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FILED/ACCEPTED

JAN 14 2013

Federal Communications Commission  
Office of the Secretary

January 14, 2013

## VIA HAND DELIVERY

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

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

Dear Ms. Dortch:

Enclosed are an original and two (2) copies of the Public version of a Reply in Support of 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 January 7, 2013. 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.

2 copies rec'd  
RECEIVED

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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 large, sweeping "M" and a long tail on the "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  
Washington, D.C. 20554

FILED/ACCEPTED

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. )

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MB Docket No. 10-56

To: The Commission

REPLY IN SUPPORT OF NBCUNIVERSAL'S APPLICATION FOR REVIEW

WILLKIE FARR & GALLAGHER LLP  
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NBCUniversal Media, LLC (“NBCUniversal”) submits this Reply in Support of Its Application for Review (“AFR”) and respectfully requests that the Commission overturn the Media Bureau’s erroneous determination that films less than one year from theatrical release (“first-year films”) are included in the definition of “Video Programming” subject to the Benchmark Condition. The plain language of the *Order* expressly *excludes* first-year films from this remedy. Reversal is critically important to preserve the integrity of the policy decisions concerning first-year films made by both the Commission in its Order and the Department of Justice (“DOJ”) in its consent agreement with NBCUniversal.

**I. The Exclusion Of First-Year Films Is Self-Evident From The Definition Of Video Programming And Supported By The Transaction-Review Record.**

In its Opposition, Project Concord, Inc. (“PCI”) wrongly argues that there is no record support for the policy judgment made by the Commission and DOJ to exclude first-year films from the definition of Video Programming.<sup>1</sup> In fact, the Commission said all that it needed to say in the most relevant portion of the *Order*: the operative definition of “Video Programming,” which expressly limits covered films to those “for which a year or more has elapsed since their theatrical release.”<sup>2</sup> This limitation speaks directly to the Commission’s decision and was plainly meant to place first-year films outside of the compulsory licensing regime. The Bureau erred by failing to give this express limitation its proper effect.

In addition to the express language of the *Order*, the transaction-review record makes clear that the Commission and DOJ gave extensive consideration to this question in drawing the

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<sup>1</sup> PCI Opposition to NBCUniversal Media Application for Review (“PCI Opp.”) at 2-3. Defined terms have the same meaning as set forth in NBCUniversal’s Petition for *De Novo* Review (“NBCUniversal Pet.”).

<sup>2</sup> *Order*, App. A, § I.

policy lines that they did. As detailed in NBCUniversal's AFR, the transaction-review record encompassed thousands of pages of license agreements showing NBCUniversal's established windowing and exclusivity practices, including all of the relevant [REDACTED] agreements affecting first-year films. And there were multiple meetings between the Commission and NBCUniversal concerning the [REDACTED] agreements, films, and related issues.<sup>3</sup>

In addition, it is indisputable that both the Commission and DOJ engaged in "unprecedented coordination" throughout the transaction-review process, consulting extensively with each other to ensure that the parallel remedies they adopted were "consistent."<sup>4</sup> Contrary to the assertions in PCI's Opposition, NBCUniversal is not asking the Commission to give primary weight to the DOJ consent agreement.<sup>5</sup> Rather, the relevant point is that both the Commission and DOJ used *identical* language in their parallel Benchmark Conditions for the first-year film exclusion (i.e., by expressly including only films "for which more than a year has elapsed from

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<sup>3</sup> NBCUniversal Pet. at 11 & n.31, 15 & n.46 (summarizing relevant parts of transaction-review record). NBCUniversal has cited to this record throughout the arbitration and Commission appeal process, including Commission and DOJ review of the relevant [REDACTED] and other agreements and extensive discussions with NBCUniversal representatives (and other interested parties) concerning [REDACTED] provisions for first-year films and other content in these agreements. NBCUniversal Phase 1 Clos. Br. at 3-8 (describing agencies' transaction-review process); NBCUniversal Phase 1 Reb. Br. at 4-7 (same). This record shows that the Commission (and DOJ) considered and understood how these well-established practices work in the entertainment industry.

<sup>4</sup> See DOJ CIS, § II.A.4, at 6-7 (discussing extensive consultations between the agencies to ensure consistent remedies); DOJ, Antitrust Division Policy Guide to Merger Remedies, at 20 n.45 (June 2011) (citing Remarks of Assistant Attorney General Christine Varney, *available at* [www.justice.gov/atr/public/speeches/266156.htm](http://www.justice.gov/atr/public/speeches/266156.htm) ("I really want to highlight the great cooperation and unprecedented coordination with the FCC . . . . This approach resulted in effective, efficient and consistent remedies.")).

<sup>5</sup> NBCUniversal's negotiations with DOJ culminated in a binding agreement (i.e., a consent decree). DOJ CIS, § II.A.4, at 6-7 (describing DOJ review process); *id.* § II.B.1, at 8; *id.* § VII at 43-46 (discussing consent decree/settlement standards); AFR at 11; NBCUniversal Pet. at 12-13, 15-16.

theatrical release” in the definition of Video Programming).<sup>6</sup> This was no accident but rather the product of an informed policy decision by *both* agencies in crafting and adopting “consistent” remedies.<sup>7</sup> The Bureau’s failure to give the express first-year film exclusion proper effect, if not corrected by the Commission, would destroy this intended consistency and wrongly subject NBCUniversal to differing and conflicting requirements under the two federal agency regimes.<sup>8</sup>

## **II. The Bureau’s Flawed Construction Of The Definition Of Video Programming Improperly Renders The Express First-Year Film Exclusion Superfluous.**

In its Opposition, PCI also embraces the Bureau’s flawed attempt to explain away the express first-year film exclusion in the definition of Video Programming when “read in context of the entire condition.”<sup>9</sup> As shown in NBCUniversal’s AFR, the Bureau’s strained analysis contravenes well-established canons of statutory construction by allowing generalized references in the *Order* (i.e., boilerplate “includes but not limited to” language) to swallow the more specific language expressly excluding first year films.<sup>10</sup> If the Commission intended to make first-year films subject to the Benchmark Condition, the definition of Video Programming would

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<sup>6</sup> Like the FCC, DOJ defines “Video Programming” subject to the Benchmark Condition. in relevant part, to include only “Films for which a year or more has elapsed since their theatrical release.” DOJ Final Judgment, §§ II.L, II.EE; *see also* NBCUniversal Pet. at 12-15.

<sup>7</sup> AFR at 6-13.

<sup>8</sup> PCI also quotes selected post-transaction review comments by a DOJ official generally describing the Consent Decree in an attempt to argue that the express exclusion should be ignored. PCI Opp. at 4 & n.15. These comments say nothing about first-year films, let alone override the express language in the Consent Decree.

<sup>9</sup> PCI Opp. at 8.

<sup>10</sup> *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”) (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *accord N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006).

have simply said “Films,” and not “Films for which a year or more has elapsed since their theatrical release.” The Commission’s use of the general boilerplate “includes but is not limited to” language cannot be properly read to override this clear policy decision. Rather, the definition of Video Programming identifies different *categories* and *media* of programming. When “read in proper context,” therefore, the “includes but is not limited to” phrase simply allows for new kinds and forms of video programming to be subject to the remedy over the life of the conditions. This construction gives proper meaning and effect to all parts of the definition.

During the arbitration, PCI proffered a newly-minted theory that the express first-year film exclusion in the definition of Video Programming was meant to capture older films that may not yet have been digitized for online distribution.<sup>11</sup> Notably, PCI has now *abandoned* this argument in its Opposition.<sup>12</sup> And for good reason: as shown in NBCUniversal’s AFR, this imagined inclusion of decades-old films is nonsensical and contradicted by the longstanding practice of films being routinely digitized. The Bureau’s adoption of PCI’s (now-abandoned) theory was an impermissible post-hoc rationalization entirely unsupported by anything in the *Order* or transaction-review record.<sup>13</sup> There is no rationale for explaining why the Commission would adopt express limiting language in defining when films become subject to the Benchmark Condition (i.e., a year or more after theatrical release) if it meant to include first-year films

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<sup>11</sup> *Order on Review* ¶ 24 & n.100.

<sup>12</sup> PCI Opp. at 5-6.

<sup>13</sup> *See Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 52 (1983) (requiring agency explanation for decisions to be “sufficient to enable [a court] to conclude that [it] was the product of reasoned decisionmaking,” and not merely “appellate counsel’s *post hoc* rationalizations for agency action”).

anyway. The Bureau plainly erred by making this express language in the definition meaningless.

**III. The Arbitration Record Established The [REDACTED] To NBCUniversal That Would Arise Under The [REDACTED] Agreements.**

Finally, PCI asserts that NBCUniversal did not offer record support for the [REDACTED] [REDACTED] that it could suffer under the [REDACTED] agreements if forced to license newly-released films based on the practices of a peer studio. This misrepresents the record. The relevant [REDACTED] agreements were in evidence, and these potential harms were attested to by NBCUniversal's industry expert, Steven Madoff, and an NBCUniversal witness in the arbitration proceedings.<sup>14</sup> NBCUniversal likewise explained these [REDACTED] to the Bureau in its Petition for *De Novo* Review, and PCI (rightly) raised no such record objection.<sup>15</sup>

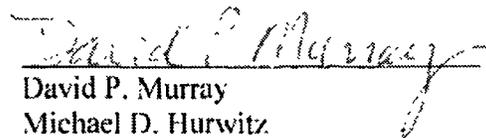
As shown in NBCUniversal's AFR, the Commission considered these same [REDACTED] [REDACTED] during the transaction-review process and determined that they should not be left to proof under the contractual impediment defense in future arbitrations. Instead, like DOJ, the Commission chose to exclude first-year films from the Benchmark Condition, precisely so that NBCUniversal would be protected from such [REDACTED] and would *not* have to relitigate its longstanding obligations to [REDACTED] relating to first-year films on a case-by-case basis, subject to potentially inconsistent and erroneous rulings by arbitrators (as occurred in this proceeding).

<sup>14</sup> Mad. Decl. ¶ 45; Mad. Sec. Decl. ¶ 1; NBCUniversal Phase 1 Op. Br. at 11-13; Cas. Decl. ¶ 29 (describing [REDACTED]); HT 90:10-91:6 (Casino) (same).

<sup>15</sup> NBCUniversal Pet. at 15-16 & n.46 (explaining and referring to specific contractual provisions in evidence); *see also* Reply in Support of NBCUniversal Pet. at 2, 4-6.

Dated: January 7, 2013

Respectfully submitted,

A handwritten signature in cursive script, reading "David P. Murray", is written over 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, Lindsay Addison, hereby certify that on January 7, 2013, I caused true and correct copies of the enclosed Reply in Support of NBCUniversal's Application for Review to be served by hand delivery to the following.

Monica Desai  
Palton Boggs LLP  
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Washington, D.C. 20037

  
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Lindsay Addison

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