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REDACTED - FOR PUBLIC INSPECTION

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August 30, 2012

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Federal Communications Commission
Office of the Secretary

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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 -R Project Concord, Inc. Reply (“PCI Reply”) To NBCUniversal Media’s Opposition To PCI Partial Appeal – Redacted – For Public Inspection

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the Project Concord, Inc.’s Reply to NBCUniversal Media’s Opposition To PCI Partial Appeal, previously filed on August 10, 2012 subject to a Request For Confidential Treatment, now redacted for public inspection. The PCI Reply 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 Reply 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.

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REDACTED - FOR PUBLIC INSPECTION

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

Respectfully submitted,



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David Murray

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.)	
)	ARBITRATION AWARD
For Consent to Assign Licenses and)	Ref: Case No. 72 472 E 01147 11
Transfer Control of Licenses)	

PROJECT CONCORD, INC. PARTIAL APPEAL – COST SHIFTING
REPLY TO NBCUNIVERSAL MEDIA, LLC OPPOSITION

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Dated: August 10, 2012

EXECUTIVE SUMMARY

Project Concord's costs and fees should be reimbursed because NBCU took myriad unreasonable positions throughout the proceedings, causing Project Concord to divert significant resources to fight NBCU's various attempts to avoid the merged entities' straightforward obligations under, and compliance with, the Conditions.

Project Concord's views were vindicated on every substantive issue raised pursuant to the protective online video Conditions established by the Federal Communications Commission when it allowed the unprecedented merger of Comcast Corporation with NBCUniversal. NBCU's obligations under the Conditions are straightforward; the ultimate contract with Project Concord should have been as well. Yet NBCU fought its obligations at every possible turn. While Project Concord is pleased with the arbitration outcome, this victory came at a significant cost that would be unbearable for most emerging companies.

The Arbitrator erroneously concluded that simply because a "theory of defense" is available, NBCU may assert it – and cause Project Concord to expend resources to prove NBCU wrong – whether or not the actual facts bear any relationship to the theory raised. As Project Concord proved over the course of 90 days, 11,000 pages, 9 witnesses, multiple days of hearings and testimony, and multiple declarations and expert reports – none of the theories that NBCU attempted to raise as roadblocks were supported by the actual evidence. It is decidedly not reasonable for NBCU to defy the Conditions by asserting unsupportable defenses in the hopes that either the Arbitrator would not actually examine the facts, or that an emerging competitor would just run out of resources to keep fighting.

The positions that NBCU has taken to avoid doing what the Conditions require it to do – follow its non-vertically integrated Peer Studio in providing comparable programming to an OVD – are not only unreasonable but also violate the Commission's directive that neither Comcast nor NBCU engage in unfair acts or practices designed to prevent any OVD from providing NBCU programming online to consumers.

REDACTED - FOR PUBLIC INSPECTION

For the reasons set forth in Project Concord's Petition for Partial Appeal, the FCC should award Project Concord the attorneys' fees and costs that it incurred in connection with responding to the factually and legally unsupported positions taken by NBCU.

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

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 – COST SHIFTING
REPLY TO NBCUNIVERSAL MEDIA, LLC OPPOSITION

In connection with its approval of the unprecedented merger of Comcast Corporation (“Comcast”) with NBCUniversal Media, LLC (“NBCU”), the Federal Communications Commission (“FCC” or the “Commission”) crafted Conditions to protect the development of emerging and innovative Online Video Distributors (“OVDs”), in order to ensure that consumers would continue to have competitive online choices for accessing video content.¹ NBCU used the very first test of the online video Conditions to send a chilling message to the marketplace – any attempt to enforce the Conditions would be met with a scorched earth resistance strategy that only a multi-billion dollar conglomerate can mount.

Through the Conditions, the FCC provided that if one party’s conduct has been “unreasonable,” the arbitrator could assess “all or a portion of the other party’s costs and expenses (including reasonable attorney fees) against the offending party.”² Project Concord seeks to have

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*”); see also *Merger Order* at 4355-4381 (App. A) (“Conditions”). For definition of OVD see *Merger Order* at 4357 (App. A, Sec. I).

² *Merger Order* at 4367, 4370 (App. A, Sec. VII.B.10, VIII.5).

that standard – which is one of “reasonableness” – squarely applied here, and to have its costs reimbursed.

The Arbitrator erroneously concluded that simply because a “theory of defense” is available, NBCU may assert it – and cause Project Concord to expend resources to prove NBCU wrong - whether or not the actual facts bear any relationship to the theory raised. As Project Concord proved over the course of 90 days, 11,000 pages, 9 witnesses, multiple days of hearings and testimony, and multiple declarations and expert reports – none of the myriad defense theories that NBCU tried to raise as roadblocks were supported by the actual evidence.

NBCU’s unreasonable tactics and positions caused Project Concord to divert resources on what unnecessarily became a “hard fought” victory.³ The costs associated with the fight would be unbearable for most emerging companies. As detailed below and in Project Concord’s related submissions on this issue, NBCU should pay for its unreasonable and unrepentant resistance to compliance with its straightforward obligations under the Conditions.

I. NBCU ENGAGED IN UNREASONABLE AND VEXATIOUS CONDUCT, MULTIPLYING THE PROCEEDINGS

As a result of unreasonable positions taken by NBCU throughout the proceedings, Project Concord was forced to divert 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. NBCU argues that “having chosen to use the Benchmark Condition in an improper attempt to [REDACTED], [Project Concord] is in no

³ See *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent* (Case No. 72412 E 0114711), Arbitration Award (As Amended), at 11 (filed July 11, 2012) (“Arbitration Award”).

position to complain about its resulting litigation costs.”⁴ What the arbitration record and the record of this appeal and NBCU’s separate appeal demonstrates, however, is that Project Concord has always sought **exactly** the same programming rights from NBCU as those that have been licensed to it by NBCU’s peer. And at **exactly** the same price. Time and time again, NBCU made similar bald assertions simply unsupported by the facts.

In its Opposition, NBCU raises various such claims contradicted by the record, including that:

1. NBCU acted reasonably in arguing that that *Order’s* definition of “Video Programming” “expressly” excludes films less than one year from theatrical release based on “the plain language of the *Order*” (even though the Conditions state that the definition “includes but is not limited to” the programming expressly listed).⁵
2. NBCU acted reasonably in insisting on bifurcated arbitration proceedings and that PCI “willingly accepted” this (despite PCI’s strong protests against doing so).⁶
3. NBCU could not file “a final offer in the form of a license agreement” because “PCI refused to disclose its peer deal with █████ prior to the arbitration” (despite the fact that Project Concord was prohibited from providing the peer deal without the Model Protective Order in place).⁷

⁴ See *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, MB Docket No. 10-56, Opposition to Project Concord, Inc.’s Partial Appeal, at 1-2 (filed July 31, 2012) (“NBCU Opposition”).

⁵ NBCU Opposition at 2-3.

⁶ *Id.* at 4.

⁷ *Id.*

4. NBCU violated its NDA with PCI by disclosing details of its Project Concord discussions to [REDACTED] because it was [REDACTED] (although NBCU cannot cite to any specific contractual provision to support its assertion).⁸

5. NBCU had “good faith” grounds to question whether PCI was a Qualified OVD (despite incontrovertible and overwhelming evidence to the contrary).⁹

6. NBCU spent “no time” during Phase 1 of the arbitration challenging whether PCI was a Qualified OVD (despite NBCU’s persistence in asserting this defense throughout Phase 1).¹⁰

7. NBCU’s Phase 2 Final Offer was [REDACTED] the Benchmark Agreement (even though it failed to provide current film and television programming as provided in the Benchmark Agreement).¹¹

8. NBCU was reasonable in claiming a “contractual impediment” defense by asserting that distribution of current film and television programming to Project Concord is restricted under NBCU’s other license agreements (even though it could not prove so under a single contract).¹²

9. NBCU did not force PCI to “retry” its contract defenses during Phase 2 and instead “simply followed the direction of the Arbitrator” (even though the record shows that NBCU contradicted the Arbitrator’s directions by presenting additional evidence on this issue).¹³

⁸ *Id.* at 6.

⁹ *Id.* at 7.

¹⁰ *Id.* at 7, n.28.

¹¹ *Id.* at 8-9.

¹² *Id.* at 9.

¹³ *Id.*

10. The proceedings “could have been avoided (or substantially narrowed) if PCI had originally offered NBCU the [REDACTED] that Project Concord ultimately offered in its Phase 2 Final Offer” (even though it is now appealing a contract that forces Comcast to provide Project Concord with the [REDACTED]).¹⁴

As explained in detail below, the record easily refutes NBCU’s claims.

A. NBCU was Unreasonable in its Pre-Arbitration Tactics

1. 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.¹⁵ 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.¹⁶

2. The executive with nominal responsibility for Internet TVOD/EST licensing at NBCU, Ronald Lamprecht, never met with anyone from Project Concord.¹⁷

¹⁴ *Id.* at 1.

¹⁵ See *Project Concord, Inc. Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Exhibit 2, Claimant’s Declaration in Support of Request for Cost-Shifting at 4, ¶ 17 (dated May 24, 2012) (“First MacHarg Declaration”). 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 to Project Concord, Inc.’s Partial Appeal filed on July 16, 2012.

¹⁶ See First MacHarg Declaration at 5, ¶ 18.

¹⁷ See Arbitration Hearing Transcript (“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?

A: With me personally?

Q: Yes.

A: That’s correct.”).

3. NBCU blatantly violated the non-disclosure obligation governing their discussions even before arbitration was triggered, by attempting to interfere with the Benchmark Agreement through a third party partner [REDACTED].¹⁸ NBCU asserts, without a shred of support, that it was [REDACTED] of its confidential discussions with Project Concord.¹⁹ This is categorically false. Absolutely nothing in NBCU's highly confidential contract with [REDACTED] NBCU to breach its obligations to Project Concord under the non-disclosure agreement between Project Concord and NBCU – and, tellingly, NBCU does not (because it cannot) cite to any specific contractual provision to suggest otherwise. NBCU plainly was acting in bad faith when it did so.

4. Moreover, NBCU argues that any of its unreasonable conduct occurring prior to the arbitration is “moot,” suggesting that consideration of that issue should be ignored. To be clear, Project Concord has only requested cost-shifting beginning in October 2011, when Project Concord served on Comcast its Notice of Intent to Arbitrate. We raise these points to demonstrate Comcast-NBCU’s pattern of unreasonable behavior.

B. NBCU Made Unreasonable and Speculative Assertions Regarding Its Contracts, Unsupported by Actual Contract Language.

It was unreasonable for NBCU to assert that providing the Comparable Programming to Project Concord would breach numerous license agreements with [REDACTED] [REDACTED]. NBCU claimed in the arbitration and now claims in its appeal to the FCC that distribution of current NBCU content to Project Concord would violate contractual provisions prohibiting it from licensing [REDACTED] exhibition of current films and television shows and [REDACTED] to such content during certain windows.²⁰ At the end

¹⁸ See First MacHarg Declaration at ¶ 9, and at ¶ 22 (“When PCI confronted NBCU with this obvious breach of their non-disclosure agreement, the response was silence.”).

¹⁹ See NBCU Opposition at 6.

²⁰ See *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, MB Docket No. 10-56, Petition for *De Novo* Review, at 17 (filed July 16, 2012) (“NBCU Petition”).

of the day, NBCU failed to demonstrate its “Contractual Impediment” defense under even one single contract. A review of the contractual provisions that NBCU contended would be breached demonstrates why, as the Arbitrator recognized, these assertions were unsupported and speculative.²¹

1. It was unreasonable for NBCU to gloss over or (mis)characterize the determinative language in its contracts, and 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 say about Project Concord’s [REDACTED] when [REDACTED] several months from now.²² For example, it was unreasonable for NBCU to claim that its licensees might possibly object to [REDACTED]
[REDACTED]
[REDACTED]. Time and time again, the Arbitrator requested that NBCU specifically show him the exact language that it claims would cause a breach.²³

²¹ See Arbitration Award at 10-11 (examining specific provisions); *Project Concord, Inc., Claimant, vs. NBCUniversal Media, LLC, Respondent*, Case no. 72 472 E 01147 11, Phase 1 Decision at 10 (dated May 10, 2012) (setting forth standard) (“Arbitration Award, Phase 1 Decision”); *Project Concord, Inc., Claimant, vs. NBCUniversal Media, LLC, Respondent*, Case no. 72 472 E 01147 11, Phase 2 Post-Hearing Brief of NBCUniversal Media, LLC, at Exhibit A (dated June 7, 2012) (identifying the specific contract language NBCUniversal asserted would be breached) (“NBCU Phase 2 Closing Brief”). A detailed response to NBCU’s assertions regarding “contractual impediment” is set forth in Project Concord’s Opposition to NBCU’s Petition for *De Novo* Review. See *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Project Concord, Inc. Opposition to NBCUniversal Media Petition for *De Novo* Review, Sec. IV (filed July 31, 2012) (“PCI Opposition”).

²² See e.g., *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, Phase 2 Opening Statement of NBCUniversal Media, LLC, at 11, 21-22 (dated May 24, 2012) (“NBCUniversal Phase 2 Opening Statement”).

²³ See, e.g., HT 796:22-801:3 (May 30, 2012) (Arbitrator discussing his need for “cogent, easy to understand list of the particular agreements that NBCUniversal is contending would be in breach of in the event they did the kind of deal PCI wants it to do, a highlighting or excerpting of the key contractual language for each of those agreements. So that without too much effort, I could focus on the contractual language of each particular agreement that you are contending would be in breach or that you’re in risk of breaching” so that the arbitrator could at least “zero in on” the language in question and not “spend an hour looking for the documents” to “see what the language is that you’re so concerned about and determine, gee, it’s a valid concern, it’s a conclusive concern or

As it turned out, none of the contracts that NBCU tried to use to avoid providing programming to Project Concord supported NBCU's claims. None look to the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In sum, none of NBCU's claims were actually supported by any of their contracts.

2. NBCU stretched, significantly, in its attempts to claim a "contractual impediment" by proffering testimony involving a high "degree of speculation"²⁴ and by "substantially overstat[ing] its risk of damages for breach of contracts with third parties and injury to its business relationships."²⁵

3. After failing to establish its Contractual Impediment Defense in Phase 1, NBCU attempted to retry the same defense during Phase 2 despite the Arbitrator's prior instructions that he did not expect or invite any additional evidence on this issue.²⁶ Because NBCU presented additional evidence and opposed Project Concord's motion to exclude it, the Arbitrator allowed it,

whatever other alternatives there are" to "decide the defense" and "take into account what all the experts say the industry practices are, and how they read everything and all this other stuff, on both sides.").

²⁴ Arbitration Award at 9.

²⁵ Arbitration Award at 10.

²⁶ See HT 1047:19 – 1048:3 ("Arbitrator Silberberg: In my tentative ruling, I said I had no expectancy that there would be presentation of additional new evidence on that subject [of NBCU's Contractual Impediment Defense]. I did anticipate that there would be discussion or argument on the subject. Ms. MacHarg [PCI's counsel]: That's what I understood, that there could be briefing, but not evidence.").

finding that NBCU had largely failed to add any substance to what was already on the record.²⁷

Even though NBCU's arguments regarding its Contractual Impediment Defense proved just as meritless in Phase 2 as they did in Phase 1, Project Concord nevertheless was forced to spend more time and resources needlessly retrying the issue.²⁸ While the Arbitrator ultimately understood NBCU's Contractual Impediment Defense better at the end of Phase 2, this was only because he and Project Concord's counsel were finally able to force NBCU to focus on the actual provisions of the third party contracts at issue. In contrast, during Phase 1, the sweeping statements made by NBCU regarding the contracts only served to confuse and mislead the Arbitrator, just as NBCU is attempting to confuse and mislead the Commission now. When the true nature of NBCU's arguments was exposed, the Arbitrator made clear that he had not correctly appreciated the real issue and that his guidance to the parties in the Phase 1 decision had been off the mark.²⁹

Specifically, the Arbitrator found that NBCU's contract defenses were "premature" and purely speculative, that NBCU had not met its burden of proof, and that there was not even an appreciable

²⁷ See HT 1048:2 – 1048:11 (“Ms. MacHarg [PCI’s counsel]: That’s what I understood, that there could be briefing, but not evidence [on NBCU’s Contractual Impediment Defense]. Arbitrator Silberberg: And so the other side, NBCUniversal, came up with a couple of pieces of paper that they wanted to throw into the pot for whatever it’s worth, and it’s been thrown into the pot for whatever it’s worth. I said on whatever it was, May 18th or thereabouts, that I didn’t consider any of that to be turning point evidence and I still don’t consider it to be turning point evidence.”).

²⁸ See HT 1046:2 – 1046:20 (“Ms. MacHarg [PCI’s counsel]: . . . The contractual impediment defense which Mr. Murray [NBCU’s counsel] insists we shouldn’t be retrying, although he put in all this evidence, two expert witnesses whose combined expert testimony was half devoted to that issue, expert witnesses who, not until Your Honor asked this morning, never referred or were able to identify a single provision in any contract that they were actually talking about . . . And yet we were forced to retry that.”); HT 1048:12 – 1048:21 (“Ms. MacHarg [PCI’s counsel]: And I can tell you that when you [the Arbitrator] made that ruling after Mr. Murray [NBCU’s counsel] said he wouldn’t withdraw the evidence [regarding NBCU’s Contractual Impediment Defense], what I spent the weekend doing, and how much of the weekend I spent dealing with that testimony and that evidence because I had to. There is no choice. I can’t just not address it, I can’t not read it, I can’t not cross-examine them. So that’s where we were and that’s what I spent the weekend doing. And many others . . .”).

²⁹ See HT 1032:5 – 1036:6.

risk of breach.³⁰ Furthermore, the Arbitrator expressed his irritation with NBCU hiding Mr. Gartner, the NBCU employee responsible for writing and enforcing many of the documents at issue, behind “experts” rather than allowing him to testify based on his first-hand knowledge of the documents.³¹

C. NBCU Took Numerous Unreasonable Positions Throughout the Arbitration

1. Even after Project Concord produced the Benchmark Agreement to NBCU, NBCU still continued to pursue a defense on the theory that the Benchmark Agreement was not sufficient to satisfy the Benchmark Condition. This was plainly unreasonable. As defined in the *Order*, the Benchmark Condition is met when “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.”³² Project Concord’s agreement with [REDACTED] undoubtedly satisfied this condition. As NBCU’s own expert, Mr. Madoff, acknowledged during his Phase 2 testimony, the Benchmark Agreement, on its face, is clearly a contract, reflecting offer,

³⁰ See HT 1035:15 – 1036:6 (“Arbitrator Silberberg: Well, I suppose I rule in the contract defenses that they’re premature, that you haven’t met your burden of proof and there is just too much speculation in determining today that any breach will be asserted, and you don’t really get to decide whether there has been a breach until it’s been asserted. The whole defense is not a defense that you plucked out of the air. It’s a defense that the conditions said that you might have. But I’m not sure the conditions really contemplated that defense being asserted in a startup situation [REDACTED]”); see also Arbitration Award at 10 (finding that “NBCU has substantially overstated its risk of damages for breach of contracts with third parties” and that NBCU has failed to satisfy its burden of proof on its Contractual Impediment Defense.”).

³¹ See HT 772:9 – 773:5 (“Arbitrator Silberberg: The guy who will really be able to answer all these questions I think would be Scott Gartner . . . Mr. Murray (NBCU’s counsel): Yes. He’s also an attorney which creates issues about privilege and everything else. Arbitrator Silberberg: I’m sensitive to that, but that’s the guy who has been writing these documents, enforcing the documents, not enforcing the documents, if there has been any nonenforcement. He knows this stuff backwards and forwards and what you’ve done here is you’ve hired a couple of experts who are very expert at what they do, but they start from scratch and reading all these documents all over again and in many ways, Dr. Wunderlich is reading the same piece of paper that I’m reading and he’s telling me how I should read it, you know, sometimes with some help and sometimes, you know, just telling me.”).

³² *Merger Order*, App. A, § I.

acceptance, and consideration for the right to distribute [REDACTED] content.³³ Nevertheless, NBCU still continued to assert that Project Concord was not a qualified OVD meeting the Benchmark Condition despite: (a) knowing that Project Concord had an [REDACTED] agreement with [REDACTED] before the arbitration was even triggered; (b) the disclosure of Project Concord's Highly Confidential Benchmark Agreement under the Model Protective Order; (c) the production of nearly 900 pages of programming titles being made available to Project Concord by [REDACTED]; (d) evidence of Project Concord's advanced payment for content under the Benchmark Agreement; and (e) a [REDACTED], letter from [REDACTED] confirming its agreement with Project Concord.³⁴ This was unreasonable. NBCU refused to offer a contract for carriage of any programming at all until Phase 2.

2. NBCU similarly distorts and misrepresents the arbitration record when it contends that it had a good faith basis for challenging Project Concord's status as a Qualified OVD and that it was caught by surprise on this issue "only *three* days before the Phase 1 hearing" by declarations filed by Project Concord's principals.³⁵ First, it is completely without merit for NBCU to attempt to justify its intransigence on this issue by asserting that Project Concord's status as a Qualified OVD was "another question of first impression under the Order."³⁶ Project Concord clearly fell squarely within the Commission's definition of a Qualified OVD. Pursuant to the *Order*, a Qualified OVD is defined as "any OVD that meets either or both of (i) the MVPD Price

³³ See HT 819:18 – 820:12 (Madoff) (In response to questioning by Claimant's counsel, Madoff testified as follows: "A: I don't think I ever said that the [REDACTED] agreement was not a real agreement. If you can read back testimony where I said that, I would like to hear it because on its face, it is an agreement . . . Q: So to you, on its face, when you look at [the Benchmark Agreement], that's a real agreement? A: That is a real agreement . . . It has an offer and acceptance and consideration. And when I went to law school, that's what an agreement was.").

³⁴ First MacHarg Declaration, at ¶¶ 17-42.

³⁵ See NBCU Opposition at 7.

³⁶ NBCU Opposition at 6.

Condition and (ii) the Benchmark Condition.³⁷ As already discussed, the Benchmark Agreement, on its face, clearly met the Benchmark Condition, thus making Project Concord a Qualified OVD.

Moreover, NBCU's assertion that Project Concord [REDACTED] regarding its status as a commercial OVD only three days before the Phase I hearing is flatly contradicted by the record.³⁸ As early as July 15, 2011, Project Concord notified NBCU that it had signed the Benchmark Agreement and wished to enter a license agreement with NBCU.³⁹ After spending nearly three months trying to secure a contract for video programming rights from NBCU, Project Concord delivered to NBCU its October 7, 2011 Notice of Intent to Request Arbitration, which expressly represented that Project Concord was a Qualified OVD.⁴⁰ Project Concord's October 10, 2011 Confidential Summary to the Commission, a copy of which was delivered to NBCU, also expressly represented that Project Concord had entered the Benchmark Agreement and was therefore a Qualified OVD.⁴¹ On March 26, 2012, after necessarily waiting for the Arbitrator to enter the Model Protective Order, Project Concord provided NBCU's counsel with a copy of the highly confidential Benchmark Agreement nearly a full month before the Phase 1 hearing.⁴² The Benchmark Agreement, along with almost 900 pages of the [REDACTED] emails of programming made available to Project Concord by [REDACTED], made perfectly clear that Project Concord would be operating as a commercial OVD. The Benchmark Agreement was easily recognizable as a studio-authorized agreement based on the rights granted under the agreement.⁴³ Moreover, the

³⁷ *Merger Order*, App. A, § I.

³⁸ *See* NBCU Opposition at 7.

³⁹ *See* First MacHarg Decl., ¶ 17.

⁴⁰ *See* First MacHarg Decl., ¶ 20.

⁴¹ *See* First MacHarg Decl., ¶ 21.

⁴² *See* First MacHarg Decl., ¶ 30.

⁴³ *See* HT 481:14 – 482:6 (DeVitre) (“Q: And based on [the [REDACTED] tracking system, how did [REDACTED] categorize Project Concord's service? A: As an internet transactional Video-On-Demand service and an internet electronic sell-through service. Q: How do you know that? A:

Benchmark Agreement was a standard and customary license agreement with standard [REDACTED] terms that clearly demonstrated that Project Concord intended to operate as a commercial OVD.⁴⁴

3. Yet, NBCU continued to raise the same issue throughout Phase 1 of the Arbitration. As illustrated by the record, NBCU's assertion that it "spent no time challenging whether Project Concord was a Qualified OVD or whether it had a license agreement with [REDACTED]" is patently false.⁴⁵ To the contrary, NBCU's counsel devoted significant time during Phase 1 to this issue, continuing to question whether Project Concord is a Qualified OVD even when asked directly by the Arbitrator at the end of Phase 1 if NBCU still wished to pursue that defense.⁴⁶ In particular, NBCU's counsel contended that they continued to question whether Project Concord is a Qualified OVD because "[i]t's just been very hard for my client, through us, to figure out what, what they are ultimately going to do or not do."⁴⁷ Given the clear and abundant evidence provided by Project Concord, it is impossible for NBCU to argue in good faith that its experienced and sophisticated

Because I read the contract. Q: What in the contract tells you that? A: The rights grant is clear. The rights grant – and not even just the rights grant, but even the header of the agreement itself tells me that this was issued by the [REDACTED], and that group is the group that issues licenses for transactional use of [REDACTED] products.”).

⁴⁴ HT 482:17 – 484:17 (DeVitre) (“Q: Having read the Project Concord/[REDACTED] contract and based on your experiences at [REDACTED], is the contract that was signed standard and customary? A: It’s standard and customary for a new business that [REDACTED] has not done business with before . . . Q: Does it reflect standard [REDACTED] terms? A: Yes, it does . . . Q: Do the terms and economics of the [REDACTED] agreement reflect common industry standards? A: Yes.”).

⁴⁵ See NBCU Opposition to Partial Appeal at 7, n.28.

⁴⁶ See, e.g., HT 578:16 – 580:22 (In response to questioning from the Arbitrator, NBCU's counsel, Mr. Murray, responded as follows. Q: Is there still an issue being raised by Respondent as to whether PCI is a qualified OVD? A: Your Honor, we don't know, because, as you heard today, there's so many aspects of what they are proposing to do with this sort of a system. It's just been very hard for my client, through us, to figure out what, what they are ultimately going to do or not do. Q: Well, let me put it a different way. In your opening brief, if I recall it correctly, you very definitively argued, at one point, that these proceedings should be forthwith terminated because PCI is not a qualified OVD. Is that still your argument? A: Your Honor, we are looking at [REDACTED] of the [REDACTED] agreement, [REDACTED] . . . we think there are very significant questions about what they are planning to do, and they do not look like a bona fide OVD in many respects.”).

⁴⁷ See HT 578:16 – 579:2.

attorneys could not understand that Project Concord would be offering [REDACTED] content on a transactional basis through its [REDACTED] services under the Benchmark Agreement. In short, there never should have been any controversy over any of this from the beginning. Indeed, it is just as unreasonable for NBCU to now assert to the Commission that “[it] spent no time challenging whether Project Concord was a qualified OVD...”⁴⁸

4. NBCU’s Phase 2 Final Offer, [REDACTED]

[REDACTED]⁴⁹ was actually not even closely comparable. Indeed, NBCU maintained that its Phase 2 Final Offer was so indisputably the economic equivalent of the Benchmark Agreement that it urged the Arbitrator to so decide without conducting a Phase 2 evidentiary hearing – just as it had asked the Arbitrator to terminate the arbitration before the Phase 1 evidentiary hearing on the grounds that Project Concord was not a qualified OVD.⁵⁰ It was not reasonable for NBCU to flout the Arbitrator’s Phase 1 decision and proffer a contract in Phase 2 that was in no way comparable to the Benchmark Agreement. The Phase 2 evidentiary hearing both began and ended with the Arbitrator noting, with more than a little frustration, that NBCU [REDACTED]

[REDACTED]⁵¹ That the NBCU offer was not comparable was not

⁴⁸ NBCU Opposition at 7, n.28.

⁴⁹ HT 599:2 – 599:7 (“Mr. Murray [NBCU’s counsel]: . . . NBCU’s phase 2 final offer [REDACTED] to the [REDACTED] peer deal and price terms and conditions. The two agreements are [REDACTED] of each other and economically equivalent in all respects.”); *see also* NBCU Phase 2 Opening Statement at 2.

⁵⁰ *See Project Concord, Inc. vs. NBCUniversal Media, LLC, Respondent*, Opening Position Statement of NBCUniversal Media, LLC at 7 (dated April 17, 2011) [sic] (“Because PCI [REDACTED] of [NBCUniversal’s] content, it is not a Qualified OVD within the meaning of the *Order*. This arbitration should thus be terminated.”) (“NBCU Phase 1 Opening Position Statement”).

⁵¹ *See* HT 607:18 – 609:7; HT 1034:18 – 1035:8.

“candidly” admitted by NBCU in the sense that it was straightforward and open,⁵² but rather it was a concession that NBCU was forced to make under close questioning by the Arbitrator and Project Concord’s counsel.⁵³ It was “candid” only to the extent that NBCU actually answered the direct questions put to it – unlike the approach taken by one of its two experts throughout the proceeding.⁵⁴

The Arbitrator correctly recognized that the gap between the two offers remained wide by the end of arbitration, remarked that NBCU’s Phase 2 Final Offer essentially came [REDACTED], and confirmed that it is “indisputable that without Current Films and Current TV Titles, NBCU’s Phase 2 Final Offer is of substantially lower value than the programming [REDACTED].”⁵⁵ There is no escaping that NBCU never made a final offer for comparable programming – this was unreasonable. As a result of these positions, Project Concord was forced to incur substantial costs and expenses to expose the artifice that NBCU’s offer mirrored the Benchmark Agreement.

⁵² See NBCU Opposition at 9.

⁵³ See, e.g., HT 607:18 – 609:7 (“Arbitrator Silberberg: [REDACTED] In phase 1, one of the things that was decided was that the appropriate programming is the programming that was contained in the PCI phase 1 offer, right? Mr. Murray [NBCU counsel]: Yes . . . Arbitrator Silberberg: And now that it’s been determined that the appropriate programming, putting your contractual defense aside, is the broader scope of programming that the claimant is asking for, you’re sort of saying, you know, we’ll offer the broader scope of programming as it’s offered in the [REDACTED] deal or the peer deal, subject however to all of our contractual defenses, which may be another way of saying we’re really offering [REDACTED], we’re just styling it a little bit differently or a lot differently.”).

⁵⁴ See, e.g., HT 226:2 – 226:10 (Wunderlich) (“Q: Okay. Well, let me posit this: Suppose that that is what it does. That means that [REDACTED], a market leading studio, views Project Concord as a transactional OVD, correct? A: If you ask me to accept your claims, then I am accepting your claims, but I don’t accept your claims. But if you ask me to say, “if you agree with me, do you agree with me,” then of course I agree with you. That’s a tautology.”).

⁵⁵ Arbitration Award at 7. See also Arbitrator’s remarks at commencement and conclusion of the Phase 2 evidentiary hearing, HT 607:18-609:7; 1034:18-1035:8.

5. NBCU argues that these proceedings could have been avoided (or substantially narrowed) if Project Concord had originally offered NBCU [REDACTED] [REDACTED] that Project Concord ultimately offered in its Phase II Final Offer [REDACTED] [REDACTED].⁵⁶ This assertion is not only impossible to reconcile with the arbitration record, but also is impossible to reconcile with NBCU's appeal of the arbitrator's award. That Arbitration Award confirms that Project Concord's Final Offer does in fact represent a contract for the same programming rights that are reflected in the Benchmark Agreement on terms and conditions and at a price that is its economic equivalent – all of which is indisputably true – yet NBCU is still appealing that award. Indeed, NBCU is once again reverting to the intransigent positions that triggered the arbitration proceedings in the first place. What NBCU is actually saying is that if Project Concord had sought **only** a contract for [REDACTED] [REDACTED], then the arbitration proceedings would not have been necessary. We will never know whether or not that assertion is correct, although we do know that NBCU never offered Project Concord any contract at all prior to NBCU's Phase 2 Final Offer in the arbitration proceedings. We also know that the Conditions require NBCU to provide to Project Concord programming that is comparable to that which Project Concord secured from a peer studio.

In short, what NBCU is saying is: if only it were not required to comply with the Conditions, then there would have been no arbitration. That is true. NBCU is required to comply with the Conditions, and when it refused to do so, the only way for Project Concord to exercise its rights under them was to demand arbitration. NBCU's actions in refusing to comply with the Condition's comparable programming requirement were – and are – unreasonable.

⁵⁶ See NBCU Opposition at 13-14.

6. NBCU also caused Project Concord to incur additional expenses by forcing it to respond to misleading statements such as “As of the date of the Phase 1 hearing, [REDACTED] [REDACTED],”⁵⁷ [REDACTED]. Of course, NBCU left out the important context that there is no reason right now for Project Concord to order from [REDACTED] digital files containing current movie content because Project Concord [REDACTED] later this year. [REDACTED] late 2012, that current content that Project Concord would have paid for won’t be available because it will be in the [REDACTED] window so Project Concord will have wasted money.⁵⁸

7. Another example is NBCU’s unreasonable attempts to assert a defense based on [REDACTED] (a technical questionnaire) to the Benchmark Agreement, and which is referenced in the Benchmark Agreement only with respect to [REDACTED].⁵⁹ [REDACTED] to the Benchmark Agreement is [REDACTED] a fairly typical questionnaire that potential licensees are generally required to complete and submit to a studio near the beginning of conversations about a potential business opportunity.⁶⁰ Project Concord’s

⁵⁷ NBCU Petition at 8, n. 20 (citing HT 262:2-263:1).

⁵⁸ HT 262:21-263:1 (Smith). “But we have [REDACTED] [REDACTED] because those could expire before we could use them.” HT: 264:5-12 (Smith). “But for sure we will [REDACTED] content as long as we feel we will have a month or two left of a license period by – if we [REDACTED] a [REDACTED]. So, for example, [REDACTED] which I just looked at, expires on [REDACTED]. [REDACTED] [REDACTED]”

⁵⁹ See NBCU Opposition at 7, n.25.

⁶⁰ See Claimant’s Rebuttal Brief to Opening Position Statement of Respondents at 6-7. See also HT 486:13 – 487:2 (DeVitre) (“Q: Would you describe how [REDACTED] uses technical questionnaires? A: Yeah. When you have a new licensee that you haven’t done business with before and especially on where they’re using some type of digital technology for the transmission or receipt of content, there is usually a lengthy questionnaire that gets information about the company, the standard information, who runs it, what sort of, you know, marketing they intend to do, how they intend to exploit and then some significant detail about their technology.”). If the people with first

completed technical questionnaire proposed [REDACTED]

[REDACTED] that it could increase [REDACTED] revenues.⁶¹ In the context of that specific starting proposal, Project Concord stated: [REDACTED]

[REDACTED].⁶² NBCU distorted not just the statement that was actually made by Project Concord in the questionnaire by omitting the crucial [REDACTED] [REDACTED] qualifier, but also the entire meaning and purpose of that questionnaire, which was to serve as a door-opener to talking about possible ways in which to do business. There is no reasonable explanation for NBCU's distortion, especially given that NBCU employs a similar questionnaire to vet new business partners, which expressly disclaims that its completion gives rise to any sort of contractual relationship.⁶³

line responsibility for vetting potential licensees like what they see, then the conversation continues. *See* HT 429:14 – 431:17 (Marenzi) (Q: When a new market entrant would come into one of your systems, were they given – how were they vetted? A: Well, there would be an initial conversation or initial some kind of contact and based on the initial interchange whether it was written or verbal, if we thought that they were somebody we wanted to do business with, we would send them a client profile form or similar to a technical questionnaire that we have seen here. Once that was filled out, that would be the basis for further discussions.”).

⁶¹ Benchmark Agreement, [REDACTED] (A copy of the Benchmark Agreement is found at Exhibit 3 of the Arbitration Record).

⁶² *Id.* at F-2 (emphasis added).

⁶³ *See* Ex. 112 of the Record; *see also* HT 130:6 – 133:1 (Lamprecht) (“Q: When a new market entrant approaches NBCU for online distribution rights, are they required to fill out some sort of a technical questionnaire? A: They are . . . it depends on where in the process they are, so, for example, at the first meeting we have, we talk about . . . what the business model is, what their plans are, what they are interested in doing with us. If it’s clear that it would be a deal that would fall in an area that I oversee, then yes, then we would through the legal team that supports me, we would provide such a questionnaire . . . Q: [Is Exhibit 112 of the Record] a series of questionnaires that are the type of questionnaires that NBC Universal provides to new market entrants that it’s interested in doing business with, or potentially doing business with? . . . A: This looks like an example of a big success . . . information about who the company is and how the technology works, yes . . . Q: May I just ask you, does the filling out of these questionnaires, these technical questionnaires constitute a contract between the entrant and NBC Universal? A: A contract for what, licensing of content? Q: Yes. A: No.”).

8. NBCU argues that there was nothing unreasonable in its insistence upon bifurcating the arbitration proceedings.⁶⁴ It contends that Project Concord agreed to bifurcation and that NBCU had no reasonable option other than to file an initial Final Offer for the scope of comparable programming – rather than an offer in the form of a license agreement – because Project Concord refused to disclose its peer deal with ██████████ prior to the arbitration.⁶⁵ NBCU’s contentions are nonsensical. First, as Project Concord previously demonstrated, NBCU had no right under the Conditions to insist on disclosure of Project Concord’s confidential peer deal before making its own Final Offer in the form of a contract for carriage.⁶⁶ And, as Project Concord has explained in prior filings, it defies common sense and logic to believe that the Commission, in setting Conditions designed to prevent anticompetitive behavior, intended to require an OVD to provide NBCU – let alone their internal business persons – with an up-front look at the contracts being offered by its competitors before Comcast-NBCU sets its own terms, conditions and prices.⁶⁷ Furthermore, Project Concord did not “willingly” agree to bifurcation by choice. To the contrary, faced by NBCU’s dilatory tactics, Project Concord only agreed to bifurcation for the express purpose of getting to contract formation as quickly as possible.⁶⁸

⁶⁴ See NBCU Opposition at 3-4.

⁶⁵ See NBCU Opposition at 3-4.

⁶⁶ See First MacHarg Decl., ¶ 29.

⁶⁷ See Letter from Monica S. Desai to Marlene H. Dortch, Secretary, Federal Communications Commission, Notice of Ex Parte Presentation, 2-3, dated March 15, 2012 (“Lack of access to an OVD’s peer deal during commercial negotiations does not injure or impair Comcast-NBCU. It is a savvy market player, with sophisticated employees whose job it is to price and negotiate content deals – and they do so every day. As they demonstrate in the regular course of their business, Comcast-NBCU has the ability, without access to an OVD’s peer deal, to price and negotiate a content deal with an OVD the same way it prices and negotiates deals with anyone else. The suggestion that Comcast-NBCU is unable to determine its own price that it believes is economically equivalent for providing access to the programming requested by an OVD unless it first has complete knowledge of the pricing of its peers is without merit.”).

⁶⁸ See First MacHarg Decl., ¶ 13.

Despite lacking any basis – let alone a reasonable basis – to support its assertions, NBCU insisted on bifurcation, arguing that there was a “reasonable dispute” about (a) whether Project Concord is a Qualified OVD; (b) what Comparable Programming, if any, Project Concord might be entitled to under the Benchmark Agreement; and (c) whether providing certain programming demanded by Project Concord would constitute a breach of another contract to which NBCU was a party.⁶⁹ Moreover, NBCU insisted that it would not – and could not be required to – make a Final Offer in the form of a contract for carriage before its Contractual Impediment Defense was tried and decided because, according to NBCU, that issue was inextricably tied to the question of which Final Offer reflected the appropriate Comparable Programming.⁷⁰ Despite Project Concord’s repeatedly showing that the Conditions expressly make that defense a merits issue for Phase 2, NBCU continued to assert this argument.⁷¹ Faced with this intransigence and for the express purpose of obtaining a contract as quickly as possible, Project Concord agreed to take the merits of NBCU’s Contractual Impediment Defense head-on in Phase 1.⁷² Prior to the start of Phase 1, Project Concord requested for expediency that the Arbitrator rule that PCI was a Qualified OVD and that Project Concord’s final offer was the offer for the scope of Comparable Programming that most closely approximated the appropriate Comparable Programming.⁷³ However, NBCU vigorously opposed this request.⁷⁴

What NBCU’s argument on these points boils down to is this: It will always be appropriate for NBCU to demand bifurcation of any arbitration under the OVD Benchmark Condition and to

⁶⁹ See Letter from David P. Murray to Paris N. Earp, dated November 4, 2011; *see also* First MacHarg Decl., ¶ 5.

⁷⁰ See First MacHarg Decl., ¶ 12.

⁷¹ See First MacHarg Decl., ¶¶ 11-12.

⁷² See First MacHarg Decl., ¶ 13.

⁷³ See Letter from Jean V. MacHarg to Henry J. Silberberg, 2-3, dated April 2, 2012.

⁷⁴ See First MacHarg Decl., ¶ 35-36.

refuse to make an offer in the form of a contract for carriage until all of its defenses – however unfounded – have been tried and rejected. That position is plainly contrary to the express language of the Conditions and the findings supporting them.

9. According to NBCU, there was nothing unreasonable in its assertion that the definition of Video Programming set forth in the conditions “expressly” excludes films for which less than a year has elapsed since their first theatrical release. Project Concord’s opposition to NBCU’s separate appeal reveals the fallacy of that argument.⁷⁵ But it was what NBCU asserted in support of its tortured reading of that definition that was most egregiously unreasonable. This is NBCU’s representation to the Arbitrator that the asserted “express” exclusion of first release films from the definition was a “hard fought” and “carefully negotiated.”⁷⁶ These were the assertions that caused Project Concord and its consultants to incur very substantial costs in connection with a search of the entire record of the proceedings before the FCC that led to the imposition of the Conditions, including thousands of ex-partes.⁷⁷ In the end, it was revealed that there is absolutely nothing in the record that supports the representations that were made by NBCU to the Arbitrator.

10. Project Concord also emphasizes that it does not have an army of in-house counsel to turn to for these types of exercises; it must call upon paid professionals to respond to the many arguments raised by NBCU. The asserted head counts in NBCU’s brief are misleading.⁷⁸ The fee applications submitted by Project Concord reflect that the vast majority of the work was done by two or three of Project Concord’s outside counsel. Notably, although NBCU submitted its own fee

⁷⁵ See PCI Opposition at 9-22.

⁷⁶ See HT 572:6-573:16; see also *Project Concord, Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, Claimant’s Phase 2 Closing Brief, at 23 (dated June 7, 2012) (“PCI Phase 2 Closing Brief”).

⁷⁷ First MacHarg Decl., ¶¶ 86-88.

⁷⁸ See NBCU Opposition at n.47.

petition in the arbitration, it has never revealed what it has actually spent on outside counsel, consultants and experts, let alone how much time in-house counsel spent on this matter.

II. THE FCC MUST EVALUATE WHETHER NBCU'S CONDUCT WAS "REASONABLE"

NBCU asserts that "having chosen to use the Benchmark Condition in an improper attempt to [REDACTED], Project Concord is in no position to complain about its resulting litigation costs."⁷⁹ What the arbitration record and the record of this appeal and NBCU separate appeal demonstrates, however, is that Project Concord has always sought **exactly** the same programming rights from NBCU as those that have been licensed to it by NBCU's peer. And at **exactly** the same price. Yet, as the Arbitrator noted, this was a "hard fought" battle. It should not have been.

Through the positions and actions it has taken throughout the course of these proceedings, NBCU has attempted to do exactly what the FCC was concerned it would do once it was vertically integrated with and controlled by Comcast: try to lock up its most valuable content, and engage in unreasonable practices to prevent Project Concord from competing.

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."⁸⁰ In the two Declarations attached to its Petition for Partial Appeal 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.

The Arbitrator ultimately concluded that, although the costs incurred by Project Concord in securing its straightforward victory were "substantial," and that "the reasonableness thereof for the

⁷⁹ NBCU Opposition at 1-2.

⁸⁰ *Merger Order*, at 4367, 4370 (App. A, Sec. VII.B.10, VIII.5).

services rendered has not been challenged,” he found that Project Concord failed to meet its “steep burden” of proving “unreasonable” conduct.⁸¹ 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.”⁸² Project Concord submits that there is no justifiable reason that NBCU should have engaged in the “battle” detailed in the Declarations attached to Project Concord’s Petition for Partial Appeal – and its conduct does not need to be “unethical” to be “unreasonable.” Indeed, a finding that a party acted unethically can result in substantial penalties above and beyond the mere reimbursement of costs. The FCC’s standard for the award of fees was intentionally and appropriately a different standard – unreasonableness. 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 2 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.⁸³

III. CONCLUSION

Taking such unreasonable positions is contrary to the plain language and intent of the *Merger Order*, and reveals that Comcast 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. The Commission recognized that even in the absence of “legal prejudice,” there can be significant

⁸¹ Arbitration Award, at 11.

⁸² *Id.*, at 11-12.

⁸³ *See id.*, at 7-9.

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financial prejudice resulting from unreasonable conduct, and underscored that it will not tolerate such tactics by calling for cost-shifting no fewer than three times in the *Merger Order*.⁸⁴

For the reasons set forth in Project Concord's Petition for Partial Appeal, the FCC, under the de novo review standard, should award Project Concord the attorneys' fees and costs that it incurred in connection with responding to the factually and legally unsupported positions taken by NBCU.

Respectfully submitted,

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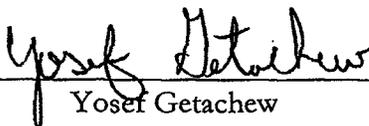
Dated: August 10, 2012

⁸⁴ *Merger Order*, at 4367, 4369, 4370 (App. A, Sec. VII.B.10, VII.E.3., VIII.5).

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 10th of August, 2012, a copy of the foregoing "Project Concord, Inc. Partial Appeal – Cost Shifting Reply To NBCUniversal Media, LLC Opposition" has been served electronically and by hand delivery(*) or first-class mail, postage pre-paid, on the following:

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