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January 14, 2013

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Federal Communications Commission  
Office of the Secretary

Marlene H. Dortch  
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Federal Communications Commission  
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Washington, D.C. 20554

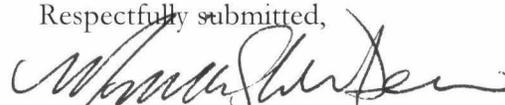
**RE: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56 – Arbitration Award - Ref: Case No. 72 472 E 01147 11 – Redacted - For Public Inspection Version of Project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

Dear Ms. Dortch:

Enclosed for filing are an original and one (1) copy of the Project Concord, Inc. Opposition To NBCUniversal Media Application For Review (“PCI Opposition”) previously filed on December 28, 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 Opposition was filed pursuant to and in accordance with Section VII.E.1. of said Appendix A to the Comcast Order and Sections 1.115 and 1.45 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, [pbesozzi@pattonboggs.com](mailto:pbesozzi@pattonboggs.com)).

Respectfully submitted,



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

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In the Matter of )  
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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. OPPOSITION TO  
NBCUNIVERSAL MEDIA APPLICATION FOR REIEW**

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Dated: December 28, 2012

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

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Transfer Control of Licenses )	Ref: Case No. 72 472 E 01147 11
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**PROJECT CONCORD, INC. OPPOSITION  
TO NBCUNIVERSAL MEDIA APPLICATION FOR REVIEW**

Project Concord, Inc. hereby submits this Opposition to the Application for Review filed by NBCUniversal Media (“NBCU”).<sup>1</sup> The Media Bureau rightly concluded that films less than one year from theatrical release are included in the definition of “Video Programming” set forth in the *Comcast-NBCU Merger Order* Benchmark Condition.<sup>2</sup> NBCU urges the Commission to overturn the Media Bureau’s ruling based on three arguments: (1) in interpreting the Benchmark Condition, the Commission should rely on language adopted by the Department of Justice (“DOJ”) instead of the language adopted by the FCC; (2) “includes but not limited to” means “excludes;” and (3) NBCU would suffer \_\_\_\_\_ if it were required to license first-year films to Online Video Distributors (OVDs) competing with Comcast.<sup>3</sup> All three arguments are without merit.

<sup>1</sup> See *Project Concord, Inc. Claimant, vs. NBCUniversal Media, LLC, Respondent*, Order on Review, MB Docket No. 10-56, NBCU Application for Review (December 13, 2012).

<sup>2</sup> See *Project Concord, Inc. Claimant, vs. NBCUniversal Media, LLC, Respondent*, Order on Review, MB Docket No. 10-56, DA 12-1829, ¶¶ 14, 17-24 (November 13, 2012) (“*Media Bureau Order*”); see also *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, Memorandum Opinion and Order, 26 FCC Rcd 4238, 42458, 4360, App. A., §§ I, IV.A.2.b (2011) (“*CNBCU Merger Order*”).

<sup>3</sup> See NBCU Application for Review at 6,13, 17.

The Media Bureau and an experienced arbitrator rightly rejected each of these arguments. The Commission should do the same. In rejecting NBCU's arguments, the Media Bureau reviewed both the plain language of the *CNBCU Merger Order* and also considered the Commission's objectives in formulating the Benchmark Condition. As the Bureau rightly acknowledged, in adopting the Benchmark Condition, the Commission wanted to ensure that Comcast could not, post-transaction, block the evolution of competing OVDs by denying them access to critical NBCU programming.<sup>4</sup> The definition of Video Programming set forth within the Benchmark Condition is entirely consistent with the concerns that gave rise to the Benchmark Condition and with the competitive objectives that it is intended to protect and promote. To argue that the Commission not only chose to undercut the entire purpose of the Benchmark Condition, but to do so *without any explanation* and by negative implication, simply cannot be credited.<sup>5</sup>

**I. THE COMMISSION DID NOT "AGREE" TO EXCLUDE FIRST-YEAR FILMS FROM THE BENCHMARK CONDITION; THE DOJ REMEDY DOES NOT SUPPORT THIS CONCLUSION.**

NBCU argues that the Commission should give primary importance to the language in the DOJ Consent Decree, rather than the language in the FCC's own *CNBCU Merger Order*. NBCU next posits, without a shred of support in the record, that the language with respect to first-year films was "specifically negotiated" by the Commission and DOJ,<sup>6</sup> the Commission and DOJ intended the same remedies, and that the DOJ remedy excludes first-year films so the FCC must

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<sup>4</sup> See *Media Bureau Order*, ¶ 21 ("Moreover, as PCI points out, the online video conditions were adopted to protect emerging OVDs from possible anticompetitive behavior by Comcast-NBCU, and excluding first-year films from the scope of the Benchmark Condition would hinder the development of OVD competition.")

<sup>5</sup> See *Media Bureau Order*, ¶ 24 ("Moreover, to the extent the Commission intended to exclude critical content such as first-year films from the definition of Video Programming, and thus from the scope of the Benchmark Condition, we believe it would have done so expressly.")

<sup>6</sup> NBCU Application for Review at 12.

have meant to as well.<sup>7</sup> The Media Bureau thoroughly addressed this issue and rightly rejected each one of these arguments, finding that (1) “nothing” in the record supports NBCU’s contention that the language was “specifically negotiated” by the Commission and DOJ; (2) any differences in the specific language used by the Commission and DOJ are “immaterial” to the construction of the Commission’s Conditions and do not support a narrower interpretation of the Benchmark Condition; and (3) even if DOJ’s language were material to enforcement of the Commission’s Conditions, the DOJ Competitive Impact Statement reflects that DOJ’s definition of Video Programming also includes first-year films.<sup>8</sup>

First, NBCU criticizes the Media Bureau’s ruling for being “silent” on what NBCU imagines as the “extensive transaction-review evidence and discussions underlying the Commission’s joint decision with DOJ.”<sup>9</sup> But it is the record that is “silent.” No such evidence exists. NBCU has pointed to nothing – not one sentence – either in the Commission’s 117 pages of findings related to the Conditions, nor in any of the hundreds of notices of *ex parte* communications, that supports NBCU’s contention. As confirmed by the Media Bureau, there is “nothing in the [*CNBCU Merger Order*] or the record of the proceeding to support NBCU’s assertion that the exclusion of first-year films from the definition of ‘Video Programming’ was specifically negotiated during the Commission’s review of the Comcast-NBCU transaction. Nor is it clear from the record why the Commission would have adopted such a broad exclusion.”<sup>10</sup>

Second, NBCU states that, because the parallel Benchmark Condition in the DOJ consent decree lacks the specific “includes but is not limited to” phrase that is included in the Commission’s

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<sup>7</sup> NBCU Application for Review at 6-13.

<sup>8</sup> See *Media Bureau Order*, ¶23.

<sup>9</sup> NBCU Application for Review at 12.

<sup>10</sup> *Media Bureau Order*, ¶ 20.

Video Programming definition,<sup>11</sup> the FCC’s specific inclusion of that language is irrelevant. The Media Bureau correctly rejected this argument and found that the omission of the “includes but is not limited to” language from the DOJ’s Video Programming Definition is immaterial to the construction of the Commission’s Conditions.<sup>12</sup> Indeed, as noted by the Media Bureau, there are numerous differences in the specific language used by the Commission and the DOJ, and “any differences do not support a narrower interpretation of the Benchmark Condition.”<sup>13</sup>

Finally, even assuming *arguendo* that this difference was material, NBCU’s suggested interpretation of that difference is wrong. In fact, the DOJ Competitive Impact Statement specifically applies to “all Comcast-NBCU programming.”<sup>14</sup> And a high-level DOJ official reiterated that, under the DOJ consent decree, Comcast “is required to make available to online video distributors (OVDs) the *same package of broadcast and cable channels that it sells to traditional distributors*. Further, it *must offer OVDs broadcast, cable, and film content that is similar to, or better than*, the content OVDs receive from the JV’s programming rivals.”<sup>15</sup> Accordingly, the remedies adopted by the Commission and DOJ on this issue are indeed consistent.

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<sup>11</sup> See NBCU Application for Review at 10.

<sup>12</sup> *Media Bureau Order*, ¶ 23.

<sup>13</sup> See *Media Bureau Order*, ¶ 23.

<sup>14</sup> *Media Bureau Order*, ¶ 23 (“Second, in any event, we question NBCU’s interpretation of DOJ’s definition of Video Programming, as the DOJ Competitive Impact Statement explains that the Benchmark Condition was intended to apply to all Comcast-NBCU programming: ‘Under the second option, set forth in Section IV.B, the proposed Final Judgment requires the JV to license to an OVD, broadcast, cable, or film content comparable in scope and quality ... The requirement applies to all JV content, even non-NBCU content, in order to ensure that the JV cannot undermine the purposes of the proposed Final Judgment by shifting content from one network to another.’”) (internal footnotes omitted) (emphasis added).

<sup>15</sup> Press Release, Department of Justice, Remarks As Prepared For Delivery By Acting Assistant Attorney General For The Antitrust Division Sharis A. Pozen At The Brookings Institution (Apr. 23, 2012) available at [http://www.justice.gov/atr/public/press\\_releases/2012/282517.htm](http://www.justice.gov/atr/public/press_releases/2012/282517.htm); (“For example, in the telecommunications and high-technology areas, we recognized the central role innovation plays, and we have worked to ensure an open and level playing field that allows that innovation to occur. Our approach to the Comcast/NBC-Universal transaction is a good example.

II. “CARDINAL PRINCIPLES OF STATUTORY CONSTRUCTION” REQUIRE INCLUSION OF FIRST-YEAR FILMS.

NBCU argues that, under “cardinal principles of statutory construction,” the phrase “includes but not limited to” means “excludes.”<sup>16</sup> The Media Bureau correctly rejected this argument, finding that NBCU’s reading of the definition fails to give any meaning and effect to the “includes but is not limited to” language preceding the definition:<sup>17</sup>

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.<sup>18</sup>

Thus, the plain language of the full definition of Video Programming expressly includes, without limitation and regardless of the medium or method used for distribution, all content offered on a TVOD basis, which is precisely the basis upon which first-run theatrical and non-theatrical

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The division recognized that Comcast’s traditional and online rivals need access to NBC’s programming to compete effectively against Comcast. Under the consent decree we entered into with the parties, the Comcast/NBC joint venture is required to make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional distributors. Further, it must offer OVDs broadcast, cable, and film content that is similar to, or better than, the content OVDs receive from the JV’s programming rivals. The settlement also prohibits Comcast from retaliating against any broadcast network, cable programmer, or studio for licensing content to a competing cable, satellite or telephone company, or OVD. It also bars Comcast from retaliating against any cable, satellite or telephone company, or OVD for obtaining video content from a competing broadcast network, cable programmer, or studio.”) *see also* PCI Phase 1 Post-Hearing Brief at 27.

<sup>16</sup> *See* NBCU Application for Review at 13-16.

<sup>17</sup> *Media Bureau Order*, ¶ 22.

<sup>18</sup> *CNBCU Merger Order* at 4358 (App. A, §I).

releases and entire current season television episodes are offered. As the Bureau explained, the phrase “includes but is not limited to” preceding a list is commonly understood to mean that the listed items are illustrative, rather than exhaustive.<sup>19</sup> Listing of “Films for which a year or more has elapsed since their theatrical release” at the end of the definition is “simply one example of the types of programming included in the definition, not an exclusion of first-year films by negative inference.”<sup>20</sup> Furthermore, the only reason to include the phrase “includes but is not limited to” is specifically to avoid any negative implication by including one category of programming but not another.

Despite this language, NBCU attempts to convince the Commission that the definition of Video Programming includes only “Films for which a year or more has elapsed since their theatrical release.”<sup>21</sup> Obviously, “includes, but is not limited to” means the opposite of “only includes.” A simple review of the full definition of Video Programming demonstrates that the Commission did not say the definition “only includes” such films. The Commission said the opposite.

Although NBCU admonishes that language should “be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,”<sup>22</sup> it ignores this principle by refusing to give any weight at all to the expansive “includes but is not limited to” language that describes the kinds of Video Programming to be included in the Conditions. Instead, NBCU dismisses such language as unintentional “boilerplate,”<sup>23</sup> rendering it not merely superfluous, but a nullity.

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<sup>19</sup> See *Media Bureau Order*, ¶ 22.

<sup>20</sup> *Media Bureau Order*, ¶ 22.

<sup>21</sup> NBCU Application for Review at 11, 13, n.35.

<sup>22</sup> NBCU Application for Review at 14.

<sup>23</sup> NBCU Application for Review at 15.

Clearly, the types of programming listed in the Condition’s expansive definition of Video Programming are expressly inclusive – “includes but is not limited to” – and are the opposite of “expressly exclusive.” And, even if read as limitations (which they expressly are not), then **the categories that are specifically listed expressly include all transactional programming, i.e., “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”))” basis – without any limitation whatsoever.**<sup>24</sup>

Moreover, the definition of a peer “Film Studio” set forth in the Conditions also supports an inclusive reading of the definition of video programming. A peer “Film Studio” includes not only certain specifically named studios, but also **“any other Person that is one of the top five distributors (other than a C-NBCU Programmer) of Films by U.S. box office gross revenue in the latest declared financial year.”**<sup>25</sup> To define the relevant peer Film Studios as including those with the highest box office gross revenue in the latest year, but to read the definition of “Video Programming” as excluding those most recent theatrical releases that make a film distributor a peer of NBCUniversal, as NBCU argues, is nonsensical.<sup>26</sup>

Finally, as the Media Bureau found, the listing of “Films for which a year or more has elapsed since their theatrical release” in the litany of programming that falls within the definition of

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<sup>24</sup> *CNBCU Merger Order* at 4358 (App. A, § I); *see also Media Bureau Order*, ¶ 24 (“NBCU argues that, if the Commission intended to subject all films to compulsory licensing under the Benchmark Condition, the definition of Video Programming would have simply said ‘Films,’ not ‘Films for which a year or more has elapsed since their theatrical release.’ We reject this claim. The definition of Video Programming expressly includes all programming offered on a VOD, PPV, or TVOD basis, which is the basis upon which many films, including first-year films, are offered. Thus, we think the better interpretation is that the Commission intended to include all Films within the definition of Video Programming and therefore within the scope of the Benchmark Condition.”) (internal footnotes omitted); *see also Arbitration Award* at 5-6.

<sup>25</sup> *CNBCU Merger Order* at 4357 (App. A, § I) (2011) (emphasis added).

<sup>26</sup> PCI Phase 1 Opening Brief, at 10-11.

Video Programming simply reinforces the Commission's determination that *all* content that is or becomes available for online distribution is subject to the Conditions.<sup>27</sup> Accordingly, the Bureau correctly concluded that "when read in context of the entire condition, we think a more reasonable interpretation is that the separate inclusion of 'Films for which a year or more has elapsed since their theatrical release' at the end of the definition of Video Programming is to ensure that the definition includes older theatrical films that NBCU may have previously held back from VOD, PPV, or TVOD exhibition or that otherwise have not previously been offered on a VOD, PPV, or TVOD basis."<sup>28</sup>

**III. THE *CNBCU MERGER ORDER* EXPLICITLY PROVIDES NBCU WITH A CONTRACTUAL IMPEDIMENT DEFENSE TO THE EXTENT THE PROVISION OF ANY PARTICULAR CONTENT WOULD CONSTITUTE A BREACH OF AN NBCU LICENSING AGREEMENT.**

NBCU (again without citing to any support) asserts that the Commission "recognized" that "NBCU 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 NBCU.<sup>29</sup> Not only is there no record support for this assertion, but it is fundamentally wrong.

As the Media Bureau found, NBCU's licensing agreements with [REDACTED] [REDACTED]<sup>30</sup> To the contrary, the licensing agreements only prohibit NBCU from licensing [REDACTED]

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<sup>27</sup> See *Media Bureau Order*, ¶ 24.

<sup>28</sup> *Media Bureau Order*, ¶ 24.

<sup>29</sup> NBCU Application for Review at 17.

<sup>30</sup> See *Media Bureau Order*, ¶ 20.

██████████<sup>31</sup> Indeed, NBCU currently licenses first-year films to numerous OVDs for distribution on a TVOD basis.<sup>32</sup>

Accordingly, the Media Bureau properly concluded that “excluding all first-year films from the scope of the Benchmark Agreement would give NBCU significantly greater protection than is necessary for it to meet its obligations under the ██████████ licensing agreements.”<sup>33</sup> Critically, to the extent that the provision of first-year films to a particular OVD would constitute a breach of NBCU’s licensing agreements with ██████████ or another contract to which NBCU is a party, the Bureau noted that “the arbitration procedures in the [CNBCU Merger Order] explicitly authorize NBCU to raise a contractual defense.”<sup>34</sup> NBCU’s argument on this point is without merit, and the Commission should disregard it.

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<sup>31</sup> See *Media Bureau Order*, ¶ 20.

<sup>32</sup> See *Media Bureau Order*, ¶ 20 and at n.83 (“NBCU currently licenses first-year films to numerous OVDs for distribution on a TVOD basis” including, for example, iTunes, Vudu, and YouTube.) Licensing films less than one year from theatrical release to VOD services is a well-established business practice.

<sup>33</sup> *Media Bureau Order*, ¶ 20.

<sup>34</sup> *Media Bureau Order*, ¶ 20 (citing *CNBCU Merger Order* at 4368, App. A, § VII.C.3).

**IV. CONCLUSION.**

For the foregoing reasons, Project Concord respectfully requests that the Commission reject the arguments advanced in NBCU's Application for Review and affirm the Media Bureau's ruling that first-year films are included within the definition of Video Programming and therefore are included within the scope of the Benchmark Condition.

Respectfully submitted,  
**Project Concord, Inc.**

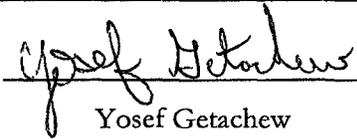
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Dated: December 28, 2012

**CERTIFICATE OF SERVICE**

I, Yosef Getachew, certify that, on this 28th 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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