Before the
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Washington, D.C.

In the Matter of	)	
Distribution of the 2004 and 2005 Cable Royalty Funds	)	**Docket No. 2007-3 CRB CD 2004-2005**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PROGRAM SUPPLIERS

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CERTIFICATE OF SERVICE

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PROGRAM SUPPLIERS

The Motion Picture Association of America, Inc. ("MPAA"), its member companies and other producers and/or syndicators of syndicated movies, series and specials broadcast by television stations ("Program Suppliers"),[1] in accordance with the November 16, 2009 and March 5, 2010 Orders of the Copyright Royalty Judges ("Judges") and Section 351.14 of the Judges' regulations, hereby submit their Proposed Findings of Fact and Conclusions of Law in the consolidated 2004 and 2005 Cable Royalty Distribution Proceeding.

[1] A listing of MPAA-represented Program Suppliers was submitted as PS Exhibit 5, Attachment MEK-2.

INTRODUCTION

This proceeding involves the distribution of approximately $300 million in cable royalty fees (including interest) among claimant groups representing those copyright owners who filed timely claims and whose works were broadcast by television stations whose signals were retransmitted by cable systems on a distant signal basis in 2004 and 2005. The four claimant groups seeking shares of the 2004-05 royalty funds are: (1) Program Suppliers; (2) the Settling Parties (consisting of the Joint Sports Claimants ("JSC"), the Commercial Television Claimants ("CTV"), the Public Television Claimants ("PTV"), and the Music Claimants); (3) the Devotional Claimants; and (4) the Canadian Claimants Group ("CCG"). Although the claimant groups agree that relative market value in attracting and retaining subscribers is the key criterion for determining royalty shares, they have presented a plethora of divergent studies and other evidence, all purporting to show what relative market value should be used to set distribution awards.

Not only do the various studies reach different results as to the relative value of the program categories, but they also reflect differences in how a hypothetical free market for distantly retransmitted television programming would be structured and operate. Because the programming at issue is broadcast by television stations before being distantly retransmitted, stations would continue to be the primary

program purchasers in a hypothetical free market. Thus, Program Suppliers presented a study that measures relative value based on the existing factors used to value television programming by stations, adjusted to fit the programming actually available on distant signals in 2004-05, as measured by the Nielsen studies. In contrast, the Bortz surveys assume that local cable system employees' willingness-to-pay for generic programming types would determine market value of program categories.

Market value has been defined in these distribution proceedings by a program category's ability to attract and to retain subscribers. Program Suppliers presented a survey that asks subscribers themselves to value programming based on what attracts them to continue their cable subscriptions. Asking subscribers how they value distant signal programming provides more direct evidence of what keeps them subscribing to cable than asking cable system employees how they value programming in attracting and retaining subscribers.

Other indicia of market value were introduced. A regression analysis that measures royalty payments and minutes of programming was presented as corroborative of the Bortz study results. However, the regression analysis was so flawed that it offered no valid evidence of market value. In any event, the results of the regression, both as originally estimated and then as modified, differ substantially from the Bortz results. A fees generated approach was offered as

showing the market value of distant Canadian stations, but fees generated are merely a construct of the statutory royalty payment scheme, not a marketplace value. A weighted music allocation ratio was presented, but it relied on assumed, not actual, payments and employed weighting factors that are not grounded in marketplace transactions. Better measures of the market value of Canadian Claimants and Music Claimants were offered in the record.

On changed circumstances, Program Suppliers introduced new evidence showing that local telecasts of professional baseball, basketball, and hockey games declined on television stations, but increased substantially on regional sports networks ("RSNs") in the years 1998-99 to 2004-05. Program Suppliers presented testimony showing that cable programming decisions are made at the multiple system operator ("MSO") level, not at the local cable system level, as well as that programming that falls in the Program Suppliers category is the most heavily carried in the cable network market.

The weight of the record evidence justifies an award to Program Suppliers in the range of 70%. Program Suppliers' market value analysis uses the same factors that determine market value in the television broadcast market to determine relative market value in a hypothetical distant market in which television stations would likely be the price makers. This analysis is corroborated by the subscriber survey, which shows Program Suppliers' programming is the most highly valued

program category. So, too, the evidence that the most widely carried cable networks overwhelmingly offer programming that would fall within the Program Suppliers' category reflects the value that subscribers and MSOs put on such programming. On the other hand, the decreased local carriage of professional baseball, basketball, and hockey games on distant signals and other television stations, along with the dramatic increase of RSN telecasts of such games, shows the declining importance of distant signals as a means for subscribers, especially heavy sports viewers, to access telecasts of those games.

SUMMARY

The governing statutory standards require that each party to a cable royalty distribution proceeding carry the burden of persuasion to show that its requested share is justified by the evidence contained in the instant record. Past awards are not precedential nor do they set the benchmarks against which succeeding cases must be measured. Nor are error or changed circumstances the only means by which a party's award may change from one proceeding to the next. The case law recognizes that the Judges may rely on new evidence and an improved showing by parties as grounds for a changed award. Moreover, the awards are fact-based and must, therefore, be justified on the record in any given case.

Prior legal rulings are to be afforded precedence, but that does not mean they are immutable. In the proper circumstances, the Judges may modify those rulings with an adequate explanation for the change. In cable royalty distribution proceedings, use of the market value criterion as the primary driver for setting royalty shares is precedent that should be applied here. Nevertheless, applying the market value criterion does not require that the Judges give the same weight as given in prior cases to previously-introduced evidentiary presentations. Rather, all evidence must be weighed in context of the record developed in a given case. As part of this evaluation, the Judges may give deference to methodologies that have withstood the test of time despite their acknowledged defects if the methodology offers assistance in determining the appropriate distribution awards.

Program category definitions established in prior proceedings and used by all parties to formulate their evidentiary presentations and requested share should be considered as precedent for this proceeding. The case law makes clear that if factors on which parties rely to formulate their evidentiary presentations are changed, the change must be announced to the parties prior to hearing so that the evidence can be adjusted accordingly.

Program Suppliers improved their presentation and introduced new evidence as compared to the last royalty distribution case. Specifically, Program Suppliers no longer rely on raw Nielsen viewing data, which the Librarian ruled did not show

by themselves relative market value, but have used the raw Nielsen data as the base for estimating relative market value in a hypothetical distant market. In this market analysis, the Nielsen data provide both the quantity (time and viewing) of the programming offered in 2004 and 2005, as well as the demographic and time of day information that is used to estimate a price related to the different programming categories. The Nielsen data was supplemented by SQAD spot advertising data which shows the cost per thousand ("CPM") price for different programming based on age demographics and time of day considerations.

Conceptually, Program Suppliers' market value estimate rests on a view that because the programming at issue must be broadcast on television stations to become distantly retransmitted by cable systems, television stations would be the price makers in an unregulated distant signal market. This means that the same determinants that can be observed today in the television station program purchase market would also be used to set prices in the hypothetical distant signal market. Further, large amounts of data about the workings of the existing television programming purchase market are currently available to provide a realistic, reliable source of information about how similar transactions would occur in the hypothetical market.

Dr. Ford, who developed and presented this market analysis, started with the Nielsen distant viewing data as the relative quantity of each category's

programming present in the 2004-05 distant market. Based on demographic and time of day considerations that affect the price of programming, Dr. Ford developed a composite unit CPM (*i.e.*, price) for each programming category based on its characteristics. By multiplying the Nielsen viewing quantity with his distant CPM unit price, Dr. Ford obtained a relative distant market value for the categories based on the determinants that apply in the television program acquisition market. Because PTV and Devotional Claimants do not follow the same commercial model as the other programming categories, Dr. Ford made certain adjustments to their estimates. After normalizing the resulting figures, Dr. Ford presented proposed market value shares for all claimants, except Music. This analysis estimated that Program Suppliers' relative market value share in the hypothetical distant market would be roughly 70% in both 2004 and 2005.

Market value has been defined in past proceedings as programming's ability to attract and to retain cable subscribers. Reliance in past proceedings was placed on a cable system employee survey as to the purported value of the programming categories in attracting and retaining subscribers. In the instant proceeding, Program Suppliers introduced, through Dr. Gruen, a subscriber survey that asked subscribers themselves to value the distant programming that keeps them subscribing to cable ("Subscriber Surveys"). Asking subscribers provides direct evidence of what distant programming they value. This follows a uses and

gratifications approach, widely used in media research, that posits subscribers use media in ways that benefit them, and thus are best able to articulate how they value programming. It also recognizes that cable subscribers make decisions about individual programs on a daily basis in contrast to cable system operators who make decisions based on entire signals or networks, not programming categories.

The Subscriber Surveys' questionnaire was structured on the Bortz survey questionnaire. But, based on recommendations from a team of experts in survey design, research, statistics, and distant programming, all of whom had prior experience in past cable royalty distribution proceedings, several refinements and improvements were made to the Subscriber Surveys' questionnaire, each geared toward obtaining more meaningful responses. Of note, the Subscriber Surveys repeated the distant signals received by the respondent and the programming categories several times during the interview to keep attention focused, provided examples within the program category definitions to help distinguish one category from another, and offered a non-team sports category to recognize that sports telecasts encompass a wider range of programming than JSC sports telecasts.

The surveys were tested through a Field Test and a Pilot Study before being fully implemented. The sample selections of both cable systems and subscribers followed accepted and long-used methodologies for obtaining random samples that can be projected to the universe. The opening question was framed so as to reduce

gender bias, and weighting was used to reduce any possible non-response bias. The respondents understood the questions and were able to provide articulate responses. The survey results on a weighted basis gave Program Suppliers slightly lower than 50% in both years, which was the highest value placed on any program category. This result was reinforced by the results for the survey question asking what programming was the most popular, which also ranked Program Suppliers at the top.

In response to indications in prior proceedings that increased availability of similar programming on cable networks could affect a claimant category's share, Program Suppliers introduced evidence, through Mr. Mansell's testimony, that the number of local telecasts on professional baseball, basketball, and hockey games on widely carried distant signals and other television stations declined between 1998-99 and 2004-05, while the number of such telecasts on RSNs had increased sharply in that same period. Looked at another way, the average number of such telecasts on a per station basis for the distant signals that were included in the Bortz and Nielsen studies declined sharply over the period.

RSNs are available to the vast majority of cable subscribers, and the increased number of professional baseball, basketball, and hockey game telecasts shown by RSNs shows a shift from the so-called regional distant signals to the RSNs as the places where cable subscribers look for and watch these telecasts.

There are several reasons for the shift, not the least of which is the growing ownership stakes that professional sports team owners have in RSNs. In any event, the shift means distant signals in 2004-05 were less important as a means for sports fans to see their teams. In addition to RSNs, a growing number of out of market (*e.g.,* season ticket passes to a particular professional or collegiate sport's telecasts) and Internet sources came into existence, from which sports fans could obtain telecasts.

To the extent that cable networks offer an analogous market to examine program value, Program Suppliers, through Mr. Homonoff's testimony, determined that the most heavily carried cable networks offer programming that would fall within the Program Suppliers category. This shows that the kind of programs in the Program Suppliers category are what operators and subscribers find to be the most valuable in attracting and retaining subscribers.

As to the Music share, Program Suppliers introduced evidence, through the testimony of Dr. Woodbury, that estimated a music ratio based on actual payments in 2004 and 2005. This provided a better representation of what the Music Claimants' share should be than the weighted music ratio they employed.

Program Suppliers presented evidence that calls into question three principal assumptions on which the Bortz studies rest. *First*, Program Suppliers, through Dr. Ford's rebuttal testimony, showed that the Bortz results measure a willingness-to-

pay by one buyer, which cannot be equated to relative market value in a hypothetical distant programming market. Relative willingness-to-pay corresponds to relative market value only in the most implausible circumstances – linear demand curves and the identical elasticities of demand at specified quantities for all seven programming categories – that have not been shown to be present here. *Second*, Program Suppliers showed that Bortz survey respondents did not consider any quantities of programming in their responses. *Third*, Program Suppliers demonstrated, through Mr. Homonoff's testimony, that program acquisition decisions, including those for distant signals, are made at the MSO level, not the local system level. Thus, the Bortz surveys of local cable system employees do not provide valuation answers from the people that actually make program acquisition decisions. In addition, the valuation question does not link respondents to the actual amount of each category's programming carried in 2004 and 2005, and thus provides valuation answers for programming in general.

Program Suppliers (as well as Devotional Claimants) presented evidence that undermines any validity to the regression analysis offered by the Settling Parties, either as evidence itself of market value or as evidence corroborative of the Bortz results. The regression analysis relied on minutes of programming without regard to viewing, demographics, time of day or other factors that differentiate the value of different programming minutes depending on their audience and when

they air. Further, the regression analysis relies on royalty payments, which are not market prices but a regulatory artifact, as a measure of market value. The regression then seeks to measure the non-market value royalty payments against different mixes of programming minutes, when royalty payments are not a function of programming mixes. In fact, the regression is so poorly specified that its coefficients, which are shown as a two-year average for 2004-05, are revealed to be widely divergent across the years when they are estimated on an annual or semi-annual basis. A related problem involves the very wide confidence intervals that are associated with the regression coefficients; they are so wide that, statistically speaking, most programming categories fit within the same interval. Finally, the regression results, even after being modified, do not corroborate the Bortz results, particularly when the regression coefficients (modified or unmodified) for each year are compared to the Bortz results for that year.

Music Claimants proffered a weighted music allocation ratio that relied on assumed, not actual, payments and employed weighting factors that are not grounded in marketplace transactions. Program Suppliers offered a music ratio allocation that was based on the actual payments for music rights during 2004 and 2005. As actual payments are closer to the market value paid for music rights than the assumed payments used in Music's weighted ratio, Program Suppliers' allocation should be adopted.

The fees generated approach advanced by CCG as support for their proposed shares does not reflect market value, but merely shows a division of royalty payments. All of the market value analyses in the record include a share for CCG, and thus provide better evidence of their relative market value than a fees generated approach.

PROPOSED FINDINGS OF FACT

I. Background Regarding Program Suppliers

A. Program Suppliers' Claim

1. Program Suppliers consist of over 200 producers and syndicators, both large and small, that filed timely claims seeking shares of the 2004 and 2005 cable royalty funds. PS Exhibit 5 at 4, Attachment MEK-2.

2. The programs represented by Program Suppliers include thousands of movies, syndicated series, and specials covering virtually the entire spectrum of subjects and genres, comprising about 54% (on a time basis) of the compensable programming in this proceeding. PS Exhibit 11 at 5, 20 (Table 1); PS Exhibit 5 at 4-5.

B. An Overview of Syndicated Programming

3. "Syndication" refers to the process by which programming is sold on a market-by-market basis to television stations. PS Exhibit 1 at 2.

4. Syndicated series are divided into off-network and first-run. PS Exhibit 1 at 3.

5. Off-network series are television programs which, after airing on a network basis, go into syndication. Examples of off-network series include *Law & Order, Everybody Loves Raymond* and *King of Queens*. PS Exhibit 1 at 3.

6. First-run series are created to go directly into syndication without a network run. Examples of first-run syndicated programming include *Entertainment Tonight*, *The Oprah Winfrey Show*, *Wheel of Fortune, Animal Rescue* and *Missing.* PS Exhibit 1 at 3.

7. Movies broadcast by television stations are either movies produced for theatrical releases ("motion pictures") or made-for-TV movies that are generally produced by the television networks. PS Exhibit 1 at 3.

8. Individual movie titles are usually licensed in syndication as part of "packages" that consist of motion pictures and made-for-TV movies that are licensed on an initial barter basis followed by a cash basis. PS Exhibit 1 at 4.

9. A television network series generally begins with a program idea that a producer tries to sell to a source of funding, such as a network, a major studio, or an independent production company. The idea may then be developed into a pilot depending on the potential of the concept to attract an audience, subsumed within which is the track record of the producer, the popularity of a given star, *etc.* PS Exhibit 1 at 4-5. A successful pilot will usually lead to a network order of six to twenty-four episodes for placement on the network schedule. PS Exhibit 1 at 5.

10. If the network series performs well enough in its first season, that is, attracts a substantial viewership, it will be evaluated for syndication as an off-network series. PS Exhibit 1 at 5.

11. Until fairly recently, an off-network series required at least 100 episodes, or roughly five seasons on the network, before it could be syndicated, given that most syndicated series are stripped, that is, broadcast at the same time every weekday. PS Exhibit 1 at 5.

12. First-run syndicated series are developed in a similar process, except that a successful idea is presented directly to individual stations or groups of stations (instead of a conventional network). To be successful, a first-run program must form an *ad hoc* network of television stations reaching approximately 70% of all U.S. television households. PS Exhibit 1 at 5-6.

C. The Program Owner/Syndicator Perspective

13. Program Suppliers, especially small producers in the group, count on receiving a share of the cable royalties as part of their revenue mix for continuing program production in today's high-risk environment, where syndication is the best, if not the only, way to recover the deficits producers incur in developing both off-network and first-run syndicated programs. PS Exhibit 1 at 6-8.

14. First-run syndicated programming faces high financial risks, especially at launch, as the number of time periods available to new programs shrinks, while weekly production costs and initial marketing and promotion expenditures continue to grow. PS Exhibit 1 at 9.

15. In 2004-05, few syndicated programs were licensed on a "straight cash" basis; meaning the station paid a cash license fee and took the risk of obtaining advertising for the program. Many syndicated programs were licensed on a "barter" basis, meaning the producer and the station divide the available advertising time between themselves and take the risk of being able to sell their available advertising slots. PS Exhibit 1 at 10-11.

16. Program revenues are determined by the appeal of a program, which is based on the number and type of viewers watching and the program's daypart. These factors determine the amounts advertisers will spend to purchase advertising on the program. PS Exhibit 1 at 11; Tr. at 629-32 (Ducey), 984-85 (Fritz).

II. How Cable Operators Make Decisions

17. The large majority of cable subscribers are served by cable systems that are owned by entities known as multiple system operators or MSOs. For example, in 2004 and 2005, approximately 70% of subscribers that received

one or more of the top 50 cable networks were subscribers to cable systems owned by MSOs. PS Exhibit 7 at 15 n. 9; Tr. at 318 (Meyka), 1741 (Homonoff).

18. A MSO typically has a senior executive at its headquarters with corporate responsibility for programming acquisition operations for all the MSO's cable systems. The executive and his/her team are responsible for all activities related to programming negotiations and implementation on the MSO's systems. These activities include evaluating program proposals from all sources, seeking input from other stakeholders within the MSO, conducting additional research, leading the negotiation process, formulating the key business terms related to the programming, and implementing launch of the program service to the MSO subscribers. All this is done within the context of the MSO's overall programming line-up strategy. PS Exhibit 7 at 6-8; Tr. at 267-68, 328 (Meyka).

19. A key factor affecting MSO programming decisions is whether the programming will attract new subscribers or retain existing subscribers. Keeping subscribers satisfied with their cable service was important during 2004-05 because MSOs faced increased competition from satellite carriers and telephone companies. PS Exhibit 7 at 9-11.

20. Cost of the programming service and bandwidth limitations are other important factors in an MSO's programming acquisition decisions. PS Exhibit 7 at 12.

21. MSOs do not make programming decisions in a vacuum but as part of an overall programming strategy. Distant signals must be considered in the broader context of what cable networks a MSO offers. Because almost all MSO programming acquisition decisions involve per channel acquisitions of cable networks that offer 24-hour programming, analyzing the overall line-up of programming on cable networks provides insight into what programming MSOs think is most desired by their subscribers. Tr. at 1742 (Homonoff); PS Exhibit 7 at 13-14.

III. The Hypothetical Market Model

A. The Current Regulated Market

22. Cable systems carry distant signals pursuant to the statutory Section 111 compulsory license. *See* 17 U.S.C. § 111. To obtain the privilege of the Section 111 compulsory license, cable systems must file semi-annual statements of account and royalty fee payments in accordance with the requirements specified by Section 111 and the applicable regulations. PS Exhibit 5 at 8-12.

23. Form 3 cable systems must calculate their cable royalty obligations using a formula whose principal components are the amount of a system's gross receipts and the number and type of distant television station signals that the system retransmitted. PS Exhibit 5 at 15-22.

24. As of March 2009, the 2004 cable royalty fund amounted to approximately $134.3 million and the 2005 fund amounted to approximately $137.2 million. Over 97% of the royalties for both years were paid by the largest (so-called Form 3) cable systems. PS Exhibit 5 at 13 and App. A & B.

25. Royalties paid by cable systems for distant signal retransmissions are not based on actual market transactions, but are set by statute. PS Exhibit 11 at 3.

26. Compulsory license royalties are not based on the amounts of different types of distant nonnetwork programming being offered, but on the number and type of distant signals being retransmitted. Consequently, these payments offer little, if any, evidence about the relative market value of the different programming categories in a hypothetical free market, and, thus, how to distribute the royalty funds. PS Exhibit 11 at 3; Tr. at 2116 (Ford).

27. The established basis for setting the distribution shares of the royalty pool among the claimants in this proceeding is relative market value, which is

done by simulating what the relative market value would be if no compulsory license existed. PS Exhibit 11 at 3-4; PS Exhibit 16 at 2.

28. Market value is defined as the price at which the programming that appears on distant signals would exchange in a market setting, with willing buyers and sellers, and no regulations. PS Exhibit 11 at 3-4; PS Exhibit 16 at 2; Tr. at 2115-16 (Ford).

29. The market value of a good or service consists of two components: price and quantity. In this proceeding, the relevant quantities are the compensable programs actually retransmitted on a distant basis in 2004 and 2005. PS Exhibit 16 at 2.

30. Price is based on what compensation the owner (or rightsholder) of the rights of the compensable programming would likely receive in return for retransmission rights in the "distant" market. PS Exhibit 11 at 6.

31. In the absence of the compulsory license, content currently distributed via cable carriage of a distant broadcast signal will likely continue to be distributed in the same manner, and cable systems would likely negotiate with broadcast stations over what they would pay instead of statutorily-specified fees. There would likely be no change in the program content on those distant signals or in the relative values of those programs from the perspective of the cable operator. SP Exhibit 52 at 12.

B. Dr. Ford's Hypothetical Market Model

32. Distant signal retransmission of broadcast signals was governed in 2004-05 by regulation, which determined the price, the quantity of programming, and the terms and conditions of such retransmission. Market value of programming retransmitted on distant signals cannot be observed in such a heavily regulated setting. PS Exhibit 11 at 10.

33. Any approach to creating a hypothetical market model should be suited to the task of estimating market value based on the price and quantity of goods and services exchanged. Market transactions and price data are vastly superior to any other evidence for estimating what value would be in a hypothetical marketplace. PS Exhibit 11 at 11-12.

34. Since all the compensable programming at issue in this proceeding appears on broadcast television stations, a hypothetical market model should focus on the valuation approach relevant to broadcasters, as evidenced in actual broadcast station licensing transactions. These transactions, determined in an unregulated setting, show the financial consideration paid to copyright owners of programming broadcast on television station signals that are distantly retransmitted and, as such, provide a valid basis for relative market value royalty distributions. PS Exhibit 11 at 10-12; Tr. at 2116-17 (Ford), 233 (Crandall).

35. The buying and selling of television programming outside of the compulsory license regime occurs routinely in the television broadcast and cable network markets, both of which are well developed and well understood. PS Exhibit 11 at 11; Tr. at 2372-73 (Crawford).

36. It is possible to obtain good relative market value estimates for the hypothetical distant signal marketplace by following the same patterns of actual market transactions for the same programming in the unregulated market. PS Exhibit 11 at 11.

37. Television broadcast stations obtain a majority of their revenues from advertising. Tr. at 2652 (Desser), 2717-18 and 2735-36 (Trautman), 625 (Ducey); PS Exhibit 11 at 49.

38. When a broadcast station considers purchasing programming, its ability and willingness-to-pay are based on the expected advertising revenues from the program's audience. PS Exhibit 11 at 5; Tr. at 981-85, 988-89 (Fritz), 626-31 (Ducey).

39. Broadcast stations select programming to maximize the net advertising revenue they can receive from the audience they can attract to that programming. SP Exhibit 52 at 3.

40. A program's value to the advertiser depends on the size of the audience and its demographic profile, among other factors. PS Exhibit 11 at 5-6; Tr. at

2117 (Ford); 629-30 (Ducey), 981-85, 988-89 (Fritz). Market value of programming is thus based on and derived from the monetary value of the audience it produces. PS Exhibit 11 at 12, 18.

41. Both broadcast stations and cable networks compete for advertising dollars based on the viewers' interest in watching the programming offered. Different programs attract different sizes of audiences with different demographic profiles, and, thus, yield different advertising revenues. PS Exhibit 11 at 12-13.

42. Generally, the larger a program's audience, the more valuable advertising time will be during that particular program. PS Exhibit 11 at 1; Tr. at 629-30 (Ducey). But audience size, or viewership, is not the only relevant factor in determining the market value of programming. Audience demographics - age and gender - also influence the prices that advertisers will pay. PS Exhibit 11 at 13, Tr. at 2117 (Ford), 984-85 (Fritz), 626-32 (Ducey). For example, programming viewed by men obtains higher advertising revenues than does programming viewed by women; likewise with programming viewed by younger adults. PS Exhibit 11 at 13-14.

43. The price paid for advertising spots may differ depending on the time of day the program airs. For example, advertising prices are much higher in

Primetime (8pm - 11pm) than during the day. PS Exhibit 11 at 14; Tr. at 981-83 (Fritz), 632 (Ducey).

44. When a broadcast station purchases programming, incorporating the variations in the expected audience size, demographics, and the time the program airs among different programs is standard operating procedure for determining the value of the programming. PS Exhibit 11 at 14.

45. Under the Section 111 regulatory scheme, cable operators are prohibited from inserting advertising on distant signals. Tr. at 2377 (Crawford). Because market value must be approximated in an unregulated environment, a hypothetical free market should not include this purely regulatory artifact of the current regulatory scheme. PS Exhibit 11 at 43. In an unregulated market, absent the cable compulsory license, it is likely that cable operators would be able to insert advertising into distantly retransmitted programming. Tr. at 2377 (Crawford), 3091-92, 3098-99 (Calfee), 2836 (Salinger).

46. In the current television broadcast market, programming rights are not sold with advertisements already embedded. Rather, the number of advertisements to be retained by the producer and the station are a matter of negotiation. Consequently, a hypothetical free market model for distantly retransmitted programming should not assume that programs would be pre-packaged with advertisements intact. Instead, when estimating relative

market value in such a market based on actual market transactions for this proceeding, it should be assumed that cable operators or stations could insert advertisements pertinent to the distant market into the distantly retransmitted programming. PS Exhibit 11 at 43, Tr. at 2123-2126 (Ford).

47. The demand side of the programming market is competitive, with many entities vying for the rights to particular programs aired on broadcast stations. As a result, it is reasonable to assume in the hypothetical unregulated market, like the actual market, that broadcast stations would be the market makers, and the prices stations would be willing to pay for programming would correspond to the programming's expected advertising revenues. Advertising income, then, is the most obvious source of market value for the simulated market. PS Exhibit 11 at 43.

48. In an unregulated distant signal market, cable operators would not be able to license programming at a price of their choosing. The preferences of both the buyer and the seller would matter. Tr. at 3094 (Calfee).

49. Determining the relative market value for the different categories of programming at issue requires translating the prices paid for the individual programs in each claimant category into a single average price applicable to all programs in the aggregated category. PS Exhibit 11 at 16, n. 26.

50. Dr. Ford makes this determination by assuming that the same drivers of price in the actual broadcast television market -- Nielsen viewing levels, audience demographics, and daypart -- would also drive prices for the additional audience for these same programs that is added by distant retransmission in a hypothetical distant signal market. PS Exhibit 11 at 16, n. 26.

51. Dr. Ford's analysis is radically different from the avidity analysis that Dr. Gruen performed in the 1998-99 Phase I Cable Proceeding. Tr. at 2230-34 (Ford).

IV. Application of the Hypothetical Market

A. The Nielsen Studies Presented by Program Suppliers

52. The Nielsen Company's ("Nielsen") name is synonymous with television ratings in the media and entertainment industries. Nielsen ratings, which are heavily relied upon by all players in both the broadcast television and cable network markets, estimate television audience size and are a barometer of viewing habits. PS Exhibit 9 at 1-2; PS Exhibit 10 at 19. A television rating is a proportion of the total group of viewers being studied that is tuned into a particular program. Tr. at 1989-90 (Lindstrom).

53. Nielsen ratings measure the viewers who are the end users of programs. Tr. at 1036-39 (Saltzman).

54. Nielsen's response rates are the highest in the industry, and likely the highest in survey methodology in general. Tr. at 2090 (Hoynoski). Nielsen utilizes two basic data collection instruments in its syndicated services: meters and diaries. PS Exhibit 9 at 2.

55. For the last several years, Nielsen's People Meters have been considered the current standard of television audience measurement in almost all of the world's television economies. PS Exhibit 10 at 3.

56. The Nielsen distant viewing study presented in this proceeding utilized People Meter data. PS Exhibit 9 at 2; PS Exhibit 10 at 2-3; Tr. at 1968 (Lindstrom). The People Meter provides a measurement of viewing to broadcast networks, national syndicated programs, and over 75 cable networks, and is also used by local cable systems and MSOs. Nielsen viewing data is widely used because it offers an agreed "currency" to value advertising time on programming. PS Exhibit 9 at 2-3; PS Exhibit 10 at 2-3.

57. Nielsen's People Meters record what every television set within a sample household is tuned to every 2.7 seconds. These 2.7-second scans are then accumulated into 30-second blocks of time. Each time two of these 30-

second blocks of time match, a viewing minute is credited to the household. Tr. at 1964-65 (Lindstrom).

58. Program Suppliers commissioned special studies of viewing of distant non-network programming from Nielsen based on separate samples of 180 stations for 2004 and 2005, using People Meter viewing data for those years. PS Exhibit 5 at 23; PS Exhibit 9 at 4.

59. To create the sample of stations to be studied in each of the years, 2004 and 2005, Nielsen divided a list obtained from Cable Data Corporation ("CDC") of all broadcast stations carried as distant signals by Form 3 cable systems into two groups – the top 50 stations, based on number of subscribers receiving each station as a distant signal, and all other distant stations. The top 50 stations were automatically included in the sample of stations and the remainder of the stations were systematically sub-sampled. The data were ultimately weighted to reflect this difference in the probability of selection. PS Exhibit 2 at 7; PS Exhibit 9 at 4; Tr. at 1959 (Lindstrom).

60. To limit the result to only distant viewing, MPAA determined what counties are considered local for each sample station based on an application of the Federal Communications Commission's distant signal carriage rules as prescribed by Section 111. PS Exhibit 5 at 24-31, Attachment MEK-1.

61. MPAA provided Nielsen with a list of what counties were local for each sample station. Because Nielsen viewing data are measured on a county basis, by eliminating viewing to all counties considered local for each station, Nielsen was able to measure only the distant viewing to that station. PS Exhibit 9 at 4; Tr. at 1959-60 (Lindstrom).

62. MPAA also supplied Nielsen with a set of program category definitions used in past cable royalty distribution proceedings so that the distant viewing could be divided into the programming categories at issue and the share of viewing for each category reported on an aggregated basis. PS Exhibit 5 at 31-32, Attachment MEK-12.

63. The viewing data were also sorted by age demographic groups to provide information on an individual viewer, in addition to a household, basis. Both household and demographic group distant viewing data were reported in the Nielsen study results. PS Exhibit 9 at 7; Tr. at 1975 (Lindstrom).

64. For 2004, the full year distant signal viewing results by households are as follows:

DEMOGRAPHIC=HOUSEHOLDS

MPAA TYPE	TOTAL VIEWING MINUTES (WEIGHTED)		TOTAL QUARTER HOURS OF PROGRAMMING	
LOCAL	473,875	8.5%	356,262	7.5%
SYND SERIES, SPCLS, MOVIES	3,015,986	54.1%	2,520,373	53.1%
DEVOTIONAL SERIES	56,025	1.0%	189,438	4.0%
SPORTS	388,340	7.0%	34,456	0.7%
OTHER	6,632	0.1%	5,235	0.1%
NON-COMMERCIAL	1,542,673	27.7%	1,429,096	30.1%
CANADIAN	92,854	1.7%	211,834	4.5%
	5,576,384	100%	4,746,694	100%

PS Exhibit 9 at PL-3, page 1.

65. For 2004, the full year distant signal viewing results for the 2+ demographic group are as follows:

DEMOGRAPHIC=PERSONS 2+

MPAA TYPE	TOTAL VIEWING MINUTES (WEIGHTED)	
LOCAL	517,342	7.8%
SYND SERIES, SPCLS, MOVIES	3,771,739	57.2%
DEVOTIONAL SERIES	68,315	1.0%
SPORTS	460,539	7.0%
OTHER	6,447	0.1%
NON-COMMERCIAL	1,675,071	25.4%
CANADIAN	95,482	1.4%
	6,594,933	100%

PS Exhibit 9 at PL-3, page 8.

66. For 2005, the full year distant signal viewing results by households are as follows:

DEMOGRAPHIC=HOUSEHOLDS

MPAA TYPE	TOTAL VIEWING MINUTES (WEIGHTED)		TOTAL QUARTER HOURS OF PROGRAMMING	
LOCAL	1,043,942	12.6%	459,827	10.0%
SYND SERIES, SPCLS, MOVIES	5,617,852	68.0%	2,599,091	56.3%
DEVOTIONAL SERIES	40,376	0.5%	248,683	5.4%
SPORTS	450,567	5.5%	32,651	0.7%
OTHER	2,611	0.0%	4,198	0.1%
NON-COMMERCIAL	990,212	12.0%	1,028,590	22.3%
CANADIAN	121,394	1.5%	243,585	5.3%
	8,266,955	100%	4,616,625	100%

PS Exhibit 9 at PL-5, page 1.

67. For 2005, the full year distant signal viewing results for the 2+ demographic group are as follows:

DEMOGRAPHIC=PERSONS 2+

MPAA TYPE	TOTAL VIEWING MINUTES (WEIGHTED)	
LOCAL	1,237,364	13.1%
SYND SERIES, SPCLS, MOVIES	6,530,564	69.0%
DEVOTIONAL SERIES	44,846	0.5%
SPORTS	536,319	5.7%
OTHER	2,813	0.0%
NON-COMMERCIAL	979,973	10.4%
CANADIAN	130,328	1.4%
	9,462,206	100%

PS Exhibit 9 at PL-5, page 8.

68. The household "Total Viewing Minutes" percentages for 2004 and 2005 are not themselves ratings, but they can be used to calculate ratings. Tr. at 2012-15 (Lindstrom).

B. Estimating Market Value Using Nielsen Viewing Data

69. For his market value estimates, Dr. Ford relied on the Nielsen viewing data as the relevant quantities and the advertising rate data as the prices. PS Exhibit 11 at 17.

70. Dr. Ford used the Nielsen viewing data for 2004 and 2005 for program volumes, viewership, and audience demographics related to each program category to establish the category's audience profile. PS Exhibit 11 at 6-7.

71. Based on the particular audience profile established for each program category, and using the advertising rate data applicable to each profile, Dr. Ford first calculates the market unit price for each program category. Next, he calculates the total relative market value across all claimant categories by applying each category's maket unit price to the quantity consumed (*i.e.*, viewing). PS Exhibit 11 at 17. This procedure parallels the standard approach to program valuation used in the television broadcast market. PS Exhibit 11 at 7. Under this approach, viewing, while highly correlated with value, is not identical to value. PS Exhibit 11 at 8, 33.

72. In order to translate the Nielsen viewing data into market value, Dr. Ford used CPM data, the standard yardstick of the price of advertising, provided by SQAD based on a large sample of advertising purchases (buys) representing billions of dollars of local spot advertising transactions. SQAD

is recognized as an industry standard source for advertising cost data. PS Exhibit 11 at 18-19; Tr. at 2120, 2135-36 (Ford).

73. Dr. Ford's CPM analysis adjusted for viewer demographics and the time of day that the different programming categories typically aired. PS Exhibit 11 at 18, 22-30.

74. Live Team Sports programs attract a disproportionately male audience. Since the male audience is generally more costly in the advertising market than the female audience, Dr. Ford made an adjustment based on gender for JSC programming. PS Exhibit 11 at 23-24, Tr. at 2142-44 (Ford).

75. Dr. Ford made adjustments to account for the daypart during which CTV and JSC programming is likely to be broadcast. PS Exhibit 11 at 25-27; Tr. at 2140-42 (Ford).

76. Because the programming represented by Devotional Claimants and the PTV Claimants do not follow the typical commercial model of the television industry, Dr. Ford made further adjustments for these two groups. PS Exhibit 11 at 33-34.

77. As a general practice, Devotional programmers pay broadcasters for air time. PS Exhibit 11 at 34; Tr. at 689 (Ducey). Actual marketplace evidence reveals that Devotional programming has a near zero market value, given its

very small viewer shares and audience profile as well as the fact that Devotional programs are rarely, if ever, compensated by broadcasters or the cable industry as a programming input. PS Exhibit 11 at 48.

78. Based on those market factors, Devotional Claimants should receive no more than 1% of the funds. PS Exhibit 11 at 34-35, 50.

79. Over half the PTV budget comes from various government subsidies and charitable gifts. PTV accepts corporate sponsorships, which accounted for about 15% of public television's annual revenues in 2004 and 2005. Corporate sponsorship was treated as a proxy for advertising on PTV stations. PS Exhibit 11 at 36. Because the amount of non-programming time on public broadcasting stations equals one-third (33%) of the time offered to advertisers by commercial television stations, Dr. Ford adjusted PTV's estimated CPM rate accordingly. PS Exhibit 11 at 37.

80. Dr. Ford's final calculations of relative market value are as follows:

Relative Market Values Based on Marketplace Evidence

Claimant Group	Relative Share of Viewership (%)	Relative Price of Viewership (Base = NAB)	Relative Market Value (%)
Year 2004	B	C	Norm(B·C)
NAB	7.852	$1.00	6.519
Program Suppliers	57.247	$1.44	68.283
Devotional	1.037	$1.39	1.194
Joint Sports Claimants	6.990	$2.39	13.843
PTV	25.424	$0.39[a]	8.237
Canadian	1.449	$1.60	1.924
Sum	100	...	100
Year 2005			
NAB	13.081	1.00	10.181
Program Suppliers	69.038	1.40	74.961
Devotional	0.474	1.30	0.481
Joint Sports Claimants	5.670	2.05	9.046
PTV	10.360	0.48[a]	3.909
Canadian	1.378	1.33	1.421
Sum	100	...	100

(a) Includes non-commercial adjustment.

PS Exhibit 11 at 39.

V. Alternative Relative Valuation

A. Dr. Gruen's Subscriber Surveys

81. Dr. Gruen played a principal role in the development and execution of the surveys that asked cable subscribers to attribute relative values to program categories that they received as distant signals during 2004 and 2005 ("Subscriber Surveys"). PS Exhibit 8 at 4; Tr. at 1817-18 (Gruen).

B. Development of the Cable Subscriber Surveys

82. The Subscriber Surveys for 2004 and 2005 were developed through a collaborative effort that meshed the knowledge and experience of several individuals familiar with the compulsory license proceedings, as well as with consumer research and statistics. PS Exhibit 8 at 6.

83. Dr. Gruen, aided by Mr. Wilkofsky, developed a questionnaire and supervised the execution of the surveys. Dr. Rubin provided input with respect to the wording of questions, Ms. Kessler provided input as to definitions and representative examples of program categories, and Dr. Frankel provided questions and wording to ensure that the questionnaire would satisfy randomness and statistical validity standards. PS Exhibit 8 at 6.

1. Questionnaire

84. The Subscriber Surveys, while structured similarly to the Bortz Survey, were tailored to subscribers and corrected aspects of the Bortz Survey questionnaire that could lead to misleading results. PS Exhibit 4 at 3, 9-10. An initial draft of a questionnaire was shared with the team and revised numerous times based on input from each team member. PS Exhibit 8 at 6.

85. Dr. Rubin analyzed the questionnaire based on his own expertise in survey research and his earlier CRT and CARP critiques of the Bortz study. He suggested refinements that provided a clear, precise, valid, and reliable means of obtaining subscribers' valuations in a manner that improved upon past approaches used by the other claimants. PS Exhibit 4 at 9-10. These refinements improved the clarity of instructions given by the interviewers to focus respondents only on nonnetwork programs from distant signals retransmitted by their cable systems that fit within precise program categories: News and Community Events, Series, Devotional Programs, Movies and Specials, Live Team Sports, Non-Team Sports, PBS Programs, and Canadian Programs. An aspect of this was listing examples of programs in each category. PS Exhibit 4 at 10.

86. In addition, the Subscriber Surveys included reminders throughout the questionnaire that responses should apply only to the nonnetwork distantly retransmitted programming available to them. PS Exhibit 4 at 10.

2. Field Test

87. Before conducting the Subscriber Survey for 2004, a field test was conducted to determine if subscribers understood the questions and were capable of providing relative values for each program category ("Field Test"). The Field Test consisted of 25 interviews in Milwaukee, Wisconsin and Columbus, Ohio. PS Exhibit 8 at 7; Tr. at 1820 (Gruen).

88. The Field Test showed that respondents understood the questions, were not discouraged by having the program definitions repeated, and were able to allocate values among the various program categories. PS Exhibit 8 at 8. Based on the Field Test report, the survey questionnaire was modified by shortening the valuation section and by adding another reference to the specific distant signals carried on the respondent's cable system. PS Exhibit 8 at 8-10.

3. Pilot Study

89. Following the Field Test, a pilot study was conducted to determine if a subscriber survey was feasible on a wider scale ("Pilot Study"). The Pilot Study targeted 150 subscribers from the top 50 cable systems (based on

2003 royalty payments). A total of 152 interviews were completed smoothly and demonstrated that a large-scale survey was feasible. PS Exhibit 8 at 10-11; Tr. at 1820-21 (Gruen).

4. 2004 Cable Subscriber Survey

90. The survey team set a target of 1,500 survey responses, twice the size of most national surveys, for the 2004 survey to provide reliable results with a relatively low sampling error. PS Exhibit 8 at 11.

91. Dr. Frankel, the survey statistician, selected the cable system sample and set out the methodological process for selecting subscribers from each of the sample cable systems. PS Exhibit 8 at 11.

a. Sample of Cable Systems

92. A two stage sampling approach was used. In the first stage of selection, a probability sample of cable systems was selected ("Stage 1 Sample"). In the second stage of selection, a Random Digit Dialing ("RDD") sample of households subscribing to the cable systems selected in Stage 1 was selected ("Stage 2 Sample"). Interviews were conducted with these qualifying households. PS Exhibit 3 at 3. Using this two stage sampling process produced a sample of subscribing households with known probabilities of selection from which sampling weights, based on each sample system's royalties, could be established to allow the projection of the sample

households to the full universe of households that subscribe to Form 3 cable systems. PS Exhibit 3 at 3.

93. A total of 100 Form 3 Cable Systems were selected based on probabilities in proportion to a "measure of size." The measure of size chosen for sample selection was the royalty fee payment for each system, which is related to the number of subscribers in each system. PS Exhibit 3 at 3-4.

94. CDC prepared a customized data report of Form 3 cable systems for 2004-1 with the corresponding royalty payment for each system. CDC provided a similar report based on 2005-1 information about Form 3 systems. PS Exhibit 2 at 4-5.

95. The 2004 sampling frame consisted of 1,319 Form 3 systems with a total measure of size (royalty payments) of $52,563,092. Five systems, each of whose royalty payments represented 1% or more of the total Form 3 royalty payments, were selected with certainty. The remaining 95 systems in the sample were selected using a sampling method know as Probability Proportional to Size ("PPS") systematic selection. Under this method, systems were sorted by their royalty payments from highest to lowest. A selection interval was determined and a random start number was chosen. Selection was done by picking each system located on the list corresponding

to the successively added selection interval after the random start. PS Exhibit 3 at 5.

96. The Stage 2 Sample (*i.e.*, households subscribing to the cable systems selected in the Stage 1 Sample) was selected using RDD telephone sampling methodology for selecting probability samples of telephone households developed in the 1970s and widely used today. PS Exhibit 3 at 5.

97. For each cable system selected in the Stage 1 Sample, the geographic coverage of the system (in terms of complete counties) along with the distant signals retransmitted, were determined by CDC. PS Exhibit 3 at 5-6; PS Exhibit 2 at 5; PS Exhibit 8 at 11-12; Tr. at 1822 (Gruen).

98. Of the 100 cable system sample, four systems were located outside of the continental United States—three in Puerto Rico and one in Guam. As the survey was intended to apply to cable systems in the continental U.S., those four non-continental U.S. systems were eliminated from the sample. PS Exhibit 8 at 12; Tr. at 1822-23 (Gruen). Five of the cable systems in the sample had only PBS distant signals and one cable system had only a Canadian distant signal. PS Exhibit 8 at 12.

99. Based on the Field Test report, respondents served by PBS signal-only systems allocated a 100 percent value to PBS. Based on that experience, it was determined that no other information could be gained by conducting

interviews in PBS signal-only or Canadian signal-only markets. Instead, the expected value allocations of those subscribers (*i.e.*, virtual value allocations) were incorporated into the survey results. PS Exhibit 8 at 12; Tr. at 1823 (Gruen); PS Exhibit 3 at 6.

100. The 2004 survey sample covered 89 markets and 90 cable systems. PS Exhibit 8 at 12-13. Dr. Frankel assigned the number of interviews targeted for each cable system (*i.e.*, interview allocations). PS Exhibit 8 at 13; Tr. at 1823-24 (Gruen); PS Exhibit 3 at 6. RDD samples of all households in the counties served by these systems were obtained using the Equal Probability of Selection Method ("EPSEM"). PS Exhibit 3 at 5-6; PS Exhibit 2 at 5. It was necessary to determine as part of the telephone screening process whether potential respondents were cable subscribers to one of the sample systems. Survey interviews were conducted only in those households that subscribed to the selected systems. PS Exhibit 3 at 5-6.

b. Questionnaire Template

101. Dr. Gruen prepared a survey template to be used by the interviewers. The survey template contained both the survey questionnaire and information unique to each market in the sample of 89 cable systems. Each template contained the following information:

- Name of cable system

- Prime city of cable system
- Counties served by the cable system
- States served by the cable system
- Federal Information Processing Standard (FIPS) County Codes
- Distant signals carried by each system
- City of license for each distant signal
- State of origin for each distant signal
- Whether a distant signal is a network affiliate
- Whether a distant signal is a PBS station
- Whether a distant signal is a Canadian station
- The target number of interviews for each cable system

PS Exhibit 8 at 13; Tr. at 1824 (Gruen).

102. The template assured that each potential respondent would be asked questions tied to the relevant cable system and the distant signals that were carried by that cable system. PS Exhibit 8 at 14.

c. Questionnaire

103. As a result of the Pilot Study, the questionnaire was keyed to ask questions about 2004 and modified to ensure random selection of the respondent in co-heads of household situations; to tie instructions to the template file; and to

ensure clarity. PS Exhibit 8 at 14 and Appendix B (2004 Cable Subscriber Questionnaire).

d. Survey Methodology

104. Survey Sampling, Inc. (SSI) provided the telephone numbers to be used in the survey based on the EPSEM sample of all possible telephone numbers that could be called, including business numbers, disconnected numbers, and fax numbers within the counties served by each sample system. The calling protocol required calling each telephone number a minimum of six times on six different days or until the record was resolved. Once a replicate was opened, each record had to be resolved even if the quota on the number of completed interviews for a given market had been reached. PS Exhibit 8 at 14-15.

105. The 2004 survey was conducted by PGM from July 13, 2005 through December 3, 2005. A total of 1,439 interviews were completed. PS Exhibit 8 at 15-16.

5. 2005 Cable Subscriber Survey

106. The process for executing the 2005 cable subscriber survey remained substantially the same as it was for the 2004 cable subscriber survey. PS Exhibit 8 at 16; Tr. at 1829 (Gruen).

a. Sample of Cable Systems

107. Although the same two-stage selection procedure was used in selecting the 2005 cable system sample, the measure of cable system size was the number of subscribers for each system rather than royalties. PS Exhibit 3 at 7. The 2005 Stage 1 sampling frame consisted of 1,292 Form 3 systems with a total of 49,201,265 subscribers. One hundred cable systems were selected at Stage 1. PS Exhibit 3 at 7. Eight systems, each serving 1% or more of all Form 3 subscribers, were selected with certainty, and the others were selected with probabilities proportional to their subscriber counts using the same PPS systematic selection process followed in 2004. PS Exhibit 3 at 7-8.

108. Three systems, located in Puerto Rico, were eliminated from the sample. PS Exhibit 8 at 16. Three systems carrying PBS-only signals and one system carrying Canadian-only signals were eliminated from the interviewing process and their expected value allocations of 100% were later factored into the final shares for the PBS and Canadian program categories. PS Exhibit 8 at 16; Tr. at 1831-32, 1839-40 (Gruen). A similar virtual allocation for one cable system that carried both PBS and Canadian distant signals, but no other signals, was later provided. PS Exhibit 8 at 16-17.

b. Questionnaire

109. The questionnaire for the 2005 survey was the same as the one used in the 2004 survey, except for changes made to reference the correct year. PS Exhibit 8 at 18.

c. Survey Methodology

110. The 2005 survey was conducted by PGM from August 2, 2006 through December 2, 2006 with 1,510 interviews completed. PS Exhibit 8 at 18.

6. 2004 and 2005 Unweighted Survey Results

111. The unweighted results of the Subscriber Surveys for 2004 and 2005 are:

Unweighted Survey Results (Percent)

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.
The other representatives of the program categories whose results are presented are as follows: News and Community Events - the National Association of Broadcasters ("NAB"); Devotional Programs - Devotional Claimants; Live Team Sports - Joint Sports Claimants ("JSC"); PBS - Public Television Claimants ("PTV"); Canadian Programs - Canadian Claimants Group ("CCG").

PS Exhibit 8 at 19.

7. Weighting the 2004 and 2005 Survey Results

112. The 2004 and 2005 raw survey results were weighted using the virtual results of Canadian-only and PTV-only systems whose subscribers were not interviewed, and based on the actual number of subscriber interviews that would have been allocated to the system if its subscribers had been interviewed. PS Exhibit 8 at 20; PS Exhibit 3 at 13. Each virtual interview assigned the full $10 allocation to either the Canadian or PTV category, respectively, for a Canadian-only or PTV-only cable system. PS Exhibit 8 at 21.

113. For the only sample cable system which carried both Canadian and PTV stations, but no other types of stations, a value of $0 was first assigned to the PTV category and $10 for the Canadian category for each virtual interview and then the reverse allocation was assigned to the system's virtual interviews. PS Exhibit 8 at 21; Tr. at 1839 (Gruen).

114. The 2004 and 2005 raw survey results were also weighted by Dr. Frankel to reflect the relative contribution to the royalty pool for each cable system as well as the proportion of the interview quota for each system that resulted in completed interviews. PS Exhibit 8 at 21; PS Exhibit 3 at 13.

115. Dr. Frankel calculated the relevant confidence intervals for the weighted survey results. PS Exhibit 3 at 13.

116. After weighting for virtual interviews and system royalty payments, and eliminating the "other" category, the recalculated shares for each claimant group resulted in the following:

Normalized Distant Signal Relative Values (Percent)

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.

PS Exhibit 8 at 23.

C. Dr. Gruen's Subscriber Surveys Are Well-Designed And Reliable.

117. Dr. Rubin has appeared as an expert witness in three prior cable royalty distribution proceedings on the issues of the validity and reliability of measuring instruments used by JSC, Local, Devotional, and Canadian claimants. Specifically, in those proceedings, Dr. Rubin pointed out various problems with the Bortz Survey. The Subscriber Survey questionnaires

benefitted from this experience by correcting previously-identified problems with the Bortz Survey. PS Exhibit 4 at 3.

118. Cable operators may be aware of how they package their channels in different tiers, but may not be sufficiently aware of what value subscribers place on specific program categories within the distant signals (or other channels) offered on those tiers. This may be especially true for technicians, public affairs directors, marketing managers, and office managers at cable systems, who have answered some cable operator questionnaires in the past. PS Exhibit 4 at 4-5.

119. Researchers must use valid and reliable measures. To be reliable, a measure must deliver consistent results. To be valid, a measure must serve its intended purpose. The validity of any measure rests with how adequately the concept (for example, *value*) is defined. Although a measure may appear to have face validity (that is, tap the attribute it purports to measure on the surface), it may lack predictive validity. A measure might be reliable (that is, deliver consistent results), even if it is not valid (that is, measure the intended concept, *value* in this instance, and predict the expected behavior). PS Exhibit 4 at 6-7.

120. The Subscriber Surveys' questionnaires proceeded systematically and methodically by: (a) introducing the brief national survey to the randomly

selected cable television subscriber; (b) randomly seeking the head or co-head of the household to respond; (c) insuring the respondent subscribed to the appropriate cable system in the year in question; (d) focusing the subscriber on "program categories on television stations that come from other cities" and then presenting the distant signal call letters and city and state of origin; (e) reminding the subscriber that the questions asked throughout the questionnaire "apply *only to these stations from these cities*"; and (f) reading the name, description, and examples of each applicable program category "shown only on" the station from the distant city. PS Exhibit 4 at 11; PS Exhibit 8 at 26.

121. Asking whether or not there is another head of the household, or a co-head of the household is a technique that is commonly used in phone surveys in order to minimize the extent to which there is a female skew in the results. Tr. at 2484-85 (Berman). It is common in household surveys to have one person answer questions for the entire household. Tr. at 3218 (Ratchford).

122. By providing program category definitions, the subscriber survey adhered to and clarified the program categories as used in these proceedings. PS Exhibit 8 at 26; PS Exhibit 4 at 11, 13.

123. The program categories used in this proceeding do not always coincide with how different program types are understood in the real world. For example,

Live Team Sports programs could easily be construed by respondents to include events such as NASCAR auto races, even though for purposes of copyright royalty distribution, NASCAR belongs in the Program Suppliers category. PS Exhibit 8 at 27; Tr. at 3180 (Ratchford).

124. In the Subscriber Surveys, when interviewers asked respondents about the "popularity of each type of program," they reminded the subscriber to consider only the specific distant signal stations and only the program category types on those distant signals and offered an opportunity for respondents to add any other popular program categories from those distant signal stations. PS Exhibit 4 at 11.

125. The Subscriber Surveys' questionnaires presented clear and unambiguous program categories based on the previously identified category definitions. PS Exhibit 4 at 13. The Subscriber Surveys response options were precise, exhaustive, and mutually exclusive, and aided by the use of representative program examples for each category. PS Exhibit 4 at 13. The list of program categories were asked in an appropriately random and meaningful manner. PS Exhibit 4 at 13. Subscribers were cooperative, knowledgeable, and were able to articulate their answers. Respondents had few, if any, problems completing the constant-sum valuation measurement. PS Exhibit 4 at 13.

D. Subscriber Preferences Provide Better Evidence of What Programming Attracts and Retains Subscribers Than Do Cable Operator Preferences.

126. Although cable operators pay to retransmit distant signals, it is subscribers, through their monthly subscription fees, that generate the revenues used to pay the royalties. PS Exhibit 8 at 28. In economic terms, demand by cable operators for distant signals is derived from subscriber demand for programming. *Id.*

127. In making their purchase decisions, cable operators are in the business of choosing channels, not program categories. SP Exhibit 52 at 13. Consequently, cable operators do not routinely place relative values on the program categories carried within the selected channels. PS Exhibit 8 at 28; Tr. at 1837 (Gruen), 3095 (Calfee), 624 (Ducey).

128. Cable systems do not negotiate rights with individual copyright owners, and it is unlikely that they have either the skills or interest to engage in such negotiations. SP Exhibit 52 at 13; Tr. at 2372-73 (Crawford), 2838 (Salinger).

129. Broadcast station owners, on the other hand, negotiate with copyright owners on an almost daily basis. Tr. at 2373 (Crawford), 2845 (Salinger).

130. Cable subscribers regularly value programs and program categories when they decide which programs they like or dislike; which programs are worth

making an extra effort to watch or to record for later viewing. Cable subscribers make relative program valuation decisions all the time and have far more experience in doing so than cable operators. PS Exhibit 8 at 28-29; PS Exhibit 4 at 11-13; Tr. at 1837-38 (Gruen).

131. Cable subscribers make value decisions about cable programming in the context of monthly subscription fees for cable service, the amount and type of local television station programming available in the market, and by the availability of service from satellite carriers or other providers competing with cable. Tr. 2554-56 (Duncan).

132. Cable operators routinely survey their subscribers primarily to evaluate the effectiveness of the programming on their channel lineups. Tr. at 2444-45; 2495-96 (Berman). Cable subscribers' opinions about the kinds of programming on distant signals are relevant to cable operators. Tr. at 3096 (Calfee).

133. The relative market value in these proceedings has been measured by programming's ability to attract and retain subscribers. Given that premise, subscriber preferences carry great weight in determining relative program values. PS Exhibit 8 at 27-28. A survey of cable subscribers is more useful in determining the relative value of program categories in attracting and retaining subscribers than a survey of cable operators. PS Exhibit 8 at 29.

134. The preferences of cable operators have been shown to be sensitive to their systems' market power. In competitive cable markets, empirical evidence shows that cable television prices are lower and more channels are provided. In contrast, subscriber preferences should not be sensitive to the cable provider's market power or lack thereof. PS Exhibit 11 at 46-47.

135. A survey of subscriber willingness-to-pay would be relevant to the Judges in this proceeding. Tr. at 2371 (Crawford).

136. The match between a subscriber valuing a program category and actually viewing the program category is better than a match between an operator's value and a hypothetical channel-budgeting exercise. PS Exhibit 4 at 7.

137. Cable systems retransmit entire distant signals, each with a complete package of programs, but subscribers choose to watch individual programs from those packages. Programs that are not watched on a distant signal have little or no value to subscribers. If the programs made available by cable systems do not have sufficient value for the subscribers, the subscribers will not continue to subscribe. PS Exhibit 4 at 7.

138. People could choose not to view a program because they have no interest in it. People can be aware of a program and its value to them, despite never actually watching it. Tr. at 2443 (Berman), 3174 (Ratchford).

139. Assessing the value of programming on distant signals to attract and retain subscribers requires examination of what subscribers actually value, not someone else's perceptions of subscribers' preferences. This is because subscribers' actions, in starting and retaining their subscriptions to obtain programming they want to watch, provide the value of different program categories. PS Exhibit 4 at 7-8.

140. This approach to determining value is consistent with an area of media research known as "uses and gratifications," which assumes people use the media for their own gratification and, thus, should be asked directly about why they feel or act in a certain way. PS Exhibit 4 at 8.

141. The basic tenets of uses and gratifications principles have greater resonance today given the numerous media choices available. It is the individual who chooses, selects, and becomes involved with the programming regardless of how it is delivered. Measuring programming value based on that individual choice to remain a cable subscriber, consistent with the uses and gratification approach, is better done by a subscriber survey than an operator survey. PS Exhibit 4 at 9, 14.

E. Dr. Ford's Weighted Average Relative Market Value Approach

142. To the extent that cable subscription revenues as well as advertising revenues are deemed to contribute to programming value in a hypothetical

market for distantly retransmitted programming, one way to measure relative value would be to use a weighted average of the cable subscriber survey results and Dr. Ford's analysis, with the average cable network's relative shares of income sources as the weights. PS Exhibit 11 at 49-50.

143. For cable networks, about half their revenues are derived from advertising and half are from cable subscription fees. Using a similar weighting for the Subscriber Surveys results and Dr. Ford's analysis reasonably measures what the expected contribution of each revenue source would be in a hypothetical market for distantly retransmitted television programming. PS Exhibit 11 at 49-50.

144. Applying a 50/50 weighting to the values in Table 6 and Table 8 from PS Exhibit 11 (assuming no adjustment for Devotionals) yields a 58.6% share for Program Suppliers and a 15.8% share for JSC. The calculations for the remaining programming categories would proceed in the same manner, except for Devotional programming, which should receive no more than 1% of the fund. PS Exhibit 11 at 50.

VI. Program Acquisition Patterns in the Cable Network Market Corroborate the High Market Value of Program Suppliers' Programming

145. Looking at the program acquisition patterns in the cable network market offers useful guidance as to how a hypothetical free distant signal market would value different types of programming. PS Exhibit 7 at 3-4.

146. An analysis of the top 50 cable networks in 2004-05, based on program categorization undertaken by SNL Kagan, indicates that 37 of the networks (74%) are comprised of programming that corresponds with the type of programming included with the Program Suppliers' category; 7 (14%) of the networks could be considered to offer programming that falls within the JSC Sports category; and 6 (12%) of the networks could be characterized as "news" channels that offer programming that could fall within the commercial television or Program Suppliers categories. PS Exhibit 7 at 15-17, Attachments 2 and 3.

147. Analyzing individual programs telecast by the top 25 cable networks in 2004 and 2005 over a randomly-selected five-week period in each year shows that of all the programs telecast on those networks in each year, approximately: 90% would fall within the Program Suppliers category, 1.8% would fall within the JSC Sports category, about 4% would be considered "news," and

something less than 4% would be considered "Other" programming. PS Exhibit 7 at 18-21, Attachments 4, 5, and 6.

148. Of the top 50 cable networks, MSOs paid on average an aggregated total license fees per subscriber of $6.85 in 2004 and $7.19 in 2005 to license the 37 networks whose programming is closest to the programming contained in the Program Suppliers category. The comparable figures for the sports cable networks were $4.92 (of which $2.65 was attributable to ESPN alone) in 2004 and $5.53 (of which $3.07 was attributable to ESPN alone) in 2005, and for the "news" cable networks $1.18 in 2004 and $1.22 in 2005. PS Exhibit 7 at 22-24, Attachments 7 and 8; Tr. 1763-64 (Homonoff).

VII. Evidence of Changed Circumstances

149. Less sports programming availability on distant signals during 2004-05 than during 1998-99 could reflect changed circumstances impacting the relative value of sports programming. Tr. at 414-15 (McLaughlin).

150. Broadly, sports programming is defined as the dissemination of audio and/or video of a game or contest involving physical skill or prowess. The sports programming that falls within the Joint Sports Claimants' category for cable royalty distribution proceedings is a subset of sports programming, consisting of over-the-air telecasts of games involving teams belonging to

Major League Baseball ("MLB"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL") and the National Collegiate Athletic Association ("NCAA") (collectively "JSC Sports"). PS Exhibit 6 at 3; Tr. at 1618-20 (Mansell).

151. After 1998-99, the number of telecasts of JSC Sports on over-the-air television stations declined, while the number of such telecasts on cable networks and regional sports networks ("RSNs") has increased dramatically. PS Exhibit 6 at 3-5.

152. RSNs are cable networks that offer telecasts of live games by teams that are considered "home" to a particular region. In 2005, cable systems offered 34 RSNs on a basic or expanded basis tier to the approximately 145 million subscribers served by those systems, representing a 59% increase over the approximately 91 million subscribers who had access to a RSN in 1999. In many regions of the country, multiple RSNs were available by 2004-05. PS Exhibit 6 at 7-9; Tr. at 329 (Meyka).

153. In 2004-05, the vast majority of cable subscribers paid to receive an expanded basic tier with less than 2% of all cable subscribers taking only a broadcast basic tier. Tr. 1664-65, 1710 (Mansell).

154. In 2005, most RSNs were owned by Comcast or Fox Sports, but many RSNs were owned in part by sports franchises. PS Exhibit 6 at 7; Tr. at 333-34 (Meyka), 1628-29 (Mansell).

155. RSNs were able to telecast increasingly larger numbers of MLB, NBA, and NHL games in the period 1999 to 2005 not only because of the increased cross-ownership of RSNs by teams from those leagues, but also because the RSNs' dual revenue streams of advertising revenues and fees paid by cable systems who license the RSN service enabled them to outbid television stations for long-term licensing rights to the telecasts of the games. PS Exhibit 6 at 10.

156. The number of MLB games telecast by over-the-air television stations declined from 1,656 in 1999 to 1,066 in 2005. In 1999, RSNs telecast 2,160 MLB games; by 2005, RSNs telecast 3,067 games. In 2005, no over-the-air telecasts were offered for seven of the 30 MLB teams, but all 30 teams' games were telecast by RSNs. PS Exhibit 6 at 11-12.

157. In the 1999-2000 season, 781 NBA games were telecast by over-the-air television stations, while in the 2004-05 season, 558 NBA games were telecast by over-the-air television stations. In 1999-2000, 1,197 NBA games were telecast by RSNs, while in 2004-05, RSNs telecast 1,561 NBA games. PS Exhibit 6 at 14.

158. The 2004-05 NHL season was cancelled due to a lockout. In the 1999-2000 season, 273 NHL games were telecast by over-the-air television stations, but by 2005-06, 169 NHL games were telecast by those stations. In 1999-2000, RSNs telecast 1,187 NHL games, while in 2005-06, RSNs telecast 1,636 NHL games. PS Exhibit 6 at 14-15.

159. In 1998-99, WGN telecast 150 MLB games and 20 NBA games. In 2005, WGN telecast 99 MLB games and 25 NBA games. WGN did not telecast any NHL games in either period. PS Exhibit 6 at 19, 21.

160. In 1998-99, five television stations that were widely carried as distant signals (KCAL, WGN, WPSG, WSBK, WUAB) telecast a combined total of 575 MLB, NBA, and/or NHL games. In 2004-05, the same five stations, which were still widely carried as distant signals, telecast a combined total of 321 MLB, NBA, and/or NHL games. PS Exhibit 14 at 9, Table 5.

161. In 1998-99, distant stations retransmitted by cable systems in the Bortz survey carried, on average, 90 telecasts of MLB and NBA games combined. In 2004-05, distant stations retransmitted by cable systems in the Bortz survey carried, on average, 60 telecasts of MLB and NBA games, combined. In 1998-99, distant stations retransmitted by cable systems in the Bortz survey carried on average 32 telecasts of NHL games. In 2004-05, the NHL season was canceled, but in 2003-04, distant stations retransmitted by cable

systems in the Bortz survey carried, on average, 17 telecasts of NHL games. PS Exhibit 14 at 8, Table 4.

162. In 1998-99, distant stations retransmitted by cable systems in the Nielsen Studies carried on average 97 telecasts of MLB and NBA games, combined. In 2004-05, distant stations retransmitted by cable systems in the Nielsen study carried on average 59 telecasts of MLB and NBA games combined. In 1998-99, distant stations retransmitted by cable systems in the Nielsen Studies carried on average 32 telecasts of NHL games. In 2004-05, the NHL season was canceled, but in 2003-04, distant stations retransmitted by cable systems in the Nielsen Studies carried on average 15 telecasts of NHL games. PS Exhibit 14 at 12, Table 8.

163. TNT licensed a nationwide and league-wide package of games from the NBA that is not tied to a specific "home" team, that included the exclusive right to telecast the NBA All-Star game, and that included the rights to games for use in starting a new cable network like ESPN. In 2004-05, no distant television station had a licensing agreement that contained similar provisions. Tr. 2657-60 (Desser).

164. A number of entities with ownership interests in NBA teams also had ownership interests in national and regional sports networks. Tr. 2661-62 (Desser).

VIII. Facts Pertaining to Bortz Survey

A. The Bortz Survey Does Not (And Cannot) Provide a Reliable Estimate of Relative Market Value

165. The Bortz survey does not reflect the value that cable operators would pay for retransmitted distant signals in open negotiations. Instead, it shows how cable operators would have distributed their royalty payments, which are set by the compulsory license scheme, among the programming categories. Tr. at 488-89 (McLaughlin).

166. The Bortz survey responses do not directly estimate market value, but elicit, at best, estimates of cable operators' willingness-to-pay. Relative willingness-to-pay does not equal relative market value except under an implausible set of conditions, which is not satisfied here. PS Exhibit 16 at 3.

167. A Bortz respondent's valuation of programming based on a dominant impression is driven by signature programs, which are programs carried in prime time or that are otherwise notable. Tr. at 86 (Trautman).

168. The Bortz survey does not ask respondents to value the actual amounts of programming retransmitted in 2004 and 2005, but asks only for hypothetical willingness-to-pay for general categories of programming. As a result, it is not clear exactly what amounts of programming are being valued by the Bortz survey respondents. PS Exhibit 16 at 3.

169. Dr. Crandall stated that in an unregulated environment, the cable operator would compete for programming rights with other potential buyers, including broadcasters and satellite video providers. Tr. at 260-63 (Crandall). The Bortz survey valuations from only cable operators do not reflect what market value would be in a competitive market where market price would rarely, if ever, be determined by a single buyer's valuations or relative valuations. To the contrary, competition among buyers, combined with seller behavior, determines prices. PS Exhibit 16 at 3-4.

170. Dr. Crandall's depiction of the hypothetical market underlying his conclusions explicitly rejects the cable-centric Bortz survey as an indicator of relative market value. PS Exhibit 16 at 5-6.

1. Bortz Does Not Seek a Market Value Response.

171. The Bortz survey valuation question asks: "[H]ow much do you think each such type of programming was worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers[?]" This question solicits the respondent's willingness-to-pay for, rather than the market value of, such programming. Dr. Crandall's assertion that the Bortz survey results could equate to market value lacks any supporting explanation. Willingness-to-pay is, at best, indirect evidence of market value, and relative willingness-to-

pay equals relative market value only under an implausible set of conditions. PS Exhibit 16 at 6-7.

172. For relative willingness-to-pay to equate with relative market value of programming categories requires the demand curves for all programming categories to be linear. If all the demand curves are not linear, then relative willingness-to-pay cannot equal relative market value (except by chance). No evidence was presented to support linearity of all the demand curves, nor is there any reason to believe that the demand curves for all programming categories are linear. PS Exhibit 16 at 7.

173. Demand curves are typically not linear. Linearity of the demand curve is assumed for the purposes of textbooks. There is no reason to believe that real demand curves are linear. Tr. at 2852 (Salinger).

174. Besides the linearity requirement, the elasticities of demand for all programming categories must be identical at the selected quantities for relative willingness-to-pay to equate with relative market value. Satisfying the condition of equal elasticities is highly improbable where demand curves are linear. A linear demand curve has a constant slope, which can only be satisfied if the elasticity of demand has a different value at every price-quantity pair. Because elasticity changes at each point on the demand curve, any single linear demand curve will have a very large number of demand

elasticities. Because a linear demand curve is a condition for relative willingness-to-pay to equal relative market value, and given that linearity requires a large number of demand elasticities across the curve, there is every reason to believe that the elasticities are *not* equal for all programming categories at any specified quantity. PS Exhibit 16 at 7-8.

175. No economic theory or other evidence has been introduced to support a claim of equal factor demand elasticities across the programming categories (inputs of production here). Absent a showing that the simultaneously required conditions of linear demand and equal elasticities of demand are met here, there is no reason to expect that the Bortz relative willingness-to-pay results equal relative market value. PS Exhibit 16 at 7-8.

2. The Bortz Survey Does Not Assign Value Based on the Programming Actually Retransmitted.

176. The total value of a good, whether value is identified with market value or willingness-to-pay, depends on the quantity being valued. The Bortz survey fails to provide respondents with any measure of the quantity of the different programming categories available on their distant signals in 2004 and 2005. As a result, the relative willingness-to-pay valuations bear no relation to the actual quantities of programming retransmitted. PS Exhibit 16 at 8.

177. This omission means that the Bortz results offer nothing more than a generic valuation of the program categories. No systematic effort was made to

determine if the distant signals retransmitted by the Bortz respondent systems actually carried all the programming categories for which a value response was given. Tr. at 79-81 (Trautman). For example, some respondents gave values to sports programming despite the fact that the distant signals they carried did not telecast any sports programming. Tr. at 159-60 (Trautman); PS Exhibit 16 at 8-9. Even though, where known, those individual responses were removed from the final results, SP Exhibit 2 at 38-39, they point out the danger of seeking market value responses without giving respondents an idea of the quantity of programming available.

178. The lack of connection between the valuation question and the quantities of distant signal programming categories available in 2004-05 presents a strong reason to reject the Bortz survey valuations as indicative of either relative willingness-to-pay or relative market value of the programming at issue here. Without such a connection, it is unclear whether the Bortz survey's willingness-to-pay valuations address the programming actually retransmitted in 2004-05 or some generic idea of programming. PS Exhibit 16 at 9.

3. The Bortz Survey Incorrectly Reflects a Single Buyer's View of the Market

179. Dr. Crandall suggested the cable system would compete with "the satellite provider" and "off-the-air broadcasting" in a hypothetical distant signal

market. Tr. at 261, 264 (Crandall). It follows that the Bortz survey, which shows only one buyer's perspective, cannot provide an accurate measure of relative market value in that market. PS Exhibit 16 at 10.

180. In a multi-buyer environment involving purchase decisions for a fixed supply, the willingness-to-pay value of the next highest potential buyer, not the willingness-to-pay value of the ultimate buyer will determine market price of the fixed supply. PS Exhibit 16 at 11.

B. The Vast Majority of Sports Programming Shown on the Distant Signals Received By Bortz Survey Respondents Did Not Fall in the JSC Category

181. In 2004, the distant stations retransmitted by the cable systems in the Bortz study offered approximately 850,000 minutes of telecasts of all types of sports programming. Of those minutes, approximately 129,000 minutes (15%) fall within the JSC Sports category. PS Exhibit 13 and Appendix B; Tr. 3241 (Kessler).

182. In 2005, the distant stations retransmitted by the cable systems in the Bortz study offered approximately 909,000 minutes of telecasts of all types of sports programming. Of those minutes, approximately 130,000 minutes (15%) fall within the JSC Sports category. PS Exhibit 13 and Appendix B; Tr. 3241 (Kessler).

183. In 2004 and 2005, approximately two-thirds of compensable sports programming minutes of the distant stations retransmitted by the cable systems in the Bortz survey did not belong in the JSC category. PS Exhibit 13 and Appendix B; Tr. at 3241 (Kessler).

184. The Bortz study sports willingness-to-pay valuation results do not provide similar results to the top 25 market valuation estimates of market share for JSC Sports. In 2004, the Bortz sports result was 33.5%, while the top 25 valuation for JSC Sports was 20%. In 2005, the Bortz sports result was 36%, while the 2005 valuation for JSC Sports was 17.3%. SP Exhibit 56 at 9-10; Tr. 114, 2701-02, 2740-41 (Trautman).

C. Other Criticisms of the Bortz Survey's Methodology

185. The Bortz survey results cannot be compared year to year because each survey has a different body of respondents and no statistical tests of the year to year differences have been performed. Tr. 179-83 (Trautman).

186. The Bortz Survey did not include a question regarding the gender of the respondent. Tr. at 2491 (Berman).

187. It is reasonable to expect that cable operators responding to the Bortz survey were aware that certain WGN programs were substituted at the satellite level. Tr. at 481-82 (McLaughlin), 164-65, 167 (Trautman).

IX. Facts Pertaining to Waldfogel Regression Analysis

A. Dr. Waldfogel Relied On Unadjusted Minutes In Formulating His Regression Analysis

188. The minutes related to the programming categories as determined by Dr. Ducey's time-based analysis are a critical component of Dr. Waldfogel's time-based regression analysis. Tr. at 597-98, 612-13 (Ducey); SP Exhibit 14.

189. The program minutes used in Dr. Waldfogel's time-based regression analysis were not adjusted for audience size, gender, age, or the time of day that a program aired, but they were weighted by subscriber instances without regard to whether the subscribers viewed the programming. Tr. at 633-34 (Ducey), 848-49 (Waldfogel).

190. Dr. Ducey's categorization of certain program minutes as part of the CTV programming category included some news programs that were aired on WGN locally, but not retransmitted on a distant basis via the WGNA satellite feed. Tr. at 711-16 (Ducey).

B. Dr. Waldfogel's Regression Analysis Does Not Provide A Reliable Estimate of Relative Market Value

191. Regression analysis, if done appropriately, documents the magnitude of relationships, it does not establish causation. Tr. at 814 (Waldfogel).

192. For hedonic regression analysis models to provide legitimate value estimates of the contribution of a good's studied attributes to the good's market value, the prices incorporated into the model must be market prices, resulting from the willing interaction of both buyers and sellers in an open market. Attributes can be valued only when changes in those attributes lead to changes in market prices. PS Exhibit 16 at 11-12; DC Exhibit 4 at 8, 18.

193. Dr. Waldfogel's regression analysis satisfies neither condition for a valid hedonic model. First, the dependent variables of Dr. Waldfogel's regression are not market prices but *regulated* royalty payments. Second, the attributes being studied are programming minutes for each programming category, even though changes in programming minutes from one category to another has no effect on royalty payments under the regulations. Since royalty payments are not market prices, and since the mix of programming does not determine royalty payments, Dr. Waldfogel's regression model lacks both legitimacy and relevance. PS Exhibit 16 at 11-12; DC Exhibit 4 at 8, 18.

194. A statistical review of Dr. Waldfogel's analysis highlights the instability in his coefficient estimates when they are estimated for 2004 and 2005 separately, rather than presented as a single average for both years. Additional problems with the econometric model, such as its very wide

confidence intervals, render Dr. Waldfogel's results unreliable. PS Exhibit 16 at 13; DC Exhibit 4 at 4.

195. The wide confidence intervals mean that the coefficients for most programming categories fall within the range of coefficients for other categories, thus suggesting that the coefficients, and resulting shares, for these categories cannot be differentiated from one another. DC Exhibit 4 at 7.

196. The regression analysis is missing important variables, such as the programming on the cable networks offered by each system in the analysis. Without these data, it is impossible to know if distant signal choices are correlated with cable network choices. Tr. at 2873-74 (Salinger).

1. Royalty Payments Are Not Market Prices

197. Royalty payments are based on a prescribed regulatory formula, and, thus, do not reflect market values as determined by negotiations over prices and quantities between willing buyers and willing sellers. It is not possible to extract market information from regulatory royalty payments using a hedonic regression analysis model as Dr. Waldfogel purports to do. PS Exhibit 16 at 13-14.

198. There is no statistical relationship that shows market value between copyright royalties and the type of distant signal programming cable systems

retransmit. Instead, any relationship between program category minutes and royalty payments is merely an artifact of the regulatory formula for determining royalty payments based on the number and type of distant signals retransmitted. DC Exhibit 4 at 31-32; Tr. at 2807-08 (Salinger).

2. Royalty Payments Are Independent of Program Minutes

199. Royalty payments are calculated based on the number of distant signal equivalents ("DSE"), which are a function of the type and number of distant signals, and the cable system's gross receipts. DSE values are wholly independent of the quantities of the various programming types appearing on retransmitted signals. The royalty payment for a system carrying one independent distant station, which equates to 1.0 DSE value, will be the same whether that distant signal broadcasts 100% movies, 100% live sporting events, 100% Mexican programming, or 100% Canadian programming. The regression analysis model using programming minutes as the independent variables ignores that royalty payments are independent of the programming mix on distant signals, as shown by examples from the regression data of two systems whose royalty payments are identical even though their respective programming minutes mixes differ sharply. PS Exhibit 16 at 14-16; DC Exhibit 4 at 8, 32.

3. The Estimated Coefficients Are Unstable

200. Dr. Waldfogel's regression analysis is intended to quantify the relationships between royalty payments, the dependent variable, and the actual determinants of such payments. Even though the determinants of royalty payments are DSE values and gross receipts, neither appears in the regression model. Consequently, the model is mis-specified. PS Exhibit 16 at 16.

201. Mis-specified models will produce unstable coefficients. To evaluate the stability of Dr. Waldfogel's coefficients, Dr. Ford estimated Dr. Waldfogel's model using subsamples of his data. This analysis demonstrates extreme sensitivity of the coefficients to data set changes, indicative of a mis-specified model. For example, when the coefficients are estimated separately for the four accounting periods in 2004-05, the resulting coefficients vary widely across the accounting periods. PS Exhibit 16 at 16-18; DC Exhibit 4 at 11-12; Tr. at 2790-91 (Salinger). This instability indicates Dr. Waldfogel's analysis is too unreliable to allocate the royalty fund under a relative market value standard. PS Exhibit 16 at 20-21.

202. Most of Dr. Waldfogel's coefficients are not statistically different from zero and have very wide confidence intervals. These poor estimates make it difficult to perform statistical tests on the equality of coefficients.

Nonetheless, it appears that several coefficients are equal to zero and cannot be differentiated from the coefficients for other programming categories. PS Exhibit 16 at 18-19.

4. Specification and Outliers

203. Dr. Waldfogel's model failed a widely-used test of specification error. This failure provides strong evidence that Dr. Waldfogel's regression model is not correctly specified, suggesting the model is inadequate and the estimated coefficients are unreliable. PS Exhibit 16 at 21-22.

204. Dr. Waldfogel's regression model contains 337 outliers in the data. Excluding the outliers from the estimation sample leads to substantially different royalty shares with all the estimated coefficients positive. Most of these "outliers" appear to have correctly paid royalties and, thus, would not be outliers in a correctly specified model. PS Exhibit 16 at 22-24.

5. The Supposed Corroboration of Bortz

205. Dr. Waldfogel attempts to corroborate the Bortz survey results, as adjusted by Ms. McLaughlin, with modified regression results. In any event, the regression results do not corroborate the unadjusted Bortz survey results. Tr. at 789-93, 797, 854-60 (Waldfogel).

206. Two alternative computations of regression results -- one based on "Compensable Minutes" and the other based on "All WGNA Minutes" are

presented. The Compensable Minutes results, which Dr. Waldfogel advanced as the correct basis for allocation of royalties, are inconsistent with the Bortz results. PS Exhibit 16 at 24-26.

207. Dr. Waldfogel re-computes the relative shares for the claimants using All WGNA Minutes, which he claims *do not* show relative market value and compares them to the Bortz results as corroborative. Thus, the regression results that supposedly show relative market value are not corroborative of the Bortz results, while the revised All WGNA Minutes regression results that do not show market value supposedly are corroborative. PS Exhibit 16 at 26.

208. But the All WGNA Minutes results, estimated as an average for both years, do not corroborate the Bortz survey results for the years 2004 and 2005. PS Exhibit 16 at 27.

209. As a consequence of the coefficient instability from mis-specification, the allocation shares based on All WGNA Minutes model also are very different in 2004 and 2005, and do not come close in most cases to matching the Bortz results in each of those years. These differences clearly belie the alleged corroboration between the two methodologies. PS Exhibit 16 at 27-28.

X. Facts Pertaining to Music Share

210. The music ratio measures the total music rights payments against the total broadcast and music rights payments of television networks and stations in a given year. The music ratio approach reasonably approximates the relative value of the Music category compared to other programming categories based on the dollars paid by television stations for music rights compared to the dollars paid by stations for programming rights. PS Exhibit 14 at ¶¶ 9 and 12; SP Exhibit 27 at ¶ 26.

211. The U.S. Census at one time compiled and reported the total music license fees payments separately from the total broadcast license fees payments (including music payments) for all stations including ABC, CBS, and NBC affiliates. By 2004 and 2005, the Census Bureau no longer reported the music license fees payments separately, but did continue to report the total rights fees payments. PS Exhibit 14 at ¶ 18.

212. The Census Bureau initially reported total broadcast rights payments of approximately $11.7 billion for 2004 and $12.0 billion for 2005. The Census Bureau revised those figures in its 2007 report to approximately $10.9 billion in both years. The Census Bureau indicated that the 2007 revisions "may not be comparable to previously published estimates." PS

Exhibit 14, Appendix 3; SP Exhibit 63, Table 3.6.4; Tr. at 3330-34 (Woodbury).

213. The actual music license fees paid to the Performing Rights Organizations ("PROs") by the Big 3 Networks (ABC, CBS, NBC), Univision, and broadcast stations were approximately $239 million in 2004 and $234 million in 2005. These numbers likely understate the total amounts actually paid for music rights fees because they do not include direct license fee payments made by stations to composers and producers. PS Exhibit 14 at ¶ 32 and Appendix 2; Tr. at 1086-87 (O'Neill), 3294-95 (Woodbury).

214. The music ratio based on the total broadcast and music rights figures reported in the Census Bureau's *Service Annual Survey 2006* was 2.04% ($239 million divided by $11.7 billion) for 2004 and 1.94% ($234 million divided by $12.0 billion) for 2005. Using the Census Bureau's *Service Annual Survey 2007* figures for total broadcast and music rights fees, the music ratio for 2004 would be 2.19% ($239 million divided by $10.9 billion) and 2.14% for 2005 ($234 million divided by $10.9 billion). PS Exhibit 14, Appendix 3; SP Exhibit 63, Table 3.6.4; Tr. at 3330 (Woodbury).

215. The fee that an individual station pays to the PROs under a blanket license is not related to the amount of music that the station uses. Instead, a blanket

license provides for unlimited access to the music in that PRO's repertoire. Tr. at 1097-98 (O'Neill).

216. Each station can choose between a blanket license or a per program license for its music rights. Tr. at 1099 (O'Neill).

217. Under a per program license, a station pays the PROs per program for the amount of music that is actually used by the station. Tr. at 1099 (O'Neill).

218. A station elects to have a per program license rather than a blanket license to reduce its licensing fee payments to the PROs. Tr. at 1102-03 (O'Neill).

219. Stations who elect a per program license also use direct and source licenses to reduce their music rights payments even further. A station that has a per program license pays less to the PROs than it would otherwise owe under the blanket license. Tr. at 1103-04, 1105 (O'Neill).

220. Use of the blanket license fees as a surrogate for actual fees paid almost certainly overstates the actual fees paid by television stations for music rights. BMI's 2005 blanket license fee is an interim figure that may increase or decrease depending on further negotiations. In addition, a number of stations use a per program license in conjunction with direct licensing that costs less than the amount they would pay under the blanket license. Approximately 300-350 stations employ the per program/direct license

approach rather than pay the BMI blanket license. Tr. at 1089, 1102-05, 1119-22 (O'Neill), 1188-90 (Zarakas); PS Exhibit 14 at ¶¶ 13-14.

221. The Big 3 networks (ABC, CBS, NBC) and Univision each paid a blanket license fee in 2004 and 2005 rather than paying a per program/direct licensing fee. SESAC does not offer per program licensing rights. Tr. at 1107-08 (O'Neill).

222. The Television Music Licensing Committee ("TMLC") determines each station's share of the blanket license fee on the basis of Nielsen viewing data. SP Exhibit 26, Appendix 5 at 10, SP Exhibit 27 at 15 n. 22; Tr. at 1112-17 (O'Neill), 1227-28 (Zarakas).

223. Under Section 111, royalty payments are not made for programming made available by ABC, CBS, and NBC and broadcast by their affiliated stations. PS Exhibit 13 at 4; PS Exhibit 14 at 7, n. 16; Tr. at 1234-37 (Zarakas).

224. Music proposed a weighted music ratio approach be used to determine its royalty share. Under this approach, Music initially divided the stations' blanket music license fee payments among various station categories (ABC, CBS, NBC, Fox, UPN, WB, Independent) based on the viewing allocation of the stations' blanket license fee by the TMLC to these station categories. To re-allocate the music license fee among the same station categories in a distant signal market, Music used "distant signal market weights," that were

based on the ratio of distant subscriber instances for each station group to the total number of distant subscriber instances for all Form 3 systems in 2004 and 2005. SP Exhibit 27 at 14-15 & Table 2, and at 26-29 & Tables 9-10.

225. There is no basis for the assumption that using distant subscriber instances provides any meaningful estimate of the actual music payments that each station category would be assigned in a distant signal market or is a comparable allocation method to the TMLC's allocation method for blanket license fee payments using Nielsen viewing data. SP Exhibit 27 at ¶ 54; PS Exhibit 14 at ¶¶ 25-27; Tr. at 3298-3301, 3348-49 (Woodbury).

226. Music counted the distant subscriber instances for WGN as part of the independent station category, even though at all other steps of the calculation, WGN's figures were included in the WB station category. This was done because WGN does not offer WB programming in the telecast (WGNA) that is retransmitted as a distant signal. No other independent station broadcasts programming that is specifically targeted to reach a national distant signal audience. SP Exhibit 27 at 28 n. 30; SP Exhibit 14 at ¶¶ 29-30; Tr. at 1232, 1253 (Zarakas), 3302-03, 3360 (Woodbury).

227. There have been no changed circumstances in the amount of music on distant signals during the 1998-99 to 2004-05 time period. Tr. at 1041 (Saltzman), 1124-25 (O'Neill).

XI. Facts Pertaining to Canadian Claimants Group's Share

228. Canadian Claimants Group's ("CCG") fees generated approach does not provide a reliable estimate of relative market value. SP Exhibit 6 at App. 3, pp. 3-9.

229. Several different parties in this proceeding presented evidence purporting to provide the relative market value of CCG programming distantly retransmitted during 2004 and 2005. These approaches uniformly arrive at a CCG share that is lower than the fees gen-based approach:

Estimated Relative Value of CCG Shares, 2004-2005

Year	Bortz Survey	McLaughlin Adjustment of Bortz	Gruen Subscriber Survey	G.S. Ford Analysis
2004	0.2%	0.5%	0.8%	1.9%
2005	0.3%	1.5-1.8%	1.8%	1.4%

Exhibit CDN-R-3 at 10-11.

PROPOSED CONCLUSIONS OF LAW

I. Governing Legal Standards

1. The governing statutory standard states in relevant part:

> The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. 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 . . . and the Copyright Royalty Judges . . . and decisions of the court of appeals . . . .

17 U.S.C. § 803(a)(1).

2. Subchapter II of chapter 5 of title 5 of the U.S. Code sets forth the terms and procedures applicable to agency proceedings. Cable royalty distribution proceedings under 17 U.S.C. §§ 801(b)(3)(B) and 804(b)(8) fit within the meaning of "adjudication" under 5 U.S.C. § 551(7) and are subject to the procedures set forth in 5 U.S.C. § 554. Further direction for the conduct of such hearings is provided in 5 U.S.C. § 556. In particular § 556(d) provides that "the proponent of a rule or order has the burden of proof." This provision has been interpreted to mean that the proponent has the burden of persuasion, not simply the burden of production. *Director, OWCP v.*

Greenwich Collieries, 512 U.S. 267, 270-80 (1994); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002).

3. In the instant proceeding, this means that each party seeking specific distribution share(s) of the 2004 and 2005 funds has the burden of persuasion that its requested share(s) is adequately supported in the record to be adopted as the appropriate distribution award(s) in the Judges' order.

4. The necessity to satisfy the burden of persuasion in each case undermines the Settling Parties' assertion that "the benchmark awards established in the last litigated proceeding should be changed only where the evidence demonstrates that 'past conclusions were incorrect' or that circumstances have changed." Written Direct Statement of the Settling Parties, "Memorandum" Tab at 2 (filed June 1, 2009) (citations omitted). The characterization of the last litigated awards as "benchmark awards" implies that those awards, which related to 1998-99, set the bar for the 2004-05 (and presumably subsequent) distribution awards. This ignores that the awards are fact-based, and thus offer no precedential value. *See, e.g.*, Tr. at 32 (Sledge, C.J.).

5. Likewise, Settling Parties' assertion that past awards "should be changed *only*" upon a showing of error or changed circumstances is wrong. The very case cited by Settling Parties for their assertion, *NAB v. CRT*, 772 F.2d 922,

932 (D.C. Cir. 1985), states that "it would be improper, as a matter of law, for the [Copyright Royalty] Tribunal to rely solely upon a standard of 'changed circumstances.'" Contrary to considering changed circumstances as the *only* means to modify past awards, the D.C. Circuit "expressly contemplated . . . the claimants would improve upon the quality and sophistication of their evidentiary submissions," *id.*, as possible reasons to change prior awards. A changed circumstances showing thus is merely "one of [the] analytical factors," *id.*, to be considered in setting awards.

6. Indeed, the Court discredited "'the assumption that the Tribunal was bound by the precedents of its previous decisions, and could not alter those previous allocations unless the facts had materially changed,'" *id.* at 933 (quoting CRT dissent), finding the CRT considered both new evidence and attempts to improve the quality of parties' presentation in setting awards. *Id.* at 932. Nor does *Program Suppliers v. Librarian of Congress*, 409 F.3d 395 (D.C. Cir. 2005), offer Settling Parties any solace. There, in response to a claim that PTV's award was based solely on a lack of changed circumstances, the Court agreed that such a claim, if true, would be "problematic," but found "additional factors" provided a "'facially plausible explanation'" for why PTV's award was not changed. 409 F.3d at 403-04.

7. The Settling Parties' view that to change the 1998-99 awards "one ... needs to show changed circumstances, [that] something has happened during this period that makes those awards incorrect" (Tr. at 34 (Garrett)) does not comport with the Court's conclusion about "[t]he invalidity of such a rigid approach." 772 F.2d at 932. Rather, as the Act makes clear, the Judges must determine whether a party has carried its burden of persuasion about its requested 2004-05 award based on the current record. *See NAB v. Librarian of Congress*, 146 F.3d 907, 923-24 (D.C. Cir. 1998) (noting it would be arbitrary to set an award that "was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award") (citations omitted).

8. While prior awards have no precedential value, past legal rulings do. In particular, because Section 111 does not identify "criteria for allocating awards," deference should be afforded past rulings identifying allocation criteria. *Program Suppliers*, 409 F.3d at 401. Nonetheless, the Judges may depart from such precedent so long as they provide a reasoned explanation for the change. *Id.* at 402.

9. In this regard, "relative market value [has been ruled] the key criterion for allocating awards." *Id.* at 401. While this ruling has precedential value, it does not mean, when applying the relative market value criterion to a new

distribution case, the Judges are obligated to give the same weight given in the past to a particular piece of evidence. Rather, the Judges may change how they credit that evidence when applying the criterion to the record before them. *Id.* at 402. Indeed, as the Judges clarified in the recent 2000-2003 Cable Phase I Proceeding, an approach or methodology for determining relative value adopted in a prior proceeding is not considered legal precedent. Rather, it "should be accorded deference" as *a* possible means to measure value, if it "has endured the scrutiny of litigation and review" more than once, regardless of "admitted shortcomings." *Distribution of the 2000-2003 Cable Royalty Funds,* Docket No. 2008-2 CRB CD 2000-2003, "Distribution Order" at 25 (March 3, 2010).

10. The long-established definitions of the Phase I program categories on which all parties relied to formulate their evidentiary presentations and distribution share requests in the instant proceeding should be adopted by the Judges here. Not only the Phase I parties, but also prior decision-makers, including the D.C. Circuit, have relied on those definitions in setting, or reviewing, prior distribution awards. *See, e.g., NAB*, 146 F.3d at 913-14 & ns. 1-2 (quoting with approval the definitions of certain program categories as identifying the programs that form each category).

11. Under 5 U.S.C. § 554(b)(3), parties participating in agency adjudication "shall be timely informed of . . . [the] law asserted." This provision requires that where an agency "seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party must be given notice and an opportunity to introduce evidence bearing on the new standard." *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981) (citations collected in support omitted).

12. Here, the Phase I program category definitions are the long-established standard for identifying what types of programs fall within each category, and the parties relied on those definitions for the presentation of evidence in this proceeding. Thus, a change in the category definitions would necessarily require a change in each party's evidence. In circumstances where "the change [in an existing standard] is a qualitative one in the nature of the burden of proof so that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to submit conforming proof." *Id.* Absent such an opportunity, which was not given here, no change in the existing Phase I category definitions should be undertaken.

II. The Evidence Supports an Increased Award to Program Suppliers.

13. Prior to the 1998-99 cable royalty determination, the Nielsen viewing results were regarded as reliable and significant evidence that is useful in making royalty allocations. *See* 1979 Final Determination, 47 Fed. Reg. 9879, 9892 (March 8, 1982) (describing the Nielsen Studies as the "single most important piece of evidence in the record" and a useful "starting point" for allocating royalties). A chief advantage of the Nielsen Studies over survey evidence is that they measure actual behavior, not attitudes:

> We also favor Nielsen data over attitudinal surveys presented in this proceeding for several reasons. ...*[T]he Nielsen survey is the only survey to measure behavior.* As Paul Virtz, a surveyor testifying on behalf of the Devotional Claimants stated, *it is recognized by surveyors that how people say they behave and how they do behave are quite different.*

51 Fed. Reg. 12792, 12807-09 (April 15, 1986) (emphasis added). For this reason, the Nielsen Studies were found useful in "develop[ing] the 'zone of reasonableness' for the [Copyright Royalty] Tribunal's allocation." *Id.* at 12795-96.

14. By objectively distinguishing between viewing to each of the program categories, the Nielsen Studies provided "the necessary ingredient to weight the value of each program -- reliable estimates of actual viewing by distant cable subscribers." 57 Fed. Reg. 15286, 15301. As in the 1983 proceeding,

the 1989 Tribunal deemed the Nielsen Studies a useful "starting point" in its analysis. *Id.* at 15301-02.

15. As to whether viewing says anything about a program's value in retaining subscribers, the 1990-92 CARP found that it did:

> *Certainly viewing is a significant factor in value.* Cable networks and broadcast stations, which together provide all of the programming for cable systems, use Nielsen ratings in pricing their programs to cable systems and advertisers. Measured against these facts is the contention by the proponents of the Bortz surveys that while advertising is significant to those industries, it is not important to cable systems. Cable systems, they argue, care about attracting subscribers and viewing does not translate into subscribers. We find that argument of value but not totally persuasive. *It is disingenuous to say that the cable system is interested only in attracting subscribers but is totally unconcerned with whether or not the subscriber, in fact, watches the programming.* As was stated by Sieber, who testified for the Program Suppliers, cable system operators are more willing to carry the more heavily watched, higher rated services.

Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, Docket No. 94-3 CARP CD 90-92 at 43-44 (May 31, 1996) (emphasis added). As a result, the Nielsen viewing results played an important role in the allocation:

> [W]e accept the Nielsen data for what it purports to be, a survey of actual conduct with adequate accuracy for the larger claimant groups in particular. *We cannot quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant when weighed with all other factors.*

Id. at 44 (emphasis added).

16. In this proceeding, Program Suppliers improved the quality and sophistication of their evidence in several ways. In response to criticism that "'without a means of translating viewing shares to value, the [Nielsen] study does not afford an independent basis for determining relative value,'" *Distribution of 1998 and 1999 Cable Royalty Funds,* "Final Order," 69 Fed. Reg. 3606, 3613 (2004) ("98-99 Final Order") (citation omitted), Program Suppliers presented Dr. Ford's testimony. This testimony analyzes how different programming categories would be valued in a hypothetical market for distantly retransmitted programming based on the Nielsen distant viewing shares in conjunction with the factors currently applied to Nielsen viewing data in existing market transactions to determine the market value of broadcast television programming. PS Exhibit 11.

17. Given that "'the value of the retransmitted programming [was found to be] its ability to attract and retain subscribers,'" 98-99 Final Order, 69 Fed. Reg. at 3609, 3613 (citation omitted), Dr. Gruen presented a constant sum survey that asked subscribers how they valued distant programming as a reason to continue their cable subscription. *See generally*, PS Exhibit 8. To the extent that attitudinal information about programming value is given weight, this survey provides direct information of how subscribers themselves value

programming. Supporting testimony regarding sample selection and standard errors for the surveys was provided by Dr. Frankel (PS Exhibit 3) and regarding the conceptual development and questionnaire design by Dr. Rubin (PS Exhibit 4). Ms. Martin described the data that was supplied in connection with the sample selection for the surveys. PS Exhibit 2.

18. Consistent with the prior determination that "competition from 'look-alike' cable networks may have affected [a claimant's] value" relative to other categories, *Program Suppliers,* 409 F.3d at 399, Mr. Mansell presented testimony showing that from 1998-99 to 2004-05 telecasts of games involving the professional sports leagues and represented by JSC ("JSC telecasts") shifted dramatically from over-the-air television to regional sports networks ("RSN"). PS Exhibit 6. This shift leading to a reduced number of JSC telecasts on distant signals and increased competition from RSNs lowered the availability and market value of JSC telecasts on distant signals.

19. Mr. Homonoff presented a new perspective on distant signals purchase decisions by providing evidence that programming purchase decisions, including those for distant signals, are made at the multiple system operator ("MSO") level, not at the individual cable system level. PS Exhibit 7 at 6-8; Tr. at 267-68 (Homonoff). He also presented evidence that the vast majority

of programming on the most heavily carried cable networks fall within the Program Suppliers category. PS Exhibit 7 at 15-24.

20. Program Suppliers also presented the results of the Nielsen distant signal viewing studies for 2004 and 2005 through the testimony of Messrs. Lindstrom and Hoynoski. PS Exhibits 9 and 10. As in past proceedings, the Nielsen results were presented not only on a household basis, but also by demographics (age) and quintile (heavy to light viewers) groups. Ms. Kessler explained the process used to determine the counties in which each Nielsen sample station is considered distant for cable royalty purposes, so that the Nielsen data would report only distant viewing by cable subscribers. PS Exhibit 5.

21. Testimony from Mr. Paen, a producer and syndicator of syndicated series, explained the program syndication process, from development of an idea through production into a series to licensing with television stations. PS Exhibit 1. Mr. Paen differentiated the various types of syndicated programs, the types of licensing arrangements with television stations, and the several challenges that syndicators face in launching a successful series.

A. Program Suppliers' Market Value Analysis

22. The market value of a good or service consists of two components: price and quantity. PS Exhibit 16 at 2.

23. Compulsory license payments do not reflect the marketplace value that cable operators place on distant signal programming, but, rather, are calculated in accordance with the regulatory plan. As a result, royalty payments say virtually nothing about the relative marketplace value of the competing program categories. Thus, the payments offer no guidance on how royalties should be allocated among programming categories under a simulated hypothetical free market for distant signal programming. PS Exhibit 11 at 3; Tr. at 2116 (Ford).

24. To estimate what relative market value of programming categories would be outside the regulatory plan, it is necessary to simulate relative market valuation in a hypothetical market where no compulsory license applies. PS Exhibit 11 at 4.

25. In existing marketplace transactions for the programming at issue here, Nielsen viewing, while fundamental to and correlated with a program's market value, is not identical to that value. PS Exhibit 11 at 33. This is consistent with the Register's finding that "while raw Nielsen data [are] not indicative of marketplace value, [they] might be converted into such evidence through proper adjustments." 98-99 Final Order at 3614 (footnote omitted). Program Suppliers, through Dr. Ford's testimony (PS Exhibit 11),

converted the 2004-05 Nielsen distant viewing data into a measure of marketplace value of distant signal programming.

26. Instead of equating viewing with value, Dr. Ford's analysis translates raw Nielsen viewing results into relative market value measures applicable to a hypothetical market. First, Dr. Ford identifies the relevant quantity. Next, he establishes the prices, expressed in cost per thousand ("CPM") viewers. Dr. Ford's analysis then adjusts the prices based on factors that are routinely used to value television programming -- amount of viewing, age, gender, and time of day -- in the existing television station market as appropriate. PS Exhibit 11 at 6-7, 14. Dr. Ford used these factors because they affect the prices paid for advertising and, ultimately, the television programs. *Id.* at 18. Because this proceeding involves distant programming carried in 2004-05, Dr. Ford relied on the Nielsen distant viewing data for the relative quantities of each Phase I programming category (exclusive of Music) distantly retransmitted in those years. *Id.* at 19-20. Thus, the analysis incorporates both the price and quantity factors on which market value is based. *Id.* at 11-12; Tr. at 2133 (Ford); PS Exhibit 16 at 2.

27. Under 17 U.S.C. § 111(c), the cable compulsory license applies only to programs that are broadcast by television stations and simultaneously retransmitted by cable systems. Under § 111(d)(3), only copyright owners

of non-network programs that are distantly retransmitted are entitled to compensation. Finally, this proceeding relates to programming broadcast by television stations in 2004 and 2005 that was distantly retransmitted by cable systems. In these circumstances, it makes sense to focus on a valuation approach relevant to broadcasters, as they actually purchased the programming that was then distantly retransmitted. PS Exhibit 11 at 10.

28. The purchasing behavior of television stations and cable systems would likely remain unchanged in a hypothetical free market for distantly retransmitted programming. Television stations would likely remain the program purchasers and would serve as intermediaries between cable systems and program owners, selling their entire program line-ups to cable systems. Tr. at 233-34 (Crandall), 2117, 2168-70, 2177-78, 2184-85, 2190-95 (Ford), 2407-10 (Crawford), 2850 (Salinger). In this hypothetical market, because television stations remain the purchasers, relative programming value would be determined by the same determinants of value that apply in the existing television station market. Tr. at 2125-28, 2182-83 (Ford). Moreover, in this unregulated market, no party would purchase programs solely at any price it chose—the value exchanged would reflect the preferences of both the buyer and the seller. Tr. at 3094 (Calfee).

29. As all the programming in the hypothetical unregulated distant signal market would be broadcast by television stations, the licensing fee paid by stations would likely be the price maker in that market and would likely encompass a program's anticipated distant market value. PS Exhibit 11 at 43-44.

30. Licensing fees for television programs are based on the expected advertising revenues that programs will generate. Using the same actual market determinants that drive expected advertising revenues in the existing and well-functioning television program acquisition market provides a reasonable basis for estimating expected advertising revenues, and hence relative market value, of the programming categories in a hypothetical distantly retransmitted program market. PS Exhibit 11 at 43-44.

31. Although the current regulatory regime prohibits insertion of advertising ("ads") on distantly retransmitted programming, there is no reason to expect that such a limitation would be present in an unregulated market. PS Exhibit 11 at 43; Tr. at 2123-26 (Ford), 2377 (Crawford), 2836 (Salinger), 3091-92, 3098-99 (Calfee). Programs are not typically licensed with all the advertising availabilities filled (PS Exhibit 1 at 10-11), a practice that would be expected to continue in an unregulated distant market. PS Exhibit 11 at 43. While advertisements that are local to the television station market (*e.g.*, a local car dealership) would unlikely have much value in a distant market,

in an unregulated market those ads could be replaced by either ads local to the distant market or national ads. *Id.*; Tr. at 2127-28, 2181-84 (Ford).

32. The relevant quantity for Program Suppliers' relative market value analysis is the Nielsen distant viewing results for 2004 and 2005. PS Exhibit 11 at 20, Table 1; PS Exhibit 9 Attachments 3 (2004) and 5 (2005).

33. The price for the relative market value analysis incorporates an age demographics factor because programming is priced differently depending on the age demographics of its viewers. PS Exhibit 11 at 22-23 and Table 2. For this factor, Dr. Ford calculated the 2004-05 average of each programming category's age demographic composition based on the Nielsen data. *Id.*; *see* PS Exhibit 9, Appendices 3 and 5 (Demographic: Person +2 tables).

34. Next, Dr. Ford incorporated a gender factor applicable to JSC telecasts only because audiences for JSC telecasts are largely male, while roughly the same proportion of men and women view other programming categories. PS Exhibit 11 at 23-24 and Table 3. As males are a more desirable audience, this adjustment increased the relative CPM for JSC telecasts by 1.18 compared to other programming categories. PS Exhibit 11 at 25.

35. A separate daypart factor was incorporated into the price analysis to account for the different values of programming broadcast at different parts of the

day. This affected the CTV and JSC categories. Because much of CTV programming is broadcast on the Big 3 network affiliates, *see, e.g.,* SP Exhibit 19 (CTV industry witness from owner of eight ABC affiliates), certain dayparts are largely filled with non-compensable network programs, requiring a downward CPM adjustment. PS Exhibit 11 at 26-27. JSC telecasts, on the other hand, are shown largely in afternoon or primetime slots, which led to an upward CPM adjustment. *Id.*

36. The primary source of CPM data about the prices advertisers pay is SQAD DATAVue, which reports the spot CPM prices paid for different age demographics in different dayparts. PS Exhibit 11 at 29, Table 4. These CPM prices were adjusted for the age, gender, and daypart factors related to the distant signal viewing noted above to provide average CPM for each program category, and then normalized to obtain relative CPMs for all categories. *Id.* at 31, Table 5.

37. This calculation provides, in effect, a unit CPM price for the distant signal programming market that when multiplied by quantity, represented by the Nielsen distant viewing, provides a relative market value share for each programming category consistent with actual market transactions. *Id.* at 32.

38. These calculations all rely on a commercial television program model, but the Devotional Claimants and the PTV Claimants do not follow that model.

Accordingly, adjustments were made to account for them. PS Exhibit 11 at 33-34. Devotional Claimants are not compensated by broadcast stations for licensing their programming to stations. As a result, the market value of Devotional programming is the opportunity cost to the broadcast station of broadcasting a Devotional program rather than a different program. Tr. at 2315-16 (Ford). The Devotionals' calculated share (0.76% average for 2004 and 2005) under Dr. Ford's approach reasonably estimates that opportunity cost as comparable relative market value share. *Id.* and PS Exhibit 11 at 35.

39. In the case of the PTV Claimants, over half of PTV's funding comes from government support or charitable gifts and approximately 15% from corporate sponsorships, which are akin to commercial advertising buys. PS Exhibit 11 at 36. In addition, public television devotes approximately 5 minutes per broadcast hour to non-program content, compared to 12-17 minutes per hour for commercial television. In light of these factors, Dr. Ford adjusted the final results for the PTV category to 33% of their calculated relative CPM (*id.* at 31, Table 5) to provide comparable figures to the commercial categories. *Id.* at 37 and *see* Table 6 (making adjustment).

40. Dr. Ford determined relative market value by multiplying the Nielsen viewing results (quantity) by the unit CPM (price) based on the demographic and time of day factors relevant to each distant programming category. This

calculation is then normalized to shares of 100% to provide relative values consistent with the task in the royalty distribution proceeding. PS Exhibit 11 at 39, Table 6. The relative market value shares for the claimants under this approach are:

	2004	2005
CTV	6.5%	10.1%
Program Suppliers	68.3%	74.9%
Devotional	1.2%	0.5%
JSC	13.8%	9.0%
PTV	8.2%	3.9%
Canadians	1.9%	1.4%

PS Exhibit 11 at 39, Table 6.

41. These numbers differ from the Nielsen viewing shares, although in most cases the difference is not large. A small variance should be expected, for the most part, because many programs in different categories attain similarly-composed demographic audiences and are broadcast in the same dayparts. PS Exhibit 11 at 40-41. Also, dealing with these numbers on a highly aggregated level of all programming in each category tends to minimize the idiosyncrasies related to individual programs. Tr. at 3290-92 (Ford). Nonetheless, the differences do transform pure viewing data into relative market values.

42. Dr. Ford also calculated the relative market shares excluding the children 2-17 demographic, due to lack of data about all parts of this demographic. PS

Exhibit 11 at Table 7. The differences between the two results are, however, very small, and do not require that the Table 6 results be adjusted.

B. Program Suppliers' Subscriber Survey

43. Program Suppliers, through the testimony of Dr. Gruen, presented the results of a survey designed to ask subscribers how they value the programming on distant signals. Although patterned on the structure of the Bortz cable operator survey, the subscriber survey contained several improvements in design and execution. PS Exhibit 8 at 6. Principal improvements included listing of representative examples of shows contained in each program category, a separate category for non-team sports, and frequent reminders of both the program categories and distant signals including the city and state where the signal originated. PS Exhibit 8 at 5-6; PS Exhibit 4 at 10-13.

1. Survey Design and Methodology

44. The survey questionnaire was developed as a product of consultation among a team of experts, including Dr. Gruen, Dr. Rubin, Dr. Frankel, and Ms. Kessler. Dr. Gruen developed the initial questionnaire and worked with Dr. Rubin on the wording and re-wording of the questions. Dr. Frankel provided guidance to assure randomness and statistical validity. Ms. Kessler offered input regarding wording and provided the representative sample programs listed within each category definition. PS Exhibit 8 at 6.

45. Before conducting a full study, Dr. Gruen conducted a Field Test and a Pilot Study. The Field Test involved 25 respondents in two arbitrarily-selected markets for the purpose of obtaining reactions to the initial questionnaire. PS Exhibit 8 at 7. In response to the Field Test, some modification was made to the wording of the questions. *Id.* at 8-10. The Pilot Study of 150 respondents from the top 50 cable systems (based on royalty payments) was conducted to determine if the survey would be feasible on a large scale. *Id.* at 10-11. Both the Field Test and the Pilot Study were monitored and reviewed by Program Suppliers' survey team, which led to some further adjustments and refinements. PS Exhibit 4 at 10-11. Although Program Suppliers included the results of the Field Test and the Pilot Study in the record, PS Exhibit 8 at 30 and Appendix A, Table 2-A, they did not rely on those results to draw any conclusions.

46. The sample selection for the 2004 and 2005 subscribers surveys was undertaken by Dr. Frankel, who has a Ph.D. in statistics, has taught statistics at the undergraduate and graduate levels for over 30 years, has published numerous books and papers on statistics as applied to surveys and sampling, and has appeared as an expert witness in several cases on the presentation and interpretation of statistical evidence. PS Exhibit 3, Appendix E.

47. The sample selection processes employed in selecting the 2004 and 2005 samples were conceptually alike. PS Exhibit 3 at 7. Dr. Frankel used a two-step random process to select 100 cable systems from the total Form 3 cable system universe of approximately 1,300 systems in each year. *Id.* at 4. The first step involved selecting with certainty those Form 3 systems that represented 1% or more of the total Form 3 royalties or Form 3 subscribers, respectively, in 2004 and 2005. *Id.* at 4, 7. The remaining sample systems were selected in both years using a Probability Proportionate to Size systematic selection. PS Exhibit 3 at 5, 7-8; PS Exhibit 8 at 14-17.

48. The sample selection process for subscribers to these selected systems employed RDD, a method of determining probability samples of telephone households that has been widely used since the 1970s. PS Exhibit 3 at 5.

49. A sample size target of 1,500 subscriber household interviews was chosen, allocated among the sample cable systems in proportion to the size of the systems. *Id.* at 6. The probabilities of selection for both cable systems and subscribers were calculated. PS Exhibit 3, Appendix A. Dr. Gruen presented lists of the names and locations of cable systems selected, the target number of household interviews, and completed survey results for each selected system for 2004 and 2005. PS Exhibit 8, Appendices C and E. Weighting of the sample was done to compensate for unequal probability of

selection and non-response by adjusting to the units of projections, the royalties paid by each sample system. PS Exhibit 3 at 10-11 and Appendix B.

50. Ninety-six percent (96%) of the target number of interviews were completed for the 2004 survey. Ninety-nine percent (99%) of the target number of interviews were completed for the 2005 survey. PS Exhibit 8 at 15-16, 18-19.

51. The conceptual approach to the subscriber surveys is based on an area of media research known as "uses and gratifications," which assumes that people select specific content from a medium to satisfy particular needs. PS Exhibit 4 at 8-9. Subscribers make individual choices all the time about what programming they want to watch on distant signals, which is, in effect, a continual assessment of what programming on distant signals attracts them and keeps them subscribing. Therefore, surveying subscribers offers the best measure of such value. *Id.* at 7, 9.

52. From a methodological approach, the subscriber survey benefitted from the lessons learned in past distribution proceedings about what techniques were most useful as well as from Dr. Rubin's expertise and experience in survey research. PS Exhibit 4 at 13 and Appendix A (summarizing Dr. Rubin's academic and professional experience). In particular, the Subscriber Survey

questionnaire provided clear program category distinctions. The program category descriptions were further enhanced by examples differentiating one program category from another, and the subscriber responses were focused by repeated references to the distant signals offered by the respondents' cable systems. *Id.* at 10, 13. Respondents were knowledgeable and responsive and were able to articulate their answers clearly in the constant sum framework. *Id.*

53. The Bortz survey did not focus respondents' attention on the specific programming categories carried by distant signals until the final valuation question. PS Exhibit 8 at 25-26. The initial Bortz question was an open-ended question about popularity for which the interviewers assigned the answers into a program category. Tr. at 129-30 (Trautman). The next Bortz question was answered by only a small minority of respondents. Tr. at 135 (Trautman). Thus, the vast majority of Bortz respondents first heard the program categories when answering the valuation question. Tr. at 133 (Trautman). In contrast, the subscriber surveys reminded respondents of the program categories and distant signals they received several times before the valuation question. PS Exhibit 8 at 25-26. These reminders focused respondents' attention on distant signal programming categories rather than on programming available from other sources, and, thus, provided a better

vehicle for obtaining relative market value related to distant signal programs, rather than to programming in general. *Id.*

54. Another refinement to the subscriber survey was the addition of a separate program category for non-team sports. PS Exhibit 8 at 27. The JSC Claimants represent a small portion of all the sports telecasts available on distant signals; nonetheless, the Bortz survey offered only one possible category for sports. This could create a situation where respondents were providing a value for sports programs that did not fall within the JSC category, thus overinflating the value that is properly attributable to the narrower JSC sports programming. *Id.;* Tr. at 2820-21 (Salinger). Subscribers gave the non-team sports category, on average, more than a 7% share, PS Exhibit 8 at 19, which suggests strongly that using only a single sports category overstates the value of the JSC program category.

2. Subscriber Survey Results

55. The unweighted survey results provided roughly 50% shares to the Program Suppliers' category in both years. PS Exhibit 8 at 19, Table 1. These raw data were then adjusted to include the virtual interview results for respondents who were offered only PTV or Canadian distant signals on their systems as well as the royalty weighting to adjust for the different-sized systems in the sample. *Id.* at 20-22. Finally, Dr. Gruen eliminated the

"other" program category results and adjusted the remaining category results to equal 100%. *Id.* at 23, Table 3.

56. The normalized results after these calculations are as follows:

	2004	2005
Program Suppliers	48.9%	46.6%
News and Community Events	15.5%	19.5%
Devotional Programs	7.4%	8.2%
Live Team Sports	17.8%	17.1%
PBS	9.6%	6.8%
Canadian	0.8%	1.8%

Id. at 23, Table 3 (rounded to first decimal).

57. The subscriber surveys also included an aided (*i.e.*, the program categories were identified) question on which program categories were most popular. Program Suppliers' category had the highest share of most popular responses with 57% in 2004 and a little over 60% in 2005. PS Exhibit 8 at 24, Table 4.

58. As Dr. Gruen acknowledged, the results of attitudinal surveys, including the Bortz survey, are not, by themselves, measures of marketplace value. Tr. at 1846, 1851 (Gruen). To the extent, "relative marketplace value" turns on what programming attracts and retains subscribers, a subscriber survey is more relevant than a cable operator survey for that issue. *See id.* One means to translate the Subscriber Surveys into relative market shares is presented by Dr. Ford's weighted average approach, which combines the results of the

Subscriber Surveys with the results of his analysis. PS Exhibit 11 at 49-50. This weighted average approach acknowledges that cable networks' revenues are derived from two sources: advertising and subscription. *Id.*

3. Subscriber Preferences Provide Better Evidence of What Programming Attracts and Retains Subscribers Than Do Cable Operator Preferences.

59. Although cable operators pay to retransmit distant signals, subscribers, through their monthly subscription fees, generate the revenues used to pay the royalties. PS Exhibit 8 at 28. In economic terms, demand by cable operators for distant signals is derived from subscriber demand for programming. *Id.*

60. Cable operators select channels, not program categories; thus, they need not place relative values on the program categories carried within the channels they select. As a result, cable operators do not routinely make relative valuations among the various program categories in this proceeding. PS Exhibit 8 at 28; Tr. at 624 (Ducey), 1837 (Gruen), 3095 (Calfee).

61. Cable subscribers, on the other hand, regularly, if not daily, value programs and program categories when they decide which programs they like or dislike; which programs are worth making an extra effort to watch or to record for later viewing. Cable subscribers make relative program valuation decisions all the time and have far more experience in doing so than cable

operators. PS Exhibit 8 at 28-29; Tr. at 1837-38 (Gruen); PS Exhibit 4 at 7-8.

62. Cable subscribers make value decisions about cable programming in the context of monthly subscription fees for cable service, the amount and type of local television station programming available in the market, and the availability of service from satellite carriers or other providers competing with cable. Tr. 2554-56 (Duncan).

63. It follows that a survey of cable subscribers is not only relevant evidence, *see* Tr. at 2371 (Crawford), but also more useful in determining the relative value of program categories in attracting and retaining subscribers than a survey of cable operators. Given that relative market value in these proceedings is defined in terms of attracting and retaining subscribers, subscriber preferences should carry great weight in determining relative program values. PS Exhibit 8 at 27-29.

III. Corroborating Cable Network Evidence

64. Program Suppliers introduced evidence, through Mr. Homonoff, that corroborates the high values for Program Suppliers' programming found in the Ford analysis and the Subscriber Surveys. PS Exhibit 7.

65. Mr. Homonoff has considerable experience in programming acquisition at cable multiple system operators ("MSO") and as a consultant working with MSOs. PS Exhibit 7 at 2-3 and Attachment 1.

66. Mr. Homonoff testified, as did Ms. Meyka, that programming decisions for the large majority of cable systems are made at the MSO, not individual system, level. PS Exhibit 7 at 5-7; Tr. at 1741 (Homonoff); SP Exhibit 4; Tr. 321-23 (Meyka). In a hypothetical market, MSOs, not individual cable systems, would most likely make program acquisition decisions, consistent with how they now make decisions regarding offering cable networks and distant signals on the systems owned or operated by the MSOs. Tr. at 1742-45 (Homonoff).

67. MSOs currently make programming decisions on a per channel basis by providing cable networks on their systems. These programming decisions reflect the value that the MSOs place in different programming as well as their inferred perception of what programming is valued by their subscribers. PS Exhibit 7 at 14. Mr. Homonoff determined that in 2004 and 2005, 37 of the top 50 cable networks (in terms of number of subscribers to whom the networks are available) would be considered to fall within the Program Suppliers' category, seven of the networks labeled as sports, and the remaining six labeled as news. *Id.* at 15-17, Figures 1 and 2 and

Attachments 2 and 3; Tr. at 1747-48 (Homonoff). This analysis corroborates the high values for Program Suppliers' programming under the Ford analysis and the Subscriber Surveys.

68. Mr. Homonoff drilled down into the individual programming offered by the top 25 cable networks on five randomly selected weeks each in 2004 and 2005 to determine what categories of programming those networks offered. PS Exhibit 7 at 14 and Attachments 5-6. This analysis determined that approximately 90% of the programming on these networks would fall within the Program Suppliers' category, somewhat more than 4% in the news category, and less than 2% in the JSC category. *Id.* at 19-21, Figures 3 and 4; Tr. at 1750-51 (Homonoff).

69. Mr. Homonoff analyzed the aggregated monthly per subscriber license fees that MSOs paid the top 50 cable networks in 2004 and 2005, and determined that the largest amounts were spent on the networks that offer principally Program Suppliers programming with the sports networks the next highest amount and news the last. PS Exhibit 7 at 22-24, Figures 5-6, Appendices 7-8; Tr. at 1754-56 (Homonoff)

70. This ranking is consistent with the Ford analysis and the Subscriber Surveys in which Program Suppliers' programming also ranked the highest among the claimant categories.

IV. Evidence of Changed Circumstances: Fewer JSC Telecasts On Distant Signals and More on RSNs

71. The most dramatic changed circumstance between 1998-99 and 2004-05 in the distant signal environment presented on this record has been the diminished number of JSC telecasts on distant signals coupled with the growth of JSC telecasts on regional sports networks ("RSN"). PS Exhibit 6 at 4-5.

72. RSNs are cable networks. They are carried on expanded basic tiers of service taken by over 98% of cable subscribers, and offer advertiser-supported telecasts of primarily professional sports teams that are "local" to the region. PS Exhibit 6 at 7; Tr. at 1684-85, 1710 (Mansell). The number of RSNs has increased since 1999 with the effect that many regions of the country are served by more than one RSN. PS Exhibit 6 at 7-9. In part, this change has been fostered by the professional sports teams, who increasingly have established their own, or partnered with MSOs to establish, RSNs telecasting the team(s)' games throughout their "home" regions. *Id.*; Tr. at 1628-29 (identifying RSNs owned by teams). From 1999 to 2005, the number of subscribers who receive RSNs on their cable systems increased from approximately 91 million to 145 million, an almost 60% increase. PS Exhibit 6 at 8-9, Table.

73. For Major League Baseball ("MLB") local telecasts, the number broadcast by local television stations declined from 1,656 in 1999 to 1,066 in 2005. PS Exhibit 6 at 12, Table. In contrast, the number of MLB telecasts on RSNs increased from 2,160 in 1999 to 3,067 in 2005. *Id.* On the distant signal stations included in the Bortz surveys and the Nielsen studies, the average number of local telecasts per station of MLB games declined from 55 in 1998-99 to 41 in 2004-05 (Bortz) and from 67 to 37 (Nielsen). PS Exhibit 15 at 8 (Table 4) and 12 (Table 8).

74. For National Basketball Association ("NBA") local telecasts, the number broadcast by local television stations declined from 781 in 1999-2000 to 558 in 2004-05. PS Exhibit 6 at 14, Table. In contrast, the number of NBA telecasts on RSNs increased from 1,197 to 1,561 over the same period. *Id.* On the distant signal stations included in the Bortz surveys and the Nielsen studies, the average number of local telecasts per station of NBA games declined from 34 in 1998-99 to 20 in 2004-05 (Bortz) and from 31 to 22 (Nielsen). PS Exhibit 15 at 8 (Table 4) and 12 (Table 8).

75. For National Hockey League ("NHL") local telecasts, a direct comparison of the same years is not possible because no NHL games were broadcast during the cancelled 2004-05 season. PS Exhibit 6 at 14, 32. The number of NHL games broadcast by local television stations declined from 273 in 1999-2000

to 194 in 2003-04. PS Exhibit 6 at 15, Table. In contrast, the number of NHL telecasts on RSNs increased from 1,187 to 1,447 over the same period. *Id.* On the distant signal stations included in the Bortz surveys and the Nielsen studies, the average number of local telecasts per station of NBA games declined from 46 in 1998-99 to 30 in 2003-04 (Bortz) and from 23 to 15 (Nielsen). PS Exhibit 15 at 8 (Table 4) and 15 (Table 8).

76. The number of MLB, NBA, and NHL games telecast on five widely carried distant signals (WGN, KCAL WPSG, WSBK, and WUAB) declined from an aggregate of 575 in 1998-99 to 321 in 2004-05. PS Exhibit 15 at 9, Table 5. On WGN, the most widely carried distant signal, the number of MLB telecasts declined from 150 in 1999 to 99 in 2005, while the number of NBA telecasts went from 20 in 1998-99 to 25 in 2004-05. PS Exhibit 6 at 19, 21 (tables).

77. In addition to increased availability of MLB, NBA, and NHL telecasts on RSNs, games from these leagues as well as from NFL and NCAA (the other claimants within the JSC category) were increasingly available on out-of-market video-on-demand services that offer nearly every NFL, MLB, NBA, and NHL regular-season game, as well as hundreds of NCAA football and basketball games on a video, full, or partial season-ticket basis. PS Exhibit 6

at 26-28. Additionally, games from these leagues and the NCAA have become increasingly available via Internet streaming. *Id.* at 29-31.

78. In short, unlike the 1998-99 period, by 2004-05 many more options to see JSC telecasts besides distant signal telecasts became available. Tr. at 1678 (Mansell). One effect of the migration of JSC telecasts from local television stations to RSNs was that the number of JSC telecasts offered by distant signals declined substantially from 1998-99 to 2004-05. *See* Tr. at 1729 (noting relevance of possible change).

V. The Bortz Willingness-To-Pay Survey Results Do Not Show Market Value

79. JSC again introduced the Bortz survey results as indicative of relative market value among the program categories on grounds that the Bortz surveys are "conceptually the right studies," relying on *CBN v. CRT*, 720 F.2d 1295, 1306 (D.C. Cir. 1983), for this assertion. Tr. at 18-19 (Garrett). But *CBN* reviewed the 1979 cable royalty distribution proceeding, 720 F.2d at 1300, which was prior to the time the Bortz surveys were even introduced into distribution proceedings. *See* SP Exhibit 2 at 23, Table III-1 (showing Bortz surveys not introduced until 1983 proceeding); Tr. at 122 (Trautman).

80. Indeed, the surveys done in the 1979 proceeding were done by a different company and addressed different respondents. Mr. Trautman explained that

in those earlier non-Bortz studies, "they used various methodologies, in some cases, quite a bit different from the methodology that we use and, in other cases, fairly similar." Tr. at 121-22. In particular, the 1979 study did not ask about Devotional or Canadian programming, Tr. at 123 (Trautman), and the definitions of the other categories were defined by the survey company in a manner that might not conform to the current definitions. Tr. at 123-24 (Sledge, C.J.).

81. Also the 1979 survey involved "different categories of respondents" from those included in the current Bortz surveys. Tr. at 124 (Wisniewski, J.). In particular, the 1979 surveys involved one survey that asked "MSOs, in other words, corporate level executives," and the other one asked "[s]ystem level local managers." Tr. at 124-26 (Trautman). Both differ from the respondents in the current Bortz survey. *Id.* at 126 (Trautman).

82. In short, *CBN* addressed different studies, and thus the reasoning as to the validity of those studies has no precedential value as to whether the Bortz studies presented here are conceptually the right studies in the 2004-05 cable environment, which differed sharply from the cable environment in 1979.

83. Putting aside the variations in program category definitions between the 1979 studies and the 2004-05 Bortz studies, the 1979 study's respondents were MSO corporate executives, while the 2004-05 Bortz studies involved

local cable system employees. The testimony in the instant matter demonstrated that program acquisition decisions in 2004-05 were made at the MSO level, not at the local cable system level. SP Exhibit 4 at 2-3, 5, and 8; Tr. at 319-23, 326-27, 390-91 (Meyka); PS Exhibit 7 at 5-13. Consequently, the Bortz study approach of asking local cable system employees about program acquisition does not target the people who actually made program acquisition decisions in 2004-05.

84. Further, the qualifying question, SP Exhibit 2, Appendix B, Q.1, asked about a respondent's role in "making carriage decisions about *cable programming networks* . . . and which of those types of programming reflected on those *networks* are most valuable in attracting and retaining subscribers." Tr. at 157 (Trautman); *see* SP Exhibit 2 at 37 ("cable operators surveyed . . . are familiar with the rates charged by the sellers of the various genres of *cable networks*") (emphasis added). The cable network market differs from the broadcast/distant signal market in terms of what revenue streams are available for program purchases, and thus how programming is valued. Tr. at 2712-18 (Trautman). Consequently, familiarity with cable network market valuation may not indicate familiarity with distant signal valuation. *See* Tr. at 2701-04 (Wisniewski, J.).

85. The Bortz valuation question (SP Exhibit 2, Appendix B, Q.4a) does not ask about market value, but about a respondent's willingness-to-pay. PS Exhibit 16 at 6 & n. 6; Tr. at 2850 (Salinger). Willingness-to-pay is normally higher than market value, which is actual price paid for a specific quantity. PS Exhibit 16 at 6 & n. 5. Relative willingness-to-pay would equate with relative market value only under implausible conditions. Among other conditions, the demand curves for *all* programming categories must be linear and the elasticities of demand for *all* programming categories must be identical at selected quantities. PS Exhibit 16 at 7 and Appendix A. It is highly unlikely that both conditions can be met in any given circumstance, particularly simultaneously for as many as seven different programming categories involved in the Bortz valuation question. PS Exhibit 16 at 8 & n. 10; SP Exhibit 2, Appendix B, Q. 4a. Absent those conditions being met, the Bortz relative willingness-to-pay answers do not provide any valid evidence of relative market value.

86. The Bortz responses provide one possible buyer's view, but fail to consider that cable systems would likely compete with other buyers to obtain distant signal programming and how that competition would affect the valuation in a hypothetical free market. Tr. at 261-64 (Crandall). In a competitive market situation dealing with a fixed supply, one buyer's view will not

accurately measure market value, which would, instead, be a function of the competition and actual buyer behavior. PS Exhibit 16 at 10-11. Likewise, in a fixed budget situation involving multiple goods, one buyer's relative willingness-to-pay for each good will not correspond (except by chance) to the relative market value as determined by market price. *Id.* at 11 Table 1.

87. The disconnect between the willingness-to-pay Bortz answers and relative market value was demonstrated by the inaccurate assertion that the results of a top 25 cable network analysis (SP Exhibit 57 at 9, Table 3) "comes up with values that are consistent with the results of [the Bortz] survey." Tr. at 2702 (Trautman). Even assuming that SP Exhibit 57, Table 3 shows a valid "JSC only Top 25 valuation comparison" (title of table), its 20.12% value for JSC sports in 2004 substantially differs from the Bortz study 33.5% response for sports as does the 2005 valuation of 17.35% compared to the 36% 2005 Bortz sports response. Tr. at 2740-41 (Trautman).

88. Although the Bortz survey results were touted as consistent from year to year, no statistical tests were done to determine if the year-to-year differences are significant. Tr. at 183 (Trautman). In addition, because each yearly study "is a result unto itself" involving a different body of respondents, the surveys cannot be directly compared year to year. Tr. at 179 (Trautman). The purported consistency also comes into question

facially because the 2004 confidence interval ranges for sports, movies, and devotional programming fall outside the confidence interval ranges of the 1999 Bortz results. SP Exhibit 2 at 24, Table 4. Finally, the purported consistency is called into question by the dramatic shift in JSC telecasts from broadcast stations to RSNs.

VI. The Waldfogel Regression Analysis Is Neither Reliable Nor Evidence of Relative Market Value.

89. The Settling Parties introduced a regression analysis whose modified results purportedly corroborate the augmented Bortz survey results. SP Exhibit 18 at 13-14, Table 4. The regression analysis has, however, fatal methodological, statistical, and conceptual flaws that preclude any reliance being placed on its results, either on their own or as purportedly corroborative evidence. Tr. at 254-55 (Crandall), 2785-86 (Salinger); PS Exhibit 18 at 13-28; DC Exhibit 4 at 6-36.

90. In addition, Dr. Waldfogel's regression analysis relies on Dr. Ducey's calculated minutes of programming that were aired on distant signals during certain days during 2004 and 2005. Tr. at 597-98 (Ducey).

91. All minutes of programming are not created equal, yet Dr. Ducey's calculations proceed on the assumption that they are. The value of programming is driven by many factors, including the time of day that a

particular program airs, the expected size, gender, and age demographic of its audience. *See* PS Exhibit 11 at 1, 13; Tr. at 626-32 (Ducey), 984-85 (Fritz), 848-49 (Waldfogel), 2117 (Ford). None of these factors have been taken into account, however, in Dr. Ducey's or Dr. Waldfogel's analyses. Tr. at 633-34 (Ducey), 848-49 (Waldfogel). Indeed, as Dr. Ducey acknowledged, the only weighting that he performed on the minutes was by subscriber instances. Tr. at 634 (Ducey). Thus, the minutes used in the regression analysis do not encompass any market measure of program value.

92. A fatal defect in the regression is demonstrated by the lack of stability in its reported coefficients. The "baseline regression results" were presented as two-year (2004 and 2005) average coefficients for the dependent variables, including an average coefficient for each programming category. SP Exhibit at 11, Table 2. This presentation implies the coefficients would be roughly the same across the short two-year time frame. PS Exhibit 16 at 17. That expectation is dashed, however, when the coefficients are estimated on an accounting period basis, *id.* at 18, Table 3, or on a yearly basis, DC Exhibit 4 at 10, Table 1. Both those estimates show widely differing program category coefficients (and hence shares) across time. The variations in coefficients for the programming categories across time range from a high of 7247% for PBS to a low of -33% for Canadians. DC Exhibit at 10, Table 1.

93. Likewise, the variations within individual programming categories is extremely wide: for example, the highest coefficient for Program Suppliers (0.111) differs by a factor of 5 from the lowest (0.022); for PBS, the lowest (-0.007) differs by a factor of 20 from the highest (0.141) and changes from a minus to a plus. PS Exhibit 16 at 18, Table 3; *see also id.* at 20, Table 4 (showing significant differences in coefficients for 3.75 rate and non-3.75 rate cable systems). *See also* DC Exhibit 4 at 11, Table 4 (showing instability of yearly calculated shares based on coefficients for programming categories).

94. This dramatic instability of results, hidden by presenting coefficients as two-year averages, highlights the consequences of a poorly specified model. PS Exhibit 16 at 18. No evidence was presented of radically changed circumstances between 2004 and 2005 that would fit, much less explain, the regression's widely divergent yearly results. Quite the opposite, Settling Parties asserted that no changes in this period "significantly affected the relative valuations of the different Phase I categories here." Tr. at 11 (Garrett). Thus, it can only be concluded that the regression analysis is fatally flawed. Tr. at 2794 (Salinger) ("the imprecision means that the results you get are very sensitive to completely random factors. And that's what

makes the methodology inherently unstable and, in my opinion, unreliable.").

95. A related point concerns the very wide confidence intervals associated with the coefficients. SP Exhibit 18 at 11, Table 2. These reported confidence intervals mean, statistically speaking, that the reported coefficients for Program Suppliers, Commercial TV, Public Broadcasting, and Devotional are all equal. PS Exhibit 16 at 19 & n. 23. The very broad confidence intervals also mean that the results are exceptionally weak and very imprecise. *Id.*; Tr. at 2793 (Salinger). Equally damning, the reported confidence intervals are understated because they were calculated on the wrong basis. Tr. at 2794-95 (Salinger). Correct calculations would further widen the intervals, making the results all that more imprecise.

96. A second fatal defect in the regression model concerns its assumption that royalty payments are a function of the minutes of different distant signals' programming mixes. But, royalty payments are not determined by programming mix, but by the number and type of distant signals and gross receipts of the reporting cable system, in accordance with the strictures of Section 111 and the governing regulations. PS Exhibit 16 at 14. Accordingly, cable systems that have the same gross receipts and DSE value will pay the same royalties, despite having entirely different mixes of distant

signal programming. *Id.* at 16, Table 2. *See* DC Exhibit 4 at 19-24 (comparing stability of results from regression model based on royalty factors with instability of results from Waldfogel model); Tr. at 2799-2805 (Salinger) (same). This demonstrates that royalty payments have no relationship to different distant signal programming mixes.

97. This point was also demonstrated by an analysis of the residuals to the regression. Tr. at 935-36 (Wisniewski, J.). Such an analysis can show evidence of poor model specification, and that was the case here. Based on a well-known statistical approach for determining outliers, the Waldfogel model had 377 "outliers" that turned out to be systems that were paying the correct royalties based on their distant signal carriage. PS Exhibit 16 at 23-24. In other words, these would not be considered outliers in a correctly specified model, and their large presence here without any explanation or attempt to account for them shows a poorly specified model. *Id.*

98. Settling Parties claimed that the modified regression results ("WGNA results") corroborate the augmented Bortz study results, based on the average 2004-05 WGNA results compared to the Bortz results for each year. SP Exhibit 18 at 13-14, Table 4. But even on this basis, the averaged WGNA results and the yearly augmented Bortz results are dissimilar. PS Exhibit 16 at 26, Table 5. In addition, the WGNA results differ from the

coefficients for the compensable minutes regression results on which the purported market value shares were determined. *See* SP Exhibit 18 at 14, Table 4 ns. 1-2.

99. Comparisons using either regression basis show huge dissimilarities between the regression and the Bortz study results: for the compensable minutes, the differences range from 10%-67%, while for the WGNA results, the range is 2% to 63%. PS Exhibit 16 at 26, Table 5. The dissimilarities are even more pronounced when the WGNA results are estimated on a yearly basis, rather than as a two-year average, because the 2004 regression results vary markedly from the 2005 results. *Id.* at 27-28, Table 6.

100. In short, the regression results, no matter how they are sliced and diced, do not corroborate the Bortz results. As Dr. Salinger stated: "the right conclusion to draw from [the regression study] would be that it contradicts Bortz in showing that the composition of programming really doesn't matter very much." Tr. at 2889 (Salinger).

VII. Dr. Woodbury's Music Ratio Approach Provides A More Accurate Estimation of Music's Share.

101. The Music Claimants proposed to increase their award to 5.2% in 2004 and 4.6% in 2005 based on a weighted music ratio. *See generally* SP Exhibit 27. The weighted music ratio approach incorporates several features that make it

both inaccurate and unreliable. PS Exhibit 14 at 8. The chief failings of the weighted music ratio are its reliance on assumed, not actual, music license fee payments; its use of subscriber instances as a surrogate for viewing to weight the value of different station types in the distant signal market; and, its treatment of the nationally-distributed WGNA as being analogous to a locally-distributed independent station. *Id.*

102. The weighted music ratio relies on assumed, rather than actual, payments in the form of the 2004 and 2005 local television blanket license fees negotiated between the Television Music License Committee ("TMLC") for the stations and the performing rights organizations ("PROs") for music. SP Exhibit 27 at 11-12. The difference between the local station blanket license fees and the actual license fee payments to the PROs is substantial: the actual payments were $44 million lower in 2004 and $42 million lower in 2005. PS Exhibit 3x; Tr. at 1165 (Zarakas). Indeed, all witnesses agreed that even though the exact amount of direct license fees is unknowable, the actual payments to the PROs plus direct license fees would be less than the blanket fees, given that 300-350 stations (out of 1300 plus total) paid a per program license fee plus direct license fees instead of a blanket license fee. Tr. at 1102-05 (O'Neill), 1188-90 (Zarakas), 3321-23 (Woodbury); *see* PS

Exhibit 14 at 4 (noting unlikelihood that direct license fees make up difference between blanket license fee and actual payments to PROs).

103. The second problem with Music's weighted music ratio involves the use of subscriber instances as the weighting factor for translating the over-the-air allocation of the blanket license fees among different station types (SP Exhibit 27 at 15, Table 2) into a similar allocation for distant signal retransmission. SP Exhibit 27 at 25-29. Although Music offered no justification for using subscriber instances as the means to devise a distant signal allocation, it appears that they are to serve a similar role to that played by Nielsen viewing data to allocate the blanket license fees among station types in over-the-air markets. *Id.* at 14-15 & n. 22; *see* Tr. at 1228 (Zarakas) (no thought given to using Nielsen distant signal viewing data for allocation). But while the Nielsen viewing data provides an industry-accepted means for determining the actual usage of programs (and thus of music), subscriber instances do not, nor do they provide a reasonable proxy for viewing. Tr. at 3298-3301 (Woodbury); PS Exhibit 14 at 7.

104. Because subscriber instances do not reasonably approximate the Nielsen viewing data on which TMLC's over-the-air allocation relies, the use of subscriber instances (SP Exhibit 27 at 27, Table 9) does not reasonably approximate how the blanket license fees would be allocated in a distant

signal market. Accordingly, no reliance can be placed on the subscriber instance weighting (*id.* at 29, Table 10) used in Music's weighted music ratio calculation.

105. The third problem with the weighted music ratio concerns the treatment of WGN. For purposes of determining music license fees and total broadcast rights payments, WGN was treated as a WB affiliate. SP Exhibit 27 at 25, Table 8; Tr. at 1217-18 (Zarakas). But for the subscriber instances weighting, WGN's subscriber instances were switched to the independent station category. SP Exhibit 27 at 25, Table 10. This switch artificially increased the weighted music ratio result (*id.* at 31, Table 12) because the music ratio for independent stations (4.1% in 2004 and 3.8% in 2005) was nearly triple the WB ratio (1.4% in both years). Thus, switching the WGN-infused subscriber instance weight (by far the highest of those weights, *see id.* Table 10) to the higher independent station music ratio, rather than the lower WB ratio, dramatically increased the results compared to if WGN had been treated as a WB affiliate for all purposes. PS Exhibit 14 at 8.

106. Ostensibly, switching WGN to the independent station category for subscriber instances weighting followed from the fact that WGN does not broadcast WB programming on its national feed (WGNA). SP Exhibit 27 at 28 n. 30. This claim ignores that WB affiliates are considered independent

stations for the cable royalty purposes, and thus cable systems pay the same royalty for WGN whether it broadcasts WB or some other programming. Tr. at 1235-37 (Zarakas). Even if replacing WB with other programming affected royalties (which it does not), WGNA's programming is designed for a national market and thus is not analogous to independent stations whose programming is designed for local markets. Consequently, there is no basis for treating WGN as a typical independent station in the weighted music ratio calculation. PS Exhibit 27 at 9. At the very least, WGN should have been treated separately and an analysis of its distant viewership compared to other distant signals should have been undertaken to determine a proper distant signal weighting. Tr. at 3303-05 (Woodbury). Treating WGN as a typical independent station in the weighted music ratio results does not reflect actual conditions under Section 111, and thus does not offer a valid basis on which to set Music's royalty share. *Id.*

107. Program Suppliers provided an alternative music ratio calculation that is based on the actual music license fee payments from both the local stations and the networks. PS Exhibit 14 at 5-6 and Appendices 2 and 3. This calculation understates the music payments by not including direct payments, which all agree cannot be determined for 2004-05. Tr. at 3294-95, 3318 (Woodbury).

108. The music ratio based on actual payments for 2004 is 2.04% and for 2005 is 1.94%. PS Exhibit 27, Appendix 3. At hearing, it was proposed that the 2007 U.S. Census Bureau figures for total rights payments of $10.9 billion in both years should have been used as the denominator. Tr. at 3330 (citing SP Exhibit 63 at p. 72). Even assuming the 2007 numbers should be used (*but see* Tr. 3333-34 (Woodbury)), that would change the ratios to 2.19% in 2004 and to 2.14% in 2005. *See* PS Exhibit 27, Appendix 3 (substituting $10.9 billion as the denominator). Because the actual payments, even without direct license fees, are likely closer than assumed (blanket license fee) payments to what was paid for music rights in 2004-05, Tr. at 2005 (Woodbury), a music ratio based on actual payments, rather than one based on blanket license fee payments, offers a more accurate estimate of the value of music.

VIII. The Canadian Claimants Group's Fees Generated Approach Does Not Reflect Market Value, And Should Be Rejected.

109. The Canadian Claimants offered a fees generated approach to set their share of the royalty funds. A fees generated approach is derived from the royalty payments made in accordance with the statutory plan, and thus does not provide a reasonable estimate of what the relative value of Canadian programming would be in a hypothetical free market for distant signal

programming. Other measures of relative market value of all programming types, including Canadian, were introduced in this proceeding. The shares proposed for Canadian programming under those approaches are:

	2004	2005
Bortz Study	0.2%	0.3%
Bortz, adjusted by McLaughlin	0.5%	1.5-1.8%
Gruen Subscriber Surveys	0.8%	1.8%
Ford Analysis	1.9%	1.4%.

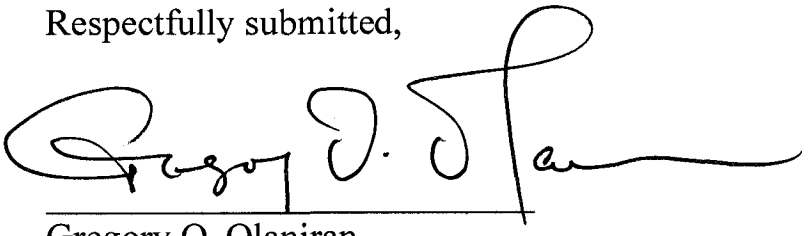
Exhibit CDN-R-3 at 10-11.

CONCLUSION

110. For all of the foregoing reasons, the Judges should determine that the evidence submitted in this proceeding demonstrates that Program Suppliers are entitled to the following shares of the 2004 and 2005 cable royalty funds:

Royalty Year	Basic Fund (%)	3.75% Fund (%)	Syndex Fund (%)
2004	68.283	74.412	96.000
2005	74.961	78.011	96.000

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Dated: March 17, 2010

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