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FILED/ACCEPTED

JAN 7 2013

Federal Communications Commission
Office of the Secretary

January 7, 2013

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: ***REDACTED - FOR PUBLIC INSPECTION***
Project Concord, Inc. v. NBCUniversal Media, LLC (AAA Case No. 72-472-E-01147-11)
MB Docket No. 10-56

Dear Ms. Dortch:

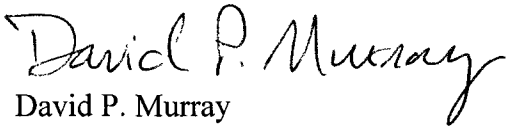
Enclosed are an original and two (2) copies of the Public version of an Application for Review, submitted on behalf of NBCUniversal Media, LLC ("NBCUniversal") in the above-captioned proceeding.

This Public version has been redacted consistent with the procedures directed by Media Bureau staff, and for the reasons detailed in the Request for Confidential Treatment submitted with the Confidential version of the filing on December 13, 2012. NBCUniversal is also today serving a copy of the Public version of the filing via hand delivery to Monica Desai, counsel for Project Concord, Inc.

If you have any questions, please do not hesitate to contact me.

No. of Copies rec'd 0+2
List ABCDE

Very truly yours,



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cc: Monica Desai, Counsel for Project Concord, Inc.

Enclosures

REDACTED - FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
JAN 7 2013
Federal Communications Commission
Office of the Secretary

In the Matter of Arbitration between	)	
	)	
Project Concord, Inc.,	)	
	)	
Claimant,	)	
	)	
-vs.-	)	MB Docket No. 10-56
	)	
NBCUniversal Media, LLC,	)	
	)	
	)	
Respondent.	)	
	)	

To: The Commission

APPLICATION FOR REVIEW

WILKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
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Arbitration Award And Transcript	
Phase 2 Award	Arbitration Award
HT	Arbitration Hearing Transcript
NBCUniversal Pleadings And Testimony	
Cas. Decl.	Direct Testimony of Bruce Casino (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Decl.	Expert Report of Steven Madoff (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Sec. Decl.	Phase 2 Expert Report of Steven Madoff (attached to NBCUniversal Phase 2 Op. Br.)
Wund. Sec. Decl.	Phase 2 Expert Report of Robert Wunderlich: Analysis of PCI's "Final Offer" (attached to NBCUniversal Phase 2 Op. Br.)
NBCUniversal Phase 1 Op. Br.	Phase 1 Opening Position Statement of NBCUniversal Media, LLC
NBCUniversal Phase 1 Reb. Br.	Phase 1 Rebuttal Statement of NBCUniversal Media, LLC
NBCUniversal Phase 1 Clos. Br.	Phase 1 Post-Hearing Brief of NBCUniversal Media, LLC

I. INTRODUCTION AND SUMMARY

Pursuant to Section VII.E(1) of Appendix A of the *Comcast-NBCUniversal Order* ("*Order*")[1] and Section 1.115 of the Commission's Rules[2], NBCUniversal Media, LLC ("NBCUniversal") hereby requests review and reversal by the Commission of the portion of the Media Bureau's *Order on Review* concerning films less than one year from theatrical release ("first-year films").[3] The Bureau's decision erroneously interprets the *Order* to include first-year films in the definition of "Video Programming" subject to the Benchmark Condition. The plain language of the *Order*, however, expressly *excludes* first-year films from this remedy. By failing to give this plain language its proper meaning and effect, the Bureau committed reversible error.

Overturning this ruling is especially important because the exclusion of first-year films reflects an intentional line – drawn *both* by the Commission and by the Department of Justice ("DOJ") – for when NBCUniversal films should become subject to the Benchmark Condition. During the transaction-review process, both agencies gave extensive consideration to NBCUniversal's historical licensing practices for films. These include long-established requirements and restrictions in its licensing agreements with [redacted] that are specific to NBCUniversal and limit or preclude certain forms of exhibition during a film's first year [redacted] Ultimately, both agencies determined that requiring NBCUniversal to mirror the licensing

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[1] *In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238 (2011).

[2] 47 C.F.R. § 1.115.

[3] *In the Matter of Project Concord, Inc., Claimant v. NBCUniversal Media, LLC, Respondent*, Order on Review, MB Docket No. 10-56 (Nov. 13, 2012) ("*Order on Review*")

practices of "peer" studios – which may have no or very different licensing arrangements with [redacted] – for first-year films under the Benchmark Condition would be inappropriate, potentially triggering [redacted] to NBCUniversal under its [redacted] agreements that the peer studio would not suffer. After considering various options for addressing these potential harms, including removing films from the Benchmark Condition altogether, the agencies decided to exempt films from the remedy until one year after their theatrical release.

In DOJ's case, this decision took the form of a binding *agreement* (i.e., consent decree) between NBCUniversal and the agency. The Commission drew the same line in its *Order*, for the same reasons and with the stated intent to adopt a "consistent" Benchmark Condition. Although the Bureau claimed that it found nothing in the *Order* explaining this decision, the plain and *identical* language used by both agencies in their parallel definitions of Video Programming, which only include "Films for which *a year or more* has elapsed since their theatrical release," speaks for itself and accurately reflects the express understandings and agreements reached during the transaction-review process.[4]

It should be presumed that both agencies intended to (and will) adhere to the lines drawn and understandings embodied in the conditions they adopt in approving transactions. Otherwise, the integrity of the regulatory review process would be severely undermined. The Bureau does not indicate whether it sought or received guidance from individuals at the Commission (and/or DOJ) with direct knowledge of the negotiations and intent of the parties. Now that this issue is before the Commission, it should reaffirm its commitment to the Benchmark Condition as

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[4] *Order*, App. A, § I (emphasis added).

expressly written and rule that NBCUniversal films are excluded from the remedy during their first year from theatrical release.

II. BACKGROUND

A. Arbitration Proceeding

On October 28, 2011, PCI filed a demand for arbitration under the Benchmark Condition.[5] The arbitration proceeded in two phases pursuant to the *Order*'s provisions.[6] The Arbitrator ruled in Phase 1 that first-year films were subject to the Benchmark Condition and, for this and other reasons, chose PCI's final offer for the scope of comparable programming.[7] Based on this ruling, the parties resubmitted final offers for Phase 2 of the arbitration. The Arbitrator ultimately chose PCI's Phase 2 final offer. He also ruled that NBCUniversal had failed to carry its burden of proof on its contractual impediment defenses because no licensee had yet asserted a breach claim. In the event of such a claim, the Arbitrator required PCI to [redacted] and to [redacted] NBCUniversal. Finally, the Arbitrator denied both parties' cost-shifting requests.[8]

NBCUniversal filed a Petition for *De Novo* Review of three issues: 1) whether first-year films are excluded from the definition of Video Programming; 2) whether the Arbitrator applied an erroneous standard for establishing the contractual impediment defense; and 3) whether, as a procedural matter, the contractual impediment defense should be heard in Phase 1 or Phase 2 of a

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5 *Order on Review* ¶ 8.

6 *Id.* ¶ 4 (Two-phase arbitrations are proper where there is a reasonable dispute regarding a claimant's Qualified OVD status, what Comparable Programming a Qualified OVD is entitled to receive, or whether certain defenses would defeat a claim.).

7 Phase 1 Decision of Arbitrator (May 10, 2012).

8 Phase 2 Award of Arbitrator (June 15, 2012).

Benchmark Condition arbitration.[9] PCI filed a partial appeal challenging the Arbitrator's denial of its cost-shifting request.[10]

B. *Order On Review*

The Media Bureau released the *Order on Review* on November 13, 2012, granting in part and denying in part NBCUniversal's Petition and denying PCI's Partial Appeal on cost-shifting.[11] The Bureau determined that construing the Benchmark Condition to exclude first-year films would "frustrate the intent" of the remedy and was not required under a plain-language interpretation.[12] On NBCUniversal's contractual impediment claims, the Bureau clarified the standard for establishing the defense.[13] The Bureau rejected the "breach first/fix later" approach adopted by the Arbitrator, holding that an arbitrator should determine whether the defense applies based on the relevant contractual language and evidence of its interpretation within the industry.[14] The Bureau correctly noted that the defense exists to protect the rights and interests of other licensees from being violated.[15] NBCUniversal is not required to show that a licensee has actually asserted a breach of contract; for the same reasons, post-breach "remedies" in a final offer do not obviate the need for an arbitrator to rule on an asserted contractual

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[9] NBCUniversal Media, LLC Petition for *De Novo* Review, MB Docket No. 10-56 (July 16, 2012) ("NBCUniversal Pet.").

[10] Project Concord, Inc. Partial Appeal, MB Docket No. 10-56 (July 16, 2012).

[11] *Order on Review* ¶ 1.

[12] *Id.* ¶¶ 17-24.

[13] *Id.* ¶¶ 27-30, 42-62.

[14] *Id.* ¶ 28.

[15] *Id.* ¶ 29.

impediment defense during an arbitration.[16] Based on a thorough review and evaluation of representative NBCUniversal license agreements and related evidence, the Bureau held that NBCUniversal had proven that these and other agreements containing similar language would be breached by providing certain film and television content to PCI.[17] Given this ruling, the Bureau concluded that NBCUniversal's request for clarification of the relevant procedural rules was moot and, therefore, declined to address it.[18]

III. STANDARD OF REVIEW

Commission review of the Bureau's decision is conducted *de novo* based on the record before the Arbitrator.[19] As the author of the *Order*, the Commission is "uniquely qualified" to interpret its scope.[20] The underlying arbitration was the first conducted under the Benchmark Condition, and so interpretation of its definitions involves questions of law and policy which the Commission has not previously resolved. The Bureau disregarded the plain language concerning first-year films in the *Order*'s definition of Video Programming and made erroneous factual determinations that have no evidentiary support in the record in reaching its ruling, presumably due to a lack of knowledge of the transaction-review negotiations and the understandings and

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16 *Id.*

17 *Id.* ¶¶ 42-62

18 *Id.* ¶ 13 n.59.

19 *See Order*, App. A, § VII.E.1; *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, 25 FCC Rcd 16054, n.45 (2010) ("*Massillon Order*") (application for review pending); Letter from William T. Lake, Chief, Media Bureau, to David P. Murray, Counsel to NBCUniversal Media, LLC and Monica S. Desai, Counsel to Project Concord, Inc. (Nov. 1, 2012) (discussing limitations on review process under the *Order*).

20 *Massillon Order* n.45; *see also TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, n.5 (2010), *aff'd, TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012).

intent of the Commission (and DOJ) in excluding this content from the Benchmark Condition The Commission may therefore properly grant this Application for Review and reverse the Bureau's decision.[21]

IV. FILMS LESS THAN ONE YEAR FROM THEATRICAL RELEASE ARE EXPRESSLY EXCLUDED FROM THE BENCHMARK CONDITION.

The Bureau erred in determining that first-year films are subject to the Benchmark Condition for the following reasons.

A. During The Transaction-Review Process, The Commission And DOJ Agreed To Exclude First-Year Films From The Benchmark Condition And Crafted The Express Language Of Their Respective Orders To Embody That Result.

The Benchmark Condition is a novel and extraordinary remedy imposed by both the Commission in the *Order* and DOJ in its parallel consent decree. The Benchmark Condition requires NBCUniversal to mirror the behavior of designated "peer" studios and programmers, subject to common and reasonable industry practices that restrict certain forms of exhibition during different periods (or "windows") in the life of a film or television show.[22]

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[21] 47 C.F.R. § 1.115(b)(2)(ii), (iv) (review is warranted where an action "involves a question of law or policy which has not previously been resolved by the Commission" or involves an "erroneous finding as to an important or material question of fact").

[22] For example, at each stage of a film's lifecycle, a studio typically licenses a film for some forms of exhibition and "holds back" against certain other forms. After a film has been exhibited in theaters, it is usually licensed for non-theatrical distribution, such as hotel pay-per-view ("PPV") or airline exhibition. Then, the film is released on DVD and Blu-ray disc and also made available on an electronic sell-through ("EST"), residential PPV, and transactional video on demand ("VOD") basis. The film next becomes available to premium pay television exhibitors, like HBO, Starz, Epix, and Showtime. Eventually, the film is licensed to broadcast and cable networks for advertising-supported exhibition. There are then second (and sometimes third) pay "windows" when the film is generally restricted to premium pay television exhibition. Ultimately, the film becomes part of a studio's "library" and can be licensed at reduced rates. Library films may still cycle in and out of availability if later licensed on an exclusive basis to pay television services and advertising-supported broadcast or cable networks. *Order on Review* ¶ 19 & n.75 (citations to arbitration record omitted).

During the transaction-review process, the Commission and DOJ gave extensive consideration to whether NBCUniversal's films should be included in this new Benchmark remedy and, if so, to what extent.[23] Historically, NBCUniversal has exploited its films within a long-established framework of exhibition windows and practices. Given the box office performance of a particular film, and other factors, NBCUniversal releases a film to different forms of exhibition at varying times to derive maximum revenues from the content. In making these decisions, NBCUniversal is subject to windowing and exclusivity requirements and related restrictions in its license agreements with [redacted].[24] These highly valuable [redacted] agreements have been in place for years – and long before any transaction with Comcast was ever contemplated.

Specifically, under its [redacted] agreements, NBCUniversal must comply with exacting restrictions and requirements relating to the manner in which NBCUniversal [redacted] These types of [redacted] occur during the first year of a film's theatrical release. A failure by NBCUniversal to comply with these [redacted] requirements for any film, which are NBCUniversal-specific, would [redacted]

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[23] *See, e.g.*, NBCUniversal Phase 1 Clos. Br. at 3-8 (discussing DOJ's role in evaluating the OVD conditions, the industry's longstanding exclusivity and windowing practices, and the DOJ's determination to strike a balance in the programming available to OVDs under the Benchmark Condition); NBCUniversal Phase 1 Reb. Br. at 4-7 (describing details of the transaction review undertaken by the Commission and DOJ and the plain language of the *Order* with regard to newly-released films).

[24] *See, e.g.*, DOJ Competitive Impact Statement ("DOJ CIS"), § II.B.1, at 7-8 (discussing [redacted] exclusive rights in sequential windowing of films).

[redacted][25]

In contrast, several of NBCUniversal's "peer" studios [redacted] do not license their newly-released films to [redacted] And even peer studios that do license newly-released films to [redacted] including [redacted] may have different windowing and exclusivity restrictions and obligations from NBCUniversal.

NBCUniversal sought to exclude films altogether from the Benchmark Condition, arguing that, post-transaction, it should be permitted to follow its same established windowing and exclusivity practices in deciding when and how to exploit each new film. In the end, the Commission and DOJ determined to include films in the remedy. However, in reaching this determination, both agencies recognized that forcing NBCUniversal to match the different licensing practices of a peer studio during the first year of a film's theatrical release could [redacted]

After careful consideration of NBCUniversal's particular arrangements with [redacted] the

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[25] For instance, if NBCUniversal is required to follow a peer studio's deal that does not comply with the strict conditions found in its [redacted] contracts [redacted] *See also* NBCUniversal Phase 1 Op. Br. at 11-13; Cas. Decl. ¶ 29 (describing [redacted] Agreement); HT 90:10-91:6 (Casino) (same); HT 86:13-87:6 (Casino) (discussing how NBCUniversal is "cognizant [redacted] and makes sure that the business is in compliance with its license obligations); Mad. Decl. ¶ 4; Mad. Sec. Decl. ¶¶ 11-17; Wund. Sec. Decl. ¶ 7(g)-(i).

Commission and DOJ made a policy decision to exclude films from the remedy during their first year from theatrical release to protect NBCUniversal from these [redacted] After that period, the films become subject to the condition.

These discussions and negotiations took place in parallel and, at times, intersecting meetings with the Commission and DOJ. Importantly, NBCUniversal's negotiations with DOJ which included extensive, hours long discussions of films and the [redacted] agreements culminated in an *agreement* between the parties, which ultimately took the form of a consent decree.[26] These negotiations involved highly specific discussions of whether and how to apply the Benchmark Condition to NBCUniversal's content including whether to include films *at all*.[27] As its Competitive Impact Statement indicates, DOJ made clear that it was trying to craft a condition that would require NBCUniversal to mimic the behavior of a non-integrated program producer, which DOJ concluded would achieve the Government's pro-competitive goals for online video distribution.[28] Because NBCUniversal was "only" being required to follow conduct of a similarly-situated peer, DOJ concluded that it was appropriate to impose this new and novel obligation on NBCUniversal, including its film content. Once DOJ made clear that it believed

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[26] DOJ CIS, § II.A.4, at 6-7 (describing DOJ review process); *id.* § II.B.1, at 8; *id.* § VII at 43, 46 (discussing consent decree/settlement standards); NBCUniversal Pet. at 12-13, 15-16.

[27] DOJ CIS, § II.B.1, at 7-8 (discussing NBCUniversal production and distribution of first-run movies and licensing of those movies [redacted] DOJ Complaint ("DOJ Compl.") ¶ 23 (same); NBCUniversal Pet. at 11 n.31 (noting the agencies' review of thousands of pages of license agreements, including the relevant [redacted] contracts, and the extensive discussions of the parties).

[28] DOJ CIS, § I, at 2-3, § III, at 30 (detailing pro-competitive effects of Final Judgment); *id.* § II.C.2.b, at 18 (describing "potential competitive significance" of OVDs in video programming distribution marketplace); *id.* § II.D.4, at 28-29 (same); *id.* § II.D.2.b, at 26 (summarizing history of NBCUniversal's partnerships with Hulu and agreements with Apple, iTunes, Amazon and Netflix); DOJ Compl. ¶ 52 (same); *id.* ¶ 33 (describing OVD market).

the remedy should include films, the negotiations moved to the question of how to address the particular complexities and difficulties that applying a "benchmark" condition formula to films during their first year from theatrical release would create for NBCUniversal, given the specific provisions of its [redacted] agreements.[29] The parties considered at length whether there was a sensible and fair way to apply the Benchmark Condition to films during this initial phase of their life cycle. However, given the exacting set of obligations and consequences that the [redacted] contractual framework imposes specifically on NBCUniversal for first- year films, it became apparent that requiring NBCUniversal to follow a peer's conduct during this initial time period could easily (and repeatedly) result in [redacted] that the peer would not suffer.[30] After prolonged discussions about this problem, the two sides reached a compromise agreement: Films as a broad category would be covered by the Benchmark Condition, but films during the first year from their initial theatrical release would be excluded.[31] The resulting consent decree, embodying this agreement to exclude first-year films, is *binding* on both NBCUniversal and DOJ.[32]

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[29] DOJ CIS, § II.B.1, at 7-8 (discussing [redacted] exclusive rights in sequential windowing of films); NBCUniversal Pet. at 15-16 (discussing the relevant [redacted] provisions).

[30] *See supra* note 25.

[31] DOJ Final Judgment at 7-8 (defining "Video Programming" and expressly excluding first-year films); DOJ CIS, § III.A.4, at 36 (the consent decree "strikes a balance by allowing reasonable and customary exclusivity provisions that enhance competition while prohibiting those provisions that, without any offsetting procompetitive benefits, hinder the development of effective competition from OVDs"); *see also* DOJ CIS, § III.A.2, at 31-32 (explaining the Benchmark Condition, including a list of NBCUniversal's studio programming peers); § III.A.4, at 35-36 (describing generally the industry's exclusivity and windowing practices).

[32] DOJ CIS, § VII, at 43, 46.

The Commission participated in some of these same meetings and discussions. The Commission also had access to all of the relevant [redacted] agreements, as well as extensive evidence of NBCUniversal's established windowing and exclusivity practices, and had additional meetings with NBCUniversal concerning films.[33] Further, both the Commission and DOJ engaged in "unprecedented coordination" throughout the transaction-review process, consulting extensively with each other to ensure that the parallel remedies they adopted were "consistent."[34] There is thus no question that the Commission likewise intended to exempt NBCUniversal films from the Benchmark Condition during their first year from theatrical release. Indeed, the two agencies embodied this joint decision using the *identical* language (i.e., by expressly including only films "For which more than a year has elapsed from theatrical release" in their corresponding definitions of the Video Programming subject to the Benchmark Condition).[35]

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[33] NBCUniversal Pet. at 11 & n.31, 15 & n.46 (summarizing relevant parts of transaction-review record).

[34] *See* DOJ CIS, § II.A.4, at 6-7 (discussing extensive consultations between the agencies to ensure consistent remedies). The Antitrust Division's Policy Guide to Merger Remedies specifically cites the DOJ-Commission collaboration in the Comcast-NBCU transaction as a model. DOJ, Antitrust Division Policy Guide to Merger Remedies, at 20 n.45 (June 2011) (citing Remarks of Assistant Attorney General Christine Varney, *available at* www.justice.gov/atr/public/speeches/266156.htm ("I really want to highlight the great cooperation and unprecedented coordination with the FCC . . . . This approach resulted in effective, efficient and consistent remedies.")).

[35] Like the FCC, DOJ defines "Video Programming" subject to the Benchmark Condition, in relevant part, to include only "Films for which a year or more has elapsed since their theatrical release." DOJ Final Judgment, §§ II.L, II.EE; *see also* NBCUniversal Pet. at 12-13. Contrary to the Bureau's conclusions, DOJ's mirror definition is further indication that both agencies intended and agreed to exclude first-year films from the scope of this remedy. Moreover, DOJ does not use the "includes but is not limited to" language, which is further evidence that both agencies meant to exclude first-year films from the conditions. NBCUniversal Pet. at 14-15.

The *Order on Review* is utterly silent on the extensive transaction-review evidence and discussions underlying the Commission's joint decision with DOJ to exempt NBCUniversal films from the Benchmark Condition during their first year from theatrical release. The Bureau's erroneous ruling suggests that it may not have received guidance from individuals at the Commission (and/or DOJ) with direct knowledge of the negotiations and intent of the parties. In all events, the Bureau plainly erred in finding "nothing" to indicate that the exclusion of first-year films was specifically negotiated during the transaction-review process.[36] The express exclusion of first-year films in the *Order*'s definition of "Video Programming" is direct evidence of the Commission's decision (which, as shown, is further bolstered by DOJ's adoption of the identical definition in its consent decree with NBCUniversal).[37] The Commission was not obligated to provide any further explanation for it.[38]

The integrity of the transaction-review process would be severely undermined if the Commission fails to adhere to the intent and understandings reached by both agencies on this critical aspect of the deal. It is unreasonable to presume that the Commission would knowingly renege on a commitment of this kind, let alone knowingly expose NBCUniversal to the [redacted] agreements if NBCUniversal is forced to match the licensing practices of a "peer" studio for first-year films under the Benchmark Condition.[39] Moreover, because the Bureau's ruling on first-year films is

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36 *Order on Review* ¶ 20.

37 *Order*, App. A, § I; note 35 *supra*.

38 Of the thirty-four defined terms in the definitions section of the *Order*, explanatory notes are offered for only four.

39 *See supra* note 25.

directly at odds with DOJ's parallel Benchmark Condition, NBCUniversal could be subject to inconsistent and conflicting obligations if the Bureau's ruling is not reversed. That result would contravene the express intent of both agencies to adopt "consistent" remedies and would leave NBCUniversal in the untenable position of trying to comply with contradictory orders.[40]

For all of these reasons, the Bureau erred by substituting its judgment for the lines expressly drawn by the Commission and DOJ in crafting the Benchmark Condition. The Bureau's erroneous ruling on first-year films should be reversed by the Commission.

B. The Bureau's Failure To Give Proper Effect To The *Order*'s Plain Language Contravenes Well-Established Canons Of Construction.

Because the Bureau substituted its judgment for the express language adopted by the Commission in the *Order*, the Bureau's ruling on first-year films also contravenes hornbook canons of statutory construction. As shown above, the Commission used the language "Films *for which a year or more has elapsed since their theatrical release*" to exclude first-year films from the scope of Video Programming subject to the Benchmark Condition.[41] This plain language was crafted by both the Commission and DOJ to reflect their intention – and the parties' express

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40 *See supra* note 34.

41 *Order*, App. A, § I (emphasis added). The full definition reads: "'Video Programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); programming offered to viewers on an on-demand, point-to-point basis (also known as video on demand ('VOD'), pay per view ('PPV') or transactional video on demand ('TVOD')); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and Films for which a year or more has elapsed since their theatrical release."

understanding during the transaction-review process to exclude this content from the remedy. The Bureau erred by failing to give this plain language its intended and proper effect.

It is a "cardinal principle of statutory construction" that each part of a provision must be read in combination with other parts to give proper effect to all of the provision's language.[42] A construction must "give effect, if possible, to every clause and word of a statute," which ought, "upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[43] Consistent with these principles, the Commission has relied on the plain text of conditions and other rules to determine their meaning and effect[44] and has properly declined to read words as mere surplusage.[45] These same principles, when

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[42] *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (where a sentence in a statute included two clauses, each must be given independent meaning and effect; reading the clauses as "one general restriction" or, here, definition, impermissibly "avoid[s] confronting the specific meaning" of a clause in violation of statutory construction principles) (citations to other precedent omitted).

[43] *Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) (rejecting a construction that would only apply the modifier "State" to one portion of a sentence, as it would render the word "insignificant, if not wholly superfluous" and also because it is "well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (citations to other precedent omitted).

[44] *See, e.g.*, *Massillon Order* ¶ 10 (relying on the "plain language of the condition" to reach a determination regarding when "MVPDs may avail themselves of the arbitration remedy" under the *News Corp.-Hughes Order*); *Application of Northeast Communications of Wis., Inc.*, 19 FCC Rcd 18635, ¶ 12 (2004) (finding that Northeast engaged in collusive conduct in violation of an FCC rule and that "the application of the rule to Northeast is based not an interpretation of the rule, but on the plain language of the rule").

[45] *See, e.g.*, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, 16 FCC Rcd 9751, ¶ 20 (2001) (stating that, "as a matter of statutory interpretation, we are obligated to interpret statutory language in a manner that gives meaning to each word if at all possible over an interpretation that renders certain words superfluous," and finding an alternate interpretation "violates basic canons of statutory construction by giving no independent meaning" to the relevant provisions); *Application of BellSouth Corp. for Provision of In-Region, InterLATA Services in La.*, 13 FCC Rcd 20599, ¶ 29

properly applied here, likewise require that the plain words of the *Order* excluding first-year films be given their proper meaning and effect.

In its ruling, the Bureau gave great weight to the "includes but is not limited to" phrase in the definition of "Video Programming," concluding that the listed items following this boilerplate – including the reference to films a year or older – are intended to be illustrative rather than exhaustive.[46] But that reading of the phrase is both overbroad and again fails to give proper effect to the plain language adopted by the Commission. It is well-established that general language in a provision may not be read to swallow more specific language.[47] If the Commission intended to make all films subject to compulsory licensing under the Benchmark Condition, the definition of Video Programming would have simply said "Films," and not "Films for which a year or more has elapsed since their theatrical release." The "includes but is not limited to" boilerplate is not a proper basis to disregard the express limiting language that the Commission used in identifying the scope of films covered by the definition. Moreover, DOJ did not use the "includes but is not limited to" boilerplate in its parallel definition of Video Programming.[48] Because the Commission and DOJ intended "consistent" remedies,[49] this further reinforces the conclusion that the appearance of this general language in the

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n.67 (1998) ("[S]tatutes must not be interpreted in a manner that makes an exception mere surplusage.").

46 *Order on Review* ¶ 23.

47 *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.") (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *accord N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006).

48 NBCUniversal Phase 1 Reb. Br. at 4-7; NBCUniversal Phase 1 Clos. Br. at 6-7.

49 DOJ CIS, § II.A.4, at 6-7.

Commission's definition was not intended – and cannot properly be read – to render the express carve-out of first-year films superfluous, as the Bureau has wrongly done. Rather, the definition of "Video Programming" identifies both categories and media of programming. Properly read, the boilerplate "includes but is not limited to" phrase simply allows for new kinds and forms of video programming content to be subject to the Benchmark remedy over the life of the conditions.

The Bureau next attempted to explain the Commission's express reference to "Films for which a year or more has elapsed since their theatrical release" in the definition of Video Programming by adopting PCI's theory – first advanced in the arbitration – that this language was meant to capture older films that may not yet have been digitized for online distribution.[50] This strained reading wrongly turns an express *exclusion* of first-year films into an imagined *inclusion* of decades-old films, and is belied by the extensive transaction-review record. Films have been routinely digitized for many years. It would have been nonsensical for the Commission to refer to films for which only *a year* or more has elapsed since theatrical release for this supposed purpose. Instead, as shown above, the Commission (like DOJ) was fully aware of [redacted] longstanding rights concerning Universal films after their *first year* from theatrical release, which is why the Commission (and DOJ) chose this express language (and time period) for the carve-out. The Bureau's interpretation is an impermissible post-hoc rationalization that is entirely unsupported by anything in the *Order* or transaction-review record.[51] In contrast,

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[50] *Order on Review* ¶ 24 & n.100.

[51] *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Under *State Farm*, an agency's explanation for its decision must be "sufficient to enable [a court] to conclude that [it] was the product of reasoned decisionmaking," and not merely "appellate counsel's *post hoc* rationalizations for agency action," which a court "may not accept." *Id.* at 50, 52.

NBCUniversal's straightforward construction of the first-year film language is amply supported by the Commission's (and DOJ's) thorough consideration of [redacted] longstanding windowing and exclusivity practices, as well as other customary and reasonable industry practices, during the transaction-review process.

The Bureau further erred by concluding that the Commission must have meant to include first-year films under the Benchmark Condition because otherwise the *Order* would give NBCUniversal "significantly greater protection than is necessary for it to meet its obligations."[52] This again improperly substitutes the Bureau's judgment for the policy decisions made by the Commission (and DOJ). It is also factually incorrect.

As shown above, NBCUniversal could suffer [redacted] if it was required under the Benchmark Condition to license newly-released films based on the practices of a peer studio that does not license to [redacted] or does so under different terms and conditions from NBCUniversal.[53] Among other things, [redacted].[54] The Commission – like DOJ – decided that these [redacted] should not be left to proof under the contractual impediment defense in future arbitrations. (That decision has indeed proven to be prescient, since the first arbitrator to confront the issue here found "the pertinent language" in the [redacted] agreements to be [redacted] and was unable to parse these contractual restrictions and assess their applicability during the parties'

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52 *Order on Review* ¶ 20.

53 NBCUniversal Pet. at 15-16 & n.46.

54 *Id.* at n.46.

expedited arbitration proceedings.)[55] Instead, both agencies chose to exclude first-year films from the scope of the Benchmark Condition altogether, precisely so that NBCUniversal would *not* have to relitigate its longstanding obligations to [redacted] subject to potentially inconsistent and erroneous rulings by arbitrators (as occurred in this proceeding), on a case-by-case basis. Indeed, but for the fact that PCI has [redacted] its service, NBCUniversal would have been forced to breach its license agreements with [redacted] and others, subjecting NBCUniversal to [redacted] which PCI would have been required to attempt to [redacted].

Finally, the Bureau wrongly concluded that OVD competition may be harmed if first-year films are excluded from the Benchmark Condition.[56] This again substituted the Bureau's judgment for the policy decisions made by the Commission and DOJ. As the transaction-review record demonstrated, NBCUniversal has been an industry leader in providing content to OVDs.[57] NBCUniversal continues to have every incentive to license films to OVDs, consistent with its obligations to [redacted] and, in fact, offered to do the same to PCI here.[58] Moreover, competition

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[55] Phase 2 Award at 10. The Bureau correctly construed [redacted] contract on review. *See Order on Review* ¶¶ 44-50.

[56] *Order on Review* ¶ 21.

[57] DOJ CIS, § II.D.2.b, at 26-27 (noting NBCUniversal's contribution to the creation and success of Hulu and deals with OVDs such as Apple, iTunes, Amazon, and Netflix).

[58] For example, NBCUniversal originally offered to make this content available to PCI, provided PCI [redacted] PCI only agreed to do so as a [redacted] at the conclusion of the arbitration, and then only [redacted] element. In addition, NBCUniversal from the start was willing to go to [redacted] pursuant to the [redacted] to determine if [redacted] would permit NBCUniversal to provide these early films to PCI. HT 605:16-606:15 (Murray). PCI not only thwarted those

among OVD services offering current films on demand directly to consumers is robust. NBCUniversal already licenses such films to numerous online transactional VOD services (e.g., iTunes, Amazon, Microsoft, Sony, Vudu, Google) that compete with traditional PPV/VOD services.[59] And at least two of the more successful OVD business models identified by the Commission and DOJ during the transaction review, Netflix and Hulu, have gained significant market share by focusing on providing other categories of film and television content (notwithstanding Netflix's recent efforts to obtain more current content).[60] Based on this and other extensive industry evidence compiled during the transaction-review process, the Commission – like DOJ – appropriately exercised its expert judgment in striking a balance that is intended to promote OVD competition while preserving reasonable exclusivity and windowing practices like those reflected in NBCUniversal's longstanding agreements with [redacted]

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efforts but threatened to sue NBCUniversal if it made any such effort "by going to [redacted] and trying to make trouble . . . ." HT 248:9-10 (MacHarg).

[59] *See* Ex. 40A-Z (NBCUniversal's licensing agreements in evidence with VOD/FST services).

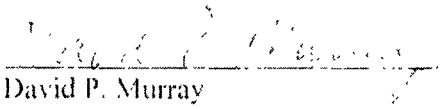
[60] Netflix's online subscription service "primarily consists of relatively recent movies, older movies, and past-season television shows." DOJ CIS, § II.C.2, at 16. Netflix "has grown substantially in the last several years, from 7.5 million subscribers at the end of 2007 to 16.9 million in the third quarter of 2010." *Id.* As the Commission observed in its latest Video Competition Report, Netflix has thrived and developed innovative ways for OVDs to acquire and distribute studios' content, despite the fact that Netflix does not generally offer new major studio films. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, ¶¶ 301-303 (2012) ("*14th Video Competition Report*"). Hulu is another successful ad-supported OVD that, in DOJ's words, "has experienced substantial growth since its launch in 2008, reaching 39 million unique viewers by February 2010." DOJ CIS, § II.C.2; *see also Order* ¶ 63 & n.134. Like Netflix, Hulu does not generally exhibit major studio first-year films either. *See 14th Video Competition Report* ¶¶ 299-300 (discussing range of content available on Hulu, including "full-length movies – often library content several years or decades old").

V. CONCLUSION

For the foregoing reasons, NBCUniversal respectfully requests that the Commission grant its Application for Review and hold that first-year films are expressly excluded from the scope of Video Programming subject to the Benchmark Condition.

Dated: December 13, 2012

Respectfully submitted,



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REDACTED - FOR PUBLIC INSPECTION

CERTIFICATE OF SERVICE

I, Mary Claire B. York, hereby certify that on December 13, 2012, I caused true and correct copies of the enclosed Application for Review to be served by hand delivery to the following.

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