

Obviously, 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.” If there was any exclusion (which there expressly is not), then it would have been an implied exclusion based on the sentence “Films for which a year or more has elapsed since their theatrical release.” However, the definitional language preceding this sentence, further supported by the basis for the establishment of the Conditions altogether (as discussed below),⁷⁰ demonstrates that the Commission expressly did not intend to imply such an anti-competitive restriction on the most valuable TVOD programming. 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.⁷¹

Moreover, an inclusive reading of the definition of “Video Programming” is also consistent with the definition of a peer “Film Studio” set forth in the Conditions. 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.”**⁷² 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

⁷⁰ *CNBCU Order* at 4268 - 4269, ¶ 78.

⁷¹ *CNBCU Order* at 4358 (App. A §I); *see also* PCI Phase 1 Opening Brief, at 8.

⁷² *CNBCU Order* at 4357 (App. A §I) (2011) (emphasis added).

Nevertheless, NBCU attempts to create a distraction by pointing to the parallel Benchmark Condition in the DOJ consent decree, which lacks similar language.⁷⁷ Respondent's attempt to use the DOJ arbitration process – which is, of course, irrelevant to proceedings being held under the Commission's Conditions – as support for its argument that it can exclude an entire category of must-have programming from an OVD seeking access under the FCC Conditions -- is particularly troubling in light of recent comments made by the Acting Assistant Attorney General for the Antitrust Division at the Department of Justice, Sharis Pozen, discussing DOJ's Comcast/NBCUniversal consent decree. She 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.”⁷⁸

In short, NBCUniversal's contention that the definition of Video Programming set forth in the Conditions must be read – by negative inference no less – as excepting the very category of

⁷⁷ See NBCU Petition at 14.

⁷⁸ In relevant part, Ms. Pozen stated: “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. 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.” 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); see also PCI Phase 1 Post-Hearing Brief, at 27.

programming that is most critical to the ability of OVDs to compete with Comcast's traditional PPV and TVOD services and a category of programming distributed by other OVDs – the first run Films that are provided on those services – is untenable. Here, the Benchmark Agreement requires [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Benchmark Agreement also requires [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], respectively. Accordingly, the Comparable

Programming that the Conditions require NBCU to license to PCI must include those same categories of content. Any other result would undermine one of the primary objectives that the Conditions are intended to achieve – ensuring that OVDs are on a level playing field when it comes to competing with Comcast for the most valuable content that NBCU controls.⁷⁹

IV. BASED ON AN EXTENSIVE RECORD, THE ARBITRATOR RULED CORRECTLY THAT NBCU FAILED TO MEET ITS BURDEN OF PROOF ON ITS CONTRACTUAL IMPEDIMENT DEFENSE.

During the Arbitration proceedings, NBCU asserted that providing the Comparable Programming to PCI would breach numerous license agreements with [REDACTED] [REDACTED] that prohibit it from licensing [REDACTED] exhibition of current films and television shows and [REDACTED] for access to such content during certain windows.⁸⁰ Upon review of the actual contractual provisions that NBCU contended would

⁷⁹ PCI Phase 1 Post-Hearing Brief, at 27-28.

⁸⁰ See NBCU Petition at 17.

be breached, however, the Arbitrator determined that NBCU had not demonstrated any likelihood that such provisions would in fact be breached if NBCU provided the programming to PCI.⁸¹

In this appeal, NBCU argues that it presented “ample evidence” that it would breach such agreements if it were to license such films or shows to PCI based on NBCU’s flagrant mischaracterization of the Project Concord ██████. Specifically, NBCU argues that the Arbitrator’s holding regarding its contract impediment defense should be reversed because: (1) the Arbitrator applied an erroneous standard; and (2) NBCU proved under the proper standard that providing certain television and film content to PCI would constitute a breach of numerous NBCU license agreements.⁸²

These arguments are wholly unsupported by the record. Fundamentally, NBCU failed to establish that it is more likely than not that any of the specific contract provisions at issue were at risk of being breached—the standard the Arbitrator identified in his Phase 1 decision and applied in the Arbitration Award. Ironically, the Arbitrator went out of his way to also evaluate the “risk of being in breach” – as urged by NBCU’s own experts.⁸³

The Arbitrator’s determination that NBCU did not meet its burden of proof was based on (1) the specific contract language (which NBCU does not point to in this appeal but instead attempts to rely on paraphrases that the Arbitrator advised on multiple occasions were not a substitute for the

⁸¹ See Arbitration Award at 10-11 (examining specific provisions); Arbitration Award, Phase 1 Decision at 10 (setting forth standard); NBCU Phase 2 Closing Brief, Exhibit A (identifying the specific contract language NBCUniversal asserted would be breached).

⁸² See NBCU Petition at 18-42.

⁸³ Arbitration Award, Phase 1 Decision at 10 (“In addition, while I think that under the circumstances, in order to establish the Defense, it should be sufficient for NBCU to show that, as its two experts have opined, it is at risk of being in breach, that is a question that should be addressed definitively.”); see also, e.g., HT 663:10-667:5 (Wunderlich).

specific language and were not helpful),⁸⁴ (2) the facts (as opposed to NBCU’s repeated inaccurate and misleading characterizations) established on the record about Project Concord’s store and (3) evidence that specifically bears on the risk of breach, including but not limited to evidence from both NBCU’s and PCI’s experts about how licensing issues are raised and resolved in the industry and the contractual provisions in the parties’ final offers that remove the risk of breach of NBCU’s other contracts. Based on this record, the FCC should affirm the Arbitrator’s determination. Here, NBCU failed to meet its burden – either through the language in its agreements or through the testimony of its expert witnesses – to demonstrate by a preponderance of the evidence that the terms of its other agreements justify its refusal to offer access to certain types programming to PCI.⁸⁵

The evidence also demonstrated that without the incentives to hinder a competing content distributor that are created by a combined cable television distribution business and content provider,⁸⁶ studios will ordinarily embrace new opportunities that enhance their ability to make money on their content, and they work with their licensing partners to make room for them to do

⁸⁴ *See, e.g.*, HT 796:22-801:3 (May 30, 2012) (Arbitrator discussing his need for “cogent, easy to understand list of the particular agreements that NBCUniversal is contending would be in breach of in the event they did the kind of deal PCI wants it to do, a highlighting or excerpting of the key contractual language for each of those agreements. So that without too much effort, I could focus on the contractual language of each particular agreement that you are contending would be in breach or that you’re in risk of breaching” so that the arbitrator could at least “zero in on” the language in question and not “spend an hour looking for the documents” to “see what the language is that you’re so concerned about and determine, gee, it’s a valid concern, it’s a conclusive concern or whatever other alternatives there are” to “decide the defense” and “take into account what all the experts say the industry practices are, and how they read everything and all this other stuff, on both sides.”).

⁸⁵ *See CNBCU Order* at 4368 (App. A §VII.C.3) (2011).

⁸⁶ *See CNBCU Order* at 4268-4269, ¶ 78.

so.⁸⁷ As a result, studios generate more content for distribution, and distributors make more money for the studios because they have more product to sell.⁸⁸

A. The Arbitrator Applied the Correct Standard - the “Preponderance of the Evidence” Standard Set Forth in the Conditions.

Section VII.C.3(ii) of the Conditions provides that it is a defense to the requirement of providing Comparable Programming if NBCUniversal demonstrates “by a preponderance of the evidence” that “providing the Online Video Programming to the particular Qualified OVD would constitute a breach of a contract to which [NBCUniversal] is a party (provided that any provision prohibited under Section IV.B shall not be a defense.)”⁸⁹ The Arbitrator set forth, in Phase 1, what NBCU would need to demonstrate under this standard, based on the opinion of NBCU’s two experts: “In addition, while I think that under the circumstances, in order to establish the Defense, it should be sufficient for NBCU to show that, as its two experts have opined, it is at risk of being in breach, that is a question which should be addressed definitively.”⁹⁰ NBCUniversal failed to carry its burden of proving by a preponderance of the evidence that providing programming to PCI that is comparable to that provided to PCI under the Benchmark Agreement will breach any agreement to

⁸⁷ HT 960:4-961:15 (DeVitre) (May 31, 2012). This fact has been made abundantly clear by NBCUniversal’s contracts with █████, which have been amended numerous times to allow for wider distribution of content by the studio inside the permitted TVOD/EST distribution window.

⁸⁸ HT 960:4-961:15 (DeVitre) (May 31, 2012) (█████ needs a healthy studio to supply it with product, given the decline for studios in the hard goods business, █████ recognizes that studios need to generate revenue in new ways and as long as the studio isn’t creating a new competitor subscription service in the █████ window, it is willing to negotiate and allow new digital distribution to occur); see also PCI Phase 2 Closing Brief at 18.

⁸⁹ *CNBCU Order* at 4368 (App. A. §VII.C.3). The Commission interprets the preponderance of the evidence standard “generally [to] mean[] ‘the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.’” *Application By SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance*, 15 FCC Rcd. 18354, 18375, ¶ 48 (2000).

⁹⁰ Arbitration Award at 10; see also, e.g., HT 663:10-667:5 (Wunderlich).

which NBCU is a party – and it did not show by a preponderance of the evidence that it was at risk of being in breach.⁹¹

Instead of acknowledging the Arbitrator’s clear finding that NBCU failed to meet its burden under the proper standard, NBCU insists that the reason its contract defense failed was not because it failed to prove its case based on facts, but because the Arbitrator applied the wrong standard. NBCU now asserts that the Arbitrator applied “an erroneous standard,” a “breach first/fix later standard,” and “declined to rule” on “ripeness grounds” whether NBCU’s contracts preclude providing content to PCI.⁹² This is yet another attempt by NBCU to malign what has fairly been decided by the Arbitrator, based on an extensive record, just because it does not like the outcome. As the record shows, however, not only was this not the standard that the Arbitrator applied, but NBCU failed to demonstrate by a preponderance of evidence that any such breach would occur in the first place, let alone a breach that would require repair.

A review of the Arbitration Award reflects that in actuality, as the Arbitrator correctly found after completing the Phase 2 hearing, is that NBCU simply did not meet its burden of demonstrating, by a “preponderance of the evidence” that providing its programming to Project Concord “would constitute a breach of a contract to which Comcast or NBCU is a party.”⁹³ The

⁹¹ See *CNBCU Order* at 4368 (App. A §VII.C.3); see also PCI Phase 1 Post-Hearing Brief, at 2.

⁹² NBCU Petition at 18, 21. NBCU’s citation to a 1997 Commission order implementing the Closed Captioning requirements of the 1996 Telecommunications Act, in which, according to NBCU, the Commission required a “straightforward assessment of the relevant contract language” to establish a breach of contract defense, is misplaced for the proposition that the Arbitrator somehow applied an incorrect legal standard under the *CNBCU Order* Conditions. NBCU Petition at 19 (referencing *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd 3272, ¶ 172 (1997)). As explained below, the Arbitrator DID, in the first instance, undertake a “straightforward assessment of the relevant contract language,” and then also evaluated the “speculative” (as characterized by even NBCU as well as the Arbitrator) evidence NBCU presented regarding how third parties might interpret that same language, and actual evidence of how parties normally handle such a dispute. Arbitration Award at 8-9.

⁹³ Arbitration Award at 8-9; see also *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (“[T]he burden of establishing the affirmative defense rests on the defendant.”); *AT&T Corp. v. YMax*

Arbitrator squarely decided that “NBCU has failed to meet its burden of proof on its Contractual Impediment Defense.”⁹⁴

NBCU complains (misleadingly) that “Although the Arbitrator was willing to speculate about how [REDACTED] will perform under the peer deal, he was unwilling ‘to speculate’ whether [REDACTED] and other NBCUniversal licensees will object to the [REDACTED] of PCI’s business model.”⁹⁵

First, as we have stated and explain in more detail later, there is no [REDACTED] to “PCI’s business model.” If there were one, an entirely different group at [REDACTED] would have negotiated the peer deal, and the distribution rights would not have been for EST TV and VOD films.⁹⁶ Moreover, NBCU completely ignores that the Arbitrator details all of the evidence about how [REDACTED] IS actually performing.⁹⁷ The Arbitrator did not speculate about how [REDACTED] “will perform;” there was actual hard evidence about how [REDACTED] is performing that the Arbitrator cited to during the hearing— [REDACTED]

[REDACTED] that there is no evidence to suggest that it will not continue to do so [REDACTED] Project Concord [REDACTED].⁹⁸

Comm’n Corp., 26 FCC Rcd 5742, 5760 ¶ 50 (2011) (“YMax bears the burden of proof regarding its affirmative defenses”); *APCC Serv., Inc. v. NetworkIP, LLC*, 22 FCC Rcd 4286, 4311 ¶ 60, n. 156 (citing 5 Wright & Miller, *Federal Practice & Procedure*, § 1271 for the proposition that a party asserting an affirmative defense bears the burden of proof).

⁹⁴ Arbitration Award at 3.

⁹⁵ NBCU Petition at 8.

⁹⁶ Phase 1 DeVitre Rep. ¶ 14; HT 480:16-22 (DeVitre) (April 25, 2012); *see also* PCI Phase 1 Opening Brief at 14 (April 17, 2012).

⁹⁷ *See* Arbitration Award at 6-7.

⁹⁸ *See* Arbitration Award at 7 (explaining that [REDACTED], and that PCI is on that same list) (citing to HT 919 (DeVitre); Phase 2 DeVitre Rep. ¶¶ 16-17; Exhibit 107; and Exhibit 110 in Arbitration Record).

The Arbitrator went on to explain, in detail, that his conclusion that NBCU failed to meet its burden was based on his review of the contracts presented by NBCU and the testimony of NBCU's own expert witness. The Arbitrator specifically addressed the [REDACTED] agreement, the [REDACTED] agreement, the [REDACTED] Agreements, the [REDACTED] agreement, and NBCU's agreements with [REDACTED]. After reviewing the pertinent contractual language for each, the Arbitrator concluded that "NBCU has failed to satisfy its burden of proof on its Contractual Impediment Defense as to each of the third party agreements which NBCU has identified in connection with the Defense."⁹⁹

In addition, the Arbitrator pointed to the testimony of one of NBCU's own expert witnesses as a reflective of the high "degree of speculation involved in NBCU's Defense."¹⁰⁰ He found that "NBCU substantially overstated its risk of damages for breach of contracts with third parties and injury to its business relationships."¹⁰¹ Because NBCU could not point to any specific language in its contracts demonstrating that providing Project Concord with programming would "more likely than not" result in a breach, and because NBCU offered nothing additional but speculative testimony regarding how third parties might react, the Arbitrator was left with no choice but to conclude that NBCU had failed to meet its burden.¹⁰²

In its Petition, NBCU states that "an arbitrator's obligation is to assess that language [of the relevant license agreement] in light of the evidence presented and make a determination whether

⁹⁹ Arbitration Award at 10.

¹⁰⁰ Arbitration Award at 9.

¹⁰¹ Arbitration Award at 10.

¹⁰² See *Contel of the South, Inc. d/b/a/Verizon Mid-States v. Operator Commc'n Inc.*, 23 FCC 548, 553 ¶ 12 (2008) ("As OCI notes, 'where an issue is left in doubt by proof so that a trier of fact would be required to speculate, the party on which the burden of proof ultimately rests must lose.'").

about the likelihood (or not) of a breach, Mr. Scott Gartner¹⁰⁶— does not (and cannot) satisfy NBCU’s burden of showing by a preponderance of evidence that providing Comparable Programming to PCI’s service would violate any contract that it actually has with a third party.¹⁰⁷

Because NBCU cannot meet its required burden under the preponderance of the evidence standard set forth in the Conditions, or even under the suggested “risk of breach” standard advanced by its experts, NBCU now implies that the Media Bureau should give additional unspecified weight to the “rights and interests of the other licensees.”¹⁰⁸ NBCU also advocates changing the fundamental nature of the “baseball style” arbitration approach required by the Commission by instead requiring the inclusion of “selection and content withdrawal provisions” in any final agreements.¹⁰⁹

However, applying the standard properly (as the Arbitrator did), it is clear that NBCU’s defense claims must fail. During the entire Arbitration proceeding, NBCU has never been able to identify language in any contract that would make it more likely than not (the measure under the preponderance of the evidence standard) that providing the programming to PCI “would constitute a breach of contract.” Instead, NBCU has offered only speculation, unsupported by facts, that

¹⁰⁶ See, e.g., HT 772:16-773:5 (May 30, 2012) (Arbitrator’s observation that the one person with actual knowledge of the risks of breach—Scott Gartner—is not there). Mr. Gartner’s name came up at least 89 times during the Phase 2 Hearings. He is the [REDACTED] [REDACTED] See, e.g., Exs. 1-5 to Wunderlich Sec. Decl. He is also the person that Willkie Farr & Gallagher called upon to tell NBCU’s experts (who never asked) about the [REDACTED] (HT 834:11-19 (Madoff) (May 30, 2012), 698:14-699:13 (Wunderlich)) (May 30, 2012) and to remind one of his experts about the [REDACTED] of a certain contract. HT 836:17-837:19 (Madoff) (May 30, 2012). Mr. Gartner was present in Washington, DC during the Phase 1 hearing. Yet NBCU declined to present him as a witness or subject him to cross-examination, preferring instead to present his testimony by means of counsel-convened conference calls with its experts.

¹⁰⁷ See HT: 1035:15-21 (DeVitre) (May 31, 2012). See also *Project Concord, Inc., Claimant, vs. NBCUniversal Media, LLC, Respondent*, AAA Case No. 72 472 E 01147 11, Claimant’s Phase 2 Closing Brief, at 18 (dated June 7, 2012) (“PCI Phase 2 Closing Brief”).

¹⁰⁸ NBCU Petition at 20 and note 57.

¹⁰⁹ NBCU Petition at 20 and note 57.

providing certain content would force it to breach its contracts. The Arbitrator did undertake “straightforward assessment of the relevant language” of NBCU’s contracts and, taking into account the evidence presented by NBCU (which consisted primarily of speculative expert opinion testimony) and by PCI (which included testimony and demonstrations by its principals, expert testimony and extensive documentary evidence demonstrating how NBCU’s peer Film Studio—which, like NBCU, also has a license agreement with [REDACTED] and with far more other licensees than NBCU—is performing and intends to perform once Project Concord launches), determined that NBCU had not met its burden of proof.¹¹⁰

B. NBCU Failed to Establish Its Contractual Impediment Defense. It Did Not Prove, and Cannot Prove, That PCI’s Service Violates Any of the Prohibitions In Its Agreements.

NBCU states that its licensees commonly require the following of other services, such as Project Concord, delivering the same programming:

(1) [REDACTED];

(2) [REDACTED];

[REDACTED]

(3) [REDACTED]

[REDACTED].¹¹¹

NBCU wrongly contends that these are the criteria specified in its contracts, and then wrongly contends that, under these criteria, it would breach its contracts with [REDACTED] [REDACTED] by providing to PCI the right to exhibit first-run Films, and current season TV programming.¹¹² As demonstrated through the evidence and detailed below, the Project

¹¹⁰ See Arbitration Award at 10.

¹¹¹ NBCU Petition at 29.

¹¹² See NBCU Petition at 30-40.

Concord distribution model fits the definition a transactional PPV/VOD or EST service. There is

[REDACTED]

[REDACTED].¹¹³ Moreover, the Arbitrator repeatedly urged and directed NBCU to focus on particular contract language in attempting to establish its Contractual Impediment Defense – in the preliminary hearing, at the conclusion of the Phase 1 hearing, in the Phase 1 Decision, and again during the Phase 2 hearing.¹¹⁴ When NBCU finally produced a chart of contractual provisions that it asserted would be breached by providing programming to Project Concord (after the Phase 2 hearing had closed), it was revealed that there was no “there” there. NBCU still could not show by a preponderance of the evidence that it was actually at any risk of being in breach.¹¹⁵ As confirmed by the Arbitrator, and explained below, NBCU’s provisioning of programming to Project Concord does not violate NBCU’s agreements with [REDACTED], or other contracts.

¹¹³ Wunderlich Report, ¶ 8.c.i. *See also* Phase 1 DeVitre Rep. ¶ 32 (the common industry view is that [REDACTED] [REDACTED] [REDACTED]); Marenzi Report, ¶¶ 12-15 (“NBCU’s continued reference to PCI as [REDACTED] is inconsistent with how the entertainment industry interprets that term . . . PCI is a transactional OVD.”).

¹¹⁴ The Arbitrator specifically directed NBCU to flag, highlight or otherwise clearly identify the particular provisions of the contracts upon which its Contractual Impediment Defense would be asserted during the Preliminary Hearing on March 23, 2012. He did so again upon the conclusion of the Phase 1 evidentiary hearing. HT 530:20-532:3. He did so again in his Phase 1 Decision. Arbitration Award, Phase 1 Decision at 10. He made this request again during the Phase 2 evidentiary hearing. HT 796:4-799:15. *See also* PCI Phase 2 Closing Brief at 17 and note 18.

¹¹⁵ NBCU Phase 2 Post-Hearing Brief, Ex. A.

1. The Project Concord [REDACTED] Economic Model is Transactional, Distributing Programming on a PPV/VOD or EST Basis.

The Benchmark Agreement itself – the touchstone for determining PCI’s distribution model – confirms that Project Concord is a transactional OVD. The Conditions define “Economic Model” to mean:

*the primary method by which the Video Programming is monetized (e.g., ad-supported, subscription without ads, subscription with ads, electronic sell through (“EST”) or PPV/TVOD) reflected in the terms of the agreement(s) for the Comparable Programming.*¹¹⁶

The Benchmark Agreement, which was executed by [REDACTED] division, licenses programming to PCI’s store on a transactional VOD and EST basis.¹¹⁷ Both the title and the rights granted under the agreement reflect [REDACTED] standard transactional VOD and EST licensing practices.¹¹⁸ [REDACTED] long ago independently confirmed in a letter intended for third parties to rely upon in conducting their business affairs that its [REDACTED] division granted to PCI a non-exclusive license to distribute on an Internet TVOD basis “current and library motion pictures” and, on an EST basis “current season and library season television programs within the United States on the ‘Project Concord’-branded Internet VOD and EST residential video distribution service.”¹¹⁹ Indeed, had [REDACTED] considered the Project Concord [REDACTED] [REDACTED], an entirely different division of [REDACTED] would have had responsibility for negotiating and executing an agreement with PCI.¹²⁰

¹¹⁶ *CNBCU Order* at 4357 (App. A §I) (emphasis added).

¹¹⁷ *See* Phase 1 DeVitre Rep. ¶ 14; HT 481:14-482:18 (DeVitre) (April 25, 2012).

¹¹⁸ *See* Phase 1 DeVitre Rep. ¶ 20; HT 481:14-484:18 (DeVitre) (April 25, 2012).

¹¹⁹ Letter from [REDACTED] to Project Concord, Inc., (dated [REDACTED]) (Exhibit 110 in Arbitration Record); *see also* Arbitration Award at 7 (citing to letter).

¹²⁰ Phase 1 DeVitre Rep. ¶ 14; HT 480:16-22 (DeVitre) (April 25, 2012); *see also* PCI Phase 1 Opening Brief at 14 (April 17, 2012).

By contrast, online, [REDACTED] video on demand services require no upfront fee or any other payment to view content; [REDACTED] “in stream” in each TV episode or movie and cannot be skipped; viewers have to watch the [REDACTED] in order to begin or to continue to view the content; and content offerings are strictly limited and do not include first run movies.¹²⁵

Licenses to [REDACTED] are typically exclusive for current TV episodes (for example, [REDACTED]), do not reflect output availability of first run films and include mostly library film content that is many years past the first home video digital distribution window.¹²⁶

NBCU further suggests that the Benchmark Agreement gives [REDACTED], [REDACTED],¹²⁷ ignoring the overwhelming evidence and the Arbitrator’s conclusions to the contrary.¹²⁸ The record makes clear that in context, and consistent with industry practice, “[REDACTED] [REDACTED] as to what it makes available to all of its TVOD/EST licensees at the same time – it alone retains the right in the first instance to determine what rights and desire it has

¹²⁴ [REDACTED]; see also PCI Phase 1 Post-Hearing Brief at 15 (April 17, 2012).

¹²⁵ Smith Declaration at 1, ¶ 3. See also Marenzi Expert Report at 3, ¶ 11 ([REDACTED]).

¹²⁶ Phase 1 Devitre Rep. ¶¶ 16-17.

¹²⁷ NBCU Petition at 5.

¹²⁸ Arbitration Award at 6-7; see also Arbitration Award, Phase 1 Decision at 5 (confirming that the [REDACTED]).

to license particular content to the entire class of non-exclusive internet TVOD/EST licensees.¹²⁹ It does not exercise [REDACTED] on a licensee-by-licensee basis.¹³⁰ This is because the Benchmark Agreement (and other license agreements in the non-exclusive internet TVOD and EST market), is a typical [REDACTED] deal, pursuant to which [REDACTED]

[REDACTED]¹³¹ And, NBCU's asserted interpretation of [REDACTED] is also inconsistent with its construction of such language in its own [REDACTED] with Internet TVOD/EST licensees.¹³²

¹²⁹ HT 434:8-436:14 (Marenzi); *see also Project Concord, Inc., Claimant vs. NBCUniversal, Media, LLC, Respondent*, Claimant's Phase 2 Opening Brief, Expert Report of Mark DeVitre, ¶14 (dated May 24, 2012) ("PCI Phase 2 Opening Brief") ("Phase 2 DeVitre Rep."); *see also* PCI Phase 2 Opening Brief at 8.

¹³⁰ *See* Phase 2 DeVitre Rep. ¶¶ 15, 17; HT 484:6-9 (DeVitre), 258:16-259:10 (Smith) 439:12-18, 468:22-469:5 (Marenzi); HT 206:14-214:5, 214:21-215:12 (Wunderlich); *see also* PCI Phase 1 Post-Hearing Brief at 7. Virtually every one of the non-exclusive [REDACTED]

[REDACTED]. Wunderlich ¶ 50; DeVitre 2 ¶ 35; *see also* PCI Phase 2 Opening Brief at 8.

¹³¹ *See* Madoff Sec. Decl. ¶¶ 22-23; Phase 2 DeVitre Rep. ¶¶ 16, 20, 33; HT 807:11-14 ("the [REDACTED] is clearly [REDACTED] requiring NBCUniversal to supply PCI with all of the content that it supplies to EST and VOD services") (Madoff); 688:3-5 ("Q: And the final offer proposed by PCI is an [REDACTED], correct? A: I believe it is, yes.") (Wunderlich); HT 665:10-666:3 (PCI's Phase 2 Final Offer would "force NBCU to make the same content available [to PCI] that it makes available to ESTs and VODs.") (Wunderlich). *See also* HT 896:9-898: 3 (DeVitre) (explaining what makes a deal an [REDACTED] in the non-exclusive TVOD/EST market).

¹³² The contract language NBCU customarily includes in its own OVD EST/VOD distribution license agreements provides that [REDACTED]

[REDACTED]. *See, e.g.,* Ex. 40M, ([REDACTED])

[REDACTED], ¶ 4(a). *See also* HT 202:7-19 (Wunderlich), 136:15-137:2 (Lamprecht).

2. The Project Concord [REDACTED]. It is in no way [REDACTED] and it Does Charge a Distinct Fee for Each Transaction.

NBCU's entire Contractual Impediment Defense rests on its assertion (which is wholly at odds with the view of its peer Film Studio as reflected in the Benchmark Agreement, industry standards and the definitions in the pertinent contracts) that PCI is [REDACTED]

[REDACTED]¹³³ NBCU was unable to prove, because it simply is not true, that "providing current film and television programming to PCI would constitute a breach of numerous NBCUniversal license agreements that [REDACTED] exhibition of this content."¹³⁴ NBCU failed in its attempt to convince the Arbitrator of this, because the evidence reflects the opposite:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³³ NBCU Petition at 28.

¹³⁴ NBCU Petition at 2.

¹³⁵ HT 353:12-19 (Peyer) (April 25, 2012).

¹³⁶ HT 292:16-20 (Smith) (April 25, 2012); 357:3-10-359:208 (Peyer) (April 25, 2012).

¹³⁷ HT 442:16-443:3 (Marenzi) (April 25, 2012).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Yet, NBCU presented no evidence [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵⁹

[REDACTED] NBCU points

to a patent application filed by Project Concord in December of 2009 as “evidence” of its [REDACTED]

[REDACTED] business model. The evidence shows that that patent application, like most, sought to

¹⁵⁵ Smith Decl. pages 16-19 (screen shot of [REDACTED]);
page 20-22 (other examples of [REDACTED]);
[REDACTED]; pages 25- 27(explaining that [REDACTED]).

¹⁵⁶ See PCI Phase 1 Post-Hearing Brief at 18.

¹⁵⁷ Peyer Decl. para. 10; HT, 356:10-363:7 (Peyer) (April 25, 2012).

¹⁵⁸ Peyer Decl. para. 9.

¹⁵⁹ HT 356:10-363:7 (Peyer) (demonstration of Project Concord [REDACTED]) (April 25, 2012).

protect the widest possible application of PCI's unique technological capabilities. It does not provide evidence of how PCI has actually deployed its capabilities in connection with the design and launch of its [REDACTED]. In any event, the Field of the Invention Statement set forth in that patent application supports the conclusion that PCI's service is not [REDACTED].

The present invention relates generally to systems and methods of delivery and accessing information targeted to a user in a computer network environment, and more specifically is a system and method of enabling, over a distributed, networked computer system, negotiated transactions between an information content owner, an advertiser, and a consumer, in which the consumer can earn electronic credit for viewing target advertisements delivered by the advertiser and use the earned credit to access information content from the information content owner. During the transactions between the respective parties, the information content owner is in control over the terms of sale for its information content, the advertiser is in control over terms of its advertising campaign, and the consumer is in control over whether and when he or she views the targeted advertisers and the information content, while maintaining control over his or her personal profile information upon which the targeting of advertisements is at least partially based.¹⁶⁰

All of this makes clear that PCI's economic model does not violate any restriction in any contract to which NBCU is a party.

3. NBCU's Provision of Programming to Project Concord Does not Violate NBCU's Agreements with [REDACTED].¹⁶¹

NBCU's [REDACTED] was at the top of NBCUniversal's list of contracts that it says are impediments to providing Comparable

¹⁶⁰ PCI Phase 1 Post-Hearing Brief at 20.

¹⁶¹ NBCUniversal has two [REDACTED] contracts. Both have identical provisions in respect of [REDACTED] requirements and restrictions. The [REDACTED] Agreements are at Ex. 35 of the Record.

