AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 79 Friday,
No. 80 April 25, 2014

Part III

Library of Congress

Copyright Royalty Board

37 CFR Part 380

Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2009–1 CRB Webcasting III]

Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning on January 1, 2011, and ending on December 31, 2015.

DATES: *Effective Date:* April 25, 2014.

Applicability Dates: These rates and terms are applicable to the period January 1, 2011, through December 31, 2015.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. Email: *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: On July 6, 2012, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) remanded this matter for determination. The Copyright Royalty Judges (Judges) determine that the royalty rates payable under 17 U.S.C. 114(f) for the public performance by webcasters of digital sound recordings for the period 2011 through 2015 shall be as follows. For commercial webcasters subject to the agreement between the National Association of Broadcasters and SoundExchange, as stipulated in the agreement. For all other commercial webcasters:

Year	Rate per-performance [1]
2011	$0.0019
2012	0.0021
2013	0.0021
2014	0.0023
2015	0.0023

The Judges determine that section 114 public performance rates for noncommercial webcasters shall be as follows. For noncommercial educational webcasters, as agreed by and between College Broadcasters, Inc. and SoundExchange in the agreement approved by the Judges in this proceeding. For other noncommercial webcasters, the rate shall be $500 per station or channel, including side channels, up to a maximum usage of 159,140 Aggregate Tuning Hours [2] (ATH) per month. Commercial usage rates apply to usage in excess of 159,140 hours per month.

All parties in interest in this proceeding agreed that royalties payable for the license granted under 17 U.S.C. 112(e) should be bundled with the section 114 royalties and deemed to be 5% of the bundled remittances. The Judges adopt this agreement for the period 2011 through 2015.

Following are the bases of the Judges' determination.

I. Introduction
A. Subject of the Proceeding
B. Procedural Posture
C. Statutory Background
D. The Record
II. Rates Under the Section 112 Ephemeral License
III. Rate Structure Under the Section 114 Performance License
IV. Rates for Commercial Webcasters
A. The National Association of Broadcasters/SoundExchange Agreement
B. All Other Commercial Webcasters
1. The Live365 Rate Proposal
2. The SoundExchange Rate Proposal
3. The ''Affordability'' of the Proposed Interactive Benchmark Rates
4. Judges' Conclusions Regarding the Commercial Webcasters Rates
V. Rates for Noncommercial Webcasters
A. Noncommercial Educational Webcasters
B. Other Noncommercial Webcasters
1. Rate Proposals of the Participants
2. Evaluation of the Rate Proposals and Determination of Rates
VI. Terms
A. Uncontested Terms
1. Collective
2. Stipulated Terms and Technical and Conforming Changes
3. Electronic Signature on Statement of Account
B. Contested Terms for Commercial Webcasters
1. Terms Proposed by Live365
2. Terms Proposed by SoundExchange
C. Contested Terms for Noncommercial Webcasters
VII. Determination and Order

I. Introduction

A. Subject of the Proceeding

This Determination results from a rate proceeding convened under section 803(b) of the Copyright Act (Act), 17 U.S.C. 803(b). On January 5, 2009, the Copyright Royalty Judges (Judges) announced commencement of the captioned proceeding. *See,* 74 FR 318 (Jan. 5, 2009). The purpose of the proceeding was to determine royalty rates and terms for the public performance of digital sound recordings by eligible nonsubscription transmission services or new subscription services, as defined in section 114 of the Act.[3] This proceeding includes determination of rates and terms relating to the making of ephemeral copies under section 112 of the Act in furtherance of the digital public performances. The rates and terms the Judges determine in this proceeding apply to the period of January 1, 2011, through December 31, 2015. *See* 17 U.S.C. 804(b)(3)(A).

B. Procedural Posture

In response to the Judges' published notice of commencement, forty entities filed Petitions to Participate. The participants followed the statutory procedures for rates and terms determinations, which include a voluntary negotiation period. In addition, Congress provided expanded opportunities for settlement by passing the Webcaster Settlement Acts of 2008 and 2009 (WSA).[4] Most participants negotiated agreements relating to rates and terms prior to the hearing.[5]

When the Judges convened the hearing to determine rates and terms applicable to the non-settling participants, the parties remaining were: SoundExchange, Inc. (SoundExchange),

[1] This rate is applicable from first performance, but subject to recoupment credit for the agreed minimum fee of $500 per year for each station or channel.

[2] ''Aggregate Tuning Hours'' is defined in SoundExchange's rate proposal as using the same definition employed during the 2006–2010 rate period and codified at 37 CFR 380.2 (2010). It is a measure of the duration of all programming transmitted by licensee, less the actual running time of any sound recordings that are licensed directly or which do not require a license under the Act.

[3] Including as amended by the Digital Millennium Copyright Act (DMCA), Public Law 105–304, 112 Stat. 2860, 2887 (Oct. 27, 1998).

[4] Public Law 110–435, 122 Stat. 4974 (Oct. 16, 2008); Public Law 111–36, 123 Stat. 1926 (June 30, 2009). The Webcaster Settlement Acts of 2008 and 2009 authorized webcasters to negotiate rates and terms for the section 112 and 114 licenses to be effective during the then current rate term *in lieu* of the adjudicated rates for that term, and to extend through the rate term at issue in this proceeding. The WSAs also gave parties the option to exclude those negotiated terms from evidence in a proceeding before the Judges notwithstanding the provisions of sections 112(e)(4) and 114(f)(2)(B), which permit the Judges to consider evidence of voluntarily negotiated licenses in determining statutory rates and terms.

[5] The participants reached eight settlements in all, accounting for approximately 95% of the royalties paid to SoundExchange in 2008 and 2009. The Copyright Office published notices of settlements as follows: 74 FR 9293 (Mar. 3, 2009) (three agreements); 74 FR 34796 (July 17, 2009) (one agreement); and 74 FR 40614 (Aug. 12, 2009) (four agreements).

College Broadcasters, Inc. (CBI),[6] the Intercollegiate Broadcasting System, Inc. (IBS), Live365, Inc. (Live365), RealNetworks, Inc., and Royalty Logic, LLC. The Judges heard evidence for seven days in April 2010 in the direct case and three days in July 2010 in the rebuttal case. On May 5, 2010, the Judges heard oral argument relating to the settlement and resulting regulatory language proposed jointly by SoundExchange and CBI. The Judges heard closing arguments of counsel on July 30, 2010.

Following presentation of written and testimonial evidence, legal briefing, and argument of counsel, the Judges published their Final Determination in this matter on March 9, 2011. *See* 76 FR 13026 (Mar. 9, 2011). IBS filed a timely appeal to the United States Court of Appeals for the DC Circuit. IBS asserted on appeal that the $500 minimum fee and the attendant recordkeeping and reporting requirements established for noncommercial webcasters is excessive and burdensome for small college broadcasters. IBS further challenged the Constitutionality of the statutory construct granting the DC Circuit the power not just to affirm, reverse, or remand appeals from the CRB, but also to remediate CRB determinations—an ability IBS challenged as a non-judicial function and unconstitutional under Article III of the Constitution. IBS likewise challenged the constitutionality of the Judges under the Appointments Clause of the United States Constitution. U.S. Const., art. II, sec. 2, cl.2.[7]

SoundExchange and CBI intervened in the appeal. Both intervenors filed briefs in support of the Judges' determination. SoundExchange controverted the constitutional challenges asserted by IBS. CBI sought to assure the validity of its agreement with SoundExchange regardless of the resolution of the constitutional issues.

On July 6, 2012, the DC Circuit ruled that the Judges were acting as principal officers of the United States government in violation of the Appointments Clause of the Constitution. *Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Board,* 684 F.3d 1332, 1342 (D.C. Cir. 2012), *cert. denied,* 133 S. Ct. 2735 (2013).[8] To cure the violation of the Appointments Clause, the DC Circuit excised that portion of the Act that limited the Librarian's ability to remove Judges. Having determined that the Judges were not validly appointed at the time they issued the challenged determination, the DC Circuit ''vacate[d] and remand[ed] the determination,'' without addressing any substantive issue on appeal, so that a constitutionally appointed panel of Judges could render a new determination. *Id.* at 1334, 1342.

Following the Supreme Court's denial of IBS's petition for a writ of *certiorari,* the Judges requested proposals from the participants on the conduct of proceedings on remand. *Order for Further Briefing* (July 26, 2013). SoundExchange essentially argued for a summary reissuance of the Judges' original determination and CBI argued for summary adoption of its settlement with SoundExchange. IBS urged the Judges to reopen the proceeding to allow additional written and oral testimony and new briefing. IBS argued in the alternative that the Judges permit each participant to submit new briefs.

The substantive issues on appeal were (i) the $500 minimum fee for noncommercial educational webcasters and (ii) terms proposed by IBS relating to ''small'' and ''very small'' noncommercial webcasters. The language of the DC Circuit's remand, however, was not limited to any specific portion of the determination. Rather, the DC Circuit ''vacate[d] and remand[ed] *the determination.''* *Id.* at 1342 (emphasis added). The Judges interpret the Court's remand order as directing the Judges to review the entire record and to issue a new determination on all issues included therein, not just the $500 minimum fee that was the subject of the appeal.

The Judges have considered both the language of the remand order and proposals from the participants regarding remand procedure. While the DC Circuit's remand instructions compel the Judges to consider anew all issues in the original determination, the Judges decline to reopen the proceeding and accept additional evidence or argument. Each party had ample opportunity to present its case.[9] The Judges have concluded that this matter shall be determined based upon a *de novo* review of the substantial record that the parties developed during the proceeding leading to the first determination.

Upon completion of their *de novo* review of the existing record, the Judges issued their initial *Determination After Remand for Royalty Rates and Terms for 2011–2015,* Docket No. 2009–1 CRB Webcasting III (Jan. 9, 2014) (*Initial Determination*). Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, IBS filed a motion for rehearing. After reviewing the motion, the Judges denied the motion for rehearing. *Order Denying Motion for Rehearing,* Docket No. 2009–1 CRB Webcasting III (Feb. 4, 2014). As explained in the February 4, 2014 Order, the Judges determined that IBS had failed to show that any part of the *Initial Determination* was erroneous, *i.e.,* IBS's arguments did not satisfy the ''exceptional case'' standard necessary to warrant a rehearing. More particularly, the motion failed to establish: (1) An intervening change in controlling law, (2) the availability of new evidence, or (3) a need to correct a clear error or prevent manifest injustice. *Id.*

C. Statutory Background

Transmission of a sound recording constitutes a public performance of that work. Owners of copyright in sound recordings are not accorded an exclusive, general public performance right with regard to those recordings. *See* 17 U.S.C. 106(4). Owners of copyright in ''musical works,''[10] have an exclusive right of public performance of those works; owners of copyright in ''sound recordings''[11] do not. As a

[6] In August 2009, under the auspices of the WSA of 2009, CBI and SoundExchange reached a settlement between them (CBI/SoundExchange Agreement) covering rates and terms for certain college broadcasters and noncommercial educational webcasters. The Copyright Office published notice of this settlement on August 12, 2009. *See* 74 FR 40616 (Aug. 12, 2009). CBI and SoundExchange then filed a joint motion for approval of their settlement and adoption of its terms as the applicable regulations for all noncommercial educational webcasters. The Judges published proposed regulations based upon the CBI/SoundExchange agreed rates and terms. *See* 75 FR 16377 (Apr. 1, 2010). The Judges received multiple comments in favor of the proposed regulations and an objection from IBS. The Judges, therefore, heard oral argument of counsel in May 2010, and published the Final Rule relating to the CBI/SoundExchange Agreement and the NAB/SoundExchange Agreement. *See* 76 FR 13026 (Mar. 9, 2011).

[7] IBS argued that the Judges were principal officers of the United States government and, as such, must be appointed by the President with the advice and consent of the United States Senate. IBS also opined that the Librarian is not an agency head authorized to appoint inferior officers of the government, notwithstanding that the Librarian is appointed by the President and confirmed by the Senate.

[8] To remedy the violation of the Appointments Clause, the Librarian appointed the incumbent panel as at-will employees. The Librarian appointed the current panel of Judges while the IBS appeal was pending; consequently, the panel of Judges making the determination on remand is not the same as the panel that made the first determination.

[9] The Judges' consideration of this issue is discussed in detail in *Notice of Intention to Conduct Paper Proceeding on Remand and Solicitation of Comments from the Parties* (Sept. 17, 2013).

[10] A ''musical work'' is a musical composition, together with any accompanying words, that has been fixed in any tangible medium of expression. *See* 17 U.S.C. 102(a)(2).

[11] '' 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other

Continued

consequence, U.S. copyright law permits many public performances of sound recordings—including radio broadcasts—to take place without the authorization of, or compensation to, sound recording copyright owners (*e.g.,* performers and record labels).

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRA),[12] which created and granted to sound recording copyright owners a new exclusive right to perform a sound recording publicly by means of a digital audio transmission. 17 U.S.C. 106(6). The new right was, however, subject to a number of important limitations, including the grant to subscription digital audio transmission services (including satellite digital audio radio services) of a statutory license that permitted them to use sound recordings without the agreement of the copyright owner. 17 U.S.C. 114(d)(2), (f) (1997) (amended 1998).

Technology proceeded apace and, within a few short years, digital transmissions of sound recordings over the Internet were prevalent and available from both subscription and nonsubscription services. Congress did not specifically contemplate these ''webcaster'' services when it drafted the DPRA. Consequently, Congress expanded the statutory license in section 114 to cover ''eligible nonsubscription transmissions,'' *i.e.,* webcasting, when it enacted the Digital Millennium Copyright Act of 1998, Public. Law 105–304, 112 Stat. 2860 (Oct. 28, 1998),

> To ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and . . . to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services. . . .

H.R. Rep. No. 105–796, at 79–80 (1998).

In addition, in recognition of the fact that webcasters must make temporary copies of sound recordings in order to facilitate the transmission process, Congress created a compulsory licensing scheme for so-called ''ephemeral'' recordings. *See id.* at 89–90. Licensees are limited to no more than one ephemeral recording (unless the terms of the license permit more) for use in the broadcasting or transmission of the copied work. 17 U.S.C. 112(e). The ephemeral recording must be transitory in nature, unless the licensee retains it solely for archival purposes. *See* 17 U.S.C. 112(a).

In the Copyright Royalty and Distribution Reform Act of 2004,[13] Congress created the role of Copyright Royalty Judge and authorized the Judges, *inter alia,* to determine and set rates and terms for the licensing and use of copyrighted works in several contexts, *e.g.,* cable television transmission, satellite radio broadcast, and, the medium relevant to this proceeding, webcasting. Congress retained the prior statutory standards and made them applicable to the Judges for determining rates and terms for both the ephemeral and the public performance licenses. For webcasting rates under either license, the ''Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 114(f)(2)(B). The quoted language is substantially identical to the statutory language regarding ephemeral recordings. *See* 17 U.S.C. 112(e)(4).

To ascertain rates that represent this hypothetical market under both statutory sections, the Judges shall consider ''economic, competitive, and programming information presented by the parties. . . .'' *Id.* The Judges are not limited with regard to the evidence they may consider (other than the limitations in the WSAs on the use of agreements reached under those statutes). The Judges' determination relating to both licenses should also account for whether the use at issue might substitute for, promote, or otherwise affect the copyright owners' stream of revenues. The Judges must also consider, again for both licenses, the relative contributions of the owners and licensees in making the licensed work available to the public. *Id.* Except as directed by the WSAs, the Judges may consider rates and terms negotiated in voluntary licensing agreements for comparable transmission services. *Id.*

D. The Record

SoundExchange, Live365, IBS, and CBI presented evidence in this proceeding.[14] CBI only presented evidence to support adoption of its settlement with SoundExchange for noncommercial educational webcasting. SoundExchange and Live365 presented evidence relating to commercial webcasters. SoundExchange presented evidence relating to noncommercial webcasting; IBS presented evidence for small noncommercial webcasters. The Judges received written and live testimony from 15 witnesses[15] and admitted 60 documentary exhibits into evidence.

The record on which the Judges base this determination after remand is the existing record, including written and oral legal argument of counsel, and transcripts of the entire determination proceeding.[16]

II. Rates Under the Section 112 Ephemeral License

Between the direct and rebuttal phases of this proceeding, SoundExchange and Live365 presented settlements of (i) the minimum fee and royalty rates for the section 112 license and (ii) the minimum fee for the section 114 license applicable to the commercial webcasters not encompassed by the NAB/SoundExchange Agreement. These two settlements were included in one stipulation. The terms of the settlement are the same as the agreement reached and included as a final rule following the prior webcasting rate determination, following remand. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule),* 75 FR 6097 (Feb. 8, 2010).

The minimum fee for commercial webcasters is an annual, nonrefundable fee of $500 for each individual channel and each individual station (including any side channel), subject to an annual cap of $50,000. The royalty rate for the section 112 license is bundled with the fee for the section 114 license. There is one additional term in the stipulation that was not included in the prior determination. The royalty rate for the section 112 license is deemed to be 5% of the bundled royalties. No party objected to the stipulation. SoundExchange presented unopposed evidence to support the minimum fee for commercial webcasters and the bundled royalty rates. *See* SoundExchange Proposed Findings of Fact (SX PFF) at ¶¶ 459–468, 472. These agreed provisions are supported by the parties and the evidence.

There is no disagreement between SoundExchange and IBS as to the rates for the section 112 license for noncommercial webcasters. As it did for commercial webcasters, SoundExchange

sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.'' 17 U.S.C. 101.

[12] Public Law 104–39, 109 Stat. 336 (Nov. 1, 1995).

[13] Public Law 108–419, 118 Stat. 2341 (Nov. 30, 2004).

[14] After filing Written Direct Statements, RealNetworks, Inc. withdrew from the proceedings, and Royalty Logic, LLC, did not participate further.

[15] The Judges also considered designated written testimony.

[16] The original panel of judges heard approximately ten days of testimony and legal argument in aggregate, resulting in approximately 2,600 pages of transcripts.

proposed a bundled rate approach for both the section 112 and section 114 rights, allocating 5% of the entire bundled royalty as the section 112 royalty. SX PFF at ¶ 671. IBS endorsed the proposal. *Amplification of IBS' Restated Rate Proposal,* at 2. The testimony offered by SoundExchange supported this proposal and the Judges adopt it. *See, e.g.,* Ford WDT at 9–12, 14–15; 4/20/10 Tr. at 434 (Ford); 4/22/10 Tr. at 729–31 (McCrady); *Post-Hearing Responses to Judges' Questions by Michael D. Pelcovits,* at 5 (May 21, 2010).

The issues remaining for the Judges' determination are (i) rates and terms for commercial webcasters' section 114 licenses and (ii) the rates and terms—specifically, the minimum fee—for noncommercial webcasters' section 114 licenses.

III. Rate Structure Under the Section 114 Performance License

The Copyright Act clearly establishes the willing buyer/willing seller standard for the royalty rates at issue in this proceeding. *See* 17 U.S.C. 114(f)(2)(B). To establish the *level* of such rates, the Judges must first determine the *structure* of those rates, *i.e.,* the metric or metrics that willing buyers and sellers likely would have negotiated in the marketplace.

SoundExchange and Live365 proposed that royalties for the section 114 license be computed pursuant to a per-performance usage structure. SoundExchange acknowledged, however, that ''[t]he metrics by which most services pay'' are the ''percentage-of-revenue'' metric or the ''per-subscriber'' metric—both of which are not fixed rates,'' but rather are rates that increase the monetary payment ''as subscribers and revenue increase.'' SX Reply PFF ¶ 74. However, neither SoundExchange nor Live365 proposed an alternative to the per-performance rate structure.

SoundExchange's industry witness noted the ubiquity of rate structures based on revenues or subscribership. More particularly, W. Tucker McCrady, Associate Counsel, Digital Legal Affairs at Warner Music Group acknowledged that ''[i]n the U.S., WMG does not have a single agreement with an audio streaming service where the payment amount is based solely on a per-play rate, as is the case with the statutory license.'' *See* McCrady WDT at 10. As Mr. McCrady further explained, the per-play royalty fee is typically combined with a percentage-of-revenue royalty fee, so that a per-play floor is seen as sort of a minimum protection for the value of the music,'' whereas, beyond that minimum, ''a *revenue share* . . . allows us to share in the upside . . . .'' 4/22/10 Tr. at 658 (McCrady) (emphasis added).

Live365 introduced as an exhibit in this proceeding the prior written direct testimony of Dr. Pelcovits in the previous webcasting proceeding, *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order,* 72 FR 24084, 24090 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 574 F.3d 748 (D.C. Cir. 2009)(*Web II*), in which he testified:

- Through the percentage-of-revenue, the record companies ensure that they will receive a share of royalties in the benchmark interactive market that *properly compensates* them for their valuable copyrighted material,
- The business justification for the percentage-of-revenue structure is so compelling *it should be adopted as the rate structure for the statutory license,*
- Removing the percentage-of-revenue element would unravel the complex set of factors that affected the negotiations, and undoubtedly would change the underlying rates, and
- There is a good argument that the percentage-of-revenue rate applied in the interactive market should simply be adopted for the noninteractive market.

Live365 Tr. Ex. 5, at 28–30.

The parties to the instant proceeding declined to propose rates based explicitly upon the revenues of webcasters, apparently because they had concluded that the Judges would reject revenue-based rates.[17] The parties thus submitted no evidence as to any alternative rate structure premised explicitly on the percentage-of-revenue realized by webcasters.

Given the limitations of the record developed by the parties, the Judges defer to the parties' decision to eschew advocacy for such percentage-of-revenue based fees in this proceeding. 17 U.S.C. 114(f)(2)(B) (''In determining . . . rates and terms the Copyright Royalty Judges shall base their decision on . . . information presented by the parties . . . .''). Accordingly, the Judges consider the relative merits of the competing per-performance rates proposed by the two contending parties.

The Judges recognize, however, that as a practical and strategic matter, participants in these proceedings carefully consider prior rate proceedings as roadmaps to ascertain the structure of the rates they propose. Mindful of that fact, the Judges wish to emphasize that by deferring to the present parties' decision to propose only a per-performance rate structure, the Judges do not *per se* reject future consideration of rate structures predicated upon other measurements, such as a percentage of revenue realized by webcasters.[18]

IV. Rates for Commercial Webcasters

A. The National Association of Broadcasters/SoundExchange Agreement

Section 801(b)(7)(A) of the Act allows for the adoption of rates and terms negotiated by ''some or all of the participants in a proceeding at any time during the proceeding,'' provided they are submitted to the Copyright Royalty Judges for approval. The Judges must adopt the settlement after affording all interested parties an opportunity to comment, unless a participant in the proceeding objects to it and the Judges determine that the settlement does not provide a reasonable basis for setting rates and terms.

On June 1, 2009, the National Association of Broadcasters (NAB) and SoundExchange filed a settlement of all issues between them in this proceeding, including proposed rates and terms (NAB/SoundExchange Agreement). Their settlement was one of several WSA agreements that the Copyright

[17] For example, SoundExchange expressly noted that in *Web II* both the webcasters and SoundExchange ''proposed rate structures that included revenue-based elements and usage-based elements [but t]he Judges . . . concluded that a per-performance usage fee structure was more appropriate for commercial webcasters, and rejected revenue-based proposals.'' SX PFF ¶ 36 (*quoting Web II,* 72 FR at 24089). Likewise, Dr. Pelcovits indicated that his choice of a rate structure was constrained by the fact that the Judges in *Web II* had ''rejected alternatives such as fees calculated as a percentage of the buyer's revenue. . . .'' Pelcovits WDT at 6. The Judges note, however, that the rejection of percentage-of-revenue rate structures in *Web II* was based on the evidentiary record in that proceeding and that *Web II* explicitly did not establish a *per se* rejection of such rate structures. *Web II,* 72 FR at 24090 (''[The] evidence in the record weighs in favor of a per-performance usage fee structure. . . .This does not mean that some revenue-based metric could not be successfully developed. . . .'').

[18] Of course, the Judges' adoption of any rate structure in a future proceeding would depend upon the evidence and arguments the participants present, including arguments addressing concerns raised by the Judges in earlier proceedings. *See, e.g., Web II,* 72 FR at 24089–90. The Judges' possible future consideration of a percentage-of-revenue rate structure in a section 114(f)(2)(B) proceeding for noninteractive webcasting does not suggest that such a structure or the resulting rates should necessarily be related in any manner to the structure or level of rates set (pursuant to section 801(b)(1) for preexisting services identified in section 114(f)(2)(B)). *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240, 45244 (July 8, 2002)(*Web I*). Additionally, although rates might be set pursuant to the same structure under both statutory provisions, there is no reason why the level of rates would necessarily be the same.

Office published in the **Federal Register**. NAB and SoundExchange filed their WSA agreement in the instant proceeding and requested that the Judges adopt the agreed rates and terms for some services of commercial broadcasters for the period 2011 through 2015. The settlement applies to statutory webcasting activities of commercial terrestrial broadcasters, including digital simulcasts of analog broadcasts and separate digital programming. The settlement includes per-performance royalty rates, a minimum fee, and reporting requirements.

The Judges published the settlement (with minor modifications [19]) as proposed regulations in the **Federal Register** on April 1, 2010, and provided interested parties an opportunity to comment and object by April 22, 2010. 75 FR 16377 (Apr. 1, 2010) (publishing NAB/SoundExchange and CBI/SoundExchange Agreements). The Judges received no comments or objections; therefore, the provisions of section 801(b)(7)(A)(ii) (permitting the Judges to decline to adopt the settlement as a basis for statutory rates and terms) are inapplicable. In the absence of an objection from a party that would be bound by the proposed rates and terms, the Judges adopt the rates and terms in the settlement for certain digital transmissions of commercial broadcasters for the period of 2011–2015. 17 U.S.C. 801(b)(7)(A).

B. All Other Commercial Webcasters

Only two participants—SoundExchange and Live365—presented evidence relating to public performance royalty rates for commercial webcasters.

SoundExchange proposed that the section 114 royalty rates for noninteractive webcasting be established by applying two categories of benchmarks:

- Agreements between SoundExchange and: (a) The NAB; and (b) Sirius XM Satellite Radio (Sirius XM), both of which established per-performance royalty rates for the same noninteractive webcaster rights that are at issue in this proceeding; and
- Rates established in a different but purportedly analogous market—the market for *interactive* webcasting of digital sound recordings—adjusted to render them probative of the rates for noninteractive webcasting.

Relying on these proposed benchmarks, SoundExchange proposed the following royalty rate schedule:

Year	Rate per-performance
2011	$0.0021
2012	0.0023
2013	0.0025
2014	0.0027
2015	0.0029

SX PFF ¶ 11.

Live365 proposed that commercial webcasters pay $0.0009 per performance throughout the entire period 2011–2015. Live365 PFF ¶ 170. In addition, Live365 sought a 20% discount on its proposed per-performance rate for ''Internet radio aggregators,'' such as itself, to account for the alleged value to copyright owners of their provision of certain specified ''aggregation services.'' Live365 PFF ¶ 193.

Live365's proposed rate is not premised upon any benchmarks. Its economic expert, Dr. Mark Fratrik, stated that he was ''not aware of comparable, voluntary license agreements that would serve as an appropriate benchmark for an industry-wide rate.'' Fratrik Corrected and Amended WDT at 7 [hereinafter, Fratrik WDT].[20]

Rather, Live365 proposed a unique model by which:

- Revenues are estimated for a supposedly ''representative'' webcaster;
- All costs—except for the royalty fees to be determined—are estimated for a ''representative'' webcaster; and
- Royalty fees are established, on a per-performance basis, at a level which assures the ''representative'' webcaster a 20% operating margin, *i.e.,* a 20% profit.

1. The Live365 Rate Proposal

As discussed above, Live365 proposed a single constant rate of $0.0009 for each year of the 2011–2015 rate period. This proposed rate was supported by Dr. Fratrik's written and oral testimony.

With regard to the fundamentals of the hypothetical market, Dr. Fratrik first assumed, correctly, that the ''underlying product'' consisted of ''blanket licenses for each record company which allows use of that record company's complete repertoire of sound recordings.'' Fratrik WDT at 8. Next, he properly assumed that the rates must be those that would be negotiated between a willing buyer and a willing seller. Fratrik WDT at 4.

With regard to the market participants, Dr. Fratrik properly identified the hypothetical ''willing buyers'' to be the webcasting services that operated under the statutory license.'' *Id.* at 8. He also properly identified the ''hypothetical willing sellers'' as the several record companies. *Id.*

To determine the statutory rate, Dr. Fratrik attempted to determine the appropriate license rate based upon an examination of the ''revenue and cost structure of a mature webcaster—in this case, Live365.'' *Id.* at 4.

For assumed revenues, Dr. Fratrik utilized in his model ''publicly available industry data on webcasting revenues.'' *Id.* These revenue figures were not historical data, but rather ''estimates of revenues recognizing the changing marketplace.'' *Id.* at 10. More particularly, Dr. Fratrik relied upon ''[p]ublicly available industry reports from Accustream and ZenithOptimedia [to] serve as lower and upper bounds, respectively, on advertising revenue measurements for the past period.'' *Id.* at 16. Although webcaster revenue came from two sources, subscriptions and advertising, the only data available to Dr. Fratrik, and the only data he used, were advertising revenues. *Id.* at 16–17.

For assumed costs, Dr. Fratrik utilized the ''operating costs'' from Live365. *Id.* at 5. Given the mechanics of his model, the costs he included were ''all of the operating costs *except* for the royalty rates to be paid to the copyright owners.'' *Id.* (emphasis added). The royalty cost is omitted because it is the ''unknown'' that Dr. Fratrik's analysis is designed to determine. Dr. Fratrik chose to utilize the costs incurred by Live365 because, in his opinion, ''Live365 is a representative webcaster with respect to its operating costs . . . and will serve as a good conservative proxy for the industry as it is a mature operator.'' *Id.* at 16.

With regard to the difference between revenues and costs, *i.e.,* profits, Dr. Fratrik assumed that ''a Commercial webcaster is *entitled* to a reasonable profit margin.'' *Id.* at 17 (emphasis added). Accordingly, Dr. Fratrik

[19] Exercising the right granted in the WSAs, SoundExchange and NAB provided in their agreement that, unlike the rates and terms they set for the section 114 licenses, the rates and terms they set for the ephemeral recording license could not be used as evidence and would not serve as precedent in any contested rate determination. The Judges, deeming such language inappropriate to the purposes of the regulations, declined to include it in the published regulations. For the same reason, the Judges declined to accept language in the agreement regarding SoundExchange's acceptance of a broadcaster's election to be a ''Small Broadcaster'' or the broadcaster's reservation of rights. The Judges also declined on the same basis to include some of the language of the CBI agreement.

[20] Throughout this determination, the Judges will employ abbreviations that they have used in past determinations, *e.g.,* ''WDT'' for the last version of the witness's Written Direct Testimony; ''WRT'' for Written Rebuttal Testimony; ''Tr.'' for hearing transcripts; ''PFF'' for Proposed Findings of Fact, *etc.*

attempted to identify a ''fair operating margin (measured as a percentage of revenues)'' for a hypothetical webcaster. *Id.* at 5. Dr. Fratrik's proposal fails to create a royalty rate framework that can satisfy the statutory criteria *viz.,* rates that would have been negotiated in the marketplace between a willing buyer and a willing seller; the Judges cannot adopt it.

a. Dr. Fratrik's Misapplication of a Public Utility-Style Rate-Setting Process in the Present ''Willing Buyer/Willing Seller'' Statutory Context

Dr. Fratrik's methodology mimics the methodology by which government agencies or commissions set rates for public utilities or other regulated natural monopolies. There is no basis in the Act or in economic theory to support the use of this paradigm to establish royalty rates for the licensing of sound recordings by noninteractive webcasters.

A fundamental defect in this reasoning is Dr. Fratrik's requirement that the statutory royalty rate must provide for a fixed ''profit margin'' for webcasters. *See* 4/27/10 Tr. at 1138 (Fratrik) (''I believe the 20 percent rate is what they would strive to get *and have to get.''*) (emphasis added). Dr. Fratrik does not provide any evidentiary support for the assumption that the record companies, *i.e.,* the willing sellers in the hypothetical marketplace, would accept (or be compelled to accept) a royalty rate simply because it allowed buyers to realize a predetermined level of revenue as profits. Further, Dr. Fratrik does not provide any evidentiary support for his assumption that the buyers, *i.e.,* the webcasters, would require a royalty rate low enough to maintain a predetermined 20% profit margin or otherwise be driven out of the marketplace. *See* 4/27/10 Tr. at 1166–67 (Fratrik) (Dr. Fratrik unaware of any webcasters earning 20% operating margin).

Not only does Dr. Fratrik's methodology lack evidentiary support, it has embedded within it a perverse incentive structure. Dr. Fratrik's methodology would cause the royalty rates to be a function not only of the revenues of the webcasters, but also a function of: (i) The other (non-royalty) operating costs incurred by the webcasters; and (ii) the guaranteed profit (20% according to Dr. Fratrik) after inclusion of the (to be determined) royalty costs. This fundamental flaw in Dr. Fratrik's methodology can be demonstrated algebraically as follows:

Dr. Fratrik's requirement of a 20% operating profit for webcasters can be expressed as:

TOTAL PROFIT = TOTAL REVENUE (TR) − TOTAL COST (TC) = 0.2(TR)

Dr. Fratrik dichotomizes costs into royalty costs (*i.e.,* the unknown to be determined) and all other operating costs, which can be expressed as:

TC = Royalty Costs (rc) + All Other Operating Costs (oc)

So,

TR − rc − c = 0.2(TR)

Subtracting 0.2(TR) from both sides of the equation results in the following:

0.8(TR) − rc—oc = 0

Adding rc to both sides of the equation results in the following:

0.8(TR) − oc = rc

For presentation purposes, the above equation can be set forth in reverse as:

rc = 0.8(TR) − oc

This presentation makes plain that in Dr. Fratrik's model the royalty rate would be a function of: (i) The revenues of the webcaster (TR); and (ii) all other webcaster costs (oc). Egregiously, the relationship between the royalty rate and all other costs incurred by the webcaster (oc) would be inverse, *i.e.,* as all other costs (oc) increased, the section 114 royalty rate would decrease.

Thus, a webcaster would have no incentive to minimize or otherwise reduce all other operating costs, because higher operating costs would result in a lower royalty paid to owners/compulsory licensors of sound recordings. Such a result would be perverse: The royalty revenue realized by the owners/licensors would be subject to the cost-minimization successes or failures of the webcasters under a formula by which the latter had no incentive to minimize costs.[21]

As previously noted, Dr. Fratrik's methodology mimics the setting of public utility rates for natural monopolies. In that setting, the ''unknown'' variable is the rate to be charged to the end-user, which, when multiplied by the number of units of the service sold, establishes the revenue received by the seller. What can be ''known'' (*i.e.,* determined via such public utility-style hearings) are: (i) The reasonable costs incurred by the utility; and (ii) the fair rate of return to which the utility is deemed entitled by consideration of appropriate marketplace returns on capital. *See generally* Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 169 (2d ed. 1988).

In the present proceeding, the ''unknown'' is different, but the proposed methodology is similar. What is ''unknown'' is one element of total costs, *i.e.,* the royalty fee. The revenues received by the sale to the end-users (*i.e.,* the provision of the listening experience to consumers) is known (or estimated), whether as a function of advertising revenues, subscriptions, or both. Here, as in classic rate regulation, the percentage to be realized as a rate of return (profit) likewise is known or discovered (as Dr. Fratrik purported to have ''discovered'' the 20% return by his examination of the assertedly analogous terrestrial radio marketplace).

The foregoing analysis crystalizes a fundamental problem in Dr. Fratrik's analysis: Rate-setting proceedings under section 114 of the Act are not the same as public utility rate proceedings. The Act instructs the Judges to use the willing buyer/willing seller construct, assuming no statutory license. The Judges are not to identify the buyers' reasonable other (non-royalty) costs and decide upon a level of return (normal profit) sufficient to attract capital to the buyers.

Moreover, Dr. Fratrik's methodology attempts to graft a public utility style rate—designed to regulate a natural monopoly—onto a rate-setting scheme in which he properly acknowledges the existence of a multitude of buyers, whose costs are critical to his analysis. Public utility-style rate-setting procedures are designed to consider the costs and potential returns to a monopoly seller, not the costs or potential returns of numerous buyers.

Not only does Dr. Fratrik's methodology improperly apply the public utility style rate-setting process, it ignores and thus exacerbates a particularly thorny issue in such rate regulation. Regulators of natural monopolies such as public utilities must ascertain the actual operating costs of the monopolist, and disallow inappropriate costs from entering the ''rate base.'' This undertaking is very difficult. *See generally* Richard Posner, *Economic Analysis of Law* 367 (6th ed. 2003) (''The regulatory agency's success in monitoring the regulated firm's costs will inevitably be uneven.''); Paul Krugman & Robin Wells, *Microeconomics* 374 (2d ed. 2009) (''[R]egulated monopolies . . . tend to exaggerate costs to regulators . . . .'').

Here, Dr. Fratrik relies upon only Live365's particular cost data, rather

[21] If webcasters operating under Dr. Fratrik's methodology did minimize or otherwise reduce all other operating costs, then, in order to prevent an increase in their pre-established profit margin, the royalty rate would need to increase. However, given that the Act requires these rates to be fixed for five years, the webcaster could reduce or minimize all other operating costs and simply pocket the profit, increasing their profit percentage above the level set by the Judges.

than any industry-wide cost data, without providing any evidence that Live365's cost structure is representative of the industry. SX PFF ¶¶ 312–322. Further, there is no breakdown by Dr. Fratrik of those other operating costs incurred by Live365 that would ensure that his *de facto* rate base includes only appropriate categories of costs incurred at minimally efficient levels.

To the extent Live365 is not sufficiently representative of all webcasters (or representative at all of other webcasters), Dr. Fratrik's methodology would yield an inaccurate royalty rate. On a more general level, to the extent the cost structure of any given webcaster is not representative of the industry writ large, Dr. Fratrik's methodology is hopelessly impractical. To utilize rate-of-return style regulation in a competitive industry such as webcasting would require information regarding the cost structures of thousands of buyers of sound recordings.

This defect in Dr. Fratrik's methodology was made plain during his cross-examination. For example, Dr. Fratrik admitted that if other royalties (such as for musical works paid by Live365 to Performing Rights Organizations) were to increase, then, *ceteris paribus,* under his methodology the royalties paid to SoundExchange for sound recordings would decrease. 4/27/10 Tr. at 1127 (Fratrik). This relationship, as Dr. Fratrik also admitted, existed with regard to all costs (other than sound recording performance royalties) incurred by a webcaster. Pursuant to his methodology, for example, a webcaster's staff wages, payments to advertising agencies, and payment to bandwidth suppliers could all depress the sound recording royalty. *Id.* at 1125 (Fratrik). Thus, Dr. Fratrik was compelled during cross-examination to conclude:

> Q: Okay. So basically the way you modeled this out, if anybody else who supplies an input to Live [365] raises their price, the result is going to be your suggested royalty rate goes down, right?
>
> A: Assuming all the other factors remain constant.

Id. at 1127–28.

The Judges conclude that two glaring and fatal defects in Dr. Fratrik's methodology are: (i) Its ill-conceived attempt to utilize the public utility style ratemaking construct in this ''willing buyer/willing seller'' context; and (ii) its reliance upon an inverse relationship between the sound recording royalty rate and all other operating costs incurred by webcasters.[22] Thus, while (in the interest of completeness) the following section discusses details of the methodology proposed by Dr. Fratrik, the Judges' rejection of his overall rate structure alone constitutes a sufficient basis to reject Live365's proposed rate.

b. The Specific Elements of Dr. Fratrik's Model and His Proposed Rates

As summarized below, even assuming, *arguendo,* that the Live365 model had been acceptable in theory to the Judges, the inputs in that model—costs, revenues and profit margin—failed to establish a credible ''marketplace'' rate under the ''willing buyer/willing seller'' standard.

(1) Costs

Dr. Fratrik assumed that Live365's cost structure would serve as a good conservative proxy for the industry as it is a mature operator. Fratrik WDT at 16. This assumption is unsupported by the evidence, which revealed an array of existing webcasting services and business models. SX PFF at ¶ 323.

Moreover, it would be unreasonable for the Judges to conclude, as Live365 urged, that these many disparate business models might be experiencing essentially the same unit costs. Indeed, Dr. Fratrik conceded that even Live365 has two separate business lines, ''broadcasting'' services[23] and webcasting and, further, that Live365 also acts as an aggregator with respect to webcasting. Dr. Fratrik offered no example of a comparable participant in the industry that is structured in this manner. Further, Dr. Fratrik failed in his attempt to adjust Live365's costs to isolate only webcasting operations, because he failed to address the *synergistic* nature of Live365's various lines of business. SX PFF at ¶¶ 355, 357, 358.

(2) Revenues

The revenue side of Dr. Fratrik's analysis suffers from infirmities as well. Most importantly, Dr. Fratrik admitted that the advertising revenue estimates (from ZenithOptimedia and Accustream) upon which he relied were ''challenging'' because many webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220 (Fratrik). The limitations of these databases diminished the credibility of the analyses that depended upon them.

That analysis is apparently based only on Dr. Fratrik's analysis of revenues using the data Dr. Fratrik found to constitute his ''upper bound,'' derived from ZenithOptimedia data. In an attempt to avoid the acknowledged problems with these data, Dr. Fratrik attempted to mix and match his several revenue data sources. To further muddy the statistical waters and compromise his analysis, Dr. Fratrik added to the ''upper bound'' and ''lower bound'' of his combined data sets a third separate source—Live365's own subscription revenue data. This further admixture only underscores the lack of rigor and persuasiveness in the Live365 analysis.[24]

(3) Profit Margin

Dr. Fratrik has not provided adequate support for the assumption of a 20% operating margin for webcasters in his analysis. That operating profit margin was not put forward as either a historical profit margin (or a forecasted profit margin) for webcasters. Indeed, Dr. Fratrik conceded that he had no ''evidence that actual webcasters'' would require a 20% operating margin, and that he was not aware of any

[22] The Judges distinguish Dr. Fratrik's methodology from a structure that would be based upon the percentage-of -revenue realized by a webcaster, *without regard to the webcaster's other costs.* If Dr. Fratrik's methodology had simply made the royalty rate a function of webcaster revenue, the methodology would have relied upon a positive (*i.e.,* direct) relationship—as revenues received by webcasters increased, royalty rates would also increase. Such a methodology would constitute a percentage-of-revenue royalty rate, which (as noted *supra)* was rejected on evidentiary bases in *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240 (July 8, 2002)(*Web I*) and *Web II,* yet (as also noted *supra*) was not foreclosed by either of those decisions as a potential *future* basis for determining rates in a section 114 proceeding.

[23] Live365 refers to the services it provides to *webcasters* as ''broadcasting'' services, in an Orwellian (and unsuccessful) attempt to distinguish its principal webcasting business from its ancillary webcasting support services.

[24] Dr. Fratrik's analysis also makes certain assertions regarding future growth—or lack of future growth—in the webcasting industry. The Judges note that predictions by witnesses as to future industry growth are highly speculative—economists are not oracles and ergodicity should not be assumed—past growth (or decline) is not necessarily indicative of future trends. *See generally* John Maynard Keynes, *The General Theory of Employment, Interest and Money* 97 (1936) (''Our knowledge of the factors which will govern the yield of an investment some years hence is usually very slight and often negligible. . . . If we speak frankly, we have to admit that our basis of knowledge for estimating . . . amounts to little and sometimes to nothing . . . *even five years hence.*) (emphasis added). The instant dispute makes the point well because the economy was in recession in all of 2008 and economic activity overall remained depressed throughout 2009, causing a reduction in the revenues received by many businesses throughout the United States and the world. That decline does not necessarily foretell a trend in a particular industry, including the markets for interactive and noninteractive sound recording licenses.

webcaster currently earning a 20% margin. 4/27/10 Tr. at 1166–67 (Fratrik).

Rather, Dr. Fratrik's 20% figure was derived from the profit margins reported by the over-the-air (a/k/a terrestrial) radio broadcasting industry. SX PFF at ¶¶ 328, 330. However, the record of evidence in this proceeding does not support the notion that profit margins for webcasters are likely to be similar to the more capital intensive terrestrial radio industry. SX PFF at ¶¶ 332–335. In fact, Dr. Fratrik admitted that the terrestrial radio industry requires much higher capital costs than webcasting, and that the barriers to entry are higher for terrestrial radio than for webcasting. 4/27/10 Tr. at 1168–72 (Fratrik); *see also* SoundExchange rebuttal testimony of Dr. Janusz Ordover, WRT at 3 (''Dr. Fratrik's selection of a minimum expected margin of 20% is based on margins earned by terrestrial radio broadcasters, who operate in a market with higher fixed capital and other costs and therefore do not provide a useful benchmark from which to determine a reasonable operating margin.'').

In fact, when choosing the 20% figure, Dr. Fratrik did not even look at the returns earned by any other digital business, which are lower than 5%. 4/27/10 Tr. at 1173–74 (Fratrik). Likewise, if Dr. Fratrik had considered the operating margins of record companies, he would have had to reconcile the fact that they too had operating margins of approximately 5% or less. 4/27/10 Tr. at 1175–76 (Fratrik).

c. Live365's Proposed Aggregator Discount

Live365 seeks a further 20% discount applicable to the commercial webcasting per-performance rate for certain ''qualified webcast aggregation services'' that operate a network of at least 100 independently operated ''aggregated webcasters'' that individually ''stream less than 100,000 ATH per month of royalty-bearing performances.'' Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2 and § 380.3(a)(2). This ''discount'' proposal may be more properly understood as a proposed term rather than an additional rate proposal. It is conditional; that is, it is applicable only to the extent that certain defined conditions are met (*e.g.,* minimum number of 100 aggregated webcasters and each individual aggregated webcaster streaming less than 100,000 ATH per month). It proposes to establish a mechanism whereby a group of commercial webcasters under certain qualifying conditions may utilize a ''webcast aggregation service'' to aggregate their monitoring and reporting functions. Rate Proposal for Live365, Inc., Appendix A, Proposed Regulations at § 380.2(m). Monitoring and reporting are compliance-related functions that are currently required of all individual webcaster licensees.

The Judges discern no theory and no evidence that would support an adoption of the so-called ''aggregator discount'' as a separate rate or as a separate term. Live365 submitted the testimony of Mr. Floater in support of the ''aggregator discount.'' He testified that the asserted benefits of an aggregation service flow to the individual webcasters who contract to use that service. As Mr. Floater asserted, the aggregator offers ''a streaming architecture that can aggregate tens of thousands of individual webcasters'' and provides individual webcasters with ''broadcast tools and services [that] contain costs. . . .'' Floater Corrected WDT at 11–14. Dr. Fratrik provided further testimony regarding these aggregation services, noting that they consisted of collecting and compiling ''all of the necessary documentation of the copyrighted works that are streamed and the number of total listening levels for each of these copyrighted works.'' Fratrik WDT at 38.

The Judges construe these ''aggregator services'' as benefits that individual webcasters receive pursuant to their contracts with an aggregator—such as Live365. Apparently, through certain economies of scale or otherwise, Live365 can provide these services at a lower cost per webcaster than the cost each webcaster would incur if it assumed the duties individually. That is a real economic benefit to the individual webcasters. In turn, Live365 can realize a profit from the fees it charges webcasters for these aggregation services, after Live365 incurs the costs of providing the aggregation services. Thus, the webcasters are enriched by the difference between the higher cost of providing these services individually and the contract rate they pay to Live365, and Live365 is enriched by the difference between the fee it charges the individual webcasters and the cost of providing the aggregation services.

Thus, the economic benefits of these aggregation transactions have already been accounted for in the private market through these contracts. Accordingly, the benefits and burdens of the services have already been addressed privately, and it would constitute a double-counting if the Judges were to reduce the rate paid by aggregators and received by the copyright owners.

Live365 contended that the discount is appropriate because copyright owners receive a benefit from the aggregation of these services. However, the copyright owners are not parties to the aggregation contracts between Live365 (or any aggregator) and the webcasters. To the extent there are external benefits arising from those agreements that inure to copyright owners, they are no different than any form of benefits that inure to third parties from the contractual arrangements of other parties. The Judges cannot compel such third parties to incur a cost in exchange for such unsolicited benefits.

This point relates to yet another basis to deny to Live365 a reduced royalty rate in exchange for its provision of aggregation services. Under the Act, royalty payments unambiguously are to be established and paid for ''public performances of sound recordings. . . .'' 17 U.S.C. 114(f)(2)(A). The aggregation services provided by Live365 are not themselves ''public performances of sound recordings,'' but rather are services that are complementary to the provision of ''public performances of sound recordings.'' Live365 is improperly attempting to characterize a distinct complementary service as an essential element of utility bundled into the ''public performance of sound recordings.'' The complementary—as opposed to bundled—nature of the service is underscored by the separate fee received by Live365 from the webcasters who voluntarily choose to utilize that service.

Further, since these aggregation services are not themselves ''public performances of sound recordings,'' the rationale for the statutory license is not triggered. The rationale for the statutory license is to cure the perceived market failure that may arise if multiple webcasters were required to negotiate for individual licenses for a multitude of recordings from the various copyright owners. That rationale does not present itself with respect to the aggregation services—and certainly, Live365 has not presented any evidence to that effect. Alternately stated, if an aggregator desired to internalize the benefit its services provided to the record companies, the aggregator could attempt to enter into voluntary contracts with the record companies. There is no market failure or other issue that would preclude or impede such negotiations and contracts. Of course, since Live365 indicated that copyright owners already receive these benefits as a concomitant to the services provided to the webcasters, there is no incentive for a copyright owner to pay for those benefits. (That is the economic nature of a positive externality.)

In sum, Live365 has asked the Judges to provide aggregators with

remuneration from the copyright owners that is both unavailable under the statute and that Live365 was unable to procure in the private marketplace. The Judges decline to do so.

d. Conclusions Regarding the Live365 Proposal Based on Dr. Fratrik's Model

For the foregoing reasons, the Judges decline to utilize Live365's proposed rate structure or rates to set the rates for the 2011–2015 rate period or establish a zone of reasonableness within which to set the rates.

Live365 contends that the rates for the 2011–2015 term should be set at a level below the 2010 rates to reflect certain factors identified in section 114(f)(2)(B)(i) and (ii) of the Act.[25] However, as a general principle, espoused in both *Web II* and *Web I,* and absent evidence to the contrary, these statutory considerations are deemed to have been addressed implicitly within the participant's proposed rate structure. *See Web II,* 72 FR at 24095; *Web I,* 67 FR at 45244. Live365 proffered no evidence to support another conclusion.

In the present case, given the Judges' rejection of the Live365 rate structure and proposed rates, they have no basis to depart from this general principle. Moreover, Live365 provides only a qualitative argument for its proposed downward adjustments, rather than a quantitative basis for a reduction below the 2010 rates. Further, even if qualitative arguments were sufficient in this regard, Live365 has not established such a basis for a decrease in webcaster royalty rates.

2. The SoundExchange Rate Proposal

a. Zone of Reasonableness

SoundExchange sought to demonstrate that its proposed rates were within a zone of reasonableness delineated by its economic expert witness, Dr. Michael Pelcovits. He constructed his zone of reasonableness based upon the following assumptions:

- The rates are intended to be those that would have been negotiated in the marketplace between a willing buyer and a willing seller;
- The rates are intended to replicate those that would have been negotiated in a hypothetical marketplace;
- The hypothetical marketplace is one in which no statutory license exists;
- The buyers in this hypothetical marketplace are the statutory webcasting services;
- The sellers in this hypothetical marketplace are record companies;
- The products sold consist of a blanket license for each record company's complete repertoire of sound recordings;
- A per-performance usage fee structure was adopted, rather than a fee structure based upon a percentage of the buyer's revenue, a per-subscriber fee or a flat fee.[26]

The Judges conclude that these general assumptions by Dr. Pelcovits are appropriate when determining the zone of reasonableness within which the statutory rates may be set.

b. Benchmark Analysis

Dr. Pelcovits utilized a ''benchmark'' approach, *i.e.,* an attempt to establish rates by comparing, and as appropriate adjusting, rates set forth in other agreements that he concluded were sufficiently comparable. Dr. Pelcovits's overall benchmark approach to establishing a rate structure is consistent with both *Web I* and *Web II.* Further, the Act itself authorizes the Judges to utilize a benchmark analysis: ''In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).'' 17 U.S.C. 114(f)(2)(B).

The Judges, therefore, agree that it is appropriate to rely on benchmarks to establish rates in this section 114 proceeding.[27]

Dr. Pelcovits identified the following two categories of benchmarks:

- The then-contemporaneous license fees for statutory webcasting services that had been negotiated in two separate agreements under the WSA between SoundExchange and two groups of broadcasters: terrestrial (over-the-air) broadcasters represented by the NAB and Sirius XM;
- The then-contemporaneous license fees that had been negotiated between buyers and sellers in the market for interactive, on-demand digital audio transmissions.

Pelcovits WDT at 2.

The WSA Agreements relied upon by Dr. Pelcovits are such voluntary agreements. Thus, the Judges may rely upon those agreements as benchmarks, assuming the Judges find them to be sufficiently comparable, perhaps after any appropriate adjustments.

The agreements between buyers and sellers in the interactive market are not expressly identified under the Act as agreements upon which the Judges may rely as benchmarks in a proceeding under section 114. However, nothing in the Act suggests that it would be improper for the Judges to consider those agreements as potential evidentiary benchmarks, or as some other form of probative evidence. In this regard, the Act clearly does not constrain the Judges from considering any economic evidence (apart from non-precedential WSA agreements) that they conclude would be probative of the rate that would be established between willing buyers and willing sellers in the hypothetical marketplace—regardless of whether that evidence relates to a market other than the market for licenses of sound recordings by webcasters.[28]

Thus, the Judges conclude that it was proper for Dr. Pelcovits to use benchmark analyses in attempting to establish the zone of reasonableness for rates in this proceeding.[29]

[25] These factors are: (i) The promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (ii) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost, and risk in bringing the copyrighted work and the service to the public.

[26] Dr. Pelcovits did not opine that a percentage-of-revenue-based fee or any other type of fee structure was economically improper. Rather, he indicated that he believed the ''per-performance approach'' constituted ''precedent'' established in *Web II,* and therefore he did ''not attempt to independently examine the merits of different rate structures.'' Pelcovits WDT at 6. As noted *supra,* however, *Web II* did *not* create such a precedent, but rather noted that the parties' failure of proofs regarding a proposed percentage-of-revenue fee structure ''does not mean that some revenue-based metric could not be successfully developed'' for use in a future proceeding under section 114. *Web II,* 72 FR at 24090. Nonetheless, even though he was mistaken in that regard, Dr. Pelcovits relied on that belief as to precedent by declining to consider a percent-of-revenue rate structure, or any other rate structure. Thus, the Judges can consider only his per-performance rate structure, and contrast it with Dr. Fratrik's methodology.

[27] The appropriateness of the benchmark method of analysis was called into question by Live365 through the rebuttal expert economic testimony of Dr. Michael Salinger, who described the benchmark approach as a ''shortcut,'' used ''because it is convenient, not because it is correct.'' Salinger WRT at 12–13.

[28] A wide array of potentially comparable markets can and should be considered by the Judges, including those with comparable economic characteristics. For example, a market in which copies of goods can be reproduced at zero marginal cost may provide relevant economic evidence (even if it is not a market for sound recordings), whereas, for example, a market for ancillary reporting services that benefits buyers and sellers of sound recording licenses (such as Live365's aggregator services discussed *infra*) may be economically quite distinct even though it relates to the same parties and licenses.

[29] Dr. Pelcovits's use of benchmarks in principle, discussed in this section, is a separate issue from the issues of whether the particular benchmarks he applied were appropriate, whether his adjustments to those benchmarks were correct or whether other adjustments may be required.

(1) SoundExchange's First Proposed Benchmark: The WSA Agreements

The first benchmark category relied upon by Dr. Pelcovits is comprised of two multi-year agreements that had recently been entered into between SoundExchange and two entities: (i) The NAB, covering webcasting by over-the-air (terrestrial) radio stations; and (ii) Sirius XM, covering webcasting of the music channels broadcast on satellite radio. Each of these agreements was entered into in 2009 pursuant to the WSA and each established royalty rates for the period 2011 through 2015. Together, these two agreements cover webcasters that paid more than 50% of the webcasting royalties received by SoundExchange in 2008. Pelcovits WDT at 14.

Both the NAB and Sirius XM agreements set royalty rates on a per-performance basis. The rates established by those agreements for the license term under consideration by the Judges are set forth below.

Year	NAB Agreement	Sirius XM Agreement
2011	$0.0017	$0.0018
2012	$0.0020	$0.0020
2013	$0.0022	$0.0021
2014	$0.0023	$0.0022
2015	$0.0025	$0.0024

Id. Dr. Pelcovits found these agreements to be ''useful to understand the bargaining range over which buyers and sellers would negotiate in the hypothetical market for statutory webcasting.'' *Id.* at 15.

The Judges agree for the following reasons:

- The rights being sold were precisely the rights at issue in this proceeding;
- The buyers (with the broadcasters represented as a group by the NAB) share characteristics with the buyers in the hypothetical market at issue in this case, but are not identical in all respects;
- The sellers are the same copyright owners whose copyrights are at issue in this case, albeit represented by SoundExchange;
- The copyrights will be used for statutory webcasting services; and
- The agreements were contemporaneous with the time at which the hearing in this proceeding was conducted.

The Judges find that additional reasons support the use of the WSA Agreements as benchmarks in this proceeding.

First, no later than September 2009, ''404 entities had opted into the NAB Agreement on behalf of several thousand individual stations.'' Kessler WDT at 21. Of those broadcasters, approximately 100 were start-ups, reporting their first instance of webcasting after the execution of the NAB Agreement. Ordover WRT at 18. Thus, the rates contained in the NAB Agreement clearly were acceptable to a large number of webcasters.

Second, in similar fashion, as of September 2009, several commercial webcasters opted into the Sirius XM Agreement. *See* Live365 Trial Ex. 25 at 18. The fact that these webcasters, who did not participate in the negotiations, nonetheless adopted the terms of the agreement is evidence that the negotiated rates and terms were reasonable and acceptable to the webcasters.

Third, it is noteworthy that the webcasters who have entered into the NAB Agreement are almost entirely dependent on advertising rather than subscription revenue. 4/20/10 Tr. at 283 (Pelcovits). This fact tends to address the concern raised by Dr. Michael Salinger, the economic expert testifying on rebuttal for Live365, that Dr. Pelcovits's interactive services benchmark analysis had failed to consider webcasters that were dependent primarily on advertising revenue.

Live365 raised a number of criticisms that it argued diminished the value of these WSA Agreements as benchmarks. The Judges address here each of Live365's questions.

(a) Were the rates in the WSA agreements increased in exchange for the revised lower rates for 2009 and 2010 that were agreed to by the parties to the WSA agreements?

Live365 alleged that the 2011–2015 rates in the WSA agreements are higher than they otherwise would be because SoundExchange acquiesced to a lowering of the already existing 2009 and 2010 statutory rates for the NAB and Sirius XM. Dr. Salinger surmised that SoundExchange must have bargained for some form of *quid pro quo* in the 2011–2015 rate structure in exchange for a reduction in the rates already established for 2009 and 2010. Salinger WRT at ¶¶ 55–56. Live365 presented no evidence of such a bargain, however.

On the other hand, Dr. Pelcovits opined that SoundExchange's reduction of the 2009 and 2010 rates, as permitted under the WSAs, was analogous to a ''signing bonus''—offered to induce the NAB and Sirius XM to settle early. That assertion, too, raised a factual question rather than an issue that required expert economic testimony. SoundExchange likewise did not proffer testimony or any other evidence to identify the benefit that SoundExchange received by reducing the statutory 2009 and 2010 webcasting rates.

Neither Dr. Salinger nor Dr. Pelcovits proffered any empirical evidence to support their respective hypotheses as to the relationship, *vel non,* between the reduction in the 2009–2010 rates and the rates for 2011–2015 in the WSA agreements. Neither did the respective parties proffer testimony from their other witnesses that would shed light upon the negotiating strategies of the parties as they related to this issue.

In the absence of such factual or economic evidence, the Judges cannot reach any conclusion regarding the relationship between the reduction of the 2009 and 2010 webcasting rates and establishment of the voluntary rates for 2011–2015 in the WSA agreements. Accordingly, the reduction in the 2009 and 2010 rates charged by SoundExchange to the NAB and Sirius XM cannot serve to diminish the value of the rates in the WSA Agreements as benchmarks in this proceeding.

(b) Does the grant by the four major record companies to the NAB of a waiver of the ''Sound Recording Performance Complement'' rules diminish the probative value of the NAB agreement as a benchmark?

Live365 asserts that the waiver by the four major record companies [30] of the ''sound recording performance complement'' for the benefit of the NAB in its WSA Agreement undermines the value of those rates as benchmarks. It is correct that, contemporaneous with entering into its WSA Agreement with SoundExchange, the NAB negotiated ''performance complement waivers'' with each of the major record companies. Pelcovits WDT at 20 n.21. These waivers allowed the NAB broadcasters to simulcast their broadcasts on the Internet even though the number of plays by an artist or from an album might exceed the allowable levels under section 114(j)(13) of the Act.[31] Live365, through its economic expert, Dr. Fratrik, opined that the waiver of the ''performance complement'' provided additional value to the NAB broadcasters, a value that must be bundled implicitly into the purported benchmark per-performance rates contained in the NAB/SoundExchange Agreement. Dr. Fratrik opined that if the terrestrial broadcasters

[30] As of the date of this Determination on remand, there are three major record labels, following the merger of EMI and Sony.

[31] In their role as terrestrial broadcasters, the NAB broadcasters were not bound by the ''performance complement,'' but in their role as webcasters they would have been subject to the restriction without the waiver.

covered by the NAB/SoundExchange Agreement had been bound by the ''performance complement,'' they would have been required to modify their webcasts, as opposed to simply simulcasting their terrestrial broadcasts. Fratrik WDT at 43–44.

However, neither Dr. Fratrik nor any other witness provided any empirical evidence to indicate the extent, if any, of any additional value realized by the NAB broadcasters in exchange for the waiver of the performance complement rules. Thus, the Judges are asked, in effect, to unbundle the per-performance rates in the NAB/SoundExchange Agreement, without any evidence as to the value of this ''stick'' within that bundle, *i.e.,* the waiver of the performance complement rules.

SoundExchange disputed the assertion that the waiver of the performance complement rules should reduce the efficacy of the NAB agreement as a benchmark. Even so, Dr. Pelcovits does admit the existence of *some* value in the waiver of the performance complement rules:

> The performance complement waivers are *uniquely valuable to broadcasters,* whose over-the-air programming is not subject to a sound recording copyright and therefore not subject to the performance complement. The waiver allows these broadcasters to re-transmit their terrestrial signal without having to alter the programming that they created primarily for a use not subject to the performance complement.

Pelcovits WDT at 20 n.21 (emphasis added).

Dr. Pelcovits notes though that ''[t]he market value of the waiver appears to be very small, since Sirius XM, with no such waiver, agreed to rates that are virtually identical over the life of the contract.'' *Id.* Dr. Pelcovits is correct. The differences between the per-performance rates in the NAB/SoundExchange Agreement and the Sirius XM/SoundExchange Agreement for the 2011–2015 rate period are illustrated on the following table.

Year	NAB Rate	Sirius XM rate	Difference
2011	$0.0017	$0.0018	−$0.0001
2012	0.0020	0.0020	0.0000
2013	0.0022	0.0021	+0.0001
2014	0.0023	0.0022	+0.0001
2015	0.0025	0.0024	+0.0001

Thus, the average annual difference in the per-performance rates between the two agreements is $0.00004. Accordingly, the Judges conclude that the waiver of the performance complement rule has no discernible impact on the value of the WSA Agreements as benchmarks.

(c) Does it matter if the terrestrial broadcasters covered by the NAB/SoundExchange Agreement were able to pay a higher rate because their webcasting costs are lower than the costs of pure webcasters?

Dr. Fratrik opined that the terrestrial commercial radio broadcasters have a vastly different cost structure than pure play webcasters, which allows them to pay higher royalty rates for sound recordings. Specifically, Dr. Fratrik noted:

- Terrestrial radio broadcasters who simulcast on the web their over-the-air transmissions have already incurred the necessary programming costs.[32]
- Terrestrial commercial radio stations can promote their Web site on their own broadcast stations, reducing their advertising costs.[33]
- Terrestrial radio broadcasters can use the sunk cost of a pre-existing sales force to sell online advertising.
- Terrestrial radio broadcasters have audiences more concentrated in the same geographic area than pure webcasters, thus allowing the former to realize more revenue selling advertising to local advertisers.

Fratrik WDT at 41–42. Consequently, Dr. Fratrik concluded ''terrestrial broadcasters are more willing to pay higher royalty fees for webcasting as they are able to generate greater profits from that industry.'' *Id.* at 42.

Live365 has not quantified or otherwise estimated the monetary value of these differences. Thus, even if this argument had substantive merit, the Judges could not make any specific adjustment of the rates in the NAB/SoundExchange Agreement to reflect these theoretical cost advantages.

More importantly, however, the recitation of these advantages inuring to the benefit of the NAB simulcasters is simply another way of stating that their business models afford them the *synergy* to expand horizontally across the landscape of differentiated sound recording sub-markets by paying a higher per-performance fee than webcasters with a more costly and less synergistic business model.[34] As noted in *Web I,* the Act does not provide for a consideration of ''the financial health of any particular service'' when establishing rates. 67 FR at 45254.

(d) Did the WSA agreements have the design, intent, and effect of raising the input costs of smaller webcasters?

Live365, through Dr. Salinger, opined that the parties to the WSA agreements set rates above market rates for 2011–2015 because they had strategically intended to use those rates as benchmarks, and thereby raise the costs of their rivals, *i.e.,* all other webcasters. Salinger WRT at 23. As Dr. Salinger notes, those parties had the power to influence the impact of those contractual rates, because they could elect—as they ultimately did—to permit these agreements and rates to be made available as potential precedents. *Id.* at 24.

This argument is theoretically plausible, as noted in the articles cited by Dr. Salinger. *Id.* at 24 (*citing* Steven Salop and David Scheffman, *Raising Rivals' Costs,* 73 Am. Econ. Rev. 267–71 (1983); Thomas Krattenmaker and Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986)). However, Live365 has not provided any empirical or other evidence that would tend to prove the existence of such strategic coordination or conduct in this proceeding.

In the absence of any such evidence, the Judges cannot simply assume a multi-party conspiracy among SoundExchange, the NAB, and Sirius XM to increase the rates charged to the NAB and Sirius XM, in the hope that the Judges would utilize those WSA rates to establish the statutory rates. Although the Judges acknowledge that, generally, explicit or tacit collusion may exist among participants in concentrated industries, that general proposition cannot serve as the basis for an ultimate finding of specific tri-partite collusion, absent an adequate factual record.

[32] The webcasters on whose behalf NAB negotiated a deal with SoundExchange are predominantly simulcasters, *i.e.,* entities that offer terrestrial broadcasts of their programming and simultaneously transmit that same programming on the Internet. Ordover WRT ¶ 51.

[33] This point seems to confuse economic cost with out-of-pocket cost. If a broadcaster foregoes paid advertising from a third party in order to air an advertisement for its own webcasts, that broadcaster has incurred an opportunity cost equal to the advertising revenue that the third party would have paid.

[34] SoundExchange's rebuttal economic witness, Dr. Janusz Ordover, makes an important point in his critique of Dr. Fratrik's cost differential argument—one that relates to the rate structure analysis undertaken earlier in this Determination. Specifically, Dr. Ordover opines that SoundExchange would not offer pure webcasters a lower rate in light of their higher cost structures unless SoundExchange could ''price discriminate at the level of license.'' Ordover WRT at 15. In this context, Dr. Ordover then identifies the pros and cons of marginal cost pricing, as well as the impact of such price discrimination upon the subscription rates of the ultimate consumers, the returns to licensors, and the shifting of revenues between and among different webcasters. *Id.* at 14–16. These are the types of issues that would need to be addressed and supported by empirical analyses in a proceeding in which a party had proposed a rate premised on a form of price discrimination, such as a percentage-of-revenue based fee.

(e) Were the rates in the WSA agreements inflated to reflect litigation cost savings by the NAB and Sirius XM?

Live365 asserted that the rates in the WSA Agreements are higher than market rates because they reflect the litigation cost saved by the NAB and Sirius XM of foregoing a rate proceeding and its attendant expenses. Live365 PFF ¶¶ 322–326. Further, Live365 asserted that this litigation cost/opportunity cost saving only affected the settling webcasters, not SoundExchange, because the latter would be incurring litigation costs regardless, since other webcasters (such as Live365) remained as contesting parties at the time of settlement. Live365 PFF ¶ 283.

SoundExchange disputed these assertions on several grounds.

First, SoundExchange asserted that the principal reason for the WSA Agreements was that the parties had ''a high degree of confidence that the Judges would establish rates consistent with the willing buyer/willing seller construct . . . .'' SX PFF ¶ 282. Dr. Ordover explained that, consequently ''neither party likely would be willing to incur litigation costs in the event of a disagreement . . . .'' Ordover WRT at 16. This is certainly one explanation to counter Live365's assumption that the NAB and Sirius XM paid a rate premium to avoid litigation costs. The Judges recognize that rational parties will attempt to predict the determination of any tribunal, and that they will tend to settle if their respective predictions are sufficiently proximate.[35]

Second, SoundExchange asserted that it too had an incentive to avoid litigation costs, and that such an incentive offset the potential impact of any similar incentive on the settling webcasters with regard to the rates contained in the WSA Agreements. Ordover WRT at 5, 16–17; 8/2/10 Tr. at 351 (Ordover) (threat of litigation ''works on both sides''). However, Live365 is correct in its claim that SoundExchange still would have been required to participate in a rate proceeding against other contesting webcasters. Nonetheless, SoundExchange did avoid the potential impact of arguments that would have been made by the NAB and Sirius XM that might have resulted in lower rates. Instead, SoundExchange was required ultimately to contest the claims of only one webcaster, Live365.

In any event, neither party presented evidence to the Judges regarding how to quantify the relative opportunity costs saved by SoundExchange and/or the settling webcasters. For all these reasons, the Judges cannot adjust the marketplace rates to reflect any such impact arising out of the litigation costs allegedly avoided by the WSA Agreements.[36]

(f) Are the rates in the WSA agreements reflective of SoundExchange's monopoly power?

Live365 asserted that the rates in the WSA Agreements reflect the monopoly power of the single seller in those two contracts, *i.e.,* SoundExchange. Live365 PFF ¶ 286. As Live365 correctly notes, in the ''hypothetical market'' that the Judges are statutorily required to consider, the hypothetical sellers are the several record companies rather than a single monopolist. *Web II,* 72 FR at 24087, *Web I,* 67 FR at 45244.

Dr. Salinger, Live365's economic rebuttal witness, testified that it is ''a very general principle of economics'' that the presence of a monopolist ''poses a risk of increased prices.'' Salinger WRT at 26. SoundExchange's rebuttal economic witness, Dr. Ordover, concurred, acknowledging that SoundExchange ''may [have] additional bargaining power'' because of its status as the single seller. Ordover WRT at 22.

The power that these two economists acknowledged was the well-understood market power of a (single price) monopolist to set a price at a level higher than would be set in a perfectly competitive market, while also restricting the quantity sold to the level at which marginal revenue equals marginal cost. *See, e.g.,* Krugman & Wells, *supra,* at 367; Edwin Mansfield & Gary Yohoe, *Microeconomics* 364–65 (11th ed. 2004).

It is not at all apparent, however, that the market power of SoundExchange to command a high rate would be appreciably greater (if at all) than the power of the major record companies, who owned approximately 85% of supply (the sound recordings) and therefore comprise an oligopoly. 4/20/10 Tr. at 299 (Pelcovits). As stated by Dr. Pelcovits:

> [N]egotiation of the WSA Agreements by SoundExchange *does not significantly alter the market power equation.* Each record company has a unique catalog of sound recordings that are highly valued (or even necessary inputs) to any webcasting service. The individual record companies, as a consequence, have a degree of market power.

Pelcovits WDT at 17 (emphasis added). Dr. Pelcovits's testimony is consonant with contemporary economic understanding that oligopoly pricing behavior can mimic monopoly pricing decisions.

Economists once believed that oligopoly pricing may have been essentially indeterminate. More modern game theory analyses recognize, however, the strong potential for tacit collusion among long-standing oligopolists (such as the major record companies), after repeated ''tit for tat'' pricing maneuvers, that will cause oligopolistic pricing to approach monopoly pricing:

> [W]hen oligopolists expect to compete with each other over an extended period of time, each individual firm will often conclude that it is in its own best interest to be helpful to the other firms in the industry. So it will restrict its output in a way that raises the profits of the other firms, expecting them to return the favor. . . . [T]hey manage to act as if they had . . . an agreement. When this happens, we say that firms engage in tacit collusion.

Krugman & Wells, *supra,* at 401; *see* Hal Varian, *Intermediate Economics: A Modern Approach* 531 (8th ed. 2010) (''The threat implicit in tit for tat may allow the firms to maintain high prices.''). Such tacit collusion can lead to pricing by oligopolists at the monopoly level. *See, e.g.,* L. Kaplow, *On the Meaning of Horizontal Agreements in Competition Law,* 99 Cal. L. Rev. 683, 811 (2011) (''oligopoly pricing is akin to monopoly pricing.'').

Thus, consistent with Dr. Pelcovits's testimony, *theoretically* there *could* be no important difference between the bargaining power of the four major record companies and SoundExchange. However, as discussed *infra,* the evidence in this proceeding does not

[35] However, SoundExchange overstates the logic of this point. The mere fact that two adversarial parties reach a settlement premised upon their mutual prediction of the Judges' future determination does not mean that they have correctly predicted (with ''a high degree of confidence'' no less) that the rate the parties settled upon would be the same as the rates the Judges ultimately would have established. It is a sufficient inducement for the parties to settle if they agree on their prediction, not that their prediction be correct. It would be hopelessly circular if the Judges were to put their imprimatur on rates negotiated in a settlement merely on the assumption that the parties were able to predict how the Judges would apply the statutory standards. Such an argument would essentially require the Judges to abdicate their responsibilities and defer to the settling parties, whose self-declared rational expectations as to the Judges' future determination would be deemed both prescient and dispositive.

[36] Two ancillary points were made by the respective parties with regard to the alleged impact of litigation costs: Live365 asserted that the settling webcasters did not have the same capacity to absorb litigation costs as SoundExchange, but there was no evidence that indicated such a disparity existed or, even if it did, how it affected the rates upon which the parties settled. Fratrik WDT at 43; Ordover WRT at 17. SoundExchange argued that the settling parties had additional options beyond settle or litigate—they could either elect not to participate in the rate proceeding or decide not to webcast. SX PFF ¶ 284. Both of those supposed ''options'' seem extreme.

indicate that the rates in the WSA Agreements were so high as to enable SoundExchange to extract monopoly rents from webcasters.[37]

(i) The NAB's Countervailing Market Power

As Dr. Ordover noted, the NAB, which negotiated on behalf of a group of broadcasters, enjoyed a degree of bargaining power on the buyers' side during its negotiations with SoundExchange. Ordover WRT at 23; *see also* 7/28/10 Tr. at 129–30 (Salinger) (acknowledging balance of power in this context). This power arose from the fact that, at the time of the WSA Agreement negotiations, the NAB broadcasters had accounted for over 50% of the royalty payments to SoundExchange in the immediately preceding calendar year. Ordover WRT at 23; Live365 Trial Ex. 25. As Dr. Ordover testified, ''[s]uch added market power on the buyer side tends to mitigate, if not fully offset, additional leverage that SoundExchange might bring to the negotiations.'' Ordover WRT at 23; *Web II,* 72 FR at 24091 (''[T]he question of competition is not confined to an examination of the seller's side of the market alone. Rather, it is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market.'')

(ii) The Availability of a Rate Setting Proceeding

The monopoly power of SoundExchange was compromised by the fact that the NAB or any webcasters negotiating with SoundExchange could have chosen instead to be subject to the rates to be set by the Judges. Ordover WRT at 23. Dr. Ordover explained that ''[a]t some point, buyers such as the NAB members would simply elect to seek rates established by the Judges—which would be free of any potential cartel effects—rather than voluntarily agree to pay above-market rates.'' Ordover WRT at 23; *see* Salinger WRT at 27 (buyers can resort to the court if the collective seeks to charge more than each individual member could charge).

(iii) The Evidence Did Not Demonstrate That the Individual Record Companies Necessarily Would Have Negotiated a Lower Rate Than SoundExchange

As Dr. Ordover explained, the nature of the market indicated that SoundExchange might have been in a position to negotiate rates that were actually lower than the rates the record companies would have negotiated individually. More particularly, the existence, *vel non,* of SoundExchange's power to set higher prices ''depends partially on the assumption one makes about whether a webcaster requires access to the repertoire of all four major record companies in order to operate an economically viable business, or only to a subset.'' Ordover WRT at 23–24.

As Dr. Ordover further explained, if the repertoires of all four major record companies were each required by webcasters (*i.e.,* if the repertoires were necessary complements) and webcasters were required to negotiate with each record company individually, then each record company would have an incentive to charge a monopoly price to maximize its profits without concern for the impact on the market writ large. That is, while these higher prices would constitute profits for the record company receiving them, they would constitute higher monopoly costs (incurred four times—paid by webcasters to each of the four record companies). The webcasters would pass on the higher costs to listeners, thus reducing the quantity of sound recordings made available to end users. Ordover WRT at 25–26.

By contrast, SoundExchange, as a collective, would internalize the impact of the complementary nature of the repertoires on industry revenue and thus seek to maximize that overall revenue. This would result in lower overall rates compared to the situation in which the individual record companies negotiated separately. Ordover WRT at 27.

Of course, this argument would be valid only if the repertoires of the several record companies indeed were complements rather than substitutes. If it was sufficient for webcasters to obtain only the licenses for one (or less than all four) of the major record companies, then separate negotiations with individual record companies (absent collusion, tacit or otherwise) could lead to competitively lower royalty rates.

The parties presented no evidence from which the Judges could conclude that the repertoires of the respective record companies were complements or substitutes, or, perhaps, complementary to some degree and substitutional to some degree.[38] Thus, the Judges cannot conclude that SoundExchange necessarily wielded a level of pricing power sufficient to affect the use of the WSA Agreements as benchmarks.[39]

(g) Conclusion Regarding the WSA Agreements

On balance, the Judges conclude that the arguments made by Live365 as to why the WSA Agreements cannot serve as benchmarks are not persuasive. Therefore, the Judges conclude that the evidence permits these two agreements to serve as benchmarks in this proceeding.

(2) SoundExchange's Second Proposed Benchmark: The Adjusted Interactive Subscription Service Rate

In addition to its WSA Agreements benchmark, SoundExchange relied on Dr. Pelcovits's analysis of another purported benchmark—the market for interactive webcasting of digital

[37] An oligopolistic marketplace rate that did approximate the monopoly rate *could* be inconsistent with the rate standard set forth in 17 U.S.C. 114(f)(2)(B), as that standard has been construed by the D.C. Circuit and the Librarian of Congress. The D.C. Circuit has held that this statutory section does not oblige the Judges to set rates by assuming a market that achieves ''metaphysical perfection and competitiveness.'' *Intercollegiate Broadcast System, Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 757 (D.C. Cir. 2009). Rather, as the Librarian of Congress held in *Web I,* the ''willing seller/willing buyer'' standard calls for rates that would have been set in a ''*competitive* marketplace.'' 67 FR at 45244–45 (emphasis added). *See also Web II,* 67 FR at 24091–93 (explaining that *Web I* required an ''*effectively* competitive market'' rather than a ''*perfectly* competitive market.'' (emphasis added)). Between the extremes of a market with ''metaphysically perfect competition'' and a monopoly (or collusive oligopoly) market devoid of competition there exists ''[in] the real world . . . a mind-boggling array of different markets,'' Krugman & Wells, *supra,* at 356, all of which possess varying characteristics of a ''competitive marketplace.'' As explained in the text, *infra,* in this proceeding the evidence demonstrates that sufficient competitive factors existed to permit the WSA Agreements to serve as useful benchmarks, and does not demonstrate that the rates in the WSA Agreements approximated monopoly rates.

[38] In *Web II,* the Judges found that there was testimony sufficient to indicate that the several repertoires were substitutes rather than complements. 72 FR at 24093. The contesting parties in this proceeding did not provide the Judges with evidence sufficient to make a factual finding as to this issue.

[39] The Judges reject an additional argument made by SoundExchange that the WSA Agreements could be construed as competitive by comparing the prices negotiated by the major record companies in their agreements with ''custom radio services'' to the lower prices in the WSA Agreements. Pelcovits WDT at 19. The Judges agree with Dr. Salinger's critique that a comparison of rates for ''custom radio services'' and noninteractive webcasters is not an ''apples-to-apples'' comparison, because ''custom radio'' adds additional value in terms of substitutability for the purchase of music and adds a level of control for the listener. Salinger WRT at 26. Further, even Dr. Pelcovits acknowledges that custom radio service involves a ''degree of interactivity . . . and therefore is not necessarily comparable to noninteractive webcasting.'' Pelcovits WDT at 32. Thus, this issue posits at least two potential explanatory variables that could explain why the record companies negotiated higher rates for custom radio than SoundExchange negotiated for noninteractive services in the WSA Agreements: (i) The monopoly or oligopoly character of the seller(s); and (ii) the differentiated nature of the two services. Absent any empirical or other evidence that indicates how each of these explanatory variables relates to the pricing differential, SoundExchange's attempt to rely on the pricing differential as probative of a more competitive rate must fail.

performances of sound recordings. According to Dr. Pelcovits, that interactive market is comparable to the noninteractive market at issue in this proceeding for the following reasons:

- Both markets have similar buyers;
- Both markets have similar sellers;
- Both markets utilize a blanket license in sound recordings;
- Both markets are input markets;
- Both markets have a demand schedule for these inputs that is derived from the demand of ultimate consumers; and
- Both markets deliver the sound recordings via the Internet.

Pelcovits WDT at 3; 4/19/10 Tr. at 126 (Pelcovits).

In the interactive market, the rates for sound recordings are not subject to the statutory license. Rather, in the interactive market, the rates for sound recordings are set through marketplace negotiations between the owners of the sound recordings, as sellers/licensors, and the individual interactive webcasters, as buyers/licensees.

The major difference between the two markets is the role of the ultimate consumer in selecting the sound recordings for listening. In the interactive market (as the adjective connotes), the ultimate consumer essentially decides which sound recordings he or she will receive.[40] By contrast, in the noninteractive market (as the adjective again connotes), the consumer plays a more passive role, and the webcaster offers the consumer music that the webcaster anticipates the listener might enjoy (much like radio). *Compare* 17 U.S.C. 114(j)(6) with 17 U.S.C. 114(j)(7).

Thus, it is necessary to isolate the value of such consumer choice, *i.e.,* the utility of interactivity, and subtract that value from any estimate of the value of sound recordings in the interactive market, in order to make that value more comparable to the value in the noninteractive market.

Dr. Pelcovits attempted to make such an adjustment in his analysis (as well as other adjustments discussed *infra*), which resulted in his proposed per-performance rate of $0.0036 per play for a statutory noninteractive webcaster.

The Judges conclude, as the Judges concluded in *Web II,* that such an adjusted benchmark constitutes the type of benchmark that the Act permits (but does not require) the Judges to consider. However, the fact that this is an appropriate type of benchmark to be considered does not necessarily mean that any particular application of the benchmark will be of assistance in a given proceeding. Rather, the Judges must consider the application of such a benchmark, and decide whether to adopt or reject it *in toto* or whether it is necessary to adjust the proposed benchmark.

As explained *infra,* the Judges have concluded that the interactive benchmark proposed by Dr. Pelcovits on behalf of SoundExchange is of assistance in establishing a zone of reasonableness in this proceeding, but only after making certain significant adjustments to that proposed benchmark.

(a) The Methodology Utilized by Dr. Pelcovits in His Interactive Benchmark Analysis

Dr. Pelcovits opined that ''the interactive, on-demand music services [are] the best benchmark to use for the purpose of setting rates for statutory webcasting services in this proceeding.'' Pelcovits WDT at 23. Dr. Pelcovits testified, ''it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets.'' Pelcovits WDT at 23; *see* 4/20/10 Tr. at 277–78 (Pelcovits). The theory upon which Dr. Pelcovits relied to make this prediction was premised on the economic concept of ''derived demand.'' As Dr. Pelcovits testified, ''webcasters demand or have a need for the music performance because that's what their customers demand.'' 4/19/10 Tr. at 132 (Pelcovits); Pelcovits WDT at 23 (''I believe it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets.'').

However, in order to use the rates in this interactive benchmark market to develop rates in the target market, Dr. Pelcovits also concluded that he was required to make adjustments ''to account for the differences between the benchmark and target markets.'' Pelcovits WDT at 22; 4/29/10 Tr. at 127 (Pelcovits). Specifically, Dr. Pelcovits adjusted (i) the interactive benchmark rates to take into account the fact that there are more plays per subscriber in the noninteractive market; and (ii) the subscription prices in the interactive market to remove the value of interactivity. Pelcovits WDT at 23.

(i) The Marketplace Agreements Considered by Dr. Pelcovits

Dr. Pelcovits obtained 214 agreements between certain interactive webcasters and the four major record companies, *viz.,* Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI, that spanned the period from approximately 2004 through 2009, with an emphasis on contracts that were created in the most recent three years. Pelcovits WDT, App IV. Under the terms of these agreements, Dr. Pelcovits found that the interactive webcasters generally ''pay royalties on the basis of the greatest of three measures: A per-play rate; a percentage of gross revenue rate; and a per-subscriber fee.'' Pelcovits WDT at 29; 4/29/10 Tr. at 129–30 (Pelcovits).

Dr. Pelcovits had available for consideration, *inter alia,* two types of interactive webcasting models: (i) Subscription on-demand interactive streaming services and (ii) advertising-supported (nonsubscription) on-demand streaming services.[41] SoundExchange explained the difference between these models in the following manner, through the testimony of its industry witness:

- Subscription on-demand interactive streaming.

This type of webcasting allows a paying subscriber to request the exact song he or she wishes to hear. McCrady WDT at 12. In addition, most of these services allow their subscribers to conditionally download requested songs to their personal computer and sometimes to a portable storage device, such as an iPod. *Id.* These downloads remain available for listening at any time by a subscriber, provided that the subscription remains active. *Id.*

- Advertising-supported (nonsubscription) on-demand interactive streaming.

This type of webcasting is the same as subscription on-demand interactive

[40] The ability of the ultimate consumer to choose to listen to specific sound recordings renders that decision analogous to the decision to purchase music digitally or otherwise. Thus, as noted in the legislative history of the Digital Performance Right in Sound Recordings Act, that statute permits the owners of sound recordings to bargain directly with each interactive webcaster over the price of each transmission, in the same manner as if the parties were negotiating the price of a digital download for outright purchase. *See* H.R. Rep. No. 104–274 at 14 (1995) (''Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.'').

[41] Dr. Pelcovits also reviewed agreements between ''custom radio'' services and the four major record companies, agreements that, according to SoundExchange's witnesses, occupy a functional gray area between interactive and noninteractive services. *See* McCrady WDT at 16. Dr. Pelcovits made note of such agreements in his testimony, including a particular reference to the agreement between WMG and one such custom radio service, Slacker Premium. As discussed *infra,* Dr. Pelcovits needed data regarding the number of plays by Slacker Premium to serve as a proxy for the number of plays by noninteractive webcasters, because such data was not available for clearly noninteractive services. Pelcovits WDT at 32.

streaming except the listener does not subscribe and receives *gratis* the songs he or she wishes to hear. The webcaster sells advertising on the site and the listener hears the advertising as well as the specific songs requested. Mr. McCrady described these interactive webcasting services that derive their revenue from advertising alone and not from subscriptions to be ''experimental'' and not yet ''mature.'' 4/22/10 Tr. at 663 (McCrady); McCrady WDT at 15.

Dr. Pelcovits ultimately elected to ignore the advertising-supported (nonsubscription) on-demand interactive streaming in his analysis because, in his opinion, ''it is more straightforward to infer differences in consumer willingness-to-pay (and by extension how much the webcaster would be willing to pay for the license) from observed prices for subscription services.'' Pelcovits WDT at 24.

(ii) Dr. Pelcovits's Calculation of the Per-Play Rate in the Benchmark Interactive Subscription Market

Dr. Pelcovits proceeded to calculate the ''effective per play rate'' paid under the contracts between the benchmark interactive services and the four major record companies. To do so, he obtained data from the major record companies that revealed:

- The revenue reported by the interactive subscription services to the major record companies; and
- The number of unique plays those services reported to the major record companies.

Pelcovits WDT at 30; 4/29/10 Tr. at 128 (Pelcovits). The revenue data that Dr. Pelcovits analyzed represented not merely revenue paid under the per-performance rate structure in the interactive contracts, but rather all revenue, regardless of whether that revenue had been paid pursuant to one of the other structures contained in those contracts. Pelcovits WDT at 30.

As noted at the outset of this determination, given Dr. Pelcovits's assumption that only a per-performance (*i.e.,* per play) royalty rate structure would pass muster with the Judges, he only proposed a per-play royalty rate. Accordingly, Dr. Pelcovits determined an ''effective'' per-play royalty rate by combining the revenue reported and paid pursuant to the percentage-of-revenue structure and the per-play structure for the purposes of his analysis. Pelcovits WDT at 30.

The data reviewed by Dr. Pelcovits also showed that the percentage of plays on the interactive services attributable to the four major record companies was approximately 85%. 4/20/10 Tr. at 299 (Pelcovits). Thus, by considering only the data from the four major record companies, Dr. Pelcovits did not consider 15% of the sellers in his benchmark market.

With regard to the number of plays per subscriber for his benchmark market, Dr. Pelcovits counted ''the total number of unique plays of recorded music owned (or distributed) by the four major record companies reported by the interactive webcasting service(s).'' Pelcovits WDT at 30; 4/19/10 Tr. at 130–31 (Pelcovits). Dr. Pelcovits calculated the average number of monthly plays by these interactive subscription services to be 287.37 per subscriber. Pelcovits WDT at 31. To derive the effective per-play rate in the interactive market, Dr. Pelcovits then divided the total revenue collected by the record companies by 287.37, *i.e.,* the total number of unique plays. This division resulted in an effective per-play rate for the benchmark interactive subscription service market of $0.02194 per play. *Id.*

(iii) Dr. Pelcovits's Adjustments to the $0.02194 Per-Play Rate in the Benchmark Interactive Subscription Market

Dr. Pelcovits believed that it was necessary to make certain adjustments to the interactive benchmark streaming per-play rate before it could be applied to the noninteractive streaming market. In particular, Dr. Pelcovits adjusted for:

- The higher usage intensity (number of plays per month) by subscribers of noninteractive services compared to subscribers of interactive services; and
- The value that consumers place on the greater interactivity offered by the on-demand services compared to statutory services that do not offer that function.

Pelcovits WDT at 3, 31.[42]

(a) The Adjustment for Usage Intensity/Number of Monthly Plays

Dr. Pelcovits's first adjustment sought to account for the fact that there were a greater number of plays by subscribers of noninteractive services than by subscribers on interactive statutory services. Pelcovits WDT at 31; *see* 4/19/10 Tr. at 139–41 (Pelcovits).

While, as noted *supra,* Dr. Pelcovits was able to obtain data regarding the number of interactive plays, he admitted to difficulty in calculating the number of noninteractive plays. As Dr. Pelcovits candidly acknowledged, the noninteractive services ''do not report the number of subscribers in public documents or in data provided to the record companies or SoundExchange.'' Pelcovits WDT at 31.

In light of these difficulties, Dr. Pelcovits turned to data provided to the record companies for the subscription custom radio service Slacker Premium. Pelcovits WDT at 32. Although Slacker Premium is not a noninteractive service, because it allows for a degree of user customization, Dr. Pelcovits claimed that most of the music transmitted through the service is ''pushed to the consumer,'' rather than being truly on-demand. Pelcovits WDT at 32. Therefore, he concluded that the data on plays-per-subscriber for this one service would serve as a good proxy for plays-per-subscriber for statutory subscription services.[43] Pelcovits WDT at 32; 4/19/10 Tr. at 141–42 (Pelcovits). Although the unavailability of data for the number of plays of unambiguously noninteractive services reduces the usefulness of Dr. Pelcovits's proposed benchmark, it does not invalidate his methodology and results.[44]

Using the Slacker Premium data, Dr. Pelcovits determined that the average monthly plays per subscriber for a purely noninteractive service was 563.36. Pelcovits WDT at 32. Dividing the plays per subscriber for interactive services (287.37) by the plays per subscriber for statutory services (563.36) resulted in a per-play adjustment of 0.5101. Pelcovits WDT at 33.

(b) The Interactivity Adjustment

Dr. Pelcovits also made an adjustment to account for the difference in the relative value of a service that is interactive to one that is not. Dr. Pelcovits began his calculation of the interactivity adjustment by comparing the subscription rates for selected benchmark interactive services with the subscription rates for certain audio streaming services that he identified as ''arguably'' noninteractive services. Pelcovits WDT at 24; Live365 Trial Ex. 5 at 31–32.

Inasmuch as that ''value added'' feature (by definition) is not available for the noninteractive services, Dr.

[42] Dr. Pelcovits made a third adjustment in an attempt to account for the substitutional effect of the two types of services on CD and permanent download sales. Pelcovits WDT at 35–36. As explained *infra,* the Judges find that this adjustment is subsumed within his willing seller/willing buyer analysis.

[43] Dr. Pelcovits established his own definition of ''statutory services'' as ''services that offer no interactivity or limited interactivity,'' but he cautioned that he was not making a ''legal judgment'' as to whether his self-defined ''statutory services'' would qualify legally as noninteractive statutory services. Pelcovits WDT at 24–25 and n.22.

[44] Based on other data produced by Live365 during discovery, Dr. Pelcovits testified that he was able to confirm that the number of plays per subscriber that he calculated for Slacker Premium represented a reasonable estimate of the plays per subscriber for the statutory webcasting market. Pelcovits WDT at 32 n.27.

Pelcovits calculated the value of the interactivity feature in order to subtract it from his proposed benchmark service. Dr. Pelcovits calculated the purported value added by interactivity in two ways. 4/19/10 Tr. at 133–34 (Pelcovits); Live365 Trial Ex. 5 at 37–40.

First, Dr. Pelcovits compared the retail subscription prices for the interactive and noninteractive streaming services that he analyzed. Pelcovits WDT at 24; Live365 Trial Ex. 5 at 39–40. More particularly, he supervised the collection of information regarding 41 audio streaming services out of the agreements that SoundExchange had provided to him. Pelcovits WDT at 24; 4/19/10 Tr. at 134–35 (Pelcovits). However, Dr. Pelcovits excluded from his analysis 23 of those 41 services (56% of the total) because they were not subscription services. The remaining 18 services that he included in his analysis were paid subscription services. Pelcovits WDT at 24. Of these 18 subscription services, 11 were in the benchmark interactive market, and 7, according to Dr. Pelcovits, ''arguably qualify as statutory services.'' Pelcovits WDT at 24–25. Dr. Pelcovits found that the average monthly subscription price for the 7 noninteractive services that he defined as ''statutory'' was $4.13. Pelcovits WDT at 25.

With regard to the 11 interactive subscription services, Dr. Pelcovits calculated the average subscription price in two different ways. Pelcovits WDT at 25.

- First, Dr. Pelcovits calculated the average monthly subscription prices for the 11 interactive services—an average of $13.70.
- Second, Dr. Pelcovits re-calculated the average monthly subscription prices of 2 of these 11 interactive services to adjust them downward to reflect additional value these 2 services provided in the form of a fixed monthly number of permanent downloads at no additional cost to the subscriber.[45] This calculation resulted in a lower average monthly subscription price of $13.30.

Pelcovits WDT at 25; 4/19/10 Tr. at 135–36 (Pelcovits).

To make his interactivity adjustment, Dr. Pelcovits then subtracted the average (mean) subscription price of his 7 statutory noninteractive services ($4.13) from the average (mean) subscription price of his 11 benchmark interactive services. Because he calculated two different averages for the 11 benchmark interactive services (one ignoring the bundled free downloads and the other adjusting for the bundled free downloads, as noted *supra*), Dr. Pelcovits performed two different subtractions ($13.70 − $4.13; and $13.30 − $4.13). These calculations resulted in interactivity adjustment factors of:

0.301 (using the unadjusted subscription prices for the interactive services); and

0.311 (using the subscription prices for the interactive services adjusted for the bundled downloads offered by two of the benchmark interactive services).

Pelcovits WDT at 26; 4/19/10 Tr. at 136–37 (Pelcovits).[46]

As an alternative measure of the value of interactivity (to be subtracted from the benchmark value), Dr. Pelcovits performed a hedonic regression. Pelcovits WDT at 26; Live365 Trial Ex. 5 at 38–39. As Dr. Pelcovits accurately summarized, a hedonic regression is a statistical technique that can be applied ''to measure the value of different characteristics of a heterogeneous product.'' Pelcovits WDT at 26. *See also* Salinger WRT at 18 (''Hedonic regression is a statistical analysis of prices that seeks to explain prices as a function of product features.'').

This hedonic regression was used ''to isolate the value of interactivity to consumers of on-line music services'' by measuring ''the value of different characteristics of a heterogeneous product,'' which in this case is subscription audio streaming services. Pelcovits WDT at 26; 4/19/10 Tr. at 137 (Pelcovits). In his hedonic regression, Dr. Pelcovits analyzed a number of variables across the same 18 subscription-streaming services he had considered in his ''mean comparison'' interactivity adjustment, and applied those variables to the subscription price. Pelcovits WDT at 26–27. Among the variables that Dr. Pelcovits included in his hedonic regression were: (i) The presence of interactivity; (ii) the availability of a mobile application for the service; and, (iii) and the ability to conditionally download tracks to a portable device (expressed as ''Tethered Downloads'' in the regression table). Pelcovits WDT at 27; *see also* Live365 Trial Ex. 5 at 39.

Dr. Pelcovits's hedonic regression analysis resulted in an interactivity coefficient indicating that ''interactivity is worth $8.52 per month to the typical subscriber.'' Pelcovits WDT at 28; 4/19/10 Tr. at 137–39 (Pelcovits). Dr. Pelcovits then applied this $8.52 value for interactivity to the $13.30 mean value for the 11 interactive on-demand services he had analyzed (*see supra*). By this comparison, the interactivity feature comprised 64.1% of the entire value of the price paid by consumers for subscriptions to interactive webcasting subscriptions ($8.52/$13.30 = 64.1%). *Id.* Alternatively stated, the value of a noninteractive subscription would create an alternative interactivity adjustment factor of 35.9% (*i.e.,* 100% − 64.1%).

Based on the above techniques, Dr. Pelcovits derived three potential interactivity adjustment factors. Pelcovits WDT at 28. That range is shown in the following table.

Source	Interactivity adjustment
Comparison of Mean Subscription Rates—Unadjusted Subscription Prices	0.301
Comparison of Mean Subscription Rates—Adjusted Subscription Prices	0.311
Regression of Subscription Prices	0.359

Pelcovits WDT at 29.

(iv) Dr. Pelcovits's Derivation of Recommended Rates Based on the Foregoing Adjusted Benchmark Analysis

Dr. Pelcovits then multiplied the unadjusted per-play rate he had calculated in the benchmark market by the two adjustment factors. That is, he multiplied the unadjusted per-play rate by: (i) The per-play adjustment (that had accounted for the greater number of plays in the statutory noninteractive market) and (ii) the interactivity adjustment rate (calculated three different ways—two ''mean'' comparisons and one hedonic regression). Through this multiplication, Dr. Pelcovits derived the following range of recommended statutory per-play license fees:

[45] These ''permanent'' downloads are distinguished from the ''conditional'' downloads referred to by Mr. McCrady and discussed *supra,* because the listener cannot retain the ''conditional'' downloads after his or her subscription has expired. McCrady WDT at 12.

[46] ''Interactivity adjustment factor'' is simply the ratio of the mean noninteractive subscription price ($4.13) to the mean interactive subscription price, as calculated in two different ways ($13.70 or $13.30). Thus, the math is as follows: $4.13/$13.70 = 0.301 and $4.13/$13.30 = 0.311.

Recommended source of interactivity adjustment	Proposed statutory per-play rate (rounded)
Comparison of Mean Subscription Rates—Unadjusted Subscription Prices ($0.02194 × 0.51 × 0.301) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	$0.0034
Comparison of Mean Subscription Rates—Adjusted Subscription Prices ($0.02194 × 0.51 × 0.311) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	0.0035
Regression of Subscription Prices ($0.02194 × 0.51 × 0.359) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	0.0040

Pelcovits WDT at 33; *see* 4/19/10 Tr. at 142–45 (Pelcovits) (explaining step-by-step calculations to derive recommended statutory per-play royalty fee).

Dr. Pelcovits then calculated the simple average of the above three recommended rates—$0.0036 per play (rounded). Pelcovits WDT at 33; 4/19/10 Tr. at 145 (Pelcovits).

(b) Review of Dr. Pelcovits's Interactive Benchmark Analysis

(i) The Overemphasis on Subscription Revenues and the Failure To Account for Advertising Revenues

Dr. Pelcovits's interactive benchmark analysis is of some, albeit limited, assistance in determining the royalty rate in the noninteractive market. His analysis was based upon the subscription revenues of noninteractive webcasters, without accounting for their advertising revenues. In fact, ''the reality of a lot of the services is that they have a mix of subscribers and non-subscribers.'' 7/28/10 Tr. at 55 (Salinger); *see also* 4/20/10 Tr. at 312–13 (Pelcovits) (acknowledging that most listening to noninteractive webcasting is by non-subscribers).

Moreover, as noted *supra,* Dr. Pelcovits possessed data regarding advertising revenue for both the benchmark market and the statutory market, yet he chose not to focus on such data, asserting that it failed to reflect the willingness of consumers to pay for the services.[47] Pelcovits WDT at 24.

The Judges conclude that the interactive benchmark model as developed by Dr. Pelcovits is compromised, and its usefulness reduced, by its failure to take into account the advertising revenue received in both the interactive benchmark market and the statutory noninteractive market.

(ii) SoundExchange's Failure To Incorporate Independent Label Contract Rates in its Benchmark Analysis

Dr. Pelcovits relied upon the contracts between the major record companies and 18 webcasters in performing his interactive benchmark comparison. However, he completely excluded from his rate analysis the rates charged by the independent record companies in his benchmark interactive market and in the noninteractive market that is the subject of this proceeding. This is an important omission, because, as noted by Live365's rebuttal economic witness, Dr. Michael Salinger, approximately 40% of the music streamed on noninteractive webcasts is owned and licensed by independent labels. Salinger WRT at 15. On the other hand, Dr. Salinger did not provide any empirical support for the conclusion that inclusion of the rates charged by independent labels would have resulted in different rates. SX RFF at ¶¶ 101–103.

Thus, the issue becomes one of allocation of the burden of going forward with evidence on this point. The Judges conclude that since SoundExchange had collected information on 214 agreements between webcasters and record companies, including independents, it was in the best position to go forward with evidence indicating the impact, *vel non,* of the rates charged by the independent labels. By failing to do so, SoundExchange compromised the probative value of its benchmark analysis. Accordingly, the Judges conclude that the absence of any evidence as to the impact of the rates charged by the independent labels, either within the model itself or as an adjustment, diminishes the value of that interactive benchmark analysis.

(iii) SoundExchange's Failure To Adjust for the Downward Trend in Rates in the Interactive Benchmark Market

The effective play rate in the interactive benchmark market calculated by Dr. Pelcovits covered an 18-month period from 2007 through 2009. 4/20/10 Tr. at 309–10 (Pelcovits). Dr. Pelcovits relied upon the average rate in that 18-month period. However, he did not account for the fact that the rate had been declining during this period, from $0.02610 in 2007 down to $0.01917 in 2009. By relying upon the average during the period, $0.02194, and not weighting more heavily in that average the more recent periods, Dr. Pelcovits's model failed to account for the temporal decline of rates during his period of analysis. Salinger WRT at 16–17; Live365 Reb. Ex. 1; 7/28/10 Tr. at 127–28 (Salinger).[48] Thus, the Judges conclude that the interactive benchmark rate analysis is compromised by the failure to adequately weight this downward trend in rates.

However, as Dr. Salinger acknowledged, this concern could have been addressed by multiplying Dr. Pelcovits's recommended $0.0036 rate by the ratio of the low 2009 rate to the average rate over the 18-month period, *i.e.,* by multiplying that rate by .01917/.02194 (or .8737). 7/28/10 Tr. at 128–29 (Salinger). SoundExchange performed this calculation and noted that the rate established by its interactive benchmark analysis decreased to $0.0031, still above its proposed rates for the term of the license. SX PFF ¶ 210.

(iv) The Limited Data Regarding Noninteractive Plays

Dr. Pelcovits candidly admitted that he was unable to obtain data regarding the number of monthly noninteractive plays, because such data was not available. Pelcovits WDT at 31–32. Although he attempted to use a different source as a proxy for such data—the monthly plays by the Slacker Premium service that allegedly had some noninteractive features—the probative value of his analysis was diminished by this lack of sufficient data.

[47] Dr. Pelcovits's decision to ignore advertising revenues in his analysis implicitly constituted an *a priori* rejection of the noninteractive webcaster business model that seeks revenue primarily through advertising rather than from subscriptions.

[48] *See* note 24 *supra,* regarding the more serious problem with attempts to predict future industry trends.

(c) Problems With Dr. Pelcovits's Hedonic Regression Used as an Alternative To Measure the Value of Interactivity To Be Subtracted From Interactive Benchmark Value

Dr. Salinger set forth the same valid overarching criticism of Dr. Pelcovits's hedonic regression adjustment as he had asserted with regard to Dr. Pelcovits's adjustment based on the ratios of royalties to mean subscription rates in the two markets. That is, Dr. Salinger opined ''*any* estimate of a reasonable royalty rate . . . suffers from the fundamental flaw that noninteractive Internet radio is primarily an advertising-supported business, not a subscription business.'' Salinger WRT at 18 (emphasis added).

On a more granular level, Dr. Salinger further questioned the results of Dr. Pelcovits's hedonic regression. First, Dr. Salinger disagreed with Dr. Pelcovits's use of ''dummy variables'' (*i.e.,* ''fixed effects variables'') in the hedonic regression. Second, Dr. Salinger questioned the significance of the results given what Dr. Salinger testified was the relatively broad confidence interval bracketing the estimated interactivity coefficient in the hedonic regression. Salinger WRT at 20, 21 n.31 and Exhibit 6; 7/28/10 Tr. at 66–69 (Salinger).

With regard to the first issue, Dr. Salinger noted, and Dr. Pelcovits did not disagree, that dummy variables ''are indicator variables that capture unobserved characteristics whose value does not change over time.'' Salinger WRT at 21; *see also* Pelcovits WDT at 28.

In the present case, Dr. Pelcovits included fixed effects/dummy variables for six separate interactive services—one each offered by Classical Archives, Digitally Imported, Pasito Tunes, and Altnet (formerly Kazaa), respectively, and two offered by iMesh.com. In his Written Direct Testimony, Dr. Pelcovits did not comment upon the impact of these fixed effects/dummy variables. However, he also ran his regression *without* these fixed effects/dummy variables. This alternative regression increased the value of interactivity from $8.52 to $10.55 per subscriber per month. Salinger WRT at 20.

This higher value for the interactivity feature, when *subtracted* from the overall value of an interactive service as computed by Dr. Pelcovits, ''caus[ed] the estimated royalty rate to decline . . . from $0.0036 to $0.0023.'' Salinger WRT at 20 (emphasis added). SoundExchange did not contest the probative value of this criticism, but rather acknowledged: ''Dr. Pelcovits also ran regressions without the fixed effects variables, and those results were produced to Live365.'' SX PFF ¶ 215. The Judges are mindful that this essentially undisputed revised value—$0.0023—is highly proximate to the rates established in the WSA Agreements.[49]

Dr. Salinger's second specific criticism of Dr. Pelcovits's hedonic regression, identified above, concerns the breadth of the confidence interval within which lies Dr. Pelcovits's estimated interactivity coefficient. Specifically, Dr. Pelcovits did not provide any ''confidence interval'' around his result. Salinger WRT at 21–22 and n.31. Dr. Salinger calculated that, at a 95% confidence interval, Dr. Pelcovits's regression results would have a range that would be far less (on the low end of the range) than the rate that Live365 proposed and far higher (on the high end of the range) than the rates that SoundExchange proposed. *Id.*

3. The ''Affordability'' of the Proposed Interactive Benchmark Rates

Live365 asserted that SoundExchange's interactive benchmark rate was too high. Specifically, Live365 asserted that this interactive benchmark rate could not be utilized because numerous webcasters would be unable to afford the $0.0036 rate derived from that analysis. Live365 PFF ¶¶ 216–222. Although Live365 characterizes this alleged unaffordability as a ''reality check,'' it is no such thing. A single price established in any market by its very nature inevitably will restrict some purchasers who are unable or unwilling to pay the market price. (In common parlance, they may be said to have been ''priced out of the market.'') The rate of $0.0036 may be too high for other reasons (and indeed it is), but the fact that any particular number of webcasters might not profit under that rate, or that others would either shut down or never enter the market, is not evidence that the rate deviates from the market rate. The essence of a single market price is that it rations goods and services; by definition, a non-discriminatory price system therefore excludes buyers who cannot or will not pay the market price (and excludes sellers who cannot or will not accept the market price).

[49] Dr. Pelcovits also acknowledged that his hedonic regression did not necessarily isolate product characteristics (such as interactivity in the present proceeding) from supply and demand effects on prices (subscription rates in the present proceeding). 4/20/10 Tr. at 373–76.

4. Judges' Conclusions Regarding the Commercial Webcasters Rates

To summarize the Judges' conclusions as discussed above: [50]

- The Judges will set a per-performance rate, in light of the fact that neither of the contesting parties proposed a percentage-of-revenue based rate or any other rate structure.
- The Judges shall not utilize the Live365 Model to establish either the rate for commercial webcasters or the zone of reasonableness within which an appropriate rate would lie.
- The Judges shall utilize the rates set forth in the WSA Agreements between SoundExchange and the NAB and Sirius XM, respectively, to establish an approximate zone of reasonableness for the statutory rates to be determined in this proceeding.
- The Judges shall utilize the SoundExchange interactive benchmark analysis, adjusted to reflect the undisputed impact of the fixed effects/dummy variables, to establish an approximate zone of reasonableness for the statutory rates to be determined in this proceeding.

The Judges are also mindful of the procedural context of this determination, as summarized at the outset of this decision, *supra.* Rates were set for noninteractive commercial webcasting almost three years ago, on March 9, 2011, for the 2011–2015 rate period. No participant sought a rehearing or appealed those rates to the D.C. Circuit.

Further, after the D.C. Circuit vacated the March 9, 2011, determination and the case was remanded to the Judges, neither Live365 nor SoundExchange requested any new proceeding in connection with any aspect of the prior determination. Indeed, Live365 did not respond to the Judges' request for

[50] In considering the Live365 proposal, the willing buyer/willing seller standard in the Act encompasses consideration of economic, competitive, and programming information presented by the parties, including (i) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (ii) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. *See* 17 U.S.C. 114(f)(2)(B)(i) and (ii). The adoption of an adjusted benchmark approach to determine the rates leads this panel to agree with *Web II* and *Web I* that such statutory considerations implicitly have been factored into the negotiated prices utilized in the benchmark agreements. *Web II,* 72 FR at 24095; *Web I,* 67 FR at 45244. Therefore, the Judges have implicitly incorporated such considerations in the evaluation of the benchmark proposals submitted by SoundExchange. Accordingly, the Judges conclude that SoundExchange's separate analyses discussing these statutory factors, *see* SoundExchange PFF, Point IX, are subsumed in its willing buyer/willing seller analyses.

suggestions as to how to proceed with the remand, and SoundExchange responded only with regard to the minimum fee issue that had been challenged on appeal by IBS, stating that the prior determination in that regard should be reaffirmed.

Thus, it is clear that the contesting parties had accepted the rates as established in the March 9, 2011, determination. The Judges are reluctant to upset settled expectations by retroactively altering rates that have been established for several years, and that licensees have already paid in some years, provided that those rates fall within the zone of reasonableness that the Judges determine in this proceeding.

The present *de novo* determination is substantively distinct in a number of respects from the prior determination, but the analysis leads to an approximate ''zone of reasonableness'' within which an appropriate rate for commercial webcasters can be established that includes the rates established in the March 9, 2011 determination.

Specifically, the Judges find that the approximate zone of reasonableness for the rates for commercial webcasters for the 2011–2015 rate period is as follows:

Year	Lower bound	Upper bound
2011	$0.0017 (NAB/SX rate)	$0.0023 (lowest adjusted interactive rate).
2012	$0.0020 (NAB/SX; Sirius XM/SX rate)	$0.0023 (lowest adjusted interactive rate).
2013	$0.0021 (Sirius XM/SX rate)	$0.0023 (lowest adjusted interactive rate).
2014	$0.0022 (Sirius SM/SX rate)	$0.0023 (lowest adjusted interactive; NAB/SX rate).
2015	$0.0023 (lowest adjusted interactive rate)	$0.0025 (NAB/SX rate).

The Judges recognize that the rates set previously for the 2011–2015 term fall within this zone of reasonableness,[51] and hereby adopt them.

Accordingly, with regard to the license for commercial webcasters, the Judges set the following per-play rates for the five-year period that began in 2011:

Year	Rate
2011	$0.0019
2012	$0.0021
2013	$0.0021
2014	$0.0023
2015	$0.0023

V. Rates For Noncommercial Webcasters

A. Noncommercial Educational Webcasters

On August 13, 2009, SoundExchange and CBI submitted a joint motion under 17 U.S.C. 801(b)(7)(A) regarding a partial settlement ''for certain internet transmissions by college radio stations and other noncommercial educational webcasters'' (CBI/SoundExchange Agreement). The parties sought to make the agreed rates and terms applicable to noncommercial educational webcasters for the period 2011 through 2015.[52] *Joint Motion to Adopt Partial Settlement,* at 1 (Aug. 13, 2009). CBI and SoundExchange reached the CBI/SoundExchange Agreement under authorization granted by the 2009 WSA. The Copyright Office published the terms of the settlement in the **Federal Register**. *See* 74 FR 40616 (Aug. 12, 2009). By virtue of that publication, the CBI/SoundExchange Agreement is ''available, as an option, to any . . . noncommercial webcaster meeting the eligibility conditions of such agreement.'' 17 U.S.C. 114(f)(5)(B).

On April 1, 2010, the Judges published the CBI/SoundExchange Agreement, with minor changes,[53] under the authority of section 801(b)(7)(A) of the Act. *See* 75 FR 16377 (Apr. 1, 2010) (including CBI/SoundExchange Agreement and NAB/SoundExchange Agreement). With respect to rates, the Agreement imposes an annual, nonrefundable minimum fee of $500 for each station or individual channel, including each of its individual side channels. *Id.* at 16384. Under the Agreement, those noncommercial educational webcasters whose monthly ATH exceed 159,140, pay additional fees on a per-performance basis. The CBI/SoundExchange Agreement also provides for an optional $100 proxy fee that noncommercial educational webcasters may pay in lieu of submitting reports of use of sound recordings. The agreement also contains a number of payment terms.

Section 801(b)(7)(A) of the Act provides that, after providing notice and opportunity for affected parties to comment, the Judges shall adopt a settlement agreement among some or all of the participants in a proceeding as a basis for statutory rates and terms, unless a participant in the proceeding objects and the Judges find that the agreement does not provide a reasonable basis for setting rates and terms. The Judges received 24 comments from terrestrial radio stations favoring adoption of the CBI/SoundExchange Agreement.[54] IBS opposed adoption of the CBI/SoundExchange Agreement. The Judges held a hearing on those objections on May 5, 2010.[55]

[51] However, the zone of reasonableness in this determination is significantly tighter than the zone established in the vacated determination. Specifically, the zone in the vacated determination was bracketed by a low per-play rate of $0.0019 and a high rate of $0.0036. 76 FR at 13036.

[52] The proposed regulatory language in the CBI/SoundExchange agreement originally included the following sentences in 37 CFR 380.20(b) that created confusion as to whether SoundExchange and CBI were asking the Judges to adopt the agreement as an option for noncommercial educational webcasters or whether the agreement would be binding on all noncommercial educational webcasters:

However, if a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this subpart.

Digital Performance Right in Sound Recordings and Ephemeral Recordings, Proposed rule, 75 FR 16377, 16383 (Apr. 1, 2010); *see* 5/5/10 Tr. at 5–51 (Hearing on Joint Motion to Adopt Partial Settlement).

With the concurrence of SoundExchange's counsel, *see* 5/5/10 Tr. at 46–47, 50–51 (Hearing on Joint Motion to Adopt Partial Settlement), the Judges find the language confusing and unnecessary and decline to adopt it.

[53] The Judges modified a reference to earlier regulations to bring it up to date. Deeming it inappropriate to the purpose of CRB regulations, the Judges declined to adopt language regarding compliance or noncompliance with the Agreement and reservation of rights. *See* note 52 *supra,* and accompanying text.

[54] Many of these comments asserted that the rate structure was compatible with their stations' respective budget constraints, *see, e.g., Comment of Bill Keith for WSDP Radio, Plymouth-Canton Community Schools* (Apr. 20, 2010) (''The monetary amount was reasonable and most college or high school stations can live with the amounts charged for webcasting''), and several expressed satisfaction with the $100 proxy fee in lieu of reports of use. *See, e.g., Comments of Christopher Thuringer for WRFL, University of Kentucky* (Apr. 20, 2010); *Comments of David Black, General Manager, WSUM–FM* (Apr. 19, 2010).

[55] The Judges deferred a decision whether to adopt the settlement until IBS had an opportunity to present its witness testimony as part of its direct and rebuttal cases.

The rationale for the IBS objection to adoption of the settlement described in the CBI/SoundExchange Agreement has remained elusive throughout the proceeding. In its initial comments, IBS expressed its concern that adoption of the agreement would create an ''impression'' that the Judges had ''prejudged the outcome of the adjudicatory hearing,'' notwithstanding IBS's acknowledgement that ''the proposed rates and terms . . . are non-exclusive, *i.e.,* [the Agreement] provides for other parties' agreeing with SX to different rates and terms.'' *Comments of IBS* (Apr. 22, 2010).

During the May 5, 2010, hearing, IBS argued that by moving for adoption of their settlement agreement, CBI and SoundExchange were ''attempt[ing] to freeze IBS out of statutory rights to a decision from the Board on the record.'' 5/5/10 Tr. at 52 (Hearing on Joint Motion to Adopt Partial Settlement). IBS also raised for the first time specific exceptions to the $500 minimum fee and $100 proxy fee that are part of the CBI/SoundExchange Agreement. *Id.* at 62–64.

In closing argument, IBS reiterated its objection to adoption of the CBI/SoundExchange Agreement. When pressed by the Judges to articulate specific objections, IBS counsel stated that IBS objected to the agreement to the extent it applied to IBS's smaller members.[56] By this, the Judges understand counsel to be expressing concern that adoption of the agreement would prevent IBS from pursuing its rate proposal (for ''small'' and ''very small'' noncommercial webcasters) in the proceeding.

The Judges find that IBS did not interpose a proper objection under section 801(b)(7)(A)(ii) of the Act that would require the Judges to weigh the reasonableness of the CBI/SoundExchange Agreement. IBS's objection is premised on the erroneous assumption that adoption of the agreement would prevent IBS from pursuing its rate proposal. IBS's proposal relates to different categories of webcasters from those covered by the CBI/SoundExchange Agreement. While the latter covers noncommercial educational webcasters, the IBS proposal covers noncommercial webcasters (whether or not they qualify as ''educational'') that fall within its definitions of ''small'' and ''very small.'' Adoption of the one does not preclude (and has not precluded) consideration of the other.

In addition, even if the Judges were to consider IBS's objection to be proper, IBS failed to present any evidence to support a conclusion that the CBI/SoundExchange Agreement does not form a reasonable basis for setting rates and terms for noncommercial educational webcasters. IBS's counsel made dire predictions that the rate structure adopted in the agreement would prevent many IBS members from performing webcasting services. *See, e.g.,* 5/5/10 Tr. at 62–64 (Hearing on Joint Motion to Adopt Partial Settlement). IBS did not offer testimony from any adversely affected member, however, in spite of the Judges' invitation to do so. *Id.* at 81–82. By contrast, 24 noncommercial webcasters filed comments with the Judges stating that they support the rates and terms of the CBI/SoundExchange Agreement, which they found reasonable and affordable. The Judges find those comments to be both credible and persuasive.

Finding neither a proper nor a credible objection to the CBI/SoundExchange Agreement, nor other grounds requiring rejection, the Judges adopt the agreement (with the modification described *supra* at note 52) as the basis for rates and terms for noncommercial educational webcasters for the period 2011–2015.

B. Other Noncommercial Webcasters

1. Rate Proposals of the Participants

For noncommercial webcasters, SoundExchange proposes a royalty of $500 per station or channel (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with CBI) for each calendar year or part of a calendar year during which the webcaster is a licensee under sections 114 and 112 of the Act. The licensee would pay the royalty in the form of a $500 per station or channel annual minimum fee, with no cap. The $500 fee would constitute the minimum fee under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B), and would permit the noncommercial webcaster to perform sound recordings up to a limit of 159,140 ATH per month. If a station or channel were to exceed the ATH limit in any month, then the noncommercial webcaster would pay at the commercial usage rates for any overage. *Second Revised Proposed Rates and Terms of SoundExchange,* at 3–4 (July 23, 2010). SoundExchange's proposal would cover all noncommercial webcasters that are not covered by the CBI/SoundExchange Agreement (*i.e.,* noncommercial educational webcasters).

The IBS rate proposal is more difficult to discern. *See, e.g.,* 4/22/10 Tr. at 774–93 (Kass).[57] IBS proposes to create two new categories of noncommercial webcasters: Small noncommercial webcasters (defined as noncommercial webcasters with usage up to 15,914 ATH per month) and very small noncommercial webcasters (defined as noncommercial webcasters with usage up to 6,365 ATH per month). *Amplification of IBS's Restated Rate Proposal,* at 1 (July 28, 2010). Under the IBS proposal, small noncommercial webcasters would pay a flat annual fee of $50, which would also constitute the minimum fee. Very small noncommercial webcasters would pay a flat annual fee of $20, which would constitute the minimum fee. *Id.* at 2. Noncommercial webcasters that exceed

[56] [THE JUDGES]: You're not proposing a rate for noncommercial educational webcasters. Only CBI and SoundExchange are.

MR. MALONE: Right.

[THE JUDGES]: So why are you objecting to the adoption of that if you have a—two separate categories that you want adopted?

MR. MALONE: Well, the judges can certainly say that—I mean, there's nothing incompatible with them. The—

[THE JUDGES]: But I'm asking you why are you still objecting to the adoption of a $500 minimum fee for noncommercial educational webcasters when you have proposed new fees for two new types of services and have not proposed a fee for something called a noncommercial educational webcaster?

MR. MALONE: Well, our—

[THE JUDGES]: Where is your dog in that fight? I don't see it.

MR. MALONE: All right. The dog in that fight is—and, again, excluding indirect effects that I understand to be the context of your question. We have no objection to the terms that are there as long as they don't apply to our small stations.

[THE JUDGES]: So you're just objecting to it on the theory that you just hope that what's ever in there doesn't somehow get applied to your case, even though you're asking for two completely different services?

MR. MALONE: That's essentially correct, Your Honor.

9/30/10 Tr. at 660–61 (IBS Closing Argument).

[57] IBS did not file a formal rate proposal with the Judges prior to the evidentiary hearing. Instead, IBS included a vague request in the written direct testimony of one of its three witnesses, Frederick J. Kass, Jr., IBS's chief operating officer. Kass WDT at 1, 9 (''IBS Members should only pay for their direct use of the statutory license by the IBS Member. There should be no minimum fee greater than that which would reasonably approximate the annual direct use of the statutory license, not to exceed $25.00 annually.''). Capt. Kass's written testimony also included as an exhibit a joint petition to adopt an agreement negotiated between the RIAA, IBS, and the Harvard Radio Broadcasting, Co. that was submitted to the Copyright Office on August 26, 2004. That agreement contained rates that diverged from those Capt. Kass proposed in his testimony. This discrepancy led to a convoluted discussion during Capt. Kass's live testimony as the Judges strived to determine precisely what rate structure IBS was seeking. 4/22/10 Tr. at 774–93 (Kass). After the hearing, IBS submitted a ''Restatement of IBS's Rate Proposal'' on May 21, 2010, and an ''Amplification of IBS's Restated Rate Proposal'' on July 28, 2010. The proposal summarized in text is from IBS's July 28, 2010, submission.

15,914 ATH would be subject to the noncommercial webcasting rates proposed by SoundExchange, including SoundExchange's proposed per performance rates for transmissions in excess of 159,140 ATH per month. *Id.* IBS also expressly adopted SoundExchange's proposal with regard to ephemeral recordings under section 112. *Id.*

IBS also proposed that noncommercial webcasters transmitting more than 15,914 ATH but no more than 55,000 ATH per month, be permitted to pay a $100 annual proxy fee in lieu of submitting reports of use. *Id.* at 3. IBS proposed that noncommercial webcasters transmitting fewer than 15,914 ATH per month be exempted from making reports of use. *Id.* While couched as part of IBS's rate proposal, this is a proposed term that the Judges will consider in the discussion of terms, *infra,* part VI.

As an alternative to the foregoing proposal, IBS stated that it was ''prepared to offer to SoundExchange'' an annual $10,000 payment to cover IBS members that are small noncommercial webcasters. *Id.* The $10,000 payment was apparently an estimate based on IBS's proposed rates for ''small'' and ''very small'' noncommercial webcasters; to the extent that participation by IBS members were to exceed $10,000, ''there would be a true up within 15 days of the end of the year.'' *Id.*[58]

2. Evaluation of the Rate Proposals and Determination of Rates

Section 114(f)(2)(B) of the Act directs the Judges to ''distinguish among the different types of . . . services then in operation'' in applying the willing buyer/willing seller standard to determine rates and terms. *Id.* The recognition of different services is to be ''based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.'' *Id.*

In *Web II,* the Judges found that noncommercial webcasters constituted a different type of service that should be subject to a different rate from commercial webcasters.

> Based on the available evidence, we find that, up to a point, certain ''noncommercial'' webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than . . . for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve . . . . The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.

Web II, 72 FR at 24097. As a safeguard to ensure that the distinct segment of the market occupied by noncommercial webcasters did not encroach on the segment occupied by commercial webcasters, the Judges capped eligibility for the noncommercial rate at 159,140 ATH per month. *Id.* at 24097, 24099–100.

In this proceeding both SoundExchange and IBS have proposed rates for noncommercial webcasters that differ from the rates for commercial webcasters, implicitly endorsing the commercial/noncommercial distinction adopted by the Judges in *Web II.* For noncommercial webcasters that do not exceed the 159,140 ATH monthly thresholds, these participants have proposed the continuation of what is economically a zero rate for the sound recordings (together with a $500 minimum fee).

The Judges conclude that it is appropriate to continue this commercial/noncommercial distinction because there is a good economic foundation for maintaining this dichotomy. More specifically, a ''noncommercial'' webcaster by definition is not participating fully in the private market. Although the costs associated with the production and delivery of a sound recording remain the same regardless of whether it is played by a commercial or noncommercial webcaster, apparently the noncommercial webcaster receives little or no customer or advertiser revenue. (Revenue must be received from some source though, in order to pay the minimum fee.)

The zero per-performance fee has an economic basis because it reflects: (i) The paucity of revenue earned by a noncommercial webcaster; and (ii) the essentially zero marginal cost to the licensors of supplying an additional copy of a sound recording. The $500 annual minimum fee per channel or station defrays a portion of the transaction costs incurred in administering the license.[59]

Where SoundExchange and IBS part company is with IBS's proposal to make further distinctions among noncommercial webcasters based on the quantity of sound recordings they transmit under the statutory license (as measured by ATH).

Section 114(f)(2)(B) expressly mentions the quantity of use of sound recordings as an element that may be considered in recognizing different types of services. If a participant in a rate proceeding were to present evidence that, in a hypothetical marketplace, a willing buyer and a willing seller would negotiate a different rate for noncommercial webcasters at a given ATH level than they would for all other noncommercial webcasters, that would argue in favor of recognizing noncommercial webcasters at that ATH level as a distinct type of service. IBS, however, did not present any such evidence.

IBS presented testimony from three witnesses as part of its direct case.[60] Mr. John Murphy, general manager of WHUS at the University of Connecticut, Mr. Benjamin Shaiken, a student at the University of Connecticut and operations manager of WHUS, and Captain Kass, each testified about the distinctions between college (and, to a lesser extent, high school) radio stations and commercial radio stations. 4/21/10 Tr. at 570–73 (Murphy); Murphy WDT ¶ 4; 4/21/10 Tr. at 615 (Shaiken); Shaiken WDT ¶ 6; 4/22/10 Tr. at 761, 765 (Kass); Kass WDT ¶ 6. This is beside the point. There is no dispute between SoundExchange and IBS as to whether there should be different rates for commercial and noncommercial webcasters. Both participants accept the commercial/noncommercial distinction that was part of the Judges' determination in *Web II,* and the Judges adopt it in this proceeding. The issue at hand is whether there should be a

[58] It is unclear whether IBS intended this proposed payment as part of the rates proposed to the Judges for adoption, or as an offer to SoundExchange. Given the Judges' rejection of IBS's proposed rate structure, it is not necessary to resolve this ambiguity.

[59] Of course, this rate structure does not permit the licensors to recoup from the noncommercial webcasters any portion of the long-term (non-marginal) costs incurred in the creation and production of sound recordings.

[60] The Judges declined to admit the testimony of IBS's sole rebuttal witness, Frederick Kass, after it became apparent that his Written Rebuttal Testimony was not submitted in accordance with the Judges' rules (it was not verified in accordance with 37 CFR 350.4(d)) and Capt. Kass was unfamiliar with its contents. 7/29/10 Tr. at 292–96 (Kass). IBS sought reconsideration of the decision, which the Judges denied. *Order Denying IBS's Motion for Reconsideration of the Rulings Excluding Its Rebuttal Case* (Aug. 18, 2010). Even if Capt. Kass's testimony had been admitted, it could not have made up for the deficiencies of IBS's direct case, as such testimony would have been outside the scope of rebuttal testimony.

distinction among different groups within the category of noncommercial webcasters.

IBS's primary contention to support a different rate for ''small'' and ''very small'' noncommercial webcasters was that entities falling into those categories are unable to pay the $500 minimum fee proposed by SoundExchange. This argument fails for several reasons.

First and foremost, there is no record evidence to support the contention that noncommercial webcasters who transmit less than 15,914 ATH per month are unable to pay a $500 minimum royalty. IBS did not offer testimony from any entity that demonstrably qualified as a ''small'' or ''very small'' noncommercial webcaster.[61] Conclusory statements by counsel that a $500 minimum royalty is unaffordable for smaller noncommercial webcasters are not evidence. *See, e.g.,* 5/5/10 Tr. at 62–64 (Hearing on Joint Motion to Adopt Partial Settlement); IBS PFF at ¶¶ 9–10; IBS PCL at ¶ 4. Further, these assertions are undercut by testimony that some of these same entities pay IBS close to $500 annually for membership dues and fees for attending conferences. *See* 4/22/10 Tr. at 803–05 (Kass). The only testimony that mentions any specifics about the finances of smaller webcasters is a reference by Captain Kass to a survey that showed that IBS members had an average annual operating budget of $9,000. Kass WDT at ¶ 9. The survey, which was conducted more than ten years ago, 4/22/10 Tr. at 835 (Kass), was not offered into evidence. Without documentary evidence that would allow the Judges to assess the validity of the survey, Capt. Kass's reference to it cannot be accepted as evidence. *See* 37 CFR 351.10(e). Even if the Judges could accept such a reference as evidence, it would not advance IBS's case. On its face, an assertion that the average operating budget for IBS members is $9,000 does not establish that its members lack the wherewithal to pay a $500 minimum royalty.

There also is no evidence in the record to establish any correlation between the quantity of sound recordings being transmitted by a noncommercial webcaster and the size of that webcaster's operating budget (and, thus, its ability to pay a $500 annual minimum fee).

In addition, the evidence strongly suggests that the ATH cutoffs that IBS proposed for ''small'' and ''very small'' noncommercial webcasters are arbitrary. It appears that IBS chose ATH levels that represent 10% and 4%, respectively, of the ATH cutoff for noncommercial webcasters employed in *Web II* and SoundExchange's rate proposal. *Id.* at 787, 791; IBS PFF at ¶ 10; IBS PCL at ¶ 1. Nothing in the record substantiates these ATH levels as definitive or conclusive of a webcaster's ability to pay a $500 minimum royalty.

Finally, even if there were a sufficient basis in the record to conclude that ''small'' and ''very small'' noncommercial webcasters are unable to pay a $500 minimum fee, that, in itself, does not demonstrate that a willing seller in a hypothetical marketplace would be prepared to negotiate a different, lower rate with them. That proposition is particularly dubious in this proceeding given the evidence in the record (discussed *infra*) that SoundExchange's average annual administrative cost exceeds $500 per station or side channel. The record does not support a conclusion that, in a hypothetical marketplace, a willing seller would agree to a price that is substantially below its administrative costs.

As to the statutory criterion of the ''nature of the use of sound recordings'' for distinguishing between types of services, there is no evidence in the record establishing that the use of sound recordings by ''small'' and ''very small'' noncommercial webcasters differs qualitatively from that of other noncommercial webcasters. 9/30/10 Tr. at 647–51 (IBS Closing Argument) (conceding the point).

For the foregoing reasons, the Judges find that IBS has failed to establish a basis for its proposal to recognize ''small'' and ''very small'' noncommercial webcasters as types of services that are distinct from noncommercial webcasters generally. The remainder of the IBS rate proposal (for noncommercial webcasters that exceed 15,914 ATH per month) is identical to the SoundExchange rate proposal. As noted *supra,* IBS proposed an additional term for a subset of noncommercial webcasters. This is discussed *infra,* part VI. The Judges, therefore, reject the IBS proposal for ''small'' and ''very small'' noncommercial webcasters and proceed to evaluate the SoundExchange rate proposal for noncommercial webcasters.

SoundExchange contends that its rate proposal (i) most closely approximates the rate that a willing buyer and willing seller would negotiate in a hypothetical market, (ii) is demonstrably affordable to a broad range of noncommercial webcasters, and (iii) is objectively reasonable given the average administrative cost per service or channel. The Judges agree.

The CBI/SoundExchange Agreement (*see* III.B.2.A, *supra*) is persuasive evidence that SoundExchange's proposal satisfies the willing buyer/willing seller standard. That negotiated agreement employs the same minimum per-channel fee without a cap, as well as the 159,140 ATH limitation. The fact that 24 noncommercial webcasters filed comments supporting the agreement corroborates that conclusion.

SoundExchange points out that it was established in *Web II* that 363 noncommercial webcasters paid royalties in 2009 similar to SoundExchange's current rate proposal, with 305 of those webcasters paying only the $500 minimum fee. *Web II (Determination on Remand),* 75 FR at 56874. Taken together with IBS's failure to present even a morsel of contrary evidence, the Judges find this fact to be strong evidence that noncommercial webcasters are able and willing to pay the proposed fees.[62]

[61] The two IBS witnesses who were actually engaged in webcasting were both affiliated with WHUS at the University of Connecticut, Storrs. There is no record evidence regarding the quantity of sound recordings transmitted by WHUS. Two facts in the record—WHUS's 2009 annual revenues of more than $500,000, and their annual profits of more than $87,000, 4/21/10 Tr. at 583–86 (Murphy)—suggest that WHUS is not a ''small'' or ''very small'' webcaster as those terms are conventionally understood. *See also id.* at 590 (''WHUS is probably one of the most financially well-off stations in the entire IBS system'').

[62] In its proposed findings, IBS introduced two new related arguments: (i) ''Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses,'' and (ii) the Judges are required under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6), to determine whether the $500 fee unnecessarily burdens IBS's members. IBS PFF (Reformatted) at ¶¶ 10–13. Both contentions are without merit.

The Judges find no support in the text or legislative history of the Act for the proposition that rates adopted under section 114(f)(2) must be tailored to benefit small businesses. The statute is quite clear that the Judges' task is to determine rates that ''most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 114(f)(2)(B).

IBS has also failed to establish that the RFA applies to this proceeding. The RFA defines a ''rule'' (that triggers review under the Act) as ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the APA. 5 U.S.C. 601(2). Determinations of the Judges in rate proceedings are not subject to the notice and comment rulemaking process under the APA. Moreover, the RFA's definition of ''rule'' specifically excludes ''a rule of particular applicability relating to rates.'' *Id.*

Nor has IBS established that any of its members (or any entities falling within its proposed definitions of ''small'' and ''very small'' noncommercial webcasters) are ''small entities'' as defined in 5 U.S.C. 601(6). IBS did not introduce any evidence concerning any webcaster other than WHUS, and never even identified its own members in this proceeding.

In any event, the Judges did consider the circumstances of noncommercial webcasters in

Continued

Finally, the testimony of Ms. Barrie Kessler, SoundExchange's Chief Operating Officer, demonstrates that the $500 annual minimum fee is reasonable. Ms. Kessler estimated SoundExchange's annual administrative cost per station or channel to be approximately $825 on average. Kessler WDT at 25. IBS offered no persuasive evidence to dispute this estimate. As the Judges have noted in previous proceedings, it is reasonable and appropriate for the minimum fee to at least cover SoundExchange's administrative cost. *See, e.g., Web II (Determination on Remand),* 75 FR at 56873–74. With the average administrative cost exceeding $800, the Judges find a $500 minimum fee to be eminently reasonable and appropriate.

In conclusion, the Judges find that the evidence in this proceeding strongly supports SoundExchange's rate proposal for noncommercial webcasters. The Judges adopt that proposal for the 2011–2015 rate period.

VI. Terms

As part of every rate determination, the Judges adjust the regulatory language that effects the rate changes. These implementing terms are published in title 37 of the Code of Federal Regulations. The Judges are obliged to adopt agreed terms if, after published notice, no party prospectively bound by the terms objects. *See* 17 U.S.C. 801(b)(7)(A). For the Judges to adopt a contested proposed term, the proponent must show support for its adoption by reference to the record of the proceeding.

In this proceeding, both SoundExchange and Live365 proposed changes to the existing regulatory language. Some of the terms proposed by SoundExchange are contained in the NAB/SoundExchange and CBI/SoundExchange agreements adopted in this proceeding. The Judges will adopt any contested proposed terms only if the proponent meets its evidentiary burden.

A. Uncontested Terms

1. Collective

The Judges have concluded previously that designation of a single Collective is economically and administratively efficient. No party to this proceeding requested a different or additional Collective. SoundExchange seeks to continue as the sole Collective for royalties paid by commercial and noncommercial webcasters under the licenses at issue in this proceeding for the period 2011–2015.

SoundExchange is a section 501(c)(6) nonprofit organization governed by a Board of Directors comprised of an equal number of artist representatives and copyright owners. *See* Kessler WDT at 2. Over the years of its service as the Collective, SoundExchange has gained knowledge and experience and has developed efficient systems for achieving the goals of the Collective at a reasonable cost to those entitled to the royalties. *See id.* at 4. In the absence of any request or suggestion to the contrary, the Judges designate SoundExchange as the Collective for the 2011–2015 license period.

2. Stipulated Terms and Technical and Conforming Changes

SoundExchange and Live365 stipulated to certain terms in the Proposed Regulations appearing as an attachment to the Second Revised Proposed Rates and Terms of SoundExchange, Inc., filed July 23, 2010. They stipulated that some of the current provisions of the webcasting terms remain unchanged, that some provisions be removed or changed because the terms were applicable only to the 2006–2010 license period, and that some provisions be changed to reflect the terms of the NAB/SoundExchange and CBI/SoundExchange agreements.

The Judges find that the stipulated terms constitute for the most part technical and non-controversial changes that will add to the clarity of the applicable regulations. The Judges, therefore, adopt the terms proposed jointly by SoundExchange and Live365. In addition, the Judges adopt what they deem to be technical and conforming changes to the regulations proposed by SoundExchange, and not opposed by any party, in Section IV of their Second Revised Rates and Terms, filed July 23, 2010.

3. Electronic Signature on Statement of Account

SoundExchange proposed eliminating the requirement of a handwritten signature on the statement of account found in section 380.4(f)(3). SX PFF at ¶ 576. According to SoundExchange, allowing electronic signatures would make it easier for licensees to submit their statements of account. *Id., citing* Funn WRT at 3 n.1. Live365's proposed regulations would also eliminate the requirement for a handwritten signature on the statement of account. *See* Attachment to PFF, Proposed Regulations, § 380.4(f)(3).

The Judges find that this uncontested term would improve the ease and efficiency with which statements of account may be processed electronically. In addition, they find the change to be consonant with the public policy preference expressed by Congress in adopting the E–SIGN Act, Public Law 106–229, 114 Stat. 464 (June 30, 2000), which established a general rule upholding the validity of electronic signatures in interstate and foreign commerce.

The Judges note that the terms they adopted with regard to other categories of licensees did not eliminate the extant requirement for a handwritten signature on statements of account. *See, e.g.,* 37 CFR 380.13(f)(3) (for Broadcasters); 380.23(f)(4) (for Noncommercial Educational Webcasters). The signatories to the Agreements incorporating the handwritten signature requirement did not participate in the hearing, however, and did not request a change in the signature requirement in this proceeding. Given the advance of technology, the Judges anticipate such requests in the forthcoming rulemaking proceeding. *See* note 66, *infra.*

The adopted terms are included in the appended regulatory language.

B. Contested Terms for Commercial Webcasters

1. Terms Proposed by Live365

Live365 proposed changes to the definitions of two terms in section 380.2: ''performance'' and ''aggregate tuning hours.'' [63] Live365 PFF at ¶ 387 and PCL at ¶ 79. Specifically, Live365 proposed to modify the definition of ''performance'' to ''exclude[ ] any performances of sound recording that are not more than thirty (30) consecutive seconds.'' Live365 PFF at ¶ 387. Live365 suggested this modification would conform the definition of ''performance'' in section 380.2 to that of a ''performance'' or ''play'' defined in the four interactive service agreements reviewed by Dr. Pelcovits. *Id.* Live365 also contended that precedent has excluded partial performances from ''royalty-bearing'' performances, citing *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket Nos.*

establishing the $500 fee, and found that the evidence supported their willingness and ability to pay it.

[63] In the proposed regulations attached to its proposed findings of fact, Live365 included an additional term: A proposed deadline for the completion and issuance of a report regarding an audit to verify royalty payments. *See* Attachment to Live365's Proposed Findings of Fact and Conclusions of Law, § 380.6(g). Live365 did not discuss this proposal in its proposed findings and conclusions, and Live365 presented no evidence to support the need for such a term. The Judges consider the proposal withdrawn.

2002–1 CARP DTRA3 & 2001–2 CARP DTNSRA, 68 FR 27506, 09 (May 20, 2003).

Live365's proposal regarding the definition of ''aggregate tuning hours'' sought to exclude programming that does not contain recorded music, *e.g.,* talk, sports, and advertising not containing music. Live365 PCL at ¶ 79. Live365 asserted ''programming without sound recordings should not be subject to consideration in regulations dealing with a royalty to be paid for the use of sound recordings.'' *Id.*

SoundExchange opposed both of the Live365 proposed modifications. SoundExchange contended that these proposed modifications would constitute new terms, not revisions to a rate proposal, which SoundExchange asserted may be revised, under section 351.4(b)(3), at any time up to and including submission of proposed findings of fact.[64] SX Reply Findings of Fact at ¶ 223 (hereinafter, RFF).

SoundExchange asserted that Live365's citation to interactive service agreements without more did not provide sufficient analysis and was insufficient to show the need for or benefit of the requested redefinition of ''performance.'' *Id.* at ¶¶ 226–228. SoundExchange pointed to Live365's failure to consider the potential effect of its definition of ''performance'' on the per-performance rate presented by Drs. Pelcovits and Fratrik. *Id.* at ¶ 230. SoundExchange contended that if the Live365 performance exclusion proposal were adopted, SoundExchange would require an upward adjustment to the per-performance rate.[65] *Id.*

With regard to the request to redefine ''aggregate tuning hours,'' SoundExchange argued that Live365 failed to point to anything in the record explaining, much less supporting, the need for the proposed change. *Id.* at ¶¶ 231–232. Live365 offered no evidence or analysis regarding the development of a performance rate based on the current definition of ''aggregate tuning hours.'' The parties developed their evidence regarding the proposed performance royalty rates using the existing definition.

Live365 has not met its burden regarding adoption of these terms. The Judges, therefore, decline to adopt either of Live365's proposed definitions.

[64] The Judges need not address this argument as they decline to adopt the proposal on other grounds.

[65] According to SoundExchange, the upward adjustment would result from a reduction in the number of plays in the calculation of a per-performance rate. SX RFF at ¶ 230.

2. Terms Proposed by SoundExchange

SoundExchange proposed several terms relating to the Webcasters' royalties at issue in this proceeding.[66] The terms proposed by SoundExchange follow.

a. Server Log Retention

SoundExchange urged the Judges expressly to include server logs as records to be retained pursuant to section 380.4(h). *See* Second Revised Rates and Terms of SoundExchange, Inc., Section III.A., Proposed Regulations, § 380.4(h) (July 23, 2010); Kessler Corrected WDT at 27. SoundExchange asserted that retention of these records is required under the current regulations, but requested this amendment because not all licensees retain server logs. SX PFF at ¶¶ 556–57; Kessler Corrected WDT at 27. SoundExchange asserted that ''[t]he evidence indicates marketplace acceptance of such a term,'' citing to the CBI/SoundExchange Agreement which contains an equivalent term. SX PFF at ¶ 555.

In its opposition to this term, Live365 noted that neither the NAB/SoundExchange Agreement nor the Commercial Webcasters Agreement contained this term nor do any of the interactive service agreements submitted in this proceeding. Live365 RFF at ¶ 555. Live365 further argued that SoundExchange failed to establish that the benefits to SoundExchange of this term outweigh the burden on licensees to comply. *Id.* at ¶ 557.

The Judges find that SoundExchange has failed to meet its evidentiary burden. None of the interactive agreements in evidence is as specific as the regulation SoundExchange proposes. Live365 Exs. 17 and 18; McCrady WDT, Exs. 104–DR & 106–DR. Rather, the agreements require licensees only to retain records relating to their obligations under the agreement and in terms no more specific than in the current regulation. *See, e.g.,* Live365 Exs. 17 at ¶ 7(h) and Ex. 18 at ¶ 7(h); McCrady WDT, Exs. 104–DR at ¶ 6(j) and 106–DR at ¶ 4(h). Since these agreements were negotiated in a setting free from the constraints of the regulatory scheme, they provide the best evidence of the agreement of a willing buyer and a willing seller in this respect.

SoundExchange's assertion that inclusion of this term in the CBI/SoundExchange Agreement constitutes ''marketplace acceptance'' is overbroad. As SoundExchange acknowledged, the parties reached agreement under atypical marketplace conditions, overshadowed by the possibility of a regulatory proceeding. *See* 9/30/10 Tr. at 547–48 (SoundExchange Closing Argument). Furthermore, while the CBI/SoundExchange Agreement contains the term, the NAB/SoundExchange and Sirius XM Agreements do not, thus undercutting the thrust of the SoundExchange argument.

SoundExchange failed to note, let alone balance, the burden on licensees against the likely benefits from the proposed change. The Judges are loathe to adopt a term without such evidence. The Judges decline to amend § 380.4(h) to specify server logs.

b. Standardized Forms for Statements of Account

SoundExchange proposed to require licensees to submit statements of account on a standardized form prescribed by SoundExchange. SoundExchange asserted that a standard form would simplify licensees' calculations of the royalties owed and facilitate SoundExchange's efficient collection of information from licensees. SX PFF at ¶¶ 572, 575. At the time of hearing in this proceeding, SoundExchange provided a template statement of account on its Web site. *Id.* at ¶ 574. SoundExchange noted that noncommercial educational webcasters are required pursuant to their WSA agreement to use a form supplied by SoundExchange. McCrady WDT, Ex. 103–DP at section 4.4.1.

Live365 opposed adoption of this term because it would have general application, thus affecting parties that did not participate in this proceeding. Live365 asserted that a change with such an impact is addressed more appropriately in a rulemaking proceeding. Live365 RFF at ¶ 574.

The Judges do not find support in the record for adoption of a mandatory standardized statement of account. As Mr. Funn testified, the majority of

[66] On October 21, 2013, during the pendency of this remand proceeding, SoundExchange filed a petition for rulemaking seeking changes to the CRB Notice and Recordkeeping regulations. In the petition, SoundExchange proposes changes to: (i) Standardize, consolidate, identify, and match reports to facilitate distribution of royalties; (ii) conform report formatting of electronic reports, including adoption of electronic signatures; (iii) require use of the International Standard Recording Code or another unambiguous identifier of tracks actually transmitted; (iv) require reports to include all performances transmitted by a licensee, even though some may not be subject to the statutory license; (v) address late or missing Reports of Use by shortening the reporting period, imposing late fees, and allowing proxy distributions; (vi) set time limits for submission of corrected or amended Reports of Use; (vii) require licensees to retain source documents for the data reported on the Reports of Use; and (viii) implement several regulatory changes denominated by SoundExchange as ''housekeeping.''

webcasters currently use the template form made available on SoundExchange's Web site. Funn WRT at 2; 8/2/10 Tr. at 492 (Funn) (''much more than half'' of webcasters currently use template). Mr. Funn provided no information quantifying the additional work for SoundExchange to process a nonconforming statement of account from the webcasters that choose not to use the template. Further, neither the NAB/SoundExchange Agreement nor the Sirius XM/SoundExchange Agreement contains this term. McCrady WDT, Exs. 101–DP and 102–DP.

Given the already widespread use of SoundExchange's template form, the lack of quantification in the record of the time savings to SoundExchange by having a standardized form, and SoundExchange's failure to include this term in the NAB/SoundExchange and Sirius XM/SoundExchange Agreements, the Judges find that the record does not support the adoption of this term.

c. Identification of Licensees and Late Fee for Reports of Use

SoundExchange requested that the Judges harmonize identification of licensees among the (i) notice of intent to use licenses under sections 112 and 114, (ii) statements of account, and (iii) reports of use, and to impose a late fee for reports of use. These two requests differ from the rest of the SoundExchange requests in that these are notice and recordkeeping terms.[67] Ms. Kessler acknowledges, at least with respect to the late fees for reports of use, that they could be implemented either in the notice and recordkeeping regulations or in the license terms. *See* Kessler WDT at 20–23, 27–28. The Judges decline to adopt SoundExchange's proposals regarding the harmonization of licensee identification and the imposition of a late fee for reports of use. The evidence does not compel amendment of the current recordkeeping regulations; rather, these issues are more appropriately addressed in a future rulemaking proceeding.

(1) Identification of Licensees

SoundExchange asserted that harmonization of the identification of licensees can be accomplished by (i) requiring licensees to identify themselves on their statements of account and reports of use ''in exactly the same way [they are] identified on the corresponding notice of use . . . and that they cover the same scope of activity (*e.g.,* the same channels or stations),'' SX PFF at ¶ 568, Kessler WDT at 28; (ii) making the regulations clear that the ''Licensee'' is ''the *entity* identified on the notice of use, statement of account, and report of use and that each Licensee must submit its own notice of use, statement of account, and report of use,'' *id.* (emphasis in original); and (iii) requiring licensees to use an account number issued by SoundExchange. *Id.* at ¶ 571. Ms. Kessler testified that these proposals would allow SoundExchange to match to the requisite notice of use, statement of account, and report of use to the correct licensee more quickly and efficiently. Kessler WDT at 29; 4/20/10 Tr. at 461 (Kessler). She also claimed that, for ''little or no evident cost'' to licensees, their accounting and reporting efforts would be simplified by use of an account number. Kessler WDT at 29. SoundExchange also asserted that these proposals are included in the NAB/SoundExchange and CBI/SoundExchange Agreements. SX PFF at ¶ 569. In fact, neither Agreement requires use of an account number.

Live365 did not controvert SoundExchange's proposed findings of fact relating to the identification issue, nor did it stipulate to the proposed term. As the term is not agreed, the Judges treat it as a litigated term. SoundExchange's witness asserted, without evidence, that the cost to licensees of conforming their reports and using an assigned account number would be minimal. Kessler WDT at 29.

Conformity of reporting and use of an account number system, however, is not a feature of the WSA Agreements in evidence. McCrady WDT, Exs. 101–DP (NAB), 102–DP (Commercial Webcasters) and 103–DP (CBI). The CBI/SoundExchange Agreement requires that statements of account list the licensee's name as it appears on the notice of use, *see* § 380.23(f)(1), but it does not impose that requirement on reports of use. *Compare* McCrady Ex. 103–DP, section 5.2.2 *with* § 380.23(g).

If adopted in this proceeding, therefore, SoundExchange's proposal would create an inconsistency within the webcasting regulations. The Judges decline to adopt this proposal, but find that the issue would be more appropriately addressed in a future rulemaking proceeding.

(2) Late Fee for Reports of Use

SoundExchange sought imposition of a late fee of 1.5% for reports of use. The regulations currently require a late fee for untimely payments and statements of account. *See* 37 CFR 380.4(c). In support of this request, Ms. Kessler testified that there was widespread noncompliance with reporting requirements. She cited failure to file reports of use as well as late or ''grossly inadequate'' reports. Kessler WDT at 28. Ms. Kessler testified that noncompliance with the report of use and payment requirements significantly hamper SoundExchange's ability to make timely royalty distributions. Kessler WDT at 28; 4/20/10 Tr. at 458 (Kessler). SoundExchange also points to the inclusion of a late fee for untimely reports of use in the NAB/SoundExchange and CBI/SoundExchange Agreements as further support for its request. SX PFF at ¶ 564.

Live365 questioned SoundExchange's characterization of a payment as being useless without a report of use given that both the NAB/SoundExchange and CBI/SoundExchange Agreements contain reporting waivers. Live365 RCL at ¶ 20.

The Judges are not persuaded that a late fee for reports of use is necessary. None of the interactive agreements in evidence contains such a term. Live365 Exs. 17, 18; McCrady WDT, Exs.104–DR and 106–DR. Only the NAB/SoundExchange and CBI/SoundExchange Agreements contain the late fee; the parties did not include a late fee in the Sirius XM/SoundExchange Agreement.

SoundExchange failed to meet its burden with regard to this proposal; the Judges decline to adopt the proposed late fee terms.

C. Contested Terms for Noncommercial Webcasters

IBS proposed two new terms. The first is an exemption from the recordkeeping reporting requirements, or a permissive proxy fee *in lieu* of reporting, for noncommercial webcasters whose usage exceeds 15,914 ATH per month, but is less than 55,000 ATH per month. The second term proposed by IBS is an express authorization that SoundExchange ''may elect to accept collective payments on behalf of small and very small noncommercial webcasters.'' IBS PFF at ¶ 26.

The Judges decline to adopt IBS's proposed subcategories of noncommercial webcasters, rendering

[67] *See* n.66, *supra.* SoundExchange requested these same, or similar, changes in an earlier rulemaking, in which the Judges imposed census reporting for all services except those broadcasters paying no more than the minimum fee. *See* Comments of SoundExchange, Docket No. RM 2008–7, at 20–23 (Jan. 29, 2009). The requests were outside the scope of that rulemaking, which was to improve the reporting regulations in light of technological developments since promulgation of the interim regulation. The Judges deferred SoundExchange's requests for consideration in a future rulemaking. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Final rule),* 74 FR 52418, 52422–23 (Oct. 13, 2009).

moot their proposed exception from reporting for small and very small noncommercial webcasters. Their proposal to create an *ad hoc* subcategory of noncommercial webcasters whose usage falls between 15,914 and 55,000 ATH suffers from the same defects as their proposal to create formal categories for small and very small noncommercial webcasters. IBS presented no evidence to support differential treatment for webcasters falling in this *ad hoc* subcategory. While there was evidence regarding the appropriateness and desirability of a proxy fee for *educational* noncommercial webcasters, there was no evidence presented by any party that the same is true for noncommercial webcasters other than educational webcasters (who may already take advantage of the CBI/SoundExchange Agreement).

The Judges decline to adopt IBS's second proposal. As the Judges do not recognize IBS's proposed subcategories, the second proposal is rendered moot.

VII. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact and Determination based on the record. The Judges issue the foregoing as a Final Determination. The Register of Copyrights may review the Judges' Final Determination for legal error in resolving a material issue of substantive copyright law. The Librarian shall cause the Judges' Final Determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

So ordered.

Dated: February 12, 2014.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Jesse M. Feder,

Copyright Royalty Judge.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

■ In consideration of the foregoing, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Subpart A—Commercial Webcasters and Noncommercial Webcasters

Sec.
380.1 General.
380.2 Definitions.
380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
380.4 Terms for making payment of royalty fees and statements of account.
380.5 Confidential Information.
380.6 Verification of royalty payments.
380.7 Verification of royalty distributions.
380.8 Unclaimed funds.

Subpart B—Broadcasters

Sec.
380.10 General.
380.11 Definitions.
380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
380.13 Terms for making payment of royalty fees and statements of account.
380.14 Confidential Information.
380.15 Verification of royalty payments.
380.16 Verification of royalty distributions.
380.17 Unclaimed funds.

Subpart C—Noncommercial Educational Webcasters

Sec.
380.20 General.
380.21 Definitions.
380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings
380.23 Terms for making payment of royalty fees and statements of account.
380.24 Confidential Information.
380.25 Verification of royalty payments.
380.26 Verification of royalty distributions.
380.27 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

Subpart A—Commercial Webcasters and Noncommercial Webcasters

§ 380.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of

facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114, and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions, but that is not—

(1) A Broadcaster as defined in § 380.11; or

(2) A Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and:

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) *Commercial Webcasters.* For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(2) *Noncommercial Webcasters.* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2011, 2012, 2013, 2014, and 2015.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(b) *Minimum fee*—(1) *Commercial Webcasters.* Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than $50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters.* Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is

designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 380.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties

during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Broadcasters

§ 380.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as

set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that:

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of ''Small Broadcaster'' if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

§ 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(b) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this

section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) *Minimum fee.* Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2011–2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the ''Proxy Fee'') to the Collective for the reporting waiver discussed in § 380.13(g)(2).

§ 380.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Broadcaster shall make the royalty payments due under § 380.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments and reporting.* Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) *Late fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Broadcasters in General.* (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if:

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to paragraph (g)(3) of this section, the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) *Election of Small Broadcaster Status.* To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) *Retention of records.* Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.14 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the

Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart,

the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart C—Noncommercial Educational Webcasters

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Noncommercial Educational Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

§ 380.21 Definitions.

For purposes of this subpart, the following definitions shall apply:

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that:

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(4) Is not a ''public broadcasting entity'' (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings, including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the ''Minimum Fee'') for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver

described in § 380.23(g)(1), shall pay a $100 annual fee (the ''Proxy Fee'') to the Collective.

(b) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (''Usage Fees'') for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster:

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

(3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

(5) The printed or typewritten name of the person signing the statement of account;

(6) The date of signature;

(7) The title or official position held by the person signing the statement of account;

(8) A certification of the capacity of the person signing; and

(9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general*—(1) *Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of $100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to paragraph (g)(3) of this section shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by § 370.4 of this chapter), except that, notwithstanding § 370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with paragraph (g)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with paragraph (g)(3) of this section for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under paragraph (g)(3) of this section shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service

provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

(ii) [Reserved]

§ 380.24 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.25 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Noncommercial Educational Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.26 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a

notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.27 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: February 12, 2014.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Approved By:

James H. Billington,

Librarian of Congress.

[FR Doc. 2014–08664 Filed 4–24–14; 8:45 am]

BILLING CODE P