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**FILED/ACCEPTED**

**JUL 30 2012**

Federal Communications Commission  
Office of the Secretary

July 30, 2012

**VIA HAND DELIVERY**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

Re: **REDACTED - FOR PUBLIC INSPECTION**  
*Project Concord, Inc. v. NBCUniversal Media, LLC (AAA Case No. 72-472-E-01147-11)*  
**MB Docket No. 10-56**

Dear Ms. Dortch:

Enclosed are an original and two (2) copies of the Public version of a Petition for *De Novo* Review, submitted on behalf of NBCUniversal Media, LLC (“NBCUniversal”) in the above-captioned proceeding.

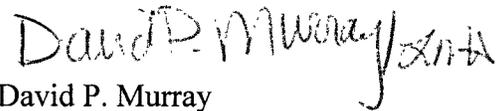
This Public version has been redacted consistent with the procedures directed by Media Bureau staff, and for the reasons detailed in the Request for Confidential Treatment submitted with the Confidential version of the filing on July 16, 2012. NBCUniversal is also today serving a copy of the Public version of the filing via hand delivery to Jean MacHarg and Paul Besozzi, counsel for Project Concord, Inc.

If you have any questions, please do not hesitate to contact me.

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Marlene H. Dortch  
July 30, 2012  
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Very truly yours,



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Enclosures



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**GLOSSARY**

<b>Arbitration Award And Transcript</b>	
Phase 1 Dec'n	Phase 1 Decision
Phase 2 Award	Arbitration Award
HT	Arbitration Hearing Transcript
<b>NBCUniversal Pleadings And Testimony</b>	
Cas. Decl.	Direct Testimony of Bruce Casino (attached to NBCUniversal Phase 1 Op. Br.)
Lam. Decl.	Direct Testimony of Ron Lamprecht (attached to NBCUniversal Phase 1 Op. Br.)
Rob. Decl.	Direct Testimony of Elizabeth Roberts (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Decl.	Expert Report of Steven Madoff (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Sec. Decl.	Phase 2 Expert Report of Steven Madoff (attached to NBCUniversal Phase 2 Op. Br.)
Wund. Decl.	Expert Report of Robert Wunderlich: Analysis of PCI's "Final Offer" (attached to NBCUniversal Phase 1 Op. Br.)
Wund. Sec. Decl.	Phase 2 Expert Report of Robert Wunderlich: Analysis of PCI's "Final Offer" (attached to NBCUniversal Phase 2 Op. Br.)
NBCUniversal Phase 1 Op. Br.	Phase 1 Opening Position Statement of NBCUniversal Media, LLC
NBCUniversal Phase 1 Reb. Br.	Phase 1 Rebuttal Statement of NBCUniversal Media, LLC
NBCUniversal Phase 1 Clos. Br.	Phase 1 Post-Hearing Brief of NBCUniversal Media, LLC
NBCUniversal Phase 1 FOF	Proposed Findings of Fact of NBCUniversal Media, LLC
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PCI Phase 1 Op. Br.	Claimant's Phase One Opening Brief
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DeVitre Decl.	Expert Report of Mark DeVitre (attached to PCI Phase 1 Reb. Br.)
Marenzi Decl.	Expert Report of Gary Marenzi (attached to PCI Phase 1 Reb. Br.)
Peyer Decl.	Declaration of Sharon Peyer (attached to PCI Phase 1 Reb. Br.)
Smith Decl	Declaration of Lawrence Smith (attached to PCI Phase 1 Reb. Br.)
PCI Phase 1 Clos. Br.	Claimant's Phase One Post-Hearing Brief
PCI Phase 1 Prop. FAC	Claimant's Proposed Findings and Conclusions
PCI Phase 2 Op. Br.	Claimant's Phase Two Opening Brief
DeVitre Sec. Decl.	Expert Report of Mark DeVitre (attached to PCI Phase 2 Op. Br.)
MacHarg Decl.	Claimant's Declaration in Support of Request for Cost-Shifting
PCI Phase 2 Reb. Br.	Claimant's Phase Two Rebuttal Brief
DeVitre Third Decl.	Phase 2 Rebuttal Expert Report of Mark DeVitre (attached to PCI Phase 2 Reb. Br.)
PCI Phase 2 Clos. Br.	Claimant's Phase 2 Closing Brief
PCI Phase 2 Prop. Findings	Claimant's Phase 2 Proposed Findings
MacHarg Sec. Decl.	Claimant's Second Declaration in Support of Request for Cost-Shifting

## I. INTRODUCTION AND SUMMARY

NBCUniversal Media, LLC (“NBCUniversal”) seeks *de novo* review by the Commission of an arbitration award issued on June 15, 2012 under the Benchmark Condition of the *Comcast-NBCUniversal Order*.<sup>1</sup> The arbitration was initiated by Project Concord, Inc. (“PCI”) based on a video programming license agreement that PCI obtained from [REDACTED] which is one of the “Peer” studios identified in the *Order*.<sup>2</sup>

NBCUniversal has been willing to license content to PCI from the start; indeed, NBCUniversal believes it should have been possible to reach agreement here without arbitration. Further, by the end of the arbitration, the differences between the parties’ respective final offers had narrowed significantly, as the baseball-style nature of these arbitrations contemplates. This permitted a fairer result that is more consistent with the Benchmark Condition than what PCI originally demanded. NBCUniversal’s appeal is limited to two legal errors that the Arbitrator made in construing the Benchmark Condition, and one procedural ambiguity that arose during the proceeding.<sup>3</sup> Prompt review of these issues is necessary to ensure that NBCUniversal’s license agreement with PCI satisfies the Benchmark Condition without violating the rights of other NBCUniversal licensees, and will provide important and necessary guidance for any future negotiations and arbitrations under the condition.

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<sup>1</sup> *In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238 (2011) (“*Order*”).

<sup>2</sup> *Id.*, App. A, § I (noting that “‘Film Studio’ means[, among others,] [REDACTED]”).

<sup>3</sup> Attached as Appendix A is copy of the Arbitrator’s Phase 2 Award, which incorporates the Phase 1 Decision. References to Exhibits (“Ex.”) throughout the Petition refer to exhibits in the record below.

*First*, the Arbitrator ruled that NBCUniversal films within their first year of theatrical release were intended to be included in the award of Video Programming available under the Benchmark Condition. This is clear legal error. The plain language of the *Order* expressly excludes such films. This language was specifically negotiated during the governmental review of the NBCUniversal transaction, and reflects a deliberate policy choice made both by the Commission and the Department of Justice (“DOJ”), in its parallel condition, to leave films during this limited and valuable “window” to existing marketplace practices, including NBCUniversal’s [REDACTED], rather than including them in a compulsory licensing regime that might disrupt these practices and result in negative consequences to NBCUniversal and others. The Arbitrator improperly substituted his view about the “intent” of the Benchmark Condition for the plain language that the Commission (and DOJ) used in striking this balance.

*Second*, the Arbitrator applied an improper and unworkable standard for the contract defenses authorized in the Benchmark Condition. The evidence showed that PCI intends to [REDACTED] Providing current film and television programming to PCI would constitute a breach of numerous NBCUniversal license agreements that prohibit [REDACTED] exhibition of this content. Rather than giving proper meaning and effect to these common and reasonable contract restrictions (or “holdbacks”) in determining the appropriate scope of programming that NBCUniversal must provide to PCI, the Arbitrator ruled that NBCUniversal’s contract defenses were “premature” [REDACTED]. [REDACTED] The Arbitrator instead held that NBCUniversal must provide the restricted programming to PCI and then wait until another licensee objects to remedy

the problem. This “breach first/fix later” approach is bad policy, improperly places the interests of a claimant OVD over those of other NBCUniversal licensees, and is precisely what the contract defense authorized under the *Order* is designed to avoid.

*Third*, the Arbitrator read the *Order* to defer consideration of NBCUniversal’s contract defenses until Phase 2 of the arbitration. Under the more logical – and, NBCUniversal believes, intended – construction of the *Order*, these defenses should be decided in Phase 1 of the arbitration, as part of an arbitrator’s ruling on the appropriate scope of comparable programming that NBCUniversal must provide to a claimant OVD. That threshold ruling then forms the basis for both parties to submit final offers in the form of agreements, based on the identified programming, for “baseball-style” selection in Phase 2 of the arbitration. Because this question may arise in future arbitrations under the Benchmark Condition, the Commission should clarify its intended procedure under these provisions.

## II. BACKGROUND

PCI is a start-up company that plans to

[REDACTED]

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<sup>4</sup> See Ex. 9, [REDACTED]

[REDACTED]

NBCUniversal's efforts to negotiate a license agreement with PCI were unsuccessful. As an initial matter, PCI refused to disclose its peer deal with [REDACTED] and instead demanded that NBCUniversal "match" the peer deal based on PCI's representations about it (representations that proved to be materially inaccurate). In addition, PCI claimed that [REDACTED] had agreed to license to PCI: [REDACTED]

[REDACTED]

[REDACTED] PCI demanded that NBCUniversal provide the same video programming. However, NBCUniversal already has numerous agreements with other licensees [REDACTED] for current films and television shows that impose certain restrictions on this content's exploitation by others during the early and certain later stages of the programming's lifecycle (known as "windows"). These restrictions generally (1) provide that NBCUniversal may only license the programming to other distributors during the relevant windows [REDACTED] and (2) prohibit [REDACTED]

[REDACTED] Because PCI uses [REDACTED] [REDACTED], NBCUniversal cannot provide current film and television programming to PCI without breaching the rights of these other NBCUniversal

<sup>5</sup> In one example in the record, a [REDACTED] HT 323:10-324:1 (Smith). Abbreviations to record materials, such as "HT," are explained in the preceding glossary.

<sup>6</sup> See Ex. 9, [REDACTED]

licensees. Moreover, in light of NBCUniversal's [REDACTED] [REDACTED] the *Order* itself expressly excludes films during the first year of theatrical release from the scope of "Video Programming" subject to the Benchmark Condition.<sup>7</sup>

NBCUniversal was willing to license significant film and television content to PCI that is not subject to these contractual restrictions. PCI rejected this proposal and initiated arbitration in October 2011.

It took three months for an arbitrator to be appointed. The parties interviewed numerous individuals from the FCC-approved panel, but very few had any meaningful recent experience in the licensing of video programming. On March 14, 2012, the American Arbitration Association ("AAA") selected an arbitrator from its complex litigation panel, Henry Silberberg ("Arbitrator"), who had been included by the parties on a list of five potential candidates.

The arbitration was conducted in two stages and completed in three months. During Phase 1, PCI produced the [REDACTED] peer deal subject to the Commission's model confidentiality and protective order (the "CAPO").<sup>8</sup> The peer deal turned out to be a [REDACTED]

[REDACTED]<sup>9</sup> [REDACTED]

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<sup>7</sup> *Order*, App. A, § I.

<sup>8</sup> Under the CAPO, only NBCUniversal's outside counsel, Willkie Farr & Gallagher LLP, and outside experts, Steven Madoff and Robert Wunderlich, were permitted to review confidential materials. Both Mr. Madoff and Dr. Wunderlich are qualified experts with significant experience in and with the entertainment industry. HT 149:9-151:6; 805:4-13 (Madoff) (summarizing Mr. Madoff's industry experience and expert qualifications, in particular as a long-time senior business and legal executive at Paramount, where he managed worldwide film content, including under Paramount's similar [REDACTED]); Mad. Decl., Ex. A; HT 190:5-193:17 (Wunderlich); Wund. Decl., Ex. A (summarizing Dr. Wunderlich's expert qualifications, in particular his role as a business consultant for studios and individuals in the entertainment industry in general, and in the television sector in particular).

<sup>9</sup> [REDACTED] HT 349:1-350:7 (Smith).

[REDACTED]

[REDACTED]<sup>11</sup> PCI did not include these same rights in its original final offer to NBCUniversal. The Arbitrator was “not at all persuaded” by PCI’s claimed reasons for failing to do so.<sup>12</sup> He nonetheless found, based on the [REDACTED] peer deal, that the scope of comparable programming that NBCUniversal should provide to PCI includes current film and television shows. In addition, he was perplexed “why the FCC considered it desirable to specifically mention that ‘Films for which more than a year has elapsed since theatrical release’ are within the definition of ‘Video Programming,’” and concluded that excluding films less than a year from theatrical release “would appear to frustrate the intent of the Conditions.”<sup>13</sup> From the Phase 1 evidence, the Arbitrator further found that the [REDACTED]

[REDACTED]<sup>14</sup> But, as a procedural matter, he read the Benchmark Condition to defer until Phase 2 consideration of NBCUniversal’s contract defenses (i.e., whether providing current film and television content to PCI would constitute a breach of NBCUniversal’s license agreements with [REDACTED] and others).<sup>15</sup>

Based on these rulings, both parties submitted revised final offers. NBCUniversal’s Phase 2 final offer was the [REDACTED]. NBCUniversal simply [REDACTED]

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<sup>10</sup> [REDACTED]

<sup>11</sup> [REDACTED]

<sup>12</sup> Phase 1 Dec’n at 8.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 10-11. PCI agreed to have NBCUniversal’s contract defenses heard and decided in Phase 1.

[REDACTED]

[REDACTED]

[REDACTED]<sup>16</sup> PCI's Phase 2 final offer included several important revisions to its original offer, including [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>17</sup> These are the kind of remedies that NBCUniversal proposed at the outset of the parties' discussions. Had PCI disclosed the [REDACTED] peer deal upfront, and been willing to provide such rights to NBCUniversal from the start, this arbitration may have been avoidable.

At the conclusion of Phase 2, the Arbitrator chose PCI's revised final offer. Although NBCUniversal's final offer indisputably [REDACTED] peer deal, the Arbitrator determined that the available evidence indicated that [REDACTED] intends to provide the same current film and television programming to PCI that [REDACTED]

[REDACTED]<sup>18</sup> Thus, he concluded that NBCUniversal must do the same and should not be able to [REDACTED]

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<sup>16</sup> Phase 2 Award at 5 (describing NBCUniversal's Phase 2 Final Offer); NBCUniversal Phase 2 Op. Br. at 2-3 (same); Wund. Sec. Decl. ¶¶ 7a, 10-11 (same).

<sup>17</sup> Phase 2 Award at 4 (describing PCI's Phase 2 Final Offer); PCI Phase 2 Final Offer § 8(d); Wund. Sec. Decl. ¶¶ 22-23; Mad. Sec. Decl. ¶ 20.

<sup>18</sup> Phase 2 Award at 6-8.



NBCUniversal would incur damages or other harms to its business relationships from this “breach first/fix later” approach were adequately addressed by [REDACTED] that PCI included in its revised Phase 2 final offer.<sup>23</sup>

### III. QUESTIONS FOR *DE NOVO* REVIEW BY THE COMMISSION

This is the first completed arbitration under the Benchmark Condition. Based on the Arbitrator’s rulings, NBCUniversal seeks *de novo* review of the following three questions:

1. Did the Arbitrator err in ruling that films less than one year from theatrical release are subject to the Benchmark Condition notwithstanding the plain text of the *Order*, which expressly excludes films within one year of theatrical release from the relevant definition of Video Programming?
2. Did the Arbitrator err in: (a) failing to decide whether providing current film and television content to PCI “would constitute a breach” of other NBCUniversal license agreements, based on the language of the relevant agreements and related testimony and evidence presented; and (b) holding instead that the contract defenses authorized in the Benchmark Condition can only be established after-the-fact, when another licensee asserts a breach of contract against NBCUniversal based on its actual provision of restricted content to an OVD that has been awarded a license agreement under the condition?
3. Are the authorized contract defenses under the Benchmark Condition to be decided during Phase 1 of the arbitration, as part of an arbitrator’s determination of the “appropriate scope of Comparable Programming” and other defenses, or during Phase 2, when the arbitrator is to select the party’s final offer in the form of an agreement that is most economically equivalent to the peer deal?

### IV. EXPEDITED CONSIDERATION OF THESE QUESTIONS IS WARRANTED.

Because the Arbitrator’s award requires NBCUniversal to provide current films and television shows to PCI, and the parties are already performing under the license agreement, the Commission should decide these questions on an expedited basis. Prompt rulings and guidance

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<sup>23</sup> *Id.* at 10. The Arbitrator also denied the parties’ respective requests for costs and attorneys’ fees, finding that the disputed issues were complex, neither party engaged in any unreasonable conduct during the course of the arbitration, and the proceedings were conducted in good faith, professionally, and ethically. *Id.* at 11-13.

from the Commission will ensure that (1) NBCUniversal's contractual obligations to PCI satisfy (but do not exceed by unlawful compulsion) the Benchmark Condition; (2) the rights and interests of other NBCUniversal licensees are properly considered and protected; and (3) the risks to NBCUniversal of the "breach first/fix later" approach adopted by the Arbitrator are mitigated.

## V. STANDARD OF REVIEW

The *Order* provides for *de novo* review of an arbitration award.<sup>24</sup> The Commission "may depart from the arbitrator's findings based on its review of the existing evidentiary record."<sup>25</sup> Moreover, as the Commission observed in an analogous proceeding, because the Benchmark Condition was created and adopted by the Commission, the Commission is "uniquely qualified to interpret its scope."<sup>26</sup>

## VI. ARGUMENT

### A. Films Less Than One Year From Theatrical Release Are Expressly Excluded From The Benchmark Condition.

The Benchmark Condition requires NBCUniversal to provide an OVD with "Online Video Programming" that is comparable to the programming being provided by a peer studio.<sup>27</sup> "Online Video Programming" means "Video Programming" that an NBCUniversal programmer

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<sup>24</sup> *Order*, App. A, § VII.E.1.

<sup>25</sup> *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, 25 FCC Rcd 16054, n.45 (2010) ("*Massillon Order*") (application for review pending).

<sup>26</sup> *Id.*; see also *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, n.5 (2010) ("*MASN Order*"), *aff'd*, *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012).

<sup>27</sup> *Order*, App. A, § VII.C.2.

has the rights to enable for exhibition over the Internet or other IP-based transmission path.<sup>28</sup>

“Video Programming,” in turn, only includes (in relevant part) “Films for which a year or more has elapsed since their theatrical release.”<sup>29</sup> This contrasts with the *Order’s* separate definition of “Film,” which includes *any* “feature-length motion picture that has been theatrically released” whether one day old or decades old.<sup>30</sup>

Read together, these provisions clearly exclude films less than one year from theatrical release from the scope of the Benchmark Condition. This is not an accident or a mistake in drafting. It is the product of the governmental review of the Comcast-NBCUniversal transaction.<sup>31</sup> To hold otherwise would be contrary to what the Government negotiated with NBCUniversal. The Arbitrator erred by failing to give proper effect to the plain language of the *Order*, thereby rendering the express exclusion of first-year films mere surplusage.

It is a “cardinal principle of statutory construction” that each part of a provision must be read in combination with other parts to give proper effect to all of the provision’s language.<sup>32</sup> A

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<sup>28</sup> *Id.*, App. A, § I.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> As NBCUniversal informed the Arbitrator, the Commission and DOJ reviewed thousands of pages of license agreements, including the relevant [REDACTED] contracts, and extensively discussed with NBCUniversal representatives (and other interested parties) the holdback and exclusivity provisions of these agreements, including those specifically pertaining to first-year films, in order to understand how these well-established practices work in the entertainment industry. NBCUniversal Phase 1 Clos. Br. at 3-8 (describing agencies’ transaction review process); NBCUniversal Phase 1 Reb. Br. at 4-7 (same). The exclusion of films in the first year of theatrical release from the scope of the conditions reflects the informed product of these efforts and, as further discussed above, both agencies coordinated closely with each other on this point (and other issues) to make sure that NBCUniversal was not put in the impossible position of trying to comply with two different compulsory licensing schemes.

<sup>32</sup> *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citations to other precedent omitted).

construction must “give effect, if possible, to every clause and word of a statute,” which ought, “upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”<sup>33</sup> Consistent with these principles, the Commission has relied on the plain text of conditions and other rules to determine their meaning and effect<sup>34</sup> and has properly declined to read words as mere surplusage.<sup>35</sup> These same principles, when properly applied here, require that the plain words of the *Order* excluding first-year films be given their proper meaning and effect.

The exclusion of first-year films from the Benchmark Condition is reinforced by the parallel Benchmark Condition adopted by the DOJ in its consent decree. As NBCUniversal informed the Arbitrator, DOJ adopted the exact same terms as the Commission, defining (a) “Film” to mean “a feature-length motion picture that has been theatrically released”; and (b) “Video Programming” subject to the Benchmark Condition to mean only “Films for which a year

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<sup>33</sup> *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citations omitted).

<sup>34</sup> *See, e.g., Massillon Order* ¶ 10 (relying on the “plain language of the condition” to reach a determination regarding when “MVPDs may avail themselves of the arbitration remedy” under the *News Corp.-Hughes Order*); *Application of Northeast Communications of Wis., Inc.*, 19 FCC Rcd 18635, ¶ 12 (2004) (finding that Northeast engaged in collusive conduct in violation of an FCC rule and that “the application of the rule to Northeast is based not an interpretation of the rule, but on the plain language of the rule”).

<sup>35</sup> *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, 16 FCC Rcd 9751, ¶ 20 (2001) (stating that, “as a matter of statutory interpretation, we are obligated to interpret statutory language in a manner that gives meaning to each word – if at all possible – over an interpretation that renders certain words superfluous,” and finding an alternate interpretation “violates basic canons of statutory construction by giving no independent meaning” to the relevant provisions); *Application of BellSouth Corp. for Provision of In-Region, InterLATA Servs. in La.*, 13 FCC Rcd 20599, ¶ 29 n.67 (1998) (“[S]tatutes must not be interpreted in a manner that makes an exception mere surplusage.”).

or more has elapsed since their theatrical release.”<sup>36</sup> The Commission and DOJ consulted extensively with each other during the transaction review, and intended for their respective conditions to be consistent. The identical terms and language used by both agencies in these parallel provisions further confirms that neither agency intended to compel NBCUniversal to license first-year films based on the practices of a peer studio.<sup>37</sup>

The Arbitrator acknowledged the relevant language in the definition of Video Programming, but found the lack of any explanation in the *Order* for the exclusion of first-year films perplexing, stating that “[i]f such an exclusion was intended, it would have been easy to have so stated and I believe the FCC would have so stated.”<sup>38</sup> But far from being “silent” on the issue, the Commission did “so state” its intention by *expressly* excluding first-year films from the definition of Video Programming. The Arbitrator’s proper role – like that of a court or agency – was to give proper meaning and effect to this express language and not to question whether the Commission should have provided some further explanation for it elsewhere in the *Order*.

The Arbitrator also found it odd that the Commission chose to place the exclusion of first-year films “at the tail of the definition” of Video Programming, mistakenly concluding that this created a “negative inference” about whether the Commission really meant to exclude this

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<sup>36</sup> DOJ Final Judgment §§ II.L, II.EE; *see also* NBCUniversal Phase 1 Op. Br. at 11-13; NBCUniversal Phase 1 Reb. Br. at 4-7; NBCUniversal Phase 1 Clos. Br. at 3-8.

<sup>37</sup> DOJ Competitive Impact Statement § II.A.4, at 6-7. The Antitrust Division’s Policy Guide to Merger Remedies specifically cites the DOJ-FCC collaboration in the Comcast-NBCU transaction as a model. DOJ, Antitrust Division Policy Guide to Merger Remedies, at 20 n.45 (June 2011) (citing Remarks of Assistant Attorney General Christine Varney, *available at* [www.justice.gov/atr/public/speeches/266156.htm](http://www.justice.gov/atr/public/speeches/266156.htm) (“I really want to highlight the great cooperation and unprecedented coordination with the FCC . . . . This approach resulted in effective, efficient and consistent remedies.”)).

<sup>38</sup> Phase I Dec’n at 5. PCI argued that the first-year film exclusion was simply “inartful drafting” by the Commission. HT 45:10-12 (MacHarg); *see also* HT 582:18-583:2 (MacHarg).

category of content.<sup>39</sup> This stands the applicable canons of statutory construction on their head. It is irrelevant where the Commission chose to place the exclusion of first-year films within the definition. By specifically carving this content out of the definition, the Commission did not leave the matter to “negative inference” (or indeed any inference) – the Commission instead expressly spoke to it in plain language.

The Arbitrator further observed that the definition of Video Programming contains the boilerplate phrase “included but not limited to” and concluded that this allows for a more expansive construction which includes first-year films.<sup>40</sup> However, it is well-established that general language in a provision should not be read to swallow more specific language.<sup>41</sup> If the Commission intended to make all films subject to compulsory licensing under the Benchmark Condition, the definition of Video Programming would have simply said “Films,” and not “Films for which a year or more has elapsed since their theatrical release.” The “included but not limited to” boilerplate is not a proper basis to disregard the express limiting language that the Commission used in identifying the scope of films covered by the definition. Moreover, as NBCUniversal informed the Arbitrator, DOJ did not use the “included but not limited to” boilerplate in its parallel definition of Video Programming.<sup>42</sup> Because the Commission and DOJ

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<sup>39</sup> Phase 1 Dec’n at 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”) (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); accord *N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006).

<sup>42</sup> NBCUniversal Phase 1 Reb. Br. at 4-7; NBCUniversal Phase 1 Clos. Br. at 6-7.

intended “consistent” remedies,<sup>43</sup> this further reinforces the conclusion that the appearance of this general language in the Commission’s definition was not intended – and cannot properly be read – to render the express carve-out of first-year films superfluous.

Finally, the Arbitrator observed that first-year films are “offered to viewers on a VOD, PPV or TVOD basis,” and concluded that excluding films less than one year from theatrical release “would appear to frustrate the intent of the Conditions.”<sup>44</sup> The Arbitrator plainly erred in substituting his judgment about the “intent” of the Benchmark Condition for the plain language of the *Order* itself. Both the Commission and DOJ were fully aware that NBCUniversal has

[REDACTED] that further restrict the exhibition of virtually all of NBCUniversal’s films in the year following their theatrical release.<sup>45</sup> Several of NBCUniversal’s “peer” studios (e.g., Disney, Paramount, and Sony) do not license films to

[REDACTED] And peer studios that do license films to [REDACTED] [REDACTED] may have different windowing restrictions and obligations. Both agencies recognized that requiring NBCUniversal to “match” the practices of a peer studio with respect to newly-released films could place NBCUniversal at odds with its obligations to [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]<sup>46</sup> The agencies thus determined – and expressly codified in the *Order* and consent

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<sup>43</sup> DOJ Competitive Impact Statement, § II.A.4, at 7.

<sup>44</sup> Phase 1 Dec’n at 6.

<sup>45</sup> See, e.g., DOJ Competitive Impact Statement § II.B.1, at 7-8 (discussing [REDACTED] exclusive rights in sequential windowing of films).

<sup>46</sup> For example, if NBCUniversal is required to follow a peer studio’s deal that causes NBCUniversal to violate strict conditions found in its [REDACTED] contracts [REDACTED]



**B. The Arbitrator Erred In Failing To Decide Whether Providing Current Film And Television Content To PCI Would Constitute A Breach Of Other NBCUniversal License Agreements.**

The Benchmark Condition expressly recognizes that the rights and interests of OVDs that invoke the remedy are subject to certain limitations, including the countervailing and legitimate rights and interests of other NBCUniversal licensees. Thus, the condition expressly authorizes NBCUniversal to decline to provide programming to an OVD when doing so “*would constitute a breach of a contract to which . . . NBCU is a party,*”<sup>48</sup> so long as the exclusivity and windowing provisions in such contracts are “*consistent with reasonable, common industry practice.*”<sup>49</sup>

NBCUniversal presented numerous representative license agreements with [REDACTED] [REDACTED] that prohibit NBCUniversal from licensing [REDACTED] [REDACTED] exhibition of current film and television shows and [REDACTED] [REDACTED] for access to such content during the windows covered by these agreements.<sup>50</sup> The reasonableness of these agreements was not contested,<sup>51</sup> and ample evidence demonstrated that

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<sup>48</sup> *Order*, App. A, § VII.C.3 (emphasis added).

<sup>49</sup> *Id.*, App. A, § IV.B.1.

<sup>50</sup> Attached as Appendix B is a chart identifying the relevant [REDACTED] language for each of the representative contracts, with citations to where they can be found in the record; *see also* NBCUniversal Phase 2 Clos. Br. Ex. A. Wund. Decl. Ex. B identifies additional contracts in evidence where NBCUniversal [REDACTED] [REDACTED] Those agreements further demonstrate the common and reasonable industry practice of [REDACTED] [REDACTED] Additionally attached as Appendix C are Exs. A and B to the Cas. Decl. summarizing the [REDACTED] and Ex. A to the Rob. Decl. summarizing [REDACTED]

<sup>51</sup> Of the 21 representative agreements, 17 were executed prior to December 3, 2009 and are thus presumed under the *Order* to reflect reasonable, common industry practice. *Order*, App. A, § IV.B.1; *id.*, App. A, § VII.C.3. The more recent contracts likewise reflected reasonable and common industry practice, consistent with the contracts of peer studios and NBCUniversal’s pre-transaction agreements.

they would be breached were NBCUniversal to license those films or shows to PCI, given the [REDACTED] of PCI's service.

Rather than ruling on and limiting PCI's access to this programming in light of these contractual restrictions, the Arbitrator instead held that NBCUniversal must license the restricted content to PCI regardless of its contractual obligations, [REDACTED]

[REDACTED] This "breach first/fix later" approach misreads the *Order*, places PCI's rights to programming over the rights of other licensees (as well as NBCUniversal's right to avoid legal risk and harm to its business relationships), disrespects contractual obligations and is therefore bad public policy, and establishes an impossible standard that makes the contract defense unworkable.

**1. The Arbitrator Applied An Erroneous Standard.**

The Benchmark Condition does not require NBCUniversal to provide restricted programming to an OVD first and then wait to be sued by another NBCUniversal licensee for breach of contract. Instead, the condition relieves NBCUniversal of the obligation to license content if doing so would conflict with its contractual obligations. The language of the relevant license agreements controls, and an arbitrator's obligation is to assess that language in light of the evidence presented and make a determination whether providing the restricted programming "would constitute a breach of contract."

The Commission adopted the same standard in its closed captioning rules when it exempted video programming providers from having to caption "[v]ideo programming that is subject to a contract . . . for which an obligation to provide closed captioning *would constitute a*