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**FILED/ACCEPTED**

January 14, 2013

JAN 14 2013

**VIA HAND DELIVERY**

Federal Communications Commission  
Office of the Secretary

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

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

Dear Ms. Dortch:

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

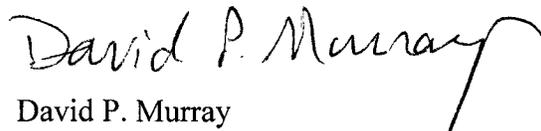
This Public version has been redacted consistent with the procedures directed by Media Bureau staff, and for the reasons detailed in the Request for Confidential Treatment submitted with the Confidential version of the filing on December 28, 2012. NBCUniversal is also today serving a copy of the Public version of the filing via hand delivery to Monica Desai, counsel for Project Concord, Inc.

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

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

Marlene H. Dortch  
January 14, 2013  
Page 2

Very truly yours,

A handwritten signature in black ink that reads "David P. Murray". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

David P. Murray  
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*Counsel for NBCUniversal Media, LLC*

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

Enclosures

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION FILED/ACCEPTED  
Washington, D.C. 20554

JAN 14 2013

Federal Communications Commission  
Office of the Secretary

In the Matter of Arbitration between )  
Project Concord, Inc., )  
Claimant, )  
-vs,- )  
NBCUniversal Media, LLC, )  
Respondent. )  
\_\_\_\_\_ )

MB Docket No. 10-56

To: The Commission

OPPOSITION TO PROJECT CONCORD, INC.'S APPLICATION FOR REVIEW

WILLKIE FARR & GALLAGHER LLP  
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**GLOSSARY**

<b>Arbitration Award And Transcript</b>	
Phase 1 Dec'n	Phase 1 Decision
HT	Arbitration Hearing Transcript
<b>NBCUniversal Pleading And Testimony</b>	
Lam. Decl.	Direct Testimony of Ron Lamprecht (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Decl.	Expert Report of Steven Madoff (attached to NBCUniversal Phase 1 Op. Br.)
Mad. Sec. Decl.	Phase 2 Expert Report of Steven Madoff (attached to NBCUniversal Phase 2 Op. Br.)
Rob. Decl.	Direct Testimony of Elizabeth Roberts (attached to NBCUniversal Phase 1 Op. Br.)
Wund. Decl.	Expert Report of Robert Wunderlich: Analysis of PCI's "Final Offer" (attached to NBCU Phase 1 Op. Br.)
Wund. Sec. Decl.	Phase 2 Expert Report of Robert Wunderlich: Analysis of PCI's "Final Offer" (attached to NBCUniversal Phase 2 Op. Br.)
NBCUniversal Phase 1 Op. Br.	Phase 1 Opening Position Statement of NBCUniversal Media, LLC
<b>PCI Testimony</b>	
Marenzi Decl.	Expert Report of Gary Marenzi (attached to PCI Phase 1 Reb. Br.)

I. INTRODUCTION AND SUMMARY

NBCUniversal Media, LLC ("NBCUniversal") hereby opposes the Application for Review ("AFR") submitted by Project Concord, Inc. ("PCI"). In its AFR, PCI argues that its business model for providing video programming to consumers is not [REDACTED] but rather a transactional Video on Demand ("VOD")/electronic sell through ("EST") service. In fact, it is indisputable to any objective person that PCI [REDACTED]

[REDACTED] By [REDACTED]

[REDACTED] No [REDACTED] is required. This makes PCI's service [REDACTED]

During the arbitration, a former Executive Vice President of Business & Legal Affairs at Paramount Pictures, who ran the studio's domestic and international film and television licensing businesses for over 20 years, made the following observation in response to PCI's claim that it is not ad-supported: "You can call a service VOD or you can call it EST, but if the main way that the service is generating revenue is because viewers are [REDACTED] [REDACTED] and not from users taking money out of their wallet, then it is by definition an [REDACTED] service." HT 188:18-189:2 (Madoff). However PCI tries to dress up its technology and describe its supposed "uniqueness," its business model is [REDACTED] – just like other distributors that have used [REDACTED] [REDACTED] since the advent of television.

PCI's attempt to suggest in its AFR that the Arbitrator reached a different conclusion on this question misrepresents the record. After watching a demonstration of PCI's service, the Arbitrator readily concluded that [REDACTED] [REDACTED] Phase 1 Dec'n at 10 (emphasis added). PCI's own patent

application and marketing materials tout the same thing, offering users access to newly-released films and current television shows through an “advertiser-supported” payment” rather than a “consumer-supported” payment” in short, “without ever having to reach into your wallet.” PCI is now asking the Commission to believe what the Media Bureau, the Arbitrator, objective industry experts, multiple NBCUniversal executives, and [REDACTED] who have seen a demonstration of PCI’s service have uniformly rejected: namely, the same worn claim that PCI is a transactional EST/VOD service and is not [REDACTED]. The Commission, like others, should easily see through this artifice.

Denial of PCI’s AFR will simply leave PCI in the same position as other OVDs. PCI can still license *all* of NBCUniversal’s newest films and current television shows for exhibition on PCI’s service, so long as PCI charges its users an [REDACTED]. This places PCI “on par” with every other genuine transactional EST/VOD service (e.g., iTunes, Vudu, Amazon, Microsoft, Sony, and Google). The only thing that PCI may not do is use [REDACTED] [REDACTED] That would breach numerous NBCUniversal contracts that prohibit [REDACTED] [REDACTED] exhibition and give PCI an unfair advantage in the marketplace. Although not required under the awarded contract, NBCUniversal has also offered to provide *additional* film and television content to PCI that is not subject to restrictions against [REDACTED] exhibition, which PCI can use with the [REDACTED] feature of its service.

Finally, the “verification” process that PCI belatedly proposes in its AFR is unnecessary and unjustified. The *Order on Review* provides clear guidance on the relevant contract issues. And PCI’s own Final Offer (i.e., the awarded contract) specifies a [REDACTED] [REDACTED] that might arise. PCI is not entitled to rewrite its Final Offer after-the-fact.

Accordingly, PCI’s AFR should be denied.

## II. BACKGROUND

During the arbitration, NBCUniversal presented two expert witnesses and three fact witnesses. The experts, Steven Madoff and Dr. Robert Wunderlich, are both highly qualified with significant experience in the entertainment industry.<sup>1</sup> Each expert explained, with specific reference both to NBCUniversal's representative contracts and to established industry practices, why licensing certain content to PCI's [REDACTED] service would constitute a breach of numerous NBCUniversal's contracts. NBCUniversal's fact witnesses were similarly experienced business executives who are responsible, on a daily basis, for the negotiation and administration of NBCUniversal's licensing relationships with numerous third parties.<sup>2</sup> Each executive explained at length why the relevant contracts would be breached by PCI's service.

In contrast, PCI presented its two principals and two experts. One of the experts admitted that he did not even review the relevant NBCUniversal contracts.<sup>3</sup> PCI's other expert purported to speak authoritatively for the peer studio and broadly opined that none of NBCUniversal's

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<sup>1</sup> Mr. Madoff has approximately thirty years of industry experience, including twenty years at Paramount Pictures Corporation where, among other responsibilities he negotiated, drafted, and executed more than 1,000 free television, basic cable, pay television, pay-per-view, transactional video-on-demand, subscription VOD, digital media and internet delivery agreements, covering the United States and over 100 international territories. HT 149:9-151:6 (Madoff). Dr. Wunderlich likewise has frequently consulted for major studios and individuals in the entertainment industry in general, and in the television sector of the entertainment industry in particular, for more than 18 years. HT 190:5-193:17 (Wunderlich); Wund. Decl., Ex. A.

<sup>2</sup> NBCUniversal's fact witnesses were Elizabeth Roberts, Chief Operating Officer, Universal Cable Productions and Executive Vice President, Business Affairs, NBCUniversal Cable Entertainment and Cable Studios; Bruce Casino, Senior Vice President, Cable and New Media Sales, NBCUniversal; and Ronald Lamprecht, Executive Vice President, Sales Business Development, NBCUniversal Digital Distribution.

<sup>3</sup> See Marenzi Decl., Ex. B (titled "Materials Relied On" and showing that Mr. Marenzi did not review any NBCUniversal contracts); HT 463:13-18 (Marenzi) (admitting that he had not reviewed the [REDACTED] contract).

representative contracts would be breached on the premise that PCI's service is not [REDACTED] and requires an [REDACTED] to the consumer.<sup>4</sup>

Based on this evidence, and after watching a demonstration of PCI's service, the Arbitrator readily determined that the [REDACTED] [REDACTED]<sup>5</sup> It is thus incorrect for PCI to suggest, as it does throughout its AFR, that the Arbitrator did not find that its service is [REDACTED] He did. He also "observed" that some of NBCUniversal's contracts that restrict against [REDACTED] exhibition likely would be breached by providing certain content to PCI. The Arbitrator nonetheless refused to rule on NBCUniversal's contractual impediment defense on the grounds that it was premature because no licensee had yet asserted an actual claim of breach.<sup>6</sup> He also found that it was unnecessary to rule on the defense given the availability of certain post-breach remedies in PCI's Final Offer (i.e. the awarded "Final Agreement"). These remedies included provisions requiring PCI [REDACTED] [REDACTED]

In the *Order on Review*, the Bureau clarified the standard for establishing NBCUniversal's contractual impediment defense.<sup>7</sup> The Bureau properly rejected the "breach first/fix later" approach adopted by the Arbitrator, holding that an arbitrator should determine

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<sup>4</sup> *Project Concord, Inc., Claimant v. NBCUniversal Media, LLC, Respondent*, Order on Review, MB Docket No. 10-56, ¶ 36 & n.169 (Nov. 13, 2012) ("*Order on Review*") ("Moreover, we note that [REDACTED] was not a party to or a participant in the arbitration proceeding, and the record does not reflect [REDACTED] interpretation of these provisions or its views on PCI's service."); *see also* NBCUniversal Reply at n.103 (discussing PCI's expert Mark DeVitre).

<sup>5</sup> Phase 1 Dec'n at 10 (emphasis added).

<sup>6</sup> *Order on Review* ¶ 26.

<sup>7</sup> *Id.* ¶¶ 27-30, 42-62.

whether the defense applies based on the relevant contractual language and evidence of its interpretation within the industry.<sup>8</sup> The Bureau confirmed that the defense exists to protect the rights and interests of other licensees from being violated.<sup>9</sup> NBCUniversal is not required to show that a licensee has actually asserted a breach of contract. For the same reasons, post-breach “remedies” in a final offer do not obviate the need for an arbitrator to rule on an asserted contractual impediment defense during an arbitration.<sup>10</sup> Based on a thorough review and evaluation of representative NBCUniversal contracts and related evidence, the Bureau held that NBCUniversal had proven that these and other agreements containing similar language would be breached by providing certain film and television content to PCI.<sup>11</sup>

In its AFR, PCI challenges the Bureau’s finding that PCI’s business model is [REDACTED] and does not require a [REDACTED]. Based on that false premise, PCI contends that NBCUniversal failed to carry its burden of proof on the contractual impediment defense.<sup>12</sup>

### III. STANDARD OF REVIEW

Commission review of the Bureau’s decision is conducted *de novo* based on the record before the Arbitrator.<sup>13</sup> The *Order* expressly limits the Commission’s review to “examin[ing]

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<sup>8</sup> *Id.* ¶ 28.

<sup>9</sup> *Id.* ¶ 29.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶¶ 42-62.

<sup>12</sup> PCI does not challenge the Bureau’s ruling affirming the Arbitrator’s denial of PCI’s cost-shifting request.

<sup>13</sup> *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Red 18099, ¶ 1 n.5 (2010) (“*MASN Order*”) (*de novo* review of arbitration award issued under the *Adelphia Order*

the same evidence that was presented to the Arbitrator.”<sup>14</sup> The Commission has interpreted identical language in other merger order conditions to place limits on the review process. The Commission “may not hold another evidentiary hearing or allow the parties to adduce new evidence.”<sup>15</sup> The Bureau recently affirmed the applicability of these limits on the review process in this proceeding.<sup>16</sup>

#### IV. ARGUMENT

##### A. The Media Bureau Properly Found That PCI Is An [REDACTED] Service, Where No [REDACTED] Is Required.

The Media Bureau correctly concluded, based on the extensive arbitration record, that PCI’s service is [REDACTED] under (1) the relevant [REDACTED] [REDACTED] provisions in NBCUniversal’s representative contracts;<sup>17</sup> and (2) their common, reasonable, and well-established construction and application in the video programming

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arbitration conditions), *aff’d sub nom. TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012).

<sup>14</sup> *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Red 4238, App. A, § VII.E.2 (2011) (“Order”).

<sup>15</sup> *MASN Order* ¶ 1 n.5; *see also DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utilities, Inc.*, Order on Review, 26 FCC Red 12574, ¶ 8 (MB 2011) (*de novo* review of arbitration award issued under the Liberty Media Order arbitration conditions), *application for review pending*; *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, 25 FCC Red 16054, ¶ 8 n.45 (MB 2010), *application for review pending* (*de novo* review of arbitration award issued under the *News Corp.-Hughes Order* arbitration conditions).

<sup>16</sup> Letter from William T. Lake, Chief, Media Bureau, to David P. Murray, Counsel to NBCUniversal Media, LLC and Monica S. Desai, Counsel to Project Concord, Inc. (Nov. 1, 2012) (“*Supplemental Motion Order*”) (confirming limitations on review process [REDACTED]).

<sup>17</sup> *Order on Review* ¶¶ 42-62. A chart excerpting all of the applicable [REDACTED] and restrictions in NBCUniversal’s representative contracts in evidence is attached as Exhibit A.



determined, PCI is *not* a [REDACTED] service but instead is [REDACTED] because it

[REDACTED]  
[REDACTED]<sup>23</sup>

At bottom, PCI is attempting to use the Benchmark Condition to obtain highly valuable film and television content for exhibition in a way that no genuine transactional EST/VOD service is permitted to do, thereby giving PCI a significant – and unique – competitive advantage over other content providers in the marketplace. That is plainly not what the Commission intended in adopting the Benchmark Condition.

1. PCI [REDACTED]

In its AFR, PCI claims that the Bureau “imposed its own view of what is industry practice in this matter.”<sup>24</sup> That is not true. The Bureau’s conclusion is based on the [REDACTED] nature of PCI’s service, as further bolstered by the testimony of NBCUniversal’s highly qualified and experienced industry experts and businesspersons, and the abundant record evidence of how [REDACTED] services like PCI are treated in the industry.<sup>25</sup> These “industry practices” are also well-known to the Commission.<sup>26</sup>

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<sup>23</sup> *Order on Review* ¶¶ 34-35.

<sup>24</sup> PCI AFR at 7.

<sup>25</sup> *Order on Review* ¶¶ 25-26.

<sup>26</sup> *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, ¶¶ 290-291 (2012) (“14<sup>th</sup> Video Competition Report”) (“Depending on the OVD, consumers can gain access to programming in several ways, including: (1) for free, usually with advertising; (2) through a subscription service, with or without advertising; (3) on a per program basis for a fee; or (4) via ‘electronic sell-through’ (‘EST’), where a consumer pays a one-time fee to download a television show, movie, or other media to be stored locally on a hard drive. Any OVD may implement any one or a combination of these business models. Some OVDs provide video content for free. As a general rule, free OVD content is usually supported by advertisements delivered to viewers.”).

As the Bureau correctly found, it is indisputable that PCI intends to [REDACTED]

[REDACTED]<sup>27</sup> PCI's service includes both an [REDACTED]  
[REDACTED]<sup>28</sup> [REDACTED]<sup>29</sup>  
[REDACTED]  
[REDACTED]

[REDACTED]<sup>30</sup> [REDACTED]  
[REDACTED]

[REDACTED]<sup>31</sup> [REDACTED]

[REDACTED]<sup>32</sup> Each of NBCUniversal's fact and expert witnesses testified that this kind of service, which uses [REDACTED]

[REDACTED], is a [REDACTED]

[REDACTED] distribution service as commonly understood in the entertainment industry.<sup>33</sup> Indeed, that is what PCI touts as its unique competitive advantage.<sup>34</sup>

<sup>27</sup> Order on Review ¶ 34.

<sup>28</sup> Id. ¶ 31; see also [REDACTED]

<sup>29</sup> Order on Review ¶ 31.

<sup>30</sup> Id. ¶¶ 31-32; see also HT 323:10-21 (Smith); HT 377:21-378:9 (Peyer).

<sup>31</sup> IIT 323:10-324:1 (Smith); see also Ex. 7 (PCI000049).

<sup>32</sup> Order on Review ¶ 35; see also [REDACTED]  
[REDACTED]

<sup>33</sup> See HT 68:21-69:9 (Roberts); IIT 85:8-86:9 (Casino); IIT 124:21-126:6 (Lamprecht); IIT 151:7-18 (Madoff); HT 193:21-195:19 (Wunderlich).

<sup>34</sup> HT 466:13-19 (Marenzi) ("[w]hat makes [PCI] unique is it provides a platform for a [REDACTED]

The Bureau further observed that PCI's website promotes the service as free, promising access to "your favorite movies and TV shows on demand, without having to reach into your wallet."<sup>35</sup> [REDACTED]

[REDACTED]<sup>36</sup> And PCI has a pending U.S. patent application (co-authored by a PCI principal who testified in the arbitration) which, as the Bureau correctly noted, is yet "another indication that PCI's [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding."<sup>37</sup> Among other things, the application distinguishes "advertiser-supported payments" from real dollars that a consumer may spend to obtain a show, and references [REDACTED]<sup>38</sup>

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[REDACTED]: Wund. Decl. ¶ 8.h (this is PCI's "key distinguishing feature and the hoped for competitive advantage . . . relative to true EST services").

<sup>35</sup> *Order on Review* ¶ 35 & n.156.

<sup>36</sup> HT 403:8-11 (Peyer) (reading from Ex. 26).

<sup>37</sup> *Order on Review* ¶ 40.

<sup>38</sup> Method and System for Processing On-Line Transactions Involving a Content Owner, an Advertiser, and a Targeted Consumer, U.S. Patent Appl. No. 12/644,553 ("PCI Patent Application") at 6 (filed Dec. 22, 2009) (Ex. 63) ("[T]he consumer may be motivated to receive and consume . . . such ads for the purpose of receiving relevant, useful advertisements, and/or to receive compensation for use as possible payment toward past or future consumption of any desired information content. Such payment for desired information content resulting from the consumption of ads is herein referred to as '*advertiser-supported*' payment, and any payment for desired information content that is *not* advertiser-supported is herein referred to as '*consumer supported*' payment.") (emphasis added); 9 ("Such electronic credit earned from consuming ads can be used as *advertiser-supported* payment for any desired video or any other information content currently being consumed or to be consumed at some later time, in the information content consuming mode of the consumers computer.") (emphasis added). The Bureau properly dismissed Ms. Peyer's efforts to distance herself from these statements, given that she is one of the patent's inventors. *See Order on Review* ¶ 40 n.186.

In its AFR, PCI simply ignores its own website and marketing materials, and tries to wriggle out of its patent application, claiming that the filing has “nothing to do” with how PCI will deploy its service. PCI further asserts that “advertiser-supported *payment*” is not the same as [REDACTED]<sup>39</sup> But that is a distinction without meaning in the entertainment industry. [REDACTED] and other licensees pay hundreds of millions of dollars for NBCUniversal content, and [REDACTED] [REDACTED] to recoup their investments.<sup>40</sup> In framing [REDACTED] and restrictions against [REDACTED] [REDACTED] exhibition, these NBCUniversal licensees care *foremost* about whether [REDACTED] [REDACTED] is charged to the consumer to obtain the content. If the consumer can instead obtain the content for [REDACTED] it would significantly undermine the ability of these licensees to charge for the same content (i.e., the viability of their transactional business models).<sup>41</sup> For example, the very [REDACTED] contract language that PCI quotes in the AFR clearly states that the [REDACTED]

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<sup>39</sup> PCI AFR at 15 (emphasis added).

<sup>40</sup> See *Order on Review* ¶ 42; NBCUniversal Phase 1 Op. Br. at 13-15 ([REDACTED] and [REDACTED] have each paid NBCUniversal [REDACTED] and describing their windows); Lam. Decl. ¶¶ 11-13, 19-20 (MVPDs like [REDACTED] and [REDACTED] commonly secure [REDACTED] to their subscribers); Rob. Decl. ¶ 27 ([REDACTED] agreements reflect the fact that the [REDACTED] during the license period.”); Mad. Decl. ¶¶ 27-31; Wund. Decl. ¶¶ 23-24.

<sup>41</sup> See *Order on Review* ¶ 42; Rob. Decl. ¶¶ 12-18; HT 67:19-68:10 (Roberts); Wund. Decl. ¶¶ 24-26; Mad. Decl. ¶¶ 30-31.



[REDACTED]<sup>47</sup> [REDACTED] for obtaining and viewing the content in its [REDACTED]<sup>48</sup> The fact that PCI simply requires users to [REDACTED] the content does not “alter the *fundamental* [REDACTED] nature of PCI’s service.”<sup>49</sup> PCI is simply a [REDACTED] variation on the well-worn practice of using [REDACTED]<sup>50</sup> NBCUniversal’s licensees are not bound by PCI’s self-serving view of [REDACTED] exhibition and instead have written and enforced the relevant [REDACTED] and restrictions in their contracts to prohibit exactly what PCI intends to do here.<sup>51</sup>

**2. The Benchmark Agreement Is Irrelevant To Whether PCI Is [REDACTED] For Purposes Of The Contract Impediment Defense.**

PCI next asserts that it is not [REDACTED] because the peer studio, [REDACTED] allegedly views PCI as a transactional EST/VOID service.<sup>52</sup> To support this inference, PCI notes that the Benchmark Agreement prohibits certain types of [REDACTED] exhibition of [REDACTED] content and [REDACTED]

<sup>47</sup> *Order on Review* ¶ 34.

<sup>48</sup> *Id.* ¶ 37; *see also* [REDACTED]  
[REDACTED] *Order on Review* ¶ 35.

<sup>49</sup> *Order on Review* ¶ 37 (emphasis added).

<sup>50</sup> PCI’s [REDACTED] like other services such as YouTube and Hulu often do. As with other [REDACTED] models, the viewer’s [REDACTED] for viewing the licensed film or TV show. PCI’s own [REDACTED] that PCI’s “innovative” form of [REDACTED] exhibition is just a variation on the traditional [REDACTED] model. III’ 403:8-11 (Peyer) (reading from [REDACTED]).

<sup>51</sup> *Order on Review* ¶¶ 44-47 (describing representative examples of these contract provisions).

<sup>52</sup> PCI AFR at 7; *Order*, App. A, § I.

... (which mirror those in the agreement with and, indeed, NBCUniversal's own agreement with ).<sup>53</sup> In fact, these of the Benchmark Agreement) do not impose any restrictions on PCI at all. They instead require

PCI similarly points to restrictions against certain types of the Benchmark Agreement. These restrictions

<sup>54</sup> Nothing in restricts a PCI customer from - which, as the Bureau found, is the "fundamental nature of PCI's service."<sup>55</sup> And it is precisely this ability of PCI users to obtain content that implicates the and restrictions in the representative NBCUniversal contracts.<sup>56</sup>

Because none of contracts were in evidence, there is no way to know whether is subject to the same and restrictions as NBCUniversal. In all events, the Benchmark Agreement does not trump the provisions in NBCUniversal's contracts.

<sup>53</sup> PCI AFR at 10-11. agreement with was not in evidence.

<sup>54</sup> Benchmark Agreement (Ex. 3) (describing when an ).

<sup>55</sup> Order on Review ¶ 37 (emphasis added).

<sup>56</sup> See Wund. Decl. ¶ 77(a); HT 151:7-154:16; HT 879:3-883:15 (Madoff); Mad. Decl. ¶ 40; Mad. Sec. Decl. ¶¶ 8-11. Because of these restrictions, NBCUniversal includes this same language in each of its transactional EST/VOD agreements - and expressly does not allow to the consumer, regardless of how

which are the relevant ones for analysis under the contract impediment defense. PCI again obfuscates things by wrongly suggesting that the Bureau “struggled to rationalize” why the Benchmark Agreement would allow the [REDACTED]<sup>57</sup> In fact, the Bureau correctly found that these “attributes” of the Benchmark Agreement do not matter for purposes of NBCUniversal’s contract impediment defense.<sup>58</sup>

Finally, PCI notes that it must [REDACTED]

[REDACTED] claiming that this is consistent with a transactional EST/VOD service.<sup>59</sup> But this [REDACTED] requirement is likewise irrelevant to whether a PCI user’s access to content is being [REDACTED] – which is the pertinent question for NBCUniversal’s contract impediment defense.

3. **The** [REDACTED]

In a further attempt to obfuscate its service, PCI asserts that its [REDACTED]<sup>60</sup> PCI goes to great lengths in its AFR to portray the [REDACTED] as a traditional EST/VOD service, where “[n]o consumer is [REDACTED]<sup>61</sup> But, as the Bureau correctly found, this simply hides the ball. As shown, the distinguishing element of

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<sup>57</sup> PCI AFR at 10.

<sup>58</sup> *Order on Review* ¶ 36.

<sup>59</sup> PCI AFR at 8.

<sup>60</sup> *Id.* at 3 (emphasis added).

<sup>61</sup> *Id.* at 17.

PCI's service is the [REDACTED] which enables [REDACTED]

[REDACTED]<sup>62</sup> A [REDACTED]

of the service.<sup>63</sup> PCI uses the [REDACTED]

[REDACTED]<sup>64</sup> PCI then encourages users to act on these incentives by [REDACTED]

[REDACTED]<sup>65</sup> Contrary to PCI's assertions in the AFR (which improperly attempt to re-create the record), the [REDACTED]

[REDACTED] to view content.<sup>66</sup> Once in the [REDACTED]

[REDACTED] PCI [REDACTED]

<sup>62</sup> Order on Review ¶ 34.

<sup>63</sup> Id.; PCI's Phase 1 and 2 Final Offers to NBCUniversal, § 15(c) (Exs. 4, 65) (allowing for this [REDACTED]).

<sup>64</sup> Order on Review ¶ 35 [REDACTED]; HT 452:12-17 (Marenzi) (agreeing with counsel that [REDACTED]); see also Wund. Decl. ¶¶ 19-20, 63; HT 194:6-195:19 (Wunderlich); HT 298:15-299:12; 300:14-301:3 (Smith).

<sup>65</sup> Order on Review ¶ 35; HT 459:10-13 (Marenzi) ([REDACTED]); HT 317:14-318:2 (Smith) [REDACTED]

<sup>66</sup> Order on Review ¶ 32.

[REDACTED]

[REDACTED] And so on.<sup>67</sup>

As one industry expert observed, PCI is not running its [REDACTED] as a charity.<sup>68</sup> It is the fundamental aspect of PCI's service that distinguishes it from genuine transactional EST/VOD services, which the Bureau, the Arbitrator, and industry experts (including PCI's) all readily found.<sup>69</sup> PCI's attempt to pretend that the [REDACTED] has nothing to do with its [REDACTED] is not credible and fully refuted by the record.

4. PCI [REDACTED]

PCI next claims that the [REDACTED]  
[REDACTED]<sup>70</sup> This is likewise not credible. No one disputes that there are several ways to pay for products and services electronically, using credit cards, PayPal, and other types of accounts. But each of these payment methods involves

<sup>67</sup> In its AFR, PCI further asserts that "[g]enerally, [REDACTED]  
[REDACTED]" PCI AFR at 16. But this is *not* what PCI's principals said during the arbitration. See HT 250:12-16 (Smith); HT 359:9-14; 385:10-16; 393:2-13 (Peyer) [REDACTED]

[REDACTED] PCI is again improperly attempting to re-create the record. In all events, even if this were true, it would not change the relevant analysis.

<sup>68</sup> Wund. Sec. Decl. ¶¶ 7, 27 (for PCI to claim it operates the [REDACTED] as a charity defies common sense).

<sup>69</sup> *Order on Review* ¶ 33; see also Phase 1 Dec'n at 10; HT 466:14-19 (Marenzi) (stating [REDACTED] makes PCI unique); HT 515:9-12 (DeVitre) (same); *supra* note 43).

<sup>70</sup> PCI AFR at 20-21.

[REDACTED] tendered by the consumer. PCI [REDACTED] in contrast, do not involve [REDACTED]  
[REDACTED]<sup>71</sup>

PCI users do not receive any [REDACTED] - [REDACTED] [REDACTED]  
[REDACTED] Instead, they only get a [REDACTED]  
[REDACTED]

[REDACTED].<sup>72</sup> PCI [REDACTED]

[REDACTED]<sup>73</sup> For these reasons, as the Bureau correctly observed, there is a  
"substantial difference" from a consumer's perspective between [REDACTED]  
[REDACTED]<sup>74</sup>

PCI further claims that the Bureau erred in finding that [REDACTED]  
[REDACTED]<sup>75</sup> This is yet another obfuscation. The Bureau did not  
dispute that [REDACTED] are paying [REDACTED] to reach PCI users. But PCI [REDACTED]  
[REDACTED]<sup>76</sup> PCI uses this [REDACTED] its users' access to content. Thus,

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<sup>71</sup> The Arbitrator used the nomenclature of [REDACTED] and [REDACTED] in noting this distinction between [REDACTED] and PCI [REDACTED] Phase 1 Dec'n at 10.

<sup>72</sup> *Order on Review* ¶ 35 [REDACTED]  
[REDACTED]

<sup>73</sup> [REDACTED]

<sup>74</sup> *Order on Review* ¶ 38. Notably, PCI's expert witness in the arbitration was [REDACTED]  
[REDACTED] for participating in the arbitration. HI 521:13-20 (DeVitre)  
[REDACTED]

<sup>75</sup> PCI AFR at 18.

<sup>76</sup> *Order on Review* ¶ 35.

the Bureau was correct in finding that a PCI user [REDACTED]  
[REDACTED]<sup>77</sup>

In its AFR, PCI also improperly tries to re-create the arbitration record by referencing a new and unspecified [REDACTED] for its users.<sup>78</sup> However, PCI's [REDACTED] for the service expressly [REDACTED]<sup>79</sup> And both of PCI's principals testified during the arbitration that PCI [REDACTED]<sup>80</sup>

Rather, they emphasized (as everyone else saw) that the whole point of PCI's service is to

[REDACTED]

[REDACTED]

[REDACTED]<sup>81</sup> PCI's untimely attempt to change the record with this supposed [REDACTED] [REDACTED] is, at bottom, a concession that the Bureau's findings about the non-monetary nature of PCI's [REDACTED] – from the perspective of the PCI user (and hence [REDACTED] and other NBCUniversal licensees) are entirely correct. In all events, the Bureau already rejected PCI's

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<sup>77</sup> *Id.* ¶ 45.

<sup>78</sup> PCI AFR at 19.

<sup>79</sup> [REDACTED]  
[REDACTED]

<sup>80</sup> HT 293:16-20; 294:7-8 (Smith) [REDACTED]  
[REDACTED]; IIT 385:6-9 (Peyer) (discussing use of Project Concord [REDACTED]  
[REDACTED]).

<sup>81</sup> *See supra* note 67; HT 293:19-20 (Smith).

previous attempt to introduce this new, extra-record evidence, which may not be properly considered by the Commission here.<sup>82</sup>

Finally, PCI contends that its [REDACTED] - if not [REDACTED] - are simply the same as other kinds of [REDACTED] offered by genuine transactional EST/VOD services, like [REDACTED] and [REDACTED].<sup>83</sup> That is likewise untrue. [REDACTED] [REDACTED] "real cash."<sup>84</sup> Further, the arbitration evidence showed - and the Bureau correctly found - that [REDACTED] on services like [REDACTED] are a limited exception in terms of overall transactions, *de minimis* in nature, not based on the [REDACTED] and typically designed to spur further cash purchases of content (e.g., through registering a [REDACTED] enabled device).<sup>85</sup> PCI's [REDACTED] [REDACTED] as shown, the distinguishing aspect of PCI's service is its [REDACTED]

<sup>82</sup> *Supplemental Motion Order* at 1-2 [REDACTED] PCI's improper attempt to introduce this new evidence is also pointless. Even if PCI had a [REDACTED] the ability of users to [REDACTED] content would remain. Because PCI would still be using [REDACTED] this supposed [REDACTED], in the Bureau's words, would not alter "the *fundamental* [REDACTED] nature of PCI's service." *Order on Review* ¶ 37 (emphasis added). *Cf.* HT 194:11-19 (Wunderlich); Mad. Decl. ¶ 37 (that PCI users [REDACTED] does not change the [REDACTED] nature of the service, it merely affects the degree to which it is so).

<sup>83</sup> PCI AFR at 20-21.

<sup>84</sup> *Order on Review* ¶ 39; HT 127:9-21 (Lamprecht) ("Well, in a case of [REDACTED] as an example, they have what's called [REDACTED] So you either pay by credit card and you buy - you buy a card at a retail store with a credit card or with cash, and it's effectively a one-for-one transfer of U.S. currency to an [REDACTED] . . ."); Wund. Decl. ¶ 52.

<sup>85</sup> *Order on Review* ¶ 39. The Commission is well aware that Vudu is not running a promotions-based business. *See 14<sup>th</sup> Video Competition Report* ¶¶ 294-295, 326 (discussing Vudu's fee-based service and its market share in "Consumer Purchase Transactions").



[REDACTED]

[REDACTED] refers to [REDACTED]: the relevant [REDACTED] provision refers to [REDACTED]; etc.<sup>91</sup> The whole point of the [REDACTED] requirement is to make sure consumers are [REDACTED] for the content, not obtaining it [REDACTED].

[REDACTED] How the content provider is [REDACTED] or what a service calls itself, are simply irrelevant to what these licensees care about and protect against in the relevant [REDACTED] provisions.

For all of these reasons, the Commission should affirm the Bureau's findings in the *Order on Review* that PCI's service is [REDACTED] and does not require a [REDACTED] [REDACTED] and that providing certain film and television content to PCI would constitute a breach of the relevant NBCUniversal contracts.

**B. The *Order On Review* Provides Clear Guidance On The Contract Impediment Defense And Does Not Require A "Verification" Process.**

During the arbitration, PCI did not dispute that the [REDACTED] and restrictions in NBCUniversal's representative contracts reflected reasonable and customary industry practices.<sup>92</sup> Nor did PCI dispute the use of representative contracts to establish the contract impediment

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<sup>91</sup> See Exhibit A (chart of excerpts of NBCUniversal representative agreements) (emphasis added). The [REDACTED] restrictions and/or [REDACTED] requirements in NBCUniversal's (and other customary industry) agreements all serve the same fundamental purpose of ensuring that consumers cannot view for [REDACTED] content that other licensees have paid millions of dollars to exploit on an exclusive or otherwise limited basis. *Order on Review* ¶ 42.

<sup>92</sup> *Order on Review* n.102 (noting that "[t]here was no dispute between the parties as to whether the *representative* contracts provided by NBCU, including the exclusivity and windowing provisions contained therein, are 'consistent with reasonable, common industry practice,' and neither side sought review of this issue") (emphasis added); *id.* ¶¶ 27-30.

defense.<sup>93</sup> Indeed, it would have been entirely unreasonable, cumulative, and burdensome to expect NBCUniversal to produce every one of the scores of contracts that contain similar [REDACTED] and restrictions, particularly given the expedited nature of the arbitration.

In the *Order on Review*, the Bureau confirmed the reasonable approach used by the parties to address the contract impediment defense in the arbitration.<sup>94</sup> The Bureau also ruled on each of the representative contracts in evidence and provided clear guidance to NBCUniversal (and PCI) that other third party license agreements “that contain similar restrictions” to those specified in the *Order on Review* would also be breached.<sup>95</sup> This simply requires a straightforward analysis of whether a contract contains similar [REDACTED] and restrictions to those in the representative contracts. As the arbitration record shows, NBCUniversal works diligently to honor these [REDACTED] in its agreements and makes these kind of determinations every day in licensing content to other parties with [REDACTED] services.<sup>96</sup> No NBCUniversal licensee has “verification” rights over this administrative process.

Even more fundamentally, PCI did not ask for “verification” rights in the awarded Final Agreement (i.e., PCI’s own Final Offer). Rather, consistent with industry practice, the Final

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<sup>93</sup> *Id.* n.102 (detailing 21 representative license agreements, seventeen of which were prior to December 3, 2009). NBCUniversal also excerpted the relevant provisions of those contracts in chart form for the Arbitrator and PCI. *See* Mad. Decl., Schedules C-1, C-2, C-3, and C-4 (Exs. 19-22).

<sup>94</sup> *Order on Review* ¶ 42.

<sup>95</sup> *Id.* ¶ 61.

<sup>96</sup> *See* HIT 69:11-70:9 (Roberts) (explaining licensing process and “well established” nature of restrictions in license agreements against [REDACTED] exhibition); HIT 85:17-86:9 (Casino) (stating it is a part of his “daily job” to determine what NBCUniversal can license to [REDACTED] services); HIT 124:9-14 (Lamprecht) (describing responsibility for overseeing distribution of content on an EST/VOD basis).



party (or its outside counsel) in any proceeding. NBCUniversal would be required to notify all of these third parties before any disclosure of their contracts, triggering a host of potential objections and disputes.<sup>101</sup> Even if access to the contracts were restricted to outside counsel or experts, it would not reduce the unreasonable burdens and risks that such a process would impose on NBCUniversal and its other licensees.<sup>102</sup>

Nor is any of this necessary. NBCUniversal will comply with the Bureau's clear guidance on the contract impediment defense, just as NBCUniversal does in applying these same customary [REDACTED] and restrictions in its day-to-day commercial relationships with other licensees. PCI, in turn, can raise any questions it might have about the restrictions on any particular film title or television show, which NBCUniversal will address in the ordinary course and pursuant to the processes that PCI itself proposed in the Final Agreement.

## V. CONCLUSION

Accordingly, NBCUniversal respectfully requests that the Commission (1) affirm the Bureau's rulings in the *Order on Review* concerning the [REDACTED] nature of PCI's service and NBCUniversal's contractual impediment defense; and (2) deny PCI's request for a "verification" process on the grounds that this proposal is improper, unjustified, and has been waived.

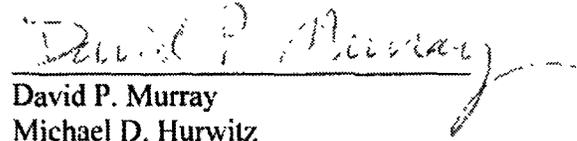
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<sup>101</sup> These contracts generally restrict disclosure unless it is legally compelled and include advance notice and other rights to the third party. *See, e.g.*, [REDACTED]

<sup>102</sup> On at least two occasions during these proceedings, PCI's outside counsel has disclosed Highly Confidential information from NBCUniversal's third party contracts (including the [REDACTED] agreement) to unauthorized individuals in violation of the Confidentiality Agreement and Protective Order in this proceeding. Even taking at face value that these disclosures were inadvertent, they further underscore the unreasonableness of turning scores of additional Highly Confidential contracts over to PCI's outside counsel or experts.

Dated: December 28, 2012

Respectfully submitted,

A handwritten signature in black ink that reads "David P. Murray". The signature is written in a cursive style and is positioned above a horizontal line.

David P. Murray

Michael D. Hurwitz

Lindsay M. Addison

Mary Claire B. York

*Counsel for Respondent NBCUniversal  
Media, LLC*

**CERTIFICATE OF SERVICE**

I, Michael Hurwitz, hereby certify that on December 28, 2012, I caused true and correct copies of the enclosed Opposition to Application for Review to be served by hand delivery to the following.

Monica Desai  
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# EXHIBIT A

**ENTIRE EXHIBIT  
REDACTED – FOR PUBLIC  
INSPECTION**