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REDACTED FOR PUBLIC INSPECTION

July 30, 2012

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FILED/ACCEPTED
JUL 30 2012
Federal Communications Commission
Office of the Secretary

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

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 – Arbitration Award - Ref: Case No. 72 472 E 01147 11 – Project Concord, Inc. Partial Appeal Redacted For Public Inspection.

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the Partial Appeal of Project Concord, Inc., previously filed on July 16, 2012 subject to a Request For Confidential Treatment, now redacted for public inspection. The Partial Appeal relates to 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 Partial Appeal was filed pursuant to Section 7.E.1. of Appendix A to the Comcast Order and the Redacted For Public inspection copy is being filed at this time as agreed with the Commission's Staff.

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

Respectfully submitted,

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cc: Sarah Whitesell
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REDACTED FOR PUBLIC INSPECTION

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

In the Matter of	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.	**MB Docket No. 10-56**
For Consent to Assign Licenses and Transfer Control of Licenses	**ARBITRATION AWARD** **Ref: Case No. 72 472 E 01147 11**

PROJECT CONCORD, INC. PARTIAL APPEAL

Monica S. Desai
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Dated: July 16, 2012

EXECUTIVE SUMMARY

After an extensive and resource-intensive 93-day process, an experienced AAA arbitrator confirmed Project Concord's views on every substantive issue raised in this first arbitration triggered pursuant to the protective conditions established by the Federal Communications Commission when it allowed the unprecedented merger ("Conditions") of Comcast Corporation ("Comcast") with NBCUniversal ("NBCU"). Project Concord is extremely pleased with the arbitration result, which has cleared the path for this enterprising start-up company to partner with NBCU for the benefit of consumers and Project Concord and NBCU Project Concord is excited to be moving forward with NBCU on that basis.

Consumers will enjoy the option of streaming the entire range of NBCU content, including new release video on demand ("VOD") movies and in-season TV episodes, through Project Concord's transactional distribution service because the Arbitration Award definitively established that:

1) Project Concord's transactional distribution service is exactly the type of online video distributor contemplated under the merger Conditions, and Project Concord is qualified to enter into a contract with NBCU under those Conditions by virtue of having an [redacted] agreement with one of NBCU's peers;

2) the contract proffered by Project Concord more closely approximated the peer deal, both in scope of comparable programming and in the fair market value of the programming rights at issue, than the contract proffered by NBCU;

3) the Commission did not exclude NBCU films for which less than a year has elapsed since their theatrical release from the definition of "Video Programming" contained in the Conditions; and

4) nothing in any of NBCU's numerous existing contracts prevents distribution of its premium film and television content by Project Concord's distribution service on a transactional VOD and electronic sell-through ("EST") basis.

The Arbitration Award order comprehensively details the reasons underlying these conclusions and decisively vindicates Project Concord on each and every substantive issue raised in the proceeding. Moreover, the Arbitration Award is supported by an exhaustive record of nearly 11,000 pages developed through the arbitration process.

It is encouraging that, in the case of Project Concord, the baseball-style arbitration process, which resulted in a contract between NBCU and Project Concord, ultimately served to protect and support the emergence of Project Concord's advanced online video distribution service for exactly the policy reasons discussed by the Commission in establishing the Conditions: promoting competition in the nascent online video market and offering more choice and convenience to consumers in the market for VOD movies and TV episodes.

Importantly, consumers who purchase film and television content [redacted].

While Project Concord is pleased with the arbitration outcome, this victory came at a significant cost that would be unbearable for most emerging companies. As a result of various unreasonable positions taken by NBCU throughout the proceedings, Project Concord diverted significant product and business development resources to fight NBCU's various attempts to avoid the merged entities' straightforward obligations under, and compliance with, the Conditions. Accordingly, Project Concord hereby narrowly appeals that portion of the Arbitration Award that denied its cost-shifting request.

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

In the Matter of	)	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.	)	**MB Docket No. 10-56**
For Consent to Assign Licenses and Transfer Control of Licenses	)	**ARBITRATION AWARD** **Ref: Case No. 72 472 E 01147 11**

PROJECT CONCORD, INC. PARTIAL APPEAL

In connection with its approval of the merger of Comcast Corporation with NBC Universal, Inc. ("NBCU"), the Federal Communications Commission ("FCC" or "Commission") recognized that such an "unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers" could create incentives for exclusionary conduct by the combined entity, and particular danger to "the development of rival online video offerings."[1] The Commission specifically found that the combined entity would have the "incentive and ability to…inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business."[2] Accordingly, the Commission was especially concerned with protecting the development of emerging and innovative Online Video Distributors ("OVD"), to ensure that consumers would continue to benefit by having competitive

[1] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees,* Memorandum Opinion and Order, 26 FCC Rcd 4238 4240, ¶ 3 (2011) ("*Merger Order*").

[2] *Id.*

online choices for accessing video content.[3] Consequently, the Commission created safeguards through Conditions specifically designed to "ensure that OVDs retain non-discriminatory access to Comcast-NBCU video programming, while permitting the continued evolution of the online market."[4]

Pursuant to those Conditions, the Commission required that "once an OVD has entered into an arrangement to distribute programming from one or more Comcast-NBCU peers, we require Comcast-NBCU to make comparable programming available to that OVD on economically comparable terms,"[5] and provided for enforcement of these Conditions through a baseball-style arbitration process.[6] Project Concord, Inc. ("Project Concord"), an OVD qualified to obtain programming from NBCU under the Conditions, prevailed in the arbitration process, gaining access to NBCU programming.

Project Concord hereby submits this partial appeal of the Arbitration Award only on the issue of cost-shifting, as the remainder of the Arbitration Award confirmed Project Concord's views on every single substantive issue raised in its arbitration with NBCU.[7]

After an extensive and resource-intensive 93-day process, which was the first arbitration proceeding triggered under the OVD safeguards provided by the Conditions, Project Concord's [redacted] will be able to offer consumers a broad selection of new and library films and television content from NBCU [redacted] later in 2012.

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[3] *Merger Order*, at 4355-4381 (App. A) ("Conditions"). For definition of OVD *see Merger Order* at 4357 (App. A, Sec. I).

[4] *Merger Order*, at 4273, ¶ 87.

[5] *Id.*, at ¶ 88.

[6] *Id.*, at 4273-4274, ¶ 89.

[7] *In the Matter of the Arbitration Between PROJECT CONCORD, INC., Claimant and NBCUNIVERSAL MEDIA, LLC, Respondent,* Case No. 72 472 E 01147 11, Arbitration Award (As Amended), June 15, 2012 ("Arbitration Award").

Importantly, consumers of Project Concord's online distribution service now have the option of paying for both the peer studio's and NBCU's film and TV content [redacted].

[redacted]

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[8] *See* Declaration of Sharon Peyer, dated April 20, 2012, submitted in connection with Phase 1 Hearing held on April 25, 2012 ("Peyer Declaration") and NBCU Arbitration Exhibit No. 10 (Project Concord, Inc. Power Point Presentation). The Peyer Declaration and Power Point Presentation, which was referenced in the Peyer Declaration, are attached as Exhibit 1.

[redacted].[9]

Much to Project Concord's satisfaction, the Arbitration Award confirmed that a consumer's ability to pay for content [redacted]. This cleared the path for Project Concord, an innovative start-up company, to partner with NBCU as it did with the peer studio for the benefit of both consumers and the two companies. Project Concord is excited to be moving forward with NBCU on that basis.

Consumers will enjoy the option of accessing the entire range of NBCU content, including new release VOD movies and in-season television episodes, via Project Concord's state-of-the-art streaming model because the arbitration definitively established that:

1) Project Concord's 's transactional online video distribution service is exactly the type contemplated under the Conditions, and Project Concord is qualified to enter into a contract with NBCU under those Conditions by virtue of having entered into an [redacted] agreement with one of NBCU's peers;

2) the contract proffered by Project Concord more closely approximated the peer deal, both in scope of comparable programming and in the fair market value of the programming rights at issue, than the contract proffered by NBCU;

3) the Commission did not exclude NBCU films for which less than a year has elapsed since their theatrical release from the definition of "Video Programming" contained in the Conditions; and

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[9] *See* Claimant's Phase One Post-Hearing Brief, May 4, 2012, at p.18; Claimant's Phase 2 Closing Brief, June 7, 2012, at p. 15; Preyer Declaration.

4) nothing in any of NBCU's numerous existing contracts prevents distribution of its premium film and television content by Project Concord's online video distribution service on a transactional VOD and EST basis.[10]

The Arbitration Award order comprehensively details the reasons underlying these conclusions and decisively vindicates Project Concord on each and every substantive issue raised in the proceeding. Moreover, the Arbitration Award is supported by an exhaustive record of nearly 11,000 pages developed through the arbitration process.

Project Concord's [redacted] will compete with Comcast's cable television business and the VOD services Comcast makes available to its cable subscribers. Accordingly, it is precisely the type of entity the Commission sought to protect when establishing conditions to counteract the combined entity's "incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business."[11] It is encouraging that, in the case of Project Concord, the baseball-style arbitration process resulting in the current contract between NBCU and Project Concord ultimately served to protect and support the emergence of Project Concord's advanced online video distribution service for exactly the policy reasons discussed by the Commission in establishing the Conditions: promoting competition in the nascent online video market, and offering more choice and convenience to consumers in the market for VOD movies and TV episodes.[12]

However, this victory came at a significant cost that would be unbearable for most emerging companies. As a result of various unreasonable positions taken by NBCU throughout the

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[10] Arbitration Award, at 8-10.

[11] *Merger Order*, at 4240, ¶ 3.

[12] *Merger Order*, at 4342, 4352-4353, ¶¶ 253, 256, 284 & 285.

proceedings, Project Concord diverted significant resources that could have been used to employ additional staff, expand business opportunities, and continue innovating, to instead fight NBCU's various attempts to avoid the merged entities' straightforward obligations under, and compliance with, the Conditions. For example, NBCU blatantly violated the non-disclosure obligation governing their discussions even before arbitration was triggered, by attempting to interfere with the peer deal through a third party partner.[13] As another example, despite (a) knowing that Project Concord had an agreement with a named peer before the arbitration was even triggered; (b) the actual production of Project Concord's Highly Confidential benchmark agreement; (c) the production of nearly 900 pages of programming titles being made available to Project Concord by the peer studio; (d) evidence of Project Concord's advanced payment for content under the benchmark agreement; and (e) a letter from the peer studio intended to confirm its agreement with Project Concord, NBCU still continued to assert that Project Concord was not a qualified OVD meeting the benchmark condition.[14]

Pursuant to the Conditions, "[i]f the arbitrator finds that 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."[15] In the two Declarations attached as Exhibits 2 and 3, Project Concord has comprehensively detailed the long list of unreasonable and vexatious arguments and conduct that support its request for cost-shifting.

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[13] *See* Claimant's Declaration in Support Of Request For Cost-Shifting, May 24, 2012 ("First MacHarg Declaration"), at ¶ 9. The First MacHarg Declaration and Claimant's Second Declaration In Support of Request For Cost Shifting, June 7, 2012 ("Second MacHarg Declaration") are attached as Exhibits 2 and 3 respectively.

[14] First MacHarg Declaration, at ¶¶ 17-42.

[15] *Merger Order*, at 4367, 4370 (App. A, Sec. VII.B.10, VIII.5).

The Arbitrator ultimately concluded that, although the costs incurred by Project Concord in securing its straightforward victory were [redacted] and that "the reasonableness thereof for the services rendered has not been challenged," he found that Project Concord failed to meet its "steep burden" of proving "unreasonable" conduct.[16] Project Concord respectfully and vigorously disagrees with only that portion of the Arbitration Award. The Arbitrator found that this was a "hard fought" battle but that the attorneys acted "ethically."[17] Project Concord submits that there is no justifiable reason that NBCU should have engaged in the "battle" detailed in the attached Declarations – and its conduct does not need to be "unethical" to be "unreasonable." The positions taken by NBCU -- from refusing to admit that Project Concord is a qualified OVD, with all the evidence it had to the contrary -- to submitting a Phase Two final offer that outright flouted the Arbitrator's Phase One conclusion that Project Concord is entitled to current TV titles and current movie titles, to asserting a contractual impediment defense that even NBCU admitted [redacted] and which the Arbitrator characterized as "substantially" overstating risks" -- are blatantly unreasonable and support cost-shifting.[18] Taking such positions is contrary to the plain language and intent of the *Merger Order*, and reveals that NBCU believes it can prevail not on the merits, but rather by outspending, outlasting and attempting to intimidate and discriminate against a competitor in the OVD market.[19] The Commission underscored that it will not tolerate such tactics by calling for cost-shifting no fewer than three times in the *Merger Order*.[20]

Accordingly, for the reasons set forth herein, Project Concord believes it is entitled to the costs and expenses it incurred as a result of this process, including attorneys' fees, and therefore

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[16] Arbitration Award, at 11.

[17] *Id.*, at 11-12.

[18] *See id.*, at 7-9.

[19] First MacHarg Declaration, at ¶¶ 57-65.

[20] *Merger Order*, at 4367, 4369, 4370 (App. A, Sec. VII.B.10, VII.E.3., VIII.5).

appeals that narrow portion of the Arbitration Award denying Project Concord its request for cost-shifting.

Respectfully submitted,

Project Concord, Inc.

By: ______________________

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Dated: July 16, 2012

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 16th of July, 2012, a copy of the foregoing "Project Concord, Inc. Partial Appeal" has been served by hand delivery or electronically and first-class mail, postage pre-paid, on the following:

Sarah Whitesell Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554	Steven Broeckaert Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554
Martha Heller Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554	Lindsay Addison Willkie Farr & Gallagher 1875 K Street NW, Suite 100 Washington DC 20006
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Yosef Getachew

Yosef Getachew

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EXHIBIT 1

ENTIRE EXHIBIT REDACTED FOR PUBLIC INSPECTION

EXHIBIT 2

ENTIRE EXHIBIT REDACTED FOR PUBLIC INSPECTION

EXHIBIT 3

ENTIRE EXHIBIT REDACTED FOR PUBLIC INSPECTION

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