

*breach of contract.*⁵² In implementing this rule, the Commission concluded that a straightforward assessment of the relevant contract language is sufficient to establish the defense, and that requiring anything more (such as proof that the contract would in fact be enforced by the programmer) “completely undermines the significance” of the defense and “would create such a high threshold and be applicable to so few contracts as to render [the defense] meaningless.”⁵³ The Commission specifically rejected arguments that the exemption should be subject to additional evidentiary tests beyond the language of the contract, such as a “good faith test”⁵⁴ or determining whether a programmer “might . . . waive[] [the restriction].”⁵⁵

The same kind of straightforward assessment of relevant NBCUniversal license agreement language and related evidence is all that should be required to establish the contract defense authorized under the Benchmark Condition. In making these assessments, moreover, an arbitrator should be mindful that the other NBCUniversal licensees are not parties to the arbitration, are not able to assert and protect their rights and interests, and will not be bound by the arbitrator’s ruling.⁵⁶ Those licensees should be able to trust that NBCUniversal will live by

⁵² 47 C.F.R. § 79.1(d)(1) (emphasis added) (implementing the requirement under Section 713(d) of the Telecommunications Act that video programming providers “shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996”).

⁵³ *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd 3272, ¶ 180 (1997).

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 172.

⁵⁶ See *Nein v. HostPro, Inc.*, 95 Cal. Rptr. 3d 34 (Ct. App. 2009) (a party may only invoke collateral estoppel where the nonparty was in “privity” with a party to the prior proceeding); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1050-51 (7th Cir. 1995) (as matter of due process, collateral estoppel binds only those persons who were parties or were in privity with parties to prior proceeding).

its contractual obligations and should not be forced to police breaches arising out of Benchmark arbitrations – any more than NBCUniversal should be forced to breach its contracts in the first place. These factors justify a reasonably conservative approach to construing the relevant contracts and evidence so that proper weight is given to the rights and interests of the other licensees.⁵⁷ The preponderance of the evidence standard adopted by the Commission implies this approach, requiring only that the relevant record weigh 51% or more for the proposition that providing restricted content to the OVD “would constitute a breach” of another licensee’s contract.⁵⁸

In his Phase 1 decision, the Arbitrator appeared inclined to apply this proper standard, stating “preliminarily” that [REDACTED] [REDACTED] in the NBCUniversal contracts at issue, and [REDACTED]

⁵⁷ Adhering to this standard should also reduce the prospect that other NBCUniversal licensees will assert a breach of contract against NBCUniversal in a later proceeding, irrespective of an arbitrator’s (or even the Commission’s) rulings in a Benchmark arbitration, which would then require NBCUniversal to re-litigate the issue and could result in potential damages claims that the OVD must indemnify. For the same reason, final agreements for licensing of programming should also include selection and content withdrawal provisions that enable both NBCUniversal and an OVD to address any breach of contract claims that might be asserted later (notwithstanding an arbitration ruling that a contract would not be breached) and to mitigate any damages subject to indemnification. These provisions, of course, are a fallback and no substitute for striving to make correct rulings on the contract defenses under the proper standard in the arbitration.

⁵⁸ The Commission did not impose a heightened burden of proof here, such as the “clear and convincing evidence” standard required, for example, to sustain a claim of a violation of the Commission’s leased access rules, *see* 47 C.F.R. § 76.975(h)(3), or, in patent cases, to sustain the affirmative defense of patent invalidity, *see Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2251 (2011) (distinguishing between the “clear and convincing evidence” and “preponderance of the evidence” standards); *see generally Banks v. United States*, 78 Fed. Cl. 603, 616 (Fed. Cl. 2007) (“preponderance of the evidence in civil actions . . . mean[s] the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it”) (internal quotation and citations omitted).

[REDACTED]

[REDACTED]

[REDACTED] By broadly asserting confidential treatment about its economic model under the CAPO, PCI also effectively prevented NBCUniversal from having *any* communication with its other licensees about these issues, which ensured that there would not be “factual proof” of the kind the Arbitrator apparently expected. Further, the Benchmark Condition does not authorize third-party discovery or the compulsion of third-party licensees to attend and participate in an arbitration. And even assuming another licensee had some sense that its licensed programming might be at issue in an arbitration, the licensee likely would not be in a position to assert a breach of contract claim before NBCUniversal has actually licensed restricted programming to the claimant OVD and the OVD actually exhibits it (i.e., before the violating conduct occurs). Practically, therefore, NBCUniversal could not prove an actual claim of breach by another NBCUniversal licensee – and under this standard could *never* do so in any Benchmark arbitration. The Arbitrator’s “breach first/fix later” standard thus effectively renders the authorized contract defense a nullity.⁶²

Further, it is plainly bad policy to force NBCUniversal to breach a contract simply because another licensee [REDACTED]

⁶² The Arbitrator also questioned whether “the conditions really contemplated th[e contract] defense being asserted in a startup situation [REDACTED]’ HT 1035:15-1036:6 (Arb. Silberberg). But the same practical issues described above will exist regardless of whether the OVD is a start-up company or an established service. Moreover, NBCUniversal routinely licenses available content to new services before they have launched. The status of the OVD should have no bearing on the relevant standard for establishing NBCUniversal’s contract defenses.

NBCUniversal strives to honor its contractual commitments to licensees and does not conduct its business on a “breach first/fix later” basis.⁶³ In imposing the Benchmark Condition, the Commission did not expect (much less require) NBCUniversal to change its business practices in the way the Arbitrator has dictated. To the contrary, the whole point of the contract defense is to respect the legitimate contractual rights of other licensees.⁶⁴ The Arbitrator’s ruling stands this provision on its head. By requiring NBCUniversal to provide restricted content to PCI and then

⁶³ HT 78:4-16 (Roberts) (discussing that NBCUniversal reviews “content with obligations and restrictions [to] make sure [NBCUniversal is] not in breach” of its licensing agreements when making content “available to third parties”); HT 86:13-87:6 (Casino) (discussing how NBCUniversal is “cognizant of [REDACTED] windowing strategy” and makes sure that the business is in compliance with its license obligations); HT 87:8-18 (Casino) (same with regard to [REDACTED] contracts); HT 106:14-17 (Casino) (“we again have our attorneys that determine when rights begin and end and then we have the business people that say, yes these are available”); Lam. Decl. ¶ 23 (“Testing the tolerance of [licensees] to ignore or forgive contractual breaches is a non-starter for NBCUniversal networks from a business perspective.”); *id.* ¶ 28 (explaining that NBCUniversal writes contracts with non-exclusive licensees to avoid breaches of other licensees’ rights).

⁶⁴ The contract defense authorized under the *Order* is consistent with the Commission’s general approach of respecting rather than abrogating privately negotiated contracts. *See, e.g., Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service*, 26 FCC Rcd 17663, ¶ 815 (2011) (emphasizing that “our reforms do not abrogate existing commercial contracts or interconnection agreements or otherwise require an automatic ‘fresh look’ at these agreements”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, ¶ 82 (2001) (new rate regulation “does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions”). This approach is consistent with longstanding precedent. *See Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907) (“... a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required . . .”); *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974) (“The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act ‘imperatively require’ that [a court] imply such authorization.”).

2. NBCUniversal Sufficiently Proved Its Contract Defenses Under The Proper Standard.

Under the appropriate “*would* constitute a breach” standard set forth in the Benchmark Condition, the relevant evidence amply showed that providing current film and television content to PCI *would* constitute a breach of numerous NBCUniversal license agreements that prohibit [REDACTED] exhibition. Based on a *de novo* review of this evidence, the Commission should promptly rule on NBCUniversal’s contract defenses.

That ruling will not require any change in or substitution of the awarded license agreement, but instead will simply identify programming that NBCUniversal is restricted from providing to PCI under the agreement due to the rights of other licensees. As PCI acknowledged during the arbitration: “If the Arbitrator were to decide that NBCU had established a Contractual Impediment Defense as to any particular contract to which NBCU is a party, then the result would be a hold back of that content, pursuant to which NBCU would be relieved of any contractual obligations to provide it to PCI.”⁶⁸ This, in turn, will ensure that the rights and interests of other licensees are protected and NBCU has satisfied (but not been forced unlawfully to exceed) its obligations under the condition.

⁶⁸ PCI Phase 2 Reb. Br. at 15; *see also* Letter from Jean V. MacHarg, Patton Boggs LLP, to Henry J. Silberberg, Arbitrator, at 4 (Mar. 21, 2012) (Vol. I, Tab 18 of Additional Record Items Before the Arbitrator) (“Respondent may raise the defense that it would breach another contract that it has with a third-party After deciding the merits of that defense . . . the Arbitrator decides which of the two Phase 2 final offers most closely approximates the ‘economic equivalent of the price, terms and conditions the OVD paid for the Comparable Programming’ (*minus any programming for which Respondent has established a Phase 2 defense.*)”) (emphasis added). Thus, notwithstanding the [REDACTED] nature of the awarded final offer, a finding by the Commission that NBCUniversal has proven its defense with respect to any representative contract would place the affected content outside of the contractual requirement that NBCUniversal supply it to PCI. It would also be a basis for NBCUniversal to [REDACTED] under the parties’ agreement.

[T]he consumer may be motivated to receive and consume . . . such ads for the purpose of receiving relevant, useful advertisements, and/or to receive compensation for use as possible payment toward past or future consumption of any desired information content. Such payment for desired information content resulting from the consumption of ads is herein referred to as “*advertiser-supported*” payment, and any payment for desired information content that is *not* advertiser-supported is herein referred to as “*consumer supported*” payment.⁷⁸

After hearing testimony and seeing a demonstration of PCI’s service, the Arbitrator found that the [REDACTED]
[REDACTED]⁷⁹ Indeed, [REDACTED]
[REDACTED],⁸⁰ [REDACTED]
[REDACTED]’ to use PCI’s service rather than the [REDACTED] that require a [REDACTED].⁸¹

Each of NBCUniversal’s fact and expert witnesses testified that this kind of service, which plainly [REDACTED]
[REDACTED] service as commonly understood in the entertainment industry.⁸² Indeed, that is what PCI touts as its

⁷⁸ *Id.* at 6 (emphasis added).

⁷⁹ Phase I Dec’n at 10.

⁸⁰ *Id.*

⁸¹ *Id.* PCI’s own expert agreed with these findings. HT 965:5-966:10 (Murray/DeVitre).

⁸² *See* HT 68:21-69:9 (Roberts); HT 85:8-86:9 (Casino); HT 124:21-126:6 (Lamprecht); HT 151:7-18 (Madoff); HT 193:21-195:19 (Wunderlich). That PCI users may someday be able to [REDACTED]
[REDACTED] HT 194:11-19 (Wunderlich); Mad. Decl. ¶ 37.

unique competitive advantage.⁸³ PCI's website promotes the service as free, promising access to "your favorite movies and TV shows on demand, without having to reach into your wallet."⁸⁴

And a [REDACTED]
[REDACTED]
[REDACTED]⁸⁵

b. Providing Certain Film And Television Content To PCI's [REDACTED] Would Constitute A Breach Of Numerous NBCUniversal License Agreements.

NBCUniversal's various network and distributor licensees pay significant fees for rights to film and television programming. They recoup their investments in this programming by charging subscriptions and/or selling time to advertisers against the programming. To protect the value of these investments, licensees commonly restrict NBCUniversal's concurrent exploitation of that film and television programming to [REDACTED]

[REDACTED] In addition, the licensees insist that [REDACTED] during their license periods: (1) [REDACTED] and (2) [REDACTED] [REDACTED]
[REDACTED]⁸⁶ These requirements

⁸³ HT 466:13-19 (Marenzi) ("[w]hat makes [PCI] unique [REDACTED]"); Wund. Decl. ¶ 8.h (this is PCI's "key distinguishing feature and the hoped for competitive advantage . . . relative to [REDACTED]").

⁸⁴ <http://www.projectconcord.com> (last visited July 16, 2012).

⁸⁵ HT 403:8-11 (Peyer) (reading from Ex. 26).

⁸⁶ These practices have a long history in the industry. See Mad. Decl. ¶ 16 ("Pay television services accepted that the PPV/VOD window could precede their window, but only so long as

help ensure that the licensees' ability to monetize the programming (either through a [REDACTED] [REDACTED] is not undermined by having the same content simultaneously available [REDACTED] elsewhere or by having to compete with another service for the [REDACTED] ⁸⁷

i. **Films**

[REDACTED] pays [REDACTED] dollars to NBCUniversal and other major studios every year for the exclusive rights to films during [REDACTED] [REDACTED]

[REDACTED] To protect its investments, [REDACTED] prohibiting many types of exploitation of the licensed films during [REDACTED] [REDACTED] ⁸⁸ These restrictions are straightforward when properly understood. ⁸⁹

First, [REDACTED] [REDACTED] ⁹⁰ [REDACTED] [REDACTED]

the economic offering to the consumer remained adequately differentiated. The pay television services offered a full month of programming for \$10-\$20, whereas a single PPV/VOD movie cost the consumer about \$4 or more.”).

⁸⁷ See Mad. Decl. ¶¶ 20-24 (explaining the film windowing model); Wund. Decl. ¶¶ 24-29 (explaining the television windowing model).

⁸⁸ Cas. Decl. ¶¶ 10-18, Ex. A; HT 85:17-88:11 (Casino); HT 151:19-154:16 (Madoff).

⁸⁹ The Arbitrator found the language [REDACTED] At the Arbitrator's request, however, Mr. Madoff carefully walked the Arbitrator through the [REDACTED] language and explained how these restrictions apply to PCI's [REDACTED] HT 876:6-889:4. Notably, PCI's expert did not disagree with Mr. Madoff's construction of the contract language. HT 908:8-17 (DeVitre).

⁹⁰ [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹¹

PCI does not satisfy [REDACTED]

[REDACTED]

[REDACTED] In the words of PCI's patent application, those transactions must be "consumer-supported," not "ad-supported." PCI users, [REDACTED]

[REDACTED]

[REDACTED] This violates the [REDACTED]

restrictions.⁹²

[REDACTED]

[REDACTED] The entire agreements are in the record as Ex. 35B, H & 35E, I; the full collection of the [REDACTED] Agreements are provided in Ex. 35.

⁹¹ [REDACTED] (Ex. 35I) (NBCU_PCI_00000422) (emphasis added). [REDACTED]

[REDACTED] (Ex. 35H) (NBCU_PCI_00000369).

⁹² HT 85:13-86:12 (Casino); HT 151:7-154:16 (Madoff); Mad. Decl. ¶ 40; Mad. Sec. Decl. ¶ 12. [REDACTED]

[REDACTED]

Second, [REDACTED]

93 [REDACTED] (NBCU_PCI_0000012)
(emphasis added); [REDACTED]
(NBCU_PCI_00000174).

[REDACTED]⁹⁴

The plain language of these provisions makes clear that PCI does not satisfy [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁵ Indeed, the Arbitrator himself found that the [REDACTED]

[REDACTED] As Mr. Madoff

further explained, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁶

The record showed that [REDACTED] imposes the [REDACTED] restrictions against [REDACTED] exhibition of its licensed films. Even by the Arbitrator's own analysis, there is no question that these restrictions prohibit NBCUniversal from licensing newly-released films to PCI's [REDACTED]⁹⁷

⁹⁴ [REDACTED] (Ex. 35I) (NBCU_PCI_00000392-93).
[REDACTED]
(Ex. 35H) (NBCU_PCI_00000325-26).

⁹⁵ Mad. Sec. Decl. ¶¶ 8-11; HT 879:3-883:15 (Madoff).

⁹⁶ HT 887:14-20. Mr. Madoff's expert qualifications as a long-time senior business and legal executive at Paramount, including managing film content under similar [REDACTED] agreements, speak for themselves. HT 149:9-150:20; 805:4-13 (summarizing Mr. Madoff's industry experience); HT 150:21-151:5 (Madoff) (discussing Mr. Madoff's experience with Paramount's [REDACTED]).

⁹⁷ As noted, the Arbitrator found that contracts that [REDACTED] may "present a better case of breach." There is no clearer case that [REDACTED] HT 879:3-883:15 (Madoff).

ii. TV Shows

Similar [REDACTED] provisions in NBCUniversal license agreements prohibit [REDACTED] exhibition of certain television shows.¹¹¹ For example:

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹²
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹³
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹⁴

¹¹¹ HT 67:11-69:9 (Roberts); HT 193:21-195:19; 197:2-198:6 (Wunderlich); Rob. Decl. ¶¶ 18-19, 30, Ex. A; Wund. Decl. ¶¶ 24-27, 30; Cas. Decl. ¶¶ 23-27 (noting that NBCUniversal's [REDACTED]).

¹¹² [REDACTED] (NBCU_PCI_00004448; entire contract Ex. 47A-D) (emphasis added).

¹¹³ [REDACTED] (NBCU_PCI_00004605; entire contract Ex. 51A-B) (emphasis added).

¹¹⁴ [REDACTED] (NBCU_PCI_00004592-93; entire contract Ex. 50A-B) (emphasis added).

This exclusivity is common in the industry and essential for a [REDACTED] to be able to cover its costs, and strive to turn a profit, [REDACTED] programming.¹¹⁹ There is no competition for these [REDACTED]
[REDACTED] In contrast, as shown above, [REDACTED] which again is exactly what these common and reasonable restrictions are intended to prevent.¹²⁰

NBCUniversal's [REDACTED] are likewise subject to certain [REDACTED]¹²¹

For example, in its [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²²
[REDACTED]
[REDACTED]
[REDACTED]

Decl. Exs. C-2 (entire representative contracts Exs. 41-47, 58-60), C-3 (entire representative contracts Ex. 48A-E), C-4 (entire representative contracts Exs. 49-57).

¹¹⁹ Rob. Decl. ¶¶ 12-18; HT 67:19-68:10 (Roberts); Wund. Decl. ¶¶ 24-26; Mad. Decl. ¶¶ 30-33.

¹²⁰ See *supra* note 110.

¹²¹ Lam. Decl. ¶¶ 9-14, Ex. A.

¹²² [REDACTED] (NBCU_PCI_00001459, 00001457; entire contract Ex. 39L-Z).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²³

And [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹²⁴

Licensing [REDACTED] TV programming to PCI's service would run the risk of breaching these restrictions – or triggering negative consequences ([REDACTED]),

[REDACTED]¹²⁵

iii. NBCUniversal's Contracting Practices With [REDACTED]

NBCUniversal bolstered the record supporting its contract defenses by providing evidence of NBCUniversal's own contracting practices with [REDACTED]. [REDACTED] NBCUniversal produced 31 such agreements. Each showed that NBCUniversal imposes similar common and reasonable [REDACTED] licensees to ensure that their exploitation of current film and television programming comports with NBCUniversal's obligations under other license

¹²³ [REDACTED]
(NBCU_PCI_000001201, 1240-41; entire contract Ex. 39B, E) (emphasis added).

¹²⁴ [REDACTED]
(NBCU_PCI_000001249, 1256, 1258; entire contract Ex. 39F, I) (emphasis added).

¹²⁵ Lam. Decl. ¶¶ 22-23.

agreements.¹²⁶ To the extent that the Arbitrator felt he needed to look beyond the language of the relevant representative provisions to determine how they would be interpreted and enforced in the entertainment industry, these [REDACTED] contracts provided further compelling evidence of the validity of NBCUniversal's contractual defenses.

Specifically, NBCUniversal imposes – and enforces – express prohibitions against

[REDACTED]

[REDACTED]

[REDACTED] provisions in NBCUniversal's agreements with other licensees.¹²⁷ The relevant

contractual language in NBCUniversal's [REDACTED] parallels the

language of the restrictions in NBCUniversal's agreements with its [REDACTED]

[REDACTED]¹²⁸ When an [REDACTED]

[REDACTED]

[REDACTED]

¹²⁶ See Wund. Decl., Ex. F (summarizing the key restrictions in these agreements); Wund. Sec. Decl. ¶¶ 42-59 (discussing these requirements and NBCUniversal's enforcement of them); *see generally* Ex. 40A-Z (31 [REDACTED] contracts in the record).

¹²⁷ Lam. Decl. ¶¶ 25-29 (“NBCUniversal crafts the [above-discussed] definitions and restrictions in these agreements to avoid running afoul of its contractual restrictions with other licensees of this content.”)

¹²⁸ The common contractual language prohibits [REDACTED]

[REDACTED]

[REDACTED] Lam. Decl. ¶ 27 (emphasis added) [REDACTED]

[REDACTED]; Wund. Sec. Decl.

¶ 58. And [REDACTED]

[REDACTED] Lam. Decl. ¶ 25. PCI's service would

not satisfy either one of these requirements.

██████████¹²⁹ Unlike these occasional contractual infractions based on ██████████ ██████████ PCI's service would constitute a ██████████ violation of NBCUniversal's obligations to its other licensees.

The Arbitrator simply disregarded all of this record evidence in adopting his "breach first/fix later" approach. The Commission should promptly rule that NBCUniversal is authorized to honor its proven contractual commitments to other licensees by ██████████ ██████████ restricted film and television content from PCI's ██████████ ██████████

C. The Commission Should Clarify The Proper Procedure For Deciding Contract Defenses During Arbitrations Under the Benchmark Condition.

The arbitration revealed a procedural ambiguity in Section VII.C.1 of the Benchmark Condition over whether the authorized contract defenses should be determined in Phase 1 or Phase 2 of the proceedings. Because this ambiguity is likely to arise in future arbitrations, the Commission should clarify its intent on the proper procedure.¹³⁰

Specifically, Section VII.C.1 provides for two arbitration phases "if there is a reasonable dispute regarding one or more of the following: (i) whether an OVD is a Qualified OVD; (ii) what Comparable Programming a Qualified OVD is entitled to . . .; and (iii) whether any of the defenses in Section VII.C.3 below would defeat a claim (provided that, with respect to Section VII.C.3, the first phase shall concern defenses based on 47 C.F.R. § 76.1002(b)(1) only)."

¹²⁹ Wund. Sec. Decl. ¶¶ 50-57 & Exs. 1-5 (discussing and providing five such examples with ██████████).

¹³⁰ See Letter from David P. Murray, Willkie Farr & Gallagher LLP, to William T. Lake, Chief, Media Bureau, MB Docket No. 10-56, at 5-7 & nn.15-18 (Feb. 17, 2012) (Vol. I, Ex. 7 to Tab 8 of Additional Record Items Before the Arbitrator) (discussing the Media Bureau's authority to issue a procedural clarification to the implementation of transaction conditions).

Section VII.C.3, in turn, authorizes NBCUniversal to deny Online Video Programming to an OVD based on the following defenses: “(i) any of the factors listed under 47 C.F.R. § 76.1002(b) as of the date of this Order, or (ii) that providing the Online Video Programming to the particular Qualified OVD would constitute a breach of contract to which . . . [NBCUniversal] is a party”

Subpart (b)(1) of § 76.1002 allows NBCUniversal to deny or limit programming to an OVD based on its financial stability, character, and other factors. The contract defenses likewise affect the scope of programming that NBCUniversal may provide to an OVD that invokes the Benchmark Condition without violating the rights and interests of other licensees. The Commission intended for these threshold issues to be determined in Phase 1, as part of an arbitrator’s determination of the *appropriate* scope of Comparable Programming at issue. That determination, in turn, is intended to guide the OVD and NBCUniversal in fashioning final offers in the form of agreements (“final agreements”) for “baseball-style” selection by the arbitrator in Phase 2. Construing Section VII.C.1 to encompass consideration of any contract defenses *and* any defense based on 47 C.F.R. § 76.1002(b)(1) during Phase 1 of an arbitration, therefore, is logical and would promote efficiency by having all of the issues pertaining to the appropriate scope of Comparable Programming resolved at the outset, before the parties are required to submit their final agreements.

The remaining subparts of 47 C.F.R. § 76.1002(b) – (b)(2) and (b)(3) – establish grounds for NBCUniversal to require different *prices* to be paid by an OVD based on its volume of distribution, service offerings, and other factors. These subparts relate to the *economics* of a final offer in the form of an agreement for the appropriate Comparable Programming, which is relevant to Phase 2, and not to the threshold question of the appropriate scope of Comparable