

REDACTED – FOR PUBLIC INSPECTION

July 11, 2012

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FILED/ACCEPTED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

JUL 11 2012
Federal Communications Commission
Office of the Secretary

RE: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56 – Public Version of Arbitrator Decision

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the public inspection version of the Arbitrator decision in an arbitration proceeding between Project Concord, Inc. and NBCUniversal Media, LLC conducted pursuant to Appendix A of the Commission's Memorandum Opinion and Order, FCC 11-4, released January 20, 2011, in the referenced Docket ("Comcast Order"). The filing is being made pursuant to Section VII. B. 14 of Appendix A.

If there are any questions on this matter, please contact the undersigned or, in the alternative, Paul C. Besozzi (202-457-5292, pbsozzi@pattonboggs.com).

Respectfully submitted,

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Counsel for Project Concord Inc.

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July 11, 2012

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cc: Sarah Whitesell
Martha Heller
Steven Broecker
Lindsay Addison
Michael Hurwitz
David Murray

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Federal Communications Commission
Office of the Secretary

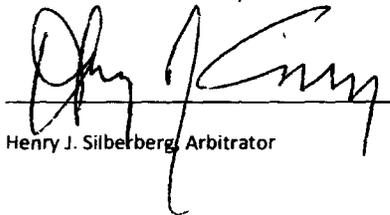
AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration)	
Between)	Case No. 72 472 E 01147 11
PROJECT CONCORD, INC.,)	
Claimant,)	POST-AWARD ORDER RE REDACTED VERSION
)	OF ARBITRATION AWARD (AS AMENDED)
vs.)	
NBCUNIVERSAL MEDIA, LLC,)	
Respondent.)	
_____)	

The Arbitration Award (As Amended) (the "Award") was issued effective as of June 15, 2012. As provided in the Award, counsel for the parties conferred with one another in an effort to reach agreement on a redacted version of the Award pursuant to Sections VII.B.14 and VIII.8 of the Conditions to the FCC Order which the FCC would make available to any requesting party, and I retained jurisdiction to approve any agreement reached by the parties and/or to consider and resolve any disagreements between the parties on this subject. Attached hereto is the redacted version of the Award approved by me, embodying both the redactions initially agreed upon by the parties and matters on which they were unable to agree, and thus, were resolved by me in discussion with counsel for the parties.

Dated: July 11, 2012



Henry J. Silberberg, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration)	
Between)	Case No. 72 472 E 01147 11
PROJECT CONCORD, INC.,)	
Claimant,)	ARBITRATION AWARD (AS AMENDED)
vs.)	
NBCUNIVERSAL MEDIA, LLC,)	
Respondent.)	
_____)	

THIS ARBITRATION AWARD CONTAINS INFORMATION WHICH THE PARTIES HAVE DESIGNATED HIGHLY CONFIDENTIAL UNDER A CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER APPLICABLE TO THIS CASE

THE UNDERSIGNED ARBITRATOR, having been duly sworn, and having duly heard the proofs and allegations of the parties, hereby issues this ARBITRATION AWARD (the "Award").

Introduction

This arbitration arises under the online "Benchmark Condition" established in *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, 26 FCC Red 4238 (2011) (the "FCC Order"). Claimant Project Concord, Inc. (hereafter often referred to as "PCI") is represented in the arbitration by Jean Veeder MacHarg, Meagan T. Bachman and Monica DeSai of Patton Boggs, LLP and John M. Genga of Genga & Associates, P.C. Respondent NBC Universal Media, LLC (hereafter often referred to as "NBCU") is represented in the arbitration by David Murray, Lindsay M. Addison, Michael D. Hurwitz and Mary Claire York of Willkie Farr & Gallagher LLP. Pursuant to the FCC Order, the arbitration was conducted in two phases, under a schedule agreed to by the parties and approved by me. (Upon the issuance of this Award, the arbitration will be concluded, pursuant to the agreed schedule, within 93 days following my appointment on March 14, 2012.)

A Phase 1 evidentiary hearing was held on April 24 and 25, 2012 in Washington, D.C. After careful and full consideration of all of the oral and documentary evidence and oral and written arguments presented by the parties in connection with Phase 1, I issued my Phase 1 Decision dated May 10, 2012

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(the "Phase 1 Decision"). The Phase 1 Decision hereby is incorporated in and made a part of this Award, and a copy thereof is appended hereto as Exhibit A.

This Award now is being issued after careful and full consideration of the parties' respective Phase 2 Final Offers for agreements which they exchanged with one another and submitted to me on May 16, 2012; the Benchmark Agreement or Peer Deal; the Phase 2 opening, rebuttal and closing briefs and all related materials submitted by the parties; and all of the oral and documentary evidence and oral arguments of counsel presented at the Phase 2 evidentiary hearing, as well as the evidence and arguments presented during the Phase 1 proceedings.

All capitalized terms in this Award, unless otherwise indicated, are intended to have the same meaning as in the Conditions to the FCC Order and/or the Phase 1 Decision.

During the post-Award process to create a redacted non-confidential version of this Award which may be made available by the FCC to any requesting party, it was noted that the Award contained a few "typos" (i.e., three references to PCI as "PCA"; two references to PCI where the context is clear the intent was to refer to NBCU; and an inadvertent inclusion of the word "be" on page 8.) With the agreement of counsel for the parties, this Award hereby is amended to correct these "typos", effective (at the parties' request) as of the June 15, 2012 date of the Award.

The Phase 1 Decision

As stated in its Summary of Decision Section (at p. 4), the Phase 1 Decision, determined the following:

1. PCI is a Qualified OVD.
2. Films for which less than a year has elapsed since their theatrical release are not excluded from the definition of "Video Programming" contained in the Conditions to the FCC.
3. The scope of Comparable Programming in PCI's Final Offer more closely approximates the appropriate Comparable Programming contained in the Peer Deal than the scope of Comparable Programming contained in NBCU's Final Offer.
4. While the parties agreed (with my approval) that the evidence relating to NBCU's Contractual Impediment Defense should be presented and considered in Phase 1 notwithstanding the provision in the Conditions that Phase 1 should not be concerned with such Defense (see Sections VII.C.1 and VII.C.3), after hearing and considering the evidence, for determination purposes, I think it is best to follow the order set forth in the Conditions. Accordingly, a determination as to whether the Defense has been proven and the impact thereof will be deferred to Phase 2.
5. NBCU has requested an order requiring the indemnity provision set forth in Section IV.A.5 of the Conditions be included in the respective final offers for agreements for Phase 2. In the event that NBCU's Contractual Impediment Defense is determined in Phase 2, in whole or in part, not to have been sufficiently proven, it then also will be decided whether the requested indemnity is appropriate. Accordingly, the parties should consider including the requested indemnity provision in their respective final offers for Phase 2 on such conditional basis. I decline however to order them to do so.

6. No attorneys' fees, costs or expenses will be awarded at this time to either party based upon the other party's alleged unreasonable conduct "during the course of the arbitration," pursuant to Sections VII.B.10 and VIII.5 of the Conditions. Any party desiring an award of such attorneys' fees, costs or expenses shall submit with its Phase 2 opening brief a supporting declaration of counsel which shall include a detailed explanation of the basis for the request and a detailed showing as to how the amount requested has been calculated. Oppositions to such requests also shall be submitted in writing with the Phase 2 rebuttal briefs. There will no cross examination of counsel permitted.

In addition, the Phase 1 Decision (at pp. 3-4) also determined that the form of NBCU's Phase 1 Final Offer, which was limited to proposed programming, was consistent with a procedure authorized in Section VII.C.2 of the Conditions.

The Phase 2 Issues

The Phase 2 Issues to be decided in this Award are the following:

1. Which of the Phase 2 "final offers for agreements based on the Comparable Programming chosen by the arbitrator [in Phase 1]" "most closely approximates the fair market value of the programming carriage rights at issue, as defined in Section IV.A.2" of the Conditions? See Conditions VII.C.1 and 2.
2. Whether NBCU has proven by a preponderance of the evidence that it would be in "breach of a contract to which Comcast or NBCU is a [third] party" by providing content otherwise required of it under the proposed agreement chosen pursuant to subparagraph 1 above (i.e., the Contractual Impediment Defense)? See Conditions VII.C.3.
3. Whether PCI must provide an indemnity to NBCU pursuant to Section IV.A.5 of the Conditions, and if so, how should such obligation be satisfied?
4. Whether either of the "cost-shifting" requests made by the parties for recovery of certain attorneys' fees, costs and other expenses incurred in connection with this arbitration should be granted, in whole or in part?
5. Whether to grant or deny PCI's request made in its Closing Brief (at 26) that I retain jurisdiction relating to performance of the chosen agreement pending a judicial decision to enforce the Award or a decision by the Media Bureau or the FCC on any appeal to them?

Summary of Phase 2 Decision

1. PCI's Phase 2 Final Offer most closely approximates the fair market value of the programming carriage rights at issue.
2. NBCU has failed to meet its burden of proof on its Contractual Impediment Defense.
3. PCI is required to provide NBCU indemnity under Section IV.A.5 of the Conditions. [REDACTED]
[REDACTED]
[REDACTED]
4. The "cost-shifting" requests of both of the parties are denied.

5. PCI's request that I retain jurisdiction relating to performance of the chosen agreement is denied. The only jurisdiction I shall retain after issuance of this Award will be, as agreed by the parties, for the limited purpose of approving the agreement they reach on the non-confidential, redacted version of this Award or considering and resolving any disagreements between them on such subject.

The Phase 2 Final Offers

PCI's Phase 1 Final Offer was in the form of a complete contract for carriage (Exhibit 4). NBCU, on the other hand, in Phase 1, as authorized by the Conditions, chose to submit a Final Offer on the Scope of Comparable Programming (Exhibit 1), not a contract of carriage. For Phase 2, PCI submitted a contract for carriage different in some respects than its Phase 1 Final Offer (Exhibit 65) and the Peer Deal (Exhibit 3). For Phase 2, NBCU also submitted a complete contract for carriage (Exhibit 64).

In PCI's Phase 2 Final Offer, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NBCU's Phase 2 Final Offer [REDACTED]

[REDACTED]

[REDACTED]

Reasoning and Factual Findings

1. The Agreement Which Most Closely Approximates the Fair Market Value of the Programming Carriage Rights At Issue

As I read the Conditions to the FCC Order, where an arbitration is bifurcated, as it was here, Phase 1 primarily should be devoted to resolving certain threshold issues, such as whether the OVD is a Qualified OVD, the scope of Comparable Programming to which the OVD is entitled and any asserted defenses based on 47 C.F.R. Section 76.1002(b)(1). Phase 2 then should be focused on the economic differences between the parties' competing offers on a fair market value analysis, taking into account any differences or economic equivalents as to price, terms and conditions. (As previously discussed, the Conditions also provide for Phase 2 to be the time for hearing and determining any Contractual Impediment Defense, which procedure was partially modified in this case by agreement of the parties.)

The competing Phase 2 Final Offers do not present any noteworthy differences as to price. [REDACTED]

[REDACTED] The key and overriding dispute in this case has been over the scope of programming content to be provided by NBCU to PCI. [REDACTED]

[REDACTED] Accordingly, PCI contends it is entitled, and the Phase 1 Decision already determined, that NBCU is required to license Comparable Programming to PCI. While NBCU in its Phase 2 Final Offer now [REDACTED] the scope of programming provision contained in the [REDACTED] it candidly has made clear that it interprets that provision materially more narrowly than PCI does. According to NBCU, while PCI's Phase 2 Final Offer (as well as PCI's Phase 1 Final Offer) is in the form [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is indisputable that there is no comparison between the value of a non-exclusive Video Programming license that excludes Current Films and Current TV Titles, and one that includes such content. See, e.g., DeVitre Second Declaration, Paras. 36-38. It also is indisputable that without Current Films and Current TV Titles, NBCU's Phase 2 Final Offer is of substantially lower value than the programming [REDACTED]. Thus, the insertion by PCI [REDACTED] in its Phase 2 Final Offer is reasonable and appropriate in order to eliminate any subsequent misunderstanding as to the scope of programming to which PCI is entitled, to assure economic equivalence with the Peer Deal on available programming, and to avoid inappropriate discrimination against PCI, especially in light of NBCU's clarification of its significantly more narrow interpretation of [REDACTED] without PCI's proposed addition.

The [REDACTED] difference between the competing Phase 2 Final Offers is so critical economically that it overrides the other differences between them. Nonetheless, in the interest of completeness, I also will discuss the other principal differences [REDACTED]. NBCU is correct in noting that in a discussion with counsel during the hearing, I commented that I was not enamored with the changes PCI has proposed with respect to [REDACTED] but more favorably inclined toward PCI's proposed changes to [REDACTED] (See Transcript at 1036.) However, on further study, even if I had the authority and could, for example, choose two paragraphs from one proposal and two from the other proposal, I would not do so and I would choose PCI's Phase 2 Final Offer in its entirety.

First, I find it significant that while NBCU complains about the "additional costly duties and burdens on NBCU" imposed by PCI's changes [REDACTED] (NBCU Closing Brief at 8-9), NBCU made no effort whatsoever to attempt to quantify any of the alleged "additional costly duties and burdens," either through either of its two experts who opined on the subject or otherwise. The reason for the lack of attempted quantification seems obvious: the additional duties and burdens about which NBCU is complaining should not be costly or particularly burdensome. For example, NBCU complains of the [REDACTED]

[REDACTED] It is hard to imagine the cost and burden of compliance with these obligations possibly tipping the scale of economic equivalence in NBCU's favor. Second, PCI's proposed changes [REDACTED]

[REDACTED]

[REDACTED] Thus, albeit the language could be clearer and better, PCI seems to have adequately addressed the "what if" hypothetical posed during the hearing [REDACTED]

[REDACTED]

[REDACTED] contained in the competing Phase 2 Final Offers appears under the totality of the circumstances to be de minimus; in any case, any such difference is insufficient to tip the scale in favor of NBCU's Final Offer.

2. NBCU's Contractual Impediment Defense

In Section VII.C.3, in pertinent part, the Conditions provide that "it shall be a defense for Comcast or C-NBCU to demonstrate by a preponderance of the evidence that any of the following reasonably justifies

denying Online Video Programming to a particular Qualified OVD: . . . (ii) that providing the Online Video Programming to the particular Qualified OVD would constitute a breach of contract to which Comcast or NBCU is a party . . .” NBCU has asserted this Contractual Impediment Defense with respect to [REDACTED] contracts to which it is a party with other third party licensees. [REDACTED]

The degree of speculation involved in NBCU’s Defense was well-articulated by one of NBCU’s expert witnesses, Steven Madoff, in connection with NBCU’s agreement with [REDACTED], as follows:

. . . as I was sitting in the other room, I was thinking about how all this plays out and assuming there is a press release 30 or 60 or 90 days before the launch, people start becoming aware of the presence of PCI and [REDACTED] For all I know, they may say, you know what? We really don’t have a problem with it. Or they may say, we’ve got a problem with it. They’ll probably communicate with [REDACTED]

[REDACTED]

[REDACTED] (Transcript at 847-848.)

This speculative opinion testimony that [REDACTED] is glaringly inconsistent with the preponderance of the evidence burden which NBCU must carry. Another conclusion which I draw from this candid testimony from Mr. Madoff is that we should not be too quick to judge whether the presently speculative Defense applies [REDACTED]

[REDACTED]

With respect to the particular agreements referenced by NBCU in support of its Contractual Impediment Defense, I have the following observations:

- A. The finding in the Phase 1 Decision that [REDACTED] does not by itself substantiate the Defense as to any of NBCU's third party agreements. Even under [REDACTED] further factual proof (which is lacking in this case) is required before the Defense can be sustained.
- B. As to the [REDACTED], I agree with Mr. Madoff that the pertinent language is [REDACTED] (Transcript at 876.) [REDACTED] should not be construed without the benefit of hearing, rather than speculating, [REDACTED] Based on the evidence presented in this arbitration and my reading of the [REDACTED], I think that the issue of breach, [REDACTED], could be decided either way. There is also the issue raised by Mr. Madoff, as well as by PCI witnesses, as to whether the [REDACTED] to allow NBCU to provide the Current TV and Movie Titles to PCI.
- C. As to the [REDACTED] the pertinent language is [REDACTED] and based on the evidence presented in this arbitration, I believe [REDACTED] would have a difficult time establishing a breach, if asserted. I reach the same conclusion as to the agreements [REDACTED]
- D. [REDACTED] read more favorably in support of a claim of breach. But again, it is premature and speculative [REDACTED], and the record is not sufficient to justify any finding of a breach.
- E. [REDACTED] based on the current record, present very doubtful exposure to any claim of breach against NBCU.
- F. Based on the current record, NBCU's agreements [REDACTED] also seem unlikely to give rise to a claim of breach.

In sum, I find that NBCU has substantially overstated its risk of damages for breach of contracts with third parties and injury to its business relationships if it is required to perform the chosen Phase 2 Final Offer for agreement submitted by PCI. I further find that in any event NBCU has failed to satisfy its burden of proof on its Contractual Impediment Defense as to each of the third party agreements which NBCU has identified in connection with the Defense. This finding and ruling, of course, is without prejudice to NBCU's rights should any of the third party licensees subsequently assert a concern or conflict relating to NBCU's licensing of Current TV or Movie Titles to PCI [REDACTED]

3. NBCU's Right to Indemnity

Under Section IV.A.5 of the Conditions, "if a reasonable dispute exists or arises regarding whether a C-NBCU Programmer has the right to grant an OVD the right to the Video Programming at issue, the C-NBCU Programmer may require the Qualified OVD to indemnify it and hold it harmless against any breach of contract, tort, copyright violation or other claim arising out of any lack of right of the C-NBCU

Programmer to grant the OVD the right to Video Programming." [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

4. The "Cost-Shifting" Requests

Sections VII.B.10 and VIII.5 provide that "[i]f the arbitrator finds one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including reasonable attorneys' fees) against the offending party." Thus, the party seeking "cost-shifting" under this "unreasonable conduct" standard has a much different and more difficult burden than would be the case under a "prevailing party" test.

A. PCI's Request

PCI has submitted two extensive Declarations of its lead counsel, totaling 62 pages, in support of its request that I assess against NBCU all of the costs, expenses and attorneys' fees incurred by PCI in connection with the arbitration. [REDACTED]
[REDACTED]

[REDACTED] PCI's counsel, Jean MacHarg, stated in her first Declaration (at para. 103) that she believes that "the standard rates . . . are reasonable and competitive", thereby presumably implying that those are the amounts which should be awarded. The amount of attorneys' fees and costs sought by PCI consist of the following:

- (i) Fees incurred with Patton Boggs LLP between January 2012 and June 2012 of [REDACTED] (for which the standard rate would be [REDACTED]) plus costs of [REDACTED]
- (ii) Fees incurred with Genga & Associates PC between October 2011 and May 2012 of [REDACTED] (for which the standard rate would be [REDACTED]) plus costs of [REDACTED]

In addition, PCI seeks the recovery of expert witness fees and expenses incurred with Mark DeVitre of [REDACTED] and Gary Marenzi of [REDACTED], as well as [REDACTED] in consulting fees incurred with four different consultants. Lastly, PCI seeks the recovery of the amount incurred for the Arbitrator's fees and expenses. Thus, the total amount sought is [REDACTED]

[REDACTED] the reasonableness thereof for the services rendered has not been challenged. However, as noted above, PCI has a steep burden in having to show "unreasonable conduct" occurring throughout the arbitration proceedings. While PCI may be the prevailing party on the Award, I cannot and will not find that any "unreasonable conduct" occurred. Rather, from my perspective, this was a complex, hard fought and time-pressured legal proceeding where both sides were represented by skilled and sophisticated counsel, and while they of course did

not always agree with one another, the attorneys generally acted cooperatively, ethically and professionally with one another.

There were no dilatory or improper tactics employed by either side that I observed. At the outset, counsel for the parties jointly presented to me what seemed and proved to be an extremely ambitious schedule of events to conclude both phases of the arbitration within the 90 day limit set in the Conditions (which at the conclusion of the Phase 2 hearing counsel jointly agreed in their mutual self interest to extend for a few days so that the respective legal teams might enjoy part of the upcoming weekend). There were no improper multiplicity of proceedings. In fact, by agreeing prior to start of the Phase 1 hearing to time limits for the testimony of each witness and for the direct testimony of each witness to be presented mainly by written declarations served in advance of the hearing, the Phase 1 hearing efficiently concluded in two days, rather than the three days which had been scheduled. Similarly, but without the time limits, the Phase 2 hearing was conducted efficiently. While PCI complains, amongst other things, that NBCU's request that the arbitration be bifurcated, NBCU's challenge to PCI's status as a Qualified OVD, and NBCU's submission of a Phase 1 Final Offer on the scope of Comparable Programming rather than a proposed contract for carriage were dilatory acts, and that NBCU had no proper basis for asserting its Contractual Impediment Defense, these are all matters suggested in the Conditions. Moreover, it is wrong for PCI in its "cost-shifting" request to attribute to NBCU any improper motive in raising the question regarding the definition of "Video Programming" contained in the Conditions, or in stating at the initial March 23, 2012 case management conference that it would pursue a 47 C.F.R. Section 76.1002(b) (1) (financial stability) defense and then indicating on April 4, 2012 that it was withdrawing such defense. I cannot find any persuasive reason to conclude that NBCU and/or its counsel pursued any of these matters or engaged in any other action other than in good faith.

Further, the additional time devoted by both parties in Phase 2 in presenting further testimony relating to the Contractual Impediment Defense did not involve any unreasonable conduct, as PCI contends, and such testimony and related argument in fact were helpful in clarifying the underlying facts and assisting me in reaching the ruling set forth above in PCI's favor. Additionally, I note that PCI's "cost-shifting" request seeks over [REDACTED] in attorneys' fees incurred by PCI between October 2011 and February 2012, prior to my appointment in mid-March 2012 after which most of the activity in the arbitration began.

In short, while I have not commented upon all of the many alleged acts of unreasonable conduct upon which PCI relies, it should suffice to say that I do not find any part of PCI's "cost-shifting" request to be convincing. Accordingly, it hereby is denied.

B. NBCU's Request

NBCU's "cost-shifting" request is more modest and limited than PCI's, and conditioned upon its Phase 2 Final Offer being chosen. In light of the other determinations herein, NBCU's request appears to be moot. Briefly, NBCU argued that in light of its Phase 2 Final Offer being [REDACTED] there was no need for the Phase 2 proceedings; and therefore, if NBCU's Phase 2 Final Offer

ultimately was chosen, all of the costs and fees incurred by NBCU in connection with Phase 2 should be assessed against PCI. If not moot, NBCU's "cost-shifting" request hereby is denied.

5. PCI's Request that the Arbitrator Retain Jurisdiction

In its Closing Brief (at 26), "because performance under the Award is to commence immediately upon its entry," PCI asked that I retain jurisdiction over the matter "pending a decision on any application to enforce it in a court of competent jurisdiction or a decision by, as appropriate, the Media Bureau or the Commission on any appeal to them, unless such court or the FCC otherwise directs." After review of PCI's Closing Brief, I sent counsel for the parties an email requesting NBCU's position on PCI's request, and requesting both sides to comment on whether I have jurisdiction or authority to grant PCI's above request. On June 11, 2012, I received emails from counsel for each side addressing the issue. In the absence of a clear agreement between the parties, or a binding judicial or FCC Order conferring further jurisdiction upon me, I do not think it would be appropriate for me to retain such jurisdiction, and thus, I decline to do so.

6. Confidentiality and Agreed Limited Retention of Jurisdiction

As noted on the front page of this Award and the appended Phase 1 Decision, they contain information which the parties have designated as "Highly Confidential" under the Protective Order. This Award and the Phase 1 Decision also may contain information which has been designated as "Confidential". As suggested and agreed by counsel for the parties, they shall meet and confer with the view of reaching agreement on creating a version of this Award, including the Phase 1 Decision, which redacts all information designated by them as "Highly Confidential" or "Confidential" and then submitting that version to me for approval so as to satisfy the requirement in Section VIII.7 of the Conditions for there to be a non-confidential redacted version of this Award. The parties shall have until on or before June 26, 2012 within which to reach such agreement and present it to me for approval, and if no such agreement has been reached, to inform me of the substance of their disagreement(s) on the subject. As noted on the record (see Transcript at 659-660), in substance, counsel for the parties have stipulated that I shall retain jurisdiction for the limited purpose either of approving the agreed redacted version of the Award, or in the event counsel for the parties are unable to reach such agreement, for the limited purpose of promptly considering and resolving any disagreement between the parties on the form of the required redacted version of this Award.

7. Miscellaneous

The filing and administrative fees of the AAA totaling [REDACTED], and the fees and expenses of the Arbitrator totaling [REDACTED], shall be borne as incurred by the parties. Except as noted in the preceding paragraph 6 above, this Award is intended to determine all claims, defenses and issues submitted by the parties for decision. Any claim, defense or requested remedy not specifically mentioned herein is hereby denied.

Summary of Award

For the foregoing reasons, I find, declare and award, as follows:

1. PCI is a Qualified OVD.
2. Films for which less than a year has elapsed since their theatrical release are not excluded from the definition of "Video Programming" contained in the Conditions to the FCC.
3. The scope of Comparable Programming in PCI's Phase 1 Final Offer more closely approximates the appropriate Comparable Programming contained in the Peer Deal than the scope of Comparable Programming contained in NBCU's Phase 1 Final Offer.
4. PCI's Phase 2 Final Offer for agreement most closely approximates the fair market value of the programming carriage rights at issue.
5. NBCU has failed to meet its burden of proof on its Contractual Impediment Defense.
6. PCI is required to provide NBCU indemnity under Section IV.A.5 of the Conditions. [REDACTED]
[REDACTED]
[REDACTED]
7. The "cost-shifting" requests of both of the parties are denied.
8. PCI's request that I retain jurisdiction relating to performance of the chosen agreement is denied. The only jurisdiction I shall retain after issuance of this Award will be, as agreed by the parties, for the limited purpose of approving the agreement they reach on the non-confidential, redacted version of this Award or considering and resolving any disagreements between them on such subject. On or before June 26, 2012, counsel for the parties shall inform me via email as to whether they have reached agreement on the form of a redacted version of this Award, and if so, provide me a copy thereof for approval; if the parties have been unable to reach such agreement, on or before June 26, 2012, counsel for the parties shall inform me via email as to the substance of whatever disagreement(s) they have on the subject.
9. Except as noted in the preceding paragraph above, this Award is intended to determine all claims, defenses and issues submitted by the parties for decision. Any claim, defense or requested remedy not specifically mentioned herein is hereby denied.

Dated: June 15, 2012

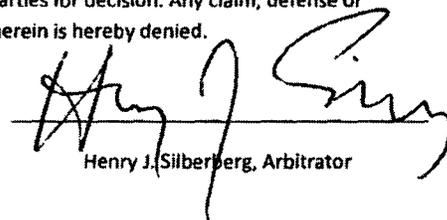

Henry J. Silberberg, Arbitrator

EXHIBIT A

REDACTED - FOR PUBLIC INSPECTION

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration)	
Between)	Case No. 72 472 E 01147 11
PROJECT CONCORD, INC.,)	
Claimant,)	PHASE 1 DECISION
vs.)	
NBCUNIVERSAL MEDIA, LLC,)	
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_____)	

THIS DECISION CONTAINS INFORMATION WHICH THE PARTIES HAVE DESIGNATED HIGHLY CONFIDENTIAL UNDER A CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER APPLICABLE TO THIS CASE

Introduction

This arbitration arises under the online "Benchmark Condition" established in *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, 26 FCC Red 4238 (2011) (the "FCC Order"). Claimant Project Concord, Inc. (hereafter often referred to as "PC") is represented in the arbitration by Jean Veeder MacHarg, Meagan T. Bachman and Monica DeSai of Patton Boggs, LLP and John M. Genga of Genga & Associates, P.C. Respondent NBC Universal Media, LLC (hereafter often referred to as "NBCU") is represented in the arbitration by David Murray, Lindsay M. Addison, Michael D. Hurwitz and Mary Claire York of Wilkie Farr & Gallagher LLP. Pursuant to the FCC Order, the arbitration is being conducted in two phases, under a schedule agreed to by the parties and approved by me, with the view that both phases would be concluded and a reasoned award with findings of fact rendered within 90 days of my appointment on March 14, 2012.

A Phase 1 evidentiary hearing was held on April 24 and 25, 2012. Prior thereto, the parties exchanged documents (including exhibits to be offered in evidence), and they exchanged and submitted opening and rebuttal briefs, as well as declarations from each of their witnesses which by agreement were

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offered and received as part of the witnesses' direct testimony. Each party offered testimony from two outside experts in addition to its internal witnesses. After the close of the hearing, the parties also submitted extensive closing briefs and proposed findings of fact. After carefully considering all of the oral and documentary evidence and oral and written arguments presented by the parties, I hereby render my Phase 1 Decision. Following the Phase 2 hearing, scheduled for May 30 and 31, 2012, I will issue an Arbitration Award which will incorporate and include this Phase 1 Decision.

Background Facts

In the FCC Order, the FCC approved the transfer of control over NBCU licensing assets from General Electric Company ("GE") to a joint venture between GE and Comcast Corporation ("Comcast") which would be controlled by Comcast and would acquire the broadcast, cable programming, online content, movie studio and other businesses of NBCU and some of Comcast's cable programming and online content businesses. In its Order, "[r]ecognizing the danger this transaction could present to the development of innovative online video distribution," the FCC adopted conditions "designed to guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances." (FCC Order at 4.) Generally, under the Benchmark Condition, if an OVD has "entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD," all as defined in the Conditions, NBCU must provide Online Video Programming sought by the OVD that constitutes Comparable Programming (i.e., programming which is reasonably similar in kind and amount as the OVD obtained under its above-mentioned other agreement) unless a specified exception applies. "Film Studio" is defined, in pertinent part, as Warner Bros. Entertainment ("WB"), Fox Filmed Entertainment, Paramount Motion Pictures, Sony Pictures Entertainment, Walt Disney Motion Pictures Group.... These entities are sometimes referred to as NBCU's peers.

PCI is a startup company that has a plan, amongst perhaps other things, to distribute films/movies and television content online. [REDACTED] end of 2012. Following some earlier discussions with NBCU dating back at least to July 2011, PCI on October 7, 2011 gave notice to NBCU of its intent to arbitrate under the Benchmark Condition based upon a license agreement it had obtained with a peer studio (the "Peer Deal"). On October 28, 2011, after the "cooling off" period required by the FCC Order, PCI timely filed a demand for arbitration with the AAA, which included its "final offer" in the form of a long form contract for carriage with exhibits captioned "Video-On-Demand And Electronic Sell-Through Distribution License Agreement" ("PCI's Final Offer"). On November 2, 2011, the AAA notified NBCU of PCI's arbitration demand. On November 4, 2011, NBCU submitted to the AAA a "Final Offer on the Scope of Comparable Programming" ("NBCU's Final Offer") along with a letter identifying what it considered threshold issues and requesting that the arbitration be conducted in two phases. Pursuant to a confidentiality agreement, NBCU's outside counsel was provided a copy of PCI's Final Offer prior to the submission of NBCU's Final Offer. On March 26, 2012, pursuant to a Confidentiality Agreement and Protective Order entered in this case on March 23, 2012 (the "Protective Order"), NBCU's outside counsel was provided with a copy of the Peer Deal upon which PCI is relying and which PCI designated as "Highly Confidential" under the Protective Order thereby limiting disclosure to NBCU outside counsel and outside experts. [REDACTED]

[REDACTED]

[REDACTED]

- ¶ [REDACTED]
- ¶ [REDACTED]
- ¶ [REDACTED]
- ¶ [REDACTED]

[REDACTED]

As noted above, NBCU's Final Offer is not in the form of a contract for carriage. Most notably, while there are some other differences in the programming offered by NBCU's Final Offer and that sought by PCI, the major differences arise from the fact that NBCU's Final Offer expressly excludes (i) "Films for which less than a year has elapsed since their theatrical release," along the definition of "Video Programming" contained in the Conditions to the FCC Order, and (ii) "Online Video Programming the provision of which to PCI would constitute a breach of contract to which the applicable NBCUniversal licensor is a party," which, if proven by NBCU, is a permissible exclusion under Section VII.C.3 of the Conditions (the "Contractual Impediment Defense").

[REDACTED]

The form of NBCU's Final Offer, which is limited to proposed programming, is consistent with a procedure approved in the FCC Order As provided in Section VII.C.2 of the Conditions:

In the case of an arbitration under the Benchmark Condition, if there is a dispute about what Comparable Programming a Qualified OVD is entitled to, the parties shall submit their final offers for the scope of Comparable Programming at the commencement of the arbitration, as provided under Section IV.A. The arbitrator shall decide which of the two offers for the scope of

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Comparable Programming most closely approximates the appropriate Comparable Programming. At the conclusion of phase 1, the parties shall submit their final offers for agreements based on the Comparable Programming chosen by the arbitrator.

Summary of Decision

In addition to whatever findings and conclusions are contained above, this Phase 1 Decision determines the following:

1. PCI is a Qualified DVD.
2. Films for which less than a year has elapsed since their theatrical release are not excluded from the definition of "Video Programming" contained in the Conditions to the FCC
3. The scope of Comparable Programming in PCI's Final Offer more closely approximates the appropriate Comparable Programming contained in the Peer Deal than the scope of Comparable Programming contained in NBCU's Final Offer.
4. While the parties agreed (with my approval) that the evidence relating to NBCU's Contractual Impediment Defense should be presented and considered in Phase 1 notwithstanding the provision in the Conditions that Phase 1 should not be concerned with such Defense (see Sections VII.C.1 and VII.C.3), after hearing and considering the evidence, for determination purposes, I think it is best to follow the order set forth in the Conditions. Accordingly, a determination as to whether the Defense has been proven and the impact thereof will be deferred to Phase 2.
5. NBCU has requested an order requiring the indemnity provision set forth in Section IV.A.5 of the Conditions be included in the respective final offers for agreements for Phase 2. In the event that NBCU's Contractual Impediment Defense is determined in Phase 2, in whole or in part, not to have been sufficiently proven, it then also will be decided whether the requested indemnity is appropriate. Accordingly, the parties should consider including the requested indemnity provision in their respective final offers for Phase 2 on such conditional basis. I decline however to order them to do so.
6. No attorneys' fees, costs or expenses will be awarded at this time to either party based upon the other party's alleged unreasonable conduct "during the course of the arbitration," pursuant to Sections VII.B.10 and VIII.5 of the Conditions. Any party desiring an award of such attorneys' fees, costs or expenses shall submit with its Phase 2 opening brief a supporting declaration of counsel which shall include a detailed explanation of the basis for the request and a detailed showing as to how the amount requested has been calculated. Oppositions to such requests also shall be submitted in writing with the Phase 2 rebuttal briefs. There will no cross examination of counsel permitted.

My reasoning and related factual findings in making these determinations is further discussed below. All capitalized terms, unless otherwise indicated, are intended to have the same meaning as in the Conditions to the FCC Order.

Reasoning and Factual Findings

1. PCI is a Qualified OVD

I preliminarily note that nowhere in NBCU's extensive Closing Brief and Proposed Findings is there any mention of its contention that PCI is not a Qualified OVD under the Benchmark Condition. That therefore is a change, at least in emphasis, from the position asserted in NBCU's Opening Brief (at pp. 6-7) that this arbitration should be terminated on the ground that PCI is not a Qualified OVD. In any case, whether or not NBCU has abandoned the contention, I find that it is without merit and not supported by the evidence. [REDACTED] is a Film Studio within the meaning of the Benchmark Condition. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Nothing more is required in order for PCI to be "qualified". [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

2. Definition of "Video Programming"

The Conditions to the FCC Order in Section I define "Video Programming" as follows:

"Video Programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); programming offered to viewers on an on-demand, point-to-point basis (also known as video on Demand ("VOD"), pay per view ("PPV") or transactional video on demand ("TVOD")); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and Films for which a year or more has elapsed since their theatrical release.

NBCU contends that this definition must be read as excluding all Films for which less than one year has elapsed since their theatrical release ("First Year Films"). I disagree for the following reasons:

- a. There is no specific exclusion of First Year Films. If such an exclusion was intended, it would have been easy to have so stated and I believe the FCC would have so stated.

- b. NBCU's contention is based only on a negative inference from the specific inclusion at the tail of the definition of "Films for which more than a year has elapsed since their theatrical release."
- c. It is indisputable that elsewhere in the language of the Conditions "Films" specifically are referred to as a category of "Video Programming". In its definition of "Comparable Programming" on page 119, the FCC states that the "following categories of Video Programming are not Comparable Programming . . . : (vii) Films are not comparable to non-Film programming." (Emphasis in original.) Thus, even though First Year Films are not mentioned specifically in the definition of "Video Programming" on page 121, the definition logically must be read as including First Year Films both because of the expansive "included but not limited to" phrase and because First Year Films constitute programming offered to viewers on a VOD, PPV or TVOD basis.
- d. Any other conclusion would appear to frustrate the intent of the Conditions.

In sum, while it is not clear to me (and neither of the parties have been able to convincingly explain) why the FCC considered it desirable to specifically mention that "Films for which more than a year has elapsed since their theatrical release" are within the definition of "Video Programming", for the reasons stated, I am persuaded that no valid basis has been shown for the exclusion from the definition of First Year Films, by silence and negative inference.

3. Scope of Comparable Programming

There appear to be two main points to NBCU's contention that PCI's Final Offer should not be determined to be the closer approximation to the appropriate Comparable Programming contained in the Benchmark or Peer Deal. One is the argument [REDACTED]

The other main NBCU point is based on its Contractual Impediment Defense, namely, that the online distribution service PCI plans to offer allegedly [REDACTED] to which NBCU cannot provide licensing of the scope sought by NBCU without being in breach or potential breach of numerous third party agreements. This second point will be discussed more fully in the next section of this Decision. (The FCC, in providing in the Conditions that the scope of Comparable Programming was a Phase 1 issue and any Contractual Impediment Defense should be decided in Phase 2, obviously concluded that a decision on Comparable Programming was not dependent upon a decision on any Contractual Impediment Defense.)

With respect to the first of NBCU's two main points, as I previously noted, there definitely are some differences between the Peer Deal and PCI's Final Offer to NBCU. [REDACTED]

[REDACTED]

NBCU's counsel in his opening statement made the following pertinent comment:

MR MURRAY: Your Honor, my client is not trying to avoid a deal. They really are not, despite what Ms. MacHarg said. [REDACTED] don't put up content that [REDACTED] is going to object to because [REDACTED] then there would be no reason for the next three days. [REDACTED] (Transcript at 53.)

[REDACTED]

The above position was raised again by NBCU's counsel twice in his closing statement. NBCU's counsel, in substance, at pages 567-568 of the Transcript, in response to a question from me, stated that if his client was offered [REDACTED] irrespective of what those third-party agreements say, "I think we get a lot closer to a deal" but he would need to show his client the Peer Deal. In addition, at page 571 of the Transcript, NBCU's counsel made the following further statement:

MR. MURRAY: And again, Your Honor, we understand that under this condition, if a peer does a deal, we have to do a deal. And we have always intended to do a deal. The question is, what is the deal that we're supposed to match. And until we saw that deal, there was no way to know. And we believe, and I think the evidence plainly shows, that there are differences between the final offer that we got from Project Concord and [REDACTED]. And if we have [REDACTED] it's a different story. We didn't have that the first time around.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] I think the "rights issue" may be more relevant to, and resolvable in, the Phase 2 process as an economic issue. Further, I am not at all persuaded by PCI's purported explanation as to why it opted to do what it did (even assuming PCI is justified in its doubt about NBCU's trustworthiness). Thus, if I had the discretion, I would mandate that [REDACTED] and this case essentially "might" be over without any need to resolve the difficult issues raised in NBCU's Contractual Impediment Defense, discussed below, or to address or further address any other Phase 2 matters. Nonetheless, under the applicable "baseball arbitration" procedures, I do not have such discretion. My job here is only to choose which of the competing Phase 1 Final Offers more closely approximates the appropriate Comparable Programming contained in the Benchmark or Peer Deal. Under any comparison of the scope of programming in the competing Final Offers against the Benchmark or Peer Deal, the PCI Final Offer must be found to be closer to the Peer Deal than the NBCU Final Offer. Therefore, I so find.

4. NBCU's Contractual Impediment Defense

PCI vigorously maintains [REDACTED]
[REDACTED] Indeed, PCI is so certain of its position, it has proposed a Finding (No. 130) that NBCU's Contractual Impediment Defense is "so lacking in merit to be unreasonable and vexatious" warranting an assessment of attorneys' fees against NBCU for asserting the Defense. NBCU, on the other hand, just as forcefully maintain [REDACTED] which would put NBCU at risk of breach under its third party agreements, if NBCU is required to consummate an agreement with PCI to license the Current Movie and TV Titles requested in PCI's Final Offer. I find this to be a close and difficult issue, for the reasons discussed below.

[REDACTED]

[REDACTED]

Additional details on how the PCI service, [REDACTED], is expected to function is contained in the testimony of PCI executives Sharon Peyer and Lawrence Smith.

NBCU argues that while PCI [REDACTED]

[REDACTED] (See Madoff Report, para. 35.) PCI's pending patent application entitled "Method And System For Processing On-Line Transactions Involving A Content Owner, An Advertiser, And A Targeted Owner" (Exh. 63) further provides evidence of [REDACTED]

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That application very explicitly purports to patent "a system and method of enabling, over a distributed, networked computer system, negotiated transactions between an information content owner, an advertiser, and a consumer, in which the consumer can earn electronic credit for viewing targeted advertisements delivered by the advertiser and use the earned credit to access information content from the information content owner." (Exh. 63 at 9.) According to NBCU, this patent application refers to

As guidance to the parties, set forth below is some of my current preliminary thinking on the Contractual Impediment Defense:

1. NBCU has the burden of proof to show by a preponderance of the evidence that the certain of the programming set forth in PCI's Final Offer, would put NBCU in breach of each of the numerous third party agreements which NBCU put in evidence. The issue necessarily involves a degree of speculation when, as here, the PCI service has not yet launched. In addition, while I think that under the circumstances, in order to establish the Defense, it should be sufficient for NBCU to show that, as its two experts have opined, it is at risk of being in breach, that is a question which should be addressed definitively.
2. From my review Accordingly, upon a contract by contract analysis, the parties could end up with a result that a breach has been proven under some contracts but not under others. Such a result may not be in the interests of either party.
- 3.
4. my current thinking is that PCI may have the better position. But again, the ultimate conclusion may vary depending upon the particular language in each contract.

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If need be, of course, I will decide all of the issues pertinent to the Defense. But I think it is best that I do so after the parties have exchanged their Phase 2 final offers for agreements and I have had an opportunity to review them and the parties' related evidence and arguments. This is the order of decision-making the Conditions contemplated, and it is the order that I now wish to follow.

5. NBCU's Indemnity Request

See Paragraph 5 of the Summary of Decision above.

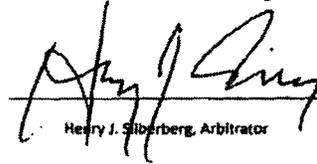
6. Requests for Attorneys' Fees, Costs and Expenses

PCI has requested an assessment of costs and expenses, including attorneys' fees, pursuant to Section VIII.5 of the Conditions. NBCU has objected, contending that PCI's request is "unfounded" and that if any party is entitled to such an assessment it should be NBCU. As stated in the Summary of Decision above, no attorneys' fees, costs or expenses will be assessed against any party at this time and this subject will be considered and determined during Phase 2 upon submission of any supporting declaration(s) pursuant to paragraph 6 of the Summary of Decision.

7. Confidentiality

As noted on the front page of this Decision, it contains information which the parties have designated as "Highly Confidential" under the Protective Order. This Decision also may contain information which has been designated as "Confidential". As suggested and agreed by counsel for the parties, they shall meet and confer with the view of reaching agreement on creating a version of this Decision which redacts all information designated by them as "Highly Confidential" or "Confidential" and then submitting that version to me.

Dated: May 10, 2012



Henry J. Silberberg, Arbitrator

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 11th of July, 2012, a copy of the foregoing Arbitrator decision has been served first-class mail, postage pre-paid, on the following:

Sarah Whitesell Federal Communications Commission 445 12 th Street, SW Washington, D.C. 20554	Steven Broeckaert Federal Communications Commission 445 12 th Street, SW Washington, D.C. 20554
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Yosef Getachew