



PUBLIC NOTICE

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DA 12-1829

Released: November 13, 2012

MEDIA BUREAU ACTION

MEDIA BUREAU ANNOUNCES DECISION REQUIRING NBCUNIVERSAL MEDIA, LLC TO PROVIDE FIRST-YEAR FILMS TO STARTUP ONLINE VIDEO DISTRIBUTOR PROJECT CONCORD, INC.

Also concludes that NBCU need not provide programming that would result in breach of certain NBCU licensing agreements.

MB Docket No. 10-56

On July 16, 2012, NBCUniversal Media, LLC (“NBCU”) filed a Petition for *De Novo* Review of an arbitration award issued under the Benchmark Condition of the *Comcast/NBCU Order*.¹ On the same day, Project Concord, Inc. (“PCI”) filed a Partial Appeal of the arbitrator’s decision.² As summarized below, the Media Bureau today adopted a decision granting NBCU’s Petition in part and denying it in part and denying PCI’s Partial Appeal.

(1) The Media Bureau rejects NBCU’s argument that Video Programming as defined in the *Comcast/NBCU Order* conditions must be read as excluding all films for which less than one year has elapsed since their theatrical release (“first-year films”) and concludes that these first-year films are included within the scope of the Benchmark Condition.

(2) In considering NBCU’s asserted defense that it is prohibited under its licensing agreements with other third parties from providing PCI with the requested programming, the Media Bureau clarifies that the correct standard to be applied in evaluating a contractual defense to a claim under the Benchmark Condition is whether NBCU has demonstrated by a preponderance of the evidence, based on the language of the relevant licensing agreement and evidence regarding the interpretation of that language, that NBCU’s provision of programming to the Online Video Distributor (“OVD”) would constitute a breach of a contract to which Comcast Corporation (“Comcast”) or NBCU is a party, provided that the agreement allegedly breached is “consistent with reasonable, common industry

¹ See 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, 26 FCC Rcd 4238, 4360, App. A., § IV.A.2.b (2011) (“*Comcast/NBCU Order*”); see also NBCUniversal Media, LLC, Petition for *De Novo* Review, MB Docket No. 10-56 (July 16, 2012) (“Petition”). NBCU and PCI are collectively the “Parties.”

² See Project Concord, Inc., Partial Appeal, MB Docket No. 10-56 (July 16, 2012) (“Partial Appeal”).

practice.”³ Applying this standard, the Media Bureau concludes that NBCU has demonstrated by a preponderance of the evidence that licensing certain films and TV programs to PCI would constitute a breach of various NBCU licensing agreements that are “consistent with reasonable, common industry practice.”

(3) The Media Bureau concludes that NBCU did not engage in “unreasonable conduct” during the course of the arbitration proceeding that would warrant grant of PCI’s request to shift its attorneys’ fees and other costs and expenses to NBCU.

The *de novo* review of arbitration awards involving requests for online video programming under the Benchmark Condition necessarily involves the analysis of proprietary commercial and financial information, including the price, terms, and conditions for carriage of the programming at issue.⁴ Moreover, in this particular case, the Parties have substantially redacted the public versions of their pleadings. Today, the Media Bureau has separately released an unredacted version of its decision to outside counsel to the Parties. The Media Bureau hereby affords the Parties’ outside counsel the opportunity to jointly submit suggested redactions of proprietary commercial and financial information. The Parties’ outside counsel must jointly submit their suggested redactions to the Media Bureau no later than November 20, 2012. The Media Bureau cautions the Parties’ outside counsel to propose redactions of only that material which they believe in good faith falls within an exemption to disclosure under Commission rules⁵ and to refrain from proposing redactions of information that has been previously disclosed to the public. The Media Bureau will release a public version of the decision after considering the redactions suggested by the Parties’ outside counsel.

For further information, contact David Konezal, David.Konezal@fcc.gov; or Kathy Berthot, Kathy.Berthot@fcc.gov; of the Media Bureau, Policy Division, (202) 418-2120. Press inquiries should be directed to Janice Wise, (202) 418-8165.

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³ *Comcast/NBCU Order*, 26 FCC Rcd at 4361, 4368, App. A, §§ IV.B.1, VII.C.3.

⁴ *See id.* at 4360, App. A, § IV.A.2.b(ii). In adopting the *Comcast/NBCU Order* arbitration conditions, the Commission specifically contemplated that these arbitrations would involve commercially sensitive material and that arbitrators would have to produce both a confidential and a redacted version of their decisions. *See id.* at 4370, App. A, § VIII.7.

⁵ *See* 47 C.F.R. § 0.457; *see also* 5 U.S.C. 552(b).