

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

In the Matter of)	
)	
Applications of Comcast Corporation,)	MB Docket No.10-56
General Electric Company)	
And NBC Universal, Inc.)	
)	
For Consent to Assign Licenses and)	
Transfer Control of Licensees)	

**OPPOSITION OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC
TO CONTENT COMPANIES' APPLICATION FOR REVIEW**

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 303-1000

*Counsel for Comcast Corporation and
NBCUniversal Media, LLC*

January 18, 2013

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION & SUMMARY	1
II. THE <i>CLARIFICATION ORDER</i> DOES NOT MODIFY THE <i>C-NBCU ORDER</i> BUT RATHER MERELY ADDRESSES A PROCEDURAL STEP IMPLICIT IN THE BENCHMARK CONDITION.	4
A. NBCUniversal’s Real-World Experience Under the Benchmark Condition Demonstrates That The Bureau’s Clarification Was Necessary.....	4
B. The <i>Clarification Order</i> Will Not Make Disclosure of Peer Deals More “Routine” Under the Benchmark Condition.	6
C. The <i>Clarification Order</i> Does Not “Fundamentally Alter” the <i>C-NBCU Order</i>	7
III. THE OTHER GROUNDS ASSERTED BY THE CONTENT COMPANIES FOR REVERSAL OF THE <i>CLARIFICATION ORDER</i> ARE BASELESS.....	13
A. The Clarification Request Was Not an Untimely Petition for Reconsideration of the <i>C-NBCU Order</i>	13
B. The Bureau Had Authority to Grant the Clarification Request.	14
C. The Benchmark Condition Does Not “Abrogate Contracts” and Disclosure of Peer Agreements Is Consistent with the Commission’s Authority and Public Policy.	15
D. The <i>Clarification Order</i> and Benchmark Condition Do Not Constitute a Regulatory Taking.	17
E. The “Analogous Situations” Cited by the Content Companies Are In Fact Irrelevant.	19
F. The <i>Clarification Order</i> Does Not Violate the Trade Secrets Act.	20
IV. CONCLUSION	23

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

In the Matter of)	
)	
Applications of Comcast Corporation,)	MB Docket No.10-56
General Electric Company)	
And NBC Universal, Inc.)	
)	
For Consent to Assign Licenses and)	
Transfer Control of Licensees)	

**OPPOSITION OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC
TO CONTENT COMPANIES’ APPLICATION FOR REVIEW**

Comcast Corporation (“Comcast”) and NBCUniversal Media, LLC (“NBCUniversal”) hereby oppose the Application For Review (“AFR”) submitted by CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (collectively, the “Content Companies”), and Public Knowledge’s supporting comments, in the above-captioned docket.¹ For the reasons below, the AFR lacks merit and should be denied.

I. INTRODUCTION & SUMMARY

In the AFR, the Content Companies object to the *Clarification Order* on the erroneous premise that it expands the required disclosure of their highly confidential programming agreements with an online video distributor (“OVD”) if the OVD invokes the Benchmark

¹ Application For Review of Media Bureau Order DA 12-1950 of CBS Corp., News Corp., Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company, MB Docket No. 10-56 (Jan. 3, 2013) (“AFR”); Public Knowledge, Comment Supporting Application for Review of Media Bureau Order DA 12-1950, MB Docket No. 10-56 (Jan. 9, 2013).

Condition in the *Comcast-NBCUniversal Order*.² In fact, the Media Bureau (or “Bureau”) correctly found that the Benchmark Condition already requires such disclosure. The Content Companies are designated as peers of NBCUniversal, and the Benchmark Condition mandates that NBCUniversal match a Content Company’s agreement with an OVD (“peer deal”) by offering comparable programming on economically equivalent rates, terms, and conditions.³ It is self-evident that NBCUniversal cannot comply with this mandate without some appropriate access to the peer deal. The Department of Justice (“DOJ”) adopted the same benchmark remedy and explicitly requires disclosure of a peer deal.⁴ The potential for such disclosure, therefore, has been apparent since both agencies adopted the remedy two years ago. Indeed, certain Content Companies raised these same concerns during the transaction review process. The Commission considered and rejected those arguments in adopting the Benchmark Condition.

The Bureau also correctly determined that the Commission intended to promote compliance with the Benchmark Condition through commercial negotiations whenever possible, with arbitration only as a last resort. The *Clarification Order* fleshes out a necessary procedure for NBCUniversal to obtain access to a peer deal at the outset of the benchmark process,

² *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Order, DA 12-1950 (MB Dec. 4, 2012) (“*Clarification Order*”); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion & Order, 26 FCC Rcd. 4238, app. A, § IV.A.2.b (2011) (“*C-NBCU Order*”).

³ To be a “Qualified OVD” eligible to seek relief pursuant to the Benchmark Condition, the OVD must “ha[ve] 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.” See *C-NBCU Order*, app. A, § 1 (definitions of “Qualified OVD” and “Benchmark Condition” and identifying Content Companies as broadcast, cable, and studio peers).

⁴ *United States v. Comcast Corp.*, No. 11-0106, Final Judgment, §§ II, IV.B (D.D.C. 2011) (“DOJ Final Judgment”).

consistent with the Commission’s objectives. Without this procedural guidance, experience proves that NBCUniversal and OVDs would be forced into costly and burdensome arbitration in every case.

Although NBCUniversal respects the Content Companies’ concerns about the confidentiality of their OVD contracts, the Bureau fully considered and addressed these legitimate interests by adopting stringent, well-established confidentiality restrictions in the Third Protective Order for Compliance (“C3PO”) accompanying the *Clarification Order*. These restrictions limit disclosure of a peer deal to outside counsel and experts not involved in competitive decision-making. The Bureau refused to authorize disclosure of a peer deal to even a limited number of senior NBCUniversal business executives, as NBCUniversal requested. These are the exact same restrictions that the Commission adopted in its Model Protective Order (“MPO”) for the disclosure of other highly confidential third party agreements in arbitrations under the Benchmark Condition. The Content Companies have previously *embraced* these same restrictions for that purpose.⁵

At bottom, the Content Companies’ objections go to the wisdom of the Benchmark Condition itself. This attempt to second-guess the Commission’s (and DOJ’s) policy decisions is untimely and, in all events, provides no justification for reversing the mere procedural guidance set forth in the *Clarification Order*.⁶ The AFR, therefore, should be denied.

⁵ See *Clarification Order* ¶ 20 n.60 (noting that the Content Companies have supported the use of confidentiality protections in the context of arbitration proceedings that are fully consistent with the C3PO); see also *id.* ¶ 24 (explaining that the *Clarification Order* fully comports with the *C-NBCU Order*).

⁶ The Content Companies’ AFR, in effect, would have the Commission re-open the transaction proceeding to reconsider the Benchmark Condition. See AFR at 4 n.15 (“[I]t is now clear that the provision governing production of peer contracts in the Merger Decision is unacceptable and should be removed . . .”). Although Comcast and NBCUniversal have consistently explained why no such condition is necessary, the Commission (like DOJ) has

II. THE CLARIFICATION ORDER DOES NOT MODIFY THE C-NBCU ORDER BUT RATHER MERELY ADDRESSES A PROCEDURAL STEP IMPLICIT IN THE BENCHMARK CONDITION.

The Content Companies have not established any basis for the Commission to reverse the *Clarification Order*.⁷ Far from “fundamentally altering” the Benchmark Condition, as the Content Companies wrongly contend, the *Clarification Order* simply sets forth a process for NBCUniversal to obtain limited access to a peer deal. By clarifying this procedural step, which is implicit in the *C-NBCU Order* itself, the *Clarification Order* furthers the Commission’s objectives of providing OVDs efficient access to NBCUniversal programming and promoting the continued development of the online video marketplace.⁸

A. NBCUniversal’s Real-World Experience Under the Benchmark Condition Demonstrates That The Bureau’s Clarification Was Necessary.

The Content Companies attempt to frame their AFR by suggesting that the *Clarification Order* was unnecessary because NBCUniversal has been able to comply with the Benchmark Condition “without the need for . . . disclosure” of peer deals.⁹ Using selected quotes from Comcast’s and NBCUniversal’s February 2012 Annual Compliance Report, the Content Companies assert that NBCUniversal has negotiated numerous benchmark agreements with OVDs without disclosure of a peer deal or resort to arbitration.

reached a different conclusion and imposed mandatory licensing obligations that NBCUniversal cannot satisfy without some reasonable access to a peer deal. The *Clarification Order* simply fills in the details for that mandated process.

⁷ As further discussed herein, the *Clarification Order* does not (i) conflict with statute, regulation, case precedent, or established Commission policy; (ii) involve a question of law or policy which the Commission has not previously resolved; (iii) involve application of precedent or policy that should be overturned or revised; (iv) involve an erroneous finding as to an important or material question of fact; or (v) involve a prejudicial procedural error. *See* 47 C.F.R. § 1.115.

⁸ *See C-NBCU Order* ¶¶ 87-88.

⁹ AFR at 5.

In reality, NBCUniversal's experience has been exactly the opposite. As the Compliance Report makes clear (when read in proper context), NBCUniversal has negotiated several OVD agreements *independent* of the Benchmark Condition.¹⁰ No peer deal was involved in any of these transactions. But, to date, each time an OVD has invoked the Benchmark Condition to gain access to NBCUniversal programming based on a peer deal, the lack of any access to the benchmark agreement has impeded negotiations and led to arbitration proceedings.¹¹

This result should not be surprising to anyone. When an OVD invokes the Benchmark Condition to demand comparable programming, NBCUniversal is not required simply to take the OVD's word about the peer deal or to try blindly to divine how it might be constructed. Plainly, NBCUniversal cannot match the rates, terms, and conditions of a peer deal, as the Benchmark Condition requires, without some appropriate access to it.¹²

¹⁰ See *id.* at 5, 7. The pertinent part of the Compliance Report reads as follows: "During the Reporting Period, the Retained Networks have not received requests for online video programming distribution licenses from MVPDs or Online Video Distributors ('OVDs') pursuant to this Condition. NBCUniversal, however, has received many such requests from OVDs for film, broadcast, and cable programming. *Some OVDs have specifically sought to obtain online video programming distribution licenses under the terms of the Conditions.* The majority of these OVDs have relied on the so-called 'Benchmark Condition.' A minority have sought a 'Full Freight' or 'MVPD Price' offer. *In other cases, OVDs have made requests outside the context of the Conditions. In fact, NBCUniversal has negotiated and executed license agreements with several OVDs on mutually agreeable commercial terms without resort to the specific processes of the Conditions.*" Comcast Corp. and NBCUniversal Media, LLC, Annual Report for Compliance with Transaction Conditions, MB Docket No. 10-56, at 8-9 (Feb. 28, 2012) ("Compliance Report") (emphasis added).

¹¹ The Commission receives confidential summaries of these disputes, pursuant to the Benchmark Condition. See *C-NBCU Order*, app. A, §§ VII.A.4, 8, 10.

¹² NBCUniversal may view a peer deal very differently from what an OVD has represented it to be. Even where an OVD in good faith claims that its proposals are materially the same as a peer deal, what NBCUniversal views as "material" under its contracts may be vastly different from what the OVD believes is "material" under its deal with the peer.

The Bureau correctly found that the lack of any such access to peer deals prior to arbitration proceedings has significantly impeded NBCUniversal's ability to comply with the Benchmark Condition and added undue burdens and costs to NBCUniversal and OVDs.¹³ That reality is far different from the picture the Content Companies attempt to paint in the AFR, and is certainly not the result that the Commission intended when it adopted the Benchmark Condition. The *Clarification Order*, therefore, is critically necessary to address the appropriate process for NBCUniversal to obtain timely access to peer deals while protecting the Content Companies' legitimate confidentiality interests in the agreements.

B. The *Clarification Order* Will Not Make Disclosure of Peer Deals More “Routine” Under the Benchmark Condition.

The Content Companies also wrongly claim that the *Clarification Order* will make disclosure of peer deals more “routine” under the Benchmark Condition.¹⁴ This argument is based on the same unreasonable premise that NBCUniversal should be expected to match the rates, terms, and conditions of a peer deal without ever seeing it.

It is impossible for NBCUniversal to comply with the Benchmark Condition without some appropriate access to a qualifying peer deal. The Content Companies begrudgingly acknowledge that a peer deal would be disclosed after arbitration proceedings commence.¹⁵ The *Clarification Order* merely addresses a process for disclosure of a peer deal before arbitration, which will allow NBCUniversal and OVDs to achieve comparable agreements more efficiently and fairly.¹⁶ Nothing in the *Clarification Order* will change the frequency of peer deal disclosures. Whether they occur at the outset of a benchmark demand or during arbitration, the

¹³ See *Clarification Order* ¶ 11.

¹⁴ See, e.g., AFR at 6.

¹⁵ See *id.* at 4 n.15.

¹⁶ See *Clarification Order* ¶ 11.

same parties (i.e., outside counsel and experts) would be granted access to a peer deal, with the same frequency, and subject to the same stringent protections. The only difference would be a few weeks' timing.

Reversal of the *Clarification Order*, therefore, would delay disclosure and increase the administrative burdens on the parties and the Commission without any justification.

NBCUniversal and OVDs would again be at an impasse whenever the Benchmark Condition is invoked. There would be no common understanding of the terms of the peer deal that NBCUniversal is required to match. Instead of being in a position to reach a negotiated agreement at the initial stage of the process, as the *Clarification Order* now facilitates (and the Commission intended), the parties would be forced to pursue time-consuming and expensive arbitration proceedings in virtually every instance for no good reason.

C. The *Clarification Order* Does Not “Fundamentally Alter” the *C-NBCU Order*.

The Content Companies further contend that the *Clarification Order* “fundamentally alters” the *C-NBCU Order* in several respects. None of these arguments has any merit either.

First, the Content Companies claim that the *Clarification Order* stands the pro-competitive purpose of the Benchmark Condition on its head by giving NBCUniversal unprecedented access to their confidential OVD agreements.¹⁷ This mischaracterizes the purpose and effect of the *Clarification Order*. The Commission – not the Bureau – determined that using these OVD agreements as “benchmarks” for the mandatory licensing of programming under the *C-NBCU Order* would serve the public interest. The *Clarification Order* merely fleshes out a necessary process for this mandate to work. Further, the Commission has long recognized that “disclosure under a protective order or agreement may serve the dual purpose of protecting

¹⁷ See AFR at 10.

competitively valuable information while still permitting limited disclosure for a specific public purpose.”¹⁸ The *Clarification Order* serves that same dual purpose here. In providing a process for limited disclosure of peer deals under the Benchmark Condition, the Bureau fully considered the Content Companies’ legitimate confidentiality interests and addressed them through a robust protective order. The C3PO released with the *Clarification Order* limits disclosure of a peer deal to outside counsel and experts not involved in competitive decision-making, continues in force indefinitely, and imposes a specific process and numerous safeguards for the confidential treatment of peer deals.¹⁹ These stringent protections are based on the MPO for arbitrations under the Benchmark Condition²⁰ and have been used by the Commission in other analogous contexts.²¹ Moreover, unlike in most other contexts, disclosures under the C3PO will generally be limited to a single peer deal rather than multiple contracts.

Second, the Content Companies make vague assertions about “possible future employment [by NBCUniversal’s outside counsel and experts] in other situations adverse to a C-NBCU competitor,” suggesting that these NBCUniversal “agents” may use highly confidential information about a peer deal for some unauthorized purpose.²² This argument is entirely

¹⁸ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report & Order, 13 FCC Rcd. 24816 ¶ 9 (1998) (“*Confidential Information Policy*”).

¹⁹ *Clarification Order*, app. A, ¶¶ 4-5, 7-8, 10, 12, 14. The Bureau declined to permit even a limited number of senior NBCUniversal business executives to have access to the peer deal, as NBCUniversal requested. *Clarification Order* ¶ 19.

²⁰ *See id.* ¶ 18 (“*Consistent with the terms of the Model Protective Order*, we adopt a Third Protective Order for use in negotiations triggered by the Benchmark Condition”) (emphasis added); *compare C-NBCU Order*, app. E, ¶¶ 10, 12, *with Clarification Order*, app. A, ¶¶ 7-8 (using analogous language describing disclosure and use of highly confidential information).

²¹ *Clarification Order* ¶ 20 & n.60 (finding that the protections in the C3PO are consistent with Commission precedent in analogous program access and program carriage contexts).

²² AFR at 10.

speculative and ignores the express restrictions on competitive decision-making and future employment that the C3PO imposes on these individuals.²³ And, as the Bureau observed in dismissing these same claims, the *C-NBCU Order* “provide[s] adequate recourse against any such bad-faith behavior,” including the assessment of costs and expenses.²⁴ Taken to their logical end, the Content Companies’ theories about the “knowledge” outside counsel or experts may obtain under these stringent restrictions would mean that no highly confidential information could ever be adequately protected or used in any Commission proceeding. The Bureau struck an appropriate balance between the competing interests and legitimate concerns at issue, consistent with well-established Commission policies regarding confidential information.²⁵

Third, the Content Companies claim that the *Clarification Order* will eliminate any incentive for NBCUniversal to negotiate with OVDs and instead will cause NBCUniversal simply to match whatever rates, terms, and conditions are reflected in the peer deal.²⁶ But that is exactly what the Benchmark Condition *requires* NBCUniversal to do. The Content Companies’ suggestion that NBCUniversal should be expected to exceed these requirements is another false premise. When an OVD invokes the Benchmark Condition, NBCUniversal’s only obligation is to offer comparable programming to the OVD on rates, terms, and conditions that are

²³ See *Clarification Order*, app. A, ¶¶ 2(k), 2(l), 5(a), 5(b) (defining Outside Counsel and Outside Experts and restricting their involvement in competitive decision-making and negotiations).

²⁴ *Clarification Order* ¶ 12.

²⁵ The Media Bureau correctly found that a balanced approach would permit efficient compliance with the Benchmark Condition while “mitigat[ing] the competitive harms that could result” from disclosure beyond outside counsel and outside experts who have signed the C3PO. *Id.* ¶ 19. The Content Companies themselves have expressed their support for the protections contained in the MPO and C3PO. See *id.* ¶ 20 n.60 (citing Joint Opposition to Comcast-NBCU Request for Clarification Regarding the Benchmark Condition of CBS Corp., News Corp., Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company, MB Docket No. 10-56, at 22 (Apr. 3, 2012) (“Content Companies’ Comments”)).

²⁶ See AFR at 7.

economically equivalent to the peer deal. As the Bureau correctly found, “disclosure of peer programming agreement terms *is necessary* . . . to enable a C-NBCU Programmer to offer terms that are economically equivalent to the terms of a peer agreement.”²⁷ By providing NBCUniversal with appropriate access to these terms at the outset of the benchmark process, the *Clarification Order* will promote negotiated agreements and make it more efficient for OVDs to gain access to NBCUniversal’s comparable programming, as the Commission intended.²⁸

Fourth, the Content Companies contend that the *Clarification Order* implicates antitrust concerns by giving NBCUniversal access to their competitively sensitive OVD agreements.²⁹ This is another makeweight. Both the Commission and DOJ decided that NBCUniversal should be required to conform its conduct to the Content Companies’ conduct in specific circumstances, based on the rates, terms, and conditions of a qualifying peer deal. Although the Content Companies clearly object to the wisdom of that policy decision, the antitrust laws cannot prohibit a party from doing something that is required by a Commission order, which itself mirrors a DOJ antitrust consent decree approved by a federal court.

Fifth, the Content Companies claim that the *Clarification Order* runs counter to DOJ’s Final Judgment, which explicitly requires disclosure of a peer deal at the time an OVD gives notice of an intent to arbitrate.³⁰ But this argument places form over substance. Both the Commission and DOJ intended for NBCUniversal to comply with the Benchmark Condition through commercial negotiations whenever possible, with arbitration only as a backstop.³¹

²⁷ *Clarification Order* ¶ 18 (emphasis added).

²⁸ *See id.* ¶ 11.

²⁹ *See* AFR at 8-9.

³⁰ Letter from David H. Pawlik, Skadden, Arps, Slate, Meagher & Flom LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2-3 (Jan. 4, 2013).

³¹ *Clarification Order* ¶ 11; DOJ Final Judgment § IV.C.

DOJ's Final Judgment serves that purpose by requiring disclosure of the peer deal *before* NBCUniversal is required to submit a final offer in arbitration.³² That allows for NBCUniversal to match the peer deal and should avoid the need for arbitration in most instances.³³ The *Clarification Order* serves the same purpose by fleshing out the process for disclosure of a peer deal when a benchmark demand is made pursuant to the *C-NBCU Order*, which again should allow for NBCUniversal to match the peer deal without resort to arbitration. The DOJ also stated its expressed preference for OVDs to follow the Commission's benchmark process.³⁴ The *Clarification Order* serves that policy objective as well, by making the Commission's process work more efficiently and fairly for both OVDs and NBCUniversal.³⁵

At bottom, the Content Companies' objections are with the Benchmark Condition itself, not with the *Clarification Order*. In the AFR, they assert that "it is *now clear that the provision governing production of peer contracts in the Merger Decision itself is unacceptable and should be removed*, as it requires disclosure of the Content Companies' highly confidential business materials without sufficient justification."³⁶ But, as their own ex partes show, the Content

³² See DOJ Final Judgment § VII.I.2.

³³ The DOJ Final Judgment also expressly allows the parties to suspend any arbitration proceedings "to attempt to resolve their dispute through negotiation." *Id.* § VII.M.

³⁴ *Id.* § IV.C.

³⁵ *Clarification Order* ¶ 11; DOJ Final Judgment § IV.B-C.

³⁶ AFR at 4 n.15 (emphasis added). Among other things, the Content Companies "expressed serious concern" about these same supposed "harms" during the Commission's review of the C-NBCU transaction. See Content Companies' Comments at 11 & n.21; *id.* at 12 n.24 (citing Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (Jan. 14, 2011) ("Disney Ex Parte")). For example, when The Walt Disney Company met with the Commission, it "expressed concern that, if the Commission were to make the application of an online program access condition dependent on the actions of third-parties, especially the actions of just one entity, then third-party marketplace negotiations would no longer be independent from the condition itself. Indeed, marketplace negotiations for online distribution of video content would be affected and distorted *if the Commission were to provide that a single distribution agreement automatically results in the*

Companies knew of this potential disclosure of their peer deals during the transaction review process and long before the *Clarification Order* was ever issued. The opportunity for challenging this policy choice by the Commission (and DOJ) has long passed.³⁷ Because the Bureau merely fleshed out the process for disclosure of a peer deal already implicit in the Benchmark Condition, the *Clarification Order* does not afford any proper basis for the Content Companies to challenge the Benchmark Condition two years after-the-fact.³⁸

imposition of a condition requiring Comcast/NBCU to make similar content available upon similar terms.” Disney Ex Parte at 1 (emphasis added). Similarly, News Corp. met with Commission staff and argued that, “if NBCU were compelled to enter into an online distribution arrangement *solely based on the terms and conditions reached by one other content provider*, it could open the door to a single unfavorable business deal ‘establishing the market,’” which could “result in undue market pressure that compels other content providers to reach similar deals.” Letter from Maureen O’Connell, Senior Vice President, Regulatory & Government Affairs, News Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (Jan. 13, 2011) (emphasis added).

³⁷ The Content Companies’ attempt essentially to reopen the *C-NBCU Order* for reconsideration on this point is plainly improper. Petitions for reconsideration must be filed within 30 days of the date of public notice of the final Commission action, 47 C.F.R. § 1.106(f), and this deadline passed nearly two years ago. Further, the Commission may deny petitions for reconsideration that “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding.” 47 C.F.R. § 1.106(p)(3); *see, e.g., Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 21 FCC Rcd. 9432 ¶ 7 (2006). Given that several of the Content Companies alerted the Commission to their concerns about the Benchmark Condition, including the use of their OVD agreements as “benchmarks,” and the Commission went forward anyway, it is clear that the Commission both considered and rejected such arguments. *See supra* n.36. They cannot be re-litigated now. With respect to the DOJ, the Tunney Act specifies that parties may submit comments regarding a Proposed Final Judgment for 60 days after its publication in the Federal Register, a deadline which elapsed in mid-2011. *See* 15 U.S.C. § 16.

³⁸ *See, e.g.,* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b) (petitions for reconsideration of a Commission decision may be filed by a party or “any other person whose interests are adversely affected by any action taken by the Commission”); *Applications for Consent to the Transfer of Control of Licenses; XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion & Order, 27 FCC Rcd. 924 ¶¶ 5-6 & n.16 (2012) (“*Sirius-XM Order*”)(denying Minority Media and Telecommunications Council’s (“MMTC”) Petition for Reconsideration on the merits and declining to address an opposing party’s standing challenge). Like the Content Companies here, MMTC had participated in the proceeding through ex parte meetings and described how it was aggrieved by the Commission’s decision in its Petition.

III. THE OTHER GROUNDS ASSERTED BY THE CONTENT COMPANIES FOR REVERSAL OF THE *CLARIFICATION ORDER* ARE BASELESS.

The AFR contains several additional, wide-ranging arguments as to why the *Clarification Order* should be reversed. As demonstrated below, each of these additional arguments fails to withstand scrutiny.

A. The Clarification Request Was Not an Untimely Petition for Reconsideration of the *C-NBCU Order*.

The Content Companies wrongly assert that the Clarification Request amounted to a modification of the *C-NBCU Order* and was thus subject to the procedural requirements for a petition for reconsideration.³⁹ In fact, as shown above, the Commission – like DOJ – made the policy decision to impose the Benchmark Condition two years ago.⁴⁰ The Clarification Request merely sought clarification of the timing and process for disclosure of a peer deal necessary to comply with the condition. Upon due consideration, the Bureau recognized this fact and correctly determined that it was only clarifying the *C-NBCU Order*, making explicit the process for disclosure of a peer deal already implicitly required under the Benchmark Condition.⁴¹ This kind of clarification request – and resulting agency order – are far from unique in the context of

Sirius-XM Order ¶¶ 5-6 & n.16; see also *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998) (rejecting an argument styled as an “as applied” challenge which, in substance, questioned the underlying rule: “[T]he so-called ‘as applied’ challenge is . . . really no different than a challenge to the rule. It is as apparent to us as it was to the Commission that Tribune is not presenting a unique ‘as applied’ case.”).

³⁹ See AFR at 13-14; Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp. and NBCUniversal Media, LLC, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (Feb. 17, 2012) (“Clarification Request”).

⁴⁰ See *C-NBCU Order*, app. A, § IV.A.2.b; DOJ Final Judgment § VII.I.2.

⁴¹ See, e.g., *Clarification Order* ¶¶ 11-12, 24 (indicating that the Bureau views its *Order* as a clarification).

implementing merger conditions.⁴² In fact, it is the Content Companies' AFR that is an untimely petition for reconsideration.

B. The Bureau Had Authority to Grant the Clarification Request.

Because the Clarification Request did not seek modification of the *C-NBCU Order*, the Content Companies' claim that the Bureau lacked authority to provide the requested clarification can be easily dismissed.⁴³ In considering and rejecting this same claim, the Bureau correctly determined that the "issuance of this clarification and the Third Protective Order [was] within [its] delegated authority."⁴⁴

⁴² See *infra* note 44.

⁴³ See AFR at 15.

⁴⁴ *Clarification Order* ¶ 24; see Clarification Request at 5-6. The Media Bureau, and other agency bureaus, acting under delegated authority, have routinely provided similar clarifications to both merger and non-merger related Commission rules and order. See, e.g., *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd. 9411 (OGC, EB 2011) (providing guidance on specific methods of disclosure that will be considered to comply with the transparency rule adopted in the Commission's Open Internet proceeding); *Media Bureau Clarifies 2009 Biennial Filing Requirements for Ownership Report (Form 323)*, Public Notice, 25 FCC Rcd. 7986 (MB 2010) (clarifying that for any assignment or transfer of control application granted during a specific period, the FCC would include as a condition that the proposed assignor/transferee file Form 323 regarding ownership information); *Media Bureau Clarifies Issues Concerning Franchise Authority Certification to Regulate Rates*, Public Notice, 24 FCC Rcd. 399 (MB 2009) (clarifying the Commission's long-standing rules governing LFAs that seek to regulate basic cable rates charged by new entrants); Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, FCC, to Sandra Wagner, Vice President – Federal Regulatory, SBC Telecommunications, Inc., 15 FCC Rcd. 24479 (CCB 2000) (answering several questions regarding the performance tests used to determine if SBC's ILECs were providing the same quality of service to CLECs as the ILECs provided to themselves, as required by the SBC/Ameritech merger order); Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, to Michael Glover, Senior Vice President and Deputy General Counsel, Verizon Communications, Inc., 15 FCC Rcd. 18327 (CCB 2000) (clarifying that the requirement under the GTE/Bell Atlantic merger order that UNEs be made available in accordance with the FCC's TELRIC pricing rules would not impose an independent obligation should the Supreme Court vacate the TELRIC pricing rules).

The Clarification Request did not present “a novel question of law, fact, or policy that cannot be resolved under existing precedent or guidelines.”⁴⁵ The Commission, like DOJ, already considered and answered any “novel” question about the necessity of disclosing a peer deal in adopting the Benchmark Condition itself.⁴⁶ In the *Clarification Order*, the Bureau merely provided a necessary process for such disclosure.

Nor did the Bureau “set aside” a Commission decision, as the Content Companies wrongly contend.⁴⁷ The only question addressed by the Bureau was *when*, not *whether*, an OVD should disclose the peer deal under stringent confidentiality protections. DOJ already explicitly required such disclosure; the *Clarification Order* simply fills in the details for the same implicit requirement in Commission’s Benchmark Condition. By providing this procedural guidance, the Bureau helped to effectuate the Commission’s decision in adopting the Benchmark Condition, not set it aside.

C. The Benchmark Condition Does Not “Abrogate Contracts” and Disclosure of Peer Agreements Is Consistent with the Commission’s Authority and Public Policy.

The Content Companies further argue that the Commission cannot “abrogate contracts” by overriding the confidentiality and non-disclosure provisions that are commonly found in programming agreements.⁴⁸ As the Content Companies know, however, it is standard industry practice for parties to include an *express exception* to non-disclosure provisions when disclosure is compelled by a government agency or court order.⁴⁹ The Content Companies do not identify a

⁴⁵ *Clarification Order* ¶ 24.

⁴⁶ *Id.*

⁴⁷ *See* AFR at 15.

⁴⁸ *See id.* at 16-17.

⁴⁹ The Commission previously has noted that programming agreements typically contain exceptions for government- and court-mandated disclosures. *See, e.g., EchoStar Satellite L.L.C.*

single contract that they contend deviates from this industry norm. The Benchmark Condition was imposed by lawful government orders (both Commission and DOJ) and mandates (implicitly and explicitly) disclosure of peer deals. This is more than sufficient to trigger the non-disclosure exception in these contracts.⁵⁰ And the *Clarification Order* removes any doubt on this point by expressly requiring OVDs to disclose a peer deal when they invoke the Benchmark Condition. Thus, disclosure of the peer deal would be fully consistent with the plain terms of the contracts – nothing about them would be “abrogated.”⁵¹

The Content Companies’ abrogation argument also fails assuming (for argument’s sake) there are any contracts that do not contain similar non-disclosure exceptions. While courts generally undertake to effectuate the purpose and expectations of contracting parties, this deference does not extend to enforcement of contract terms that violate public policy or ignore legitimate government action.⁵² As courts have observed, “[e]ven sophisticated parties cannot contract around public policy”⁵³ and it is “well-settled that parties are not permitted to contract

v. Home Box Office, Inc., Order, 21 FCC Rcd. 14197 ¶ 7 (2006) (noting HBO’s representation that its contracts contain exceptions to confidentiality restrictions when “required by law or a governmental agency”).

⁵⁰ Contrary to the Content Companies’ claims, the C3PO provides just as much “respect” for non-disclosure provisions as the MPO and does not represent any “major change.” See AFR at 16. Again, this claim boils down to an issue of when, not if, such disclosure will be ordered. As discussed above, the C3PO and MPO provide the same protections.

⁵¹ Such disclosure would be permissible under the contracts regardless of whether it is made pursuant to the *Clarification Order* subject to the C3PO, an arbitrator’s order subject to the MPO, or the DOJ’s procedures. See *Clarification Order*, app. A, ¶ 14; *C-NBCU Order*, app. E, ¶ 20; DOJ Final Judgment § VII. In each instance, an agency order of disclosure is involved consistent with its statutory authority.

⁵² See, e.g., *CSX Transp. v. Mass. Bay Transp. Auth.*, 697 F. Supp. 2d 213, 228 (D. Mass. 2010) (indemnification portions of a contract were unenforceable where allowing indemnification would have frustrated the purpose of a state statute and judicial precedent).

⁵³ *Id.* at 229.

around statutory obligations.”⁵⁴ The Commission (as well as DOJ) imposed the Benchmark Condition pursuant to clear statutory authority.⁵⁵ Therefore, any contractual terms that purport to prohibit disclosure of a peer deal in conflict with those valid governmental conditions would be void as against public policy.

D. The Clarification Order and Benchmark Condition Do Not Constitute a Regulatory Taking.

The Content Companies next allege that the *Clarification Order* “interferes with the rights of programming providers, who will suffer a ‘regulatory taking’ under the Fifth Amendment.”⁵⁶ In fact, the *Clarification Order* did not grant any new substantive rights or impose any new obligations that could constitute a taking.⁵⁷ Disclosure of peer deals is already implicitly required under the Benchmark Condition. The Bureau simply filled in necessary details for the timing and process of such disclosure.

The Content Companies also fail to acknowledge that a peer deal involves a counterparty – the OVD. The OVD is equally an “owner” of the terms and information contained in its agreement with a Content Company. When the OVD invokes the Benchmark Condition, it chooses to make its peer deal the “benchmark,” thereby triggering the need for disclosure under the remedy. There is no government “taking” at all.

⁵⁴ *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 517 F. Supp. 2d 391, 409 n.12 (D.D.C. 2007) (rejecting an argument that contractual provisions regarding appeal procedures should trump the governing statute) (citing *Hartford Accident & Indem. Co. v. Pro-Football, Inc.*, 127 F.3d 1111, 1114 (D.C. Cir. 1997)).

⁵⁵ See Opposition of Comcast Corp. & NBCUniversal Media, LLC to Content Companies’ Request for Stay, MB Docket No. 10-56, at 20-22 (Dec. 26, 2012); Reply Comments of Comcast Corp. & NBCUniversal Media, LLC, MB Docket No. 10-56, at 13-14 (Apr. 17, 2012) (“C-NBCU Reply Comments”); *Clarification Order* ¶ 20 n.60.

⁵⁶ AFR at 18-20.

⁵⁷ See *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (discussing the types of agency action that can constitute a regulatory taking).

The fallacy of the Content Companies’ theory is further revealed by a proper analysis of the “taking” factors they cite.⁵⁸ First, there is no adverse “economic impact” or interference with “investment-backed expectations” that can reasonably be linked to the *Clarification Order*. The Content Companies rely on only generalized and speculative allegations of harm arising from disclosure of peer deal terms to “one of their fiercest and strongest competitors.”⁵⁹ But these allegations are just criticisms of the Benchmark Condition itself.⁶⁰ And the Content Companies again fail to account for the fact that the Bureau considered and fully addressed their legitimate confidentiality concerns. As the Bureau noted, “the confidentiality protections afforded in the [C3PO] are . . . fully consistent with those in the Model Protective Order, the use of which the Content Companies *support* in the context of arbitration proceedings.”⁶¹

Second, there is nothing “extraordinary” about the nature of the *Clarification Order* that alters any of the underlying rights or obligations stemming from the *C-NBCU Order*. In requesting clarification, Comcast and NBCUniversal made clear that they were only seeking guidance on the appropriate process for something that is already implicit in the condition. The *Clarification Order*, in turn, simply provides that procedural guidance. As shown above, elsewhere in their AFR the Content Companies acknowledge that the Benchmark Condition

⁵⁸ AFR at 18-19.

⁵⁹ *Id.* at 18-19.

⁶⁰ Further, any peer deal with a Content Company that an OVD relies on in making a Benchmark Condition claim will have been executed after the *C-NBCU Order* was issued in January 2011. Contracting parties to that deal, therefore, could and should have already expected (and accounted for) this regulatory environment in striking their bargain.

⁶¹ *Clarification Order* ¶ 20 n.60 (emphasis added) (citing Content Companies’ Comments at 21).

requires disclosure of a qualifying peer deal.⁶² The *Clarification Order* fleshes out the timing and process for that disclosure, it does not alter any substantive right or obligation.⁶³

E. The “Analogous Situations” Cited by the Content Companies Are In Fact Irrelevant.

The Content Companies further argue that disclosure of a qualifying peer deal is analogous to civil litigation scenarios involving the production of a non-party’s confidential information through the discovery process.⁶⁴ This analogy is misplaced.

The cases cited by the Content Companies involve private civil actions where the third party’s confidential information was not central to the litigation.⁶⁵ Here, in contrast, an OVD is using its *own* programming agreement (i.e., a peer deal) as the basis for invoking a federally-mandated licensing regime (i.e., the Benchmark Condition). NBCUniversal is then required to match the peer deal. This bears no resemblance to requests for the disclosure of non-party information, or the discretion of courts in supervising such third-party discovery, in private civil litigation.

⁶² See AFR at 4 n.15.

⁶³ The Content Companies contend that (1) their abrogation of contract theory also provides additional support for their regulatory taking claim; and (2) the Bureau’s Public Notice was deficient for not requesting comment on these points. See *id.* at 17-18. For the reasons shown above, the *Clarification Order* does not abrogate private agreements so both of these additional arguments quickly collapse. Moreover, it was clear from the beginning of this proceeding that what Comcast and NBCUniversal were asking for, and what the Bureau provided, was merely a process for *when* a peer deal should be disclosed under the Benchmark Condition – not *whether* it should be disclosed. The notion that the *Clarification Order* was “unanticipated” or somehow lacked sufficient notice is not credible.

⁶⁴ See *id.* at 20-23.

⁶⁵ See, e.g., *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325-27 (Fed. Cir. 1990) (quashing nonparty subpoena and finding that plaintiff in patent infringement action had failed to show need for nonparty competitor’s sales data to prove its own lost profit damages); *R & D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993) (quashing subpoena in part and finding that defendant in antitrust action had failed to show sufficient need for nonparty competitor’s supplier information where the requested information would have negligible impact on strength of defense).

Of course, an OVD is under no obligation to make a demand pursuant to the Benchmark Condition. But, once it does, it has made the qualifying peer deal the central feature of this federally-imposed remedy.⁶⁶ The Commission clearly has authority to require the OVD to disclose its own agreement once the OVD has chosen to invoke the Benchmark Condition.⁶⁷ Although a Content Company may be a counterparty to the peer deal, the Content Company itself is not compelled to produce anything, and its sensitive business information will be protected under the stringent confidentiality provisions of the C3PO.

F. The Clarification Order Does Not Violate the Trade Secrets Act.

Finally, the Content Companies contend that the Trade Secrets Act⁶⁸ bars the Commission from permitting use of a peer deal by NBCUniversal under the Benchmark Condition.⁶⁹ As the Bureau correctly concluded, that is not the case.⁷⁰

The D.C. Circuit has explained that the Trade Secrets Act “is ‘merely a general prohibition against unauthorized disclosures of confidential commercial or financial information.’”⁷¹ This is a “nondemanding” standard.⁷² The Content Companies acknowledge the three-part test applied in *Chrysler Corp. v. Brown*, which examines whether the regulation authorizing the disclosure of information is: (i) substantive in that it affects individual rights and obligations, (ii) “rooted in a grant of . . . power by the Congress,” and (iii) promulgated in

⁶⁶ See *Clarification Order* ¶ 8.

⁶⁷ See C-NBCU Reply Comments at 13-14; *Clarification Order* ¶ 20 n.60.

⁶⁸ 18 U.S.C. § 1905.

⁶⁹ See AFR at 23-24.

⁷⁰ See *Clarification Order* ¶ 20 n.60.

⁷¹ *Qwest Commc’ns Int’l Inc. v. FCC*, 229 F.3d 1172, 1177 (D.C. Cir. 2000) (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1141 (D.C. Cir. 1987) (“The Act attempts to forestall casual or thoughtless divulgence – disclosure made without first going through a deliberative process – with an opportunity for input from concerned parties.”)).

⁷² *Id.* at 1179.

conformance with any procedural requirements established by Congress.⁷³ The *C-NBCU Order* easily satisfies these factors here.

The Content Companies wrongly contend that there is no Commission regulation authorizing the disclosure of confidential information from one party to another. But this ignores the Commission’s authority under Section 310(d) of the Communications Act to review transactions involving the transfer of control or assignments of licenses and to “impose remedial conditions to address potential harms likely to result from the transaction.”⁷⁴ Commission orders approving such transactions, and the conditions therein, have the force and effect of law.⁷⁵ The Commission also retains ongoing authority to monitor and enforce compliance with the conditions it imposes, which the *Clarification Order* will plainly facilitate.⁷⁶ There is no

⁷³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979); AFR at 23-24.

⁷⁴ 47 U.S.C. §§ 303(r), 310(d); *see also C-NBCU Order* ¶ 2; *see, e.g., N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 961 (D.C. Cir. 1968) (stating that antitrust laws are a tool that a regulatory agency can use to bring “understandable content to the broad statutory concept of the ‘public interest’” (internal citation omitted)). Furthermore, as the Bureau correctly noted in the *Clarification Order*, the Content Companies have “expressly acknowledge[d] in their comments” that “permitting the disclosure of confidential information to outside counsel and experts, when necessary, is consistent with ‘substantial [FCC] precedent’” and embraced the confidentiality protections afforded in the C3PO in the context of arbitration proceedings. *Clarification Order* ¶ 20 n.60. The Content Companies offer no explanation of or rebuttal to these findings.

⁷⁵ The ordering clauses identify the provisions of the U.S. Code that give the Commission the authority both to approve the transaction (47 U.S.C. § 310(d)) and impose conditions (47 U.S.C. § 303(r)). *C-NBCU Order* ¶ 285. It is hornbook law that substantive rules – such as those contained in the *C-NBCU Order* – that are properly issued by an agency under its delegated authority carry the force and effect of law. *See, e.g., Chrysler Corp.*, 441 U.S. at 295.

⁷⁶ *See* 47 U.S.C. § 303(r); *C-NBCU Order* ¶ 286 (noting that the conditions will continue to apply until they expire on their own terms or until the Commission determines that they should be modified or removed).

question, therefore, that the Commission can require disclosure of a peer deal as part of an order establishing conditions to a transaction that serve the public interest.⁷⁷

Moreover, during the transaction review proceeding, the Commission gave significant consideration to, and ample opportunity for, concerned parties to comment on, the conditions adopted in the *C-NBCU Order*.⁷⁸ In particular, the Content Companies knew that they were specifically named as “peers” for the purpose of the Benchmark Condition. And they participated in the review process – among other things, meeting with Commission staff to express the exact same concerns over the confidentiality of their programming agreements with OVDs.⁷⁹ This record more than satisfies the “nondemanding” threshold of an agency making a “conscious choice in favor of disclosure” consistent with proper procedural requirements.⁸⁰

⁷⁷ Further, the Bureau’s clarification of the process and safeguards for use of peer deals under the Benchmark Condition is consistent with well-established Commission policies regarding confidential information. *See supra* note 18.

⁷⁸ As the Content Companies admit, the *C-NBCU Order* and its conditions were adopted after an “exhaustive, twelve-month analysis. The record in the proceeding consisted of hundreds of thousands of pages. More than ten thousand comments were submitted by public advocacy groups, C-NBCU competitors and numerous individual citizens.” Content Companies’ Comments at 18.

⁷⁹ *See* Letter from Jared S. Sher, Skadden, Arps, Slate, Meagher & Flom LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (July 21, 2010) (noting that some of the Content Companies met with Commission staff to “discuss *issues related to confidentiality of programming contracts*” in connection with the Comcast-NBCUniversal transaction) (emphasis added). In addition, it is clear that at least some of the Content Companies were aware of the general parameters of the Benchmark Condition prior to release of the *C-NBCU Order*. *See* Disney Ex Parte at 1 (expressing concerns “if the Commission were to provide that a single distribution agreement automatically results in the imposition of a condition requiring Comcast/NBCU to make similar content available upon similar terms,” which is exactly what the Benchmark Condition does).

⁸⁰ *Qwest Commc’ns Int’l Inc.*, 229 F.3d at 1177 (“[T]he Trade Secrets Act ‘seems to embody a congressional judgment that private commercial and financial information should not be revealed by agencies that gather it, *absent a conscious choice* in favor of disclosure *by someone with power to impart the force of law to that decision.*’” (emphasis added) (citing *CNA Fin. Corp.*, 830 F.2d at 1141)).

Although the Content Companies do not like the Benchmark Condition, their attempt to raise Trade Secrets Act concerns two years after-the-fact is unfounded and in all events untimely.

IV. CONCLUSION

For all these reasons, the AFR should be denied.

Respectfully submitted,

/s/ David P. Murray _____

David P. Murray

Mary M. Jackson

Jessica F. Greffenius

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.

Washington, D.C. 20006-1238

(202) 303-1000

*Counsel for Comcast Corporation and
NBCUniversal Media, LLC*

January 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on January 18, 2013, copies of the foregoing Opposition of Comcast Corporation and NBCUniversal Media, LLC to Content Companies' Application for Review were served on the following by U.S. First-Class Mail:

Anne Lucey
CBS CORPORATION
601 Pennsylvania Avenue, N.W.
Suite 540
Washington, D.C. 20004

Counsel for CBS Corporation

Maureen O'Connell
Jared S. Sher
NEWS CORPORATION
444 N. Capitol Street, N.W.
Suite 740
Washington, D.C. 20001

Counsel for News Corporation

Leonard Venger
SONY PICTURES ENTERTAINMENT INC.
10202 W. Washington Blvd.
Culver City, CA 90232

Counsel for Sony Pictures Entertainment Inc.

Susan A. Mort
TIME WARNER INC.
800 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20006

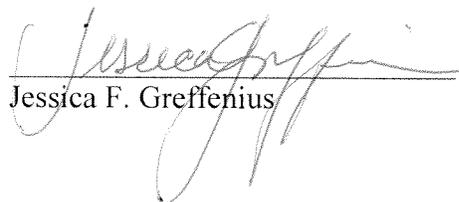
Counsel for Time Warner Inc.

Keith R. Murphy
VIACOM INC.
1501 M Street, N.W.
Suite 1100
Washington, D.C. 20005

Counsel for Viacom Inc.

Susan L. Fox
THE WALT DISNEY COMPANY
425 Third Street, S.W.
Suite 1100
Washington, D.C. 20024

Counsel for The Walt Disney Company


Jessica F. Greffenius