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PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

DOCKET FILE COPY ORIGINAL

Facsimile 202-457-6315
www.pattonboggs.com

REDACTED - FOR PUBLIC INSPECTION

August 10, 2012

FILED/ACCEPTED

Monica S. Desai
202-457-7535
MDesai@PattonBoggs.com

AUG 10 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. Opposition To NBCUniversal Media Petition For De Novo Review Redacted - For Public Inspection

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the Project Concord, Inc.’s Opposition to NBCUniversal Media Petition For De Novo Review, previously filed on July 31, 2012 subject to a Request For Confidential Treatment, now redacted for public inspection. The PCI Opposition 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 PCI Opposition was filed pursuant to Section VII.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.

041

August 10, 2012

Page 2

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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,



Monica S. Desai
Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-7535

Counsel for Project Concord, Inc.

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

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

FILED/ACCEPTED

AUG 10 2012

Federal Communications Commission
Office of the Secretary

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. OPPOSITION TO
NBCUNIVERSAL MEDIA PETITION FOR DE NOVO REVIEW

Monica S. Desai
Kevin J. Martin
Paul C. Besozzi
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Dated: July 31, 2012

EXECUTIVE SUMMARY

Project Concord is an emerging online video (OVD) distributor that will [REDACTED] [REDACTED] the end of this year. Project Concord has a contract with a Film Studio that enables it to distribute the Film Studio's Video Programming, including its current films and television episodes, through its [REDACTED]. The distribution will be on a traditional transactional video on demand (TVOD) or electronic sell-through (EST) basis. This [REDACTED] will compete directly with Comcast Corporation's cable television business.

The Federal Communications Commission predicted that if it allowed Comcast to acquire NBCUniversal Media, the combined entity would have the "incentive and ability" to "take anticompetitive actions against" competing OVDs (such as Project Concord), and would do so by withholding NBCU content. The FCC did not trust Comcast's claims that it would not try to harm competing OVDs. Accordingly, the FCC explicitly conditioned its approval of Comcast's acquisition of NBCU on the straightforward requirement that, (1) if a qualified OVD (such as Project Concord) enters into an agreement with a peer Film Studio to distribute Video Programming (as Project Concord did), (2) NBCU would be required to enter into an agreement to offer Comparable Programming to that OVD, as if it is not influenced by Comcast.

Despite this requirement, when Project Concord approached NBCU, NBCU refused to enter into a comparable agreement. NBCU behaved exactly as the FCC predicted a Comcast-influenced NBCU would behave. It engaged in unreasonable tactics and made unreasonable arguments in attempting to withhold programming from a Comcast competitor, dodging its straightforward obligations imposed by the FCC.

NBCU would not negotiate with Project Concord when Project Concord informed NBCU that it had an agreement with a peer film studio. NBCU said Project Concord was not qualified under the Conditions to contract with NBCU. NBCU argued that the FCC did not intend "Comparable

Programming” to include the must-have programming that allows an OVD to compete with Comcast – newly released films and television episodes. NBCU said “including but not limited to” means “does not include.” NBCU claimed that its existing contracts with other licensees prohibited it from providing Comparable Programming to Project Concord.

An experienced AAA arbitrator focused on the evidence presented and disagreed with Comcast. After evaluating a robust record including extensive testimony, expert reports and declarations from 4 expert witnesses and 5 fact witnesses; dozens of contracts; numerous brief; the FCC’s Order allowing Comcast to acquire NBCU; and a record of almost 11,000 pages, the Arbitrator ruled in favor of Project Concord on every substantive issue raised by NBCU.

NBCU’s myriad excuses for not complying with its obligations under the Conditions did not withstand scrutiny. The Arbitrator correctly concluded (1) that the FCC did not exclude NBCU films for which less than a year has elapsed since their theatrical release from the ambit of the Conditions; (2) that NBCU could not demonstrate, much less demonstrate by a preponderance of the evidence, that any language contained in any of the dozens of contracts it presented, prevents NBCU from distributing such programming through Project Concord’s [REDACTED] on a TVOD and EST basis. The Commission should confirm those decisions.

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....i

I. BACKGROUND ON PROJECT CONCORD..... 3

II. NBCU NEVER INTENDED TO PROVIDE PROJECT CONCORD WITH COMPARABLE PROGRAMMING..... 5

III. PCP'S PEER DEAL ENTITLES IT TO THE CURRENT FILMS OF NBCUNIVERSAL, AND NEITHER THE CNBCU ORDER NOR THE CONDITIONS EXCLUDE FILMS LESS THAN ONE YEAR FROM THEATRICAL RELEASE..... 9

A. The Online Video Conditions Were Expressly Designed to Protect Emerging Competitive Choices to Comcast's Cable Television Business, Which the Combined Comcast-NBCU Would Have the Incentive and Ability to Hinder..... 9

1. The Conditions Were Specifically Designed to Counter Anticipated Anticompetitive Behavior by the Combined Entity Against Emerging Online Competition..... 10

2. Comcast has Strong Incentives to Withhold NBCU Content from Emerging Online Competitors..... 11

3. The Benchmark Condition was Intended to Provide a Proxy for NBCU Behavior Absent Influence by Comcast by Virtue of the Acquisition..... 12

4. Excluding Current Releases Would Hinder the Development of OVD Competition, Counter to the Purposes of the Conditions..... 13

5. Access to Current Studio Content on a PPV and TVOD Basis is Consistent with Years of Industry Practice..... 14

6. Nothing in the Record Suggests that the FCC Intended to Foreclose OVD Access to Must-Have Content..... 15

B. The Plain Language Of The Conditions Demonstrates That First-Year Films Are Not Excluded From "Video Programming"..... 17

C. Reference To The DOJ Process Does Not Support NBCU's Arguments..... 20

IV. BASED ON AN EXTENSIVE RECORD, THE ARBITRATOR RULED CORRECTLY THAT NBCU FAILED TO MEET ITS BURDEN OF PROOF ON ITS CONTRACTUAL IMPEDIMENT DEFENSE..... 22

A. The Arbitrator Applied the Correct Standard - the "Preponderance of the Evidence" Standard Set Forth in the Conditions..... 25

B. NBCU Failed to Establish Its Contractual Impediment Defense. It Did Not Prove, and Cannot Prove, That PCP's Service Violates Any of the Prohibitions In Its Agreements..... 31

1.	The Project Concord [REDACTED] Economic Model is Transactional, Distributing Programming on a PPV/VOD or EST Basis.	33
2.	The Project Concord [REDACTED] has No [REDACTED]. It is in no way [REDACTED] and it Does Charge a Distinct Fee for Each Transaction.....	37
3.	NBCU’s Provision of Programming to Project Concord Does not Violate NBCU’s Agreements with [REDACTED].	42
a.	The [REDACTED] Requirement.	43
b.	Prohibition Against [REDACTED] Exhibition.	45
4.	PCI’s [REDACTED] Does Not Violate Restrictions Set Forth in NBCU’s Contracts with [REDACTED].	47
5.	PCI’s [REDACTED] Does Not Violate Restrictions Set Forth in NBCU’s Other Contracts.	48
6.	Risk of Breach is Further Mitigated by Actual Industry Practice.	50
V.	IT IS INAPPROPRIATE TO USE THE APPEAL PROCESS TO REQUEST RECONSIDERATION OF THE CNBCU ORDER.....	52
VI.	CONCLUSION.	53

EXHIBIT 1 – Declaration of Lawrence Smith

EXHIBIT 2 – Claimant’s Phase 1 Proposed Findings and Conclusions

EXHIBIT 3 – Claimant’s Phase 2 Proposed Findings

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

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

**PROJECT CONCORD, INC. OPPOSITION
TO NBCUNIVERSAL MEDIA PETITION FOR DE NOVO REVIEW**

Project Concord, Inc. hereby opposes the Petition for De Novo Review filed by NBCUniversal Media, LLC.¹ This is the first arbitration triggered under the protective Conditions established by the Federal Communications Commission when it allowed the unprecedented combination of Comcast Corporation with NBCU. Here an experienced AAA arbitrator found in favor of Project Concord with respect to every substantive issue raised over the course of this 93-day proceeding.² The Arbitrator carefully evaluated a robust record including letter briefs; 4 days of evidentiary hearings; extensive testimony, expert reports and declarations from 4 expert witnesses and 5 fact witnesses; and almost 11,000 pages of transcripts and documents.³ Based on this record, the Arbitrator correctly concluded that (1) under a plain reading of the Benchmark Condition, and

¹ *Project Concord, Inc. Claimant, vs. NBCUniversal Media, LLC, Respondent*, MB Docket No. 10-56, Petition for *De Novo* Review (filed July 16, 2012) (“NBCU Petition”).

² *Project Concord, Inc. Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Arbitration Award (As Amended) (filed July 11, 2012) (“Arbitration Award”); *see also 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) (“CNBCU Order”).

³ *See Arbitration Record, Project Concord, Inc., Claimant, vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11 (filed July 16, 2012).

supported by explanatory language in the *C-NBCU Order*, NBCU films for which less than a year has elapsed since their theatrical release are not excluded from the definition of “Video Programming” contained in the Conditions;⁴ and (2) NBCU could not demonstrate, much less demonstrate by a preponderance of the evidence, that any language contained in any of the dozens of contracts presented by NBCU prevents distribution of its premium film and television content through Project Concord’s ██████████ on a transactional video on demand (TVOD) and electronic sell-through (EST) basis. As explained in detail below, the FCC should reject NBCU’s appeal on these two issues.

NBCU also raises a third issue, which NBCU couches as a “clarification” question -- at what point in the arbitration process, Phase 1 or Phase 2, should an arbitrator consider contract defenses.⁵ The Conditions are unambiguous on this point: “the first phase shall concern defenses based on 47 C.F.R. sec. 76.1002 (b)(1) only.”⁶ Obviously, the word “only” means that no other defenses should be considered in Phase 1. NBCU would now like the Commission to interpret “only” as meaning “not only.” A “clarification” regarding the meaning of “only” does not impact Project Concord’s victory on the legal issues that NBCU is appealing. It is inappropriate for NBCU to use this appeal process to now request a late reconsideration of the language in the Conditions, much less in an “expedited” fashion.⁷

For the reasons set forth below, the Commission should deny NBCU’s appeal.

⁴ The “Conditions” refers to Appendix A to the *CNBCU Order*. All section references, unless otherwise indicated, shall be to the Conditions. The “Benchmark Condition” refers to App. A, § I (“Benchmark Condition” means that an OVD has entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD.)

⁵ NBCU Petition at 42.

⁶ *CNBCU Order* at 4367 (App. A §VII.C.I.) (emphasis supplied).

⁷ See NBCU Petition at 9.

I. BACKGROUND ON PROJECT CONCORD.

Project Concord is an emerging online video distributor that will be [REDACTED] end of 2012.⁸ Project Concord has developed an [REDACTED] which will feature a transactional video distribution service⁹ competing directly with Comcast's cable television business. Through the [REDACTED], consumers will be able to purchase a range of video programming content, including new release video on demand ("VOD") movies and in-season TV episodes.¹⁰ Consumers who purchase film and television content distributed through its [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹¹

The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸ *Project Concord Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimants Rebuttal Brief To Opening Position Statement of Respondents, Declaration of Sharon Peyer, ¶ 2-3 (dated April 20, 2012) ("Peyer Dec.").

⁹ Peyer Dec. ¶ 3-4.

¹⁰ Peyer Dec. ¶ 3.

¹¹ Peyer Dec. ¶ 5, 10; Hearing Transcript ("HT") 292:16-20 (Smith) (April 25, 2012); HT 357:3-10-359:208 (Peyer) (April 25, 2012).

¹² Peyer Dec. ¶ 16; HT 316:15-317:2 (Smith) (April 25, 2012); HT 363:10-371:2 (Peyer) (April 25, 2012).

¹³ Peyer Dec. ¶ 17, 19; HT 364:11-368:9 (Peyer) (April 25, 2012).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵

Project Concord's [REDACTED]

¹⁴ See *supra* n. 9 (testimony of Mr. Smith and Ms. Peyer describing [REDACTED])

¹⁵ HT 381:12-382:6, 400:11-402:12 (Peyer) (April 25, 2012).

¹⁶ Peyer Dec. ¶¶ 4-5; HT 404:14-18, 411:6-9 (Peyer) (April 25, 2012); HT 423:17-22 (Marenzi).

¹⁷ HT 291:22-292:20 (Smith) (April, 25, 2012).

¹⁸ Peyer Dec. ¶ 7; HT: 289:18-22 (Smith); HT 353:12-19 (Peyer) (April 25, 2012); HT 468:4-7 (Marenzi) (April 25, 2012); HT 499:8-18 (DeVitre) (April 25, 2012).

¹⁹ See Peyer Dec. ¶ 5; see also *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimant's Phase 1 Post-Hearing Brief, at 18 (dated May 4, 2012) ("PCI Phase 1 Post-Hearing Brief"); see also *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimant's Phase 2 Closing Brief, at 15 (dated June 7, 2012) ("PCI Phase 2 Closing Brief").

II. NBCU NEVER INTENDED TO PROVIDE PROJECT CONCORD WITH COMPARABLE PROGRAMMING.

NBCU posits that (1) it has been willing to license content to Project Concord from the start; (2) the parties should have been able to reach agreement without arbitration; and (3) the difference between the parties' final offers had "narrowed significantly" by the end of the arbitration.²⁰ Project Concord agrees that the parties should have been able to reach agreement without arbitration. From the day that Project Concord first knocked on its door, however, Comcast-NBCU did nothing but try to avoid doing what the Conditions require: provide Project Concord a license to distribute programming that is comparable to the programming that a peer has licensed it to distribute.

As early as July 15, 2011, Project Concord notified NBCU that it had entered into a Benchmark Agreement with a Peer Studio and desired a license for comparable programming.²¹ Despite this notification, however, NBCU did not provide Project Concord with a copy of the FCC conditions placed on the Comcast-NBCU transaction until two months later – a direct violation of § V of the FCC conditions.²² Moreover, the executive with nominal responsibility for Internet TVOD/EST licensing at NBCU, Ronald Lamprecht, never met with anyone from Project Concord.²³

²⁰ See NBCU Petition at 1.

²¹ See *Project Concord, Inc. Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimant's Declaration in Support of Request for Cost-Shifting at 4, ¶ 17 (dated May 24, 2012) ("First MacHarg Declaration").

²² See First MacHarg Declaration at 5, ¶ 18.

²³ See HT 140:12-140:17 (Lamprecht); see also HT 142:11-142:18 (Lamprecht) (testifying in response to questions from Claimant's counsel as follows:

"Q: So bottom line, you guys [NBCU] never intended to do business with them [Project Concord], right?

A: No.

Q: Never gave them a questionnaire? They never even had a meeting with you, right?

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.²⁴ Despite (a) knowing that Project Concord had an agreement with a named peer before the arbitration began; (b) the production of nearly 900 pages of programming titles being made available to Project Concord by the peer studio; (c) evidence of Project Concord's advance payment for content under the Benchmark Agreement;²⁵ and (d) a letter from the peer studio confirming that it had licensed TVOD/EST rights to Project Concord. NBCU still continued to assert that Project Concord was not a qualified OVD meeting the Benchmark Condition.²⁶ NBCU refused to offer a contract for carriage of any programming at all until Phase 2.

Moreover, the offer NBCU finally submitted in Phase 2 outright defied the Arbitrator's Phase 1 determination that Project Concord is entitled to current TV titles and current movie titles. NBCU stated that despite the Arbitrator's Phase 1 ruling, it [REDACTED]

[REDACTED]²⁷ The Arbitrator correctly recognized that the gap between the two offers remained wide

A: With me personally?

Q: Yes.

A: That's correct.”).

²⁴ See First MacHarg Declaration at 3, ¶9 (“[N]ot long after receiving Project Concord’s Notice of Intent to Arbitrate, the Peer Studio notified PCI that it had received a call from its [REDACTED] asking why the Peer Studio had done an [REDACTED] with [REDACTED]. When PCI confronted NBCU about this blatant violation of the non-disclosure agreement . . . there was only silence.”).

²⁵ The “**Benchmark Agreement**” is the [REDACTED] (as amended) together with all titles made available to PCI pursuant to it. A copy of the Benchmark Agreement is found at Exhibit 3 to the FCC Record.

²⁶ First MacHarg Declaration at 4-11, ¶¶ 17-42.

²⁷ Arbitration Award at 6.

the Conditions. The positions and mischaracterizations NBCU is now attempting to advance in its appeal are a continuation of its attempt to avoid its straightforward obligations under the *CNBCU Order*.

III. PCIP'S PEER DEAL ENTITLES IT TO THE CURRENT FILMS OF NBCUNIVERSAL, AND NEITHER THE CNBCU ORDER NOR THE CONDITIONS EXCLUDE FILMS LESS THAN ONE YEAR FROM THEATRICAL RELEASE.

The Arbitrator read the plain language of the Conditions and the *CNBCU Order*, and concluded that the definition of “Video Programming” contained in the *CNBCU Order* must be understood to not exclude films for which less than one year has elapsed from theatrical release. Despite specific language to the contrary, and despite the entire thrust of the *CNBCU Order*, in which the FCC explained, in detail, that it wanted to support the development of OVD competition and counter Comcast’s incentives to withhold NBCU content from emerging online competition, NBCU posits that the “plain language of the *Order* expressly excludes such films,” and then claims, without pointing to a single sentence in support, that this (non-existent) “express” language was “specifically negotiated” while the FCC was considering whether to allow Comcast to combine with NBCU.³⁶ As explained in detail below, none of these arguments withstands scrutiny.

A. The Online Video Conditions Were Expressly Designed to Protect Emerging Competitive Choices to Comcast’s Cable Television Business, Which the Combined Comcast-NBCU Would Have the Incentive and Ability to Hinder.

In permitting the combination of Comcast Corporation with NBCUniversal Media, the Federal Communications Commission determined that such an “unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers” would result in an entity with the “incentive and ability” to engage in

³⁶ NBCU Petition at 2, 16.

“exclusionary conduct” and “inhibit competition.”³⁷ The FCC was particularly concerned that Comcast would withhold NBCU content from online video distributors (“OVDs”), which were emerging as a competitive threat to Comcast’s cable television business.³⁸ As a result, the entire tenor of the analysis in the *CNBCU Order* and its description of the clear intent and goals of the Online Access condition demonstrate that the FCC did not intend to limit the availability of programming validated by a peer studio.

1. The Conditions Were Specifically Designed to Counter Anticipated Anticompetitive Behavior by the Combined Entity Against Emerging Online Competition.

In particular, the FCC specifically found that, absent restrictions on its behavior, “Comcast-NBCUniversal will have the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against OVDs.”³⁹ In so finding, the FCC squarely rejected Comcast’s arguments to the contrary, and itself identified a substantial number of internal Comcast and NBCUniversal emails that contradicted their claims that they would not have any incentive or ability to withhold NBCUniversal content from emerging online competitors or otherwise harm OVDs.⁴⁰ As a result, the FCC concluded that Comcast regarded online video as a threat and took steps to prevent competition from OVDs.⁴¹

³⁷ *CNBCU Order* at 4240, ¶ 3.

³⁸ *See CNBCU Order* at 4241, ¶ 4.

³⁹ *CNBCU Order* at 4268, ¶ 78.

⁴⁰ Compare *CNBCU Order* at ¶ 75 (“Applicants respond that they have neither the ability nor incentive to withhold NBCUniversal content or otherwise harm OVDs”) with *CNBCU Order* at ¶ 85 (“The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it. The record also contains NBCUniversal e-mails and documents showing that many of the other cable companies are similarly concerned about the OVD threat and that NBCUniversal feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.”); *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*,

2. Comcast has Strong Incentives to Withhold NBCU Content from Emerging Online Competitors.

That Comcast would have such an incentive is not surprising. The FCC specifically recognized that, because “an OVD that rents or sells movies competes against Comcast’s pay-per-view movie service” and may affect the prices it charges consumers, Comcast would have a particular “incentive to deny [that] OVD access to NBCUniversal content, **including movies distributed by Universal Studios.**”⁴² The Commission further recognized that “even today OVDs may provide some competition for Comcast and affect the prices it charges consumers. For example, an OVD that rents or sells movies competes against Comcast’s pay-per-view movie service and, hence, competes with Comcast for revenue. . . . Comcast therefore has an incentive to deny that OVD access to NBCU content, including movies distributed by Universal Studios.”⁴³ And, as the Department of Justice would later note in its competitive impact statement, the combined Comcast/NBCU would earn \$34 Billion from cable service (including VOD), but at most \$16.9 Billion from distribution of its programming, providing the combined Comcast/NBCU with strong incentive to protect its cable services even if that required it to forgo potential gains in video distribution.⁴⁴ Based on the extensive record in the merger proceeding, the FCC ultimately concluded “Comcast has an incentive to prevent these services from developing to compete with it and to hinder the competition from those that do develop.”⁴⁵

AAA Case No. 72 472 E 01147 11, Claimant’s Phase 1 Opening Brief, at 9-10 (dated Apr. 17, 2012) (“PCI Phase 1 Opening Brief”).

⁴¹ See *CNBCU Order* at 4272, ¶ 85, n.190-192.

⁴² *CNBCU Order* at 4270, ¶ 81 (2011) (emphasis added).

⁴³ *CNBCU Order* at 4270, ¶ 81.

⁴⁴ DOJ Competitive Impact Statement at 3-5.

⁴⁵ *CNBCU Order* at 4269, ¶ 78.

The Commission went on to find that, if Comcast and NBCUniversal were to withhold online programming, OVDs would be less competitive, and that this was “**especially true of the online rights to NBCU network programming and movies from Universal Studios.**”⁴⁶ The Commission concluded that if “an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming” and warned that “**Comcast has strong incentives not to let this occur.**”⁴⁷ It was in this context that the FCC adopted “targeted conditions” in order to “ensure that OVDs retain non-discriminatory access to Comcast-NBCU video programming, while permitting the continued evolution of the online market.”⁴⁸

3. The Benchmark Condition was Intended to Provide a Proxy for NBCU Behavior Absent Influence by Comcast by Virtue of the Acquisition.

The FCC structured the Benchmark Condition to act as a market-based mechanism for determining what programming the combined Comcast-NBCU entity must provide to a qualified OVD, while at the same time avoiding interference with the evolution of online distribution in the marketplace. The FCC relied on the Benchmark Condition to validate a programming request as commercially reasonable, while at the same time ensuring that Comcast-NBCU would not be required to provide programming to an OVD that it could not otherwise obtain from a similarly situated content provider. In essence, the Benchmark Condition serves as a proxy for how NBCU would have behaved in the marketplace absent the acquisition by Comcast and the resultant change in NBCU’s incentives with regard to programming distribution. As the FCC explained:

Because the terms by which video programming vendors offer their programming to such services are unsettled and likely to change rapidly, we conclude that the best way to ensure that Comcast-NBCU treats such services fairly is to require it to offer its programming on terms

⁴⁶ *CNBCU Order* at 4273, ¶ 86, n. 195 (emphasis added).

⁴⁷ *CNBCU Order* at 4273, ¶ 86 (emphasis added); *see also* PCI Phase 1 Opening Brief, at 10 (emphasis added).

⁴⁸ *CNBCU Order* at 4273, ¶ 87; *see also* PCI Phase 1 Opening Brief at 10.

comparable to those offered by its non-vertically integrated peers, which lack Comcast-NBCU's incentive to harm online providers. Specifically, 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. This market-driven approach will ensure access to programming by OVDs as the online services develop, without prejudging the direction the dynamic market will take.⁴⁹

Accordingly, the FCC designed conditions to ensure that Comcast would not withhold NBCU content from emerging online competitors to Comcast's cable television business, and that consumers would continue to benefit by having competitive online choices for accessing video content.

4. Excluding Current Releases Would Hinder the Development of OVD Competition, Counter to the Purposes of the Conditions.

It is also telling that the FCC's consideration of the role of OVDs in the delivery of video programming began by noting that online video distribution is "an established and growing business" in which companies like "Apple, Amazon and Walmart offer movies and television shows to rent or purchase by downloading them over the Internet."⁵⁰ All of these companies have lucrative TVOD and EST content that includes, of course, first-run theatrical releases – the highest value content available. Indeed, films for which less than one year has elapsed since their theatrical release represent the vast majority of video programming distributed on a TVOD or pay-per-view basis and that generate the bulk of revenue for that method of distribution of video programming. Comcast implied to the Commission that it intended to make current NBCU content available to others post-transaction.⁵¹ First-run Films make up a significant part of TVOD and PPV delivery --

⁴⁹ *CNBCU Order* at 4273, ¶ 88.

⁵⁰ *CNBCU Order* at 4263, ¶ 63.

⁵¹ Letter from James Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 at 2 (filed Aug. 20, 2010) ("[W]ith respect to Comcast's content today, or new NBCU's content in the future, to the extent that Comcast makes it available online to Comcast-authenticated subscribers at sites like Xfinity TV, Comcast intends to make it available on reasonable

both as a matter of industry-wide practice and [REDACTED]. It is uncontroverted on the record of these proceedings that Films for which less than a year has elapsed since theatrical release is must-have programming for any TVOD service provider.⁵² If NBCU's reading of the definition of Video Programming were credited, however, then *no* OVD seeking to enforce its rights under the Conditions would *ever* be entitled to access that must-have content from NBCU.

Recognizing that an illustrative list could never be exhaustive, the FCC made expressly and abundantly clear that the failure to include a specific item does not create a negative implication that the FCC intended to actively exclude programming (hence "includes but is not limited to") that is or becomes "provided by or generally considered comparable to programming provided by, a television broadcast or cable network, regardless of the medium or method used for distribution."⁵³

5. Access to Current Studio Content on a PPV and TVOD Basis is Consistent with Years of Industry Practice.

NBCU also asserts that, despite explicit and voluminous language in the *CNBCU Order* unambiguously explaining the intent of the Conditions, the Arbitrator somehow misunderstood the FCC's intent because, NBCU imagines, that the FCC purposefully excluded current films based on NBCU's agreements [REDACTED].⁵⁴ NBCU goes on to assert that the FCC (and DoJ) "expressly codified in the *Order* and consent decree – that first-year films would continue to be governed by the marketplace practices of the industry, including the windowing restrictions and other requirements imposed [REDACTED], rather than be subject to potential 'lock-step' treatment under a

terms to other MVPDs to provide online to their authenticated subscribers.") The Xfinity website does offer consumers new releases, including NBCU movies within one year of theatrical release. <http://xfinitytvstore.comcast.net/movies/>.

⁵² HT 261:2-11 (Smith); 431:18-432:6 (Marenzi); *see also* PCI Phase 1 Post-Hearing Brief at 24.

⁵³ *CNBCU Order* at 4358 (App. A §I); *see also* PCI Phase 1 Post-Hearing Brief at 26.

⁵⁴ *See* NBCU Petition at 15.

compulsory licensing regime based on the decisions of a peer studio that may or may not have any relationship with ██████.”⁵⁵

First, there is absolutely no evidence in the record that the FCC did any such thing. Second, as explained in detail below, NBCU’s provisioning of current first year film programming does not violate NBCU’s agreements with ██████ or any of its other agreements. And in fact, here, the peer studio does have a relationship with ██████, lending further support to the overwhelming evidence that NBCU’s provisioning of current first year film content to Project Concord will not violate its own ██████ agreement.

Third, to address NBCU’s assertions regarding the FCC’s “intent” - distributing current films online on a TVOD/EST basis is consistent with standard windowing practices,⁵⁶ and with NBCU’s customary practice to license the right to distribute such content to many other TVOD/EST OVD licensees.⁵⁷ As explained in detail, the Project Concord online distribution model is TVOD/EST.⁵⁸ There is absolutely nothing inconsistent with compelling NBCU to license first-year films to an OVD that distributes programming through a TVOD/EST model based on the practices of the peer studio – because that is consistent with standard industry practice and NBCU’s own contracts.

6. Nothing in the Record Suggests that the FCC Intended to Foreclose OVD Access to Must-Have Content.

NBCU attempts to characterize the issue of whether or not first-year films should be part of the Benchmark Condition as language that was “specifically negotiated.”⁵⁹ First, there is no record

⁵⁵ NBCU Petition at 16.

⁵⁶ See April 20, 2012 Expert Report of Gary Marenzi, ¶¶ 4-5.

⁵⁷ See *id.*, ¶ 9.

⁵⁸ See *id.*, ¶ 4.

⁵⁹ See NBCU Petition at 2.

support for this contention. NBCU has pointed to nothing – not one sentence – either in the Commission’s 117 pages of findings in support of promulgation of the Conditions, nor in any of the hundreds of notices of ex parte communications, that suggests that the Commission focused on this question.⁶⁰ As a result, there was nothing for the Arbitrator to “second-guess.” He properly read the plain language of the *CNBCU Order* – which nowhere excludes first-year films from “Video Programming” – and decided that the expressly expansive nature of the list of Video Programming, coupled with the objectives of the Conditions, make clear that the valuable first-year films must be included.⁶¹

The FCC wanted to ensure that Comcast could not, post transaction, block the evolution of OVDs by denying it NBCU programming. Accordingly, the expansive definition of Video Programming set forth within the Conditions is entirely consistent with the concerns that gave rise to the Conditions and with the competitive objectives that the Conditions are intended to protect and promote. In essence, it is difficult to understand why the FCC would have exempted the most important and valuable programming – programming that is critical to the ability of OVDs to compete with Comcast’s traditional PPV and VOD services and programming widely available on other OVDs, *without any explanation*. NBCU’s argument runs counter to the entire text of the *CNBCU Order* and the stated intent of that order to promote competition with Comcast’s VOD and PPV service – which relies on Films less than one year from theatrical release. It defies any logic to imagine that the FCC, after explicitly identifying PPV and VOD as Comcast services with which OVDs would most likely compete, would, *without explanation*, decide to exempt from the general rule that programming provided by a peer must also be provided by Comcast/NBCU – the very programming that is most necessary for the competition the Benchmark Condition is designed to

⁶⁰ See PCI Phase 1 Post-Hearing Brief, at 22.

⁶¹ See Arbitration Award at 5-6.

protect. To argue that the FCC not only chose to undercut the entire purpose of the Benchmark Condition without explanation, but by negative implication, simply cannot be credited.

B. The Plain Language Of The Conditions Demonstrates That First-Year Films Are Not Excluded From “Video Programming.”

Moreover, the Commission expressly stated that the definition of Video Programming in the Conditions “includes, but is not limited to” a list of various types of programming.⁶² Obviously, “includes, but is not limited to” means the opposite of “only includes,” and also certainly does not mean “clearly excludes.” Yet in another attempt to persuade the Commission that specific language in the Conditions means the opposite of what the words actually say,⁶³ NBCUniversal provides a severely truncated definition of “Video Programming” in the Petition, leaving out the most crucial elements which demonstrate that first-year films are not “clearly exclude[d].”⁶⁴ NBCU tells the Commission that:

“Video Programming,” in turn, only includes (in relevant part) “Films for which a year or more has elapsed since their theatrical release.”⁶⁵

Yet a simple review of the full definition of Video Programming demonstrates that in fact, the Commission did not say the definition “only includes” such films. The Commission said the exact opposite – the definition of Video Programming “includes but is not limited to” various listed categories of programming:

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**

⁶² See *CNBCU Order* at 4358 (App. A .§I).

⁶³ See *supra* at 2; Section V, *infra*.

⁶⁴ NBCU Petition at 11.

⁶⁵ NBCU Petition at 11 (citing *CNBCU Order* at 4358 (App. A. §I)).

(“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.⁶⁶

Thus, the plain language of the full definition of Video Programming expressly includes, without limitation and regardless of the medium or method used for distribution, all content offered on a TVOD basis, which is precisely the basis upon which first-run theatrical and non-theatrical releases and entire current season television episodes are offered.⁶⁷ Furthermore, the only reason to include the phrase “includes but is not limited to” is specifically to avoid any negative implication by including one category of programming but not another.

Despite this plain language, NBCU ironically accuses the Arbitrator of “failing to give proper effect to the plain language of the *Order*,” and interpreting the *CNBCU Order* in a way that renders its imagined “express exclusion of first-year films” a “mere surplusage.”⁶⁸ Although NBCUniversal admonishes that language should “be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,” it ignores this principle by refusing to give any weight at all to the expansive “includes but is not limited to” language that describes the kinds of Video Programming to be included in the Conditions. Instead, NBCUniversal dismisses such language as unintentional “boilerplate,”⁶⁹ rendering it not merely superfluous, but a nullity. Apparently, NBCUniversal’s statutory construction principles only apply when they produce a result that it likes.

⁶⁶ *CNBCU Order* at 4358 (App. A §I).

⁶⁷ PCI Phase 1 Opening Brief, at 8 (emphasis added).

⁶⁸ NBCU Petition at 11.

⁶⁹ NBCU Petition at 14.