

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Media Bureau Seeks Comment on)	MB Docket No. 10-56
Whether Comcast-NBCU Benchmark)	
Condition Needs Clarification and Whether)	
a Proposed Third Protective Order for)	
Compliance Should be Adopted)	

**REPLY COMMENTS OF COMCAST CORPORATION AND
NBCUNIVERSAL MEDIA, LLC**

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Comcast Corporation (“Comcast”) and NBCUniversal Media, LLC (“NBCUniversal”) hereby file reply comments in response to arguments opposing their request for clarification on implementation of the “Benchmark Condition” of the *C-NBCU Order*¹ (“Request”) and their proposed Third Protective Order for Compliance (“TPO”) to govern disclosure of an online video distributor’s (“OVD’s”) peer deal.

I. INTRODUCTION AND SUMMARY

As explained in the Request,² NBCUniversal cannot comply with its obligations under the Benchmark Condition to shape an economically equivalent content license for a qualified OVD without the peer deal that sets the “benchmark.” Contrary to suggestions by various commenters, the Request does not seek to modify or rewrite the Benchmark Condition. It

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 & Order, 26 FCC Rcd 4238 (2011) (“*C-NBCU Order*”). The Benchmark Condition is one of the online programming conditions adopted in the *C-NBCU Order*. *Id.*, App. A., § IV.A.2.b.

² *See* Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation and NBCUniversal Media, LLC, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (Feb. 17, 2012) (“Request”).

merely seeks a procedural clarification to enable efficient compliance with the condition – to the benefit of OVDs – while safeguarding the legitimate interests of content owners.

Claims that the Model Protective Order (“MPO”)³ is intended to govern the Benchmark Condition are likewise incorrect. The MPO applies to confidential information exchanged during arbitration discovery, which may involve use of numerous third-party license agreements to establish the fair market value of comparable programming. The MPO does not apply to, and was not intended for, use of a single peer deal in responding to a Benchmark Request. That activity involves business negotiations and requires relevant business expertise. The proposed TPO strikes the appropriate balance between protecting the confidential interests of the content owners and ensuring that the peer deal is used as intended under the Benchmark Condition.

Nor does the Request raise antitrust or competitive concerns. The Commission already considered these issues and determined that the Benchmark Condition would promote OVD competition and serve the public interest. At bottom, the commenters’ real objection relates to the wisdom of those policy decisions, not the Request.

Finally, NBCUniversal’s use of a peer deal to shape an economically equivalent content license would not violate the Trade Secrets Act, implicate further disclosure under FOIA, or be considered arbitrary or capricious, as commenters variously suggest. These commenters essentially argue that instead of achieving efficient, negotiated deals under the Benchmark Condition, OVDs and NBCUniversal should be forced into arbitration before a peer deal can be disclosed. That is neither a desired outcome for OVDs, nor what the Commission intended.

³ *C-NBCU Order*, App. E.

II. THE COMMENTS OPPOSING THE REQUESTED CLARIFICATION AND PROPOSED TPO LACK MERIT.

A. The Request Merely Seeks A Procedural Clarification Necessary For Compliance With The Benchmark Condition.

Contrary to the assertions of the commenters, Comcast and NBCUniversal are not asking for modification of the *C-NBCU Order*.⁴ The Commission – like the Department of Justice (“DOJ”) – has already made the policy decision to impose the Benchmark Condition, which requires NBCUniversal to offer an economically equivalent content license to qualified OVDs based on a peer deal. The DOJ explicitly requires an OVD to disclose its peer deal to NBCUniversal before NBCUniversal is required to respond with a “final offer” of an economically equivalent content license.⁵ The same requirement is implicit in the Commission’s version of the Benchmark Condition. The Request merely seeks clarification of the timing and procedures for that requirement to enable compliance with the condition without resort to arbitration in every case. And NBCUniversal has proposed stringent confidentiality protections in the TPO to address any reasonable concerns expressed by the Content Companies.⁶ By providing the requested clarification, therefore, the Commission will ensure that the Benchmark

⁴ See Joint Opposition to Comcast-NBCU Request for Clarification Regarding the Benchmark Condition of CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company, MB Docket No. 10-56, at 6-7 (Apr. 3, 2012) (“Content Companies Comments”); Comments of Dish Network L.L.C., MB Docket No. 10-56, at 4 (Apr. 3, 2012) (“Dish Network Comments”); Comments of Public Knowledge, MB Docket No. 10-56, at 5 (Apr. 3, 2012) (“Public Knowledge Comments”); see also Letter from Monica Desai, Patton Boggs LLP, Counsel for Project Concord, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 4 (Mar. 15, 2012) (“Project Concord 3/15/12 Letter”).

⁵ *United States v. Comcast Corp.*, Final Judgment, § VII.I.2 (D.D.C. 2011) (“DOJ Final Judgment”) (“[T]he OVD may commence arbitration by filing with the AAA and furnishing to Defendants and to the Department of Justice . . . each agreement with any such Peers.”).

⁶ CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company filed together and on behalf of their affiliated businesses as the “Content Companies.”

Condition works as intended, to the benefit of OVDs, while safeguarding the legitimate interests of the Content Companies.

Ironically, if anyone is trying to modify the Benchmark Condition here, it is the commenters in their attempts to prevent the condition from working as the Commission plainly intended.⁷ At bottom, the commenters' real objection goes to the wisdom of the policy choices made by the Commission and DOJ in crafting the Benchmark Condition itself. But the condition is what it is: a federal mandate that NBCUniversal offer economically equivalent content licenses based on a benchmark deal. NBCUniversal cannot comply with that obligation without knowing what is in the "benchmark."⁸

Because the Request does not seek modification of the *C-NBCU Order*, claims by the Content Companies and others that the Bureau lacks authority to provide the requested clarification can be easily dismissed.⁹ As the Request makes clear, NBCUniversal only seeks a procedural clarification to facilitate what the Benchmark Condition already implicitly requires (and the parallel DOJ version explicitly requires); namely, use of a peer deal as the "benchmark" for NBCUniversal to craft an economically equivalent content license. The Media Bureau and other agency bureaus, acting under delegated authority, have routinely provided similar clarifications to both merger and non-merger related Commission rules and orders.¹⁰ The Bureau

⁷ Public Knowledge goes even further, suggesting that the peer deal should not be seen as a "benchmark" at all, but rather only as the minimum starting point from which NBCUniversal should offer even greater programming rights to OVDs. Public Knowledge Comments at 3. This approach at best fundamentally misunderstands and would in all events seriously distort a condition that is specifically designed to *reflect* an existing arrangement. Of course, as we discuss below, commercial negotiations always remain an option for any OVD, *separate* from this condition.

⁸ A "benchmark" is "a standard or reference by which others can be measured or judged." Webster's Encyclopedic Unabridged Dictionary.

⁹ Content Companies Comments at 8; Project Concord 3/15/12 Letter at 4.

¹⁰ *See* Request at 6 & n.18 (cataloging relevant precedent).

would not be acting “*ultra vires*,” as the Content Companies contend.¹¹ Nor is there any “novel question” presented by the Request that only the full Commission may consider.¹² The Commission, like DOJ, has already considered and answered any “novel” question in adopting the Benchmark Condition itself.

B. The Commission’s Model Protective Order For Arbitrations Is Inapplicable To The Business Negotiations Contemplated Under The Benchmark Condition.

All of the commenters generally argue that the Commission already established the confidentiality requirements for disclosure of a peer deal under the MPO, which restricts disclosure of highly confidential information exchanged during arbitrations to outside counsel and experts. Based on this theory, they assert that the Commission has ruled out any use of a peer deal by NBCUniversal business executives to shape an economically equivalent license agreement.¹³ This mixes apples and oranges.

The MPO is expressly designed for use in arbitrations authorized under the *C-NBCU Order*, where an arbitrator evaluates the relative fair market value of “final offers” submitted by the parties. This typically involves the exchange of numerous license agreements for the same or similar programming involving multiple third parties. These agreements are primarily used to show the rates other distributors have agreed to pay in arm’s-length negotiations. The agreements may also be used to conduct regression or other analyses relating to fair market value. These valuation efforts can be conducted, in the litigation context, by outside counsel and experts, without the need for in-house employees to use the agreements.

¹¹ See Content Companies Comments at 9.

¹² *Id.*

¹³ See Project Concord 3/15/12 Letter at 2; Content Companies Comments at 7; Dish Network Comments at 4.

The MPO is not suitable for, and was not intended to apply to, use of a peer deal by NBCUniversal in responding to a demand for an economically equivalent content license under the Benchmark Condition. This activity involves business negotiations between NBCUniversal and an OVD, not litigation, and is limited to use of a single “benchmark” – the peer deal. Like other media companies, NBCUniversal necessarily relies on its business executives to negotiate content licenses. These individuals know the content inventory, the available windows for it, how it is valued, and the myriad other factors that go into structuring the terms and economics of a content license. Nothing in the *C-NBCU Order* suggests that the Commission intended to displace NBCUniversal business executives from the negotiating process or to eliminate negotiations. Nor would it make any sense. This business expertise is critically important to NBCUniversal’s ability to respond to peer deals under the expedited timeframes established in the *C-NBCU Order*, particularly since even nuanced differences in a peer deal can have a significant effect on economic equivalence.¹⁴ It is thus both necessary and appropriate for the Commission to structure a protective order, like the proposed TPO, that reflects and serves this fundamentally different purpose.¹⁵

The commenters’ suggestion that the MPO was intended to govern here is not only incorrect, but also ignores practical reality. The programming an OVD requests based on a peer deal may cut across several NBCUniversal divisions. For example, responding to an OVD’s

¹⁴ Others have also recognized that use of the peer deal is necessary for appropriate business executives to negotiate an economically equivalent content license under the Benchmark Condition. *See, e.g.,* Jonathan Make, *OVD Competition Concerns Undergrid Difficulty of Enforcing Some Deal Curbs*, *Communications Daily*, Mar. 6, 2012, at 4 (quoting Randolph May, President of the Free State Foundation, that “[s]ubject to [a] confidentiality agreement, Comcast should be able to have those persons in the best position to evaluate the ‘comparability’ of the peer agreements review them”).

¹⁵ The Content Companies’ claim that disclosure of the peer deal during negotiations would render the MPO “meaningless” is incorrect. *See* Content Companies Comments at 21. The MPO will continue to apply in arbitrations, as intended; it is simply not appropriate (and was not intended) for the very different context of using a peer deal to shape an economically equivalent content license at the outset of business negotiations under the Benchmark Condition.

request for film and television content would involve different divisions, content databases, and, most importantly, business expertise within NBCUniversal. No outside counsel or expert can replace NBCUniversal business executives in making the kind of critical comparative judgments about comparable programming for all business models required to shape a content license that is economically equivalent to the benchmark.

The commenters also lose sight of the fact that, ultimately, business executives will have to approve and implement a content license that satisfies the Benchmark Condition. At that point, the business executives will necessarily know the nature and operation of the “economically equivalent” peer deal. There is thus no meaningful or permanent way to “wall off” necessary business executives from a peer deal, which is the standard by which the business itself must shape and offer an economically equivalent content license. Imposing this artificial “veil” at the outset of the process would serve no legitimate purpose. It would simply impede the parties’ ability to achieve agreement without resort to costly and burdensome arbitration, which plainly cannot be what the Commission intended.

That NBCUniversal business executives must approve and implement an economically equivalent content license based on a benchmark deal also renders irrelevant the Content Companies’ concern that NBCUniversal business executives cannot “unknow” what they know about the peer agreement. Since NBCUniversal business executives must ultimately administer a content license reflecting the peer deal, the essence of the peer deal is going to be known in all events. At bottom, the Content Companies’ objection again goes to the wisdom of the Benchmark Condition itself.

Moreover, as shown in the Request, confidentiality restrictions like those proposed in the TPO are a common feature of doing business in the media industry, including as part of

negotiating licensing agreements with buyers that may be competitors in other parts of the business. NBCUniversal's in-house counsel and business executives are well-versed in complying with these kinds of obligations.¹⁶

The Content Companies further argue that adopting the TPO would “abandon[] substantial precedent” restricting disclosure of highly confidential information to outside counsel and experts, pointing to examples where Comcast has requested similar protections.¹⁷ But this again misapprehends the very different nature and operation of the Benchmark Condition, which makes a peer deal the standard by which NBCUniversal is required to provide an economically equivalent content license. The appropriate precedent in this context is the kind of confidentiality protection that typically applies to business negotiations in the industry, which is what the TPO reflects. Indeed, the TPO adopts the same, restrictive, “need to know” approach for NBCUniversal executives¹⁸ that the Content Companies describe in their *own* standard confidentiality provisions.¹⁹ The other circumstances cited by the Content Companies are simply inapposite.

Public Knowledge and Project Concord separately contend that because NBCUniversal is a “savvy market player, with sophisticated employees,” there is no need to use the peer deal as a benchmark for negotiations under the condition.²⁰ This stands the Benchmark Condition on its

¹⁶ Request at 5.

¹⁷ See Content Companies Comments at 22-26; see also Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1-2 (Mar. 21, 2012).

¹⁸ Proposed TPO at 3 (Attachment A to the Request).

¹⁹ See Content Companies Comments at 3, 15-16.

²⁰ Project Concord 3/15/12 Letter at 2 (noting that Comcast “is a savvy market player” and “has the ability, without access to an OVD’s peer deal, to price and negotiate a content deal with an OVD the same way it prices and negotiates deals with anyone else”); Public Knowledge Comments at 2 (“Comcast is a sophisticated negotiator that almost certainly has superior knowledge of market practices and rates compared to any given OVD. It is unlikely

head. When the condition is invoked, NBCUniversal is not negotiating as a free player in the open marketplace. Instead, the government has mandated that NBCUniversal offer an economically equivalent content license based on what a peer has agreed to offer. In other words, NBCUniversal's "business savvy" becomes irrelevant; the deal is dependent on what the peer has done. And it is unreasonable (and infeasible) to expect NBCUniversal simply to divine what terms and conditions the peer *might* have agreed to in a complex, multi-schedule content license in any particular case.

Nor did the Commission or DOJ expect NBCUniversal simply to accept an OVD's word about a peer deal. The Benchmark Condition can only operate as intended by using the peer deal as the standard by which NBCUniversal shapes an economically equivalent content license. This again is an implicit aspect of the Benchmark Condition, and proper implementation of the mandate requires it. Even the most savvy and sophisticated business persons cannot be expected to match a deal they cannot see (and that may be very different from what has been claimed).²¹

Finally, commenters misapprehend the Benchmark Condition's purpose in suggesting that NBCUniversal should be expected to exceed a peer deal with its own content license.²² As the *Annual Compliance Report* submitted by Comcast and NBCUniversal shows, NBCUniversal has been able to negotiate numerous OVD license agreements without resort to the Benchmark Condition.²³ But when an OVD invokes the Benchmark Condition as a basis for demanding a

that one piece of information that an OVD might have would change its negotiating position one way or the other or somehow trick it into entering into economically unsustainable deals.").

²¹ Even where an OVD in good faith claims that its proposals are materially the same as a peer deal, what NBCUniversal views as "material" under its contracts may be vastly different from what the OVD believes is "material" under its deal with the peer.

²² See Content Companies Comments at 23-24, Public Knowledge Comments at 3.

²³ Comcast Corporation and NBCUniversal Media, LLC, Annual Report of Compliance with Transaction Conditions, MB Docket No. 10-56, at 8-9 (Feb. 28, 2012) ("*Annual Compliance Report*").

content license, the OVD's rights arise from and are governed by the peer deal. NBCUniversal's sole obligation is to provide a content license that is economically equivalent to the peer deal, subject to any applicable exclusions, defenses, or other limitations established in the Benchmark Condition.²⁴ NBCUniversal cannot comply with that mandate without its business executives/negotiators having access to the required standard for shaping an economically equivalent agreement – namely, the peer deal.

C. The Commenters' "Antitrust" and "Competition" Concerns Go To The Wisdom Of The Benchmark Condition, Not To Its Intended Operation.

The Content Companies and other commenters raise numerous antitrust and competition concerns over the Request.²⁵ These concerns again go to the wisdom of the Benchmark Condition. They have no bearing on the Request itself.

The Content Companies make clear that they have never liked the Benchmark Condition and "expressed serious concern" about the supposed "harms" that it will inflict on them during the Commission's review of the transaction.²⁶ The Content Companies are merely rearguing the

²⁴ Nor is the Request intended to "delay arbitration proceedings," as Project Concord erroneously suggests. Letter from Monica Desai, Counsel to Project Concord, Inc., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56, at 2 (Feb. 23, 2012) ("Project Concord 2/23/12 Letter"). To the contrary, the Request seeks to ensure that the Benchmark Condition works as intended, enabling NBCUniversal to shape economically equivalent license agreements based on a peer deal and *reducing* the prospects of arbitration. This should serve, not undermine, the interests of OVDs.

²⁵ See Content Companies Comments at 11-14; Public Knowledge Comments at 4-5; Dish Network Comments at 3-4.

²⁶ Content Companies Comments at 11 ("The [Content Companies] have been dragged into this matter against their will, solely because the Commission arbitrarily defined the class of C-NBCU 'peers' to include the specific entities that comprise the Content Companies' group.") & n.21 ("This is not the first time that the Content Companies have expressed serious concern with disclosure of their confidential programming agreements in the context of the Comcast-NBCU merger."); *id.* at 12 n.24 (citing Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Jan. 14, 2011) ("Disney Ex Parte")). When The Walt Disney Company met with the Commission, it "expressed concern that, if the Commission were to make the application of an online program access condition dependent on the actions of third-parties, especially the actions of just one entity, then third-part marketplace negotiations would no longer be independent from the condition itself. Indeed, marketplace negotiations for online distribution of video content would be affected and distorted *if the Commission were to provide that a single distribution agreement automatically results in the imposition of a condition requiring Comcast/NBCU to make similar content available upon similar terms.*" Disney

policy decisions made by the Commission and DOJ in adopting the condition more than a year ago.²⁷

The notion that use of a peer deal under the Benchmark Condition to shape an economically equivalent content license raises “antitrust” and “competition” concerns is ill-founded. Both the *C-NBCU Order* and the Consent Decree negotiated by the Antitrust Division of DOJ (and entered by Judge Leon of the U.S. District Court for the District of Columbia) mandate this result. Plainly, the antitrust laws cannot prohibit conduct required to comply with a Commission order that replicates a federal antitrust Consent Decree.

While the Content Companies never really articulate the basis for their “antitrust” or “competition” concerns, their theory appears to be that the required information sharing would lead NBCUniversal to conform its conduct with the other Content Companies. But this conformity is precisely what the *C-NBCU Order* and Consent Decree set out to achieve.

Ex Parte at 1 (emphasis added). Similarly, News Corp. met with Commission staff and argued that “if NBCU were compelled to enter into an online distribution arrangement solely based on the terms and conditions reached by one other content provider, it could open the door to a single unfavorable business deal ‘establishing the market,’” which could “result in undue market pressure that compels other content providers to reach similar deals.” Letter from Maureen O’Connell, Senior Vice President, Regulatory & Government Affairs, News Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (Jan. 13, 2011).

²⁷ See 47 U.S.C. § 405; 47 C.F.R. § 1.106(b) (petitions for reconsideration of a Commission decision may be filed by a party or “any other person whose interests are adversely affected by an action taken by the Commission . . .”). See, e.g., *In re Applications for Consent to the Transfer of Control of Licenses; XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion & Order, 27 FCC Rcd 924, ¶¶ 5-6 & n.16 (2012) (denying Minority Media and Telecommunications Council’s (“MMTC”) Petition for Reconsideration on the merits and declining to address an opposing party’s standing challenge. MMTC had participated in the proceeding via ex parte meetings and described how it was aggrieved by the Commission’s decision in its Petition.). As the Content Companies note, petitions for reconsideration must be filed within 30 days of the date of public notice of the final Commission action, 47 C.F.R. § 1.106(f), and that this deadline passed more than a year ago. Further, the Commission may deny petitions for reconsideration that rely on arguments that have been fully considered and rejected by the Commission within the same proceeding. 47 C.F.R. § 1.106(p)(3); see, e.g., *In re Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 21 FCC Rcd 9432, ¶ 7 (2006) (denying NY3G Partnership’s Petition for Reconsideration because “the Commission fully considered and rejected the arguments NY3G had earlier set forth in its Petition to Deny”). Given that several of the content companies alerted the Commission to their concerns about the Benchmark Condition, and the Commission went forward anyway, it is clear that the Commission both considered and rejected such arguments. They cannot be re-litigated now.

Moreover, the Content Companies never explain how they are injured by this mandated conformity – and so lack standing even to raise this point.

The commenters’ related theory that the Request will “chill” future online distribution deals is likewise misplaced and entirely speculative. The Commission and DOJ adopted the Benchmark Condition to help promote OVDs’ access to programming, not chill it. In doing so, both agencies made the policy decision that the Benchmark Condition would achieve this objective. The agencies’ predictive judgment on this question trumps the commenters’ recycled objections to it.²⁸ Moreover, the Request includes a stringent TPO, with restrictions specific to each peer deal, that address any reasonable confidentiality concerns of the Content Companies. With these in place, there is no basis for the Content Companies to claim the “sky is falling” or that future OVD deals will suddenly cease.

In short, the Request does nothing to alter how the Benchmark Condition already affects Content Companies other than to *protect* their interests by clarifying the confidentiality restrictions that should govern NBCUniversal’s use of a peer deal to shape an economically equivalent content license. And, as shown, the proposed TPO uses the same “need to know” confidentiality restrictions that the Content Companies use.²⁹

²⁸ Courts generally afford the Commission’s predictive judgments deference. *See, e.g., FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 521 (2009) (noting that the Commission’s predictive judgment merits deference); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (relying on “the substantial deference we owe the FCC’s predictive judgments” (citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 306 (D.C. Cir. 2006))).

²⁹ *See* Content Companies Comments at 3, 15-16.

D. The Commenters' Various Other Objections Are Similarly Misplaced.

1. The Request Does Not Raise Trade Secrets Act Issues.

The Content Companies further contend that the Trade Secrets Act³⁰ bars the Commission from permitting use of a peer deal by NBCUniversal under the Benchmark Condition.³¹ That is not so. As the D.C. Circuit has explained, the Trade Secrets Act “is ‘merely a general prohibition against unauthorized disclosures of confidential commercial or financial information.’”³² Further, “[t]he Act attempts to forestall casual or thoughtless divulgence – disclosure made without first going through a deliberative process – with an opportunity for input from concerned parties.”³³

The standard for whether a disclosure is authorized is a “nondemanding” one that is easily satisfied here.³⁴ The Content Companies acknowledge the three-part test applied in *Chrysler Corp. v. Brown*, which examines whether the regulation authorizing the disclosure of information is: (i) substantive in that it affects individual rights and obligations, (ii) “rooted in a grant of . . . power by the Congress,” and (iii) promulgated in conformance with any procedural requirements established by Congress.³⁵

The Content Companies wrongly argue that there is no FCC regulation authorizing the disclosure of confidential information from one party to another. But this theory ignores the Commission’s authority under Section 310(d) of the Communications Act to review transactions

³⁰ 18 U.S.C. § 1905.

³¹ See Content Companies Comments at 15-17.

³² *Qwest Commc’ns Int’l Inc. v. FCC*, 229 F.3d 1172, 1177 (D.C. Cir. 2000) (citation omitted).

³³ *Id.* (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1141 (D.C. Cir. 1987)).

³⁴ *Id.* at 1179.

³⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979); Content Companies Comments at 16.

involving the transfer of control or assignments of licenses and to “impose remedial conditions to address potential harms likely to result from the transaction.”³⁶ Commission orders approving such transactions, and the conditions therein, have the force and effect of law.³⁷ The Commission also retains ongoing authority to monitor and enforce compliance with the conditions it imposes, which the Request will plainly facilitate.³⁸ There is no question, therefore, that the Commission can require disclosure of a peer deal as part of an order establishing conditions to a transaction that serve the public interest.

During the Comcast-NBCUniversal proceeding, the Commission also plainly gave significant thought to, and ample opportunity for, concerned parties to comment on the conditions adopted in the *C-NBCU Order*.³⁹ The Content Companies knew that they were specifically named as “peers” for the purpose of the Benchmark Condition. And they also participated in the review process; among other things, they met with Commission staff regarding their specific concerns over the confidentiality of their peer agreements with OVDs.⁴⁰

³⁶ 47 U.S.C. §§ 303(r), 310(d); *see also C-NBCU Order* ¶ 2; *see, e.g., N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 961 (D.C. Cir. 1968) (stating that antitrust laws are a tool that a regulatory agency can use to bring “understandable content to the broad statutory concept of the ‘public interest.’” (internal citation omitted)).

³⁷ The ordering clauses identify the provisions of the U.S. Code that give the Commission the authority to both approve the transaction (47 U.S.C. § 310(d)) and impose conditions (47 U.S.C. § 303(r)). *C-NBCU Order* ¶ 285. It is hornbook law that substantive rules – such as those contained in the *C-NBCU Order* – that are properly issued by an agency under its delegated authority, carry the force and effect of law. *See, e.g., Chrysler Corp.*, 441 U.S. at 295.

³⁸ *See* 47 U.S.C. § 303(r); *C-NBCU Order* ¶ 286 (noting that the conditions will continue to apply until they expire on their own terms or until the Commission determines that they should be modified or removed).

³⁹ As the Content Companies admit, the *C-NBCU Order* and its conditions were adopted after an “exhaustive, twelve-month analysis. The record in the proceeding consisted of hundreds of thousands of pages. More than ten thousand comments were submitted by public advocacy groups, C-NBCU competitors and numerous individual citizens.” Content Companies Comments at 18.

⁴⁰ *See supra* note 26; *see also* Letter from Jared S. Sher, Skadden, Arps, Slate, Meagher & Flom LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (July 21, 2012) (noting that some of the Content Companies met with Commission staff to “discuss issues related to confidentiality of programming contracts” in connection with the Comcast-NBCUniversal transaction).

This record easily meets the threshold of an agency making a “conscious choice in favor of disclosure.”⁴¹

Further, the requested clarification of the process and safeguards for use of peer deals under the Benchmark Condition are consistent with Commission policies regarding confidential information.⁴² By issuing the TPO, the Commission would properly “balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive information.”⁴³

The fact that the Trade Secrets Act would prohibit disclosure of information that would fall under Exemption 4 of FOIA, as the Content Companies also note, is simply irrelevant here.⁴⁴ NBCUniversal’s use of a peer deal – under stringent confidentiality protections – to comply with a federal mandate cannot be reasonably compared to a FOIA request.

Granting NBCUniversal’s Request, therefore, is well within the Bureau’s delegated authority and would not be arbitrary or capricious, as the Content Companies wrongly assert. Indeed, the only potentially arbitrary result here would be to require NBCUniversal to satisfy an agency-imposed benchmark requirement without providing the benchmark.⁴⁵ Although the

⁴¹ *Qwest*, 229 F.3d at 1177 (“The Trade Secrets Act ‘seems to embody a congressional judgment that private commercial and financial information should not be revealed by agencies that gather it, *absent a conscious choice* in favor of disclosure *by someone with power to impart the force of law to that decision.*’” (emphasis added) (citing *CNA Fin. Corp.*, 830 F.2d at 1141)).

⁴² The Commission has said, as a policy matter, that “disclosure under a protective order or agreement may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.” *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report & Order, 13 FCC Rcd 24816, ¶ 9 (1998).

⁴³ *Id.*

⁴⁴ Content Companies Comments at 17.

⁴⁵ The Content Companies’ claim that granting the Request would be arbitrary and capricious is meritless. First, it will merely clarify the timing and procedures for use of a peer deal under the Benchmark Condition to enable compliance; it will not give NBCUniversal “more power.” *Id.* at 26. Second, since the Request will enable compliance with a benchmark mandate the Commission and DOJ both adopted, it is far-fetched for the Content

Content Companies do not like the condition, their attempt to raise Trade Secrets Act concerns more than a year after-the-fact are unfounded (and in all events untimely).

2. *The Request Does Not Raise FOIA Or Public Disclosure Concerns.*

The Content Companies make a related claim that the Request would place the Commission “in the untenable position of warehousing substantial amounts of confidential data, which in turn would subject it to a potentially ongoing stream of requests for access.”⁴⁶ This again overstates things. The proposed TPO prohibits “third parties (i.e., parties other than the OVD invoking the protection and NBCUniversal)” from accessing the peer deal or other confidential submissions.⁴⁷ Nor would this information be at risk of disclosure under FOIA. As the Content Companies themselves correctly note, FOIA “Exemption 4 covers the contractual terms and pricing information that is contained in” a peer deal, which would be “exempt from disclosure under FOIA if held by the FCC under Section 0.457 of the FCC’s rules.”⁴⁸ Nothing about the Request changes that result.

Notably, DOJ likewise requires that OVDs submit a peer deal to the agency⁴⁹ and is also subject to FOIA. DOJ will have the same grounds to deny a request for disclosure there as the Commission has here.

Companies to claim that granting the Request would be “wholly at odds with the intent of the *Merger Order*.” *Id.* at 27. Third, the Content Companies’ reliance on *Qwest* is misplaced, as the Commission there had articulated a specific policy with respect to disclosure of audit information and then departed from it without considering plausible alternatives to disclosure. Here, there is no such clear articulation – or departure from it – by the Commission. *Qwest*, 229 F.3d at 1181. Finally, and as discussed above, the fact that NBCUniversal has successfully negotiated and entered into online content distribution deals in the open marketplace is wholly irrelevant in the context of an OVD invoking the Benchmark Condition and has no bearing on the procedures for compliance.

⁴⁶ Content Companies Comments at 21-22.

⁴⁷ Request at 4.

⁴⁸ Content Companies Comments at 17.

⁴⁹ *See* DOJ Final Judgment, § VII.I.

The Content Companies' concern that the Commission might inadvertently disclose peer deals is equally unfounded.⁵⁰ The Commission routinely receives highly confidential information in numerous contexts. Nothing in the Request creates greater risks of inadvertent disclosure of peer deals than any other highly confidential information that the Commission receives.

3. *The Request Is Not Inconsistent With The C-NBCU Order Arbitration Process.*

Lastly, the Content Companies claim that granting the Request would render moot Phase 1 of an arbitration under the online conditions in the *C-NBCU Order*.⁵¹ They contend that “if an OVD were compelled to show all of its cards to C-NBCU up front . . . there could not possibly be a dispute as to whether the first prong of the Benchmark Condition had been triggered, i.e., whether the OVD was ‘qualified’ by virtue of having an agreement with a ‘peer’ company.”⁵² Although the Content Companies may think that requiring every OVD to engage in arbitration to prove their *bona fides* under a peer deal is both a good thing and intended under the Benchmark Condition, it is doubtful that OVDs – or the Commission – agree.

This argument also again misapprehends the Benchmark Condition. When an OVD invokes the Benchmark Condition, the OVD's only right is to obtain an economically equivalent content license from NBCUniversal based on the peer deal. Far from being forced to “show all of its cards up front,” provision of the peer deal is the *sine qua non* of an OVD's right to seek

⁵⁰ See Content Companies Comments at 22.

⁵¹ *Id.* at 20.

⁵² *Id.*

programming under the Benchmark Condition in the first place.⁵³ And, as shown, it is essential for NBCUniversal to be able to comply with the mandate.

For the same reasons, the Content Companies and Public Knowledge are mistaken in suggesting that the procedural clarification sought in the Request would enable NBCUniversal to “pick and choose” the most advantageous terms, “leav[ing] [the] OVD with no prospect of achieving a better deal out of negotiations with C-NBCU than the OVD obtained from one of the Content Companies.”⁵⁴ OVDs are free to negotiate deals with NBCUniversal in the marketplace and to strike whatever deals may be mutually agreeable. But again, when an OVD demands programming under the Benchmark Condition, the *peer* – not NBCUniversal – has set the terms and conditions that matter. NBCUniversal’s only obligation is to provide a content license that is economically equivalent to the peer deal and consistent with any applicable exclusions, defenses, or other limitations specified in the condition.⁵⁵

Notably, in the limited instances to date where the Benchmark Condition has been triggered, the OVDs’ failure to provide the peer deal has impeded negotiations and resulted in arbitration proceedings. That is not a desired outcome for either party. Nor is it what the Commission intended. The Request seeks to avoid this result by clarifying the process and safeguards for properly using a peer deal as the benchmark for an economically equivalent

⁵³ Nor is it a foregone conclusion that provision of the peer deal will “moot” the question of whether an OVD is in fact “qualified.” Not every agreement touching on online programming makes an entity a “*bona fide*” OVD under the *C-NBCU Order*. See *C-NBCU Order* ¶ 4.

⁵⁴ Content Companies Comments at 21. Public Knowledge asserts that “[i]f Comcast is permitted to review peer agreements before submitting its final offer it would likely tailor its offer to closely match them.” Public Knowledge Comments at 3. Far from demonstrating any ill-effect from the disclosure, this statement accurately summarizes how the Commission and DOJ intended for the Benchmark Condition to work in the first place.

⁵⁵ Nor is the Request intended to “delay arbitration proceedings,” as Project Concord erroneously suggests. Project Concord 2/23/12 Letter at 2. To the contrary, the Request seeks to ensure that the Benchmark Condition works as intended, enabling NBCUniversal to shape economically equivalent license agreements based on a peer deal and *reducing* the prospects of arbitration. This should serve, not undermine, the interests of OVDs.

NBCUniversal content license. Although the Content Companies may continue to object to the Benchmark Condition, the requested clarification will plainly serve the interests of the parties for whose benefit the condition was crafted – the OVDs.

III. CONCLUSION

For all these reasons, the Commission should grant the Request and adopt a Third Protective Order for Compliance to govern the use of peer deals as intended under the Benchmark Condition.

Respectfully submitted,

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