February 23, 2012

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Request for FCC Issuance of Model Protective Order in MB Docket No. 10-56
To Facilitate Efficient Negotiations Between NBCU and Qualified OVDs

Dear Bill:

On October 10, 2011, Project Concord, Inc. ("PCI") provided the FCC with a copy of the notice it had served on NBC Universal (NBCU) regarding its intent to request arbitration pursuant to the Conditions to the C-NBCU Order as a Qualified Online Video Distributor meeting the Benchmark Condition.1 NBCU has requested a copy of the peer programming agreement that triggers the Benchmark Condition. That peer agreement is highly confidential. The Commission understood the highly confidential nature of such peer agreements and, accordingly, in connection with the C-NBCU Order, provided a Model Protective Order to facilitate disclosure of the peer agreements while protecting the interests of all parties.2

PCI is unable to disclose the agreement without the protections afforded under the terms of the Model Protective Order. Accordingly, PCI respectfully requests that in order to facilitate efficient negotiations and an efficient arbitration process, the Media Bureau immediately issue a protective order consistent with the terms and conditions found in the Commission’s Model Protective Order in this proceeding. Like the protective order proposed by Comcast and NBCU in this proceeding to protect its own highly confidential information, and issued by the Bureau, the Model Protective Order limits disclosure of video programming agreements to Outside Counsel and Outside Counsel.

1 In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, FCC Order No. 11-4, 26 FCC Rcd. 4238 (2011) ("C-NBCU Order").

2 C-NBCU Order, Appendix E.
Moreover, Comcast and NBCU did not object when the Commission adopted the Model Protective Order.

NBCU agrees that the Bureau should issue a protective order to facilitate efficient and productive discussions with Qualified OVDs such as PCI. However, NBCU now seeks to re-litigate the terms of the Commission-issued Model Protective Order. Specifically, NBCU seeks to expand disclosure of this highly confidential peer agreement to both “in-house counsel and “persons with executive management and negotiating responsibilities within the business unit(s) responsible for negotiating and licensing of content via particular business models that are implicated by a benchmark conditions.” Such a controversial and significant proposed change to the terms of the Commission-issued Model Protective Order may not be made at the Bureau level. The proposal, if it is to be considered at all, must be placed on a separate public notice, to give the public the opportunity to comment and then the Commission an opportunity to consider.

However, as the Bureau and Commission consider NBCU’s request to issue a new protective order that is different from the Commission-approved Model Protective Order, the Media Bureau should move forward with immediately facilitating the disclosure of the PCI peer agreement on terms consistent with the Commission’s Model Protective Order. The Bureau has the authority to immediately issue a protective order that mirrors the Commission-approved Model Protective Order.

Equally critically, the NBCU request to adopt a new protective order inconsistent with the Commission-approved Model Protective Order should not in any way be used as an excuse to delay arbitration proceedings. In this regard, PCI respectfully requests that the Bureau specifically emphasize that any arbitration proceedings should not be delayed based on the pendency of NBCU’s proposal. Further, the Bureau should confirm that the authority of the arbitrators under the Conditions to enter into the Commission-approved Model Protective Order remains in place.

Sincerely,

Monica S. Desai
Partner

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3 See In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Second Protective Order, DA 10-371 (March 4, 2010). See also Letter from William Lake, Chief, Media Bureau, to Comcast counsel Michael Hammer, Richard Metzger and David Solomon, DA 10-1344 (July 20, 2010) (agreeing with Comcast and NBCU that Comcast's Video Programming and Carriage Agreement Terms and Conditions are Highly Confidential, for review only by outside counsel and outside consultants).

4 Letter from David Murray, Counsel for Comcast Corporation and NBCUniversal Media, Inc., to William T. Lake, Chief, Media Bureau, FCC, Docket 10-56 (Feb. 17, 2012).

5 Id.