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January 7, 2013

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FILED/ACCEPTED

JAN 7 2013

Federal Communications Commission
Office of the Secretary

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

RE: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56 – Arbitration Award - Ref: Case No. 72 472 E 01147 11 – Redacted - For Public Inspection Version of Project Concord, Inc. Application For Review

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the Project Concord, Inc. Application For Review (“PCI Application For Review”) previously filed on December 13, 2012 subject to a Request For Confidential Treatment, now Redacted - For public Inspection. This filing is being made in connection with the Arbitrator’s 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 Application For Review was filed pursuant to and in accordance with Section VII.E.1. of said Appendix A to the Comcast Order and Section 1.115 of the Commission’s Rules.

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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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)
)
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.
APPLICATION FOR REVIEW

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Dated: December 13, 2012

EXECUTIVE SUMMARY

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

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

When Project Concord entered into an agreement with a peer Film Studio, NBCU refused to enter into a comparable agreement, arguing, among other things, that its existing contracts with other licensees prohibited it from providing Comparable Programming to Project Concord.

An experienced AAA arbitrator focused on the evidence presented and disagreed with Comcast. After evaluating a robust record including: extensive testimony; expert reports and declarations from 4 expert witnesses and 5 fact witnesses; dozens of contracts; numerous briefs; the FCC's Order allowing Comcast to acquire NBCU; and a record of almost 11,000 pages, the

Arbitrator ruled in favor of Project Concord on every substantive issue raised by NBCU, including the argument that its third-party licensing agreements prevented NBCU from provisioning programming to Project Concord for earned payment for any of the [REDACTED]

[REDACTED]

The Arbitrator correctly concluded that NBCU failed to demonstrate that any language contained in any of the dozens of contracts it presented prevents NBCU from distributing such programming through Project Concord's [REDACTED] on a TVOD and EST basis.

The Media Bureau wrongly overturned the Arbitrator on this point. Although there is [REDACTED] [REDACTED] and although the [REDACTED] [REDACTED] the Media Bureau found that if a consumer purchases programming [REDACTED] the exhibition of that programming becomes [REDACTED] under the language of NBCU third-party contracts. The Media Bureau's Order is in error on several points. First, the Media Bureau was factually wrong when it concluded that the peer deal did not have similar provisions. It absolutely does. The peer studio contract contains [REDACTED] [REDACTED] -- and the peer concluded that purchases [REDACTED] [REDACTED] does not result in a violation of this prohibition.

Second, the Bureau also erred in concluding that a consumer [REDACTED] [REDACTED]

[REDACTED] Again, this is factually incorrect. The [REDACTED] [REDACTED] [REDACTED] and the [REDACTED] [REDACTED]

Accordingly, the Media Bureau's decision on this point must be overturned.

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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.)	MB Docket No. 10-56
)	
For Consent to Assign Licenses and Transfer Control of Licenses)	ARBITRATION AWARD Ref: Case No. 72 472 E 01147 11
)	

**PROJECT CONCORD, INC.
APPLICATION FOR REVIEW**

Project Concord, Inc. hereby submits this Application for Review in connection with the Media Bureau’s decision in the above-captioned matter.¹ This proceeding is the first arbitration triggered under the protective Conditions established by the Federal Communications Commission when it allowed the unprecedented combination of Comcast Corporation with NBCU. An experienced AAA arbitrator found in favor of Project Concord with respect to every substantive issue raised over the course of this 93-day proceeding.² The Arbitrator carefully evaluated a robust record including letter briefs; 4 days of evidentiary hearings; extensive testimony, expert reports and declarations from 4 expert witnesses and 5 fact witnesses; and almost 11,000 pages of transcripts and

¹ See *Project Concord, Inc. Claimant, vs. NBCUniversal Media, LLC, Respondent*, Order on Review, MB Docket No. 10-56, DA 12-1829 (November 13, 2012) (“Media Bureau Order”).

² See *Project Concord, Inc. Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Arbitration Award (As Amended) (filed July 11, 2012) (“Arbitration Award”); see also *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238 (2011) (“CNBCU Merger Order”).

documents.³ Based on this record, the Arbitrator ruled in favor of Project Concord on every substantive issue considered in the arbitration. Among the issues considered by the Arbitrator was NBCU’s “contractual impediment” argument, whereby NBCU claimed that certain contracts prevented NBCU from distributing to Project Concord its current films and other content subject to third-party agreements restricting [REDACTED] distribution. The Arbitrator rejected NBCU’s “contractual impediment” defense, and correctly concluded that NBCU could not demonstrate, much less demonstrate by a preponderance of the evidence, that any language contained in any of the dozens of contracts presented by NBCU prevents distribution of its premium film and television content through Project Concord’s [REDACTED] on a transactional video on demand (TVOD) and electronic sell-through (EST) basis using any payment method available there.⁴

The Media Bureau (perhaps because it saw no live product demonstration and, therefore had less information than the Arbitrator) overturned the Arbitrator’s conclusion on this point. The Media Bureau incorrectly concluded that when a consumer purchases content in the Project Concord [REDACTED], that purchase breaches contractual provisions (1) [REDACTED], and [REDACTED]. As detailed below, the Media Bureau is plainly wrong on both of these points, and indeed the Order is wrong on several facts supporting the Bureau’s conclusion. Accordingly, the FCC should reverse the Media Bureau’s erroneous conclusion regarding the viability of Comcast’s “contractual impediment” defense with respect to such purchases, and reinstate the Arbitrator’s decision.

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

⁴ See Arbitration Award at 10. The Arbitrator also rejected Comcast’s arguments that the CNBCU Merger Order did not apply to first-run films. The Media Bureau correctly confirmed this decision. See Media Bureau Order, ¶ 14.

I. BACKGROUND REGARDING PROJECT CONCORD.

Project Concord is an emerging online video distributor that [REDACTED] end of 2012.⁵ Project Concord has developed an [REDACTED] which will feature a transactional video distribution service⁶ competing directly with Comcast's cable television business. Through the [REDACTED], consumers will be able to purchase a range of video programming content, including new release video on demand ("VOD") movies and in-season TV episodes.⁷ Consumers who purchase film and television content distributed through its [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].⁸

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁰ The cost to the consumer is the same. [REDACTED]
[REDACTED]
[REDACTED]

⁵ *Project Concord Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimants Rebuttal Brief To Opening Position Statement of Respondents, Declaration of Sharon Peyer, ¶ 2-3 (dated April 20, 2012) ("Peyer Dec.").

⁶ Peyer Dec. ¶ 3-4.

⁷ Peyer Dec. ¶ 3.

⁸ Peyer Dec. ¶ 5, 10; Hearing Transcript ("HT") 292:16-20 (Smith); HT 357:3-10-359:208 (Peyer).

⁹ HT 292:16-20 (Smith); 357:3-10-359:208 (Peyer).

¹⁰ See *supra* n.9 (testimony of Mr. Smith and Ms. Peyer describing [REDACTED]
[REDACTED])

[REDACTED]¹¹ While such higher potential transaction volumes may be a concern to competitors, the language [REDACTED]

[REDACTED]

Project Concord's [REDACTED] operates under a traditional transactional model: all of its film and television content is offered on an industry-standard transactional VOD and electronic sell-through ("EST") basis.¹² [REDACTED]

[REDACTED]¹³ [REDACTED]

[REDACTED]¹⁴ [REDACTED]

[REDACTED]¹⁵

¹¹ HT 381:12-382:6, 400:11-402:12 (Peyer).

¹² Peyer Dec. ¶¶ 4-5; HT 404:14-18, 411:6-9 (Peyer); HT 423:17-22 (Marenzi).

¹³ HT 291:22-292:20 (Smith).

¹⁴ Peyer Dec. ¶ 7; HT: 289:18-22 (Smith); HT 353:12-19 (Peyer); HT 468:4-7 (Marenzi); HT 499:8-18 (DeVitre).

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

The [REDACTED]

[REDACTED]¹⁶ The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁷ It does not,

however, impact the [REDACTED]

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

During the Arbitration proceedings, NBCU asserted that providing the Comparable Programming to PCI would breach numerous license agreements with [REDACTED] [REDACTED] that prohibit it from licensing [REDACTED] exhibition of current films and television shows and require [REDACTED] for access to such content during certain windows.¹⁸ Upon review of the actual contractual provisions that NBCU contended would be breached, however, the Arbitrator determined that NBCU had not demonstrated any likelihood that such provisions would in fact be breached if NBCU provided the programming to PCI.¹⁹ Accordingly, the Arbitrator rejected NBCU's position and ruled in favor of Project Concord on these points.

The Media Bureau overturned the decision of the Arbitrator regarding the contractual defense raised by NBCU, finding that when a consumer purchases content in the Project Concord

[REDACTED]

¹⁶ Peyer Dec. ¶ 16; HT 316:15-317:2 (Smith); HT 363:10-371:2 (Peyer).

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

¹⁸ See NBCU Petition at 17.

¹⁹ See Arbitration Award at 10-11 (examining specific provisions); Arbitration Award, Phase 1 Decision at 10 ("Phase 1 Decision") (setting forth standard); NBCU Phase 2 Closing Brief, Exhibit A (identifying the specific contract language NBCUniversal asserted would be breached).

[REDACTED] that purchase breaches contractual provisions (1) [REDACTED]

[REDACTED] and (2) [REDACTED]

[REDACTED] According to the Bureau, consumers may purchase content [REDACTED]

[REDACTED]

[REDACTED]

The Media Bureau made several errors in coming to these conclusions. In fact, as detailed below:

A) The Project Concord [REDACTED] is a traditional transactional model. It is not an [REDACTED] [REDACTED] model.

B) Purchases made [REDACTED] do not trigger a violation of third-party agreements prohibiting [REDACTED] exhibition or requiring a [REDACTED]

1) The Media Bureau erred in finding that [REDACTED] exhibition of programming is not prohibited under the Benchmark Agreement; it is specifically prohibited [REDACTED]

[REDACTED]

2) There is [REDACTED]

3) There is [REDACTED]

[REDACTED]

4) Consumers [REDACTED]

5) A [REDACTED] is required by each transaction [REDACTED]

[REDACTED]

[REDACTED]

The Commission must critically examine the record and overturn the Media Bureau's decision regarding the viability of Comcast's contractual impediment defense with respect to purchases paid for by [REDACTED]

A. The Project Concord [REDACTED] Is A Traditional Transactional Model. It is Not An [REDACTED] Model.

The Commission, in setting the Conditions, said that it would not attempt to pre-judge the direction of the rapidly evolving and innovative online video market but instead look to the actions of NBCU's peers to set the market and dictate industry practice. The Media Bureau reversed course and imposed its own view of what is industry practice in this matter.

The peer deal itself – the touchstone for determining PCI's distribution model – confirms that Project Concord is a transactional OVD. The Conditions define "Economic Model" to mean:

the primary method by which the Video Programming is monetized (e.g., ad-supported, subscription without ads, subscription with ads, electronic sell through ("EST") or PPV/TVOD) reflected in the terms of the agreement(s) for the Comparable Programming.²⁰

The Benchmark Agreement, which was executed by [REDACTED] division, licenses programming to PCI's [REDACTED] on a transactional VOD and EST basis.²¹ Both the title and the rights granted under the agreement reflect [REDACTED] standard transactional VOD and EST licensing practices.²² [REDACTED] long ago independently confirmed in a letter intended for third parties to rely upon in conducting their business affairs that its [REDACTED] division granted to PCI a non-exclusive license to distribute on an Internet TVOD basis "current and library motion pictures" and, on an EST basis "current season and library season television programs within the United States on the 'Project Concord'-branded Internet VOD and EST residential video distribution service."²³ Indeed, had [REDACTED] considered the Project Concord [REDACTED]

²⁰ CNBCU Merger Order at 4357 (App. A, § I) (emphasis added).

²¹ See Phase 1 DeVitre Rep. ¶ 14; HT 481:14-482:18 (DeVitre) (April 25, 2012).

²² See Phase 1 DeVitre Rep. ¶ 20; HT 481:14-484:18 (DeVitre) (April 25, 2012).

²³ Letter from [REDACTED] to Project Concord, Inc. (dated [REDACTED] [REDACTED] (Exhibit 110 in Arbitration Record); see also Arbitration Award at 7 (citing to letter).

[REDACTED] model, an entirely different division of [REDACTED] would have had responsibility for negotiating and executing an agreement with PCI.²⁴

Moreover, there are many attributes of the Benchmark Agreement that clearly define it as a TVOD/EST licensing agreement. These characteristics include, for example, that (1) [REDACTED]

[REDACTED] (2) [REDACTED]

[REDACTED] (3) [REDACTED]

[REDACTED] (4) [REDACTED]

[REDACTED] (5)

[REDACTED]

[REDACTED] and (5) [REDACTED]

[REDACTED]

[REDACTED]²⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁶ [REDACTED]

²⁴ Phase 1 DeVitre Rep. ¶ 14; HT 480:16-22 (DeVitre) (April 25, 2012); *see also* PCI Phase 1 Opening Brief at 14 (April 17, 2012).

²⁵ *Project Concord Inc., Claimant vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimants Rebuttal Brief To Opening Position Statement of Respondents, Declaration of Lawrence Smith at 8, ¶ 6 (dated April 20, 2012) (“Smith Dec.”); *see also* DeVitre Report ¶¶ 15-17.

²⁶ Phase 1 DeVitre Rep. ¶ 18; Marenzi Report ¶ 5, HT 526:15-22 (DeVitre) (April 25, 2012); *see also* PCI Phase 1 Post Hearing Brief at 14-15 (April 17, 2012).

[REDACTED]

[REDACTED]²⁷

By contrast, an [REDACTED] model has very different characteristics. In an [REDACTED] model, the [REDACTED] pays the content provider directly.²⁸ An online, [REDACTED] video on demand services require no upfront fee or any other payment to view content. [REDACTED] “in stream” in each TV episode or movie and cannot be skipped; viewers have to watch the [REDACTED] in order to begin or to continue to view the content; and content offerings are strictly limited and do not include first run movies.²⁹ Licenses to [REDACTED] are typically exclusive for current TV episodes (for example, [REDACTED] [REDACTED] do not reflect output availability of first run films and include mostly library film content that is many years past the first home video digital distribution window.³⁰

B. Purchases Made [REDACTED] Do Not Trigger a Violation of Third-Party Agreements Prohibiting [REDACTED] Exhibition or Requiring a [REDACTED]

The Bureau found that customers may purchase any content [REDACTED] [REDACTED] without a violation. However, the Bureau erroneously concluded that if a customer [REDACTED] that purchase violates third-party contracts prohibiting [REDACTED] exhibition of content. According to the Media Bureau, if the customer [REDACTED]

²⁷ Phase 1 DeVitre Rep. ¶ 19; HT 527:1-11 (DeVitre) (April 25, 2012); *see also* PCI Phase 1 Post-Hearing Brief at 15 (April 17, 2012).

²⁸ HT 442:16-443:3 (Marenzi).

²⁹ Smith Dec. at 1, ¶ 3. *See also* Marenzi Expert Report at 3, ¶ 11 [REDACTED]
[REDACTED]

³⁰ Phase 1 DeVitre Rep., ¶¶ 16-17.

██████████ the customer cannot use those dollars to purchase content ██████████ if that content is restricted by contractual provisions prohibiting ██████████ exhibition and requiring a ██████████ for purchasing the content. According to the Media Bureau, dollar-denominated ██████████ are not ██████████ and because the dollars for those purchases ██████████ ██████████ the exhibition of those programs becomes ██████████ As detailed below, those conclusions are incorrect.

1. **The Media Bureau erred in finding that ██████████ exhibition of programming is not prohibited under the Benchmark Agreement; it is specifically ██████████**

As noted by the Media Bureau, the Commission stated that in evaluating the contractual impediment defense, it is relevant to review the “contracting practices of peer companies.”³¹ The Bureau struggled to rationalize why NBCU’s peer, ██████████ would allow Project Concord customers to ██████████ ██████████ while NBCU’s other licensees supposedly would not. Significantly, and inexplicably, the Bureau found that Project Concord’s Benchmark Agreement with ██████████ “does not clearly prohibit all ██████████ exhibition of ██████████ programming.”³² In fact, the Benchmark Agreement ██████████ ██████████

³¹ Media Bureau Order at n.63; *see also* CNBCU Merger Order at App. A., § IV.B.1 (discussing CNBCU Merger Order Conditions).

³² Media Bureau Order, ¶ 36.

the exhibition of the programming becomes [REDACTED] pursuant to NBCU third-party agreements.⁴¹ This is wrong and should be overturned. Dollars are dollars, regardless of how they are earned. The Media Bureau in its decision implies that because consumers may [REDACTED]

[REDACTED]
[REDACTED] The Media Bureau seems to conclude that because [REDACTED]
[REDACTED]
[REDACTED] that are made with [REDACTED] must turn the [REDACTED]
[REDACTED] into a distribution service that constitutes [REDACTED] as defined in certain NBCU third-party contracts. This is simply not true.

The Media Bureau points to language in the NBCU agreement with [REDACTED] in support of its conclusion that certain programming becomes [REDACTED] if it is purchased with [REDACTED]

[REDACTED]⁴² The [REDACTED] agreement with NBCU requires that the [REDACTED]
[REDACTED]
[REDACTED].⁴³ Purchases made with [REDACTED] fall squarely outside of [REDACTED] which provides:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴¹ See Media Bureau Order, ¶¶ 33, 41.

⁴² The Media Bureau also points to the provisions of other specific contracts in support of its conclusion. See Media Bureau Order, ¶¶ 51-52, 53-57, 58-60.

⁴³ [REDACTED] see also PCI Phase 2 Closing Brief at 14.

[REDACTED]

The [REDACTED] defines [REDACTED]

[REDACTED]

[REDACTED]⁴⁵ Critically, a [REDACTED]

[REDACTED]⁴⁶ Transactions [REDACTED] meet this test.

This exception is consistent with the common industry view that [REDACTED]

[REDACTED]

[REDACTED]⁴⁸

Despite this plain language, the Media Bureau came to the opposite conclusion than that of [REDACTED] and the Arbitrator. Instead, the Media Bureau decided that the [REDACTED]

⁴⁴ [REDACTED] (emphasis supplied). See also PCI Phase 2 Closing Brief at 14-15 (June 7, 2012).

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ DeVitre Report ¶ 32.

⁴⁸ Wunderlich Report ¶ 8.c.i.; PCI Phase 1 Post-Hearing Brief at 17 (May 4, 2012).

[REDACTED]⁴⁹ that even though (1) [REDACTED]
[REDACTED]

and (2) [REDACTED]

[REDACTED] Not only is this conclusion contrary to the plain language of the third-party contracts at issue, but this conclusion also defies common sense, and does not withstand a closer examination of the independent operations of the [REDACTED]

Although the Media Bureau states that this factor is non-dispositive, the Bureau also points to a technology patent application made by Project Concord several (at least 3) years ago referring to “ad-supported payment” – not [REDACTED] as support for its conclusion.⁵⁰ The patent application has nothing to do with how aspects of Project Concord’s technology may be implemented for content distribution purposes. However, even if it did, there still would be no [REDACTED] [REDACTED] of content distributed through Project Concord’s [REDACTED]

3. **There is** [REDACTED]
[REDACTED]

According to the Media Bureau, the [REDACTED]
[REDACTED] which then causes the Media Bureau to conclude that because a consumer can [REDACTED]
[REDACTED] that content becomes [REDACTED] In actuality, the [REDACTED] is [REDACTED] from the [REDACTED] and accordingly, this conclusion must fail.

The [REDACTED]
[REDACTED]

⁴⁹ Media Bureau Order, ¶ 34.

⁵⁰ See Media Bureau Order, ¶ 40.

[REDACTED]

[REDACTED]⁵¹

If a consumer elects to [REDACTED]

[REDACTED]

[REDACTED] the [REDACTED] – the [REDACTED] does not pay Project Concord.

[REDACTED]

[REDACTED]⁵² [REDACTED]

[REDACTED]

[REDACTED]⁵³ [REDACTED]

[REDACTED] In addition, the [REDACTED]

[REDACTED]

[REDACTED]⁵⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁵ Generally, [REDACTED]

can [REDACTED]

[REDACTED] However, even if a viewer consumes [REDACTED]

[REDACTED]

⁵¹ Marenzi Expert Report at 4, ¶13.

⁵² Peyer Dec. ¶ 16; HT 298:15-299:12 (Smith); HT 355:10-356:1 (Peyer).

⁵³ Peyer Dec. ¶¶ 4, 7; HT; 355:10-356:1 (Peyer); HT 409:11-21; 410:10-411:22 (Peyer); Marenzi Expert Report at 4, ¶ 13.

⁵⁴ Peyer Dec. ¶¶ 21-22; HT 370:13-372:19 (Peyer); HT 497:10-498:1 (DeVitre).

⁵⁵ Peyer Dec. ¶ 23; HT 354:4-18 (Peyer); HT 363:13-366:14; HT 412:9-18 (Peyer).

[REDACTED]

Significantly, it is not even necessary for consumers to ever [REDACTED]

[REDACTED] The [REDACTED]

[REDACTED]⁵⁶ Consumers can purchase content [REDACTED]

[REDACTED]⁵⁷ Indeed, as already

discussed, consumers can [REDACTED]

[REDACTED]

[REDACTED]⁵⁸ Accordingly, the Media Bureau erred in finding that “the primary

method” by which the Project Concord service “is monetized is through [REDACTED]

[REDACTED]⁵⁹ No consumer is [REDACTED]

[REDACTED]⁶⁰ [REDACTED]

[REDACTED]

[REDACTED]⁶¹ Project Concord does not [REDACTED]

[REDACTED]⁶²

Despite the overwhelming evidence of [REDACTED] the Bureau

reasoned that the [REDACTED]

⁵⁶ Peyer Dec. ¶¶ 4-5, 16; *see also* HT 395:5-17 (Peyer).

⁵⁷ *Id.*

⁵⁸ Peyer Dec. ¶¶ 4, 14; HT 289:19-22 (Smith); HT 292:12-20 (Smith); HT 312:10-18 (Smith); HT 360:2-14 (Peyer).

⁵⁹ Media Bureau Order at n.162, ¶ 34.

⁶⁰ Peyer Dec. ¶ 23; HT 412:9-18 (Peyer); 523:9-524:5 (DeVitre).

⁶¹ Peyer Dec. ¶¶ 4, 7; HT; 355:10-356:1 (Peyer) (April 25, 2012); HT 409:11-21; 410:10-411:22 (Peyer) (April 25, 2012); Marenzi Expert Report at 4, ¶ 13.

⁶² Peyer Dec. ¶¶ 16, 18; HT 380:17-19 (Peyer).

because consumers can, if they choose to do so, [REDACTED]
[REDACTED]⁶³ This fact does
not make the [REDACTED] - they are
[REDACTED]

Based on the (wrong) conclusion that the [REDACTED]
[REDACTED] the Media Bureau then also concludes that consumers making purchases [REDACTED]
[REDACTED]

[REDACTED] As discussed below, each of these conclusions is not supported by
the facts.

4. Consumers [REDACTED] through the [REDACTED]

The Media Bureau states that the [REDACTED]
[REDACTED] is somehow not [REDACTED].⁶⁴ This is incorrect. The Media Bureau apparently
reached this result based on its erroneous conclusion that when [REDACTED]
[REDACTED] and when the consumer [REDACTED]
[REDACTED] they somehow are [REDACTED] and so, continues the Media
Bureau, "[REDACTED]"⁶⁵

Of course the [REDACTED] is [REDACTED]. The fact that an [REDACTED]
[REDACTED] It is unclear why the
Media Bureau chose to refer to the term [REDACTED] in quotes [REDACTED]"⁶⁶
That money is indistinguishable from [REDACTED]

⁶³ Media Bureau Order, ¶ 34.

⁶⁴ Media Bureau Order, ¶ 39.

⁶⁵ MB Order, ¶ 45; *see also id.*, ¶ 46 [REDACTED]
[REDACTED]

⁶⁶ *See, e.g.*, Media Bureau Order, ¶¶ 31, 32, 34, 35, 38, 39, 41.

[REDACTED] and the consumer does incur a charge [REDACTED] when he spends it. Additionally, contrary to the Media Bureau's finding,⁶⁷ users can indeed [REDACTED]. Perhaps because he saw a live demonstration of this fact, the Arbitrator did not find, as the Media Bureau did (the Media Bureau did not see a live product demonstration), that [REDACTED].

Moreover, the Bureau's conclusions are based on a fundamentally wrong understanding of the [REDACTED]. The Bureau erred in finding that consumers choosing to [REDACTED].⁶⁸ In fact, consumers opting to [REDACTED] that will ultimately be [REDACTED].

Permitting consumers to [REDACTED] was always clearly contemplated, from the beginning, by Project Concord and explicitly communicated to CNBCU. Consumers do not merely [REDACTED] – they [REDACTED] that, [REDACTED], Project Concord intends the [REDACTED].⁶⁹

⁶⁷ See Media Bureau Order, ¶ 31.

⁶⁸ Media Bureau Order, ¶ 35 [REDACTED]; see also *id.*, ¶ 32 [REDACTED]; ¶ 45 [REDACTED]. The Bureau similarly erred in finding that [REDACTED]. *Id.*, ¶ 34.

⁶⁹ HT 294:22 – 296:17 (Smith) (“Q [from NBCU’s counsel]: Let me ask you this. [REDACTED] A: They are [REDACTED] (emphasis added).”)

As the Media Bureau acknowledges, similar characteristics are not uncommon among NBCU licensees.⁷⁰ For example, [REDACTED]
[REDACTED].⁷¹ The Media Bureau distinguished [REDACTED] on the basis that the [REDACTED] are “purchased” using a credit card or cash.⁷² But even that is incorrect. [REDACTED], which can be used to purchase current films and television episodes, also can be accumulated “[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁷³ As a second example, [REDACTED]

[REDACTED]
[REDACTED] Significantly, both [REDACTED] and [REDACTED] also [REDACTED].⁷⁴
The [REDACTED]

[REDACTED]
[REDACTED] Yet, NBCU presented no evidence [REDACTED]
[REDACTED] While the Media Bureau attempts to distinguish

⁷⁰ Media Bureau Order, ¶ 39; *see also* HT 250:1-22, 280:4-289:7 (Smith); HT 361:1-12, 389:9-19 (Peyer); Smith Dec. at 16-19 (screen shot of [REDACTED] page 20-22 (other examples of [REDACTED] pages 25- 27(explaining that [REDACTED] *see also* HT 276:21-285:12, 285:18-289:8 (Smith).

⁷¹ Smith Dec. at 25-27.

⁷² Media Bureau Order, ¶ 39.

⁷³ Smith Dec. at 25- 27.

⁷⁴ *See* HT 250:1-6, 17-22 (Smith); HT 284:4-14 (Smith).

Peyer specifically stated: "In the future, we also hope to make it possible to [REDACTED]

[REDACTED]⁸⁰ Peyer also explained this objective during the Arbitration, stating:

[REDACTED]⁸¹

And, as explained during the Arbitration, when CNBCU counsel asked Lawrence Smith, PCI's Vice President of Content, whether a consumer could [REDACTED], Mr. Smith explained:

[REDACTED]⁸²

Mr. Smith continued by explaining: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸³ When asked by opposing counsel whether such a [REDACTED] existed at that specific time, Mr. Smith emphasized that [REDACTED]⁸⁴ [REDACTED]

⁸⁰ Peyer Dec., ¶ 18, dated April 20, 2012 (emphasis added).

⁸¹ HT 385:13 – 386:20 (emphasis added).

⁸² HT 299:15 – 300:2 (Smith) (emphasis added).

⁸³ HT 301:11-17 (Smith) (emphasis added).

⁸⁴ See HT 301:19-20 (Smith) ("Q [from opposing counsel]: "But that [REDACTED] A: We haven't [REDACTED]"; see also HT 335:8-14 (Smith) ("Q [from opposing counsel]: "I [REDACTED] A: [REDACTED]." Q: But I can [REDACTED] A: [REDACTED] (emphasis added).

[REDACTED] In his written testimony, Mr. Smith explicitly stated, [REDACTED]
[REDACTED]
[REDACTED]⁸⁵

Additional evidence that the [REDACTED] is [REDACTED] is
that the [REDACTED]
[REDACTED]

[REDACTED] Even if Project
Concord did not plan to ultimately [REDACTED]
[REDACTED], and [REDACTED] this is not dispositive. Consumers cannot use their PayPal
accounts to buy a cup of coffee at Starbucks, and many retailers do not accept certain credit cards.

Finally, the Media Bureau implies that it is somehow a bad thing that Project Concord's
business model is [REDACTED]⁸⁶ To the
contrary, however, studios such as NBCU directly benefit if Project Concord is able to [REDACTED]
[REDACTED] Rather than lose this
revenue, Project Concord encourages the [REDACTED] viewing of content while increasing the amount of
total revenue captured for the studios.⁸⁷

5. A [REDACTED] is required by each transaction.

Based on its view that a consumer's [REDACTED] the Media Bureau
erroneously found that a consumer's purchase of NBCU content [REDACTED]
[REDACTED] violates provisions in NBCU third-party contracts, [REDACTED]

⁸⁵ Smith Dec., ¶ 11 (emphasis added).

⁸⁶ Media Bureau Order at n.156 ("It is clear from the record, however, that PCI intends to [REDACTED]
[REDACTED] [REDACTED]").

⁸⁷ HT 400:7-10 (Peyer) [REDACTED]
[REDACTED]

[REDACTED].⁸⁸ It is important to emphasize that [REDACTED]

[REDACTED]

[REDACTED]⁸⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁹⁰

In determining that [REDACTED] violates the [REDACTED] or [REDACTED] provisions of various contracts, the Media Bureau analyzed NBCU's agreements with [REDACTED].⁹¹ The Media Bureau then stated that its same reasoning applies to other contracts as well.⁹² The [REDACTED] agreement specifies that [REDACTED]

[REDACTED]

[REDACTED]⁹³ The [REDACTED] agreement simply defines [REDACTED]

[REDACTED]

[REDACTED]⁹⁴

⁸⁸ Media Bureau at 28, ¶¶ 42, 46.

⁸⁹ HT 353:12-19 (Peyer); Peyer Dec. ¶ 7; HT: 289:18-22 (Smith); HT 353:12-19 (Peyer); HT 468:4-7 (Marenzi); HT 499:8-18 (DeVitre).

⁹⁰ Peyer Dec. ¶¶ 5, 7-9; HT 289:19-22, 290:6-8, 305:3-12, 312:10-313:2 (Smith); HT: 357:3-10; 402:6-12, 410:14-411:11 (Peyer); HT 353:12-19 (Peyer).

⁹¹ See Media Bureau Order, ¶¶ 44-52. The Media Bureau also points to the provisions of other specific contracts in support of its conclusion. See Media Bureau Order, ¶¶ 53-57, 58-60.

⁹² See Media Bureau Order, ¶¶ 55, 57, 60-61.

⁹³ [REDACTED]

⁹⁴ Mad. Sec. Decl. ¶ 14, quoting [REDACTED]

Despite these factors, the Media Bureau states, however, that [REDACTED]

[REDACTED]

[REDACTED]¹⁰¹ This appears to be the crux of the Bureau's argument. And this is a non sequitur. The relevant contracts do not make any distinctions between or among the ways in which [REDACTED]

In summary, as demonstrated by the evidence, including a review of NBCU's contracts with its licensees, review of the testimony presented by fact witnesses and experts, and a review of Project Concord's service, it is clear that [REDACTED] available in PCI's [REDACTED] is all that any of those contracts requires – irrespective of how the consumer [REDACTED] and irrespective of whether that money is in the form of [REDACTED]

[REDACTED] Accordingly, the Arbitrator properly concluded that NBCU failed to carry its burden of proving its Contractual Impediment Defense.¹⁰²

III. PRACTICAL ISSUES ASSOCIATED WITH THE MEDIA BUREAU DECISION.

In addition to wrongly concluding that licensing certain film and television content to Project Concord would constitute a breach of specific NBCU licensing agreements, the Bureau further concluded that “[t]o the extent that NBCU has additional contracts that contain restrictions similar to those discussed [in the Order] . . . we likewise find that the provision of such programming content to PCI would constitute a breach of those contracts to the extent they are

to other permissible services such as [REDACTED] or [REDACTED]. But this language does not alter the fundamental fact that the consumer still must pay and the studio still receives actual money.

¹⁰¹ Media Bureau Order, ¶ 35.

¹⁰² Arbitration Award at 3, 10.

permitted under the condition.”¹⁰³ The Bureau, however, made this conclusion with respect to the potential breach of additional, unspecified contracts without establishing any procedure to verify the terms of any such contracts, much less a breach of those terms. If the terms of such contracts are not already included in the Arbitration record, the Bureau’s conclusion would place Project Concord in the untenable position of having to simply take NBCU at its word as to the restrictions contained in other contracts. Accordingly, while the Commission is evaluating the Application for Review, Project Concord requests that the Commission establish a formal process through which Project Concord’s outside counsel is permitted to review any additional contracts that NBCU claims would be breached under the Media Bureau’s analysis.

IV. CONCLUSION.

Content purchased in the Project Concord [REDACTED] does not become [REDACTED] when the purchase is made with [REDACTED]. Neither the peer agreement nor NBCU’s third-party contracts [REDACTED] that consumers use to purchase Video Programming. How any consumer earns his money is – and should be – irrelevant. There is [REDACTED]. The [REDACTED] and the [REDACTED] are [REDACTED]. Consumers [REDACTED] in the [REDACTED]. Consumers purchasing content [REDACTED].

¹⁰³ Media Bureau Order, ¶ 61 (emphasis added); *see also id.*, ¶¶ 55, 57, 60.

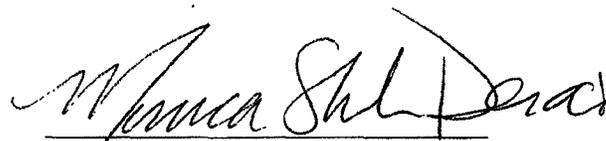
REDACTED - FOR PUBLIC INSPECTION

Accordingly, the Commission must affirm the Arbitrator's decision and overturn the Media Bureau's decision to prohibit consumers from [REDACTED] to purchase certain content [REDACTED]

Respectfully submitted,

Project Concord, Inc.

By:



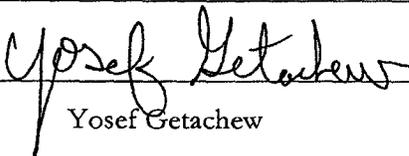
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Dated: December 13, 2012

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 13th of December, 2012, a copy of the foregoing "Project Concord, Inc. Opposition To NBCU " has been served by hand delivery or electronically and first-class mail, postage pre-paid, on the following:

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