

REDACTED VERSION – RELEASED DECEMBER 5, 2012

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

In the Matter of)	
)	
Project Concord, Inc.,)	MB Docket No. 10-56
Claimant,)	
)	
v.)	
)	
NBCUniversal Media, LLC,)	
Respondent.)	

ORDER ON REVIEW

Adopted: November 13, 2012

Released: November 13, 2012

By the Chief, Media Bureau:

Heading	Paragraph #
I. INTRODUCTION	1
II. BACKGROUND	2
A. <i>Comcast/NBCU Order</i> Benchmark Condition	2
B. The PCI/NBCU Arbitration.....	6
III. DISCUSSION	14
A. NBCU’s Petition for <i>De Novo</i> Review	17
1. Films Less than One Year from Theatrical Release	17
2. NBCU’s Contractual Impediment Defense.....	25
a. Standard of Proof.....	27
b. PCI’s Online Service.....	31
c. NBCU Licensing Agreements.....	42
(i) Film Agreements	43
(a) [REDACTED] Agreements	44
(b) [REDACTED] Agreements.....	51
(ii) Network Television Agreements.....	53
(a) [REDACTED]	54
(b) [REDACTED]	56
(iii) MVPD Agreements	58
(a) [REDACTED]	59
(iv) Effect of Ruling on Final Agreement	61
B. PCI’s Partial Appeal.....	63
IV. CONCLUSION	73
V. ORDERING CLAUSES	74

REDACTED VERSION – RELEASED DECEMBER 5, 2012**I. INTRODUCTION**

1. In this *Order*, we consider a Petition filed by NBCUniversal Media, LLC (“NBCU”) seeking *de novo* review of an arbitrator’s decision in favor of Project Concord, Inc. (“PCI”) in a dispute under the Benchmark Condition of the *Comcast/NBCU Order*.¹ The Benchmark Condition requires NBCU to provide an online video distributor (“OVD”) with programming comparable to the programming that the OVD receives from one of NBCU’s peer studios.² We also consider PCI’s Partial Appeal of the arbitrator’s decision.³ For the reasons set forth below, we grant in part and deny in part NBCU’s Petition and we deny PCI’s Partial Appeal.⁴ Specifically, we reject 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 conclude that these first-year films are included within the scope of the Benchmark Condition. In addition, 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, we clarify the correct standard to be applied in evaluating a contractual defense to a claim under the Benchmark Condition. Specifically, the applicable standard 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 OVD would constitute a breach of a contract to which Comcast Corporation (“Comcast”) or NBCU is a party, provided that the agreement allegedly

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) (“NBCU Petition”). PCI filed an Opposition to the NBCU Petition on July 31, 2012. See Project Concord, Inc., Opposition to Petition for *De Novo* Review, MB Docket No. 10-56 (filed July 31, 2012) (“PCI Opposition”). NBCU filed a Reply to the PCI Opposition on August 10, 2012. See NBCUniversal Media, LLC, Reply, MB Docket No. 10-56 (filed Aug. 10, 2012) (“NBCU Reply”). The parties requested confidential treatment of certain competitively sensitive information that appears in their pleadings and in the underlying arbitration record. We have redacted certain information in the public version of this *Order on Review* in accordance with the parties’ requests for confidentiality.

² See *Comcast/NBCU Order*, 26 FCC Rcd at 4359-60, App. A., § IV. A.2.b(i); see also *id.* at 4357, App. A., § I (defining NBCU’s peer “Film Studios” as “Warner Bros. Entertainment, Fox Filmed Entertainment, Paramount Motion Pictures, Sony Pictures Entertainment, Walt Disney Motion Pictures Group . . . and 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”; defining “Production Studios” as “Warner Bros. Television, 20th Century Fox Television, Paramount/CBS Television Studios, Sony Pictures Television, Disney-ABC Studios . . . and any other Person that is one of the top five producers (other than a C-NBCU Programmer) of Video Programming for distribution through Broadcast Networks or Cable Programmers by U.S. production revenue in the latest declared financial year”).

³ See Project Concord, Inc., Partial Appeal, MB Docket No. 10-56 (July 16, 2012) (“PCI Partial Appeal”). NBCU filed an Opposition to PCI’s Partial Appeal on July 31, 2012. See NBCUniversal Media, LLC, Opposition to Partial Appeal, MB Docket No. 10-56 (filed July 31, 2012) (“NBCU Opposition”). PCI filed a Reply to the NBCU Opposition on August 10, 2012. See Project Concord, Inc., Reply, MB Docket No. 10-56 (filed Aug. 10, 2012) (“PCI Reply”).

⁴ On September 10, 2012, the Media Bureau issued an Order on its own motion extending for an additional 60 days the deadline for issuing a decision on review in this proceeding, citing the substantial record compiled in the course of this proceeding and the complexity of the issues. See *Project Concord, Inc. v. NBCUniversal Media, LLC*, Order, DA 12-1468 (MB, Sept. 10, 2012); see also *Comcast/NBCU Order*, 26 FCC Rcd at 4369, App. A., § VII.E.1 (“The Media Bureau shall issue its findings and conclusions not more than 60 days after receipt of the petition, which period may be extended by the Media Bureau by one period of an additional 60 days.”).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

breached is “consistent with reasonable, common industry practice.”⁵ Applying this standard, we conclude 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.” Finally, we conclude 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.

II. BACKGROUND**A. Comcast/NBCU Order Benchmark Condition**

2. In the *Comcast/NBCU Order*, the Commission granted the application of Comcast, General Electric Company, and NBC Universal, Inc. to assign and transfer control of licenses from General Electric Company to Comcast, subject to certain conditions.⁶ In response to concerns that the combined entity, Comcast-NBCU or C-NBCU, would have incentives to hinder competition in the growing online video distribution market, the Commission adopted conditions to ensure that OVDs would have non-discriminatory access to C-NBCU programming.⁷ To that end, the conditions allow an OVD to seek access to C-NBCU programming through either or both the MVPD Price Condition⁸ and the Benchmark Condition.⁹ The Benchmark Condition applies when “an OVD has entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD.”¹⁰ The Benchmark Condition obligates C-NBCU programmers to provide a Qualified OVD¹¹ with Online Video Programming that is comparable to the Online Video Programming the OVD has received from a qualifying peer programmer.¹² The

⁵ *Comcast/NBCU Order*, 26 FCC Rcd at 4361, 4368, App. A, §§ IV.B.1, VII.C.3.

⁶ *See Comcast/NBCU Order*, 26 FCC Rcd at 4240-43, ¶¶ 4-8.

⁷ *See id.* at 4272-73, ¶¶ 86-87.

⁸ The MVPD Price Condition applies when an OVD “is willing to pay the economic equivalent of the price, terms and conditions on which C-NBCU Programmers provide Video Programming to MVPDs.” *Id.* at 4357, App. A, § I. The MVPD Price Condition requires C-NBCU Programmers to “provide Online Video Programming sought by the OVD to the extent that the Video Programming sought is materially the same as Video Programming that C-NBCU Programmers offer to any Similarly Situated MVPD.” *Id.* at 4359, App. A, § IV.A.2.a(i). The MVPD Price Condition is not at issue in this proceeding.

⁹ *See id.* at 4359-60, App. A, § IV.A.2.b.

¹⁰ *Id.* at 4355, App. A, § I.

¹¹ A “Qualified OVD” is defined as “any OVD that meets either or both of (i) the MVPD Price Condition and (ii) the Benchmark Condition.” *Id.* at 4358, App. A, § I.

¹² *See id.* at 4359-60, App. A, § IV.A.2.b(i) (“For any Qualified OVD that meets the Benchmark Condition, C-NBCU Programmers shall provide Online Video Programming sought by the OVD that constitutes Comparable Programming.”) (footnotes omitted). “Online Video Programming” means “Video Programming” that any C-NBCU programmer has the rights to enable others to display over the Internet or other IP-based transmission path. *See id.* at 4357, App. A, § I. “Video Programming” is defined as:

programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); 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”)); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds,

REDACTED VERSION – RELEASED DECEMBER 5, 2012

Comparable Programming¹³ that C-NBCU must provide to the OVD must be on terms that are “economic[ally] equivalent” to the terms that the OVD has received from the peer provider.¹⁴

3. If negotiations fail to produce a mutually acceptable agreement for the provision of online video programming as set forth in the Benchmark Condition, the OVD may initiate an arbitration proceeding in accordance with the procedures in the *Comcast/NBCU Order*.¹⁵ Under these procedures, each party must submit a “final offer” for carriage of the video programming at issue.¹⁶ Within 90 days of the arbitrator’s appointment, the arbitrator must issue a decision choosing the final offer that “most closely approximates the fair market value of the programming carriage rights at issue.”¹⁷

4. An arbitration under the Benchmark Condition takes place in two phases if there is a reasonable dispute as to: (i) whether an OVD is a Qualified OVD; (ii) what Comparable Programming a Qualified OVD is entitled to; or (iii) whether certain authorized defenses, such as a contract defense, would defeat a claim.¹⁸ The conditions direct the arbitrator to resolve these disputes in Phase I, except for some disputes regarding whether an authorized defense would defeat a claim.¹⁹ If there is a dispute about what Comparable Programming a Qualified OVD is entitled to, the parties must submit their final offers regarding the scope of Comparable Programming, rather than final offers in the form of a contract for carriage of the programming, at the commencement of the arbitration.²⁰ The arbitrator then decides during Phase I which of the two final offers for the scope of Comparable Programming most closely approximates the appropriate Comparable Programming.²¹ After the conclusion of Phase I, the parties must then submit their final offers for agreements based on the Comparable Programming chosen by the

including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and *Films for which a year or more has elapsed since their theatrical release.*

See id. at 4358, App. A, § I (emphasis added).

¹³ 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.

¹⁴ *Id.* at 4360, App. A, § IV.A.2.b(ii).

¹⁵ *See id.* at 4360, App. A, § IV.A.3.

¹⁶ *See id.* at 4365, App. A, § VII.A.7, 10, 13.

¹⁷ *Id.* at 4366, App. A, § VII.B.2, 4.

¹⁸ *Id.* at 4367-8, App. A, § VII.C.1. Under Section VII.C.3 of the *Comcast/NBCU Order* conditions, NBCU may raise as a defense to a claim under the Benchmark Condition (i) any of the factors listed in Section 76.1002(b) of the Commission’s rules; or (ii) that providing Online Video Programming to the particular Qualified OVD would constitute a breach of a contract to which Comcast or NBCU is a party (the “contractual impediment defense”). *See id.* at 4368, App. A, § VII.C.3.

¹⁹ *See id.* at 4367-8, App. A, § VII.C.1; *see also infra* n.59.

²⁰ *See Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.2.

²¹ *See id.*

REDACTED VERSION – RELEASED DECEMBER 5, 2012

arbitrator.²² At the conclusion of Phase 2, the arbitrator selects the final offer for carriage of the video programming at issue.²³

5. Within 30 days of the date of publication of the arbitrator’s award, a party aggrieved by the award may file with the Media Bureau a petition seeking *de novo* review.²⁴ In reviewing the award, the Media Bureau must examine the same evidence presented to the arbitrator.²⁵ The Media Bureau must issue its findings and conclusions not more than 60 days after receipt of the petition, which period may be extended by one period of an additional 60 days.²⁶

B. The PCI/NBCU Arbitration

6. PCI is an emerging OVD that plans to [REDACTED] end of 2012.²⁷ PCI’s planned service consists of an [REDACTED] and a [REDACTED].²⁸ Through the [REDACTED], consumers will be able to rent or purchase a range of video programming content, including new-release video-on-demand (“VOD”) movies and in-season television episodes.²⁹ Consumers who rent or purchase film and television content in PCI’s [REDACTED]

30

31

].³²

7. NBCU is one of the world’s largest media and entertainment companies.³³ Among other things, it owns and operates national cable and regional sports networks, the NBC and Telemundo broadcast networks, local NBC-affiliated and Telemundo-affiliated broadcast stations, and Universal Pictures, and produces, markets, and distributes cable network and broadcast television programming and theatrical and non-theatrical films.³⁴

²² See *id.*

²³ See *id.* at 4368, App. A, § VII.C.1.

²⁴ See *id.* at 4369, App. A, § VII.E.1.

²⁵ See *id.*, App. A, § VII.E.2.

²⁶ See *id.*, App. A, § VII.E.1.

²⁷ See PCI Opposition at 3; Declaration of Sharon Peyer (Apr. 20, 2012) (“Peyer Phase 1 Declaration”) at ¶ 2.

²⁸ See PCI Opposition at 3; Peyer Phase 1 Declaration at ¶ 2, 16.

²⁹ See PCI Opposition at 3; Peyer Phase 1 Declaration at ¶ 3.

³⁰ See PCI Opposition at 3; Peyer Phase 1 Declaration at ¶ 5.

³¹ See PCI Opposition at 3, 38-39; see also [REDACTED]], NBCU Ex. 23, at 5 [REDACTED]].

³² See PCI Opposition at 39; Peyer Phase I Declaration at ¶ 18.

³³ See *Comcast/NBCU Order*, 26 FCC Rcd at 4244, ¶ 13.

³⁴ See *id.* at 4244-45, ¶¶ 13-15.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

8. In July 2011, PCI notified NBCU that it had entered into a Benchmark Agreement with a peer studio, [REDACTED], and desired a license from NBCU for comparable programming.³⁵ On October 28, 2011, after failing to reach an agreement with NBCU, PCI submitted a demand for arbitration pursuant to the *Comcast/NBCU Order* conditions, which included PCI's final offer for carriage of NBCU's programming.³⁶ NBCU disputed the scope of Comparable Programming to which PCI was entitled. Accordingly, on November 4, 2011, NBCU submitted its final offer for the scope of Comparable Programming, rather than a final offer for carriage.³⁷ On March 23, 2012, the arbitrator appointed by the American Arbitration Association, Henry J. Silberberg (the "Arbitrator"), approved a Confidentiality Agreement and Protective Order proposed by the parties.³⁸

9. The parties engaged in extensive document discovery.³⁹ The arbitration was conducted in two phases because NBCU (i) disputed whether PCI was a Qualified OVD; (ii) challenged the scope of Comparable Programming to which PCI was entitled; and (iii) raised a contractual impediment defense.⁴⁰ The parties submitted Phase 1 opening briefs on April 17, 2012,⁴¹ and rebuttal briefs on April 20, 2012.⁴²

³⁵ See PCI Opposition at 5; PCI Phase 1 Proposed Findings at ¶ 1.

³⁶ See Project Concord, Inc. Demand for Arbitration and Final Offer (Oct. 28, 2011) ("PCI Phase 1 Final Offer").

³⁷ See Letter from David P. Murray, Willkie Farr & Gallagher, LLP, Counsel for NBCUniversal Media, LLC, to Paris N. Earp, Commercial Case Manager, American Arbitration Association (Nov. 4, 2011) ("NBCU Phase I Final Offer").

³⁸ See Confidentiality Agreement and Protective Order (March 23, 2012).

³⁹ See Letter from Jean V. MacHarg, Patton Boggs LLP, Counsel for Project Concord, Inc., to David Murray, Willkie Farr & Gallagher LLP, Counsel for NBCU Universal Media, LLC (Apr. 4, 2012); Letter from David Murray, Willkie Farr & Gallagher LLP, Counsel for NBCU Universal Media, LLC, to Jean V. MacHarg, Patton Boggs LLP, Counsel for Project Concord, Inc. (Apr. 4, 2012).

⁴⁰ See Phase 1 Decision of Arbitrator (May 10, 2012) ("Phase 1 Decision"). The parties agreed, with the Arbitrator's approval, that evidence relating to NBCU's contractual impediment defense should be presented and considered in Phase 1 "notwithstanding the provision in the [*Comcast/NBCU Order*] Conditions that Phase 1 should not be concerned with such Defense." *Id.* at 4. The Arbitrator, however, subsequently concluded in his Phase 1 decision that a determination as to NBCU's contractual impediment defense should be deferred to Phase 2. See *id.*; see also *infra* n.59.

⁴¹ See Project Concord, Inc. Phase 1 Opening Brief (Apr. 17, 2012) ("PCI Phase 1 Opening Brief"); Opening Position Statement of NBCUniversal Media, LLC (Apr. 17, 2012) ("NBCU Phase 1 Opening Brief"). NBCU's Phase 1 Opening Brief included expert reports from Steven Madoff, Consultant, and Robert Wunderlich, Ph.D., Discovery Economics, Inc., and declarations from M. Elizabeth Roberts, Chief Operating Officer, Universal Cable Productions and Executive Vice President, Business Affairs, NBCUniversal Cable Entertainment and Cable Studios; Bruce Casino, Senior Vice President, Cable and New Media Sales, NBCUniversal; and Ronald Lamprecht, Executive Vice President, Sales Business Development, NBCUniversal Digital Distribution. See Expert Report of Steven Madoff (Apr. 17, 2012) ("Madoff Phase 1 Expert Report"); Expert Report of Robert Wunderlich (Apr. 17, 2012) ("Wunderlich Phase 1 Expert Report"); Declaration of M. Elizabeth Roberts (Apr. 17, 2012) ("Roberts Phase 1 Declaration"); Declaration of Bruce Casino (Apr. 17, 2012) ("Casino Phase 1 Declaration"); and Declaration of Ronald Lamprecht (Apr. 17, 2012) ("Lamprecht Phase 1 Declaration").

⁴² See Project Concord, Inc. Rebuttal Brief (Apr. 20, 2012) ("PCI Phase 1 Rebuttal"); Rebuttal Statement of NBCUniversal Media, LLC (Apr. 20, 2012) ("NBCU Phase 1 Rebuttal"). PCI's Phase 1 Rebuttal Brief included expert reports from Gary Marenzi, Founder and President, Marenzi and Associates, and Mark DeVitre, Attorney/Founder, MDVLaw Group, and declarations from Lawrence Smith, Vice President of Content, Project Concord, Inc., and Sharon Peyer, Co-Founder and Vice President of Business Development, Project Concord, Inc. See Expert Report of Mark DeVitre (Apr. 20, 2012) ("DeVitre Phase 1 Expert Report"); Expert Report of Gary Marenzi (Apr. 20, 2012) ("Marenzi Phase 1 Expert Report"); Declaration of Lawrence Smith (Apr. 20, 2012) ("Smith Phase 1 Declaration"); and Declaration of Sharon Peyer (Apr. 20, 2012) ("Peyer Phase 1 Declaration").

REDACTED VERSION – RELEASED DECEMBER 5, 2012

The Phase 1 hearing was held on April 24-25, 2012.⁴³ The parties subsequently submitted post-hearing briefs and proposed findings.⁴⁴ The Arbitrator issued a Phase 1 decision on May 10, 2012.⁴⁵

10. In his Phase 1 decision, the Arbitrator concluded that: (i) PCI is a Qualified OVD; (ii) “films for which less than a year has elapsed since their theatrical release” are not excluded from the definition of “Video Programming” that NBCU must make available to PCI under the *Comcast/NBCU Order* conditions; (iii) the scope of Comparable Programming in PCI’s Phase 1 final offer more closely approximated the Comparable Programming in the peer deal than the scope of Comparable Programming in NBCU’s Phase 1 final offer; (iv) a determination as to whether NBCU proved its contractual impediment defense would be deferred to Phase 2; and (v) if NBCU failed to prove its contractual impediment defense in Phase 2, NBCU’s request for indemnity under the indemnity provision set forth in Section IV.A.5 of the *Comcast/NBCU Order* conditions would be considered.⁴⁶

11. The parties submitted their Phase 2 final offers on May 16, 2012.⁴⁷ The parties submitted Phase 2 opening briefs on May 24, 2012,⁴⁸ and rebuttal briefs on May 29, 2012.⁴⁹ The Phase 2 hearing

⁴³ See Phase 1 Decision at 1. During the Phase 1 hearing, the following witnesses testified on behalf of PCI: Lawrence Smith, Vice President of Content, Project Concord, Inc.; Sharon Peyer, Co-Founder and Vice President of Business Development, Project Concord, Inc.; Gary Marenzi, Founder and President, Marenzi and Associates; and Mark DeVitre, Attorney/Founder, MDVLaw Group. See Testimony of Lawrence Smith, Hr’g Tr. at 249 (“Smith Test.”); Testimony of Sharon Peyer, Hr’g Tr. at 353 (“Peyer Test.”); Testimony of Gary Marenzi, Hr.’g Tr. at 426 (“Marenzi Test.”); and Testimony of Mark DeVitre, Hr’g Tr. at 473 (“DeVitre Test.”). The following witnesses appeared on behalf of NBCU: M. Elizabeth Roberts, Chief Operating Officer, Universal Cable Productions and Executive Vice President, Business Affairs, NBCUniversal Cable Entertainment and Cable Studios; Bruce Casino, Senior Vice President, Cable and New Media Sales, NBCUniversal; Ronald Lamprecht, Executive Vice President, Sales Business Development, NBCUniversal Digital Distribution; Steven Madoff, Consultant; and Robert Wunderlich, Ph.D., Discovery Economics, Inc. See Testimony of M. Elizabeth Roberts, Hr’g Tr. at 66 (“Roberts Test.”); Testimony of Bruce Casino, Hr’g Tr. at 84 (“Casino Test.”); Testimony of Ronald Lamprecht, Hr’g Tr. at 124 (“Lamprecht Test.”); Testimony of Steven Madoff, Hr’g Tr. at 148 (“Madoff Test.”); and Testimony of Robert Wunderlich, Hr’g Tr. at 189 (“Wunderlich Test.”).

⁴⁴ See Project Concord, Inc. Phase 1 Post-Hearing Brief (May 4, 2012) (“PCI Phase 1 Post-Hearing Brief”); Project Concord, Inc. Phase 1 Proposed Findings and Conclusions (May 4, 2012) (“PCI Phase 1 Proposed Findings”); NBCUniversal Media, LLC Phase 1 Post-Hearing Brief (May 3, 2012) (“NBCU Phase 1 Post-Hearing Brief”).

⁴⁵ See Phase 1 Decision.

⁴⁶ See *id.* at 4; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4360, App. A, § IV.A.5 (“For claims to programming made under Section IV, if a reasonable dispute exists or arises regarding whether a C-NBCU Programmer has the right to grant an OVD the right to the Video Programming at issue, the C-NBCU Programmer may require the Qualified OVD to indemnify it and hold it harmless against any breach of contract, tort, copyright violation or other claim arising out of any lack of right of the C-NBCU Programmer to grant the OVD the right to Video Programming.”).

⁴⁷ See Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for NBCUniversal Media, LLC, to Arbitrator Henry J. Silberberg (May 16, 2012) (“NBCU Phase 2 Final Offer”); Email from Jean V. MacHarg, Patton Boggs LLP, Counsel for Project Concord, Inc., to Arbitrator Henry J. Silberberg (May 16, 2012) (“PCI Phase 2 Final Offer”).

⁴⁸ See Project Concord, Inc. Phase 2 Opening Brief (May 24, 2012) (“PCI Phase 2 Opening Brief”); Phase 2 Opening Statement of NBCUniversal Media, LLC (May 24, 2012) (“NBCU Phase 2 Opening Brief”). PCI’s Phase 2 Opening Brief included an expert report from Mark DeVitre, Attorney/Founder, MDVLaw Group. See Expert Report of Mark DeVitre (May 24, 2012) (“DeVitre Phase 2 Expert Report”). NBCU’s Phase 2 Opening Brief included expert reports from Steven Madoff, Consultant, and Robert Wunderlich, Ph.D., Discovery Economics, Inc. See Expert Report of Steven Madoff (May 24, 2012) (“Madoff Phase 2 Expert Report”); Expert Report of Robert Wunderlich (May 24, 2012) (“Wunderlich Phase 2 Expert Report”).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

was held on May 30-31, 2012.⁵⁰ The parties submitted post-hearing briefs and proposed findings for Phase 2 on June 7, 2012.⁵¹ On June 15, 2012, the Arbitrator issued a Phase 2 arbitration award in favor of PCI.⁵² In the Award, the Arbitrator concluded that: (i) PCI's Phase 2 final offer most closely approximates the fair market value of the programming carriage rights at issue; (ii) NBCU failed to meet its burden of proof on its contractual impediment defense; and (iii) PCI must indemnify NBCU under Section IV.A.5 of the *Comcast/NBCU Order* conditions.⁵³ In addition, the Arbitrator denied both parties' cost-shifting requests (*i.e.*, requests for attorneys' fees and other costs and expenses).⁵⁴

12. The Final Agreement selected by the Arbitrator provides that NBCU must license to PCI on [REDACTED] the following:

[REDACTED]

55

].⁵⁶

⁴⁹ See Project Concord, Inc. Phase 2 Rebuttal Brief (May 29, 2012) ("PCI Phase 2 Rebuttal"); Phase 2 Rebuttal Points of NBCUniversal Media, LLC (May 29, 2012) ("NBCU Phase 2 Rebuttal"). PCI's Phase 2 Rebuttal Brief included an expert report from Mark DeVitre, Attorney/Founder, MDVLaw Group. See Expert Report of Mark DeVitre (May 29, 2012) ("DeVitre Phase 2 Rebuttal Expert Report").

⁵⁰ During the Phase 2 hearing, the following witness testified on behalf of PCI: Mark DeVitre. See Testimony of Mark DeVitre, Hr'g Tr. at 893 ("DeVitre Phase 2 Test."). The following witnesses testified on behalf of NBCU: Steven Madoff and Robert Wunderlich. See Testimony of Steven Madoff, Hr'g Tr. at 805 ("Madoff Phase 2 Test."); Testimony of Robert Wunderlich, Hr'g Tr. at 661 ("Wunderlich Phase 2 Test.").

⁵¹ See Project Concord, Inc. Phase 2 Closing Brief (June 7, 2012) ("PCI Phase 2 Closing Brief"); Project Concord, Inc. Phase 2 Proposed Findings (June 7, 2012) ("PCI Phase 2 Proposed Findings"); Phase 2 Post-Hearing Brief of NBCUniversal Media, LLC (June 7, 2012) ("NBCU Phase 2 Post-Hearing Brief").

⁵² See Phase 2 Award of Arbitrator (June 15, 2012) ("Award").

⁵³ See *id.* at 3; see also *supra* n.46.

⁵⁴ See Award at 3.

⁵⁵ "Electronic sell through" is defined as the "delivery and/or exhibition of a motion picture, television show or other entertainment product, solely on a non-Ad Supported basis, where the timing and/or selection of same is not pre-determined, but rather is at the consumer's discretion, and for which, and the right to permanently retain or have access to same [sic], the consumer is charged a transactional fee." Beverly Hills Bar Association, 2010 Institute on Entertainment Law and Business CLE Materials, NBCU Ex. 11.

⁵⁶ [REDACTED]
] ("Final Agreement").

REDACTED VERSION – RELEASED DECEMBER 5, 2012

NBCU was required to begin performing under the agreement immediately.⁵⁷

13. On July 31, 2012, NBCU filed a Petition seeking *de novo* review of the arbitration award.⁵⁸ NBCU raises two legal issues⁵⁹ in its Petition: (1) whether the Arbitrator erred in ruling that films less than one year from theatrical release are included in the definition of Video Programming that NBCU must make available to PCI pursuant to the Benchmark Condition; and (2) whether the Arbitrator erred in concluding that NBCU failed to satisfy its burden of proof with respect to its contractual impediment defense.⁶⁰ PCI also filed a Partial Appeal of the arbitration award on July 31, 2012.⁶¹ PCI appeals the Arbitrator's denial of its cost-shifting request, which included attorneys' fees, expert witness fees and expenses, and consultant fees.⁶²

III. DISCUSSION

14. As discussed below, we conclude that films less than one year from theatrical release are not excluded from the definition of "Video Programming" set forth in the *Comcast-NBCU Order* conditions and therefore are not excluded from the scope of the Benchmark Condition. In addition, we clarify 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 presented regarding the interpretation of that language, that NBCU's provision of programming to the OVD "would constitute a breach of a contract" to which Comcast or NBCU is a party, provided that the agreement allegedly breached is "consistent with reasonable, common industry practice."⁶³ Under this standard, NBCU is not required to

⁵⁷ The Final Agreement was executed on [REDACTED]. *See id.* at ¶ 1; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4367, App. A, § VII.B.11 ("Following the decision of the arbitrator, the parties shall be bound by the final offer chosen by the arbitrator, regardless of the pendency of any appeal unless the appeal nullifies or modifies the award.").

⁵⁸ *See* NBCU Petition.

⁵⁹ NBCU's Petition also seeks clarification of whether the contract defenses authorized under the Benchmark Condition should be decided during Phase 1 or Phase 2 of an arbitration, asserting that this issue is likely to arise in future arbitrations. *See id.* at 9; *see also supra* n.40. We note that clarification of this issue will not affect the resolution of the instant proceeding. Moreover, because this issue may affect the rights of other entities that are not parties to this proceeding, we think that it would be appropriate to afford interested parties the opportunity to comment on the issue. Accordingly, we decline to address this issue herein. To the extent that NBCU wishes to pursue this issue, it should file a request for clarification and/or modification of the *Comcast/NBCU Order*. *See Comcast/NBCU Order*, 26 FCC Rcd at 4381, App. A, § XX n.11.

⁶⁰ *See* NBCU Petition at 9.

⁶¹ *See* PCI Partial Appeal.

⁶² *See id.* at 2. During the arbitration, PCI submitted two declarations in support of its cost-shifting request. *See* Project Concord, Inc. Declaration in Support of Request for Cost-Shifting (May 24, 2012) ("PCI First Cost-Shifting Declaration"); Project Concord, Inc. Second Declaration in Support of Request for Cost-Shifting (June 7, 2012) ("PCI Second Cost-Shifting Declaration").

⁶³ *See Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.3. Section VII.C.3 of the *Comcast/NBCU Order* conditions states: "provided that any provision prohibited under Section IV.B shall not be a defense." *Id.* Section IV.B.1. of the conditions provides: "No C-NBCU Programmer shall enter into any agreement or arrangement, or enforce any agreement or arrangement entered into after December 3, 2009, which forbids, limits, or creates economic incentives to limit the distribution of such Video Programming through OVDs; provided that nothing in this Section IV.B.1 prohibits a C-NBCU Programmer from entering into or enforcing agreements or arrangements consistent with reasonable, common industry practice. Evidence relevant to what constitutes reasonable, common industry practice may include (among other things) the contracting practices of a C-NBCU

REDACTED VERSION – RELEASED DECEMBER 5, 2012

establish that a licensee has or would in fact assert a breach of contract claim, and the existence of post-breach remedies included in either of the parties' final offers does not obviate the need to assess whether NBCU has met its burden with respect to its contractual defense.

15. With respect to NBCU's contractual impediment defense, we conclude, based on our *de novo* review of the record, that various licensing agreements put forth by NBCU restrict NBCU's concurrent exploitation of the programming covered by those agreements to certain types of business models that meet one or both of the following requirements: (1) [REDACTED]

] and (2) [REDACTED]

] We find that PCI's service is [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding, only to the extent that consumers use [REDACTED]

] We conclude that NBCU has demonstrated by a preponderance of the evidence that licensing certain films and TV programs to PCI would constitute a breach of these various licensing agreements, including its licensing agreements with [REDACTED], which are "consistent with reasonable, common industry practice" that contractually restricts distribution in stages and existed prior to the Comcast-NBCU transaction. We note, however, that if PCI agrees to [REDACTED]

], NBCU could provide the affected content to PCI without breaching its contractual obligations to other licensees. Thus, nothing in our decision today relieves NBCU of its obligation to make content available to PCI under the terms of the Final Agreement to the extent PCI [REDACTED]

].

16. Addressing PCI's Partial Appeal, we conclude 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. This proceeding raised complex issues and we find no evidence in the record that NBCU acted in bad faith or engaged in dilatory or improper tactics.

A. NBCU's Petition for *De Novo* Review

1. Films Less than One Year from Theatrical Release

17. As noted above, the Benchmark Condition requires C-NBCU programmers to provide a Qualified OVD with Online Video Programming that is comparable to the Online Video Programming the OVD has received from a qualifying peer programmer.⁶⁴ "Online Video Programming" means "Video Programming" that any C-NBCU programmer has the rights to enable others to display over the Internet or other IP-based transmission path.⁶⁵ "Video Programming" is defined as:

Programmer prior to December 3, 2009 and/or the contracting practices of peer companies." *Id.* at 4361, App. A, § IV.B.1.

⁶⁴ *See id.* at 4359-60, App. A, § IV.A.2.b(i).

⁶⁵ *Id.* at 4357, App. A, § I.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); 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”)); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and *Films for which a year or more has elapsed since their theatrical release*.⁶⁶

In addition, “Film” is defined as “a feature-length motion picture that has been theatrically released.”⁶⁷

18. During Phase 1 of the arbitration, NBCU argued that the definition of Video Programming must be read as excluding all Films for which less than one year has elapsed since their theatrical release (“first-year films”).⁶⁸ The Arbitrator rejected this interpretation, finding that there is no specific exclusion of first-year films and that if the Commission had intended to exclude such films, it would have so stated.⁶⁹ Additionally, the Arbitrator noted that “Films” are explicitly referred to as a category of “Video Programming” in the definition of “Comparable Programming.”⁷⁰ The Arbitrator concluded that, while first-year films are not mentioned specifically in the definition of “Video Programming,” the definition logically must be read as including first-year films both because of the expansive “includes but is not limited to” language in the definition and because first-year films are “programming offered to viewers on [a VOD, PPV or TVOD basis].”⁷¹ The Arbitrator also found that any other conclusion would appear to frustrate the intent of the Benchmark Condition.⁷²

19. We reject NBCU’s argument that the definition of “Video Programming” clearly excludes first-year films from the scope of the Benchmark Condition.⁷³ According to NBCU, this language was “specifically negotiated” during the governmental review of the Comcast-NBCU transaction and reflects a deliberate policy choice by the Commission and the Department of Justice (“DOJ”), in the parallel Benchmark Condition adopted in DOJ’s Final Judgment,⁷⁴ to leave films during

⁶⁶ *Id.* at 4358, App. A, § I (emphasis added).

⁶⁷ *Id.* at 4357, App. A, § I.

⁶⁸ *See* Award at 5; *see also* NBCU Phase 1 Opening Brief at 11.

⁶⁹ *See* Award at 5.

⁷⁰ *See id.* “Comparable Programming” is defined as “Video Programming that is reasonably similar in kind and amount. . . . The following categories of Video Programming are not Comparable Programming . . . : (vii) Films are not comparable to non-Film programming.” *Comcast/NBCU Order*, 26 FCC Rcd at 4356, App. A § I (emphasis in original).

⁷¹ Award at 5; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4358, App. A, § I (defining “Video Programming”).

⁷² *See* Award at 5.

⁷³ *See* NBCU Petition at 11; NBCU Phase 1 Opening Brief at 11.

⁷⁴ *See* U.S. v. Comcast Corp., No. 1:11-cv-00106, 2011 WL 5402137 (D.D.C. 2011) (“DOJ Final Judgment”) at 11, § IV.B. NBCU also contends that DOJ’s use of identical terms and language in its definitions of “Video Programming” and “Film” confirms that neither agency intended to compel NBCU to license first-year films based on the practices of a peer studio. *See* NBCU Petition at 12-13; *see also* DOJ Final Judgment at 4, § II.L (defining “Film”) and 8, § II.EE (defining “Video Programming”); NBCU Phase 1 Opening Brief at 11.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

the valuable first-year licensing “window” to existing industry practices.⁷⁵ NBCU asserts that the two agencies were aware that NBCU has longstanding and highly valuable [REDACTED]

[REDACTED].⁷⁶ Because of its contractual relationship with [REDACTED], NBCU states that it is not similarly situated to the peer studios identified in the Benchmark Condition, some of which [REDACTED]

[REDACTED].⁷⁷ According to NBCU, the two agencies recognized that requiring NBCU to match the licensing practices of a peer studio with respect to newly released films could place NBCU at odds with its obligations to [REDACTED].⁷⁸ NBCU asserts that the agencies therefore chose to exclude first-year films from the scope of the Benchmark Condition and expressly codified this exclusion in the *Comcast/NBCU Order* and the DOJ Final Judgment.⁷⁹

20. We find nothing in the *Comcast/NBCU Order* or the record of the proceeding to support NBCU’s assertion that the exclusion of first-year films from the definition of “Video Programming” was specifically negotiated during the Commission’s review of the Comcast-NBCU transaction.⁸⁰ Nor is it clear from the record why the Commission would have adopted such a broad exclusion. NBCU’s licensing agreements with [REDACTED]

⁷⁵ See NBCU Petition at 2; NBCU Reply at 4-5; NBCU Phase 1 Post-Hearing Brief at 3-7. Film studios use a distribution method known as “windowing” in licensing content for exhibition in order to recoup the film’s production expenses and optimize their revenues. A film’s lifecycle typically goes as follows: The film begins its “first run” in major theaters, where moviegoers pay premium ticket prices. The film may also have a “second run” in a smaller number of theaters for the same or reduced ticket prices. The film is then licensed for non-theatrical distribution, such as hotel or airline PPV exhibition. Next, the film is licensed for home video, where consumers pay a retail price to purchase the film on DVD, Blu-ray, or EST, and residential PPV or TVOD, where consumers pay a distinct fee to rent the film. After about a year from its theatrical release (or less, depending on the terms of the relevant agreement between the studio and the pay television exhibitor), the film becomes available to premium pay television exhibitors, such as HBO and Showtime, that charge consumers monthly subscription fees. The film is eventually licensed to broadcast and cable networks for free, advertising-supported exhibition. There may also be second and third pay “windows” where the film is restricted to premium pay television exhibition. Finally, the film becomes part of a studio’s “library” and can be licensed at reduced rates. As part of the windowing process, in addition to granting a licensee rights to exhibit the film during its “window,” the studios also typically grant the licensee “holdbacks” to ensure that other licensees do not exploit the film in ways that conflict with the licensee’s rights. For example, if a film is available on a free or ad-supported basis during the PPV/TVOD/EST window, consumers may be unwilling to pay monthly subscription fees to premium pay television providers during the premium pay television window. Thus, the studios will grant “holdbacks” to the premium pay television providers prohibiting free or ad-supported exhibition during certain windows. See NBCU Phase 1 Opening Brief at 2-3; Madoff Phase 1 Expert Report at ¶¶ 6-13. Similar windowing practices apply to television programming. See Madoff Phase 1 Expert Report at ¶¶ 13-15.

⁷⁶ See NBCU Petition at 15; NBCU Reply at 4; NBCU Phase 1 Opening Brief at 13; see also NBCU Phase 1 Post-Hearing Brief at 7. An “output” agreement is an agreement in which the supplier is obligated to provide the customer with all content that meets the agreed-upon criteria and is made available to all similarly situated customers. For example, under an output agreement, if a supplier decides to provide its online non-exclusive EST/VOD customers with particular film or television titles, it must make these same film or television titles available to each online non-exclusive EST/VOD customer with whom it has the output agreement. See Madoff Phase 2 Expert Report at 9-10.

⁷⁷ See NBCU Petition at 15, NBCU Reply at 4.

⁷⁸ See NBCU Petition at 15; NBCU Reply at 4-5; see also NBCU Phase 1 Post-Hearing Brief at 7.

⁷⁹ See NBCU Petition at 15-16; NBCU Reply at 5; see also NBCU Phase 1 Post-Hearing Brief at 7.

⁸⁰ See PCI Opposition at 15-16.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

J.⁸¹ Rather, these agreements prohibit NBCU from licensing [REDACTED] J.⁸² Indeed, it is undisputed that NBCU currently licenses first-year films to numerous OVDs for distribution on a TVOD basis.⁸³ Thus, excluding all first-year films from the scope of the Benchmark Condition would give NBCU significantly greater protection than is necessary for it to meet its obligations under the [REDACTED] licensing agreements. Further, to the extent that the provision of first-year films to a particular OVD would constitute a breach of NBCU's licensing agreements with [REDACTED] or another contract to which NBCU is a party, we note that the arbitration procedures in the *Comcast/NBCU Order* explicitly authorize NBCU to raise a contractual defense.⁸⁴

21. Moreover, as PCI points out, the online video conditions were adopted to protect emerging OVDs from possible anticompetitive behavior by Comcast-NBCU, and excluding first-year films from the scope of the Benchmark Condition would hinder the development of OVD competition.⁸⁵ In this regard, PCI avers that first-year films “represent the vast majority of video programming distributed on a TVOD or pay-per-view basis” and “generate the bulk of revenue for that method of distribution of video programming.”⁸⁶ Thus, PCI states, first-year films are indisputably “must-have” programming for any TVOD service provider.⁸⁷ Given the clear importance of first-year films to emerging OVD services, as evidenced by NBCU's own licensing agreements with online EST/VOD services, we believe that it would frustrate the intent of the Benchmark Condition to interpret the definition of Video Programming as expressly excluding first-year films.⁸⁸

22. NBCU asserts that, under “cardinal principles of statutory construction,” the Commission must “give effect, if possible, to every clause and word of a statute,” so that “no clause, sentence, or word shall be superfluous, void, or insignificant,” including the “Films for which a year or more has elapsed since their theatrical release” language at the end of the Video Programming definition.⁸⁹ NBCU maintains that applying these principles here requires that “the plain words of the [*Comcast/NBCU Order*] excluding first-year films be given their proper meaning and effect.”⁹⁰ While we agree with NBCU that an interpretation of the Video Programming definition must give proper meaning and effect to all the

⁸¹ See NBCU Petition at 4; see also Casino Declaration at Ex. A.

⁸² See NBCU Petition at 4; see also Casino Declaration at Ex. A.

⁸³ NBCU acknowledges that it “already licenses [first-year] films to numerous online transactional VOD services (e.g., iTunes, Vudu, YouTube) that compete with traditional PPV/VOD services.” See NBCU Reply at 7; see also NBCU Exs. 40A-Z (NBCU's licensing agreements with VOD/EST services); Hr'g Tr. at 51:6-10; Lamprecht Test., Hr'g Tr. at 135:8-11.

⁸⁴ See *supra* n.18.

⁸⁵ See PCI Opposition at 10-13; PCI Phase 1 Opening Brief at 9-11; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4268-73, ¶¶ 78-88.

⁸⁶ PCI Opposition at 13; see also PCI Phase 1 Post-Hearing Brief at 23.

⁸⁷ See PCI Opposition at 13; see also Marenzi Test., Hr'g Tr. at 431:21-432:6; Smith Test., Hr'g Tr. at 252:1-7.

⁸⁸ See *supra* n.83; see also PCI Opposition at 16 (“It is difficult to understand why the FCC would have exempted the most important and valuable programming — programming that is critical to the ability of OVDs to compete with Comcast's traditional PPV and VOD services and programming widely available on other OVDs, *without any explanation.*”) (emphasis in original); PCI Phase 1 Post-Hearing Brief at 28.

⁸⁹ NBCU Petition at 11-12 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citations omitted)); see also NBCU Phase 1 Rebuttal Brief at 5.

⁹⁰ NBCU Petition at 12; see NBCU Phase 1 Rebuttal Brief at 5-6.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

language of the definition, we think NBCU’s reading fails to give proper meaning and effect to the “includes but is not limited to” language at the beginning of the definition.⁹¹ The definition of Video Programming “includes but is not limited to” the various listed categories of programming.⁹² The phrase “includes but is not limited to” preceding a list is commonly understood to mean that the listed items are illustrative, rather than exhaustive.⁹³ Thus, the listing of “Films for which a year or more has elapsed since their theatrical release” at the end of the definition is simply one example of the types of programming included in the definition, not an exclusion of first-year films by negative inference.

23. NBCU asserts that, since the Commission and DOJ intended “consistent” remedies,⁹⁴ the fact that DOJ did not use the “includes but is not limited to” language in its parallel definition of Video Programming reinforces NBCU’s position that “the appearance of this general language in the Commission’s definition was not intended – and cannot properly be read – to render the express carve-out of first-year films superfluous.”⁹⁵ We find the omission of the “includes but is not limited to” language from DOJ’s definition of Video Programming is immaterial to our construction of the Commission’s conditions. First, there are numerous differences in the specific language used by the Commission and that used by DOJ both in the relevant Definitions and the Benchmark Conditions themselves.⁹⁶ Despite these language differences, we believe that the remedies adopted by the Commission and DOJ are generally consistent and that any differences do not support a narrower interpretation of the Benchmark Condition. Second, in any event, we question NBCU’s interpretation of DOJ’s definition of Video Programming, as the DOJ Competitive Impact Statement explains that the Benchmark Condition was intended to apply to all Comcast-NBCU programming: “Under the second option, set forth in Section IV.B, the proposed Final Judgment requires the JV to license to an OVD, broadcast, cable, or film content comparable in scope and quality.... The requirement applies to all JV content, even non-NBCU content, in order to ensure that the JV cannot undermine the purposes of the proposed Final Judgment by shifting content from one network to another.”⁹⁷

24. NBCU argues that, if the Commission intended to subject all films to compulsory licensing under the Benchmark Condition, the definition of Video Programming would have simply said

⁹¹ See PCI Opposition at 18; see also PCI Phase 1 Opening Brief at 8.

⁹² See *supra* ¶ 17.

⁹³ See e.g., Black’s Law Dictionary 777–78 (8th ed.2004) (“including but not limited to” “typically indicates a partial list”) (emphasis added); see also *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) (“[T]he term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 975 (9th Cir 2003) (concluding that Congress’s decision to use the words “including but not limited to” in the statute granting the Fisheries Service the authority to issue fishing permits “contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection”); *U.S. v. Garrett*, 720 F.2d 705, 709 (D.C. Cir. 1983) (finding that a list of “other proceedings” following the phrase “including but not limited to” in a time computation statute “is merely illustrative and not intended to be exhaustive”).

⁹⁴ See *U.S. v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C., Jan. 18, 2011) (“DOJ Competitive Impact Statement”) at 7 (“The Department also consulted extensively with the FCC to ensure that the agencies conducted their reviews in a coordinated and complementary fashion and created remedies that were both comprehensive and consistent.”).

⁹⁵ NBCU Petition at 15; see NBCU Phase 1 Opening Brief at 12; see also DOJ Final Judgment at § II.EE (defining “Video Programming”).

⁹⁶ Cf. *Comcast/NBCU Order*, 26 FCC Rcd at 4355-58, App. A, § I and 4359-60, App. A, § IV.A with DOJ Final Judgment at § II and IV.

⁹⁷ DOJ Competitive Impact Statement at 31.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

“Films,” not “Films for which a year or more has elapsed since their theatrical release.”⁹⁸ We reject this claim. The definition of Video Programming expressly includes all programming offered on a VOD, PPV, or TVOD basis, which is the basis upon which many films, including first-year films, are offered.⁹⁹ Thus, we think the better interpretation is that the Commission intended to include all Films within the definition of Video Programming and therefore within the scope of the Benchmark Condition. In addition, when read in the context of the entire condition, we think a more reasonable interpretation is that the separate inclusion of “Films for which a year or more has elapsed since their theatrical release” at the end of the definition of Video Programming is to ensure that the definition includes older theatrical films that NBCU may have previously held back from VOD, PPV, or TVOD exhibition or that otherwise have not previously been offered on a VOD, PPV, or TVOD basis.¹⁰⁰ Moreover, to the extent the Commission intended to exclude critical content such as first-year films from the definition of Video Programming, and thus from the scope of the Benchmark Condition, we believe it would have done so expressly.¹⁰¹ Accordingly, we conclude that first-year films are included within the definition of Video Programming and therefore are included within the scope of the Benchmark Condition.

2. NBCU’s Contractual Impediment Defense

25. Under the *Comcast/NBCU Order*, NBCU may raise as a defense to a claim under the Benchmark Condition that providing the Online Video Programming to the particular Qualified OVD “would constitute a breach of a contract” to which it is a party, provided that the exclusivity and windowing provisions in such contracts are “consistent with reasonable, common industry practice.”¹⁰² NBCU must demonstrate by a preponderance of the evidence that the provision of Online Video Programming to the particular Qualified OVD would constitute a breach of a contract.¹⁰³ In the arbitration proceeding, NBCU argued that licensing certain films and TV programs to PCI would constitute a breach of numerous licensing agreements to which it is a party, including licensing agreements with [REDACTED].¹⁰⁴ NBCU asserted that its licensing agreements prohibit it from licensing [REDACTED] exhibition of certain films and TV programs and require that [REDACTED] for access to such content during the windows covered by

⁹⁸ See NBCU Petition at 14; NBCU Reply at 9; NBCU Phase 1 Opening Brief at 12.

⁹⁹ See PCI Opposition at 18; PCI Phase 1 Post-Hearing Brief at 23; see also *supra* ¶ 21.

¹⁰⁰ For example, PCI points out that many older films were not originally shot in digital format, but are increasingly being converted to digital format, which allows them to be viewed online. See PCI Opposition at 20; PCI Phase 1 Post-Hearing Brief at 25-26.

¹⁰¹ See *supra* ¶ 21.

¹⁰² *Comcast/NBCU Order*, 26 FCC Rcd at 4361, App. A, § IV.B.1; see also *supra* n.63 and *infra* Appendix A (quoting § IV.B.1). There was no dispute between the parties as to whether the representative contracts provided by NBCU, including the exclusivity and windowing provisions contained therein, are “consistent with reasonable, common industry practice,” and neither side sought review of this issue. See NBCU Petition at 17. The *Comcast/NBCU Order* conditions provide that evidence relevant to what constitutes “reasonable, common industry practice may include (among other things) the contracting practices of a C-NBCU Programmer prior to December 3, 2009 and/or the contracting practices of peer companies.” *Comcast/NBCU Order*, 26 FCC Rcd at 4361, App. A, § IV.B.1. In this regard, almost all of the contracts were entered into prior to the announcement of the Comcast-NBCU transaction in December 2009. See NBCU Petition at 17 n.51.

¹⁰³ See *Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.3.

¹⁰⁴ See NBCU Petition at 17; see also NBCU Phase 1 Opening Brief at 13-19. NBCU states that the reasonableness of the 21 representative licensing agreements it presented during the arbitration, 17 of which were executed prior to December 3, 2009, was not contested. See NBCU Petition at 17 & n.51.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

these agreements.¹⁰⁵ According to NBCU, providing certain films and TV programs to PCI would violate these licensing agreements because PCI’s planned online distribution service is [REDACTED].¹⁰⁶ PCI argued that its service is not [REDACTED] because its [REDACTED]

].¹⁰⁷

26. The Arbitrator concluded that NBCU failed to meet its burden of proof on its contractual impediment defense as to each of the licensing agreements.¹⁰⁸ Although the Arbitrator found that “[t]he [REDACTED],”¹⁰⁹ he determined that this finding does not by itself substantiate the defense as to any of NBCU’s licensing agreements and that further factual proof is required.¹¹⁰ The Arbitrator noted that “none of NBCU’s counterparties in the agreements has asserted or hinted at the assertion of a claim of breach or appear in any way to be informed as to the scope of content PCI is seeking from NBCU” and thus found it speculative whether any of the third-party licensees will assert a claim of breach of contract.¹¹¹ The Arbitrator found NBCU’s speculation about whether [REDACTED] or any of the other licensees will assert a claim of breach of contract to be “glaringly inconsistent with the preponderance of the evidence burden which NBCU must carry.”¹¹² The Arbitrator also noted that the selected final offer provides NBCU some protections in the event that a third-party licensee raises a claim of breach — specifically, [REDACTED] provisions — as well as an [REDACTED] provision.¹¹³ Finally, while the Arbitrator made some “observations” as to whether he believed that the licensing agreements at issue would likely be breached by NBCU’s provision of certain film and television content to PCI, he did not reach any conclusions on this issue.¹¹⁴

¹⁰⁵ See NBCU Petition at 17; see also NBCU Phase 1 Opening Brief at 13-19.

¹⁰⁶ See NBCU Phase 1 Opening Brief at 13.

¹⁰⁷ See PCI Phase 1 Rebuttal Brief at 11; DeVitre Phase 1 Expert Report at 7-8; Peyer Phase 1 Declaration at 1-3.

¹⁰⁸ See Award at 10.

¹⁰⁹ Phase 1 Decision at 10; Award at 10.

¹¹⁰ See Award at 10.

¹¹¹ *Id.*

¹¹² *Id.* at 9.

¹¹³ See *id.*; see also *supra* n.46. [REDACTED]

Agreement at [REDACTED]

]. See Final

]. See *id.* at [REDACTED].

¹¹⁴ See Award at 9-10. The Arbitrator’s failure to reach any conclusions was based, at least in part, on the speculation of the parties as to whether any of NBCU’s licensees [REDACTED]]. With

REDACTED VERSION – RELEASED DECEMBER 5, 2012**a. Standard of Proof**

27. NBCU argues that the Arbitrator applied an erroneous “breach first/fix later” standard in requiring NBCU to license restricted programming to PCI first and then wait to see if another NBCU licensee asserts a breach of contract claim.¹¹⁵ Rather, NBCU asserts, “[t]he language of the relevant license agreements controls, and an arbitrator’s obligation is to assess the language in light of the evidence presented and make a determination whether providing the restricted programming ‘would constitute a breach of contract.’”¹¹⁶ PCI argues that the Arbitrator correctly found that NBCU did not meet its burden of demonstrating by a preponderance of the evidence that providing its programming to PCI would constitute a breach of any contract.¹¹⁷

28. We conclude that the Arbitrator applied an incorrect standard of proof. 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 presented regarding the interpretation of that language, that NBCU’s provision of programming to the OVD “would constitute a breach of a contract” to which Comcast or NBCU is a party, provided that the agreement allegedly breached is “consistent with reasonable, common industry practice.”¹¹⁸ In other words, evaluation of a contractual defense should consist of an assessment of the relevant licensing agreement language, its proper interpretation, its reasonableness, and evidence of its use throughout the industry. While evidence concerning past actions taken by NBCU or a licensee to enforce a contract may be relevant to the interpretation of the contract,¹¹⁹ NBCU is not required to establish that a licensee has asserted or would in fact assert a breach of contract claim. In addition, the existence of post-breach remedies¹²⁰ included in either of the parties’ final offers does not obviate the need to assess whether NBCU has met its burden with respect to its contractual defense.

29. As NBCU correctly notes, the contractual defense is intended in large part to protect the legitimate contractual rights of other programming licensees.¹²¹ In the context of an arbitration proceeding on a claim under the Benchmark Condition, it is unlikely that a third-party licensee will even be aware that its contractual rights under a licensing agreement are in dispute, much less be in a position to assert those rights.¹²² Other NBCU licensees are not parties to or participants in the arbitration, and

respect to the [REDACTED] agreements, he indicated that the language of the agreements “should not be construed without the benefit of hearing, rather than speculating, [REDACTED]

].” *Id.* at 10. Similarly, with respect to other network licensing agreements, he noted that “it is premature and speculative [REDACTED]”. *Id.*

¹¹⁵ See NBCU Petition at 18.

¹¹⁶ *Id.*; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.3.

¹¹⁷ See PCI Opposition at 26-31.

¹¹⁸ See *Comcast/NBCU Order*, 26 FCC Rcd at 4361, 4368, App. A, §§ IV.B.1, VII.C.3.

¹¹⁹ For example, evidence that NBCU has previously [REDACTED]

J.

¹²⁰ See *supra* n.113 and accompanying text (discussing post-breach remedies).

¹²¹ See NBCU Petition at 23.

¹²² See *id.* at 22; see also Award at 9 (noting that none of NBCU’s counterparties in its licensing agreements “appear in any way to be informed as to the scope of content PCI is seeking from NBCU in this arbitration”).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

much of the information in an arbitration proceeding may be subject to a protective order, as was the case in this proceeding.¹²³ Thus, as a practical matter, it may be virtually impossible for NBCU to establish that a third-party licensee has or would in fact assert a claim under a licensing agreement.

30. Furthermore, we agree with NBCU that it would be inappropriate to require NBCU to breach a contract not otherwise prohibited by Section IV.B.1 with a third-party licensee and then avail itself of any post-breach remedies if the third-party licensee objects.¹²⁴ The Benchmark Condition allows NBCU to assert a contractual defense during an arbitration proceeding prior to licensing content to an OVD, thus demonstrating that the contractual defense is intended to prevent a breach *before* it occurs.¹²⁵ It would undermine this purpose, as well as the rights and interests of the third-party licensees, to require NBCU to wait until a third-party licensee discovers that its rights have been violated and objects and then apply any remedies after the fact. In this regard, a third-party licensee may not be satisfied with the post-breach remedies and may sue NBCU for damages (and NBCU may in turn look to the OVD for indemnification).¹²⁶ Or, even if the licensee does not sue NBCU for the breach, the dispute may adversely affect NBCU’s future business dealings with the licensee.¹²⁷ Accordingly, we do not think that the inclusion of any post-breach remedies in a final offer should be taken into account in determining whether NBCU has met its burden of demonstrating that the provision of programming to a particular OVD “would constitute a breach of a contract.”

b. PCI’s Online Service

31. As noted above, PCI’s planned online service consists of [REDACTED]

] .¹²⁸ PCI states that its online service will be targeted to

[REDACTED

] .¹²⁹ PCI states that
130

[REDACTED

131

¹²³ See *Comcast/NBCU Order*, 26 FCC Rcd at 4370, App. A, § VIII.4 (“Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party pursuant to a Protective Order”).

¹²⁴ See NBCU Petition at 22-23; see also NBCU Phase 1 Post-Hearing Brief at 26; *supra* n.113 and accompanying text (discussing post-breach remedies).

¹²⁵ See *Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.3.

¹²⁶ See NBCU Petition at 24; see also NBCU Phase 1 Post-Hearing Brief at 26.

¹²⁷ See NBCU Petition at 24.

¹²⁸ See PCI Opposition at 3; Peyer Phase 1 Declaration at ¶ 2, 16.

¹²⁹ See [REDACTED], NBCU Ex. 7, at PCI 000059-000060 [REDACTED]; see also Peyer Test., Hr’g Tr. at 400:7-10 [REDACTED]

].

¹³⁰ See PCI Opposition at 3, 38; [REDACTED] at 1.

¹³¹ See [REDACTED] at PCI 000037-000040; [REDACTED] at 5-6.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

132

133

134

135

136

137

].¹³⁸

32. In the online **[REDACTED]**

139

140

141

142

143

144

145

¹³² See **[REDACTED]**] at 5-6.

¹³³ See *id.*

¹³⁴ See **[REDACTED]**], NBCU Ex. 9, at PCI 000134 **[REDACTED]**; *see also* Peyer Phase 1 Declaration at ¶ 23.

¹³⁵ See **[REDACTED]**] at 7.

¹³⁶ See *id.* at 7-8.

¹³⁷ See *id.* at 7-9.

¹³⁸ See *id.* at 9

¹³⁹ See *id.* at 2.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 3.

¹⁴² See *id.*

¹⁴³ See *id.* at 9.

¹⁴⁴ See *id.* at 2.

¹⁴⁵ See *id.*

REDACTED VERSION – RELEASED DECEMBER 5, 2012

].¹⁴⁶

33. This proceeding presents difficult questions regarding whether PCI's OVD service is [REDACTED] or [REDACTED] questions that are further complicated by the fact that PCI [REDACTED] its service. We acknowledge that [REDACTED] business model is unique and differs in a number of respects from [REDACTED] video distribution services. Nevertheless, as explained below, for purposes of evaluating NBCU's contract defense, we conclude that PCI's online service is [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding, only to the extent that consumers are using [REDACTED].

34. We agree with NBCU that PCI's business model [REDACTED]¹⁴⁷

].¹⁴⁸ Based on the record, we are not persuaded by PCI's claims that [REDACTED].¹⁴⁹ PCI concedes that [REDACTED]

¹⁵⁰

].¹⁵¹ In addition, as NBCU points out, consumers can [REDACTED].¹⁵² Thus, we find that PCI's [REDACTED].

¹⁴⁶ See Smith Test., Hr'g Tr. 250:9-16; see also [REDACTED] at PCI 000134 (stating that [REDACTED]

]). At the Phase 1 hearing,

Lawrence Smith, PCI's Vice President of Content, suggested that [REDACTED] Smith Test., Hr'g Tr. at 345:14-346:5.

¹⁴⁷ NBCU Petition at 26.

¹⁴⁸ [REDACTED] at PCI 000032-37.

¹⁴⁹ See PCI Opposition at 38; see also Peyer Phase 1 Declaration at ¶¶ 2, 16.

¹⁵⁰ See Marenzi Test., Hr'g Tr. at 452:12-17 (agreeing that [REDACTED]

]).

¹⁵¹ See *supra* ¶¶ 31-32. NBCU notes that consumers [REDACTED]. See NBCU Petition at 27 (citing Peyer Test., Hr'g Tr. at 377:21-378:9). PCI indicated that it would [REDACTED]

]. See Smith Test., Hr'g Tr. at 335:8-14; Peyer Test., Hr'g Tr. at 384:14-20, 386:13-20, 388:2-8, 392:6-20; Marenzi Test., Hr'g Tr. at 456:17-21. PCI acknowledged, however, that [REDACTED]. See Peyer Test., Hr'g Tr. at 386:13-20, 388:2-8.

¹⁵² See NBCU Petition at 26; NBCU Reply at 15; NBCU Phase 1 Post-Hearing Brief at 10. NBCU notes that PCI's Phase 1 and Phase 2 Final Offers [REDACTED]. See NBCU Petition at 26; see also PCI [REDACTED], NBCU Ex. 4, at [REDACTED]; PCI's Phase 2 Final Offer – [REDACTED], NBCU Ex.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

35. PCI also argues that an [REDACTED] ¹⁵³ PCI avers that [REDACTED] ¹⁵⁴ Rather, ¹⁵⁵ PCI states, [REDACTED] We disagree. Under PCI’s business model, [REDACTED]

¹⁵⁶
¹⁵⁷

¹⁵⁸

¹⁵⁹

¹⁶⁰

business model differs from traditional [REDACTED] ¹⁶¹ Thus, while PCI’s [REDACTED] in that the [REDACTED]

¹⁶²

65, at [REDACTED]. At hearing, Sharon Peyer, PCI’s Co-Founder and Vice President of Business Development, explained that there [REDACTED]

[REDACTED]. See Peyer Test., Hr’g Tr. at 395:5-17 (“When [consumers]

[REDACTED]

]).

¹⁵³ See PCI Opposition at 37; see also Marenzi Test., Hr’g Tr. at 442:16-443:3.

¹⁵⁴ PCI Opposition at 37; see also Peyer Test., Hr’g Tr. at 417:6-14.

¹⁵⁵ PCI Opposition at 39-40; see also Peyer Test., Hr’g Tr. at 377:3-20.

¹⁵⁶ PCI asserts that no consumer [REDACTED]

[REDACTED]. See PCI Opposition at 39-40; see also Peyer Phase 1 Declaration at ¶¶ 5, 23. To the extent that consumers elect to [REDACTED], NBCU concedes, and we agree, that such transactions are not [REDACTED]. See NBCU Reply at 18. It is clear from the record, however, that PCI intends to [REDACTED]

[REDACTED]. See [REDACTED]

[REDACTED] at PCI 000034; [REDACTED], NBCU Ex. 10, at PCI 000128 [REDACTED]; see also Madoff Phase 1 Expert Report at ¶ 34 (noting that PCI’s website, <http://www.projectconcord.com>, states that PCI provides premium content “without having to open your wallet”).

¹⁵⁷ See generally [REDACTED] at PCI 0000109-130.

¹⁵⁸ See supra ¶¶ 31-32.

¹⁵⁹ See supra ¶ 31.

¹⁶⁰ See supra ¶ 32.

¹⁶¹ See id.

¹⁶² PCI argues that [REDACTED] [REDACTED]. See PCI Opposition at 39; see also Smith Test., Hr’g Tr. at 314:7-9 [REDACTED]

[REDACTED]. We find, however, that it is relevant where, as here, the primary method by which the OVD service is monetized is through [REDACTED]

[REDACTED]. See NBCU Reply at 23 (NBCU licensees impose “[REDACTED] precisely because they care whether a

REDACTED VERSION – RELEASED DECEMBER 5, 2012

36. Additionally, PCI maintains that the Benchmark Agreement with [REDACTED] confirms that its Economic Model¹⁶³ is transactional, distributing programming on a PPV/VOD or EST basis, rather than [REDACTED].¹⁶⁴ PCI further asserts that “the [REDACTED]”¹⁶⁵ While we acknowledge that the Benchmark Agreement grants PCI a non-exclusive license to distribute programming on a PPV/VOD or EST basis, the Agreement does not clearly prohibit all [REDACTED] exhibition of [REDACTED] programming.¹⁶⁶ Rather, the provisions of the Benchmark Agreement cited by PCI simply indicate that the EST and VOD titles as delivered to PCI by [REDACTED]”¹⁶⁷ These provisions do not explicitly address [REDACTED]”¹⁶⁸ Moreover, we note that [REDACTED] was not a party to or a participant in the arbitration proceeding, and the record does not reflect [REDACTED] interpretation of these provisions or its views on PCI’s service. In any event, as NBCU points out, other NBCU licensees may have a different view of PCI’s business model than [REDACTED].¹⁶⁹

37. We recognize that PCI’s service differs in a number of other respects from a traditional [REDACTED]”. In this regard, PCI asserts that [REDACTED]

,170
,171
,172
,173

[REDACTED]” We do not believe, however, that these differences alter the fundamental [REDACTED] nature of PCI’s service. In both a traditional

consumer [REDACTED]”) (emphasis in original).

¹⁶³ “Economic Model” is defined in the *Comcast/NBCU Order* as “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.” *Comcast/NBCU Order*, 26 FCC Rcd at 4357, App. A, § I.

¹⁶⁴ See PCI Opposition at 33 (citing DeVitre Phase 1 Expert Report at ¶ 14; DeVitre Test., Hr’g Tr. at 481:14-482:18). PCI states that the Benchmark Agreement granted to PCI is a non-exclusive license to distribute current and library motion pictures on an Internet TVOD basis and current season and library season television programs on an EST basis. See PCI Opposition at 33 (citing Letter from [REDACTED] to Project Concord, Inc., [REDACTED], PCI Ex. 110, at PCI 000084 [REDACTED]).

¹⁶⁵ See PCI Opposition at 34-35 (citing Benchmark Agreement at [REDACTED]) (emphasis in original).

¹⁶⁶ See NBCU Reply at 29.

¹⁶⁷ Benchmark Agreement at [REDACTED]

].

¹⁶⁸ See *id.* By contrast, we note that NBCU’s agreements with [REDACTED]”. See *infra* ¶ 44.

¹⁶⁹ See NBCU Reply at 28.

¹⁷⁰ PCI Opposition at 38; see also Marenzi Phase 1 Expert Report at ¶ 13.

¹⁷¹ See PCI Opposition at 39; see also Peyer Phase 1 Declaration at ¶¶ 17, 20.

¹⁷² See PCI Opposition at 39; see also Peyer Phase 1 Declaration at ¶¶ 21-22.

¹⁷³ See PCI Opposition at 41; see also Peyer Phase 1 Declaration at ¶ 4.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED] model and PCI’s model, the [REDACTED]]
for viewing the licensed programming content.¹⁷⁴

38. PCI maintains that a consumer is [REDACTED]
].¹⁷⁵ While it is true that the price
listed in [REDACTED]
]. From a consumer’s
perspective, there is a substantial difference between [REDACTED]
].¹⁷⁶ Further, a consumer is
[REDACTED]
]. Thus, we do not believe that a consumer will view
[REDACTED]
].¹⁷⁷ Indeed, the main selling point of PCI’s service is that
the consumer can view movies and television programs “*without having to open [his] wallet.*”¹⁷⁸

39. We are also unpersuaded by PCI’s argument that [REDACTED]
].¹⁷⁹ According to PCI, the
[REDACTED]
].¹⁸⁰ Unlike the [REDACTED]], however,
[REDACTED] are purchased by the consumer using a credit card or real cash.¹⁸¹ Further, while
[REDACTED]

¹⁷⁴ See NBCU Reply at 16; *see also* [REDACTED]] at PCI000047-50.

¹⁷⁵ See PCI Opposition at 38; *see also* Smith Test., Hr’g Tr. at 336:8-11.

¹⁷⁶ See *supra* ¶ 32.

¹⁷⁷ Nor do we think it likely that a consumer will [REDACTED]]. PCI’s
[REDACTED]

] at PCI 0000132. Additionally, as noted above, consumers are [REDACTED]
]. See *supra* ¶ 31. Finally, at hearing, Sharon Peyer, PCI
Co-Founder and Vice President of Business Development, was [REDACTED]
]. See Peyer Test., Hr’g Tr. at 391:7-16.

¹⁷⁸ See Madoff Phase 1 Expert Report at ¶ 34 (noting that PCI’s website, <http://www.projectconcord.com>, states that PCI provides premium content ““without having to open your wallet””).

¹⁷⁹ See PCI Opposition at 40; *see also* Smith Test., Hr’g Tr. at 250:1-22, 280:4-289:7; Peyer Test., Hr’g Tr. at 361:1-12, 389:9-19.

¹⁸⁰ PCI Opposition at 40-41; *see also* Smith Phase 1 Declaration at 16-19, 20-22, 25-27.

¹⁸¹ Microsoft instituted the points system as a way to get around the five dollar minimum for credit card purchases in the U.S. See NBCU Opening Statement at 23 (citing Xbox Discussion of Microsoft Points, available at <http://www.xbox.com/en-US/live/microsoftpoints> (last visited Apr. 14, 2012)). PCI correctly notes that [REDACTED]]. See PCI Opposition at 41; *see also* Smith Test., Hr’g Tr. at 287:4-289:2. As noted above, however, [REDACTED] are purchased using a credit card or real cash, not [REDACTED]].

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED],¹⁸² these types of [REDACTED] are not based on the [REDACTED] and are a limited exception to the rule requiring users to pay a distinct fee for content.¹⁸³

40. Finally, NBCU argues that PCI’s pending patent application further confirms that its [REDACTED], asserting that relevant provisions in the patent application make clear that ““electronic credit earned from consuming ads can be used as *advertiser-supported payment* for any desired video or any other information content currently being consumed or to be consumed at some later time, in the information content consuming mode of the consumer’s computer.”¹⁸⁴ NBCU also notes that the patent application distinguishes between “advertiser-supported” payment and “consumer-supported” payment.¹⁸⁵ In response, PCI claims that NBCU mischaracterizes the patent application, asserting that the patent application sought to protect the widest possible application of PCI’s unique technological capabilities and does not provide evidence of how PCI has actually deployed its capabilities in connection with the design and launch of its [REDACTED].¹⁸⁶ While not dispositive, we think that the patent application does provide another indication that PCI’s [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding, only to the extent that consumers are using [REDACTED].¹⁸⁷

¹⁸² See PCI Opposition at 41 n.155; NBCU Petition at 17-18; see also Smith Phase 1 Declaration at 16-19, 20-22, 25-27.

¹⁸³ See Madoff Phase 2 Report at ¶ 18 (“[L]icensees . . . are willing to allow [REDACTED] on competing services . . . but only as a limited exception and never as the rule. These [REDACTED] serve a legitimate purpose by enticing consumers to try a service for the first time (or return to that service after an absence), with the goal of converting those consumers to [REDACTED].”).

¹⁸⁴ NBCU Petition at 27-28 (quoting U.S. Patent Application Publication No. US 2011/0153396, Method and System for Processing On-Line Transactions Involving a Content Owner, an Advertiser, and a Targeted Customer, filed December 22, 2009, NBCU Ex. 63, at 9 (“PCI Patent Application”)) (emphasis added).

¹⁸⁵ PCI Patent Application at 6 (“Such payment for desired information resulting from the consumption of ads is herein referred to as ‘advertiser-supported’ payment, and any payment for desired information content that is not advertiser-supported is herein referred to as ‘consumer-supported’ payment.”).

¹⁸⁶ See PCI Opposition at 41-42. At hearing, Sharon Peyer, PCI’s Co-Founder and Vice President of Business Development, indicated that the “advertiser-supported” language in the patent application came from the person who prepared the patent application, who was not familiar with “industry lingo.” See Peyer Test., Hr’g Tr. at 417:15-418:4. We note, however, that the inventors of the patent, including Sharon Peyer, are responsible for the representations made in the patent application. See 37 C.F.R. § 1.63.

¹⁸⁷ See e.g., PCI Patent Application at Fig. 1 (Fig. 1, which illustrates “a triangular economic transaction enabling negotiated transactions involving an information content owner, an advertiser, and a consumer, according to the present invention” clearly shows the flow of payment going from the advertiser to the information content owner.); at 4 (“For example, the information content owner can offer information content of value to the consumer . . . in return for proper payment of the offered content originating from the advertiser The advertiser may be willing to provide such payment to the information content owner in response to specific data received from the consumer . . . , indicating amounts of time and attention expended by the consumer while consuming . . . ads provided by the advertiser.”); and at 11 (“[I]n a triangular economic transaction, an information content owner may offer information content of value to a consumer in return for the proper payment of the offered content originating from the advertiser.”).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

41. Accordingly, we conclude that, only to the extent that consumers are using [REDACTED], PCI’s service is [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding.

c. NBCU Licensing Agreements

42. As discussed below, we conclude that NBCU has established by a preponderance of the evidence that licensing certain films and TV programs to PCI “would constitute a breach” of provisions of various licensing agreements provided by NBCU that are “consistent with reasonable, common industry practice.”¹⁸⁸ NBCU explains that its distributor and network licensees pay significant fees for rights to license its film and television programming and recoup their investments by charging subscription fees to consumers or selling time to advertisers.¹⁸⁹ In order to protect the value of their investments, the licensees restrict NBCU’s concurrent exploitation of the programming to certain types of business models, [REDACTED].¹⁹⁰ Additionally, the licensees require that these business models meet one or both of the following requirements during their license periods: (1) [REDACTED], and (2) [REDACTED].¹⁹¹ NBCU also has provided evidence that these requirements are reasonable and necessary to help to ensure that the licensee’s ability to monetize the programming, either through a [REDACTED], is not undermined by having the same programming available elsewhere [REDACTED] or by having to compete with another service for the [REDACTED].¹⁹² Below, we analyze NBCU’s licensing agreements to determine whether NBCU’s licensing of certain films and TV programs to PCI “would constitute a breach” of these agreements containing restrictions consistent with the Benchmark Condition. We note that the record includes numerous representative film and television license agreements provided by NBCU.¹⁹³ Rather than analyze each license agreement, we review a selection of film and television license agreements that include variations of the relevant language.

(i) Film Agreements

43. According to NBCU, its licensing agreements with [REDACTED] form the primary structure by which the majority of NBCU’s films are windowed and restricted during their lifecycle.¹⁹⁴ [REDACTED] pays NBCU substantial sums for the right to exhibit films, which sums are used to monetize NBCU’s films as they enter the pre-production and production stages.¹⁹⁵ NBCU’s

¹⁸⁸ See *supra* nn.102, 104 (noting that there was no dispute between the parties as to whether the representative contracts provided by NBCU, including the exclusivity and windowing provisions contained therein, are “consistent with reasonable, common industry practice,” and neither side sought review of this issue; 17 of the 21 representative licensing agreements were executed prior to the announcement of the Comcast-NBCU transaction in December 2009).

¹⁸⁹ See NBCU Petition at 29; see also Casino Phase 1 Declaration at ¶ 10; Lamprecht Phase 1 Declaration at ¶ 11; Roberts Phase 1 Declaration at ¶ 13.

¹⁹⁰ See NBCU Petition at 29; see also Madoff Phase 1 Expert Report at ¶¶ 15-17, 31; Wunderlich Phase 1 Expert Report at ¶¶ 25-26; Roberts Phase 1 Declaration at ¶¶ 14-19.

¹⁹¹ See NBCU Petition at 29; see also Madoff Phase 1 Expert Report at ¶¶ 16, 21-22, 31.

¹⁹² See NBCU Petition at 29-30; see also Madoff Phase 1 Expert Report at ¶¶ 20-24; Wunderlich Phase 1 Expert Report at ¶¶ 24-29.

¹⁹³ See NBCU Exs. 35-39 and 41-60.

¹⁹⁴ See Casino Phase 1 Declaration at ¶ 9.

¹⁹⁵ See *id.* at ¶ 10.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED

196

197

198

].¹⁹⁹ This

restriction ensures that films are restricted to [REDACTED

²⁰⁰

], it is common for the network licensees to impose their own restrictions on other concurrent exhibition.²⁰¹ Typically, the [REDACTED] that prevent NBCU from offering the same films to any other [REDACTED] service to ensure that they do not have to compete in [REDACTED] against the same films.²⁰² Below, we examine NBCU's film licensing agreements with [REDACTED].

(a) [REDACTED] Agreements

44. NBCU has licensing agreements with [REDACTED],²⁰³ which impose [REDACTED] on all forms of exhibition of covered films during [REDACTED] license period,²⁰⁴ with specific [REDACTED]

²⁰⁵

].²⁰⁶ Under the [REDACTED] agreements, the exhibition

¹⁹⁶ See *id.* at ¶ 10.

¹⁹⁷ See *id.* at ¶ 13.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at ¶ 14.

²⁰⁰ See *id.*

²⁰¹ See *id.* at ¶ 15.

²⁰² See *id.* at ¶ 17.

²⁰³ See NBCU Petition at 30; see also [REDACTED] Agreement, NBCU Ex. 35B, at NBCU_PCI_00000003-138 (“[REDACTED] Agreement”); [REDACTED] Agreement, NBCU Ex. 35E, at NBCU_PCI_00000167-271 (“[REDACTED] Agreement”). Both [REDACTED] agreements have been amended. See [REDACTED] Agreement Amendments at NBCU_PCI_00000363-440; [REDACTED] Agreement & Amendments, NBCU. Ex. 35H, at NBCU_PCI_00000287-362 (“[REDACTED] Agreement Amendments”).

²⁰⁴ See NBCU Petition at App. B; see also [REDACTED] Agreement at NBCU_PCI_00000085, § 3(d)(i); [REDACTED] Agreement at NBCU_PCI_00000218, § 3(d)(i).

²⁰⁵ See Casino Phase 1 Declaration at ¶¶ 11-15 (describing the restrictions imposed during each of [REDACTED]).

²⁰⁶ See NBCU Petition at App. B; see also [REDACTED] Agreement at NBCU_PCI_00000086, § 3(d)(i)(B); [REDACTED] Agreement at NBCU_PCI_00000218, § 3(d)(i)(A). The [REDACTED] agreements also include [REDACTED] on film content [REDACTED] See [REDACTED] Agreement at NBCU_PCI_00000086, § 3(d)(i)(B); [REDACTED] Agreement at NBCU_PCI_00000218, § 3(d)(i)(A). [REDACTED]

REDACTED VERSION – RELEASED DECEMBER 5, 2012

of NBCU-licensed films on a **[REDACTED]**

207

].²⁰⁸

The definition of **[REDACTED]**

].²⁰⁹

]. See **[REDACTED]** Agreement at NBCU_PCI_00000019-20; **[REDACTED]** Agreement at NBCU_PCI_00000175-77. The Final Agreement between PCI and NBCU authorizes PCI **[REDACTED]**]. See Final Agreement at **[REDACTED]**

Accordingly, the **[REDACTED]**in the **[REDACTED]** agreements for film content distributed by means of **[REDACTED]**] are not relevant for purposes of determining whether the provision of film content to PCI would constitute a breach of NBCU's licensing agreements with **[REDACTED]**].

²⁰⁷ See **[REDACTED]** Agreement at NBCU_PCI_00000012, § 1.13; **[REDACTED]** Agreement at NBCU_PCI_00000174, § 1.8.

²⁰⁸ See **[REDACTED]** Agreement Amendment at NBCU_PCI_00000392-395, § 1.101; **[REDACTED]** Agreement at NBCU_PCI_00000323-326, §1.65.

²⁰⁹ See **[REDACTED]** Agreement Amendment at NBCU_PCI_00000392-395, § 1.101; **[REDACTED]** Agreement at NBCU_PCI_00000323-326, § 1.65.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

45. First, regarding the [REDACTED]
] we find that consumers using [REDACTED

]. PCI argues that [REDACTED

].²¹⁰

This argument, however, misses the point. Because the [REDACTED

]. In this regard, we find persuasive NBCU’s argument that such [REDACTED

several [REDACTED
].²¹¹ In support of this argument, NBCU provided copies of

].²¹² NBCU sent one of these [REDACTED

.²¹³

.²¹⁴

].²¹⁵ NBCU further stated that “making Universal movies available to consumers for [REDACTED] is not permitted by the license agreement (which requires, among other things, that [REDACTED

] causes us to be in violation of licensing arrangements we have with third parties.”²¹⁶

We think that the similarities between [REDACTED] and PCI’s service are clear. In both cases, [REDACTED

] and similarly [REDACTED

]. Thus, in both cases, [REDACTED]

46. We also agree with NBCU that PCI’s service does not satisfy the requirement in the [REDACTED

].²¹⁷ As discussed in detail above, we believe that the cost to the consumer of renting or purchasing content [REDACTED

²¹⁰ See PCI Opposition at 44; see also Peyer Test., Hr’g Tr. at 401:21-402:12.

²¹¹ See Madoff Phase 2 Report at ¶ 12 [REDACTED

]; see also Wunderlich Phase 2 Report at ¶¶ 41-59 (explaining that the [REDACTED

] are contrary to the terms in many NBCU licensing agreements).

²¹² See Wunderlich Phase 2 Report, Exs. 1-5 [REDACTED]

²¹³ See *id.*, Ex. 4, [REDACTED]

²¹⁴ See *id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See NBCU Petition at 31; see also Madoff Phase 2 Expert Report at ¶ 12.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

].²¹⁸ Thus, the cost to consumers of renting or purchasing content [REDACTED].

47. Moreover, we conclude that PCI's exhibition of films is [REDACTED]

].²¹⁹ We explain above why we believe that PCI's service is [REDACTED],²²⁰ and we find that PCI's service falls within the broad definition in the [REDACTED] agreements. PCI states that the definition of [REDACTED]

].²²¹ To the extent that [REDACTED]

], we find that the viewing of content is [REDACTED]. In addition, as discussed above, we believe that under PCI's business model, the [REDACTED].²²²

48. PCI claims that it is highly unlikely that [REDACTED] and other licensees will view PCI's service as violating their contracts because "the industry views [REDACTED] as the gold standard — if [REDACTED] does a deal, then the other studios can be confident in following suit."²²³ We are not convinced that [REDACTED] and other NBCU licensees will view PCI's service as not violating their contracts simply because [REDACTED] has entered into an agreement with PCI. [REDACTED] is not in the record so we are unable to assess whether PCI's service would violate that agreement. Moreover, as explained above, the underlying reason for the restrictions on [REDACTED] exhibition of programming in [REDACTED] licensing agreements is to ensure that [REDACTED] ability to monetize the programming is not undermined by having the same programming available elsewhere for [REDACTED].²²⁴ We are persuaded that PCI's service implicates this concern. If consumers can [REDACTED]

], these consumers may be unwilling to pay [REDACTED] subscription fees to watch the same films during [REDACTED].

49. PCI asserts that [REDACTED] that is substantially similar to NBCU's agreement with [REDACTED], and that NBCU's agreement with [REDACTED] contains a

²¹⁸ See *supra* ¶ 38.

²¹⁹ See *supra* ¶ 44. Gary Marenzi, one of PCI's expert witnesses, testified that "[REDACTED] is a service that has [REDACTED] tied to the programs for the purpose of supporting those specific programs that are being watched immediately The [REDACTED] is buying the [REDACTED] for that specific show to reach that target demographic on that particular network." Marenzi Test., Hr'g Tr. at 442:14-443:3. [REDACTED]

]. See *supra* ¶ 44.

²²⁰ See *supra* ¶¶ 34-40.

²²¹ See PCI Opposition at 45-46 (citing DeVitre Phase 1 Report at ¶ 32).

²²² See *supra* ¶ 38.

²²³ PCI Opposition at 47 (citing Marenzi Test., Hr'g Tr. at 433:2-12).

²²⁴ See *supra* ¶ 42.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED]

].²³⁰

Thus, under the [REDACTED] agreements, NBCU is prohibited from concurrently exploiting films licensed to [REDACTED]

].

52. NBCU argues that licensing the [REDACTED] film content to PCI would constitute a breach of the [REDACTED] licensing agreements because there will be [REDACTED]

[REDACTED].²³¹ Steven Madoff, NBCU's expert, explained that "the customary and reasonable understanding of the term [REDACTED] in the entertainment industry as it relates to [REDACTED]".²³²

Mr. Madoff further explained that the language in the [REDACTED] agreements is intended to have the same effect as the [REDACTED] — with the same emphasis on the [REDACTED] — and will be viewed by [REDACTED] as having the same industry-standard meaning in any dispute over PCI's service.²³³ We find Mr. Madoff's explanation persuasive. The [REDACTED]

[REDACTED] is intended to protect the economic model underlying the [REDACTED].²³⁴ In this regard, renting a film on a VOD basis typically costs a consumer around \$4-5, whereas a pay television service typically offers the consumer a full month of programming for \$10-20.²³⁵ If films licensed to [REDACTED] were made available on an [REDACTED]

[REDACTED] basis, where consumers do not have to [REDACTED] to view the films, consumers may be unwilling to pay [REDACTED] monthly subscription fees.²³⁶ Thus, we think it is clear that the requirement in the [REDACTED] agreements that [REDACTED]

[REDACTED] is intended to ensure that the consumer, rather than an [REDACTED], actually pays for access to the film content. While PCI argues that [REDACTED] complies with the [REDACTED] agreements because it imposes a [REDACTED]

[REDACTED],²³⁷ this argument is premised on its view that its service is not [REDACTED]. As discussed above, however, only to the extent that a consumer uses [REDACTED], we conclude that PCI's service is [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding and [REDACTED] for access to content.²³⁸ Accordingly, we conclude that NBCU has

[REDACTED] are not relevant for purposes of determining whether the provision of film content to PCI would constitute a breach of NBCU's licensing agreements with [REDACTED].

²³⁰ See [REDACTED] Agreement at NBCU_PCI_00000566, § 1(ee); [REDACTED] Agreement at NBCU_PCI_00000472-473, § 1(x); see also NBCU Petition at 34-35.

²³¹ See NBCU Petition at 34-35; NBCU Reply at 26; see also Madoff Phase 2 Expert Report at ¶¶ 13-14.

²³² Madoff Phase 2 Expert Report at ¶ 14.

²³³ See *id.*

²³⁴ See Madoff Phase 1 Expert Report at ¶¶ 20-22.

²³⁵ See *id.* at ¶ 16.

²³⁶ See *id.* at ¶ 22.

²³⁷ See PCI Opposition at 47; see also PCI Phase 2 Closing Brief at 16.

²³⁸ See *supra* ¶¶ 33-41.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

established by a preponderance of the evidence that licensing films covered by the [REDACTED] agreements to PCI would constitute a breach of the [REDACTED] agreements and that the pertinent restrictions in those agreements, which predate the Comcast-NBCU transaction, are “consistent with reasonable, common industry practice[s]” as required by the Benchmark Condition.²³⁹

(ii) Network Television Agreements

53. NBCU states that its network television licensing agreements, [REDACTED],²⁴⁰ contain similar [REDACTED] provisions that prohibit [REDACTED] of certain television shows.²⁴¹ NBCU explains that, when a studio first licenses an original show to a television network, it is customary for the [REDACTED] to obtain [REDACTED] over that show, which allows the network to recoup its investment in the programming [REDACTED].²⁴² It is also common for studios and networks to “freeze” all other forms of exploitation and then negotiate over unlocking discrete exploitation rights.²⁴³ For example, the network may be permitted to exploit the show [REDACTED]

[REDACTED].²⁴⁴ In return, the studio may be permitted to [REDACTED].²⁴⁵ Such [REDACTED]; otherwise, the studios would be competing against the network for [REDACTED].²⁴⁶ Similarly, when a studio licenses a show for syndication to a basic cable network or broadcast station, the licensing agreements allow for some limited types of concurrent exploitation of the show but, to ensure that the network is not competing against other services for [REDACTED], require that the consumer [REDACTED].²⁴⁷ Below, we analyze representative examples of NBCU network licensing agreements.

(a) [REDACTED]

54. The licensing agreement between NBCU and [REDACTED], for the rights to certain episodes of the television series [REDACTED] includes a [REDACTED] provision which provides, in relevant part, that:

[REDACTED]

²³⁹ See *supra* nn.102, 104.

²⁴⁰ [REDACTED].
1. See Roberts Phase 1 Declaration at ¶¶ 24-29; Wunderlich Phase 1 Expert Report at ¶¶ 45-46.

²⁴¹ See NBCU Petition at 37; see also Roberts Phase 1 Declaration at ¶¶ 18-19, Ex. A; Casino Phase 1 Declaration at ¶¶ 23-27; Wunderlich Phase 1 Expert Report at ¶¶ 24-27.

²⁴² See Casino Phase 1 Declaration at ¶ 22; Roberts Phase 1 Declaration at ¶¶ 12-14.

²⁴³ See Casino Phase 1 Declaration at ¶ 22; Roberts Phase 1 Declaration at ¶ 16.

²⁴⁴ See Casino Phase 1 Declaration at ¶ 22; Roberts Phase 1 Declaration at ¶¶ 17-18.

²⁴⁵ See Casino Phase 1 Declaration at ¶ 22; Roberts Phase 1 Declaration at ¶ 18.

²⁴⁶ See Casino Phase 1 Declaration at ¶ 22; Roberts Phase 1 Declaration at ¶ 18.

²⁴⁷ See Casino Phase 1 Declaration at ¶¶ 23-25.

REDACTED VERSION – RELEASED DECEMBER 5, 2012].²⁴⁸**[REDACTED]**

²⁴⁹ Accordingly, under this agreement, NBCU is prohibited from licensing certain covered episodes of the television series **[REDACTED]** during the affected **[REDACTED]** for exhibition on a **[REDACTED]** basis where the consumer is **[REDACTED]** view the episodes.²⁵⁰

55. We find that, to the extent that consumers are using **[REDACTED]** is not **[REDACTED]** to access its program content. Like the **[REDACTED]** agreements and the **[REDACTED]** agreements, we think that the **[REDACTED]** is meant to ensure that the consumer **[REDACTED]** for access to the content. The record establishes that restrictions such as this **[REDACTED]** are commonly included in television licensing contracts because when a licensing network pays for the right to exhibit the program on its **[REDACTED]** channel, it does not want to compete with other services for **[REDACTED]** against the same programming.²⁵¹ As discussed above, only to the extent that a consumer uses **[REDACTED]**, we conclude that PCI's service is **[REDACTED]** within the meaning of the terms of the contracts for purposes of this proceeding and does not **[REDACTED]** access to content.²⁵² Therefore, we find that NBCU has established by a preponderance of the evidence that licensing the covered episodes of **[REDACTED]** to PCI would constitute a breach of NBCU's contract with **[REDACTED]** and that the pertinent restriction in that contract is "consistent with reasonable, common industry practice" as required by the Benchmark Condition.²⁵³ Moreover, to the extent that NBCU has additional network television licensing agreements that contain restrictions similar to those discussed above, we find that the provision of such programming content to PCI would constitute a breach of those contracts as well.

²⁴⁸ See **[REDACTED]**] NBCU Ex. 53A, at NBCU_PCI_00004659, § 11(a).

²⁴⁹ *Id.* at NBCU_PCI_00004657, at § 7(c).

²⁵⁰ Other representative network agreements submitted by NBCU which prohibit NBCU from licensing certain television shows on a **[REDACTED]** basis include the agreements governing the television series **[REDACTED]**] See **[REDACTED]**] NBCU Ex. 54A, at NBCU_PCI_00004690; **[REDACTED]**] NBCU Ex. 55A, at NBCU_PCI_00004704-5, § 15.

²⁵¹ See Casino Phase 1 Declaration at ¶¶ 23-25; see also Wunderlich Phase 1 Expert Report at ¶¶ 27-29; Madoff Phase 1 Expert Report at ¶ 33.

²⁵² See *supra* ¶¶ 33-41, 55.

²⁵³ See *supra* nn.102, 104.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

(b) [REDACTED]

56. NBCU’s licensing agreement with [REDACTED], for the rights to episodes of the television series [REDACTED] includes a [REDACTED] provision, which provides, in relevant part, that:

[REDACTED]

].²⁵⁴

The [REDACTED] provision further provides that:

[REDACTED]

].²⁵⁵

This licensing agreement thus prohibits NBCU from licensing episodes of [REDACTED] for exhibition on an [REDACTED] basis, unless such exhibitions are [REDACTED] to the consumer and are not [REDACTED].²⁵⁶

57. As detailed above, only to the extent that consumers use [REDACTED] to access content, we believe that PCI’s service is [REDACTED] within the meaning of the terms of the contracts for purposes of this proceeding and does not [REDACTED].²⁵⁷ We accordingly find that NBCU has established by a preponderance of the evidence that licensing the covered episodes of [REDACTED] to PCI would constitute a breach of NBCU’s contract with [REDACTED] and that the pertinent restriction in that contract is “consistent with

²⁵⁴ See [REDACTED] [REDACTED] NBCU Ex. 50A, at NBCU_PCI_00004576-77, and [REDACTED] [REDACTED] NBCU Ex. 50B, at NBCU_PCI_00004592-93.

²⁵⁵ See *id.* at NBCU_PCI_00004592-93.

²⁵⁶ Other representative network agreements submitted by NBCU which provide that [REDACTED] the consumer include the agreements governing the television series [REDACTED] See [REDACTED] [REDACTED] NBCU Ex. 52B, at NBCU_PCI_00004645-46, § 11; [REDACTED] [REDACTED] NBCU Ex. 56A, at NBCU_PCI_00004724, § 12; [REDACTED] [REDACTED] NBCU Ex. 45B, at NBCU_PCI_00004302, § C.2. Similarly, representative [REDACTED] agreements submitted by NBCU permit [REDACTED] [REDACTED], provided that the episodes are not [REDACTED] [REDACTED]. See [REDACTED]

[REDACTED] NBCU Ex. 48C, at NBCU_PCI_00004542, §2(b); [REDACTED]

[REDACTED] NBCU Ex. 48E, at NBCU_PCI_00004562, § 2(b); [REDACTED]

[REDACTED] NBCU Ex. 48D, at NBCU_PCI_00004552, § 2(b).

²⁵⁷ See *supra* ¶¶ 33-41.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

reasonable, common industry practice” as required by the Benchmark Condition.²⁵⁸ Moreover, to the extent that NBCU has additional network television licensing agreements that contain restrictions similar to those discussed above, we find that the provision of such programming content to PCI would constitute a breach of those contracts as well.

(iii) MVPD Agreements

58. NBCU explains that it licenses a number of national cable networks, including USA, Syfy, Bravo, Oxygen, E!, Style, and G4, to MVPDs for distribution.²⁵⁹ When an MVPD licenses a cable network, the MVPD typically agrees to pay license fees for carriage on a per subscriber basis, resulting in the payment to NBCU of substantial license fees which the MVPDs pass on to their subscribers in the form of retail charges.²⁶⁰ In order to preserve the value of the programming on these networks which their subscribers are paying to receive in real time (*i.e.*, during its initial airing), the MVPDs typically negotiate for some form of **[REDACTED]** in their carriage agreements with the networks.²⁶¹ These **[REDACTED]** prohibit the networks, for some period of time, from making the same network programming available through alternative distribution methods, such as online video distribution services.²⁶² Thus, for **[REDACTED]**, a network’s programming may not be licensed **[REDACTED]**.²⁶³ NBCU’s licensing agreement with **[REDACTED]** provides a representative example of NBCU’s MVPD licensing agreements.

(a) [REDACTED]

59. NBCU’s licensing agreement with **[REDACTED]** includes a **[REDACTED]** provision which applies to NBCU’s USA, Syfy, Bravo, Oxygen, mun2, Sleuth, and Universal HD networks.²⁶⁴ This provision states, in relevant part, that:

[REDACTED]

[REDACTED].²⁶⁵

²⁵⁸ See *supra* nn.102, 104.

²⁵⁹ See Lamprecht Phase 1 Declaration at ¶ 9.

²⁶⁰ See *id.* at ¶¶ 11-12.

²⁶¹ See *id.* at ¶ 12.

²⁶² See *id.* at ¶ 13.

²⁶³ See *id.* at ¶¶ 17-19.

²⁶⁴ See **[REDACTED]** NBCU_PCI_00001459, § 2(c).

[REDACTED] NBCU Ex. 39Z, at

²⁶⁵ *Id.*

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED]

] ²⁶⁶ Thus, under this agreement, NBCU is prohibited from licensing programming on the USA, Syfy, Bravo, Oxygen, mun2, Sleuth, and Universal HD networks for online distribution, except for [REDACTED]

].

60. We find that consumers using [REDACTED] are not being [REDACTED] within the meaning of the [REDACTED] agreement. As we explain above, consumers using [REDACTED] for access to programming content [REDACTED] and therefore [REDACTED]. ²⁶⁷ Moreover, as NBCU explained, the purpose of [REDACTED] provisions in MVPD agreements is to preserve the value of the programming which MVPD subscribers are paying to receive in real time. ²⁶⁸ In other words, if MVPD subscribers could view the same cable network programming in real time [REDACTED], the value of the programming to the subscribers and the MVPD would drop dramatically (which may create a disincentive for the subscriber to pay a monthly subscription fee for a programming package that includes such programming or for an MVPD to pay the higher price it pays for real-time programming). Thus, we believe that NBCU has provided evidence that the intent of the [REDACTED] is reasonable and necessary to ensure that consumers are paying [REDACTED] to view the covered cable network programming in real time so that MVPDs and ultimately programming networks can recover their costs, thereby creating an incentive for future programming development. Accordingly, we conclude that NBCU has established by a preponderance of the evidence that licensing programming on the USA, Syfy, Bravo, Oxygen, mun2, Sleuth, and Universal HD networks to PCI for exhibition during the [REDACTED] would constitute a breach of NBCU's agreement with [REDACTED], only to the extent that consumers use [REDACTED] to access content, and that the pertinent restriction in that contract is "consistent with reasonable, common industry practice" as required by the Benchmark Condition. ²⁶⁹ Moreover, to the extent that NBCU has additional licensing agreements with MVPDs that contain restrictions similar to those discussed above, they likely would also be "consistent with reasonable, common industry practice" and we find that providing such programming content to PCI would constitute a breach of those contracts as well.

(iv) Effect of Ruling on Final Agreement

61. For the reasons set forth above, we conclude that, only to the extent that consumers use [REDACTED], NBCU has established by a preponderance of the evidence that licensing certain film and television content to PCI would constitute a breach of numerous NBCU licensing agreements and that the pertinent restrictions in those agreements are "consistent with reasonable, common industry practice[s]" that predate the Comcast-NBCU transaction as required by the Benchmark Condition. To the extent that NBCU has additional contracts that contain restrictions similar to those discussed above, *i.e.*, restrictions prohibiting NBCU from licensing film and television content on an [REDACTED] basis, on a [REDACTED] basis, or on any basis other than a [REDACTED]

²⁶⁶ *Id.* at NBCU_PCI_00001457, § 1(h).

²⁶⁷ *See supra* ¶¶ 33-41.

²⁶⁸ *See supra* ¶ 58.

²⁶⁹ *See supra* nn.102, 104.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

] to the consumer, we likewise find that the provision of such programming content to PCI would constitute a breach of those contracts to the extent they are permitted under the condition. Our decision does not require any change in the Final Agreement awarded by the Arbitrator; rather, it simply places the affected programming content outside of the scope of NBCU's contractual obligation under the Final Agreement.²⁷⁰ NBCU is still obligated to license to PCI any other programming content covered by the Final Agreement that is not restricted by NBCU's contract provisions with other licensees. Additionally, we note that if PCI agrees to [REDACTED] (i.e., any programming content subject to the [REDACTED] discussed above) [REDACTED],²⁷¹ NBCU could provide the affected content to PCI without breaching its contractual obligations to other licensees.

62. Furthermore, we note that NBCU has licensing agreements with numerous OVDs that offer transactional EST and VOD services, including Apple (iTunes), Amazon, Best Buy, Blockbuster, Google (YouTube), Microsoft (xBox), Samsung, Sony, and Vudu.²⁷² NBCU's licensing agreements with these OVDs impose similar [REDACTED] designed to ensure that their exploitation of film and television programming comports with NBCU's obligations under other licensing agreements.²⁷³ Specifically, these agreements generally provide that the [REDACTED]

herein puts PCI on par with these OVDs.]²⁷⁴ Thus, our decision

²⁷⁰ See NBCU Petition at 25; see also PCI Phase 2 Rebuttal Brief at 15 (“If the Arbitrator were to decide that NBCU has established a Contractual Impediment Defense to any particular contract to which NBCU is a party, then the result would be a hold back of that content, pursuant to which NBCU would be relieved of any contractual obligation to provide it to PCI.”).

²⁷¹ See *supra* n.113.

²⁷² See generally NBCU Exs. 40A-Z.

²⁷³ See NBCU Phase 1 Opening Brief at 21-22; Wunderlich Phase 1 Expert Report at ¶¶ 48-51 and Ex. F, Lamprecht Phase 1 Declaration at ¶ 24-29.

²⁷⁴ See e.g., [REDACTED]]NBCU Ex. 40C, at NBCU_PCI_00001788, § 3(c)(ii) [REDACTED]]; at NBCU_PCI_00001809, Ex. A-2 [REDACTED]

]; and at NBCU_PCI_00001814, Ex. A-7 [REDACTED]

]; [REDACTED]

] NBCU Ex. 40X, at NBCU_PCI_00003943 [REDACTED]

]; at NBCU_PCI_00003964, Ex. A-3 [REDACTED]

]; and at NBCU_PCI_00003968, Ex. A-7 [REDACTED]

REDACTED VERSION – RELEASED DECEMBER 5, 2012**B. PCI's Partial Appeal**

63. The *Comcast/NBCU Order* conditions provide that, “[i]f the arbitrator finds that one party’s conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party’s costs and expenses (including reasonable attorney’s fees) against the offending party.”²⁷⁵ During the arbitration, PCI requested that the Arbitrator assess against NBCU all of the costs, expenses, and attorneys’ fees incurred by PCI in connection with the arbitration, which totaled [REDACTED].²⁷⁶ The Arbitrator denied PCI’s cost-shifting request, concluding that no “unreasonable conduct” occurred.²⁷⁷ The Arbitrator noted that “this was a complex, hard fought and time-pressured legal proceeding where both sides were represented by skilled and sophisticated counsel” and found that “the attorneys generally acted cooperatively, ethically and professionally with one another” and that “there were no dilatory or improper tactics employed by either side.”²⁷⁸

64. PCI appeals the Arbitrator’s denial of its cost-shifting request, arguing that, “[a]s a result of various unreasonable positions taken by NBCU throughout the proceedings, [PCI] diverted significant resources that could have been used to employ additional staff, expand business opportunities, and continue innovating, to instead fight NBCU’s various attempts to avoid” its obligations under the Benchmark Condition.²⁷⁹ While the Arbitrator found that this was a “hard fought” battle but that the attorneys acted “ethically,” PCI submits that there is no justifiable reason that NBCU should have engaged in the “battle” detailed in PCI’s cost-shifting declarations and that NBCU’s conduct does not need to be “unethical” to be “unreasonable.”²⁸⁰ According to PCI, the positions taken by NBCU were “blatantly unreasonable” and contrary to the plain language and intent of the *Comcast/NBCU Order*.²⁸¹

65. Based on our review of the record, we find no basis for concluding that NBCU engaged in “unreasonable conduct” during the course of the arbitration that would warrant grant of PCI’s cost-shifting request. This proceeding raised complex issues regarding the proper interpretation of the Benchmark Condition, whether PCI’s unique business model is [REDACTED], and whether NBCU’s provision of certain films and TV programs to PCI would breach other NBCU licensing agreements. The complexity of this proceeding is compounded by the fact that PCI’s online service, which PCI itself characterizes as “ground breaking,”²⁸² [REDACTED] and there remain unanswered questions about the service. As the party seeking to recover costs, expenses, and attorneys’ fees, PCI carries the burden of proof that “unreasonable” conduct occurred. PCI has not met this burden. We think that “unreasonable conduct” requires more than making arguments or taking positions that ultimately are unproven or are not supported by the evidence. Rather, a finding of unreasonable conduct requires evidence that a party acted in bad faith, engaged in dilatory or improper tactics, or pressed arguments that were plainly frivolous.²⁸³

²⁷⁵ *Comcast/NBCU Order*, 26 FCC Rcd at 4367, App. A, § VII.B.10, and 4370, App. A, § VIII.5.

²⁷⁶ See Award at 11; see also PCI Second Cost-Shifting Declaration at ¶¶ 101-120.

²⁷⁷ See Award at 12.

²⁷⁸ *Id.* at 11-12.

²⁷⁹ PCI Partial Appeal at 5-6.

²⁸⁰ *Id.* at 7; see PCI Reply at 23.

²⁸¹ PCI Partial Appeal at 7; see PCI Reply at 20-21.

²⁸² PCI Partial Appeal at 3.

²⁸³ See NBCU Opposition at 11 n.41 (citing 28 U.S.C. §1927 (allowing fee awards for costs incurred where a party “multiplies the proceedings in any case unreasonably and vexatiously”) and *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990) (upholding fee award where a party unreasonably prolonged proceedings to a point “beyond which zeal [became] vexation”)).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

We cannot conclude based on the particular facts and circumstances of this case that the positions taken by NBCU were “blatantly unreasonable” or that it employed dilatory or improper tactics. Below we address PCI’s specific arguments in support of its cost-shifting request.

66. First, we reject PCI’s argument that NBCU was unreasonable in disputing whether PCI was a Qualified OVD.²⁸⁴ In support, PCI states that it provided NBCU substantial evidence that it was a Qualified OVD.²⁸⁵ PCI asserts that NBCU initially challenged PCI’s status as a Qualified OVD based solely on the fact that PCI had declined to disclose its peer deal to NBCU, even though NBCU had no right under the Benchmark Condition to insist on such disclosure.²⁸⁶ We disagree with PCI’s assertion that NBCU’s “demand for an upfront look at the Benchmark Agreement was a plainly dilatory tactic.”²⁸⁷ We note that the Media Bureau issued a Public Notice in March 2012 seeking comment on Comcast/NBCU’s request for clarification that OVDs seeking online video programming under the Benchmark Condition are required to disclose their peer programming deals to NBCU.²⁸⁸ The Media Bureau stated therein that it “tentatively agrees that the Benchmark Condition contemplates that OVDs seeking access to C-NBCU programming will disclose the relevant peer programming deal to the extent necessary to enable C-NBCU to carry out its obligations under the Condition.”²⁸⁹ The Media Bureau also tentatively agreed that clarification of the Benchmark Condition is needed because the Benchmark Condition does not explicitly specify the manner in which the disclosure will be made.²⁹⁰ Accordingly, to the extent that NBCU’s challenge to PCI’s status as a Qualified OVD was based on PCI’s failure to disclose the peer deal to NBCU or a possible lack of clarity in the Benchmark Condition on this issue, we find that NBCU’s position was not unreasonable.²⁹¹

67. PCI further argues that, even after it provided the Benchmark Agreement to NBCU in late March 2012 pursuant to the Confidentiality Agreement and Protective Order, NBCU continued to dispute PCI’s status as a Qualified OVD.²⁹² NBCU asserts in response that it questioned PCI’s status as a Qualified OVD based on representations in an attachment to the [REDACTED] peer deal and various

²⁸⁴ See PCI Partial Appeal at 6; PCI First Cost-Shifting Declaration at 3.

²⁸⁵ See PCI First Cost-Shifting Declaration at 4-6. Specifically, PCI indicates that it notified NBCU in July 2011 that it had entered into an [REDACTED] with a peer studio which covers [REDACTED]; that PCI’s October 7, 2011 Notice of Intent to Request Arbitration expressly represented that PCI is a Qualified OVD; and that PCI’s October 11, 2011 Confidential Summary to the Commission also expressly represented that PCI was a Qualified OVD. See *id.* PCI also cites a [REDACTED] confirming its agreement with PCI and its production of [REDACTED]. See *id.* at 10-11; PCI Reply at 11; see also [REDACTED] at PCI 000084.

²⁸⁶ See PCI First Cost-Shifting Declaration at 6-7; see also Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for NBCUniversal Media LLC, to Paris N. Earp, Commercial Case Manager, American Arbitration Association (Nov. 4, 2011) (arguing that NBCU should be given access to the peer deal).

²⁸⁷ PCI Partial Appeal at 7; PCI First Cost-Shifting Declaration at ¶ 26.

²⁸⁸ See Public Notice, Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should Be Adopted, DA 12-394 (March 13, 2012) (“Public Notice”).

²⁸⁹ *Id.*

²⁹⁰ See *id.*

²⁹¹ We are not addressing or prejudging the issues raised in the Public Notice at this time. Rather, we are simply citing the Public Notice for the limited proposition that NBCU’s position on those issues was not unreasonable.

²⁹² See PCI Partial Appeal at 8-11.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

[REDACTED] that PCI produced during the proceeding, which suggested that PCI [REDACTED]

²⁹³ NBCU states that, after it filed its opening brief asserting the Qualified OVD defense based on this information, and only three days before the Phase 1 hearing, PCI produced written declarations from its principals [REDACTED]. ²⁹⁴ NBCU maintains that, based on this additional information, it did not pursue the defense after the Phase 1 hearing.²⁹⁵ We cannot conclude based on the record before us that NBCU acted unreasonably in questioning PCI’s status as a Qualified OVD. As noted above, the *Comcast/NBCU Order* specifically contemplates that there may be reasonable disputes as to whether an OVD is a Qualified OVD and that such disputes will be addressed in Phase 1 of the hearing.²⁹⁶ While the record shows that PCI provided NBCU with evidence that it was a Qualified OVD,²⁹⁷ the record also reflects that the Benchmark Agreement and PCI’s [REDACTED] contained arguably contradictory information.²⁹⁸ Most notably, the [REDACTED] attached to the Benchmark Agreement, [REDACTED]²⁹⁹

³⁰⁰ Although the Arbitrator ultimately concluded that NBCU’s argument was “without merit and not supported by the evidence,”³⁰¹ on balance, and taking into account the unique nature of

²⁹³ NBCU Opposition at 6-7; NBCU Phase 1 Opening Brief at 6-7. The attachment to the [REDACTED] peer deal was a [REDACTED]. See PCI First Cost-Shifting Declaration at ¶ 46. In this [REDACTED]

] Benchmark Agreement as amended, NBCU Ex. 3, at Ex. F-1 to F-2 (“Benchmark Agreement”); see also [REDACTED] at PCI 000034 [REDACTED]; [REDACTED] at PCI 000128 [REDACTED]

].

²⁹⁴ NBCU Opposition at 7; see also PCI Phase 1 Rebuttal Brief at 8 (“[W]hat [REDACTED]

]); Smith Phase 1 Declaration at 29 (explaining that PCI initially proposed that [REDACTED]

] licensing agreement); Peyer Phase 1 Declaration at 1-2 (describing PCI’s online [REDACTED]).

²⁹⁵ See NBCU Opposition at 7; see also Phase 1 Decision at 5 (noting that “no where in NBCU’s extensive Closing Brief and Proposed Findings is there any mention of its contention that PCI is not a Qualified OVD under the Benchmark Condition. That therefore is a change, at least in emphasis, from the position asserted in NBCU’s Opening Brief . . .”).

²⁹⁶ See *supra* ¶ 4.

²⁹⁷ See *supra* n.285.

²⁹⁸ See *supra* n.293.

²⁹⁹ [REDACTED]

]

³⁰⁰ Benchmark Agreement at Ex. F-1 to F-2.

³⁰¹ Phase 1 Decision at 5.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

PCI's business model, we believe that NBCU reasonably explored the issue of whether PCI was a Qualified OVD.

68. We are also unpersuaded by PCI's argument that NBCU's attempt to invoke a defense under Section 76.1002(b)(1) was unreasonable and vexatious.³⁰² Under Section VII.C.3 of the *Comcast/NBCU Order* conditions, NBCU may raise as a defense to a claim under the Benchmark Condition any of the factors listed in Section 76.1002(b) of the Commission's rules.³⁰³ The factors listed in Section 76.1002(b)(1) include creditworthiness, financial stability, and standards regarding character and technical quality.³⁰⁴ NBCU first suggested in a March 16, 2012 letter to the Arbitrator that it might assert a defense under Section 76.1002(b)(1) if questions existed about PCI's financial stability, character, and technical quality.³⁰⁵ In an email to the Arbitrator dated April 5, 2012, NBCU indicated that it did not intend to pursue this defense.³⁰⁶ We do not believe that raising a possible Section 76.1002(b)(1) defense and then declining to pursue it just 20 days later constitutes unreasonable and vexatious conduct warranting cost-shifting.

69. PCI also argues that NBCU was unreasonable in initially submitting a final offer for the scope of Comparable Programming, rather than a final offer in the form of a contract for carriage, thereby conflating the issue concerning the scope of Comparable Programming with its contractual impediment defense, and arguing that the contractual impediment defense should be resolved in Phase 1 of the hearing.³⁰⁷ We disagree. The *Comcast/NBCU Order* specifically contemplates that there may be reasonable disputes as to the scope of Comparable Programming to which an OVD is entitled and provides that, if there is such a dispute, parties will submit at the commencement of the arbitration final offers for the scope of Comparable Programming, rather than final offers for carriage.³⁰⁸ NBCU disputed the scope of Comparable Programming and therefore properly submitted at the commencement of the arbitration a final offer for the scope of Comparable Programming.³⁰⁹ Moreover, as we discuss in detail above,³¹⁰ this proceeding presents difficult questions as to whether PCI's business model is **[REDACTED]** and whether NBCU's provision of certain films and TV programs to PCI would breach other NBCU licensing agreements. Under the circumstances of this case, we do not think NBCU was unreasonable in arguing that there was a link between the scope of Comparable Programming and its contractual impediment defense and that the contractual impediment defense should be addressed in

³⁰² See PCI First Cost-Shifting Declaration at 14.

³⁰³ See *Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.3.

³⁰⁴ See 47 C.F.R. § 76.1002(b)(1).

³⁰⁵ See Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for NBCUniversal Media, LLC, to Arbitrator Henry J. Silberberg (March 16, 2012), at n.6. In a letter dated March 27, 2012 letter, NBCU explained that its inquiries under Section 76.1002(b) "will be limited to whether PCI has sufficient financial stability and creditworthiness to indemnify NBCUniversal against any breach of contract, copyright infringement, or other similar claims that may be asserted against NBCUniversal based on PCI's programming demands and its service." Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for NBCUniversal Media, LLC, to Jean MacHarg, Patton Boggs LLP, Counsel for Project Concord, Inc. (March 27, 2012).

³⁰⁶ Email from Lindsay Addison, Willkie Farr & Gallagher LLP to Arbitrator Henry J. Silberberg (Apr. 5, 2012, 4:53 PM).

³⁰⁷ See PCI First Cost-Shifting Declaration at 17-23.

³⁰⁸ See *supra* ¶ 4.

³⁰⁹ See *supra* n.37.

³¹⁰ See *supra* ¶¶ 33-41.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

Phase 1.³¹¹ Furthermore, we note that both parties agreed, with the Arbitrator’s approval, that evidence relating to NBCU’s contractual impediment defense should be presented and considered in Phase 1.³¹² Although the Arbitrator subsequently concluded in the Phase 1 decision that a determination as to whether NBCU’s contractual impediment defense has been proven should be deferred to Phase 2,³¹³ we do not believe that PCI was materially harmed by the presentation and consideration of evidence on the contractual impediment defense during Phase 1.³¹⁴

70. Similarly, we reject PCI’s argument that NBCU was unreasonable in arguing that the definition of Video Programming excludes first-year films.³¹⁵ Although we conclude herein that the definition of Video Programming includes first-year films,³¹⁶ we disagree with PCI’s contention that “what NBCU asserted in support of its tortured reading of that definition was most egregiously unreasonable.”³¹⁷ Rather, we find that both parties offered arguments in good faith supporting their interpretations of the relevant language.

71. In addition, PCI argues that, in disregard of the *Comcast/NBCU Order* conditions and the Arbitrator’s Phase 1 Decision, NBCU failed to make a final offer for the Comparable Programming

³¹¹ As noted above, NBCU’s Petition seeks clarification of whether the contract defenses authorized under the Benchmark Condition should be decided during Phase 1 or Phase 2 of an arbitration. *See supra* n.59. Although we decline to address this issue at this time, we acknowledge that there may be valid arguments as to why contract defenses should be addressed in Phase 1 along with the scope of Comparable Programming.

³¹² *See supra* n.40. We also reject PCI’s argument that “it was never necessary to have addressed NBCU’s Contractual Impediment Defense at all . . . because any suggestion that a third party licensee will assert a rights conflict is pure speculation and the [REDACTED] rights provided in PCI’s Final Offer make any such claim highly [improbable].” PCI Second Cost-Shifting Declaration at 15. NBCU properly raised a contractual impediment defense and, as discussed above, we think the appropriate inquiry under such a defense is whether providing the programming at issue “would constitute a breach of a contract,” not whether a third party may or may not choose to exercise its right to enforce the contract. *See supra* ¶¶ 28-30.

³¹³ *See supra* n.40.

³¹⁴ We are likewise unpersuaded by PCI’s argument that NBCU acted unreasonably by “retrying” its contractual impediment defense in Phase 2. *See* PCI Second Cost-Shifting Declaration at 17-20. PCI asserts that, despite the fact that NBCU’s contractual impediment defense was tried during Phase 1 and that the Arbitrator indicated that he did not expect to receive any additional evidence on the defense, NBCU proffered never-produced documents and “extensive additional testimony” from two witnesses with its Phase 2 Opening Statement. *Id.* at 17-18; *see also* Email from Arbitrator Henry J. Silverberg to David Murray and Jean MacHarg (May 25, 2012, 9:43 PM) (describing the additional evidence and denying PCI’s request that it be stricken from the record, noting that, while he “did not expect the presentation of any new evidence” on the contractual impediment defense, he did not find the documents to be particularly significant and was not likely to afford any such new evidence any meaningful weight). PCI also asserts that NBCU spent considerable time at the Phase 2 hearing retrying its contractual impediment defense. *See* PCI Second Cost-Shifting Request at 19. The Arbitrator found, however, that PCI was not forced to retry anything and that there was just “minor supplementation of the record that was previously created in phase 1 and was purposefully left undecided until phase 2.” Hr’g Tr. at 1046:21-1047:3. The Arbitrator further found that “the additional time devoted by both parties in Phase 2 in presenting further testimony relating to the Contractual Impediment Defense did not involve any unreasonable conduct . . . and such testimony and related arguments were in fact helpful in clarifying the underlying facts and assisting me in reaching the ruling set forth above in PCI’s favor.” Award at 12. We concur with the Arbitrator’s finding that NBCU’s presentation of this additional evidence did not amount to unreasonable conduct warranting cost-shifting. *See id.*

³¹⁵ *See* PCI First Cost-Shifting Declaration at 23-24.

³¹⁶ *See supra* ¶¶ 17-24.

³¹⁷ PCI Reply at 21; *see also* PCI First Cost-Shifting Declaration at ¶¶ 85-87.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

selected by the Arbitrator.³¹⁸ Rather, PCI states, NBCU’s Phase 2 Final Offer reverted to offering only the programming available under its Phase 1 Final Offer, which flouted the Arbitrator’s decision in Phase 1 that PCI was entitled to current film and television titles.³¹⁹ The record indicates that NBCU in fact submitted a final offer in the form of a contract for carriage that was a **[REDACTED]**

[REDACTED].³²⁰ NBCU’s Phase 2 pleadings and testimony at the Phase 2 hearing made clear, however, that NBCU was interpreting the Benchmark Agreement, and consequently its final offer, **[REDACTED]**.³²¹

Specifically, NBCU made clear that it did not consider the Benchmark Agreement to be an **[REDACTED]**,³²² but rather interpreted it to afford **[REDACTED]**

[REDACTED].³²³ The Arbitrator found that NBCU’s interpretation of its final offer was effectively **[REDACTED]**

[REDACTED].³²⁴ NBCU asserts in response that the provision of current film and television content to PCI implicates numerous other NBCU licensing agreements, which is the very basis of NBCU’s contractual impediment defense.³²⁵ Rather than flouting the Arbitrator’s decision, NBCU maintains that it was waiting for him to rule on the contract defense as part of the Phase 2 proceeding.³²⁶ We are not persuaded based on the record before us that NBCU’s actions in this regard amount to unreasonable conduct. NBCU complied with the Phase 1 Decision by submitting its Phase 2 Final Offer. Moreover, NBCU was candid throughout the Phase 2

³¹⁸ See PCI Second Cost-Shifting Declaration at 8-10; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4368, App. A, § VII.C.2 (“At the conclusion of phase 1, the parties shall submit their final offers for agreement based on the Comparable Programming chosen by the arbitrator.”).

³¹⁹ See PCI Second Cost-Shifting Declaration at 8-9; PCI Partial Appeal at 7.

³²⁰ See Award at 5. The only **[REDACTED]** between NBCU’s final offer and the Benchmark Agreement is that NBCU’s final offer also included a **[REDACTED]**. See *id.* In the Phase 1 Decision, the Arbitrator noted that NBCU had requested an order requiring that the indemnity provision set forth in Section IV.A.5 of the *Comcast/NBCU Order* conditions be included in the Phase 2 final offers and stated that the requested indemnity provision would be considered in Phase 2 in the event that NBCU’s contractual impediment defense were not proven. See Phase 1 Decision at 4. The Arbitrator further stated that the parties should consider including the requested indemnity provision in their respective Phase 2 final offers on a conditional basis. See *id.*

³²¹ See Award at 6.

³²² See *supra* n.76.

³²³ See Award at 8-9. **[REDACTED]** of the Benchmark Agreement provides that **[REDACTED]**. See Benchmark Agreement at **[REDACTED]**.

NBCU argued that because this language gives **[REDACTED]**, the Benchmark Agreement **[REDACTED]**. See NBCU Phase 2 Opening Brief at 5-6; Madoff Phase 2 Report at 9-10; NBCU Phase 2 Rebuttal Brief at 2-3. By contrast, PCI argued that this language simply means that **[REDACTED]**

[REDACTED]. See PCI Phase 2 Opening Brief at 8. PCI also provided evidence that **[REDACTED]**

[REDACTED]. See *id.*

³²⁴ See Award at 6.

³²⁵ See NBCU Opposition at 8; see also NBCU Phase 1 Post-Hearing Brief at 13-26.

³²⁶ See NBCU Opposition at 8.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

proceeding regarding its differing interpretation of the Benchmark Agreement.³²⁷ We do not believe that its actions reflect bad faith or dilatory or improper tactics.³²⁸

72. In sum, we have reviewed PCI's allegations of unreasonable conduct and find no basis for concluding that NBCU acted in bad faith or engaged in dilatory or improper tactics. We therefore conclude that PCI's cost-shifting request must be denied.

IV. CONCLUSION

73. For the reasons set forth above, we conclude that first-year films are not excluded from the scope of the Benchmark Condition. We also conclude that NBCU has established 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," but only to the extent that consumers use [REDACTED] to access the content. In addition, we find no basis for granting PCI's cost-shifting request. Accordingly, we grant NBCU's Petition for *de novo* review in part and deny it in part, and we deny PCI's Partial Appeal.

V. ORDERING CLAUSES

74. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), the Petition for *De Novo* Review filed by NBCUniversal Media, LLC **IS GRANTED IN PART AND DENIED IN PART** and the Partial Appeal filed by Project Concord, Inc. **IS DENIED**.

75. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

³²⁷ See NBCU Phase 2 Opening Brief at 2-9; Madoff Phase 2 Expert Report at 9-12; Wunderlich Phase 2 Expert Report at 5-7.

³²⁸ We have also reviewed PCI's various other allegations that NBCU acted unreasonably throughout the arbitration proceeding. For example, PCI argues that NBCU acted unreasonably in (i) failing to call Scott Gartner, NBCU's Senior Vice President, Business and Legal Affairs, as a witness during the hearing; (ii) arguing that it should be allowed to seek pre-approval of PCI's service under the [REDACTED] in its licensing agreement with [REDACTED] and to [REDACTED]; and (iii) arguing that it is entitled to discriminate against PCI. See PCI Second Cost-Shifting Request at 10-12, 13-14, 18. We find that these allegations do not establish that NBCU engaged in unreasonable conduct warranting any cost-shifting.

REDACTED VERSION – RELEASED DECEMBER 5, 2012**APPENDIX****Benchmark Condition and Other Relevant Provisions and Definitions
from the *Comcast/NBCU Order Conditions*****I. DEFINITIONS**

“Benchmark Condition” means that an OVD has entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD.

“Comparable Programming” means Video Programming that is reasonably similar in kind and amount. For purposes of determining whether Video Programming constitutes Comparable Programming, the parties or an arbitrator, as applicable, shall consider the following factors, among others:

- (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.³²⁹

The following categories of Video Programming are not Comparable Programming (among others):³³⁰

- (i) programming made available for presentation a day or more after it is first presented to viewers is not comparable to programming made available for presentation the first day;
- (ii) sports programming is not comparable to non-sports programming;
- (iii) local news programming is not comparable to programming that is not local news programming;
- (iv) prior season programming is not comparable to original, first-run programming;
- (v) broadcast programming is not comparable to cable programming;
- (vi) Children’s Programming is not comparable to programming that is not Children’s Programming (defined, only with regard to Section XIII, as programming originally produced and aired primarily for an audience of children 12 years old or younger);
- (vii) Films are not comparable to non-Film programming; and

³²⁹ If an agreement triggering the Benchmark Condition involves substantially all of a Person’s linear channel(s), then the C-NBC Programmer may require the OVD to license a bundle of substantially all of C-NBCU’s linear channels (plus other rights if included in the triggering agreement) as the Comparable Programming. If the C-NBCU Programmer opts to license less than the bundle described above, then the parties or arbitrator (as applicable) shall take into account any pricing adjustments from the bundled price necessary to reflect fair market value.

³³⁰ Programming shall not cease to be comparable solely because packages of programming contain some programming that is not comparable. For example, a channel, a bundle of channels or a bundle of programs may contain both sports and non-sports programming and still be eligible to trigger the Benchmark Condition or serve as Comparable Programming provided by a C-NBCU Programmer. If a bundle contains a mix of programming, some of which is comparable and some of which is not comparable, the C-NBCU Programmer shall satisfy a demand under the Benchmark Condition to the extent possible by providing programming that is similar in amount to the programming triggering the Benchmark Condition to the extent that programming is comparable to programming of C-NBCU Programmers (e.g., if an OVD obtains 10 shows triggering the Benchmark Condition, 5 of which are comparable to C-NBCU programming, C-NBCU Programmers would have to provide 5 shows).

REDACTED VERSION – RELEASED DECEMBER 5, 2012

- (viii) Films in the following categories are not comparable to each other: (x) Films less than five years from initial theatrical distribution, and (y) Films over five years from initial theatrical distribution.

“Economic Model” means 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.

“Film” means a feature-length motion picture that has been theatrically released.

“Film Studio” means Warner Bros. Entertainment, Fox Filmed Entertainment, Paramount Motion Pictures, Sony Pictures Entertainment, Walt Disney Motion Pictures Group, and their managed or controlled subsidiaries, successors and assigns, and 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.

“Online Video Programming” means 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.

“OVD” means any entity that provides Video Programming by means of the (i) 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.

“Production Studio” means Warner Bros. Television, 20th Century Fox Television, Paramount/CBS Television Studios, Sony Pictures Television, Disney-ABC Studios, and their managed or controlled subsidiaries, successors and assigns, and any other Person that is one of the top five producers (other than a C-NBCU Programmer) of Video Programming for distribution through Broadcast Networks or Cable Programmers by U.S. production revenue in the latest declared financial year.

“Qualified OVD” means any OVD that meets either or both of (i) the MVPD Price Condition and (ii) the Benchmark Condition.

“Video Programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); 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”)); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and Films for which a year or more has elapsed since their theatrical release.

REDACTED VERSION – RELEASED DECEMBER 5, 2012**IV. ONLINE CONDITIONS****A. ONLINE PROGRAM ACCESS****2. Qualified OVDs:****b. Benchmark Condition:**

(i) For any Qualified OVD that meets the Benchmark Condition,³³¹ C-NBCU Programmers shall provide Online Video Programming sought by the OVD that constitutes Comparable Programming.³³²

(ii) The price, terms and conditions shall be the economic equivalent of the price, terms and conditions the OVD paid for the Comparable Programming. The economic equivalent should take account of (among other things) any difference in the value of the programming being sought relative to the Comparable Programming. In addition, economic equivalent terms and conditions shall consist of the same basic Economic Model(s) for the Comparable Programming.

(iii) C-NBCU Programmers shall not at any one time be required to be a party to more agreements triggered by Experimental Deals than the greatest number of agreements then effective between a Broadcast Network, Cable Programmer, Production Studio or Film Studio (including multiple Persons if they are Affiliated) and all OVDs.

3. If negotiations fail to produce a mutually acceptable set of price, terms and conditions for Online Video Programming under Sections IV.A.1 or IV.A.2 above, an MVPD or Qualified OVD, as applicable, may choose to submit a dispute to commercial arbitration in accordance with the procedures set forth in Section VII below. A Claimant may bring a single arbitration for related claims under Section IV.A.1 and IV.A.2 and/or demands under different agreements subject to the Benchmark Condition.

5. For claims to programming made under Section IV, if a reasonable dispute exists or arises regarding whether a C-NBCU Programmer has the right to grant an OVD the right to the Video Programming at issue, the C-NBCU Programmer may require the Qualified OVD to indemnify it and hold it harmless against any breach of contract, tort, copyright violation or other claim arising out of any lack of right of the C-NBCU Programmer to grant the OVD the right to Video Programming.

B. RESTRICTIONS REGARDING EXCLUSIVITY/WINDOWING

1. No C-NBCU Programmer shall enter into any agreement or arrangement, or enforce any agreement or arrangement entered into after December 3, 2009, which forbids, limits, or creates economic incentives to limit the distribution of such Video Programming through OVDs;

³³¹ As long as the Benchmark Condition is met at the time a request for programming is made under this Order, it shall continue to be satisfied regardless of any breach or termination of the triggering agreement.

³³² A Qualified OVD that has obtained programming under the Benchmark Condition shall become eligible for additional Comparable Programming only to the extent it enters into more than one agreement (i) with different programmers for programming subject to different Economic Models or in different categories of programming (e.g., broadcast, cable or Film) or (ii) with the same programmer for additional programming.

REDACTED VERSION – RELEASED DECEMBER 5, 2012

provided that nothing in this Section IV.B.1 prohibits a C-NBCU Programmer from entering into or enforcing agreements or arrangements consistent with reasonable, common industry practice. Evidence relevant to what constitutes reasonable, common industry practice may include (among other things) the contracting practices of a C-NBCU Programmer prior to December 3, 2009 and/or the contracting practices of peer companies.

VII. COMMERCIAL ARBITRATION REMEDY**B. RULES OF ARBITRATION**

10. If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including reasonable attorney fees) against the offending party.

C. PROVISIONS APPLICABLE TO ARBITRATIONS UNDER SECTION IV (ONLINE)

1. In the case of an arbitration under Section IV of these Conditions, the arbitration shall take place in two phases if there is a reasonable dispute regarding one or more of the following: (i) whether an OVD is a Qualified OVD; (ii) what Comparable Programming a Qualified OVD is entitled to (for claims under the Benchmark Condition only); and (iii) whether any of the defenses in Section VII.C.3 below would defeat a claim (provided that, with respect to Section VII.C.3, the first phase shall concern defenses based on 47 C.F.R. § 76.1002(b)(1) only). In phase 1, the arbitrator shall determine, as applicable, the disputes raised in sub-paragraphs (i) through (iii). In phase 2, the arbitrator shall choose the final offer of the party which most closely approximates the fair market value of the programming carriage rights at issue, as defined in Section IV.A.2, above.

2. In the case of an arbitration under the Benchmark Condition, if there is a dispute about what Comparable Programming a Qualified OVD is entitled to, the parties shall submit their final offers for the scope of Comparable Programming at the commencement of the arbitration, as provided under Section IV.A. The arbitrator shall decide which of the two offers for the scope of Comparable Programming most closely approximates the appropriate Comparable Programming. At the conclusion of phase 1, the parties shall submit their final offers for agreements based on the Comparable Programming chosen by the arbitrator.

3. In the case of an arbitration under Section IV of these Conditions, it shall be a defense for Comcast or C-NBCU to demonstrate by a preponderance of the evidence that any of the following reasonably justifies denying the Online Video Programming to a particular Qualified OVD: (i) any of the factors listed under 47 C.F.R. § 76.1002(b) as of the date of this Order; or (ii) that providing the Online Video Programming to the particular Qualified OVD would constitute a breach of a contract to which Comcast or NBCU is a party (provided that any provision prohibited under Section IV.B shall not be a defense). For claims under the Benchmark Condition, there shall be a presumption against any defense based on the provisions of part (i) of this paragraph.

4. The arbitrator shall determine allowable discovery and permissible evidence.

E. REVIEW OF FINAL AWARD BY THE COMMISSION

3. The Media Bureau or Commission, as appropriate, may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if the Media Bureau or Commission, as appropriate, considers the appeal or conduct by the losing party to have been

REDACTED VERSION – RELEASED DECEMBER 5, 2012

unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.