Project Concord meets that requirement:

NBCU's own Final Offer

NBCU nevertheless protests that PCI's does not satisfy requirement because, it asserts,

This argument is unavailing for several reasons. First, NBCU itself concedes that

And critically, the studio receives the exact same amount of money from

Those forms of payment do not constitute “legal tender.” Consumers can’t use their PayPal accounts to buy a cup of coffee at Starbucks, and

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168 HT 333:19-336:11 (Smith); 396:19-397:2 (Peyer).
169 NBCU Final Offer § 4(z).
170 NBCU Petition at 31 and at note 92.
many retailers do not accept certain credit cards.

b. Prohibition Against Exhibition.

PCI's falls squarely outside of which provides:

The definition of is a standard one:

The (emphasis supplied). See also PCI Phase 2 Closing Brief at 14-15 (June 7, 2012).

This exception is consistent with the common industry view that

The fact that [REDACTED] and NBCU have been able to come to agreement on an ever-increasing number of exceptions to the decade old definition of "[REDACTED]" but also by the fact that [REDACTED] and NBCUniversal reached agreement on nearly identical exceptions to the [REDACTED].

DeVitre Report ¶ 32.

Wunderlich Report ¶ 8.c.i.; PCI Phase 1 Post-Hearing Brief at 17 (May 4, 2012).

PCI Phase 1 Post-Hearing Brief at 17.
NBCU’s assertion that [redacted] and other licensees will view PCI’s service as violating their contracts is highly implausible. As Project Concord’s expert witness Mr. Marenzi testified, the industry views [redacted] as the gold standard—if [redacted] does a deal, then the other studios can be confident in following suit.181 Indeed, [redacted] also has an agreement with [redacted] that is substantially similar to NBCU’s agreement with [redacted].182 NBCU’s agreement with [redacted] contains [redacted].183 It is therefore even more unlikely that [redacted] would pursue any action against NBCU based on providing licensing rights to Project Concord that [redacted], has already agreed to provide to Project Concord.184

4. PCI’s [redacted] Does Not Violate Restrictions Set Forth in NBCU’s Contracts with [redacted].

NBCU’s arguments regarding its contract with [redacted] fare no better. The [redacted]’s agreement simply defines [redacted].189 The agreement simply defines [redacted].189 PCI’s [redacted] clearly complies with that requirement: it imposes a [redacted] on every viewer for the privilege of viewing any particular content on a pre-exhibition basis.186

185 Mad. Sec. Decl. ¶ 14, quoting [redacted].
186 [redacted]; PCI Phase 2 Closing Brief at 16 (June 7, 2012).
5. PCI’s [REDACTED] Does Not Violate Restrictions Set Forth in NBCU’s Other Contracts.

With respect to TV shows, NBCU similarly contends that [REDACTED]. With respect to its [REDACTED], NBCU stated on the record that Internet distribution is restricted to those services that [REDACTED]. With respect to its non-exclusive TVOD/EST agreements with other OVDs, NBCU stated that they typically require that [REDACTED].

Again, the Project Concord [REDACTED] falls squarely within all of these contract restrictions. Those contracts require [REDACTED]—as also required by Project Concord. None of these agreements look to the [REDACTED] to satisfy all of these requirements. Nor is there any evidence that [REDACTED].

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187 See NBCU Petition at 37.
189 NBCUniversal Phase 1 Post-Hearing Brief at 27; PCI Phase 2 Closing Brief at 17 (June 7, 2012).
190 PCI Phase 2 Closing Brief at 17 (June 7, 2012).
Finally, there is no evidence that the practices of the licensees that were the subject of NBCU's letters led to any allegations of breach or lawsuits. Moreover, as already explained, the relevant contracts do not make any distinction between

all content in PCI's - has a set price that never varies based on payment method and must be paid in full and in advance of any viewing;

Indeed, the IRS has confirmed that digital currency and electronic funds transfers are “just like real cash,” although “not tangible” they are “money or a money substitute, such as script, that is exchanged only electronically.”

Furthermore, as confirmed by a review of the specific language used in the contract provisions upon which NBCU relies in support of its Contractual Impediment Defense and the

191 Wunderlich Second Decl. at ¶ 56, Ex. 5; HT: 704:1-705:1; 705:15-706:19 (describing ).
193 DeVitre 3 ¶¶ 11-17; PCI Phase 2 Rebuttal Brief at 27 (discussing Ex. 5 to Wunderlich Sec. Decl.).
does not differ in any material respect from them. 195

In summary, as demonstrated by the evidence, including a review of NBCU’s contracts with its licensees, review of the testimony presented by fact witnesses and experts, and a review of Project Concord’s service, it is clear that - and a transfer from a PayPal digital account suffices, an electronic debit from a credit card suffices and an electronic transfer of money from a customer’s Project Concord account suffices. Accordingly, the Arbitrator properly concluded that NBCU failed to carry its burden of proving its Contractual Impediment Defense. 196

6. **Risk of Breach is Further Mitigated by Actual Industry Practice.**

It is important to emphasize that it is NBCU that has preferred, throughout the course of the Arbitration, to argue that it simply does not matter what its contracts with others actually say -- all that really matters is what NBCU thinks its licensees might think about PCI’s service when it from now. 197 As Project Concord has consistently underscored, such premature speculation does not (and cannot) satisfy NBCU’s burden of showing by a preponderance of evidence that providing Comparable Programming to PCI’s service would violate any contract that it actually has with a third party.

Project Concord pointed to the testimony of NBCU’s own expert witness in countering NBCU’s speculative claims regarding how its licensees might react to NBCU’s provisioning of

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195 DeVitre 3 ¶ 19; HT 913:12-915:14 (DeVitre) (May 31, 2012); see also PCI Phase 2 Closing Brief at 14-17.
196 Arbitration Award at 3, 10.
197 See, e.g., NBCU Phase 2 Opening Statement at 11, 21-22.
current programming to Project Concord, who opined that if a question did arise from a licensee, the more likely scenario is the following:

... I was thinking about how all of this plays out and assuming there is a press release 30 or 60 or 90 days before the launch [of PCI’s service], people start becoming aware of the presence of PCI. For all I know, they may say, you know what? We really don’t have a problem with it. Or they may say, we’ve got a real problem with it. They’ll probably communicate with


The Arbitrator stated that this testimony was emblematic of “the degree of speculation involved in NBCU’s defense,” and that such “speculative opinion testimony is glaringly inconsistent with the preponderance of the evidence burden which NBCU must carry.”

What Mr. Madoff’s testimony is consistent with is what the evidence reflects regarding industry practice - when studios find or develop a distribution model that enhances their ability to make money on their content, they work with their licensing partners to make room for that distribution. Consistent with common sense, this works to everyone’s advantage: studios that are

199 Arbitration Award at 9 (emphasis supplied).
200 HT 960:4-961:15 (DeVitre) (“They work out their differences. And that, by the way, is evident by the [with NBCU], where, especially in the advent of digital rights and the proliferation of online video distribution, there have been quid pro quos between and the studio to allow the studio to further exploit its product in new ways as older ways are beginning to wane.”).
making money generate more content for distribution, and distributors make more money for
studios because they have more product to sell.\textsuperscript{201}

There is no evidence in this record that any licensee has ever \redacted from
\textsuperscript{202} NBCU as the result of a perceived rights conflict. Instead, it appears that, to the extent that there is
any claimed conflict between licensees' rights or inconsistencies between what a licensee is doing
and what NBCU believes it should or should not be doing, the common (and not infrequent)
practice of NBCU is \redacted
For example, the evidence of potential breaches demonstrated that (1)
\redacted. Indeed, in Phase 2, NBCU's
expert Wunderlich could not and would not quantify the risk of NBCU being sued for breach.\textsuperscript{203}
Of course, NBCU keeps leaving out all of the evidence about what actually happens in the industry
when a question arises, because when taking this into account, as the Arbitrator did, the risk of
breach becomes even lower.

\textbf{V. IT IS INAPPROPRIATE TO USE THE APPEAL PROCESS TO REQUEST RECONSIDERATION OF THE CNBCU ORDER.}

NBCU raises a third issue, which it couches as a "procedural ambiguity" that requires
"clarification" -- whether contract defenses should be considered in phase 1 or phase 2 of the
arbitration proceedings.\textsuperscript{204} Actually, the Conditions are unambiguous on this point: "the first phase

\textsuperscript{201} HT 960:4-961:15 (DeVitre).

\textsuperscript{202} See, e.g., Wunderlich Second. Decl.; DeVitre 2 at ¶ 29; DeVitre 3 ¶ 16. See also HT 911:11-912:5
(DeVitre) (describing typical process at \redacted for resolving conflicts); 980:3-21 (describing
\redacted) (DeVitre) (May 31, 2012).

\textsuperscript{203} HT 735:13-739:3 (Wunderlich ultimately answers that he is not aware of allegation of breach of
any of the agreements he analyzed that ultimately made it a lawsuit stage).

\textsuperscript{204} NBCU Petition at 42.
shall concern defenses based on 47 C.F.R. sec. 76.1002 (b)(1) only.\footnote{205} 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 “and” – or in other words, “not only.”\footnote{206}

In order to reach the point of contract formation as quickly and cost-effectively as possible, PCI agreed to allow Respondent’s defense under sec. VII.C.3(ii) to be considered and determined in the Phase 1 proceedings.\footnote{207} As a result, NBCU had two opportunities (in both phase one and phase two) to attempt to prove, by a preponderance of the evidence, its contractual defenses. Despite two bites at the apple, the arbitrator ultimately concluded that NBCU did not meet its burden.

A “clarification” regarding the unambiguous meaning of the word “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. If the Commission chooses to reopen this narrow issue, it is more appropriate to do so in the context of an open proceeding with full opportunity by all interested parties to participate, particularly because the outcome has no bearing on this proceeding.

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VI. CONCLUSION.

The Commission, in permitting Comcast to acquire NBCUniversal Media, found that without Conditions the combined Comcast-NBCU would have the “incentive and ability” to behave

\footnotetext{205}{Section VII.C.1 of the Conditions provides that this “arbitration shall take place in two 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).” Section VII.C.1 goes on to provide that, “[i]n phase 1, the arbitrator shall determine, as applicable, the disputes raised in sub-paragraphs (i) through (iii).” (emphasis supplied).}

\footnotetext{206}{NBCU Petition at 43.}

\footnotetext{207}{See PCI Opening Brief (April 17, 2012) at 2-3, n.4.}
anti-competitively by withholding NBCU content from emerging online competitors such as Project Concord. It turns out that the Commission’s predictions were exactly right.

The Conditions require that if a qualified OVD has an agreement with a Film Studio for Video Programming, "C-NBCU shall provide online video programming sought by the OVD that constitutes Comparable Programming." Project Concord has entered into an agreement with a peer Film Studio to distribute a broad array of Video Programming, including films within a year of theatrical release. NBCU must accordingly provide “Comparable Programming” to Project Concord, including films within a year of theatrical release.

Despite these straightforward obligations, NBCU refused to comply. The Arbitrator, after reviewing an extensive record, concluded that Comcast was wrong on every substantive issue. No, the Conditions do not exclude films within a year of theatrical release, the very content necessary to make an OVD competitive. And no, NBCU did not show (much less by a preponderance of the evidence) that there was any contractual impediment to providing such programming to Project Concord.

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208 Sec. IV.A.2.B.
NBCU continues to resist providing content to Project Concord, despite its straightforward obligations under the Conditions, and despite an Arbitration Award finding that NBCU was wrong on every issue it raised. Enough is enough. For all the foregoing reasons, the Commission must deny NBCUniversal's Petition in total and affirm the reasoned and well-supported Arbitration Award.

Respectfully submitted,

Project Concord, Inc.

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Dated: July 31, 2012
Declaration of Lawrence Smith
Exhibit 1
Entire Exhibit Redacted - For Public Inspection
Claimant’s Phase 1 Proposed Findings and Conclusions

Exhibit 2
Entire Exhibit Redacted - For Public Inspection
Claimant’s Phase 2 Proposed Findings

Exhibit 3
Entire Exhibit Redacted - For Public Inspection
CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 31st of July, 2012, a copy of the foregoing “Project Concord, Inc. Opposition To NBCU “ has been served by hand delivery or electronically and first-class mail, postage pre-paid, on the following:

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