Before the
Federal Communications Commission
Washington, D.C. 20554

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

IN RE: APPLICATION FOR REVIEW OF MEDIA BUREAU ORDER DA 12-1950

REPLY TO OPPOSITION OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (together and on behalf of their affiliated businesses, the "Content Companies"), pursuant to Section 1.115(d) of the Commission's rules, reply to the Opposition[1] of Comcast Corporation ("Comcast") and NBCUniversal Media LLC ("NBCU" and collectively with Comcast "C-NBCU") to the Content Companies' Application for Review[2] of the Media Bureau (the "Bureau") order in the above-captioned proceeding released on December 4, 2012 (the "Order").[3]

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[1] "Opposition of Comcast Corporation and NBCUniversal Media, LLC to Content Companies' Application for Review," MB Docket No. 10-56 (January 18, 2013) (the "Opposition").

[2] "Application for Review of Media Bureau Order DA 12-1950," MB Docket No. 10-56 (January 3, 2013) (the "Application for Review").

[3] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, DA 12-1950, 2012 WL 6039368 (Order by the Chief, Media Bureau, released December 4, 2012).

The Order modifies the Commission's decision granting its consent to the joint venture of Comcast Corporation and NBC Universal, Inc. ("C-NBCU").[4] The Merger Decision established the "Benchmark Condition," among others, in an effort to protect against potential anti-competitive and abusive effects of the C-NBCU joint venture.[5] Under the Benchmark Condition, a qualified OVD may request that C-NBCU provide online video programming at prices, terms, and conditions that are the economic equivalent of what the OVD pays for "Comparable Programming" in a peer programming agreement.[6] The Content Companies are the peers, whose highly confidential information will be contained in such a peer programming agreement.

The Opposition claims that the Order was necessary to reduce administrative burdens by requiring OVDs to turn over peer programming agreements at the time they invoke the Benchmark Condition, rather than during an arbitration process that an OVD could elect if negotiations fail. It claims that this is only a clarification and it is not a question of "whether" a contract will be disclosed, but "when." This argument misses the point that "when" will determine "whether" in this case, because the costs, inconvenience, and uncertainty of arbitration make it something to be avoided. More contracts will be disclosed if they can be demanded at the beginning of the negotiations. The Opposition cites to the Department of Justice's Final Judgment in its review of the joint venture,[7] but fails to note that the Final Judgment matches the

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[4] *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238 (January 20, 2011) (the "Merger Decision").

[5] *Id.* ¶¶ 2-4.

[6] Merger Decision, App. A., § IV, A.2.b

[7] Opposition at 2.

Merger Decision in not contemplating contract disclosures until arbitration, if at all. The Final Judgment also requires the DOJ's consent to an arbitration before agreements must be disclosed.[8]

The Order transforms the Benchmark Condition from what was designed to be a check on the merged entity's power in relation to OVDs into a huge advantage. It does so by giving C-NBCU's outside counsel and consultants encyclopedic knowledge of the online programming realm – information that antitrust law and principles would prevent OVDs and the Content Companies from amassing. The Opposition claims that the Media Bureau had sufficient authority for this transformation, but cites only to the Commission's general authority to review mergers under Section 310(d) of the Communications Act and cases where a bureau was obviously clarifying, not modifying, an established Commission decision.[9] Section 310(d) does not extend so far as to justify agency interference with the business interests of companies that were *not* applicants in license transfer and assignment applications.[10] Section 310(d) does not provide authority to abrogate private contracts between parties that are not Commission applicants.

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[8] Final Judgment, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Sept. 1, 2011) at 25, *available at* http://www.justice.gov/atr/cases/comcast.html.

[9] Opposition at pp. 21 and 14, n.44. In note 74, p. 21, the Opposition cites to the Content Companies' statements in their "Joint Opposition to Comcast-NBCU Request for Clarification Regarding the Benchmark Condition," MB Docket No. 10-56 (April 3, 2012) at 22. In the cited portion of that filing, the Content Companies were arguing against C-NBCU's request that its in-house business personnel have access to peer programming agreements. The reference to "substantial [FCC] precedent" was to certain specific limited situations where the Commission had determined that disclosure of programming agreements was necessary. In those cases the Commission had limited disclosure to outside counsel and experts and had not permitted access by in-house personnel. The Opposition is mistaken in its claim that this argument constituted an embrace of the Bureau's authority or the protective order adopted in the Order. It was a statement of what had transpired, not what the Commission *should* have done.

[10] *See, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* 16 FCC Rcd 6547 (2001) ¶ 60. Neither the Content Companies nor the OVDs were applicants; nor did they acquire permits or licenses pursuant to Section 310(d) as part of the C-NBCU transaction.

The Opposition asserts that the Order does not abrogate nondisclosure agreements or the confidentiality provisions of contracts,[11] even though the clear language of the Order states: "it is the intent of this Order to override any such confidentiality or non-disclosure provisions or agreements."[12] Notwithstanding the Opposition's claim that the OVD is an "owner" of the highly confidential terms and conditions in a peer agreement,[13] the OVD made a contractual pledge to protect those terms in part for the benefit of the peer programmer. As explained in the Application for Review, the Merger Decision respects those contractual provisions while the Order requires that the OVD violate them.[14] Thus, the Order constitutes a "taking" of the Content Company's investment-backed expectations.

The Opposition also claims that the Third Protective Order will safeguard the Content Companies' highly confidential information. As discussed in the Application for Review, no restrictions in a protective order are sufficient to balance the danger from these potential disclosures, which will be greater in number and frequency than as anticipated in the arbitration context.[15] A recent filing by C-NBCU indicates that it is aware that highly confidential information provided only to outside counsel under a protective order can still be publicly disclosed in violation of such order, which, in C-NBCU's words, "underscore[s] the

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[11] Opposition at 15-17.

[12] Order, ¶ 12.

[13] Opposition at 17.

[14] Application for Review at 16.

[15] *Id.* at 8-10.

unreasonableness of turning scores of additional Highly Confidential contracts over to . . . outside counsel or experts."[16]

In the Application for Review, the Content Companies pointed to C-NBCU's apparent success in working out deals with OVDs without need for the drastic modification imposed by the Order.[17] The Opposition claims that C-NBCU's statements in its Annual Compliance Report were taken out of context.[18] There is, however, no other reasonable interpretation of the Annual Compliance Report. C-NBCU reported that "some" OVDs had invoked the Merger Order's conditions and "the majority" of those OVDs elected the Benchmark Condition. As of January 28, 2012, the cut-off date for inclusion in the Annual Compliance Report, *only one* OVD had filed a formal demand for arbitration.[19] Now, in its Opposition, C-NBCU reports that "each time an OVD has invoked the Benchmark Condition" it has led to arbitration.[20] In any case, C-NBCU has not disclaimed its report that it "has negotiated and executed license agreements with *several* OVDs on mutually agreeable terms without resort to the specific processes of the Conditions."[21] As such, it is apparent that the Order transforming

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[16] NBC Universal Media, LLC "Opposition to Project Concord, Inc.'s Application for Review," *Project Concord, Inc. v. NBCUniversal Media, LLC* (AAA Case No. 72-472-E-01147-11), MB Docket 10-56 (December 28, 2012; *redacted version filed for public inspection* January 14, 2013), n.102 ("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.").

[17] Application for Review, pp. 5, 7, and 14.

[18] Opposition at 4-6.

[19] *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, Annual Report of Compliance with Transaction Conditions (filed Feb. 28, 2012), at 8-9 (the "Annual Compliance Report").

[20] Opposition at 5.

[21] Annual Compliance Report at 9, emphasis added.

the Benchmark Condition from an intended protective measure for OVDs to a boon for C-NBCU creates a vastly more serious problem than the one it was intended to solve.

The remaining arguments in the Opposition are equally unavailing. As the Content Companies explained in the Application for Review, the Commission established clear procedures for implementing the Benchmark Condition in the Merger Decision. The Content Companies respectfully request that the Commission now should reinstate those procedures by reversing the changes imposed by the Order. Additionally, because the Order is the product of arbitrary and capricious decision-making, abrogates contracts without statutory authority, creates a regulatory taking under the Fifth Amendment, and violates federal statutes, a reversal is necessary to serve the public interest.

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January 28, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2013, a true and correct copy of the foregoing Reply to Opposition of Comcast Corporation and NBCUniversal Media, LLC has been served, in the delivery manner specified, on the following persons at the addresses shown below:

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