Before the
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In the Matter of	)	
	)	Docket No. 2009-1 CRB DTRA
Adjustment of Rates and Terms for Digital Performance Right in Sound Recordings and Ephemeral Recordings	)	Webcasting III

IBS' REPLY FINDINGS and CONCLUSIONS

Intercollegiate Broadcasting System, Inc., files these reply findings of fact and reply conclusions of law directed principally to SoundEx's proposed $ 500 minimum fee for small and very-small non-commercial, educational webcasters. That flat minimum fee is also incorporated in the proposed findings of Live.365 at ¶ 378, and implicitly by CBI in its proposed findings and conclusions, *op. cit., passim.* Equally important to IBS' smaller members is SoundEx's support in its conclusions of law, *op. cit.* at Point II(C), the record-keeping and reporting requirements adopted in Docket No. RM-2008-7, 74 Fed. Reg. 52418 on October 13, 2009, *recon. pending and appeal pending*, D.C. Cir., No. 07-1123.[1]

Replies to Others' Proposed Findings of Fact

1. To the extent that SX's proposed findings that the small and very small educational webcasters can afford the $ 500 minimum fee (Points XI[B] and [C], ¶¶ 493-94, 502-11), are based on the record, SX's factual inferences overstate the facts of record.

2. SX's finding (Point X[9][B][1], ¶ 493-94) that "363 noncommercial webcasters paid SoundExchange in … 2009 … [at least] the minimum fee of $ 500" does not prove more

[1] By *per curiam* order, entered on August 10, 2010, the appeals court stayed the appeal pending the court's determination in Web III.

than that *some* "noncommercial services are willing to pay the rates that SoundExchange is proposing. SX fails to show that *any* of the small and very small noncommercial webcasters are able, let alone willing, to pay a $ 500 minimum for their far fewer ATH than the larger non-commercial webcasters. The numerical comparison showing the contrasts by usage were set forth in IBS' proposed findings of fact, filed June 14, 2010, at ¶ 10. SX does not show that there was a *single* webcaster that would be classified as a small or very small webcasters was among able and willing to pay an annual fee of $ 500.

3. SoundExchange fails to qualify its claim that "noncommercial services tend to impose disproportionate costs on Sound Exchange" (Point XI[B][3], ¶ 496) by explaining that that inference holds only if SX were to continue to require and process full census reporting. That reporting is not cost-effective, *i.e.,* it requires more processing costs by both the webcasters and SX so that it costs more than the royalty would yield.

4. On cross-examination Ms. Kessler conceded that SX incurs fewer processing costs for usage reports that are set aside without full processing. Kessler testimony, transcript for 4/21/10 at 525:4-:17, 527:16-:21, 536:4-:12, 545:15-:16, 546:1, 547:7-548:1.

5. The value of census reporting to SX by small educational webcasters is proved by the precedential settlement agreement between CBI and SX at ¶ 6.2, 74 Fed. Reg., No. 154, 40617, 40619 (August 12, 2009), which sets an agreed value of $ 100 per annum per channel in lieu of census reporting. Agreement at ¶ 5.1.1 (Reporting waiver) being Fed. Reg. 4018.

6. The non-commercial webcasters agreement between CBI and SX proves nothing about the ability or willingness of very small and small webcasters to pay SX $ 500 per annum royalties. (Point XI[B][4], ¶¶499, 501). Again, SX does not identify a single webcaster who was or would be willing and able to pay in accordance with the rates and terms of the CBI-SX settlement agreement.

7. SX's further claim in Point XI[C], ¶¶ 502-11, that noncommercial services generally can afford a $ 500-a-year minimum rate, is utterly without support in the record and falls far short of being true for all noncommercial services.

8. SX's citation to budget figures for WHUS (¶¶ 503, 505-06), which until the current year was CPB-qualified, proves nothing about the willingness or ability of small and very small webcasters to pay $ 500 per year in royalties. WHUS's webcasting operations, so far as the record shows, could not qualify as a small noncommercial webcaster, let alone a very small webcaster. So WHUS' figures, which were produced on cross-examination of Mr. Murphy over the objection of IBS that they were irrelevant and beyond the scope of the direct testimony, simply do not support any claim by SX as to the affordability of its proposed royalties to very small and small webcasters generally. Testimony of Mr. Murphy, transcript of April 21, 2010 at 590:2-6.

9. Rebutting this misperception in SX's proposed findings at ¶¶ 502-03, Mr. Murphy testified that many IBS members were financially strapped. Murphy written direct testimony, filed Sept. 29, 2009 at 4; Murphy testimony 4/21/10 transcript at 582:5-15. The testimony of Mr. Murphy on cross-examination, based on knowledge acquired from formal and informal discussions with other stations at IBS national and regional conferences, makes this point concisely:

> BY MR. LEVIN:
>
> Q. Now, Mr. Murphy, if I can turn your attention to paragraph seven of your written testimony which I believe is marked as IBS Exhibit Number 1. * * * Do you see where you say that budgeting is a perennial problem?
>
> A. Yes.
>
> Q. And you also testified just earlier in response to Mr. Malone's question that some radio stations have no money, some have only a little; is that correct?
>
> A. Yes.

Transcript of 4/21/2010 at 582:5-:15. Continuing, Mr. Murphy testified that WHUS was not typical financially of IBS member stations:

> A. WHUS is probably one of the most financially well-off stations in the entire IBS system and to use our budget as typical is to grossly misrepresent the reality.

Id. at 590:2-6.

10. SX's claim in ¶ 506 that "noncommercial services pay significantly more than $ 500 for things that are less central to their purpose than sound recordings" outruns the facts of record. SX does not establish the centrality claim, because that, first of all, is a latent value judgment that "sound recordings" to individual stations' purposes are more central; the assertion omits the qualification that the recordings would be playable only under an SX license, where in fact college and high school stations locally originate programs not involving SX-licensable music or recordings licensed at the source, or recordings under direct license from the artists. Kass written direct testimony, ¶ 13; Shaiken testimony, 4/21/10 transcript at 619:1-:22.

11. SX's claim in ¶¶ 507-08 that stations' dues payments to IBS demonstrate an ability to pay SX $ 500 a year for royalties are based on SX's hypothetical budget allocations by member stations. The theoretical ability of some stations to fund a $ 690 payment to IBS for dues and the national conference does not say anything about how many stations are able to do so. Murphy in 3 transcript for 4/21/2010) at 590:2-19 (" not typical").

12. As noted above, financial ability alone is a necessary but not sufficient condition to enable many IBS member-stations to pay royalties. Mr. Murphy went on to identify a non-financial obstacle:

> The most challenging area in this whole proceeding that we haven't talked about really has to do with the requirement for reporting. The cost is one issue that some stations struggle with very seriously. Some may be okay. I know that HUS could absorb that. But the most critical issue that will be a challenge for implementation of this is the reporting requirements. The staffing and the technology [are] available, the way stations run is not compatible with automated

> software, stream monitoring, and some of the requirements right now would be extremely difficult. These stations have heavy [staff] turnover. The use of the material is extremely wide, so we don't have a small library of a certain number of tracks that we use in our format all the time. We have 55,000 recordings in our library that go back to the 1950s. They're all being used, music old and new * * *

Murphy testimony, transcript for 4/21/2010, at 600:20-601:14 (emphasis supplied].

12. SX is guilty of a financial fallacy in basing its inferences concerning the ability of small and very small webcasters generally to pay $ 500 in royalties from an annual budgets averaging $ 9000 a year.

13. SX does not offer the factual connection between a station's annual average revenues and its ability to pay royalties for music under statutory license.

14. SX's conclusions based on an average says nothing about the ability of the half of the stations with budgets under $ 9000 to pay royalties. As three of SX's witnesses on cross-examination recognized the dominant characteristic of averages in that there are, in layman's terms, as many stations below the average as are above the average. Testimony of Ms. Kessler, April 21, 2010 Transcript at 525. There are, as witnesses repeatedly point out, great differences among high school and college webcasters. Murphy testimony, 4/21/10 transcript at 568:13-570:15.

15. The inference with respect to sources of stations' funding that SX seeks to draw, *viz.*, that all these sources are available to all small and very small webcasters(¶ 504), again over-reads the evidence. The logical predicate that all sources are available to all noncommercial webcasters is unsupported. Some sources may be available to some webcasters but not all, and *a priori*, they are less likely to be available to the poorer ones. The witnesses familiar with high school and college operations have repeatedly stressed the wide diversity of high school and college webcasting operations. *See, e.g.*, Murphy testimony at 4/27/10 transcript at 569:5 ("not a homogenous group").

16.. To the extent that a non-proportional royalty payment will put use of any statutorily licensed recorded music beyond the webcaster's ability to pay, that would bias station management to curtail programming to the prejudice of the webcasters' purposes, it represents a bar to entry of new and existing small webcasters.

17. SX failed offer any testimony on whether the benchmark approach was appropriate for considering rates among the noncommercial users. SX's econometrics witness, Dr. Pelkowitz, who was their proponent of the benchmark approach to rate-setting, admitted on cross-examination that drawing comparison between different models for different markets or sub-markets admitted that he had not assessed whether there was a single market among such users of digitally recorded music: "[T]he question of exactly where you would raw the boundaries of the markets and whether there are multiple markets is – is a complicated question and I haven't address that." Salinger testimony, at 145:21 - :146:9 (July 28, 2010). But highly relevant distinction between high school and college webcasters, on the one hand, and commercial webcasters remains that the latter do not generally "sell" music. Shaiken testimony, transcript of April 21, 2010, at 615:17-22.

18 Contrary to CBI's proposed conclusions of law (under Point I[A]) that affected parties had an opportunity to question the reasonableness of the proposed CBI-SX agreement under 17 U.S.C. § 801(b)(7), such an opportunity was indirectly foreclosed to affected parties at the May 5th hearing as a result of the trial strategy adopted by the proponents.

19. The only time provided for in the Judges' scheduling order of March 3d, 2010, for a hearing on adoption of the terms and rates from the CBI-SX settlement agreement was the time allocated for any objections, May 5. The ground rules for the hearing were not set forth.

20. IBS gave notice to the Judges and the proponents by letter of counsel filed on April 30, 2010, that it was prepared to offer testimony and exhibits rebutting the expected

testimony and testimony of CBI and SX in support of their agreement under Section 801(b)(7). See also transcript at 80:21- 81:3.

21. At the outset of the May 5th hearing, counsel for CBI gave notice of their reluctance to put witnesses on the stand. (Transcript of colloquies at hearing on May 5, 2010, at 5:1-5 and 51:15-16.) SX gave notice in a letter to the Judges dated May 3d that it would have witness "available" during the course of the hearing.

22. The Judges then questioned counsel for the three parties concerning the legal applicability of Section 801(b)(7) to the terms of the agreement. Id. *passim*.

23. The Judges adjourned the hearing without the proponents' introducing any record evidence.

24. Counsel for SoundEx marked the CBI-SX agreement for identification as Sound Exchange Settlement Exhibit 1 (Id. at 27:10-11), but neither counsel for CBI nor SX offered it into evidence; nor did either designate it as a record exhibit in their filing of collations of exhibits on September 10, 2010.

25. The events that transpired in the concluding minutes of the May 5th hearing were consistent with the inference that the Judges intended to rule of the legal issue of whether the settlement agreement (SX Settlement Exhibit 1 [for identification]) was in a form that qualified under Section § 801(b)(7) to warrant its admission and the taking of evidence thereon.

26. In contrast to CBI, IBS is the largest domestic association of college and high school webcasters in the United States. Direct testimony of Capt. Kass at ¶ 6.

28. To SX's proposed findings of fact under Point I(D)(5), ¶98, purporting to recite the history the proceeding, should be added that IBS tendered the testimony of its CAO and exhibits on rebuttal, but the Judges struck IBS' entire rebuttal case on procedural grounds. *See* Order denying reconsideration, filed August 18, 2010, and transcript from

29. To SX's characterization of IBS' participation and proposed rates and terms in this proceeding, ¶ 487, should be added the fact that IBS' proposal, filed July 28, 2010, contained a term limiting the subjection of small and very small noncommercial webcasters to recordkeeping and reporting requirements, *op. cit.*, at 3-4, as does article 5 (Reporting) of the SX-CBI agreement.

30 SX's Funn testified on cross-examination that Live.365 claimed that under aggregation, its proposal would cover at least 100 to 5 or 6 thousand independent small webcasters. Funn at transcript for 8/2/2010 at 481-83. Thus, the annual royalty per webcaster proposed in Live.365's proposed rates and terms might be as little as $ 8.30 per stream ($ 50,000 ÷ 6000). Even less, if Live.365 aggregates 7000 webcasters.

31. SX has a fund of in excess of $ 200 million revenue that has not yet been fully processed. Kessler, xscript for 4/21/2010, at 530:17-:21.

Reply to Others' Proposed Conclusions of Law

1. The no-witnesses-and-no exhibits strategy of CBI and SX at the hearing on the CBI-SX agreement May 5th effectively operated to deny IBS the opportunity of introducing rebuttal testimony and exhibits designed to show that the CBI-SX agreement does not provide a reasonable basis for the Judges' reasonable adoption of its terms.

2. Congress' purpose in writing Section 801(b) (7) was to facilitate settlements in cases where a party in the minority blocked settlement between the two majority interests -- not to allow the minority party to "cram down" its settlement on IBS members. Here, IBS has more members than CBI. Prop. reply fdg. 26, *supra*. It was not reasonable to allow a minority interest – here, CBI – to cram down its settlement with SX against IBS, the predominant association of college and high school webcasters..

3. SX's proposed findings of fact, ¶ 539 specifically and ¶¶ 536-43 generally,[2] based on IBS' allegedly advising webcasters to violate the law, should be rejected as irrelevant. *See* Judges' order denying IBS reconsideration, filed August 18, 2010, in which the Judges held alleged mischaracterizations of the Copyright law on IBS' website to be "irrelevant to this proceeding."

4. The Judges should not approve SX's proposed terms and rates, under any misapprehension that "IBS has no objection to the Judges' continuing substantially the current terms" as reflected in under SX's proposed rates and terms, submitted under Section 351.4(b)(3) of the Rules. SX findings, ¶ 600.

5. In determining the rates and terms for noncommercial webcasters on the record the Judges should not take cognizance of the "twenty-four CBI members who submitted comments [under Section 801(b)(7)(A)] supporting the CBI-SX agreement. SX's Proposed Findings of Fact ¶ 501; *cf.* SX's Proposed Conclusions of Law, ¶¶ 72-78. As a matter of statutory construction these comments are not part of the record on which the Judges may base their determination of rates and terms on the record. Section 801(b)(7)(A) carefully differentiates between the prerogatives of qualified participants in the rate hearing and nonparticipants, to comment on the settlement agreement. Participants are accorded the right to "comment on the agreement and object to its adoption as a basis for statutory terms and rates". Under clause (II) it is only the objections of hearing participants that invoke the requirement that the "Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates." Since these letters are not part of the record for purposes of rate determination, they cannot be considered in the Judges' determination of "terms or rates." *Cf.* colloquy between Judge Wisniewski and counsel for IBS,

[2] SX's proposed findings or fact, (Point XI[D][3]).

transcript for May 5, 2010, at 81:7 – 82:11. In other words, only "comments" adverse to the settlement agreement are cognizable under clause (II). Under the statutory terms of clause (II) such comments are to be weighed by the Judges only in concluding to reject the terms of the settlement agreement as an unreasonable basis for setting statutory terms or rates. This interpretation is consonant with a Congressional purpose not to reasonably impose a privately drafted financial burden on non-signatories without giving them an opportunity to comment thereon. A favorable "comment" does not go to supporting a determination *on the record* of rates and terms. In contrast, an "objection" (by a "participant") invokes the entire record to the extent that one exists.

6. Just as this Court has concluded that in setting terms, it "should consider matters of feasibility and administrative efficiency" *Webcasting II*, 72 Fed. Reg. at 24,102; *cf. SDARS,* 73 Fed. Reg. at 4098 ("we are obligated to 'adopt royalty payment and distribution terms that are practical and efficient'", quoted in SX's Proposed Conclusions, ¶ 62, so it should consider the cost-benefit ratio of recordkeeping and reporting by small and very small webcasters on SX's administrative costs.

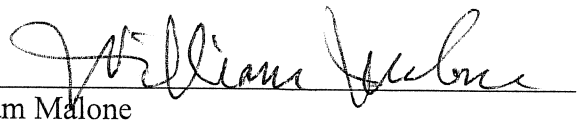
7. The revenue benefits to SX of census reporting by small and very small webcasters are negative, *i.e.,* the costs to SX of full processing of such census reports would exceed the amount of revenue generated.

Prayer

For the foregoing reasons, IBS asks that the Judges adopt IBS' proposed findings of fact and conclusions of law and, ultimately, flat usage-sensitive rate for very small and small educational webcasters, as well as realistic recordkeeping and reporting procedures, supplanting those in SX's revised rate proposal.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, Inc.

by 

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