

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]
[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]

[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]

- [REDACTED]
- [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] 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 maintains [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]

REDACTED - FOR PUBLIC INSPECTION

[REDACTED] 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 [REDACTED]

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, [REDACTED] 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 [REDACTED]

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

[REDACTED] 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. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

4. [REDACTED]
[REDACTED] my current thinking is that PCI may have the better position
[REDACTED] But again, the ultimate conclusion may vary depending upon the particular language in each contract.

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.

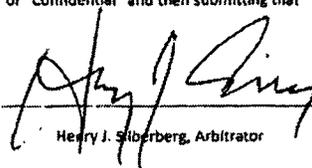
6. Requests for Attorneys' Fees, Costs and Expenses

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

APPENDIX B

**ENTIRE APPENDIX
REDACTED – FOR PUBLIC
INSPECTION**

APPENDIX C

**ENTIRE APPENDIX
REDACTED – FOR PUBLIC
INSPECTION**