



PUBLIC NOTICE

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MEDIA BUREAU SEEKS COMMENT ON WHETHER COMCAST-NBCU BENCHMARK CONDITION NEEDS CLARIFICATION AND WHETHER A PROPOSED THIRD PROTECTIVE ORDER FOR COMPLIANCE SHOULD BE ADOPTED

MB Docket No. 10-56

Comments Due: March 27, 2012
Reply Comments Due: April 3, 2012

Comcast Corporation (Comcast) and NBCUniversal Media, LLC (NBCUniversal) (together, C-NBCU) have requested guidance from the Media Bureau regarding their access to Online Video Distributors' (OVDs) peer programming deals in negotiations arising out of the Benchmark Condition adopted by the Commission in the *Comcast-NBC Universal Order*.¹ In a letter dated February 17, 2012 (C-NBCU Letter),² C-NBCU states that OVDs that have sought access to NBCUniversal programming under the Benchmark Condition have not disclosed their peer programming deals to NBCUniversal due to the confidentiality provisions contained in those agreements. C-NBCU argues that NBCUniversal needs access to the peer programming deals in order to negotiate an agreement that is in compliance with the Benchmark Condition, but that the Condition does not expressly provide for disclosure of peer programming deals.³

¹ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4360, App. A., § IV, A.2.b (2011) (*C-NBCU Order*).

² C-NBCU, Request for Clarification Regarding Disclosure of Peer Deals and Third Protective Order to Govern Negotiations Under Benchmark Condition, MB Docket No. 10-56 (February 17, 2012) (C-NBCU Letter).

³ C-NBCU Letter at 1-3. In its letter, C-NBCU maintains that, in order to provide Comparable Programming to a requesting OVD in accordance with the Benchmark Condition, NBCUniversal needs to review a full and unredacted copy of the underlying peer programming deal that is the basis for the OVD's request. C-NBCU claims that, without the opportunity to review the OVD's peer deal, NBCUniversal will be unable to determine whether the online video programming the OVD is seeking constitutes Comparable Programming or whether the OVD's request is based on economically equivalent terms. C-NBCU further claims that not having access to the peer programming deal would frustrate the negotiation process and may lead to arbitration, which would cause delay and increase the burdens and costs for both parties. *Id.*

Accordingly, it requests that the Media Bureau clarify that disclosure of a peer programming deal is required for OVDs seeking to trigger the Benchmark Condition and that the Bureau issue a Third Protective Order for Compliance in MB Docket No. 10-56, under which an OVD would disclose a peer programming deal to authorized representatives of NBCUniversal.⁴

In response to concerns that C-NBCU would have incentives to hinder competition in the growing OVD market, the Commission adopted conditions in the *C-NBCU Order* to ensure that OVDs would have non-discriminatory access to C-NBCU programming.⁵ To that end, an OVD may seek C-NBCU programming through either or both of the MVPD Price and the Benchmark Conditions.⁶ The Benchmark Condition obligates C-NBCU programmers to provide a requesting OVD with online video programming that is comparable to the online video programming the OVD has received from a qualifying peer programmer. The Comparable Programming⁷ that C-NBCU must provide to the OVD must be on terms that are “economic[ally] equivalent” to the terms that OVD has received from the peer provider.⁸ The Benchmark Condition further specifies that “[t]he economic equivalent should take account of . . . any difference in the value of the programming being sought relative to the Comparable Programming” and that “economic equivalent terms and conditions shall consist of the same basic Economic Model(s) for the Comparable Programming.”⁹ 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 *C-NBCU Order*.¹⁰

In its letter, C-NBCU maintains that, in order to provide Comparable Programming to a requesting OVD in accordance with the Benchmark Condition, NBCUniversal needs to review a full and unredacted copy of the underlying peer programming deal that is the basis for the OVD’s request.¹¹ C-NBCU therefore requests that the Bureau clarify that OVDs seeking online

⁴ C-NBCU Letter at 2. First and Second Protective Orders for Compliance previously were issued in this docket. *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Protective Order for Compliance, MB Docket No. 10-56, 26 FCC Rcd 2045 (MB, rel. Feb. 22, 2011); *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Second Protective Order for Compliance, MB Docket No. 10-56, 26 FCC Rcd 2052 (MB, rel. Feb. 22, 2011).

⁵ *C-NBCU Order*, 26 FCC Rcd at 4272-73, ¶¶ 86-87.

⁶ *See id.* at 4359-60, App. A., § IV, A.2.a & b.

⁷ 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.

⁸ *Id.* at 4360, App. A., § IV, A.2.b (ii).

⁹ *Id.*

¹⁰ *Id.* at 4360, App. A., § IV, A.3.

¹¹ C-NBCU Letter at 1-2.

video programming under the Benchmark Condition are required to provide a full and unredacted copy of a peer programming deal supporting the OVD's request.

C-NBCU also proposes that the Bureau issue a Third Protective Order for Compliance in MB Docket No. 10-56, under which OVDs would submit peer programming deals only to authorized representatives of NBCUniversal, subject to the confidentiality restrictions and conditions contained in the Protective Order. A proposed Third Protective Order submitted with C-NBCU's Letter suggests a process and timetable for (1) an OVD to provide to NBCUniversal with confidential notice of its intent to invoke the Benchmark Condition; (2) NBCUniversal representatives to execute and serve Acknowledgements of Confidentiality on the OVD and the Bureau; and (3) the disclosure of the peer deal by the OVD to the authorized representatives. In addition, C-NBCU's proposed Protective Order would permit access to a peer deal disclosed pursuant to the Benchmarking Condition to "NBCUniversal's (1) outside counsel, (2) outside experts, (3) in-house counsel, and (4) a limited number of essential business persons with executive management and negotiating responsibilities within the business unit(s) responsible for negotiating the licensing of content via particular business models that are implicated by a Benchmark request."¹²

C-NBCU further suggests that, for each NBCUniversal business unit entitled to access to the peer deal, the number of essential business persons likely would be three and would include the senior executive overseeing the unit, a mid-level executive, and the head of the division who would approve the deal.¹³ In-house counsel at NBCUniversal would designate these essential business persons on a case-by-case basis.¹⁴ C-NBCU states that such business persons would be authorized to use the information in the peer deal solely for purposes of responding to a specific OVD's request. C-NBCU argues that these proposals, which would depart from the Commission's standard protective orders previously issued in this docket by permitting in-house counsel and a limited number of in-house business persons involved in competitive decision-making to have access to confidential information, are justified by the particular context of the Benchmark Condition.¹⁵ The proposed Protective Order also provides that the 90-day negotiation period for online video programming requests under the Benchmark Condition would begin upon NBCUniversal's receipt of the OVD's peer deal.¹⁶

On February 23, 2012, counsel for Project Concord, Inc. (PCI) submitted a letter in response to the C-NBCU Letter. PCI objects to C-NBCU's proposed Third Protective Order and argues that the Bureau should issue a protective order consistent with the Model Protective Order contained in Appendix E of the C-NBCU Order.¹⁷ The Model Protective Order, which is

¹² *Id.* at 3- 4.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 5 & n.12.

¹⁶ *Id.* at 3.

¹⁷ Letter from Monica Desai, Counsel for PCI, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (February 23, 2012) (PCI Letter) (*citing C-NBCU Order*, Appendix E).

designed for the disclosure of confidential information in the context of arbitration, expressly limits disclosure to outside counsel and outside experts.¹⁸ PCI maintains that the “Commission understood the highly confidential nature of such peer agreements and, accordingly, in connection with the C-NBCU Order, provided a Model Protective Order to facilitate disclosure of the peer agreements while protecting the interests of all parties” and that “NBCU now seeks to re-litigate the terms” it agreed to in the C-NBCU Order.¹⁹ Additionally, on February 27, 2012, CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (Content Interests) collectively submitted a letter in MB Docket No. 10-56 objecting to C-NBCU’s request for disclosure of the peer agreements.²⁰ The Content Interests argue that the request is overbroad, appears to be counter to relevant competition laws, and, if granted, would have a chilling effect on future online video distribution deals. The Bureau will consider these letters as responses to this Public Notice.

The Bureau 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. Because the Benchmark Condition does not expressly specify the manner in which the disclosure will be made, however, we tentatively agree that clarification is needed with respect to the Benchmark Condition. Accordingly, we seek comment on C-NBCU’s request for clarification and the proposed Third Protective Order for Compliance included in the February 17, 2012 letter.²¹ Comments in response to this Public Notice are due on **March 27, 2012**, and replies are due on **April 3, 2012**.

This proceeding will be treated as “permit but disclose” for purposes of the Commission’s *ex parte* rules. See generally 47 C.F.R. §§ 1.1200-1.1216. As a result of the permit-but-disclose status of this proceeding, *ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission’s rules applicable to non-restricted proceedings.²² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers

¹⁸ C-NBCU Order, Appendix E.

¹⁹ PCI Letter at 1-2.

²⁰ Letter from Content Interests, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (February 27, 2012).

²¹ The C-NBCU letter can be accessed at <http://apps.fcc.gov/ecfs/document/view?id=7021861307>.

²² 47 C.F.R. § 1.1206.

where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). Written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Please place the case identifier, **MB Docket No. 10-56**, on all filings. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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For further information, contact Martha Heller of the Media Bureau, (202) 418-0426. Press inquiries should be directed to Janice Wise (202) 418-8165.

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