

**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	)	
	)	

**Order**

**Adopted: December 4, 2012**

**Released: December 4, 2012**

By the Chief, Media Bureau:

**I. Introduction**

1. In this Order, we grant in part and deny in part the request of Comcast Corporation and NBCUniversal Media, LLC (“C-NBCU”) for clarification concerning the “Benchmark Condition” contained in the *Comcast-NBC Universal Order* (“*C-NBCU Order*”).<sup>1</sup> In a letter filed with the Media Bureau (the “Bureau”) in the above-referenced proceeding (“Clarification Request Letter”),<sup>2</sup> C-NBCU asks the Bureau to clarify that Online Video Distributors (“OVDs”) seeking access to programming of a C-NBCU Programmer<sup>3</sup> pursuant to the Benchmark Condition must disclose to the C-NBCU Programmer the relevant “peer programming deal” that the C-NBCU Programmer is required to benchmark.<sup>4</sup> C-NBCU further requests that the Bureau issue a protective order in MB Docket No. 10-56, under which OVDs would disclose peer programming agreements to certain authorized in-house business executives

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<sup>1</sup> *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, 4360, App. A., § IV, A.2.b (2011).

<sup>2</sup> Letter from David P. Murray, Counsel for C-NBCU, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (February 17, 2012).

<sup>3</sup> As defined in the *C-NBCU Order* and referenced in the Benchmark Condition, “C-NBCU Programmer” means “Comcast, C-NBCU, their affiliates and any entity for which Comcast or C-NBCU manages or controls the licensing of Video Programming and/or any local broadcast television station on whose behalf Comcast or [NBCUniversal, Media LLC] negotiates retransmission consent.” *C-NBCU Order*, 26 FCC Rcd at 4356, App. A., § I. The Clarification Request Letter specifically requests that peer programming agreements be made available to representatives of “NBCUniversal.” See Clarification Request Letter at 1. In this Order, we use the term “C-NBCU Programmer,” as defined in the *C-NBCU Order* and used in the Benchmark Condition, in responding to C-NBCU’s request.

<sup>4</sup> As defined in the *C-NBCU Order*, an OVD means “any entity that provides Video Programming by means of . . . the Internet or other IP-based transmission path provided by a Person other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.” *Id.* at 4357, App. A., § I.

and in-house counsel at the C-NBCU Programmer who agree to the confidentiality restrictions and conditions set forth in the proposed protective order.<sup>5</sup>

2. We clarify that OVDs that invoke the Benchmark Condition must disclose the terms of comparable peer programming agreements to the extent necessary to enable C-NBCU to carry out its obligations under the condition. We find, however, that disclosure to a C-NBCU Programmer's in-house personnel, as C-NBCU requests, is not necessary to ensure compliance with the Benchmark Condition, could cause competitive harm to both OVDs and third-party programmers, and is inconsistent with the Model Protective Order appended to the *C-NBCU Order* as well as protective orders typically adopted by the Commission. For the reasons discussed below, we instead adopt a Third Protective Order for Compliance in this proceeding ("Third Protective Order"), which provides only a C-NBCU Programmer's Outside Counsel of Record and Outside Experts, as those terms are defined in the Third Protective Order, with access to peer programming deals disclosed pursuant to the Benchmark Condition.

## II. Background

3. In response to concerns that post-merger C-NBCU could have incentives to hinder competition in the growing OVD market, the Commission adopted conditions in the *C-NBCU Order* designed to ensure that OVDs would have access to C-NBCU programming.<sup>6</sup> Specifically, both the MVPD Price Condition and the Benchmark Condition require a C-NBCU Programmer to provide OVDs with access to its programming.<sup>7</sup> The Benchmark Condition requires a C-NBCU Programmer to provide a requesting OVD with Online Video Programming if the OVD has an agreement for Comparable Programming with a peer programmer.<sup>8</sup> The programming that a C-NBCU Programmer is required to provide to the OVD must be on terms that are "economic[ally] equivalent" to the terms the OVD has received from the peer programmer.<sup>9</sup> The Benchmark Condition further specifies that "[t]he economic equivalent should take account of . . . any difference in the value of the programming being sought relative to the Comparable Programming" and that "economic equivalent terms and conditions shall consist of the same basic Economic Model(s) for the Comparable Programming."<sup>10</sup> If negotiations fail to produce a mutually acceptable agreement for the provision of Online Video Programming, the OVD may initiate an arbitration proceeding in accordance with the procedures in the *C-NBCU Order*.<sup>11</sup>

4. In its Clarification Request Letter, C-NBCU states that OVDs that have sought access to programming of a C-NBCU Programmer under the Benchmark Condition have not disclosed the relevant peer programming agreements to the C-NBCU Programmer because those agreements contain

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<sup>5</sup> Clarification Request Letter at 2.

<sup>6</sup> *Id.* at 4272-73, ¶¶ 86-87.

<sup>7</sup> *See id.* at 4359-60, App. A., § IV, A.2.a & b.

<sup>8</sup> Online Video Programming is defined in the C-NBCU Order as "Video Programming that any C-NBCU Programmer has the right to enable others (including but not limited to other MVPDs and OVDs, but not including solely Comcast or C-NBCU) to display by means of the (i) Internet or (ii) other IP-based transmission path provided by a Person other than the OVD." *Id.* at 4357, App. A., § I. Comparable Programming is defined, in part, as "Video Programming that is reasonably similar in kind and amount." Factors to be considered in determining whether programming is considered Comparable Programming include, "(i) the number of channels and/or shows; and (ii) the similarity of the value of the Video Programming, as evidenced by ratings, affiliate fees and/or advertising revenues and the time elapsed since the programming was first distributed." *Id.* at 4356, App. A., § I.

<sup>9</sup> *Id.* at 4360, App. A., § IV, A.2.b (ii).

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

<sup>11</sup> *Id.* at 4360, App. A., § IV, A.3.

confidentiality provisions that prohibit such disclosure.<sup>12</sup> C-NBCU maintains that, in order to provide programming to a requesting OVD in accordance with the Benchmark Condition, a C-NBCU Programmer needs to review a full and unredacted copy of the comparable peer programming agreement that creates the basis for the OVD's request.<sup>13</sup> C-NBCU specifically requests that the Bureau issue a public notice clarifying that, going forward, an OVD invoking the Benchmark Condition must disclose the underlying peer agreement to the C-NBCU Programmer's authorized representatives.<sup>14</sup>

5. C-NBCU also proposes that the Bureau issue a protective order under which OVDs would submit peer programming deals to the C-NBCU Programmer's authorized representatives, subject to certain confidentiality restrictions and conditions. The proposed protective order submitted with C-NBCU's Clarification Request Letter ("C-NBCU Proposed Protective Order"), suggests a process and timetable for: (1) an OVD to provide the C-NBCU Programmer with confidential notice of its intent to invoke the Benchmark Condition; (2) the C-NBCU Programmer's representatives to execute and serve Acknowledgements of Confidentiality on the OVD and the Bureau; and (3) the disclosure of the peer deal by the OVD to the C-NBCU Programmer's authorized representatives. C-NBCU's proposed protective order would permit access to a peer deal disclosed pursuant to the Benchmark Condition to the C-NBCU Programmer's "(1) outside counsel, (2) outside experts, (3) in-house counsel, and (4) a limited number of essential business unit(s) responsible for negotiating the licensing of content via particular business models that are implicated by a Benchmark request."<sup>15</sup>

6. C-NBCU further explains that, under its proposal, for each business unit of a C-NBCU Programmer entitled to access to the peer agreement, the number of essential business persons likely would be three and would include the senior executive overseeing the unit, a mid-level executive, and the head of the division who would approve the deal.<sup>16</sup> In-house counsel at the C-NBCU Programmer would designate these essential business persons on a case-by-case basis.<sup>17</sup> C-NBCU states that such business persons would be authorized to use the information in the peer agreement solely for purposes of responding to a specific OVD's request. C-NBCU's Proposed Protective Order also provides that the 90-day negotiation period for Online Video Programming requests under the Benchmark Condition would begin on the C-NBCU Programmer's receipt of the OVD's peer deal.<sup>18</sup>

7. On March 13, 2012, the Bureau released a Public Notice seeking comment on C-NBCU's Clarification Request Letter and the C-NBCU Proposed Protective Order.<sup>19</sup> As described in greater detail

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<sup>12</sup> Clarification Request Letter at 1.

<sup>13</sup> Clarification Request Letter at 1-3.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 3-4.

<sup>16</sup> *Id.* at 4.

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

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should be Adopted*, MB Docket No. 10-56, Public Notice, 27 FCC Rcd 2527 (MB, 2012) at 4 ("Public Notice"). The Bureau established March 27, 2012 as the deadline for filing comments in response to the Public Notice and April 3, 2012 as the deadline for filing reply comments. The filing deadlines were later extended to April 3, 2012 for comments and April 17, 2012 for reply comments. *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer of Control of Licenses*, MB Docket No. 10-56, Extension Order, 27 FCC Rcd 2869 (MB, 2012).

below, commenters object to C-NBCU's requested access to peer deals.<sup>20</sup> Generally, commenters claim that the clarification C-NBCU requests is unnecessary and that grant of the request would cause competitive harm to content providers and online video providers.<sup>21</sup> Some commenters also argue that any mandatory disclosure of peer deals to C-NBCU should occur only during arbitration proceedings and should be governed by the terms of the Model Protective Order appended to the *C-NBCU Order*.<sup>22</sup> Commenters also argue that, at most, the Bureau should limit any required disclosure of peer deals outside of the context of an arbitration proceeding to C-NBCU's outside counsel and outside consultants, which would be consistent with the terms of the Model Protective Order.<sup>23</sup> In addition, some commenters argue that C-NBCU's request for clarification cannot be granted at the Bureau level because C-NBCU is requesting a substantive change to the *C-NBCU Order* that cannot be addressed on delegated authority.<sup>24</sup>

### III. Discussion

8. We find that the Benchmark Condition implicitly requires an OVD seeking access to a C-NBCU Programmer's programming to disclose the terms of the peer programming agreement that forms the basis for its claim that it qualifies for the condition and is entitled to terms that are economically equivalent to those in a peer agreement. Accordingly, we clarify that OVDs invoking the Benchmark Condition must disclose the relevant peer agreement upon the C-NBCU Programmer's request. However, the Bureau denies C-NBCU's request to require OVDs to disclose such agreements to a C-NBCU Programmer's in-house business executives and in-house counsel. Instead, we conclude that OVDs seeking access to a C-NBCU Programmer's programming under the Benchmark Condition must disclose relevant peer programming agreements only to Outside Experts and Outside Counsel of Record in accordance with the Third Protective Order adopted contemporaneously with and attached to this Order. Finally, we find that this clarification is within the delegated authority of the Bureau.

#### A. Clarification That Disclosure of Peer Programming Agreements Is Required

9. In its Clarification Request Letter, C-NBCU claims that the Benchmark Condition "necessarily require[s] that an OVD disclose the peer deal to [the C-NBCU Programmer] so that it can respond with a proposal for comparable programming."<sup>25</sup> C-NBCU contends that, without the

<sup>20</sup> Comments in response to the Public Notice were filed by CBS Corporation, News Corporation, Sony Pictures Entertainment, Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (collectively, the "Content Companies"); Dish Network L.L.C. ("Dish Network"); and Public Knowledge. In addition, Project Concord, Inc. ("PCI") and the Content Companies submitted letters in response to the Clarification Request Letter in MB Docket No. 10-56. See Letter from Monica Desai, Counsel for PCI, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (February 23, 2012) ("PCI Feb. 23 Letter"); Letter from Monica S. Desai, Counsel for PCI, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1-2 (March 15, 2012) ("PCI Mar. 15 Letter"); Letter from Content Companies, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (February 27, 2012). The Bureau considers these letters as part of the record in this proceeding. C-NBCU was the only party to file Reply Comments in response to the Public Notice. Reply Comments of Comcast Corporation and NBCUniversal Media, LLC, MB Docket No. 10-56 (April 17, 2012).

<sup>21</sup> See Content Companies Comments at 2-5; Dish Network Comments at 1; Public Knowledge Comments at 2-5; PCI Mar. 15 Letter.

<sup>22</sup> See Content Companies Comments at 18-20; Public Knowledge Comments at 4; PCI Mar. 15 Letter. The *C-NBCU Order* includes as an appendix a Model Protective Order, which is designed for the disclosure of confidential information to parties to arbitration proceedings and which expressly limits such disclosure to parties' outside counsel and outside experts. *C-NBCU Order*, 26 FCC Rcd at 4419, App. E.

<sup>23</sup> See Dish Network Comments at 2-4; PCI Feb. 23 Letter.

<sup>24</sup> See Content Companies Comments at 6; PCI Feb. 23 Letter at 2; Dish Network Comments at 4.

<sup>25</sup> Clarification Request Letter at 2.

opportunity to review an OVD's peer deal, a C-NBCU Programmer will be unable to determine either whether the online video programming an OVD is seeking is comparable to that in the peer agreement or whether the terms the OVD proposes are economically equivalent to those in the existing agreement.<sup>26</sup> C-NBCU further claims that "[t]here was not, and could not have been, any contemplation that [a C-NBCU Programmer] would simply have to take the word of the OVD on such critical matters."<sup>27</sup> According to C-NBCU, the continued withholding of peer programming deals from C-NBCU Programmers will frustrate the negotiation process and increase the likelihood that negotiations arising from the Benchmark Condition will end up in arbitration, causing delay and increasing the burdens and costs for both parties.<sup>28</sup>

10. Several commenters disagree with C-NBCU's contention that the Benchmark Condition implies that OVDs triggering the condition necessarily must disclose their peer programming deals. The Content Companies claim that, if the Commission had intended for a C-NBCU Programmer to have access to peer programming deals in connection with the Benchmark Condition, it would have stated expressly in the *C-NBCU Order* that such access is required.<sup>29</sup> The Content Companies further contend that requiring disclosure of peer agreements during negotiations arising from the Benchmark Condition would upend the arbitration process built into the *C-NBCU Order*. Because the conditions in that order governing the arbitration process provide for the potential disclosure of confidential programming agreements,<sup>30</sup> the Content Companies argue, compulsory disclosure of peer agreements prior to arbitration would render meaningless the "cautious, step-by-step" good faith negotiation and arbitration approach the Commission envisioned.<sup>31</sup> Public Knowledge similarly opposes any mandatory disclosure of confidential peer agreements outside of the arbitration process set forth in the *C-NBCU Order*.<sup>32</sup> On the other hand, PCI, an OVD that has invoked the Benchmark Condition,<sup>33</sup> and Dish Network both maintain, for the reasons discussed below, that peer programming deals should be disclosed to a C-NBCU Programmer prior to arbitration if such disclosure is governed by the protections afforded in the Model Protective Order appended to the *C-NBCU Order*.<sup>34</sup>

11. Under the Benchmark Condition, an OVD seeking access to the programming of a C-NBCU Programmer must disclose information establishing that it has an agreement providing the OVD with access to Comparable Programming. The Benchmark Condition further provides that a C-NBCU Programmer must make an economically equivalent proposal based on the "price, terms and conditions

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<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> Content Companies Comments at 8-9.

<sup>30</sup> Content Companies Comments at 19; *C-NBCU Order*, 26 FCC Rcd at 4370, App. A., §VIII, 4.

<sup>31</sup> Content Companies Comments at 19-20. Dish Network argues that the C-NBCU request is overbroad because it extends to confidential information beyond what is necessary for a C-NBCU Programmer to review in order to comply with the Benchmark Condition. Dish Network Comments at 2.

<sup>32</sup> Public Knowledge Comments at 3.

<sup>33</sup> See *Media Bureau Announces Decision Requiring NBCUniversal Media, LLC to Provide First-Year Films to Startup Online Video Distributor Project Concord, Inc.*, MB Docket No. 10-56, Public Notice, DA 12-1829 (MB, rel. Nov. 13, 2012).

<sup>34</sup> PCI Feb. 23 Letter at 1-2. While PCI appears willing to disclose peer programming deals to C-NBCU outside counsel and outside consultants in its February 23, 2012 letter to the Media Bureau, PCI subsequently argues that lack of access to peer programming deals would not impair a C-NBCU Programmer during negotiations arising from the Benchmark Condition and that it "defies common sense and logic" to conclude that the Commission intended in the *C-NBCU Order* to require OVDs to provide C-NBCU with an "up-front look" at peer programming deals. See PCI Mar. 15 Letter at 1-2.

the OVD paid for the Comparable Programming” and that “takes into account (among other things) any difference in the value of the programming being sought relative to the Comparable Programming.”<sup>35</sup> Disclosure of the terms of the relevant peer programming agreement will allow an OVD to establish that it has access to Comparable Programming and will allow a C-NBCU Programmer a reasonable opportunity to respond to an OVD request in a manner that will comply with the Benchmark Condition. Accordingly, we grant C-NBCU’s request, in part, by clarifying that an OVD that invokes the Benchmark Condition must disclose the underlying peer deal to the C-NBCU Programmer upon its request.

12. As commenters explain, the confidentiality provisions in programming agreements between OVDs and content providers often contain provisions that preclude disclosure to third parties.<sup>36</sup> Accordingly, we clarify that it is the intent of this Order to override any such confidentiality or non-disclosure provisions or agreements. Notwithstanding any contractual provisions that otherwise would preclude disclosure of a peer agreement to a C-NBCU Programmer’s representatives, the C-NBCU Programmer will have the right to receive from an OVD that invokes the Benchmark Condition the operative peer agreements, pursuant to the specifications in this Order and the protections afforded in the Third Protective Order. Although an OVD is required to disclose relevant peer agreements to the representatives of a C-NBCU Programmer, this disclosure requirement is not intended to alter an OVD’s right to pursue arbitration if negotiations under the Benchmark Condition fail to produce a “mutually acceptable set of price, terms and conditions for Online Video Programming.”<sup>37</sup> In addition, while we recognize the potential for either a C-NBCU Programmer or an OVD to act in bad faith in negotiations arising from the Benchmark Condition, the arbitration rights set forth in the condition are intended to provide adequate recourse against any such bad-faith behavior.<sup>38</sup> We remind both C-NBCU and OVDs that, in the event parties proceed to arbitration, an arbitrator has the authority to assess costs and expenses, including reasonable attorney fees, against a party if the arbitrator finds that its conduct has been unreasonable during the course of arbitration.<sup>39</sup>

### **B. Third Protective Order for Disclosure of Peer Programming Agreements**

13. As discussed above, C-NBCU’s Proposed Protective Order requires that peer programming deals be disclosed to a limited number of a C-NBCU Programmer’s business executives and in-house counsel, as well as outside counsel and outside experts, when the Benchmark Condition is triggered. C-NBCU argues that this level of disclosure, including disclosure to in-house business executives involved in competitive decision-making, is necessary to “facilitate effective negotiations and fashion appropriate agreements between [a C-NBCU Programmer] and an OVD under the relatively short time periods for negotiations set forth in the [C-NBCU] Order – and without resort to arbitration if avoidable.”<sup>40</sup> It further claims that the conditions and restrictions contained in C-NBCU’s Proposed Protective Order would ensure that use of any confidential information disclosed would be “strictly limited to the relevant proceeding” and avers that its “in-house counsel and business executives are well-versed in complying with” the obligations that would be imposed via the protective order.<sup>41</sup>

<sup>35</sup> *C-NBCU Order*, 26 FCC Rcd at 4360, App. A., § IV, A.2.b.

<sup>36</sup> See PCI Feb. 23 Letter at 1; see also Clarification Request Letter at 1 (“OVDs suggest that they cannot share their peer deals due to confidentiality restrictions in those deals.”).

<sup>37</sup> *C-NBCU Order*, 26 FCC Rcd at 4360, App. A., § IV, A.3. An OVD seeking to initiate arbitration must follow the procedures set forth in the *C-NBCU Order*. *Id.* at 4364, App. A., § VII, A.

<sup>38</sup> *Id.* at 4360, App. A., § IV, A.3.

<sup>39</sup> *Id.* at 4367, App. A., § VII, B.10.

<sup>40</sup> Clarification Request Letter at 4-5.

<sup>41</sup> Clarification Request Letter at 5.

14. Commenters in this proceeding object to the disclosure of peer programming agreements to the in-house personnel of C-NBCU Programmers, arguing that such disclosure would inflict competitive harms on both peer programmers and OVDs. For example, the Content Companies claim that programming contracts contain their “most sensitive business data and information” and contend that having access to the confidential terms of peer programming agreements would give a C-NBCU Programmer an “enormous advantage” over third-party programmers.<sup>42</sup> According to the Content Companies, C-NBCU, in its capacity as an online programming distributor, “would be able to use its knowledge of the terms of third parties’ agreements to wield extraordinary leverage against other content producers.”<sup>43</sup> At the same time, the Content Companies further argue, the C-NBCU Programmer “would glean insight into what competing content companies are charging OVDs, thereby gaining a strategic advantage of its own.”<sup>44</sup> The Content Companies also claim that programmers may be reluctant to license programming to OVDs if there is a possibility that the resulting agreement would be disclosed via the Benchmark Condition.<sup>45</sup> In addition, the Content Companies allege that the disclosure of peer programming agreements would frustrate an OVD’s ability to negotiate successfully with a C-NBCU Programmer, which would “simply select the most advantageous terms for itself” if it were given access to all of the terms and conditions of the OVD’s other programming deals.<sup>46</sup>

15. Public Knowledge similarly argues that a C-NBCU Programmer could use the information gleaned from peer programming agreements to “cement its market dominance” and warns that OVDs that disclose peer programming agreements may be shut out of future negotiations with programmers or be sued.<sup>47</sup> Dish Network and PCI also oppose the mandatory disclosure of peer programming agreements to a C-NBCU Programmer’s in-house personnel. They argue that such disclosure would be overbroad, harmful to competition, and contrary to the intent of and framework set forth in the Benchmark Condition.<sup>48</sup>

16. Several commenters discuss the relevance of the Model Protective Order, which was appended to the *C-NBCU Order*, to C-NBCU’s Clarification Request Letter.<sup>49</sup> The Model Protective Order provides a model for the disclosure of confidential documents, which can be employed in arbitrations initiated under various conditions in the *C-NBCU Order* at an arbitrator’s discretion. Unlike C-NBCU’s Proposed Protective Order, the Model Protective Order limits access to confidential documents to outside counsel of record and outside experts.<sup>50</sup> Dish Network and PCI argue that terms consistent with the Model Protective Order, and not C-NBCU’s Proposed Protective Order, should govern the disclosure of peer programming deals under the Benchmark Condition.<sup>51</sup> Other commenters, while

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<sup>42</sup> Content Companies Comments at 10-12.

<sup>43</sup> Content Companies Comments at 11-12.

<sup>44</sup> Content Companies Comments at 12.

<sup>45</sup> *Id.* at 12.

<sup>46</sup> Content Companies Comments at 12.

<sup>47</sup> Public Knowledge Comments at 4.

<sup>48</sup> See Dish Network Comments at 1-4; PCI Mar. 15 Letter at 2-4.

<sup>49</sup> *C-NBCU Order*, 26 FCC Rcd at 4419, App. E; see also *id.* at 4370, App. A., §VIII, 4.

<sup>50</sup> “Outside Counsel of Record” and “Outside Experts” are defined terms in the Model Protective Order. *C-NBCU Order*, 26 FCC Rcd at 4419, App. E., § 2.b (i) & (ii).

<sup>51</sup> Dish Network Comments at 2; PCI Feb. 23 Letter at 2 (urging the Bureau to issue a protective order consistent with the terms of the Model Protective Order to help facilitate the disclosure of PCI’s peer agreements to a C-NBCU Programmer).

supporting the use of the Model Protective Order in arbitration proceedings, object to its use prior to arbitration in negotiations arising from the Benchmark Condition.<sup>52</sup> Commenters also contend that the inclusion of the Model Protective Order in the *C-NBCU Order* demonstrates that the Commission never intended to permit a C-NBCU Programmer's in-house business executives to have access to peer programming agreements during negotiations triggered by the Benchmark Condition. In this regard, Dish Network claims that, if the Commission had believed it necessary to permit a C-NBCU Programmer's business executives to review the peer agreements prior to the start of arbitration, "it would have been pointless to adopt a *more restrictive* Model Protective Order for use after the arbitration has commenced."<sup>53</sup> The Content Companies similarly maintain that C-NBCU's Proposed Protective Order would undermine the restrictive protections contained in the Model Protective Order.<sup>54</sup>

17. In its reply comments, C-NBCU responds that restrictions such as those contained in the Model Protective Order are inappropriate in the negotiation context. C-NBCU argues that it must rely on internal business executives' knowledge of available programming in order to negotiate a contract within the expedited framework set forth in the Benchmark Condition.<sup>55</sup> C-NBCU adds that business executives ultimately must approve a programming deal negotiated pursuant to the Benchmark Condition and that neither outside counsel nor an outside expert can replace an executive at a C-NBCU Programmer in making the judgments necessary to shape an agreement that is economically equivalent under the condition.<sup>56</sup> Based on these claims, C-NBCU reasserts that it cannot comply with the Benchmark Condition if its business executives do not have access to underlying peer programming deals.<sup>57</sup>

18. Consistent with the terms of the Model Protective Order, we adopt a Third Protective Order for use in negotiations triggered by the Benchmark Condition that limits access to peer programming agreements to Outside Counsel of Record and Outside Experts of a C-NBCU Programmer, as those terms are defined in the Third Protective Order. While we find that the disclosure of peer programming agreement terms is necessary to establish that an OVD has access to Comparable Programming and to enable a C-NBCU Programmer to offer terms that are economically equivalent to the terms of a peer agreement, we reject C-NBCU's request to require such disclosure to a C-NBCU Programmer's internal personnel. We agree with commenters who argue that allowing a C-NBCU Programmer's business executives and in-house counsel access to the confidential terms of peer programming agreements has the potential to cause competitive harm to both OVDs and peer programmers. In particular, we agree that providing the access C-NBCU requests would give a C-NBCU Programmer's personnel access to competitively sensitive information that could provide them with an unfair advantage in the programming marketplace. Moreover, we are not persuaded by C-NBCU's arguments that its internal business executives must have access to the terms of peer programming agreements in order to formulate an offer on terms that comply with the requirements of the Benchmark Condition. We find that providing access to Outside Counsel and Outside Experts will make it more feasible for a C-NBCU Programmer to confirm, through outside advisors, that an OVD's request for programming is consistent with the terms of an underlying peer deal and to respond with an offer that is based on economically equivalent terms and conditions

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<sup>52</sup> See Public Knowledge Comments at 3; Content Companies Comments at 9.

<sup>53</sup> Dish Network Comments at 4 (emphasis in original).

<sup>54</sup> Content Companies Comments at 21.

<sup>55</sup> C-NBCU Reply Comments at 6.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 10.

19. At the same time, we believe that limiting access to Outside Experts and Outside Counsel mitigates the competitive harms that could result from the disclosure of confidential and competitively sensitive information to a C-NBCU Programmer's internal executives. As specified in the Third Protective Order, Outside Experts and Outside Counsel permitted access to peer programming deals may not be involved in C-NBCU's "competitive decision-making," meaning that the Outside Expert's or Outside Counsel's relationship with C-NBCU may not "involve advice about or participation in the business decisions of any C-NBCU Programmer . . . nor the analysis underlying the business decisions."<sup>58</sup> In addition, the Third Protective Order provides that Outside Counsel and Outside Experts are prohibited from disclosing confidential information contained in the peer programming agreements.<sup>59</sup> They may not disclose to a C-NBCU Programmer's business executives any Highly Confidential Information (as such term is defined in the Third Protective Order), including, but not limited to, specific price terms.

20. The Bureau agrees with commenters who argue that it would not be reasonable for it to provide a C-NBCU Programmer with greater access to the information in peer programming agreements during negotiations arising under the Benchmark Condition than would be available to it under the Model Protective Order if an OVD invokes its right to proceed to arbitration. Moreover, limiting access to Outside Counsel and Outside Experts is consistent with Commission precedent in the context of the program access and program carriage disputes in which parties need access to confidential information in order to substantiate their claims and defenses.<sup>60</sup> Such limitations also are consistent with typical Commission protective orders used in other contexts, including the Model Protective Order attached to the *C-NBCU Order*.

21. If a C-NBCU Programmer will require access to a peer programming agreement in order to provide access to its programming pursuant to the Benchmark Condition, it must so inform the

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<sup>58</sup> *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Third Protective Order for Compliance, DA 12-1950, App. A, ¶ 2(k), (l) (rel. December 4, 2012) ("Third Protective Order").

<sup>59</sup> Third Protective Order at 4, ¶ 9.

<sup>60</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-294, 22 FCC Rcd 17791, 17893 (2010) ("Program Access Order") (adopting a Protective Order under which discovery in program access complaints is submitted to parties and which prohibits disclosure to "any persons in a position to use the Confidential Information for competitive commercial or business purposes"); see also *id.* at 17896; *EchoStar Satellite LLC v. Home Box Office, Inc.*, Order, DA 06-2481, 21 FCC Rcd 14197 (2006); *WaveDivision Holdings LLC, et al., v. Comcast Corp., et al.*, Order, DA 10-381, 25 FCC Rcd 2231 (2010); *Herring Broadcasting, Inc. D/B/A WealthTV v. Time Warner Cable, Inc.*, Order, MB Docket No. 08-214, 24 FCC Rcd 346 (2009) (noting that the parties used, with some modifications, the Protective Order adopted in the Program Access Order.)

The Content Companies also claim that the Trade Secrets Act prohibits the Bureau from requiring the disclosure of the confidential agreements requested by C-NBCU. *Id.* at 15-18. C-NBCU responds that the Trade Secrets Act merely prohibits "unauthorized" disclosures of confidential material and that the "Content Companies wrongly argue that there is no FCC regulation authorizing the disclosure of confidential information" in connection with the Benchmark Condition. C-NBCU Reply Comments at 13. C-NBCU further argues that such disclosure is authorized under Section 310(d) of the Communications Act, which requires the Commission to review transfers and assignments of FCC licenses, and its authority to impose remedial conditions to address potential transaction-related harms. C-NBCU Reply Comments at 13-14 (*citing* 47 U.S.C. §§ 310(d), 303(r)). As the Content Companies expressly acknowledge in their comments, permitting the disclosure of confidential information to outside counsel and experts, when necessary, is consistent with "substantial [FCC] precedent." Content Companies Comments at 22. We further note that the confidentiality protections afforded in the Third Protective Order adopted with this Order are fully consistent with those in the Model Protective Order, the use of which the Content Companies support in the context of arbitration proceedings. See *id.* at 21 (noting "restrictive protections" imposed in Model Protective Order); see also *id.* at 19.

requesting OVD in writing within seven (7) days of receipt of a formal request for access to programming under the condition. For each negotiation arising under the Benchmark Condition in which access to a peer programming agreement is sought, authorized representatives of a C-NBCU Programmer must execute the Acknowledgement of Confidentiality attached to the Third Protective Order, file it in MB Docket No. 10-56, and serve it upon the OVD and the other parties to the peer programming agreement.<sup>61</sup>

### C. Clarification of the Benchmark Condition Is Within the Bureau's Delegated Authority.

22. The Content Companies urge the Bureau to dismiss the request for clarification as an untimely petition for reconsideration of the *C-NBCU Order*.<sup>62</sup> Specifically, the Content Companies contend that the C-NBCU request for clarification of the Benchmark Condition is akin to a petition for reconsideration because C-NBCU is seeking substantive changes to the provisions adopted in the *C-NBCU Order*.<sup>63</sup> They argue that a decision to grant C-NBCU's request would go beyond the scope of the *C-NBCU Order* and that the Bureau does not have the authority to take action that would modify a decision issued by the full Commission.<sup>64</sup> PCI and Dish Network also contend that grant of C-NBCU's request to permit a C-NBCU Programmer's in-house personnel to have access to peer programming agreements must be made by the full Commission.<sup>65</sup>

23. In its reply comments, C-NBCU claims that it is not seeking to modify the *C-NBCU Order*, but rather that it is seeking only to clarify a disclosure requirement that already is implicit in the order.<sup>66</sup> Therefore, C-NBCU argues, the Bureau, in granting its request, would not be acting *ultra vires*, as the Content Companies contend.<sup>67</sup> C-NBCU also acknowledges the Bureau's delegated authority under Commission rules and notes that, under this authority, the Bureau previously has issued two protective orders in this proceeding as well as clarifications of merger conditions in other proceedings and non-merger-related Commission rules and orders.<sup>68</sup> C-NBCU further argues that the Bureau's authority under the *C-NBCU Order* to conduct the initial review of arbitration awards in disputes arising from the Online Programming Conditions and other conditions supports C-NBCU's conclusion that it would be appropriate for the Bureau to provide clarification of disclosure requirements, confidential submissions, and other aspects of the Benchmark Condition.<sup>69</sup> Accordingly, C-NBCU rejects the arguments that its request should be viewed as a petition for reconsideration and contends that the Bureau has authority to clarify the Benchmark Condition and to issue an additional protective order.

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<sup>61</sup> The *C-NBCU Order* provides that an OVD may notify a C-NBCU Programmer that it intends to request arbitration to determine the terms and conditions of a new programming agreement no more than 90 days after the first time request for Online Video Programming. *C-NBCU Order*, 26 FCC Rcd at 4364, App. A., § VII, A.1. These procedures for initiation of arbitration will continue to apply.

<sup>62</sup> Content Companies Comments at 6.

<sup>63</sup> Content Companies Comments at 7.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> PCI Feb. 23 Letter at 2; *see also id.* ("The Bureau has authority to immediately issue a Protective Order that mirrors the Commission-approved Model Protective Order."); PCI Mar. 15 Letter at 4. Dish Network Comments at 4.

<sup>66</sup> C-NBCU Reply Comments at 3.

<sup>67</sup> C-NBCU Reply Comments at 4-5.

<sup>68</sup> *Id.* at 4, Clarification Request Letter at 6-7, n.18 *citing* 47 C.F.R. § 0.283; *Media Bureau Clarifies 2009 Biennial Filing Requirements for Ownership Report (Form 323)*, Public Notice, 25 FCC Rcd 7986 (MB, 2010); *Media Bureau Clarifies Issues Concerning Franchise Authority Certification to Regulate Rates*, Public Notice, 24 FCC Rcd 399 (MB, 2009).

<sup>69</sup> Clarification Request Letter at 6 (*citing C-NBCU Order*, 26 FCC Rcd at 4369, App. A., § VII.E.1).

24. The Bureau has authority to perform the duties delegated to it under Commission rules, provided that a decision does not present a novel question of law, fact, or policy that cannot be resolved under existing precedent or guidelines.<sup>70</sup> We have concluded that disclosure of peer programming agreements is implicit in the *C-NBCU Order* based on the express requirements the Commission adopted in the Benchmark Condition. Furthermore, the Bureau's decision to issue a protective order with the same scope of access provided in the Model Protective Order comports with, rather than departs from, the procedures set forth in the *C-NBCU Order*. Accordingly, we find that our clarification does not modify the *C-NBCU Order* and that issuance of this clarification and the Third Protective Order is within our delegated authority.

#### IV. CONCLUSION

25. We clarify that OVDs that invoke the Benchmark Condition must disclose the terms of peer programming agreements to a C-NBCU Programmer upon request and that the confidentiality protections provided in the Model Protective Order attached to the *C-NBCU Order* extend to pre-arbitration disclosures of peer agreement terms. Accordingly, we grant C-NBCU's request for clarification to this extent. We reject, however, C-NBCU's request to allow certain internal business executives and in-house counsel to have access to these agreements and any information contained therein. Contemporaneously with this Order, we adopt a Third Protective Order for use in negotiations triggered by the Benchmark Condition. The Third Protective Order restricts review of peer programming deals and the information contained therein to Outside Counsel of Record and Outside Experts, as those terms are defined in the Third Protective Order.

#### V. ORDERING CLAUSES

26. Accordingly, having reviewed the request and the record in this proceeding, **IT IS ORDERED**, pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 310(d), and authority delegated under Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283, that the above-captioned request filed by Comcast Corporation and NBCUniversal Media, LLC **IS GRANTED IN PART** to the extent set forth above and otherwise **IS DENIED**.

27. **IT IS FURTHER ORDERED** that peer programming deal(s) that are the basis for an OVD's request for programming under the Benchmark Condition of the *C-NBCU Order* be disclosed pursuant to the terms of the Third Protective Order adopted contemporaneously with and attached to this Order.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>70</sup> 47 C.F.R. §§ 0.61, 0.283.

**APPENDIX A**

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

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

**THIRD PROTECTIVE ORDER FOR COMPLIANCE**

**Adopted: December 4, 2012**

**Released: December 4, 2012**

By the Chief, Media Bureau:

1. This Third Protective Order for Compliance (“Third Protective Order”) is intended to protect trade secrets and other commercially and competitively sensitive confidential information contained in Protected Program Agreements that are provided, given, or exchanged by and among the Parties to a Negotiation arising out of the Benchmark Condition as required in the Order released in MB Docket No. 10-56 on December 4, 2012 (the “Benchmark Order”).

2. Definitions. Capitalized terms not otherwise defined herein shall have the meaning set forth in Paragraph 2.

(a) Acknowledgement. “Acknowledgement” means an Acknowledgement of Confidentiality in the form of Attachment A to this Third Protective Order.

(b) Authorized Representative. “Authorized Representative” means an individual who has signed and filed an Acknowledgment in the form of Attachment A to this Third Protective Order and is one of the following:

- (i) Outside Counsel of Record for the C-NBCU Programmer in the Negotiation; or
- (ii) Outside Expert engaged by the C-NBCU Programmer in the Negotiation.

(c) Benchmark Condition. “Benchmark Condition” means the condition of the *C-NBCU Order* that requires C-NBCU to provide Comparable Programming to requesting qualified Online Video Distributors, as described in the *C-NBCU Order* at 26 FCC Rcd 4238, 4360, App. A., § IV, A.2.b.

(d) C-NBCU Order. “C-NBCU Order” means the *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 (2011).

(e) C-NBCU Programmer. “C-NBCU Programmer” means the term defined in the *C-NBCU Order* at 26 FCC Rcd at 4356, App. A, § I.

(f) Commission. “Commission” means the Federal Communications Commission or any bureau or subdivision of the Commission acting pursuant to delegated authority.

(g) Comparable Programming. “Comparable Programming” means the term defined in the *C-NBCU Order*, 26 FCC Rcd at 4356, App. A., § I.

(h) Negotiation. “Negotiation” means only the negotiations between an Online Video Distributor and a C-NBCU Programmer concerning the request for Online Video Programming under the Benchmark Condition. This term does not include negotiations arising from provisions other than the Benchmark Condition.

(i) Online Video Distributor. “Online Video Distributor” means the term defined in the *C-NBCU Order*, 26 FCC Rcd at 4357, App. A., § I.

(j) Online Video Programming. “Online Video Programming” means the term defined in the *C-NBCU Order*, 26 FCC Rcd at 4357, App. A., § I.

(k) Outside Counsel of Record. “Outside Counsel of Record” means the firms of attorneys, or sole practitioners, as the case may be, representing the C-NBCU Programmer in the Negotiation, including its attorneys, paralegals, clerical staff and other employees of outside counsel, and vendors reasonably necessary to render professional services in the Negotiation, provided that such persons are not involved in competitive decision-making, *i.e.*, Outside Counsel of Record’s activities, association, and relationship with the C-NBCU Programmer do not involve advice about or participation in the business decisions of any C-NBCU Programmer, a Party, or any competitor of a Protected Third Party, nor the analysis underlying the business decisions.

(l) Outside Expert. “Outside Expert” means a person who, in addition to any other work for the C-NBCU Programmer, is retained or employed as a *bona fide* expert to furnish technical or other expert advice or service, or who is otherwise engaged to prepare material for the express purpose of participating in the Negotiation, whether full or part time, by or at the direction of Outside Counsel of Record, as well as personnel associated with such person who provide support or clerical services or other employees of such expert’s firm reasonably necessary to render professional services in the Negotiation, provided that such persons are not involved in competitive decision-making, *i.e.*, Outside Expert’s activities, association, and relationship with the C-NBCU Programmer do not involve advice about or participation in the business decisions of any C-NBCU Programmer, a Party, or any competitor of a Protected Third Party, nor the analysis underlying the business decisions.

(m) Parties. The “Parties” to a Negotiation are the Online Video Distributor and the C-NBCU Programmer. No other entity or natural person may become a Party absent the express, written consent of the Parties.

(n) Protected Program Agreement. “Protected Program Agreement” means a program carriage agreement, together with any amendments, extensions, modifications, addenda that is disclosed to Authorized Representatives of the C-NBCU Programmer pursuant to this Third Protective Order and the Benchmark Order.

(o) Protected Third Party. “Protected Third Party” means any entity that is a party to a Protected Program Agreement.

(p) Reviewing Party. “Reviewing Party” means an Authorized Representative of the C-NBCU Programmer.

3. Procedures for Claiming Protected Program Agreements Are Highly Confidential. Documents or data comprising Protected Program Agreements (or any material contained therein or any copies or derivative works thereof) shall be designated as Highly Confidential Information for purposes of this Third Protective Order by affixing the legend “HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO

THIRD PROTECTIVE ORDER FOR COMPLIANCE IN MB DOCKET NO. 10-56” to the front page of the document. The Online Video Distributor shall, prior to disclosing to any other party any Highly Confidential Information, ensure that any Reviewing Party (and any representative thereof) is authorized under this Third Protective Order to receive such Highly Confidential Information (including, without limitation, that such Reviewing Party has executed the Acknowledgment and that any applicable waiting period has expired). The inadvertent failure to designate a document or data as Highly Confidential Information does not constitute a waiver of such claim and may be corrected by supplemental written notice at any time, accompanied by a copy of the document or data bearing the appropriate legend, with the effect that such document or data shall be subject to the protections of this Third Protective Order from the time it is designated as Highly Confidential Information.

4. Storage of Highly Confidential Information. Any person to whom Highly Confidential Information is provided shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be withheld from inspection by any person not bound by the terms of this Third Protective Order, unless such Highly Confidential Information is released to the Commission or a court of competent jurisdiction pursuant to Paragraph 13 hereto.

5. Access to Highly Confidential Information.

(a) Other than in accordance with Paragraph 13 of this Third Protective Order, Highly Confidential Information may be disclosed, summarized, described, characterized, or otherwise communicated or made available in whole or in part only to Authorized Representatives.

(b) If Highly Confidential Information is disclosed to an Outside Expert, such Outside Expert shall not work for any entity or individual in connection with any negotiation or agreement for the distribution of programming by an MVPD or an online video programming distributor if the negotiation or agreement involves a Protected Third Party for a period of one year commencing on the date that the Outside Expert executes an Acknowledgement in connection with a Negotiation. Nothing in this paragraph shall preclude an Outside Expert from advising, assisting, or otherwise participating on behalf of a Party or Protected Third Party in future negotiations or arbitrations (and any following proceedings at the Commission or in federal court) arising under the Benchmark Condition, subject to any and all restrictions on the use of Highly Confidential Information in this Third Protective Order.

(c) If Highly Confidential Information is disclosed to a person who is Outside Counsel of Record, and such person subsequently becomes an employee of any MVPD, online video programming distributor, programming network, or entity that supplies programming to MVPDs or online distributors, such person shall not work for such employer in connection with any negotiation or agreement for the distribution of programming if the negotiation or agreement involves a Protected Third Party for a period of one year commencing on the date that the Outside Counsel of Record executes an Acknowledgement in connection with a Negotiation. Nothing in this paragraph shall preclude such counsel from advising, assisting, or otherwise participating on behalf of a Party or Protected Third Party in future negotiations or arbitrations (and any following proceedings at the Commission or in federal court) arising under the Benchmark Condition, subject to any and all restrictions on the use of Highly Confidential Information in this Third Protective Order.

6. Procedures for Obtaining Access to Highly Confidential Information. If the C-NBCU Programmer will require access to Protected Program Agreements pursuant to the provisions of the Benchmark Order, it must so inform the Online Video Distributor in writing within seven (7) days of receipt of a formal request for access to programming under the Benchmark Condition. In all cases where access to Highly Confidential Information is permitted pursuant to Paragraph 5 hereof, before reviewing or receiving access to any Highly Confidential Information, each person seeking such access shall execute an Acknowledgment, file it in MB Docket No. 10-56, and serve it upon the Protected Third Parties, with a copy to the Media Bureau. Each Protected Third Party shall have an opportunity to object to the disclosure of the Highly Confidential Information to any such persons. Any objection must be filed in MB Docket No. 10-56 and served on the Online Video Distributor and the C-NBCU Programmer, and their respective counsel, within three (3) business days after receiving a copy of that person’s

Acknowledgment. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Protected Third Party shall not have access to Highly Confidential Information. If there are no objections or upon the resolution of any objections in favor of the C-NBCU Programmer, the Online Video Distributor shall deliver a copy of the Protected Third Party Agreement to the Authorized Representatives of the C-NBCU Programmer within five (5) business days of receipt of the executed Acknowledgment. One copy shall be provided to each Authorized Representative.

7. Disclosure of Highly Confidential Information. An Authorized Representative may disclose Highly Confidential Information only to other Authorized Representatives to whom disclosure is permitted under this Third Protective Order.

8. Use of Highly Confidential Information. Highly Confidential Information shall be used solely for the preparation and conduct of a specific Negotiation for which Highly Confidential Information has been disclosed; shall not be used for any other purpose (including but not limited to competitive business purposes); and shall not be disclosed except in accordance with this Third Protective Order. This Third Protective Order shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to Protected Program Agreements through this Negotiation.

9. Client Consultation. Nothing in this Third Protective Order shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to the C-NBCU Programmer relating to the conduct of the Negotiation or any subsequent administrative or judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of any Highly Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with the C-NBCU Programmer, Outside Counsel of Record shall not disclose Highly Confidential Information.

10. Violations of Agreement.

(a) Should a Party that has obtained access to Highly Confidential Information under this Third Protective Order violate any of its terms, it shall immediately convey that fact to the Online Video Distributor and to any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Third Protective Order, any of whom may choose to bring it to the attention of the Commission as appropriate. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Online Video Distributor and any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Third Protective Order, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure.

(b) By participating in a Negotiation the parties agree that Highly Confidential Information is of special, unique, and extraordinary character, and a Protected Third Party's ability to pursue damages alone would be an inadequate remedy for a violation of this Third Protective Order. In the event that any Protected Third Party believes that use of its Highly Confidential Information in violation of this Third Protective Order has occurred or is about to occur, or that any other party hereto has violated or is about to violate this Third Protective Order, such Protected Third Party shall be entitled to seek an injunction restraining any such violation or threatened violation and enforcement of this Third Protective Order by a decree of specific performance requiring each party hereto to fulfill its obligations under this Third Protective Order, in any such case without the necessity of showing economic loss or other actual damage and without any bond or other security being required. Protected Third Parties also shall have the right to seek appropriate relief from the Commission and, to the extent that the Commission's authority is so delegated, the Media Bureau. Nothing in this Third Protective Order shall limit any other rights and remedies available to a Protected Third Party at law or equity against any person using Highly Confidential Information in a manner not authorized by this Third Protective Order.

(c) Each Protected Third Party shall have all of the rights and remedies identified herein only individually with respect to its own Highly Confidential Information; no Protected Third Party shall be required to act in concert or coordination with any other Protected Third Party to exercise its rights and remedies hereunder.

11. Termination of Negotiations. Within fifteen (15) days after an agreement for programming negotiated under the Benchmark Condition has been executed by the Parties or within fifteen (15) days after the termination of a Negotiation, as represented by at least one Party to the Negotiation in writing to the other Party, Authorized Representatives of the C-NBCU Programmer shall make their best efforts to destroy all Highly Confidential Information as well as all copies and derivative materials made therefrom, and shall certify in a writing served on the Protected Third Parties that such best efforts have been conducted to ensure that no Highly Confidential Information has been retained by any person having access thereto. Authorized Representatives shall have a continuing obligation to destroy any previously undestroyed documents if and when they are discovered.

12. No Waiver of Confidentiality. Disclosure of Highly Confidential Information as provided herein shall not be deemed a waiver by the any Protected Third Party of any entitlement to highly confidential treatment of such information. Reviewing Parties, by viewing these materials:

(a) agree not to assert any such waiver;

(b) agree not to use Highly Confidential Information in any proceeding other than such as permitted herein unless obtained independently of the Negotiation; and

(c) agree that accidental disclosure of Highly Confidential Information shall not be deemed a waiver of entitlement to highly confidential treatment of such information.

13. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Highly Confidential Information that a Reviewing Party has obtained under terms of this Third Protective Order, such Reviewing Party shall promptly notify in writing each Protected Third Party whose Highly Confidential Information is affected, of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, the Reviewing Party to whom the subpoena or order is directed shall not provide or otherwise disclose Highly Confidential Information prior to providing the Protected Third Parties notice and waiting fifteen (15) business days so that the Protected Third Parties shall have an opportunity to contest the validity of the subpoena or order of production through appeal or seek a confidentiality order or other protection against disclosure of any Highly Confidential Information.

14. Effect of Third Protective Order. This Third Protective Order and its protections will continue in force indefinitely. The express terms of this Third Protective Order control and supersede any course of performance and/or usage of trade inconsistent with any of the terms hereof.

15. Severability. In the event that one or more provisions of this Third Protective Order are held to be unenforceable under applicable law, such provisions shall automatically be replaced with one that incorporates the original intent of the Commission to the maximum extent permitted by law and the balance of the Third Protective Order shall be enforced in accordance with its terms.

## ATTACHMENT A

## THIRD PROTECTIVE ORDER FOR COMPLIANCE

## Acknowledgment of Confidentiality

## MB Docket No. 10-56

I hereby acknowledge that I have received and read a copy of the foregoing Third Protective Order for Compliance ("Third Protective Order") in the above-captioned proceeding, and I understand it. I agree that I am bound by the Third Protective Order and that I shall not disclose or use Highly Confidential Information except as allowed by the Third Protective Order. I acknowledge that a violation of the Third Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Third Protective Order is due solely to my capacity as Outside Counsel of Record or Outside Expert to a C-NBCU Programmer as described in the foregoing Third Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Third Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Highly Confidential Information is used only as provided in the Third Protective Order; and (2) Highly Confidential Information is not duplicated except as specifically permitted by the terms of the Third Protective Order, and I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Third Protective Order.

Executed at \_\_\_\_\_ this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Name]  
[Position]  
[Address]  
[Telephone]