,937 (millions), or 2.14%. (SP Ex. 63)

D. Settlement of All Parties with National Public Radio

254. On March 31, 2009, all parties to this proceeding making Phase I claims to the 2004 and 2005 cable royalty funds stipulated and agreed that National Public Radio (NPR) and its claimant member stations shall receive an amount equal to 0.18 percent of the total funds available for the 2004 and 2005 distribution, subject to the terms of the stipulation of settlement.

III. PROPOSED CONCLUSIONS OF LAW

A. The "Fee Gen" Approach Remains the Best Method for Making Accurate Awards to the CCG

1. The CCG's Distribution Theory is Grounded in the Legal Standard Requiring that Royalties Paid for the Carriage of Canadian Signals Reach the Copyright Owners of the Works Retransmitted on Those Signals

i. Congress Intended that Canadian Copyright Owners Receive their Fair Share of the Royalties Collected

1. Canadian stations were included in the compulsory license granted to U.S. cable operators because cable operators wanted to carry Canadian stations.[6] Congress explicitly recognized the international significance of its decision to subject the works of foreign copyright owners to a U.S. compulsory license. The Committee writing section 111 stressed that the foreign copyright owners whose programs were broadcast on Canadian and Mexican stations were entitled to their fair share of the royalties collected:

> The Committee wishes to stress that cable systems operating within these cable zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. *The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to*

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6 Canadian signals were discussed in the revision notes of the 1976 Act:

> Canadian and Mexican Stations. Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

H.R. Rep. No. 94-1476 at 5709.

> *their fair share of the royalties collected.* Outside the zones, however, full copyright liability would apply as would the remedies of the legislation for any act of infringement.

H.R. Rep. No. 94-1476, at 5709-10 (emphasis added).

2. Since the enactment of Section 111, U.S. cable system operators have availed themselves of the cable compulsory license for Canadian stations and have paid tens of millions of dollars to retransmit distant Canadian English- and French-language stations.[7] Their decisions to import Canadian stations were made even though Canadian stations cost the same as U.S. independent stations and four times as much as U.S. network affiliates or public television stations.[8] *See* 17 U.S.C. § 111(f) (providing the values of distant signal equivalents).

3. Canadian copyright owners have participated in every royalty distribution proceeding, and have appeared as a Phase I group since the 1979 royalty proceeding. Unfortunately, before the 1990-1992 Proceeding, requests for "their fair share" of the "royalties collected" for Canadian stations went unheeded.

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[7] For purposes of determining when a Canadian station is distant, section 111 defines the "local service area" for a Canadian station as being the "area in which it would be entitled to insist upon its signal being retransmitted if it were . . . subject to [the FCC's] rules, regulations and authorizations." 17 U.S.C. § 111(f). In other words, although Canadian stations did not have must-carry rights, cable systems are able to carry Canadian stations for free if they would be "local" under the FCC rules applicable to U.S. stations.

[8] "To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition." H.R. Rep. No. 94-1476 at 5716.

ii. Only Copyright Owners with Programming on Canadian Signals are Eligible to Share in the Royalties Paid for those Signals

4. As it did in the 1990-1992, 1998-1999 and 2000-2003 Proceedings, the CCG seeks an award that is directly tied to the royalties paid only for the carriage of Canadian stations. The CARP in the 1990-1992 Proceeding made an award to CCG members expressly tied to the Canadian royalty payments while awarding the remaining royalties paid for Canadian signals to Joint Sports Claimants and Program Suppliers. *See* 1990-92 Proceeding, 66 Fed. Reg. at 55663-64. The 1998-1999 CARP also expressly accepted the Canadian fee gen methodology. *See* 1998-99 CARP Report at 72. Most recently, in the March 3, 2010 Distribution Order in the 2000-2003 Proceeding, the Judges found that the fee generation method deserves "considerable deference." March 3, 2010 Distribution Order in the 2000-2003 Cable Proceeding, at 34.

5. The CCG's request for a royalty share is grounded in the fees paid for Canadian signals and is based on the legal concept of "eligibility." The Copyright Royalty Tribunal ("Tribunal") had identified the legal concept of "eligibility" in the context of the Satellite Carrier Royalty Distribution Proceeding. In that proceeding, the Network claimants unsuccessfully argued that their award should not be limited to the royalties paid for network signals by satellite carriers. *See generally* Consolidated 1989-1991 Satellite Carrier Royalty Distribution Proceeding, 57 Fed. Reg. 62422 (Dec. 30, 1992) (hereinafter *Satellite Decision*).

6. The Tribunal disagreed, finding that:

> The Networks seek to blur the 12 [cent] superstation and 3 [cent] network/public television station categories and commingle the royalty payments for an obvious reason—it is the only way they can tap into the larger stream of revenues from superstations and avoid the reality that the Networks seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming.

> Moreover, having gained eligibility [for network programming] for royalty payment, the Networks are now trying to get through indirection from the Tribunal what they could not get—or did not seek—through direction from Congress—parity with the copyright owners which furnish programming to superstations. But their effort to seek a subsidy from the owners of programming furnished to superstations is misguided. The Networks' opportunity for increased revenues lies not in this Phase I proceeding, but in a legislative or rate-setting proceeding.

Satellite Decision, 57 Fed. Reg. at 62426.

7. The concept behind the Satellite Decision was echoed in the 2000 DTRA Proceeding, in which the CARP adopted a per-performance approach to setting royalty rates. The CARP stated that "a per performance metric 'is directly tied to that nature of the right being licensed.' ... The more intensively an individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage." DTRA CARP Report at 37 (citation omitted).

8. The per-performance metric tied the usage of copyrighted materials to royalties paid by the users of those materials. This is simply another expression of the eligibility concept: If royalties are paid for a song, only the right holders for that song should share in the royalties paid. Similarly, if royalties were paid for a signal, only the copyright holders with programming on that signal should receive a share of the royalties. Consistent with this logic, the CCG seeks an award grounded in the royalties paid for Canadian signals. For this reason, the first step in the Canadian methodology is identifying the fees paid for distant signals. Despite criticism of the compulsory license scheme and CDC's royalty allocation method, the CCG's evidence shows that the royalties reported by CDC fairly and accurately track royalty payments made by cable systems to signals.

iii. The Relevant Criterion for Determining an Award is "Relative Market Value"

9. In assessing the evidence presented by the parties, the Judges should be seeking to answer the question: "What is the relative market value of Canadian programming compared to all other programming shown on distant signals in 2004

through 2005?" This consideration, relative market value, is the only determining factor that has survived through the history of these proceedings.

10. The development and narrowing of the relevant criteria are well chronicled in the report of the 1992 CARP. *See generally In re Distribution of 1990, 1991 and 1992 Cable Royalties*, No. 94-3 CARP CD-90-92, at 18-21 (CARP June 3, 1996) (hereinafter 1990-92 CARP Report). The original bill creating the compulsory license set forth no criteria for distribution.[9] In the 1978 distribution proceeding, the CRT identified three primary factors (harm to copyright owners, benefit to cable systems, and market place value of the works) and two secondary factors (quality of the copyrighted material and time related considerations). *See* 1990-92 CARP Report at 20-23 (describing the considerations of previous CARPs when making royalty determinations). Subsequent proceedings and appeals narrowed these criteria until the 1990-1992 CARP itself "concluded that 'market value' is the only logical and legal touchstone." *Id.* at 23. This conclusion was upheld by the Librarian and on appeal. *See Nat'l Ass'n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 926-928 (D.C. Cir. 1998).

11. By the 1998-1999 proceeding, the CARP was able to review the record and state that "*every party* to this proceeding appears to accept 'relative marketplace value' as the *sole relevant criterion* that should be applied by the Panel." 1998-99 CARP Report at 10 (citations omitted) (emphasis in original). The CARP's reliance on relative market

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[9] According to the House Committee Report section 111:

> The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

H.R. Rep. No. 94-1476 at 5712.

value was upheld on appeal. *Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 402401 (D.C. Cir. 2005) ("We detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards.")

12. The 1998-1999 CARP concluded that "it is the 'demand side' that will determine relative values of each type of programming." 1998-99 CARP at 13 (citing *Ringold Tr.* 5670-71); *accord* 1998-1999 Proceeding, 69 Fed. Reg. at 3608. In this secondary market "the only thing that's important is demand, not supply." (McLaughlin 2000-03 Dir. Tr. 672:14-15.)

13. Based on this history, the Judges should start with the understanding that the relative marketplace value is the central criterion for establishing royalty shares and that demand is a relevant indicator of relative market value. Under that criterion, the Judges should find the evidence of the CCG compelling in its support of the requested award.

14. Changes in carriage are indicators of demand. Based on subscriber growth, demand for Canadian for programs is steadily increasing over the period. *See* CCG PFF § (II)(A)(4). The CDC data shows that the demand for Canadian signals increased at a much greater rate, from 1998-1999 (the relevant period for all other claimants) resulting in a disproportionate increase for the relative market value of Canadian signals and the programming on those signals. *See* CCG PFF §§(II)(A)(2); (II)(A)(4)

2. Establishing the Relative Market Value of Canadian Distant Signals is a Complicated Process that is Best Accomplished by Reference to the Royalties Actually Paid by Cable Operators

15. Two factors that complicate the Judges' task of evaluating the relative economic value of Canadian programming carried on distant signals are that (1) the cable operators must purchase entire signals rather than discrete programming and (2) the fees for distant signals are fixed by law. (Calfee 2004-05 Reb. App. B at 2-3; *see also* Calfee 2004-05 Reb. Tr. at 3095:1-21.)

16. Because the licensing structure has been in place for many years and was the product of legislation informed by industry input, it is most unlikely that the licensing fee arrangements are completely arbitrary and bears no relationship to the underlying economic forces or to the preference of market participants. (Calfee 2004-05 Reb. App. B at 3.) Indeed, the "carriage rates reflect market realities" and "have produced longstanding carriage patterns upon which stations, cable operators and cable subscribers have come to rely." (Calfee 2004-05 Reb. App. B at 3-4 quoting "Comments of the National Association of Broadcasters," In re Section 109 Report to Congress, Docket No. 2007-1, at 24-25.)

17. The fee schedule largely coheres with basic economic principles despite its oddities, and there are compelling reasons to believe that fees paid bear a reasonable relationship with the relative value of the distant signals and the programming they contain. (Calfee 2004-05 Reb. App. B at 17.)

18. U.S. cable systems predominantly retransmit those Canadian signals that contain the highest percentages of Canadian content. (Calfee 2004-05 Reb. App. B at 9.) In 2004-2005, the top four Canadian distant signals, as measured by total royalties, accounted for about 77% of the royalties paid. (*See* de Freitas Dir. at 14, Tab 1-Q.) All these signals were CBC signals that contain the least amount of U.S. programming of all Canadian signals. In fact, during this period, 87% of all royalties attributable to Canadian distant signals are paid for CBC signals. (*See* de Freitas Dir. at 11, Tab 1-Q.)

19. Royalty payments for retransmitted Canadian signals will not provide an inflated estimate of the value of those signals because, among other reasons, adding or continuing to carry a distant signal poses a substantial cost to the cable system, regardless of whether a royalty must be paid. (*See* Calfee 2000-03 Tr. 904:3-7.)

20. A chief virtue of the fee generation method is that despite its limitations, it automatically takes into account of whatever forces were at work during the relevant periods, including the impact of changes in the number and variety of signals available for

carriage, changes in perceived attractiveness of programming, and other factors too numerous or too little understood to be identified. (*See* Calfee 2004-05 Reb. App. B. at 14-15.)

21. Because cable operators make rational decisions about what to carry, it is more likely than not that royalties are proportional to the value of the signal. (Calfee 2004-05 Reb. App. B at 5; Calfee 2000-03 Tr. at 878:1-880:6 (stating the systems succeed in establishing a rough relationship between fees and the value of signals).)

3. Three Prior Distribution Proceedings Create Strong Precedent for Making an Award to the CCG Using the Fee Gen Methodology

i. The 1990-1992 and 1998-1999 CARPs Established the Methodology for Making an Award to the CCG

22. The CCG's claim is that it should be awarded shares of the Basic Fund and 3.75% Fund Royalties measured by what was paid for Canadian distant signals and apportioned according to cable operators' valuation of the programming on those signals. The CCG's approach accurately reflects the relative market value of Canadian programming by combining measurements of cable operator behavior (i.e., the signals they choose to carry and the royalties they actually pay), and the cable operators' own expression of the relative value of programming on those same signals (captured in the CCG's cable operator surveys). The CCG's concept is analogous to using the Bortz Survey to allocate royalties among those claimants whose programming was carried on U.S. signals.

23. The CCG's approach has been accepted in both of the last two CARP proceedings and confirmed by the Librarian. It was also accepted by the Judges in the 2000-2003 proceeding, who accorded it "considerable deference." 2000-2003 Order at 34. It is a clear and quantifiable approach that should be followed again in this proceeding.

24. In the 1990-1992 Distribution Proceeding, Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Oct. 28, 1996) (hereinafter 1990-1992 Proceeding), the CCG was awarded 0.955% of the Basic Funds and 0.18718% of the 3.75 Funds. These awards were equal to 51% and 56%, respectively, of the Basic and 3.75% royalties that were paid by cable systems for the carriage of distant Canadian stations. 1990-1992 Proceeding, 61 Fed. Reg. at 55663-4. The remainder of royalties paid for the retransmission of Canadian stations was awarded to the Joint Sports Claimants and Program Suppliers, in accordance with the results of the cable operator study presented by the CCG. 1990-1992 Proceeding, 61 Fed. Reg. at 55663.

25. In the 1998-1999 proceeding, the CARP not only accepted the CCG's approach, but established a formulaic process in calculating the award to the CCG. In reviewing the CARP's decision, the Librarian summarized the core steps of that process as follows:

> Next, the Panel focused on Canadian Claimants using the fee generation approach and determined the amount of the Basic Fund for 1998 and 1999 that was generated by cable systems paying for distant Canadian signals. Within the percentage for each year, the Panel identified the amount of fees attributable to Canadian Claimants' programming, Program Suppliers' programming and Joint Sports Claimants' programming based upon a survey presented by Dr. Debra Ringold. Since Dr. Ringold did not analyze the fees generated by the other parties in this proceeding, the Panel excluded them and adjusted her numbers to equal 100%.

Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3611 (Jan. 26, 2004) (footnote omitted) (hereinafter *1998-1999 Proceeding*). The Librarian also explained fee generation: "[o]nce again, the 'fee generation' approach examines the royalty fees actually paid by cable systems for Canadian programming carried on distant broadcast signals." 1998-1999 Proceeding, 69 Fed. Reg. at 3611 n. 22. The CARP established: "[a]n assessment of changed circumstances, based upon an approximate doubling of the relative fees, implicates a substantial increase from the last award – *when the Canadians' award was determined based upon share of fees generated.*" 1998-99 CARP Report at 14 (emphasis in original).

ii. The 2000-2003 Proceeding before the Copyright Royalty Judges Again Established the Utility of the Fee Gen Methodology

26. The March 3, 2010 Distribution Order again reiterates the viability of the fee generation methodology in assessing the relative marketplace value of the CCG's programming. The Judges describe fen gen as "sufficiently vetted in both the 1990-1992 and 1998-99 proceedings" and note that the methodology had already "endured the scrutiny of litigation and review not just once, but twice," thus entitling fee gen to "deference." 2000-2003 Order at 25-26.

27. The Judges rejected the Settling Parties' four principal criticisms of the fee gen approach. 2000-2003 Order at 26. "The first, that fee generation is nothing more than an accounting artifice or allocation scheme, was considered in large part by the 1998-99 CARP and rejected." *Id.* Further, the "Min/Max" and new 3.75% analyses presented by the CCG in the 2000-2003 proceedings "corroborate the reasonableness of the approach and fall within the 'zone of reasonableness' that guided the Librarian's hand in his analysis of fee generation in the 1990-92 proceeding." *Id.* (citing 61 FR at 55663). Those same analyses are presented as corroboration in these proceedings. *See* CCG PFF § (I)(A)(2)(iii)(a)

28. Also unavailing was the Settling Parties' contention that the CCG failed to present evidence establishing that the fee generation approach reflects the relative marketplace value of their programming or changes in that value. 2000-2003 Order at 26. The Settling Parties' proffer of testimony by Linda McLaughlin and Hal Singer "does not overcome Dr. Calfee's conclusion." *Id.*

29. Finally, the Judges deemed unpersuasive the Settling Parties' assertion that it was legal error to apply the fee generation approach "to all royalties paid by cable systems without regard to whether those systems had the right to retransmit Canadian broadcast signals pursuant to the Section 111 license." 2000-2003 Order at 23 (citing 17 U.S.C. § 111(c)(4)). The Judges did not view Section 111(c)(4) as creating a legal

impediment to the fee gen approach, noting that the provision "governs infringement liability and, as such, is a limitation on the use of the Section 111 license by cable systems. It does not relate in any way to copyright royalties collected under that license, let alone their distribution." 2000-2003 Order at 28 (emphasis in original).

30. In the last proceeding, continued success in the face of two litigated challenges served as "compelling reason for establishing a high standard for evaluating the fee generation approach." 2000-2003 Order at 25. The Judges' most recent affirmation of fee gen further solidifies the deference owed and the high standard that must be overcome to challenge fee generation as a viable indication of relative market value.

iii. There was no Ruling with Regard to the CCG's 2000-2003 Claim Prior to the Close of Evidence in this Proceeding

31. The record in the 2004-2005 proceeding came to a close on February 4, 2010. *See In re Matter of Distribution of 2004-2005* Cable Royalty Funds Tr: 3386:9-12. On March 3, 2010, the distribution order for *In re Matter of Distribution of the 2000-2003 Cable Royalty Funds* was issued (hereinafter 2000-2003 CRB Distribution Order). In light of the uncertainty of having to put on its 2004-2005 direct and rebuttal cases without the guidance of the 2000-2003 distribution order, the CCG put on evidence of relative market value during the period of 2004-2005 and evidence of changed circumstances in 2004-2005 from both the 1998-1999 proceeding and the 2000-2003 proceeding.

32. In the 2000-2003 CRB Distribution Order, it was acknowledged that the CCG's data reflected "a meaningful increase in the relative growth of the fees generated for both the Basic and 3.75% Funds for the Canadian Claimants' programming from the 1998-1999 to 2000-2003 period." *Id.* at 34. This was "confirmed through examination not only of this [1998-99 to 2000-2003] period alone, but from 1990-1992 as well...." *Id.*

33. Between its direct and rebuttal cases, the majority of the evidence submitted by the CCG includes data dating back to 1998 in order to allow a comparison to both 1998-1999 and 2000-2003. (*See eg.* de Fritas Dir. Tabs M-V).

34. While the proper period with which to measure changed circumstances would be from the 2000-2003 period to the 2004-2005 period, the Judges should not look at the 2000-2003 period in a vacuum. As done in the 2000-2003 Distribution Order, the Judges should to refer to the 1998-1999 period for confirmation of changed circumstances. *See* CRB Distribution Order at 34.

iv. The Judges Should be Guided by the Precedential Effect of these Prior Rulings

35. The two prior CARP decisions and the 2000-2003 decision by the Judges guide the determination of the Judges for 2004-2005. Under 17 U.S.C. § 803(a)(1):

> The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, Copyright Arbitration Royalty Panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the Court of Appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

36. The factors at issue in this case have been shaped during thirty years of litigation undertaken to establish the distribution of Section 111 royalties. Hence, the 1998-1999 CARP continued: "[p]lainly, a CARP ought not casually depart from established precedent. 1998-99 CARP Report at 14. As one claimant group noted, a system that already imposes substantial burdens on copyright owners would become

completely unworkable if such precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly - simply because new decision-makers had different views or different personal preferences concerning the intrinsic worth of certain programming." *See id.* at 14 (quoting Proposed Findings of Fact and Conclusion of Law of the Joint Sports Claimants at 2).) The CARP concluded its discussion of precedent by balancing the need for precedent with the obligation to make decisions based on the record before it regardless of whether circumstances have changed since the last proceeding. *Id.*

B. Other Methodologies Do Not Provide A Valid Means for Making an Award to the CCG

1. The Bortz Study is Again Inadequate to Determine the Relative Market Value of the CCG's Programming

i. Prior Rulings of the CARP Have Found Bortz Unreliable with Regard to Canadian Programming

37. Historically, CARPs have found the Bortz study to be unreliable when attempting to determine the relative market place value of CCG programming. In the 1990-1992 proceeding, the CARP found that the Bortz survey figure was "totally unreliable." 1990-92 CARP Report at. 141. This was due to Mr. Bortz suggesting that "the small numbers were incapable of being accurately measured." 1990-92 CARP Report at 141. Mr. Bortz stated that the estimates were good within 2-4 percentage points, given the fact that their shares in the Bortz survey was .5% or less and their claim was for less than 2%, "the Bortz survey was simply unable to measure the Canadians' share." 1990-92 CARP Report at 64.

38. In the 1998-99 proceeding, the CARP again found "the Canadians share can not [sic] be reliably determined from the Bortz survey, the Nielsen (or Gruen) study, or the Rosston regression analyses." 1998-99 CARP Report at 72. With regards to Bortz, the CARP stated parenthetically that the Bortz study does not produce statistically significant results for Canadians. 1998-99 CARP Report at 31 n.13.

39. What was true in 1990-92 and 1998-99 for Bortz is true yet again in 2004-05. The Bortz study is an unreliable method for determining the relative market value of CCG programming for four reasons: (1) stratification deficiencies in the survey; (2) the Bortz Survey sample would have to be tripled to adequately measure the relative market value of CCG programming; (3) the questionnaire design was biased against niche programming categories; and (4) the Bortz results are economically implausible. These four reasons, both in conjunction with one another and on their own provide sufficient basis for finding the Bortz study unreliable with regard to the CCG.

ii. The Bortz Survey Sample Would Have to be Tripled in Order to Adequately Measure the Relative Value of Canadian Programming

40. For the Bortz survey to have had a sample size sufficient to have a confidence interval of 95% and have the value of CCG signals plus or minus 5%, the Bortz survey would have to be tripled in size. CCG PFF § (II)(B)(1)(iii)(a)(1). Such a wide range illustrates both a large margin for error and the primary reason why the Bortz survey is too inaccurate to measure the relative market value of CCG programming. See id. When confronted with similar evidence, previous CARPs have found the Bortz survey to be too inaccurate with regard to the CCG , and here, the Judges should do the same. *See* 1990-92 CARP Report at 64, 141; 1998-99 CARP Report at 31 n. 13, 71.

iii. Stratification Deficiencies Plague the Bortz Survey

41. In stratifying its samples by royalty payments, the Bortz survey oversampled larger systems and undersampled smaller systems to the detriment of the CCG. *See* CCG PFF §(II)(B)(iii)(a)(2). The disproportionate sampling resulted in the Bortz sample containing more of the larger systems which carry fewer CCG signals than of the smaller systems which carry more CCG signals. (Gary Ford Reb. at 11-13, Tables 3 & 4.)

42. The disproportionate sampling also affected the responses given to questions 2b and 4 of the Bortz survey. Since larger systems carried more commercial signals on average than CCG signals, when asked to recall the most popular programming, cable system operators recalled more commercial television programs than CCG programming. When asked about relative market value (question 4), the cable system operators gave responses consistent with their answer to question 2b and undervalued their actual valuation of CCG programming. (Gary Ford Reb. at 15-19); see also CGG PFF § (II)(1)(iii)(b)-(c)

43. Lastly, the disproportionate sampling resulted in an arbitrary exclusion of a quarter of all Canadian signals. (Gary Ford Tr. 2981: 15-17); *see also* CCG PFF § (II)(1(iii)(a)(2).

44. The above factors, both individually and in their totality had an impact on the value of the estimates obtained by the Bortz survey sufficient to find the survey an unreliable measure of the relative value of CCG programming.

45. Indeed Dr. Gary Ford testified that the Bortz study has not improved with regard to sampling since 1990-1992. CCG PFF § (II)(B)(1)(iii)(a)(3). Despite getting more respondents for the 2004-2005 survey, the stratification methodology remained the same. This appears to have been a conscious choice made by Bortz. Since the 1990-1992 study was "totally unreliable" tis Panel should make the same finding with regard to the 2004-2005 study. *See* 1990-92 CARP Report at 141.

iii. Faulty Design of the Bortz Questionnaire Further Exacerbates its Deficiencies

46. The Bortz questionnaire had a design defect which resulted in its respondents attempting to provide internally consistent responses within the survey instead of actual estimations of relative market value of CCG programming. CCG PFF § (II)(B)(1)(iii)(b). Question 2(b) of the Bortz survey, in asking respondents a question an

unaided recall question about the popularity of various types of programming, caused the cable operators to ignore other categories of programming enjoyed by a smaller, but still profitable, subscriber segment. (*Id.*) When asked question 4a, the key question on relative value, the respondents undervalued CCG programming in order to provide answers consistent with their answers about the most popular programming on Question 2(b). (*Id.*) Had respondents been asked about the segments in which they provide programming, they likely would have considered the value to their system of all substantive segments and potentially changed their answer to Question 4(a). (*Id.*) While the nature of change is unknown, the fact that such change would have likely occurred leads to the conclusion that the Bortz survey is an unreliable measure of the relative value of CCG programming.

v. The Bortz Survey Results are not Congruent to Economic Realities with Regard to the CCG

47. Dr. Calfee's comparison of the minimum amount cable systems would have saved if they dropped the CCG signals compared to the cable systems' valuations of CCG signals shows an economically implausible result which undermines the validity of the Bortz survey responses for CCG signals. CCG PFF § (II)(B)(1)(iii)(c). Cable systems are free to drop signals when their value is not worth their cost. In the majority of instances, cable systems carrying CCG signals would have had substantial savings in royalty payments if they dropped the CCG signal. The potential savings are so substantial that they are economically irreconcilable with the valuations given by the cable operators in the Bortz survey. Instead, the most plausible explanation for the results is the valuation questions of the Bortz survey are unable to accurately value CCG programming. Since the Bortz survey valuations do not show a connection between valuation and amount potentially saved, the Bortz survey cannot provide even a rough valuation for CCG programming and should not be used to measure the relative value of CCG programming. (Calfee 2004-05 Reb. at 7-9.)

2. The McLaughlin Adjustment Suffers from the Same Defect as Bortz

48. The McLaughlin adjustment does not adequately measure the relative value of Canadian programming because it suffers from the same sampling defects as the Bortz Study, which the adjustment does not correct. CCG PFF (II)(1)(B)(iv). If Bortz had properly sampled the CCG signals, the adjustments should only have had a minor effect on the overall numbers. However, adding a single observation adjustment to the 2004 sample more than doubled the estimated relative value. Adding a second observation (as done by Dr. Gary Ford), increased the estimated relative value by ten-fold, from 0.2% to 1.9%. (Gary Ford Reb. at 21.) Adding three observation adjustments to 2005 increased the adjustment five-fold, from 0.3% to at least 1.5%. (Calfee 2004-05 Reb. at 9.) As a result of such dramatic shifts in what should otherwise be minor adjustments, the McLaughlin methodology does not allow a reliable estimate of the relative market value of CCG distant signals.

49. Moreover, McLaughlin's adjustment does not address the bias in the questionnaire which systematically underestimates the value of Canadian programming when respondents are asked about the Canadian signal. (*Id.*) This is an ingrained flaw of Bortz and one that McLaughlin cannot adjust for. (*Id.*) For this reason as well, the McLaughlin methodology does not allow for a reliable estimate of the market value of CCG distant signals.

i. If Bortz Is Applied, Both the McLaughlin Adjustment and the Gary Ford Adjustment Must Be Made To Fit Its Data

50. If Bortz was applied by this Panel to determine relative market value of the CCG signals, not only would the McLaughlin adjustment need to be applied to CCG signals, but so too does the Gary Ford adjustment to the McLaughlin adjustment. See CCG PFF § (II)(1)(B)(v). It is well established that the Bortz survey did not obtain estimates of programming for cable systems that did not import a commercial distant signal. While imperfect, the McLaughlin adjustment adds back the estimated values of

PTV and Canadian distant signals in a way that does not incur the same questionnaire bias that affects the rest of Bortz. *See id.* However the McLaughlin adjustment underestimated the augmented royalties of the CCG by omitting Comcast of Washington IV, a cable system which paid royalties on $688,245, and which should have been assigned to stratum 4 (the largest royalty stratum). *See id.*

51. Since the Bortz survey intended to interview all of the stratum 4 systems and since Comcast of Washington IV only imported one distant signal, the Canadian signal CBUT, it should have been included in McLaughlin's augmented estimate of royalties due the Canadians. (*See* Ford Reb. at 21.) With Dr. Gary Ford's correction, the augmented Canadian royalty increases by $392,994.17 (i.e., $688,256 in system royalties times 100% of value times 57.1% response rate) and the augmented Canadian percentage increases from 0.5% to 1.9% for 2004, using McLaughlin's methodology. (*See id.*) While McLaughin's adjustment is imperfect compared to fee gen, both the McLaughlin and Ford adjustments are necessary should this Panel apply Bortz to determine relative market value of the Canadian distant signals.

3. The Gruen Studies Fail to Determine the Relative Market Value of any Claimant Group's Programming

52. The Gruen Surveys failed to determine the relative market value of any Claimant group's programming for four main reasons: (1) it surveyed the wrong population; (2) respondents were not properly qualified; (3) the questionnaire contained numerous deficiencies; and (4) non-response basis could have skewed the results. *See* CCG PFF § (II)(B)(2)(ii).

53. Additionally, the Gruen Surveys specifically failed to accurately measure the relative value of Canadian signals because: (1) the surveys used examples of Canadian programming which were likely unfamiliar to regular viewers of Canadian television or not shown during the studied year; (2) the sample size was too low, creating a strong

possibility of non-response bias, and; (3) the representation of respondents with access to Canadian distant stations was sparse. *See* CCG PFF § (II)(B)(2)(ii).

i. The Gruen Studies Surveyed the Wrong Population

54. The marketplace in which to determine relative marketplace value is where the buyer is a cable system operator ("CSO") or multi-system operator and the sellers are individual broadcast stations. *See* 1998-99 CARP Opinion at 10-11. "This is not to say that the hypothetical free market would be identical to the cable network marketplace. For example, CSOs likely would not base their distant signal programming purchase decisions merely upon viewing ratings." 1998-99 CARP Opinion at 11-12. In accepting the Bortz Methodology for the non-Canadian claimants, the CARP acknowledged that the demand side would likely determine the relative values of programming and it was probable that CSOs incorporated their understanding of the sellers' side of the marketplace. 1998-99 CARP Opinion at 22.

55. Because buyers and sellers in the hypothetical marketplace are cable system operators and individual broadcast stations, the Gruen Surveys' targeting of cable subscribers – who are non-parties in the hypothetical market place – undercuts their utility in measuring relative marketplace value. (*See* Calfee Reb. at 3.) As stated by Dr. Calfee:

> Subscribers face a very different situation from that faced by cable operators. Except when choosing among tiers, subscribers do not actually choose which distant signals to pay for. Thus, they do not allocate their cable payments toward various programming categories and have no reason to ponder the relative value of those categories. Given that the hypothetical marketplace at issue is one in which cable operators purchase bundles of programming, the results from the Gruen survey are too distant from cable system operator decision-making to provide a basis for estimating those operators' assessment of the relative value of programming bundles.

(Calfee Reb. at 3.) This failure alone is sufficient to disregard the Gruen Surveys when determining relative marketplace value. *See* 1998-99 CARP Opinion at 10-11.

ii. The Respondents Were Not Properly Qualified

56. In addition to surveying the wrong population, the Gruen Surveys are fatally flawed because they did not determine whether the respondents actually viewed any distant signals. (Ratchford Tr: 3164:22-3165:4; *see* CCG PFF § (II)(B)(2)(ii).) The Gruen Surveys failed a basic tenant of survey research: to ensure that respondents are knowledgeable enough to answer the questions. (Berman Reb. at 8; *see* Ratchford Reb. at 4.) Because cable subscribers only focus on roughly a quarter of the 70 to 100 channels generally available to them, it is unlikely that all survey respondents have a great deal of experience with programming on distant signals. (Ratchford Reb. at 5; *see* Berman Reb. at 8-9.) The opinions of respondents who rarely watched, never watched or did not know if they watched the relevant signals is not sufficiently reliable for purposes of assessing the marketplace value of such signals. (*See* Ratchford Tr. 3164:5-14; Ratchford Reb. at 7-8.) The reliability of the Gruen Surveys results is further undermined by the fact that such responses are weighted on equal footing with the opinions of respondents who actually do watch the relevant signals.

iii. The Questionnaire Was Deficient

57. Beyond surveying the wrong population and failing to qualify respondents, there were a number of deficiencies in the questionnaire itself which undermined the reliability of the answers received. (Ratchford Reb. at 8; *see* CCG PFF §(II)(B)(2)(ii).)

58. The first flaw in the questionnaire is that only one respondent answered for the entire household, regardless of whether the respondent knew the viewing behavior or preferences of the other household members. (Ratchford Reb. at 9.) Because American households typically have several television sets located in different parts of the home, it is likely that a significant number of respondents did not know exactly what others were viewing at a given time. This calls into question not only whether the respondent knew what others watched, but whether the respondent could opine as to the strength of other household members' preferences. (Ratchford Reb. at 9.)

59. A second flaw in the questionnaire is that it lacked a survey question to record the respondent's gender, despite the fact that viewing behavior is likely related to gender. (Ratchford Reb. at 9; Berman Reb. at 9-11.) If one gender is overrepresented, the results will likely be skewed in favor of that gender, as demonstrated by Mr. Berman's Pilot Study. (Ratchford Reb. at 9; Berman Reb. at 10-11.) The unavailability of data as to respondents' gender prevents any assessment as to the presence of gender bias or the implementation of curative measures to correct for gender bias. (*See* Ratchford Reb. at 9.)

60. Respondents' lack of familiarity with the distant stations covered in the Gruen Surveys' or the arguably esoteric program type definitions renders the allocations made pursuant to the questionnaire undependable. (Ratchford Reb. at 10-11; Ratchford Tr. 3177:22-3179:2.) Dependability of response is further compromised because the question seeks an allocation a year after the royalties were incurred and does not reference a specific time period in the central allocation question. (Ratchford Reb. at 9-10; *accord* Berman Reb. at 12-13; Ratchford Reb. at 11.)

iv. The Gruen Survey's Sample Size Created a Strong Possibility of Non-Response Bias

61. The sampling design of the Gruen Survey, combined with its small sample size created a strong possibility of non-response basis and may have skewed the sample to the determent of the CCG. (Ratchford Reb. at 13); *see* CCG PFF §(II)(B)(2)(ii). The 2004 and 2005 response rates were 15.83% and 27.17%, respectively, affording the strong possibility of non-response bias. (Ratchford Reb. at 15-16.) As Dr. Ringold testified, response rates of 50% are the minimum required to reduce the likelihood of non-response bias. (Ringold Tr. at 1306:16-17.)

62. In sum, the design defects in the Gruen Surveys invite non-response error and undercut the propriety of using those surveys to determine relative market value. (*See* Ratchford Reb. at 11.)

v. The Canadian's Were Specifically Affected by Unique Deficiencies in the Gruen Study

a. The Examples of Canadian Programming Used in the Questionnaire Were Likely Unfamiliar to Viewers of Canadian Television or Not Shown During The Studied Year

63. By selecting obscure examples of Canadian programming that were shown either infrequently or not at all during the 2004-2005 period, and highly popular examples of non-Canadian programming, the Gruen Surveys ensured that respondents would be likely to favor non-Canadian programming in their allocation exercise. (Ratchford Reb. at 6-7); *see* CCG PFF § (II)(B)(2)(ii). The failure of the Gruen Surveys to require the program types to be actually viewed on the distant signal in question further exacerbates the lack of reliability of such allocations. (Ratchford Reb. at 6.)

b. The Representation of Respondents with Access to Canadian Distant Stations was Sparse

64. Based on the very small number of Canadian signals included in the survey and the unlikelihood that subscribers to systems carrying Canadian signals actually received those signals, the Gruen Survey provides an inadequate measure as to the relative marketplace value of Canadian signals. (Ratchford Reb. at 16-17); *see* CCG PFF §(II)(B)(2)(iii) Given that the number of viewers of the relevant Canadian programs is likely to be a fraction of those sampled, the sample sizes are too small to allow inferences about the whole population of viewers of these programs. (Ratchford Reb. at 17.)

4. The Ford Study Fails To Determine The Relative Market Value Of Any Claimant Group's Programming

i. George Ford's Study is Too Far Removed From the Hypothetical Marketplace in Which These Proceedings are Based

65. George Ford's advertising study fails to determine the relative market value of any claimant group's programming, specifically including the CCG's, because it relies on data too far removed from actual cable operator decision making. As previously discussed within the context of the Gruen study, the 1998-99 CARP opinion established the marketplace in which to determine relative marketplace value is where the buyer is a cable system or multi-system operator and the sellers are individual broadcast stations. *See* 1998-99 CARP Opinion at 10-11. Since cable system operators do not receive ad revenue from distant signals, there is no reason to think cable system operators assess the relative value of distant signals according to their value as advertising vehicles. (Calfee Reb. at 3-4); 17 U.S.C. 111(c)(3) (stating CSOs may not, except in compliance with FCC rules, willfully alter any commercial advertisements during, before, or after the retransmitted programs); *see also* CCG PFF §(II)(B)(3)(ii).

66. When discussing the compulsory license market the CARP noted the disconnect between the broadcasters "selling" the programming and advertising: "They [the Broadcasters] would make programming decisions calculated to attract viewers in order to maximize advertising revenue - irrespective of any possibility that their signals might be subsequently retransmitted as distant signals." *See* 1998-99 CARP Opinion at 12. "Broadcasters would be indifferent respecting distant retransmission because distant carriage does not enhance their advertising revenues." *See* 1998-99 CARP Opinion at 12.

67. Furthermore, the only mechanism which a distant signal importer can generate revenue (a concept different from Fee Gen) is through payments for subscriptions to bundles that include those signals. (Crawford Reb. at 11.) For non-broadcast cable

networks, which present a different, partially advertising-based model, the great majority of cable system revenues come from subscriber fees, not advertising revenue. (Crawford Reb. at 11-12.) Indeed, Ford's model fails to account for the fact that cable systems generate the bulk of their revenue from subscriber fees. (Desser Reb. at 4.)

68. Since neither cable system operators nor broadcasters would rely on advertising in the hypothetical market place at issue in this proceeding, Ford's study cannot be considered reliable to determine relative marketplace value for any claimant in this proceeding.

ii. The Ford Study's Results Are Too Far Removed From the Actual Reported Relative Market Data Available

69. It is and has been the position of the CCG that whenever possible, relative market value should be based on or closely related to moneys actually paid by CSOs for the programming. Dr. Trautman, on behalf of the Settling Parties, analyzed the advertising model of George Ford by applying it to programming on cable networks TBS and TNT and also the top 25 cable networks. (Trautman Reb. at 4-9); *see also* CCG PFF (II)(B)(3)(ii). Dr. Trautman showed a large disconnect between the estimated relative market value for JSC programming using Ford's approach and actual data showing relative value.

70. Since these proceedings seek to determine the relative marketplace value of claimant group programming, applying a methodology whose application uses data so far removed from actual evidence of relative market value severely undercuts the utility of such a method. Not only does Ford's approach attempt to move away from actual relative market value, it attempts to move the entire market from that between the CSOs and broadcasters to another undefined theoretical market. Accordingly, Ford's approach fails.

C. Minimum Fees Paid by Cable Systems Carrying No Distant Signals Should Be Distributed in the Same Manner They Have Always Been Distributed

71. A substantial portion of the total royalties paid by Form 3 cable systems in 2000-2003 was derived from payments of the minimum fee by systems carrying no distant signals. (de Freitas Dir. at 13, Tab 1-0.) This is up from a nearly insignificant number in 1997. (de Freitas Dir. at 13, Tab 1-0.) This change was directly attributable to the loss of WTBS and other superstations as distant signals after 1997. (*See* Martin Reb. Tr. 2926:15-21) Unlike the money paid into the Basic, 3.75%, and Syndex funds, this money is not attributable to the carriage of a particular distant signal or the retransmission of a specific type of distant programming. Rather, it is a payment mandated by the Copyright Act to be paid by all large (Form 3) cable systems for the basic right to carry distant signals. When distant signals are carried, this fee is applied to the amount owed by the cable system for the distant signals actually carried. In the past, the minimum fees from systems carrying no distant signals (along with fees paid by Form 1 and Form 2 cable systems) were distributed by the Copyright Office as part of and in accordance with the CRT or CARP Basic Funds award.[10]

72. The 1998-1999 CARP, dealing with these increased minimum fee royalties recognized that the fees should be isolated for the purposes of allocating distant royalties to signals so that Basic Royalties paid for the carriage of distant signals can be compared

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[10] *See e.g., Nat'l Ass'n of Broadcasters*, 146 F.3d at 914 (emphasis added) explaining the makeup of the three funds:

> The disputed royalties consist of "Basic Funds," 3.75% Funds" and "Syndex Funds," which in turn are subdivided into 1990 collections and 1991-1992 collections. *The Basic Funds include all of the royalties collected from small- and medium-sized cable systems* as well as the royalties collected from large cable systems for retransmission that were permitted under the now defunct, distant signal carriage rules of the Federal Communications Commission (FCC).

S*see also* 1990-92 Proceeding, 61 Fed. Reg. at 55654 (identifying funds to be awarded).

meaningfully to prior years. (1998-99 CARP Report at 65 n. 33.) This was done by the parties in the 1998-1999 Proceeding and endorsed by the 1998-1999 CARP. (1998-99 CARP Report at 65 n. 33.) This approach was then later incorporated into the process used for allocating royalties by CDC. In this proceeding, all royalty fund data presented by the CCG use the updated CDC allocation methods so that royalties can be meaningfully compared to those from the 1998-1999 Proceeding.

73. After the awards are final, when it is appropriate to distribute the minimum fees, the Copyright Office's historical practice should be followed. That practice is to add the minimum fee—along with Form 3 fees paid for low power and Mexican signals and Form 1 and Form 2 fees—to the Basic Royalty fees and distribute them to the Claimant groups using the CARP's or CRT's awards for Basic Royalties. *See* 1998-99 CARP Report at 65 n. 33.

D. Changed Circumstances Support Granting the CCG's Requested Award

1. The Standard of "Changed Circumstances" does not Require the Change to Have Any Specific Minimum Threshold for Recognition

74. Evidence of changes in relative market value may take the form of changed circumstances. The concept of "changed circumstances" was adopted as a criterion for the distribution of the 1980 cable copyright royalties. (1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9564 (Mar. 7, 1983) (hereinafter 1980 Proceeding), *aff'd Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985) (hereinafter *NAB v. CRT*).

75. In *NAB v. CRT*, the court considered an argument that in making the 1980 awards, the CRT had relied solely on the standard of changed circumstances and did not evaluate new evidence. The court agreed that changed circumstances could not be the sole criteria upon which the Tribunal relies:

> We agree that, as the parties themselves recognize, it would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of "changed

> circumstances." The invalidity of this rigid approach is strongly suggested by our two prior opinions, which expressly contemplated that in the annual determination process the claimants would improve upon the quality and sophistication of their evidentiary submissions. At the same time, it is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award. But if a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.

Id. at 932.[11]

76. Therefore, under the concept of "changed circumstances" it is appropriate to alter an award when evidence in the current proceeding shows a change from similar evidence presented in a prior proceeding. The import of the *NAB* decision is that parties may also introduce new evidence (or improved evidence intended to correct previous deficiencies), of a kind dissimilar from the prior proceeding, and such new evidence should be evaluated by the adjudicating body. Phrased differently, the adjudicating body may not limit the evidence upon which it relies to changed circumstances alone, particularly where the party contends that the old form of evidence is not as good as the new form of evidence. Thus, parties may update their evidence to established changed circumstances or introduce new forms of evidence which they contend better measure their relative market value (or both). The goal, assessing relative market value, remains the same; only the forms of evidence vary.

77. The 1998-1999 CARP used changed circumstances in two ways with respect to the CCG: First, it compared changes in carriage data from the 1990-1992 to 1998-1999 proceedings to see if there were changes in similar evidence. *See* 1998-99 CARP Report at 70-72. Second, it looked to see if any other changed circumstances could

[11] The Court went on to conclude that the CRT had not in fact actually relied exclusively on changed circumstances. *NAB v. CRT*, 772 F.2d at 932 ("The CRT, however, denies having employed an exclusive, 'changed circumstances' standard. Upon examining the Tribunal's 1980 Determination, we agree that it did not in fact do so.")

be identified which would affect the CCG's claims. *Id.* at 74. The CARP discerned no changed circumstances that would affect the Canadian awards other than changes in royalties. *Id.* The CARP focused on the change in shares of fees generated from the prior period (a comparison of similar evidence) finding that change "impressive." *Id.* In the end, the CARP based its award to the CCG on a straight application of the fee gen based methodology urged by the CCG.

78. The Judges make clear in their March 3, 2010 Distribution Order that, "[u]nless the Canadian Claimants can adequately demonstrate 'changed circumstances' from the 1998-99 period to the 2000-2003 period, they have not proven entitlement to their claim." Order at 28. As to the minimum threshold of "change" required for this finding, the Judges reason as follows:

> The question arises: must we find an approximate doubling of fees generated, as the CARP did, in order to find there are sufficient changed circumstances to award the Canadian Claimants their requested share of the royalties?
>
> We answer that question in the negative. . . . [W]e therefore do not require the Canadian Claimants in this proceeding to demonstrate a similar increase in fees generated. Order at 34.

79. Unlike the deference owed to the CCG's proffered methodology – i.e. fee generation approach plus changed circumstances) – a factual inquiry is appropriate when measuring the quantum of changed circumstances. Order at 34. Phrased differently, the CCG is not saddled with the burden of precedent with regard to how much change is sufficient to show changed circumstances.

80. In assessing changed circumstances, the Judges should recognize the inherent relationship of the CCG's fee generation methodology with changed circumstances. The strength of using fee generation as evidence of relative market value is that it records the actions of cable operators, the relevant market actors, and so inherently incorporates changes in market conditions whether they can later be identified or not. (*See* Calfee 2000-2003 Reb. at 14-15, 17.) That is, the CCG's fee generation methodology, when applied to the relevant data for the period at question, here the 2004-2005 royalty

data and the 2004-2005 Ford/Ringold Survey, adjusts automatically to take into account changed circumstances that are reflected in either cable operators' actual carriage decisions regarding distant signals or their valuation of the content on Canadian Distant signals.

2. Carriage of Canadian Distant Signals Underwent Meaningful Change

81. The data submitted in the prior proceeding reflected a "meaningful increase" in the relative growth of the fees generated from 1998-99 to 2000-2003 period, as confirmed through examination of the 1990-92 to 2000-2003 period. Order at 34. Moreover, "the proportional increase in subscriber instances for Canadian distant signals, relative to all other signals" during these periods was found "significant as well." *Id.*

82. As will be shown below, the royalties and instances of carriage for Canadian distant signals have increased substantially from 1998-1999 and from 2000 and 2001 but have stayed relatively the same as 2002 and 2003. Indeed, the CCG's proposed award for 2004 and 2005 is lower than its awards for 2002 and 2003, because while royalties paid for Canadian signals have not changed, much of the rest of the pool has increased. Thus, the CCG is proffering a methodology that, if changed circumstances are found, would result in a slightly lower award in this proceeding than in the 2000-2003 proceeding.

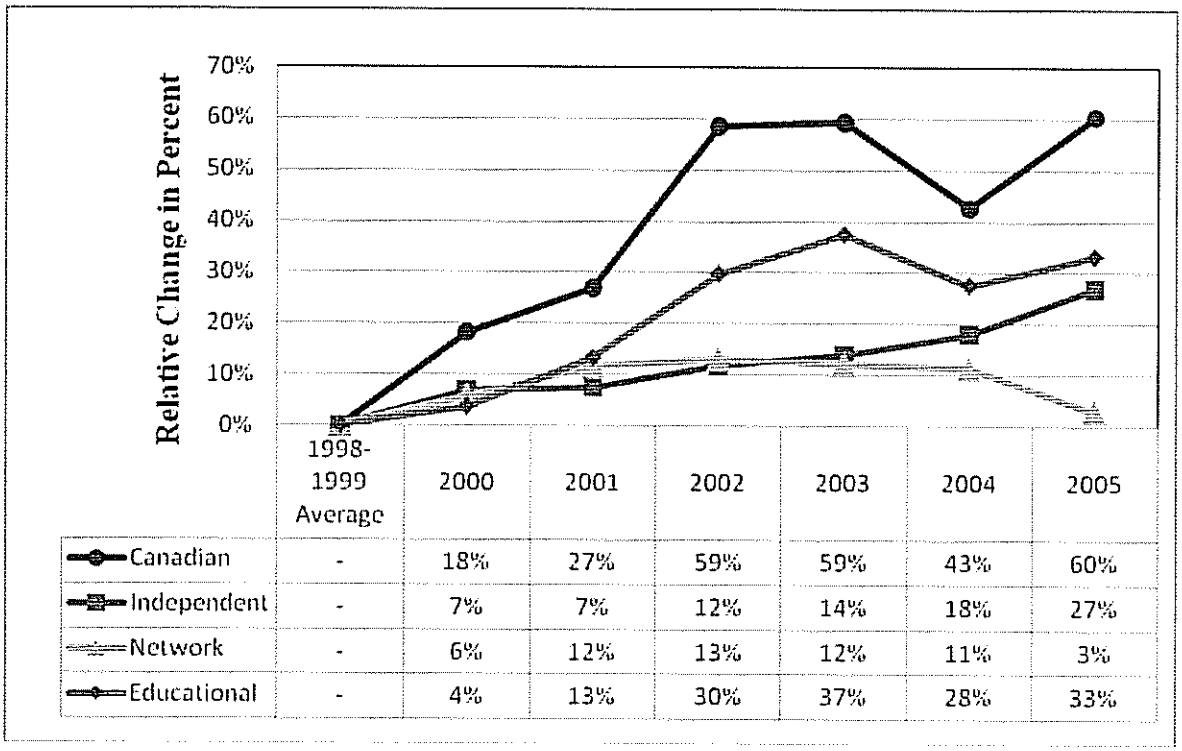
83. In 2004-2005, Form 3 cable operators paid $7.3 million in Base Rate and $1.2 million in 3.75% Rate royalties for the carriage of distant Canadian signals. (de Freitas Dir. at Tab M, pp. 1-2); CCG PFF §(II)(A)(2)(iii)(a)-(b). That money was paid by cable operators to compensate "the creators of the programs they retransmitt[ed]." *1980 Proceeding*, 45 Fed. Reg. at 63036. That is, the Copyright Act required those cable systems to pay over $8.5 million in royalties to compensate the owners of programs shown on those Canadian stations.

84. The royalties paid each year for the carriage of Canadian distant signals in 2004-2005 grew at a greater rate over the 1998-1999 period than for all other distant signal

types, as shown in Figures 2, 3 and 4, below. As these figures show, however, the relative change in royalties paid for Canadian distant signals did not show consistent growth for all accounting periods and all types of royalties. Nevertheless, the growth in the 2002-2004 period is substantial when compared to the 1998-2001 period. In this context, the changed circumstances, a change in royalties, is captured directly by the fee gen methodology.

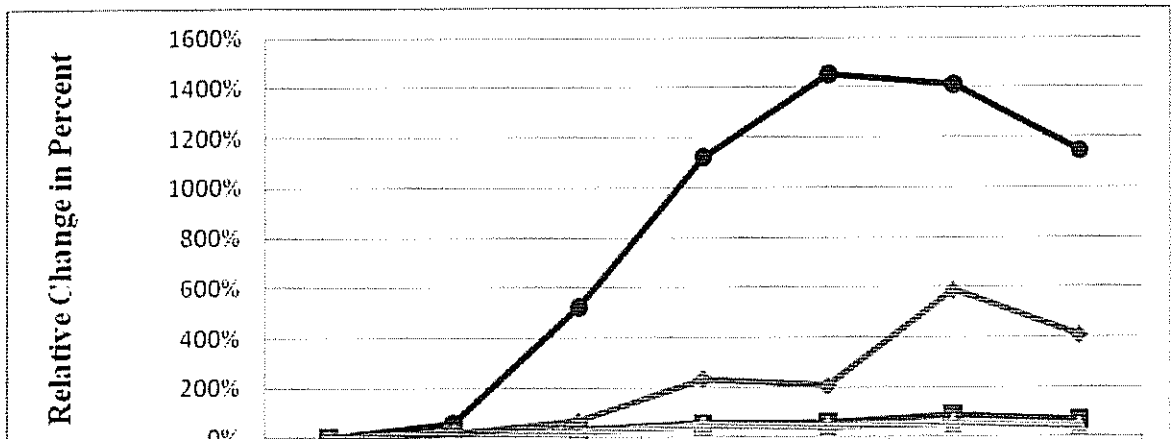
Figure 2: Relative Change in Base Rate Royalties for Distant Carriage Since 1998-1999

(de Freitas Dir. at Tab N, p. 6)



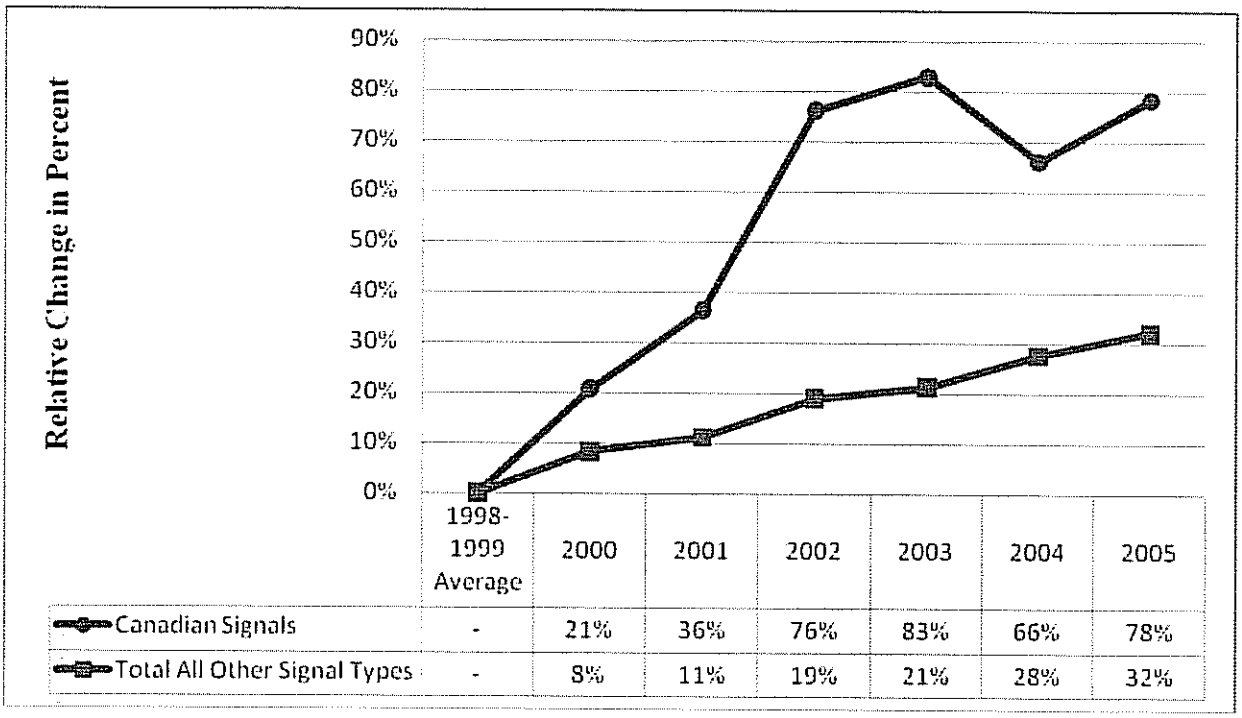
	1998-1999 Average	2000	2001	2002	2003	2004	2005
Canadian	-	18%	27%	59%	59%	43%	60%
Independent	-	7%	7%	12%	14%	18%	27%
Network	-	6%	12%	13%	12%	11%	3%
Educational	-	4%	13%	30%	37%	28%	33%

Figure 3: Relative Change in 3.75% Royalties for Distant Carriage Since 1998-1999
(de Freitas Dir. at Tab N, p. 7)



	1998-1999 Average	2000	2001	2002	2003	2004	2005
Canadian	-	56%	521%	1121%	1451%	1409%	1144%
Independent	-	18%	31%	54%	58%	88%	66%
Network	-	15%	19%	48%	43%	51%	39%
Educational	-	15%	66%	234%	204%	586%	406%

Figure 4: Relative Change in Total Royalties for Distant Carriage Since 1998-1999
(de Freitas Dir. at Tab N, p. 5)

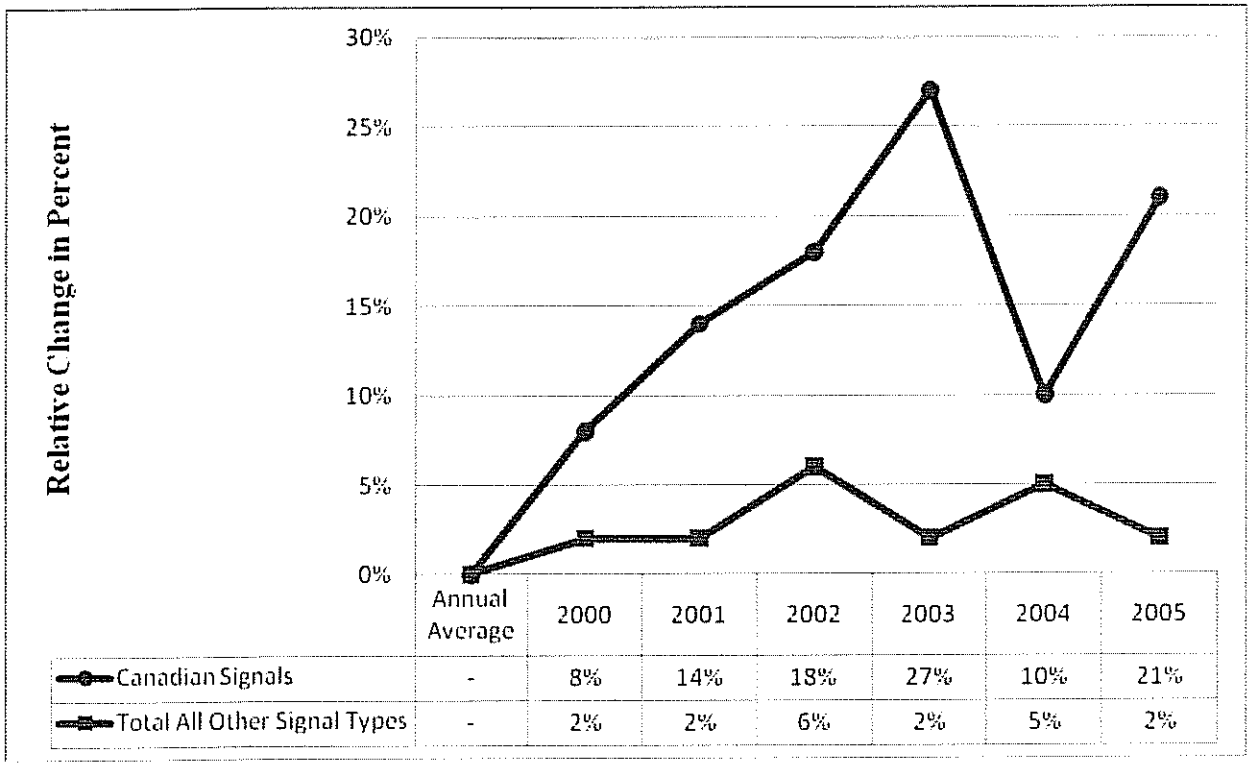


	1998-1999 Average	2000	2001	2002	2003	2004	2005
Canadian Signals	-	21%	36%	76%	83%	66%	78%
Total All Other Signal Types	-	8%	11%	19%	21%	28%	32%

85. Since 1998-1999, Canadian programming has expanded its American audience relative to the programming of other claimant groups as measured by subscriber instances.[12] *See* CCG PFF § (II)(A)(4)(i). This can be seen in Figure 5 which shows the relative change in subscriber instances:

[12] The number of subscribers presented in this table is cumulative. So, if a cable system has 10,000 subscribers and carries one Canadian and four independent signals on a distant basis in a given accounting period, CDC allocates 10,000 subscribers to Canadian signal for that period and 10,000 to each independent signal. Though the total number of subscribers reported by CDC exceeds the number of people subscribing to cable in the U.S., the subscriber instances reported by CDC are an accurate depiction of the number of people who can see a particular distant signal in the U.S. and, in the aggregate, present a reasonable basis for comparing the relative reach of each signal type. (de Freitas Dir. at 15.)

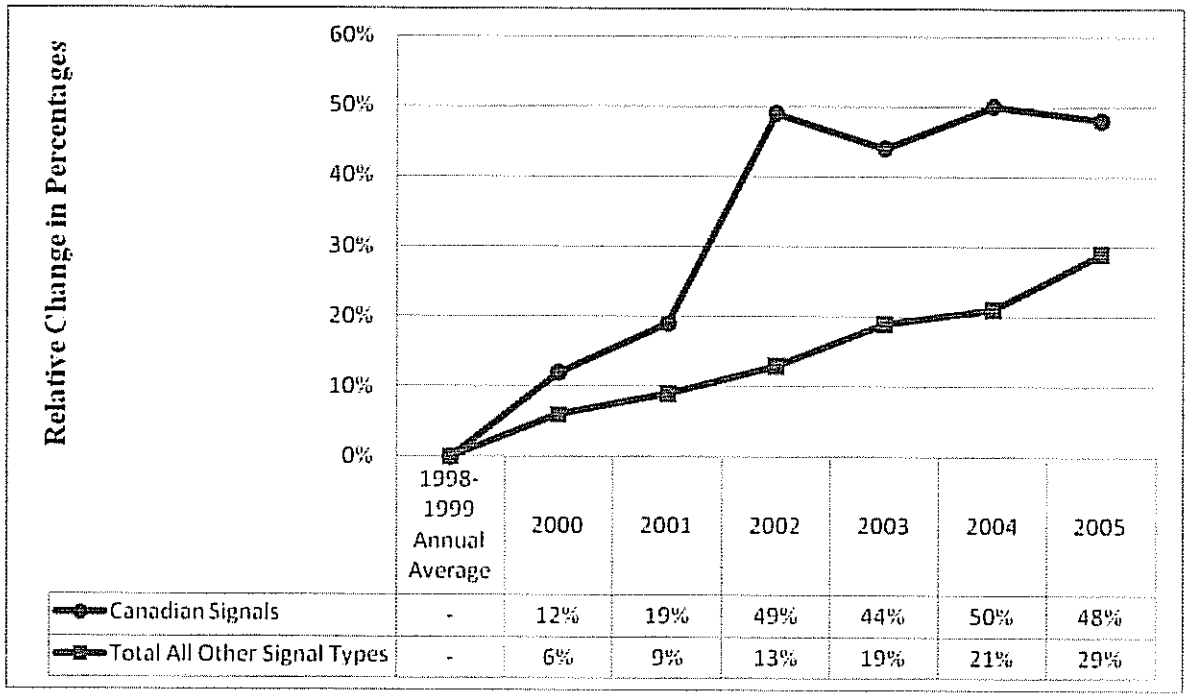
Figure 5: Total Relative Change in Distant Subscriber Instances Since 1998-1999
(de Freitas Dir. at Tab R, p. 1)



	Annual Average	2000	2001	2002	2003	2004	2005
Canadian Signals	-	8%	14%	18%	27%	10%	21%
Total All Other Signal Types	-	2%	2%	6%	2%	5%	2%

86. These increases in subscriber instances come at the same time that the relative cost of each subscriber instance for Canadian distant signals was increasing. In the 1998-1999 period, cable systems paid, on average, 51 cents in total royalties for each Canadian distant subscriber instance. In comparison, the average paid for all other distant signals was about 59 cents per subscriber instance. By 2005, those same cable systems were paying, on average, 75 cents for each Canadian distant subscriber instance and 76 cents for all other subscriber instances. For Canadian signals, this represented a 48% increase from 1998-1999 compared to the 29% increase for all other signal types over the same period. (de Freitas Dir. at Tab U.) The relative change in distant fees per subscriber instance since 1998-1999 can be seen in Figure 6, below:

Figure 6: Relative Change in Distant Fees per Subscriber Instance Since 1998-1999
(de Freitas Dir. at Tab U)

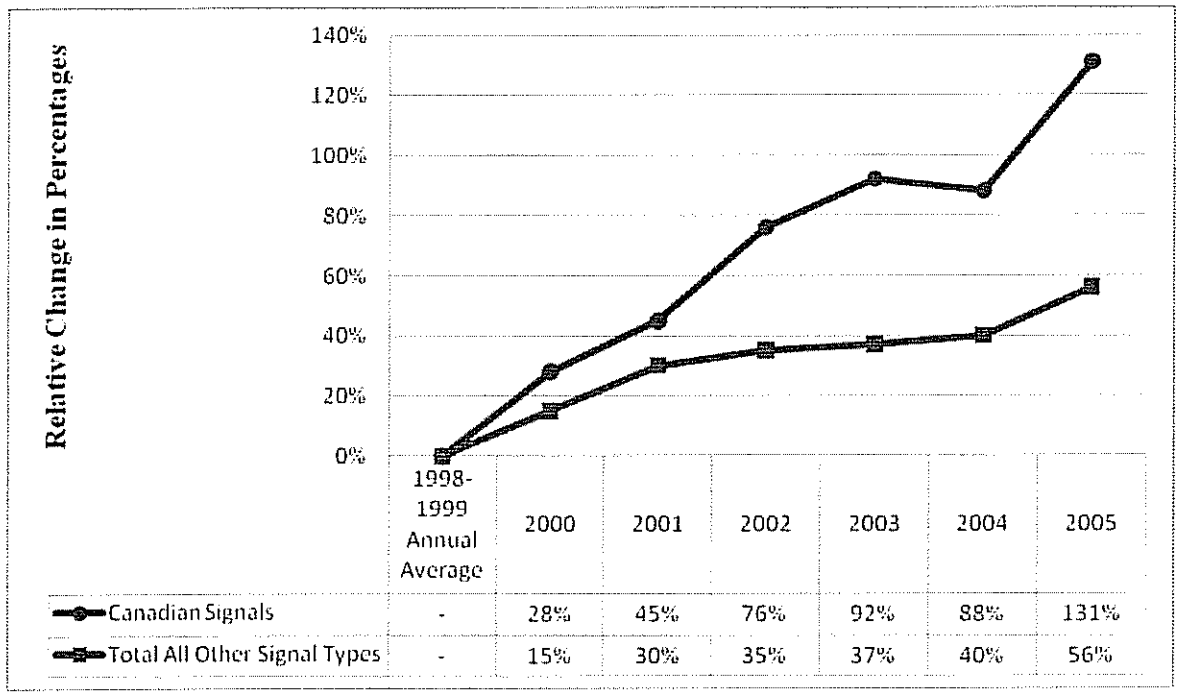


	1998-1999 Annual Average	2000	2001	2002	2003	2004	2005
Canadian Signals	-	12%	19%	49%	44%	50%	48%
Total All Other Signal Types	-	6%	9%	13%	19%	21%	29%

87. Another way to examine growth is by looking at the total distant royalties paid per instances of carriage (that is, the total amount of distant royalties paid for a signal type (using CDC's standard allocation) divided by the number of times that signal type was retransmitted). *See* CCG PFF §(II)(A)(4)(iii). In 1998-1999, Form 3 systems paid on average about $15,000 for each distant Canadian signal they carried. On average for 2000-2004, that number was just under $24,000 and by 2005, it had increased again to more than $34,500. This represented a 131% increase from the 1998-1999 average. (Ex. CDN 1-U.) In contrast, the average for all other signals types was about $9,300 for 1998-1999, increasing to about $14,400 by 2005, a 56% increase. (Ex. CDN 1-U.) The relative change can be seen in Figure 7, below:

Figure 7: Relative Total Distant Royalties Paid Per Instance of Carriage Since 1998-1999

(de Freitas Dir. at Tab U)



	1998-1999 Annual Average	2000	2001	2002	2003	2004	2005
Canadian Signals	-	28%	45%	76%	92%	88%	131%
Total All Other Signal Types	-	15%	30%	35%	37%	40%	56%

88. Finally, Dr. Ducey presented evidence of time measures that, while not directly related to the relative marketplace value of the program categories, can be used (as in the Waldfogel regression analysis) to provide information regarding the quantity of programming the Judges are trying to value. *See* CCG PFF (II)(A)(4(iv). According to SP Ex. 16, the amount of Canadian distant signal programming in the marketplace also showed a trend of steady increases over time as from 1.0% in 1992, to 3.7% in 1998-1999 to 4.5% by 2004-2005. (SP Ex. 16.) If one factor in considering the relative marketplace value is the relative price per unit, the other factor must be the quantities of such units. Dr. Ducey's information shows that whatever its value per unit, the quantity of Canadian units has increased relative to other types of programming.

E. Calculating the Awards to the Claimants

89. As the various data and oral and written testimony in this case have established, there is no "one size fits all" solution to the allocation of royalties among the claimants. Most of the methodologies are better at valuing some groups than others and none can be usedto reliably measure *all* claimants. In light of this, the royalty distribution problem can be addressed by breaking the task into more closely-examinable parts. The CCG recommends an approach based, as might be expected, on fee gen. This methodology allows the Judges to isolate awards for different claimants while still maintaining the relative relationship between those awards. This refines the approach used by the last CARP which tried to maintain the relative relationship of certain claimant groups (e.g., PS, JSC and CTV) though it had no tool for maintaining such relationship to PTV, Devotionals and the CCG. By acknowledging the utility of the fee gen approach, the distribution can be simplified, though it will never be simple.

1. The Award to NPR and Music Comes Out of the Royalty Pool Prior To Division Among The Other Claimant Groups

90. Two claimants, NPR and Music, need to be treated differently from the remaining claimants. On March 31, 2009, NPR has reached a privately negotiated agreement with all other claimant groups entitling them to 0.18% of the Basic, 3.75% and Syndex funds for 2004 and 2005. Pursuant to the terms of that agreement and past practice in these proceedings, NPR's percentage should come "off the top." (*See e.g.,* 69 FR 3606, 3609, n.15.) This means that NPR gets 0.18% of all funds.

91. The share for Music Claimants also comes "off the top" after the adjustment for NPR. 1998-99 CARP Report at 89. There was no evidence in this proceeding to indicate that the relative market value of Music differed according to the nature of the programming in which it was contained. Thus, Music's share diminishes all other claimants equally.

92. As discussed in the CCG's Proposed Findings of Fact, there is no compelling record evidence which indicates that Music is entitled to a larger or smaller award than in the prior proceeding. In the 1998-1999 Proceeding, Dr. George Schink presented a methodology that generated a relative market value for Music of 2.3%; that value was accepted by the Panel as a minimum measurement of the award to Music. (1998-99 CARP Report at 86-87; 69 FR 3606, 3609.) In this proceeding, Dr. John Woodbury largely replicates the approach offered by Dr. Schink and estimated the relative share for Music Claimants by calculating the ratio of actual music payments to the PROs divided by the total rights payments as reported by the U.S. Bureau of the Census. (Woodbury Reb. at 32; Woodbury Tr. at 3309:11-17.) When Woodbury's rebuttal testimony is corrected using updated data, the Music share percentage under that methodology for 2004 would equal $239 (millions) over $10,931 (millions), or 2.19%. The updated Music share percentage for 2005 would equal $234 (millions) over $10,937 (millions), or 2.14%. (SP Ex. 63.) The testimony of Music witness William Zarakas used blanket license fees as a substitute for actual music rights payments in an attempt to establish that Music was entitled to 5.2 and 4.6 percent for 2004 and 2005, an increase over its 1998-1999 award of 4.00 percent. (Zarakas Dir. at p.3-4.) Like the situation facing the 1998-1999 CARP, however, there is a lack of objective evidence demonstrating that the quantity, quality or relative market value of Music actually increased in this period. Given that the results of Dr. Woodbury's analysis in this proceeding are actually lower than Dr. Schink's analysis in 1998-1999, keeping Music at the same level as its 1998-1999 award falls within the "zone of reasonableness." Music should be awarded the same share they received in the 1998-1999 cable distribution proceeding of 4.00%. 98-99 CARP Report at 92.)

2 The Royalty Pool can be Broken Into Canadian, Education, and US Commercial Signal Tranches which Clarifies the Process of Determining Relative Market Value

93. After recognizing that NPR and Music are treated differently, the core task becomes allocating royalties among the remaining six claimant groups.

94. One reasonable way to do this is to first break the royalties into groups based on the type of signals that generated the royalties. Without a doubt, this is an application of the fee gen methodology, but one that is a reasonable starting point for the royalty distribution process.

95. This approach is consistent with the basic purposes of these proceedings, which is to compensate the owners of programming actually retransmitted. This is the eligibility criterion discussed above. *See* CCG PFF (II)(A)(1)(ii)

96. Here, using CDC data to allocate the royalties among the signal types is consistent with this eligibility issue and prevents the claimants from seeking royalties that are wholly unrelated to their claims. That is, the fee gen approach prevents claimants from receiving royalties "(i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming." *Satellite Decision*, 57 F.R. 62422, 62426. Further, to the extent that claimants do seek, and the Judges award royalties beyond what was paid by cable operators for a signal type, this issue can be clearly acknowledged.

97. The CCG presented data that shows CDC's allocations of royalties into several types of distant signals. (*See* de Freitas Dir., Tab N.)

98. Treating U.S. independent signals, U.S. network signals, and U.S. low power signals (and including the de minimis Mexican royalties) as one category of "U.S. Commercial" signals, the royalties can be grouped into three relevant categories or "tranches" for royalties paid for the distant retransmission of Canadian, Educational or U.S. Commercial signals. This is shown in Table 30, below, adjusted to account for allocation of the 3.75% Rate Fee:

Table 30: Base Rate Allocated Among Distant Signal Groups
(U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(de Freitas Dir., Tab N, p. 2; Martin 2004-05 Reb. at 5, Table 3)

Signal Type	2004	2005
U.S. Commercial Signals	$75,840,745	$81,052,592
Educational Signals	$3,414,047	$3,564,555
Canadian Signals	$3,464,881	$3,900,564
Total	**$82,719,673**	**$88,517,711**

99. When shown in their relative proportions to all Base Rate Royalties, these three signal groupings are as shown in Table 31, below:

Table 31: Proportion of Base Rate Allocated Among Distant Signal Groups
(U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(Based on data in Table 30, above)

Signal Type	2004	2005
U.S. Commercial Signals	91.684%	91.567%
Educational Signals	4.127%	4.027%
Canadian Signals	4.189%	4.407%
Total	**100.000%**	**100.000%**

100. For the 3.75% royalties, a similar allocation can be done. CDC data show that in each year, a very small amount of 3.75% royalties are improperly attributed by Form 3 cable operators to educational signals. Public Television Claimants are not entitled to share in 3.75% royalties because they are not eligible to receive those royalties. Taking this factor into account by ignoring the small amount of "educational" 3.75% fees, the 3.75% Fund fee generation numbers, adjusted to account for allocation of the 3.75% Rate Fee, are shown below in Table 32:

Table 32: 3.75% Rate Allocated Among Eligible Distant Signal Groups (U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(de Freitas Dir., Tab N, p.2; Martin 2004-05 Reb. at 5, Table 3)

Signal Type	2004	2005
U.S. Commercial Signals	$18,883,952	$16,954,659
Canadian Signals	$535,568	$391,447
Total	**$19,419,520**	**$17,346,106**

101. CDC data show that in each year, a very small amount of 3.75% royalties are improperly attributed by Form 3 cable operators to educational signals. Public Television Claimants are not entitled to share in 3.75% royalties because they are not eligible to receive those royalties. 1989 CRT Determination, 57 FR 15286, 15303; 1998-1999 CARP Report at 61. Taking this factor into account, the relative The proportion of 3.75% Rate Royalties between these signal groups is as shown in Table 34, below:'

Table 33: Proportion of 3.75% Rate Allocated Among Eligible Distant Signal Groups (Based on data in Table 32, above)

Signal Type	2004	2005
U.S. Commercial Signals	97.242%	97.743%
Canadian Signals	2.758%	2.257%
Total	**100.000%**	**100.000%**

102. Having broken the royalties into these constituent parts, the task of allocating royalties to claimant groups (other than NPR and Music) becomes a little easier.

i. The Canadian Tranche can be Allocated to the CCG, JSC and Program Suppliers in Accordance with Relative Market Values Determined by the Ford/Ringold Survey

a. The Royalties Paid for the Distant Carriage of Canadian Signals Should be Allocated only to those Claimants

Eligible to Receive such Royalties: the CCG, the JSC and the Program Suppliers

103. In using the fee gen approach for the CCG award, the 1990-1992 CARP stated: "While there is a great deal of criticism, particularly by PTV, concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians." 1990-92 Proceeding, 61 Fed. Reg. at 55666. The Panel further explained that "[w]hile we tried to distance ourselves from the fee generated method [sic] . . . we certainly used that method in reaching our conclusion." *Id.* at 55667.[13]

104. The 1998-1999 CARP, summarized historical criticism of fee gen methodologies proposed by other parties in the 1980s but then stated:

> "However, our predecessor CARP plainly did rely upon fee generation to determine the Canadians share. *See* 1990-92 CARP Report at 140-41. This heavy reliance was upheld by the Librarian. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55667. Moreover, the CRT used the fee generation rationale as grounds for excluding PTV from receiving royalties from the 3.75% Fund, *see* 1983 CRT Determination, *supra* at 128078, and the CRT explicitly noted PTV's fees generated in reducing PTV's award in the 1989 proceeding. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303."

1998-99 CARP Report at 61.

105. The 1998-1999 CARP also stated something of particular value in the context of the current proceeding: "it is interesting to note that every party in this proceeding (except PTV – which seeks an award well above its fees generated, and Music

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[13] In the 1990-1992 Proceeding, the CCG sought 1.1% of Basic Royalties and the CARP awarded the CCG 1.0% (before adjustments for various settlements). Part of the reason the prior CARP did not give the CCG its full 1.1% was due to its perception that the increase from 0.75% to 1.0% already represented a sufficient one-third increase in the CCG award. 1990-92 Proceeding, 61 Fed. Reg. at 55667. It is important to note that during the 1990-1992 proceeding, the Cable Copyright Royalty Fund was continuing to grow, so the overall increase was substantial (albeit not as large in real dollars as those experienced by other parties).

– which is silent on the issue) explicitly supports reliance on fee generation to determine the Canadians award. 1998-99 CARP Report at 62.

106. In this proceeding, the CCG methodology remains the most accurate and legally well-grounded method for determining the CCG's award. The CCG believes that the royalties paid for Canadian signals are the best starting point for determining an award to the CCG. The next step in making an award is to determine (among the claimants eligible to participate in those royalties) the relative value of the programming on those signals. That can be done using the Canadian survey sponsored by Dr. Ringold.

107. The CCG claim is calculated by following the steps outlined by the Librarian and used by the last CARP: multiplying the Canadian signal fee generation share for each year by the Ringold survey result (adjusted to 100%) for that year. Detailed calculation of the CCG based on these this process is shown in Appendix B, attached hereto.

b. The Canadian Survey Provides Accurate and Reliable Evidence of the Relative Value of Canadian Programming and Supports the Award Requested by the CCG

108. Section (II)(A)(1)(iii) above provides ample evidence of the depth, breadth, quality and quantity of Canadian programming broadcast on Canadian television stations. A cable operator's decision to carry a Canadian television station is influenced by the addition of such programming to their channel lineups.

109. This qualitative evidence of value to cable operators is supported by the quantitative evidence provided by the Canadian survey. In the years 2004 and 2005, Drs.

Gary Ford and Debra Ringold conducted a constant sum study[14] of the population (not a sample) of U.S. Form 3 cable systems importing English-language Canadian stations and French-language Canadian stations. The objective of the Canadian survey was to estimate the value to cable operators of Canadian programming on Canadian distant signals retransmitted by Form 3 systems. The Canadian survey sought to apportion the money paid by the people who actually bought Canadian signals. This approach combines data regarding royalties actually paid with valuation responses that are grounded in natural behavior.

110. As detailed in the Proposed Findings, the research methodology used by Drs. Ford and Ringold was rigorous and designed to accurately gauge value while avoiding significant bias or error.

111. The survey results indicate that cable system operators retransmit Canadian signals primarily for their unique Canadian programming rather than for programming belonging to JSC or Program Suppliers. In both 2004 and 2005, the value of both English- and French-language Canadian programming exceeds that of NHL, MLB and NBA games and U.S. syndicated series and movies.

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[14] The Ford / Ringold survey's use of the constant sum methodology and the Bortz survey's use of the same methodology have been reviewed extensively by the prior CARPs. In particular, the last CARP was unambiguous in its conclusion that the constant sum methodology and the survey results were reliable and acceptable for royalty distributions when applied to the relevant claimant groups. *See* 1998-99 CARP Report at 21 ("[U]ncontroverted testimony and years of research indicate rather conclusively that the constant sum methodology, as utilized in the Bortz survey, is highly predictive of actual marketplace behavior."); 1998-99 CARP Report at 31 ("[T]he Panel accepts the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative value for PS, JSC and NAB – for both the Basic Fund and the 3.75% Fund."); 1998-99 CARP Report at 73 ("The Ringold survey is the reliable means of determining the relative value of programming contained on Canadian signals.") In both the 2000-2003 and in this proceeding, there was no challenge to the validity of the constant sum methodology and the broader survey methodology used by Dr. Ringold or her results.

112. The results for 2004 and 2005 are set out in the Table 13, above. In sum, the cable operators attribute about 60% of the value of the programming on the Canadian distant signals to Canadian programming.

113. This study was further supported by a longitudinal analysis of studies conducted during the years 1996 to 2005. In that period, cable system operators who transmitted Canadian signals reported that Canadian programming constituted between 58% to 64% of the total programming value provided by imported Canadian signals. A weighted average of these results reveals that, for this period, Canadian programming constituted about 60% of the total programming value provided by imported Canadian signals. The longitudinal study shows that relative value of Canadian programming on distant Canadian signals to cable systems during the period 1996 to 2005 is remarkably stable, robust, and error free. (Ringold Longitudinal at p.4.)

ii. PTV Should Receive the Educational Signal Tranche Subject to an Upward Adjustment Coming Pro-Rata From Each of the Remaining Claimant Groups

114. The programming of Public Television Claimants for which they seek compensation appeared exclusively on educational signals.[15] Thus, the amount of royalties awarded to PTV should be tied to the amount paid by cable operators for the carriage of those educational signals. An award in excess of that amount can only come from the royalties paid for signals that did not include PTV programming. In the 1998-1999 proceeding, the CARP did not apply fee gen directly to the PTV award but used it as a factor in considering PTV's claim. 1998-99 CARP Report at 61.

115. As shown in Table 31, above, educational signals generated 4.127% of the Base Rate royalties for 2004 and 4.027 % for 2005 using CDC's standard allocation

[15] Some of the 3.75% royalties were incorrectly attributed to educational signals by cable oeprtors as reported by CDC, but Public Television Claimants are not entitled to 3.75% or Syndex royalties.

method. These numbers set a reasonable baseline for the award to PTV and certainly represent a fair estimate of what cable system operators paid for these signals. Applying the eligibility principal would in fact limit PTV to the baseline award.

116. Two factors might suggest an increase to the PTV beyond this baseline. First, as shown in the "Min/Max" analysis done for Canadian signals, there is some potential wiggle in Base Rate royalties based on the sliding scale. (*See* Martin 2004-05 Reb. at 3-4; Martin 2004-05 Reb. Tr. 562.) This variation suggests that the Base Rate royalties paid for educational signals could be a little higher or lower than reported by CDC. Second, an argument can be made that where an educational signal is the only distant signal or signals carried by a cable operator and that cable operator pays the Minimum Fee, the cable operator has placed a value on that educational signal or signals (in excess of the Base Rate royalties as allocated by CDC) measurable by the Minimum Fee. The first consideration would allow an award to PTV slightly higher than its CDC allocated fee gen, but still consistent with the fee gen methodology. The second consideration would essentially allocate some of the Minimum Fee payments directly to PTV beyond simply its proportional share. As a result, both of these considerations would permit an award to PTV in excess of the CDC standard fee gen while still being consistent with the concept of eligibility.

117. As between these two considerations, however, the issue of the sliding scale is probably a relatively inconsequential consideration (*see e.g.*, the range for Canadian signals of approximately plus or minus 5% of the fee gen number (*See* Martin 2004-05 Reb. at 3-4, Martin 2004-05 Tr. 562.) Also, as with the Canadian signals there is no record evidence to show, nor is there any logical reason to believe, that all cable operators would have assigned the educational signals as the first signal(s) on the sliding scale or that all cable operators would have assigned the educational signals as the last signal(s). Thus, as it is for the Canadian signal, CDC's standard allocation is probably the most reasonable one for educational signals.

118. The carriage of the educational signals as the only distant signals is, however, probably more important. Systems that carry one, two or three educational signals as their only distant signals are paying more in Minimum Fee (1.000 DSE of Base Rate royalties) than they are if they calculated their royalty obligation just on the .250, .500 or .750 DSEs of distant educational signals they are carrying. In those cases where a system carries only educational signals and does not carry four or more of them, some argument can be made that the cable operator showed a willingness to pay more for the signals than just the CDC allocation would suggest.

119. Unfortunately, though this information is available from CDC, the evidentiary record in this proceeding is incomplete and there is no data in the record to allow us to determine exactly how often cable systems carried three or less educational signals as their only distant signals.

120. It is possible to estimate the top of that range, however, by taking into consideration the augmented Bortz results offered by Ms. McLaughlin, which numerically augments the Bortz results to yield proposed relative market value of 5.9% and 5.9% - 6.2% (or about 6.05%) for 2004 and 2005, respectively. (McLaughlin Dir. at 11, Chart 4.) This range, 4.127% to 5.9% for 2004 and 4.027% to 6.05%, brackets PTV's prior award of 5.49125% for both 1998 and 1999. 1998-99 CARP Report at 92-93.

121. Unless the Judges believe that PTV was overvalued at 5.49125% in the last proceeding, the increase in PTV's Bortz numbers over the last proceeding, coupled with the increase in subscriber instances from approximately 10% in 1998-1999 to approximately 12% in 2004-2005 suggests PTV is entitled to an increased award up to the top of the range, 5.9% for 2004 and 6.05% for 2005.

122. Noting that this award exceeds the funds available based on CDC's standard allocation to educational signals, it is important to take the excess from the other signal groups on a pro-rata basis.

iii. The US Commercial Tranche Should be Divided Among the Joint Sports, Commercial Television, Program Suppliers, and Devotional Claimants By Using Bortz, Which is the Only Methodology that comes Close Enough to Accurately Calculating the Non-CCG Claimant Group's Relative Market Value

123. The Fee Gen approach is very useful for determining how to divide the royalties paid for Canadian and educational distant signals. Of course, that approach still leaves the vast bulk of the royalties, about 92% of Base Rate royalties and 96% of 3.75% royalties, to be divided among the remaining four claimant groups: the Joint Sports, Commercial Television, Program Suppliers, and Devotional Claimants. Three of these groups, JSC, CTV and PS, are sufficiently large that the major methodologies offered in these proceedings, the Waldfogel Regression, the Ford Advertising Model, the Gruen Subscriber Surveys and the Bortz Study all give them substantial awards. The fourth claimant group, Devotional Claimants, gets meaningful numbers on the two surveys but zero or almost zero on the other studies. *See* Table 34, below. These results suggest that Devotional Claimants should be treated differently than the other three.

Table 34: Estimated Relative Values U.S. Commercial Signal Claimant Shares, 2005
(**Bortz Survey**: JSC 04-05 Ex. 1, p. 14, Table II-1 - Distant Signal Programming Valuation Studies, 2004-05; **Gruen Subscriber Study**: Testimony of Arthur C. Gruen, Ph.D., June 1, 2009, corrected Sept. 28, 2009, p. 23, Table 3 – Normalized Distant Signal Relative Values (Percent) (Note: In 2005, this is the average of values that range from 1.44 to 2.10); **G.S. Ford Advertising Study**: Testimony of George S. Ford, June 1, 2009, corrected July 30, 2009, p. 39, Table 6 – Relative Market Values Based on Marketplace Evidence, Relative Market Value (%); **Waldfogel Regression Analysis**: Statement of Joel Waldfogel, June 1, 2009, p. 15, Table 5 – Royalty Share Allocation Form 3 Cable Systems with Positive DSE 2004-2005, Using Compensable Minutes.)

Study	Bortz Survey	Gruen Subscriber Study	G.S. Ford Advertising Study	Waldfogel Regression Analysis
Program Suppliers	37.6%	46.6%	75.7%	24.7%
Joint Sports	36.9%	17.1%	9.0%	42.4%
Commercial TV	14.8%	19.5%	9.5%	22.9%
Devotional	6.6%	8.2%	0.4%	0%

124. Three of these analyses, those done by Gruen, Ford and Waldfogel, are new to these proceedings. All three are defective and none can be relied on to resolve the allocation of royalties from U.S. Commercial signals. (*See generally*, II(B)(2)-(3).) Of all these methodologies, only the Bortz Study provides meaningful measures of relative market value for programming on U.S. Commercial signals. Unfortunately, even there, the Bortz Survey results need to be adjusted for Devotional programming.

a. The Bortz Survey Results as Applied to the Devotional Claimants are Inflated

125. Unlike all other claimant groups, the copyright owners of Devotional programming pay broadcasters to carry their programming on the broadcast signal. (*See* Written Direct Testimony of Charles Stanley at 4, 7 (hereinafter *Stanley Dir.*); *see e.g.*, Written Direct Testimony of Bruch Johansen at 7 (hereinafter *Johansen Dir.*).)

126. Second, that much of the Bortz Respondent's value ascribed to the programming category is based on non-compensable programming on WGN. (Ducey Dir. at 6; SP 14.)

127. The second issue has a readily quantifiable impact. Dr. Ducey testified that WGN was carried by 59.0% of Form 3 systems in 1999-2 and 61.7% in 2005-2. (Ducey Dir. at 4.) Though the data does not show the average for each year in 2004 and 2005, we can safely act on the understanding that WGN was carried by at least 60% of Form 3 systems in 2004 and 2005. There is also evidence from Dr. Ducey that shows the amount of compensable programming for devotional programming in 2004 and 2005 and shown in Table 35, below

Table 35: Compensable Devotional Programming on WGN
(Ducey Dir. at 6; SP 14.)

Year	Devotional Minutes of WGN and WGNA aired at the same time on the same date	All Devotional WGN Minutes	Matched Programming
2004	360	3,570	10.1%
2005	360	3,660	9.8%

128. This information can be applied to reduce the Bortz results for the Devotional Claimants by treating 60% of the Bortz value as coming from WGN (representing the amount of WGN carriage) and reducing that 60% for the matched programming that is actually compensable. The Devotional Claimants would get full Bortz value for their award on the other 40% of non-WGN signals. The Bortz results for Devotional programming were 7.8% and 6.6% for 2004 and 2005. (SP Ex. 2 at 6, Table I-2.) The calculation would be as follows:

- 2004: 7.8% (Bortz) times 60% (WGN) times 10.1% (WGN compensable) plus 7.8% (Bortz) times 40% (non-WGN) times 100% (non-WGN compensable) = 3.593%.

- 2005: 6.6% (Bortz) times 60% (WGN) times 9.8% (WGN compensable) plus 6.6% (Bortz) times 40% (non-WGN) times 100% (non-WGN compensable) = 3.028%.

129. These calculations suggest a share for Devotional Claimants of 3.593% and 3.028% in 2004 and 2005, respectively, of royalties paid for U.S. Commercial signals.

130. Given that the first factor, payment by Devotional copyright owners to broadcasters for carriage is not quantifiable, this is probably the top of the range of reasonable compensation for Devotional Claimants and is higher than any previous award. Notably, however, Devotional Claimants may be entitled to more in this proceeding than as prior proceedings based on their higher results on the Bortz survey compared to 1998 and 1999. (SP Ex. 2 at 6, Table I-2.)

b. The Remainder of the US Commercial Tranche Should Be Divided Among The Joint Sports, Commercial Television Claimants and Program Suppliers by Using Bortz Which is the Only Methodology that Comes Close Enough to Accurately Calculating their Relative Market Value

131. Of all the methodologies offered in these proceedings applicable to the largest claimant groups, only the Bortz survey has withstood rigorous examination over the years. While the survey is certainly flawed, it does a reasonable job of capturing the relative market value of the largest three claimant groups which are all available on nearly every U.S. Commercial station retransmitted by Form 3 Cable systems. The Bortz survey asks essentially the right question (with regard to program categories, not signals) to the right respondents. While it simply cannot be (and has never been) used to measure the value of CCG programming and has other shortfalls that make its accuracy questionable with regard to smaller claimants, it has done well in capturing information about the largest claimant groups. The programming categories with which cable operators are most

familiar and where the common understanding of the content of distant signals is most closely aligned with the programming categories used in these proceedings, i.e, sports, series and movies, and news and public affairs. (Gruen Dir. at 26 (Bortz respondents focus on program types as known to the general public); Calfee Reb. at 9 (Bortz useful for large program categories like sports, movies and series, and local programming); cf. Gary Ford Reb. at 19 ("most popular" questions reduce likelihood that cable operators will think about niche programming).)

132. The Bortz results show the value of PS, JSC and CTV relative to one another, as presented in Table 36, below.

Table 36: Bortz Shares for Largest Claimant Groups
(SP Ex. 2 at 6, Table I-2.)

Claimant Category	2004	2005
JSC (Live professional and college team sports)	33.5%.	36.9%
PS (Movies & syndicated shows, series and specials)	36.5%	37.6%
CTV (News and public affairs programs)	18.4%	14.8%

133. The Bortz Shares for Largest Claimant Groups (along with the Devotional Claimants' share, calculated above) should be used to allocate the U.S. Commercial signal royalties.

3. Procedure for Combining Awards to Total 100% (using 2004 Base Rate Royalties as an example)

134. Having broken the problem down into its smaller parts, it is necessary to combine those parts together to get the final awards. Using the model above, the Judges should combine the awards using the following process, which is demonstrated for the 2004 Base Rate Royalties. Appendix A hereto shows the process for all claimants and all royalties funds for both 2004 and 2005.

135. First, anticipating that PTV's share of royalties will exceed the amount of royalties paid for educational signals, the amount available to distribute to the four claimants on U.S. Commercial signals and the three claimants on Canadian signals needs to be adjusted without changing the award to PTV so that all three tranches of royalties total 100%. This is done below in Table 37:

Table 37: Adjustment of Shares of Base Rate Fees to 100% to Account for PTV Award in Excess of Educational Fee Gen

(Table 30, above; CCG PFF §(II)(B); (III)(F)(2)(ii).)

Category	Initial Percentage	Adjusted Percentage
U.S. Commercial Signal Fee Gen	91.684%	89.989%
Public Television Award	5.900%	5.900%
Canadian Signal Fee Gen	4.189%	4.111%
Total	**101.773%**	**100.000%**

136. Next, the four claimants to the royalties paid for U.S. Commercial Signal programming should be adjusted to match the total share of royalties available for claimants with programming on those signals, 89.989% (as shown in Table 37, above). These royalties need to be divided among JSC, PS, CTV and Devotional Claimants. The relative shares of these four parties, as shown above when combined to match the available royalties are shown in Table 39, below:

Table 38: Calculation of Royalties for Claimants on U.S. Commercial Signals Using Bortz and WGNA Adjustments

Claimant	Preliminary Share	Share adjusted for all U.S. Commercial Signal Royalties
JSC (Live professional and college team sports)	33.500%	32.771%
PS (Movies & syndicated shows, series and specials)	36.500%	35.706%
CTV (News and public affairs programs)	18.400%	18.000%
Devotional Claimants	3.590%	3.512%
Total	91.990%	89.989%

137. Next, the Base Rate royalties paid for Canadian distant signals are divided among the three Claimants on those signals using the Ford/Ringold cable operator survey, as shown in Table 39, below:[16]

Table 39: Division of Adjusted 2004 Base Rate Fees Among Claimants on Canadian Signals

Programming Category	Reported Results	Adjusted to Remove "Other"	Reduced to a Relative Share of Royalties Paid for Canadian Distant Signals
CCG claimed programming	59.940%	60.030%	2.468%
JSC claimed programming	27.160%	27.201%	1.118%
PS claimed programming	12.750%	12.769%	0.525%
Other	0.160%		
Total	100.010%	100.000%	4.111%

[16] In the event that the Judges take a different approach to calculating and combining the various awards, the division of royalties paid for Canadian distant signals among claimants with programming on those signals should be done before the adjustments in Table 41. The correct allocations for CCG prior to combining with any other awards are shown in Appendix B hereto.

138. Finally, the results from the above calculations for the three different groups of signals as shown in Tables 37, 38, and 39 above are combined to account for 100% of the royalties before adjusting for Music and NPR, shown below in Table 40:

Table 40: 2004 Shares of Base Rate Royalties Before Adjustment for NPR and Music

Claimant	Shares
PS (total U.S. Commercial plus Canadian)	36.231%
JSC (total U.S. Commercial plus Canadian)	33.889%
CTV	18.000%
PTV	5.900%
Devotional	3.512%
CCG	2.468%
Total	100.000%

139. The final two adjustments incorporate the award to Music (4.00%), which is taken from everything except NPR; the adjustment for NPR is for 0.18% percent of everything. These final adjustments are shown in Table 41, below:

Table 41: 2004 Final Awards for Basic Fund Royalties for All Claimant Groups (Table 40, above, CCG PFF § (II)(C),(D); (III)(F)(1);)

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers (Total, U.S. & Canadian Signals)	36.231%	34.782%	**34.719%**
Joint Sports Claimants (Total, U.S. & Canadian Signals)	33.889%	32.534%	**32.475%**
CTV	18.000%	17.280%	**17.249%**
PTV	5.900%	5.664%	**5.654%**
Devotional	3.512%	3.371%	**3.365%**
CCG	2.468%	2.369%	**2.365%**
Music		4.000%	**3.993%**
NPR			**0.180%**
Total	**100.000%**	**100.000%**	**100.000%**

IV. Conclusion

140. The Canadian Claimants Group has presented extensive and persuasive evidence supporting its claim for an award based on a methodology that uses royalty data for the years at issue in this case in conjunction with a cable operator survey. This approach has been exhaustively challenged in three prior proceedings where two CARPs and the Copyright Royalty Judges found the Canadian methodology provided a reliable tool for measuring the relative value of Canadian programming in all three instances.

141. In the current proceedings, the alternative methodologies have all proved unreliable when applied to the programming of the CCG. The criticisms of the CCG methodology have all been heard by the Judges and prior CARPS and rejected.

142. Accordingly, the CCG respectively requests that the Judges approve the Canadian methodology as applied to the 2004-2005 data and award the Canadian Claimants Group its requested award. *See* Appendix 2.

143. Based on the evidence adduced during the Direct and Rebuttal phases of this proceeding, the Canadian Claimants Group respectfully requests that the Judges issue an order awarding the Claimants to the 2004 and 2005 cable royalty shares as follows:

Table 42: Final Awards for 2004

Claimant	Basic Fund	3.75% Fund	Syndex
Program Suppliers	34.719%	37.311%	95.827%
Joint Sports Claimants	32.475%	34.654%	0.000%
Commercial Television Claimants	17.249%	18.639%	0.000%
Public Television Claimants	5.654%	0.000%	0.000%
Devotional Claimants	3.365%	3.637%	0.000%
Canadian Claimants Group	2.365%	1.586%	0.000%
Music Claimants	3.993%	3.993%	3.993%
National Public Radio	0.180%	0.180%	0.180%
Total	**100.000%**	**100.00%**	**100.00%**

Table 43: Final Awards for 2005

Claimant	Basic Fund	3.75% Fund	Syndex
Program Suppliers	35.376%	38.351%	95.827%
Joint Sports Claimants	35.567%	38.081%	0.000%
Commercial Television Claimants	13.769%	15.014%	0.000%
Public Television Claimants	5.798%	0.000%	0.000%
Devotional Claimants	2.819%	3.074%	0.000%
Canadian Claimants Group	2.499%	1.308%	0.000%
Music Claimants	3.993%	3.993%	3.993%
National Public Radio	0.180%	0.180%	0.180%
Total	**100.000%**	**100.00%**	**100.00%**

144. Alternatively, in the event the Judges decide on an alternative method for awarding or combining royalties for other claimants, the Canadian Claimants Group requests the following awards:

Table 44: Alternative Request of Canadian Claimants Group

Year	Basic Fund	3.75% Fund	Syndex Fund
2004	2.515%	1.656%	0.000%
2005	2.665%	1.365%	0.000%

Respectfully submitted,

Dated: March 17, 2010

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CERTIFICATE OF SERVICE

I, Eugene Benick, hereby certify that on this 17th day of March, 2010, a copy of the foregoing **Proposed Findings of Fact and Conclusions of Law of the Canadian Claimant Group** was sent by FED EX next day delivery to out-of-area counsel and by courier to all others:

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Canadian Claimants Group
Proposed Findings of Fact and Conclusions of Law

APPENDIX A

Calculations For Combining Royalty Awards

A.1. This Appendix A is an integral part of the Proposed Findings of Fact and Conclusions of Law of the Canadian Claimants Group. It is intended to explain the process for calculating the CCG's Basic Fund and 3.75% Fund awards based on the fee gen methodology used in the last three proceedings and then combining those awards with awards for other parties. In doing so, the CCG uses a fee gen based approach not only to calculate its awards but to combine the awards for all the parties. The CCG uses shares for the other claimant groups identified in its the body of its Proposed Findings of Fact and Conclusions of Law. The proposed awards for these claimants are reasonable recommendations based on the facts adduced in the hearings on this matter. The process shown below for combining awards can still be used even if the Judges determine that the claimants' awards should be calculated based on other facts or methodologies.

A.2. The following approach results in awards to the claimants based on principals set forth in the CCG's Proposed Findings of Fact and Conclusions of Law, including:

(i) Awarding NPR its settlement amount of 0.18% of all royalties "off the top." (*See* CCG PFOF & COL §§ II(D) & III(F)(1).)

(ii) Awarding Music Claimants the same share from all three funds and as against all other claimants. The CCG recommends an award of 4.000%. (*See* CCG PFOF & COL §§ II(C) & III(F)(1).)

(iii) Awarding the Canadian Claimants its Ford/Ringold share of royalties paid for Canadian signals, with the remainder of Canadian signal royalties divided among Program Suppliers and Joint Sports Claimants. (*See* CCG PFOF & COL §§ II(A), III(D),

III(F)(2)(i).)

(iv) Awarding Public Television Claimants a share in excess of the educational signal fee generation. The CCG recommends an award of 5.900% and 6.050% for 2004 and 2005 respectively. (*See* CCG PFOF & COL §§ II(B) & III(F)(2)(ii).)

(v) Awarding Program Suppliers, Joint Sports Claimants, Commercial Television Claimants and Devotional Claimants the royalties generated for the carriage of U.S. Commercial signals. The CCG recommends awards for these claimants according to the results of the Bortz Survey, with a downward adjustment to Devotional Claimants proportionate to their compensable programming on WGNA. (*See* CCG PFOF & COL §§ III(B)(1) & III(F)(2)(iii).)

A.3. The facts and law supporting this approach are discussed in more detail in the Canadian Claimant Group's Proposed Findings of Fact and Conclusions of Law.

I. Allocation of Basic Fund Royalties Among Claimant Groups

A.4. The Base Rate fee generation numbers, adjusted to account for allocation of the 3.75% Rate Fee, are shown in Table 30 of the CCG's Proposed Findings of Fact and Conclusions of Law, and reproduced below, in Table A-1:

Table A-1
Base Rate Allocated Among Distant Signal Groups (U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(Source: de Freitas Dir., Tab N, p. 2, Martin Reb. at 5, Table 3)

Signal Group	2004	2005
U.S. Commercial Signals	$75,840,745	$81,052,592
Educational Signals	$3,414,047	$3,564,555
Canadian Signals	$3,464,881	$3,900,564
Total	**$82,719,673**	**$88,517,711**

A.5. The relative proportions of all Base Rate Royalties, adjusted to account for allocation of the 3.75% Rate Fees broken into signal groups, are shown in Table 31 of the CCG's Proposed Findings of Fact and Conclusions of Law, and reproduced below, in Table A-2:

Table A-2
Proportion of Base Rate Allocated Among Distant Signal Groups (U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(Source: Table A-1)

Signal Group	2004	2005
U.S. Commercial Signals	91.684%	91.567%
Educational Signals	4.127%	4.027%
Canadian Signals	4.189%	4.407%
Total	**100.000%**	**100.000%**

A.6. After breaking the Base Rate royalties into their signal group parts and taking into account an award to Public Television Claimants in excess of CDC's standard fee gen for educational signals, the Base Rate fees can be adjusted to 100% as shown in Table A-3, below:

Table A-3
Adjustment of Shares of Base Rate Fees to 100% to Account for PTV Award in Excess of Educational Fee Gen
(Source: Table A-1)

Category	2004		2005	
	Initial Percentage	Adjusted Percentage	Initial Percentage	Adjusted Percentage
U.S. Commercial Signal Fee Gen	91.684%	89.989%	91.567%	89.636%
Public Television Award	5.900%	5.900%	6.050%	6.050%
Canadian Signal Fee Gen	4.189%	4.111%	4.407%	4.314%
Total	**101.773%**	**100.000%**	**102.023%**	**100.000%**

A.7. Next, the four claimants to the royalties paid for U.S. Commercial Signal programming should be adjusted to match the total share of royalties available for claimants with programming on those signals, 89.989% and 89.636% in 2004 and 2005 respectively (as shown in Table A-3, above). These royalties need to be divided among JSC, PS, CTV and Devotional Claimants. The CCG recommends the use of unaugmented Bortz numbers for PS, JSC and CTV. For Devotional Claimants, CCG recommends unaugmented Bortz numbers adjusted downward for the small amount of compensable programming on WGNA. (Use of McLaughlin augmentation is unnecessary because the relative proportions of these four claimants to one-another are not altered by the augmentation process.) The relative shares of these four parties, when combined to match the available royalties are shown in Table A-4, below:

Table A-4

Division of Base Rate Royalties for Claimants on U.S. Commercial Signals Using Bortz with Adjustment for WGNA Non-Compensable Programming

(Source: SP Ex. 2 at 6, Table I-2)

Claimant	2004		2005	
	Preliminary Share (Based on Bortz or WGNA Adjusted Bortz)	**Share Adjusted for All U.S. Commercial Signal Royalties**	**Preliminary Share (Based on Bortz or WGNA Adjusted Bortz)**	**Share Adjusted for All U.S. Commercial Signal Royalties**
JSC (Live professional and college team sports)	33.500%	32.771%	36.900%	35.823%
PS (Movies & syndicated shows, series and specials)	36.500%	35.706%	37.600%	36.503%
CTV (News and public affairs programs)	18.400%	18.000%	14.800%	14.368%
Devotional Claimants (adjusted for WGNA)	3.590%	3.512%	3.030%	2.942%
Total	**91.990%**	**89.989%**	**92.330%**	**89.636%**

A.8. Next, the Base Rate royalties paid for Canadian distant signals are divided among the three claimants on those signals using the Ford/Ringold cable operator survey, as shown in Tables A-5 and A-6, below:[1]

Table A-5
Division of Adjusted 2004 Base Rate Fees Among Claimants on Canadian Signals Using Ford/Ringold Survey
(Source: Ringold Dir., Ex. CDN-4-A, Table 1; Table A-3)

Programming Category	Ford/Ringold Survey Results	Ford/ Ringold Survey Results Adjusted to Remove "Other"	Reduced to a Relative Share of Royalties Paid for Canadian Distant Signals
CCG claimed programming	59.940%	60.030%	2.468%
JSC claimed programming	27.160%	27.201%	1.118%
PS claimed programming	12.750%	12.769%	0.525%
Other	0.160%		
Total	**100.010%**	**100.000%**	1. **4.111%**

[1] In the event that the Judges take a different approach to calculating and combining the various awards, the division of royalties paid for Canadian distant signals among claimants with programming on those signals should be done before the adjustments in Tables A-5 and A-6. The correct calculations for CCG prior to combining with any other awards are shown in Appendix B.

Table A-6
Division of Adjusted 2005 Base Rate Fees Among Claimants on Canadian Signals Using Ford/Ringold Survey
(Source: Ringold Dir., Ex. CDN-4-A, Table 1; Table A-3)

Programming Category	Ford/Ringold Survey Results	Ford/ Ringold Survey Results Adjusted to Remove "Other"	Reduced to a Relative Share of Royalties Paid for Canadian Distant Signals
CCG claimed programming	60.370%	60.467%	2.608%
JSC claimed programming	29.910%	29.958%	1.292%
PS claimed programming	9.560%	9.575%	0.413%
Other	0.160%		
Total	**100.000%**	**100.000%**	**4.314%**

A.9. Finally, the results from the calculations above for the three different groups of signals are combined to account for 100% of the royalties before adjusting for Music and NPR, shown below in Table A-7, below:

Table A-7
Shares of Base Rate Royalties Before Adjustment for NPR and Music
(Source: Tables A-4, A-5, A-6)

Claimant	2004	2005
Program Suppliers (Total, U.S. & Canadian Signals)	36.231%	36.916%
Joint Sports Claimants (Total, U.S. & Canadian Signals)	33.889%	37.116%
Commercial Television Claimants	18.000%	14.368%
Public Television Claimants	5.900%	6.050%
Devotional Claimants	3.512%	2.942%
Canadian Claimants Group	2.468%	2.608%
Total	**100.000%**	**100.000%**

A.10. The final two adjustments are to incorporate the award to Music of 4.00% of all Base Rate royalties except those awarded to NPR and the award for NPR which is 0.18% percent of all Base Rate Royalties. These final adjustments are shown in Table A-8 and A-9 below:

Table A-8

2004 Final Awards for Basic Fund Royalties for All Claimant Groups.

(Source: Table A-7)

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers (Total, U.S. & Canadian Signals)	36.231%	34.782%	**34.719%**
Joint Sports Claimants (Total, U.S. & Canadian Signals)	33.889%	32.534%	**32.475%**
Commercial Television Claimants	18.000%	17.280%	**17.249%**
Public Television Claimants	5.900%	5.664%	**5.654%**
Devotional Claimants	3.512%	3.371%	**3.365%**
Canadian Claimants Group	2.468%	2.369%	**2.365%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.000%**	**100.000%**	**100.000%**

Table A-9

2005 Final Awards for Basic Fund Royalties for All Claimant Groups.

(Source: Table A-7)

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers (Total, U.S. & Canadian Signals)	36.916%	35.439%	**35.376%**
Joint Sports Claimants (Total, U.S. & Canadian Signals)	37.116%	35.631%	**35.567%**
Commercial Television Claimants	14.368%	13.793%	**13.769%**
Public Television Claimants	6.050%	5.808%	**5.798%**
Devotional Claimants	2.942%	2.824%	**2.819%**
Canadian Claimants Group	2.608%	2.504%	**2.499%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.000%**	**100.000%**	**100.000%**

II. Allocation of Basic Fund Royalties Among Claimant Groups

A.11. For the 3.75% royalties, a similar allocation can be done. CDC data show that in each year a very small amount of 3.75% royalties are improperly attributed by Form 3 cable operators to educational signals. Public Television Claimants are not entitled to share in 3.75% royalties because they are not eligible to receive those royalties. Taking this factor into account by ignoring the small amount of "educational" 3.75% fees, the 3.75% Fund fee generation numbers, adjusted to account for re-allocation of the 3.75% Rate Fee, Table 32 of the CCG's Proposed Findings of Fact and Conclusions of Law, are shown below in Table A-10:

Table A-10
3.75% Rate Allocated Among Eligible Distant Signal Groups (U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(Source: de Freitas Dir., Tab N, p.2; Martin Reb. at 5, Table 3)

Signal Type	2004	2005
U.S. Commercial Signals	$18,883,952	$16,954,659
Canadian Signals	$535,568	$391,447
Total	**$19,419,520**	**$17,346,106**

A.12. The relative proportion of all 3.75% Rate Royalties for the two eligible signal groupings are as shown in Table 33 of the CCG's Proposed Findings of Fact and Conclusions of Law and reproduced in Table A-11, below:

Table A-11
Proportion of 3.75% Rate Allocated Among Eligible Distant Signal Groups (U.S. Commercial includes U.S. Independent, Network, Low Power and Mexican (if any))
(Source: Tables A-10)

Signal Type	2004	2005
U.S. Commercial Signals	97.242%	97.743%
Canadian Signals	2.758%	2.257%
Total	**100.000%**	**100.000%**

A.13. Next, the four claimants to the 3.75% royalties paid for U.S. Commercial Signal programming should be adjusted to match the total share of royalties available for claimants with programming on those signals, 97.242% and 97.743% for 2004 and 2005 respectively (as shown in TableA-11, above). These royalties need to be divided among JSC, PS, CTV and Devotional Claimants. The relative shares of these four parties, as shown above when combined to match the available royalties are shown in Table A-12, below:

Table A-12
Division of 3.75% Rate Royalties for Claimants on U.S. Commercial Signals Using Bortz with Adjustment for WGNA Non-Compensable Programming
(Source: SP Ex. 2 at 6, Table I-2)

Claimant	2004		2005	
	Preliminary Share (Based on Bortz or WGNA Adjusted Bortz)	Share Adjusted for All U.S. Commercial Signal Royalties	Preliminary Share (Based on Bortz or WGNA Adjusted Bortz)	Share Adjusted for All U.S. Commercial Signal Royalties
JSC (Live professional and college team sports)	33.500%	35.413%	36.900%	39.063%
PS (Movies & syndicated shows, series and specials)	36.500%	38.584%	37.600%	39.804%
CTV (News and public affairs programs)	18.400%	19.451%	14.800%	15.668%
Devotional Claimants	3.590%	3.795%	3.030%	3.208%
Total	**91.990%**	**97.242%**	**92.330%**	**97.743%**

A.14. Next, the 3.75% Rate royalties paid for Canadian distant signals are divided among the three claimants on those signals using the Ford/Ringold cable operator survey, as shown in Tables A-13 and A-14, below:[2]

[2] In the event that the Judges take a different approach to calculating and combining the various awards, the division of royalties paid for Canadian distant signals among claimants with programming on those signals should be done before the adjustments in Tables A-13 and A-14. The correct calculations for CCG prior to combining with any other awards are shown in Appendix B.

Table A-13
Division of Adjusted 2004 3.75% Rate Fees Among Claimants on Canadian Signals Using Ford/Ringold Survey
(Source: Ringold Dir., Table 1; Table A-10)

Programming Category	Ford/Ringold Survey Results	Ford/ Ringold Survey Results Adjusted to Remove "Other"	Reduced to a Relative Share of Royalties Paid for Canadian Distant Signals
CCG claimed programming	59.940%	60.030%	1.656%
JSC claimed programming	27.160%	27.201%	0.750%
PS claimed programming	12.750%	12.769%	0.352%
Other	0.160%		
Total	**100.010%**	**100.000%**	**2.758%**

Table A-14
Division of Adjusted 2005 3.75% Rate Fees Among Claimants on Canadian Signals Using Ford/Ringold Survey
(Source: Ringold Dir., Table 1; Table A-10)

Programming Category	Ford/Ringold Survey Results	Ford/ Ringold Survey Results Adjusted to Remove "Other"	Reduced to a Relative Share of Royalties Paid for Canadian Distant Signals
CCG claimed programming	60.370%	60.467%	1.365%
JSC claimed programming	29.910%	29.958%	0.676%
PS claimed programming	9.560%	9.575%	0.216%
Other	0.160%		
Total	**100.000%**	**100.000%**	**2.257%**

A.15. The results from the above calculations for the three different groups of signals are combined to account for 100% of the 3.75% rate royalties before adjusting for Music and NPR, shown below in Table A-15:

Table A-15
Shares of 3.75% Rate Royalties Before Adjustment for NPR and Music
(Source: Tables A-12, A-13, A-14)

Claimant	2004	2005
Program Suppliers (Total, U.S. & Canadian Signals)	38.936%	40.021%
Joint Sports Claimants (Total, U.S. & Canadian Signals)	36.163%	39.740%
Commercial Television Claimants	19.451%	15.668%
Public Television Claimants	0.000%	0.000%
Devotional Claimants	3.795%	3.208%
Canadian Claimants Group	1.656%	1.365%
Total	**100.000%**	**100.000%**

A.16. The final two adjustments are to incorporate the award to Music of 4.00% of all Base Rate royalties except those awarded to NPR and the adjustment for NPR which is 0.18% percent of all 3.75% Rate Royalties. These final adjustments are shown in Tables A-16 and A-17, below:

Table A-16
2004 Final Awards for 3.75% Rate Royalties for All Claimant Groups.
(Source: Tables A-15)

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers (Total, U.S. & Canadian Signals)	38.936%	37.379%	**37.311%**
Joint Sports Claimants (Total, U.S. & Canadian Signals)	36.163%	34.716%	**34.654%**
Commercial Television Claimants	19.451%	18.673%	**18.639%**
Public Television Claimants	0.000%	0.000%	**0.000%**
Devotional Claimants	3.795%	3.643%	**3.637%**
Canadian Claimants Group	1.656%	1.589%	**1.586%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.000%**	**100.000%**	**100.000%**

Table A-17
2005 Final Awards for 3.75% Rate Royalties for All Claimant Groups.
(Source: Tables A-15)

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers (Total, U.S. & Canadian Signals)	40.021%	38.420%	**38.351%**
Joint Sports Claimants (Total, U.S. & Canadian Signals)	39.740%	38.150%	**38.081%**
Commercial Television Claimants	15.668%	15.041%	**15.014%**
Public Television Claimants	0.000%	0.000%	**0.000%**
Devotional Claimants	3.208%	3.079%	**3.074%**
Canadian Claimants Group	1.365%	1.310%	**1.308%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.000%**	**100.000%**	**100.000%**

III. Allocation of Syndex Fund Royalties Among Claimant Groups

A.17. The only parties making claims to the Syndex Fund are Program Suppliers, Music Claimants and NPR. (Source: Kessler Dir. at 21; CCG PFOF & COL §§ II(C) & II(D).)Those funds should be allocated initially 100% to Program Suppliers, with subsequent adjustments for Music Claimants and NPR consistent with the procedures used above. These calculations are shown in Tables A-18 and A-19 below:

Table A-18

2004 Final Awards for Syndex Rate Royalties for All Claimant Groups.

(Source: Kessler Dir. at 21; CCG PFOF & COL §§ II(C) & II(D))

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers	100.00%	96.000%	**95.827%**
Joint Sports Claimants	0.00%	0.000%	**0.000%**
Commercial Television Claimants	0.00%	0.000%	**0.000%**
Public Television Claimants	0.00%	0.000%	**0.000%**
Devotional Claimants	0.00%	0.000%	**0.000%**
Canadian Claimants Group	0.00%	0.000%	**0.000%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.00%**	**100.00%**	**100.00%**

Table A-19

2005 Final Awards for Syndex Rate Royalties for All Claimant Groups.

(Source: Kessler Dir. at 21; CCG PFOF & COL §§ II(C) & II(D))

Claimant	Shares	Adjusted for Music's 4.00%	Final Shares (Adjusted for NPR's 0.18%)
Program Suppliers	100.00%	96.000%	**95.827%**
Joint Sports Claimants	0.00%	0.000%	**0.000%**
Commercial Television Claimants	0.00%	0.000%	**0.000%**
Public Television Claimants	0.00%	0.000%	**0.000%**
Devotional Claimants	0.00%	0.000%	**0.000%**
Canadian Claimants Group	0.00%	0.000%	**0.000%**
Music Claimants		4.000%	**3.993%**
National Public Radio			**0.180%**
Total	**100.00%**	**100.00%**	**100.00%**

IV. Final Awards for all Claimant Groups and All Funds

A.18. The results of all calculations shown above are summarized in two tables, A-20 and A-21:

Table A-20
Final Awards for 2004
(Source: Tables A-8, A-16, A-18)

Claimant	Basic Fund	3.75% Fund	Syndex
Program Suppliers	34.719%	37.311%	95.827%
Joint Sports Claimants	32.475%	34.654%	0.000%
Commercial Television Claimants	17.249%	18.639%	0.000%
Public Television Claimants	5.654%	0.000%	0.000%
Devotional Claimants	3.365%	3.637%	0.000%
Canadian Claimants Group	2.365%	1.586%	0.000%
Music Claimants	3.993%	3.993%	3.993%
National Public Radio	0.180%	0.180%	0.180%
Total	**100.000%**	**100.00%**	**100.00%**

Table A-21
Final Awards for 2005
(Source: Tables A-9, A-17, A-19)

Claimant	Basic Fund	3.75% Fund	Syndex
Program Suppliers	35.376%	38.351%	95.827%
Joint Sports Claimants	35.567%	38.081%	0.000%
Commercial Television Claimants	13.769%	15.014%	0.000%
Public Television Claimants	5.798%	0.000%	0.000%
Devotional Claimants	2.819%	3.074%	0.000%
Canadian Claimants Group	2.499%	1.308%	0.000%
Music Claimants	3.993%	3.993%	3.993%
National Public Radio	0.180%	0.180%	0.180%
Total	**100.000%**	**100.00%**	**100.00%**

Canadian Claimants Group
Proposed Findings of Fact and Conclusions of Law

APPENDIX B

Calculations of Award for Canadian Claimants Groups
Without Combining with Other Claimant Groups

B.1. This Appendix B is an integral part of the Proposed Findings of Fact and Conclusions of Law of the Canadian Claimants Group. It is intended to show in detail the process for calculating the CCG's Basic Fund and 3.75% Fund awards based on the methodology used in the last three proceedings, but excluding any effort to combine the CCG's fee gen based award with other claimant awards.

B.2. The process is very simple despite the detail shown below: Multiply the fee gen award by the value given to Canadian programming in the Ford / Ringold report to generate the CCG award. Section I, below, calculates this award for 2004 and 2005 for the Basic Fund while Section II calculates the CCG award for 2004 and 2005 for the 3.75% Fund. (The CCG makes no claim to the Syndex Fund.)

I. BASIC FUND AWARD

Step 1: Identify Fee Generation Number:

B.3. The Base Rate fee generation numbers, adjusted to account for re-allocation of the 3.75% Rate Fee, are shown in Table 11of the CCG's Proposed Findings of Fact and Conclusions of Law, and reproduced below:

Table B-1:
Summary of Basic Fund Royalties
(Source: de Freitas Dir., Tab N, p. 2; Martin Reb. at 5, Table 3)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
2004	$3,464,881	$82,719,673	4.189%
2005	$3,900,564	$88,517,771	4.407%

Step 2: Identify CCG Survey Share:

B.4. The Ford Ringold survey share numbers are shown in Table 13 of the CCG's Proposed Findings of Fact and Conclusions of Law, and reproduced below:

Table B-2
Ford / Ringold Survey Results
(Source: Ringold Dir., Ex. CDN-4-A, Table 1)

Programming Category	2004	2005
Canadian-produced programming	59.940%	60.370%
Live professional and college team sports	27.160%	29.910%
U.S. syndicated series and movies	12.750%	9.560%
Other programming	0.160%	0.160%

B.5. The survey numbers need to be adjusted to remove the "Other Programming" category by dividing each of the three relevant categories by the sum of those categories, as shown below:

Table B-3
Adjusted Ford / Ringold Survey Results Excluding "Other Programming"
(Source: Table B-2)

Programming Category	2004		2005	
	Including "Other"	Adjusted to Exclude "Other"	Including "Other"	Adjusted to Exclude "Other"
Canadian-produced programming	59.940%	60.030%	60.370%	60.467%
Live professional and college team sports	27.160%	27.201%	29.910%	29.958%
U.S. syndicated series and movies	12.750%	12.769%	9.560%	9.575%
Total	99.850%	100.000%	99.840%	100.00%

Step 3: Multiply Fee Generation Share Times Adjusted Ford Ringold Results:

B.6. In this step the adjusted survey values for Canadian programming are multiplied by the fee generation number for Canadian Signal Royalties to determine CCG Share:

Table B-4
Calculation of CCG Share of Basic Fund
(Source: Tables B-1, B-3)

Year	Adjusted Survey Value of Canadian Programming on Canadian Signals	Canadian Signal Basic Fund Royalties	Final CCG Share
2004	60.030%	4.189%	**2.515%**
2005	60.467%	4.407%	**2.665%**

II. 3.75% FUND AWARDS

Step 1: Identify Fee Generation Number:

B.7. The 3.75% Fund gee generation numbers, adjusted to account for re-allocation of the 3.75% Rate Fee, are shown in Table 12 of the CCG's Proposed Findings of Fact and Conclusions of Law, and reproduced below:

Table B-5:
Summary of 3.75% Royalties
(Source: de Freitas Dir., Tab N, p. 3; Martin Reb. at 5, Table 3)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
2004	$535,568	$19,419,520	2.758%
2005	$391,447	$17,346,106	2.257%

Step 2: Identify CCG Survey Share:

B.8. These numbers, adjusted to exclude "Other programming," are shown above in Table B-3.

Step 3: Multiply Fee Generation Share Times Adjusted Ford Ringold Results:

B.9. In this step the adjusted survey values for Canadian programming are multiplied by the fee generation number for Canadian Signal Royalties to determine CCG Share:

Table B-6
Calculation of CCG Share of 3.75% Fund
(Source: Tables B-3, B-5)

Year	Adjusted Survey Value of Canadian Programming on Canadian Signals	Canadian Signal 3.75% Fund Royalties	Final CCG Share
2004	60.030%	2.758%	**1.656%**
2005	60.467%	2.257%	**1.365%**