

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

COMCAST CORP., *et al.*,

Defendants.

No. 1:11-cv-00106-RJL

SECOND ANNUAL REPORT

The United States submits this report in response to the Court's September 1, 2011 Memorandum Order¹ (Dkt. 27) requesting the following information for the past year with respect to online video distributors ("OVDs"):

1. *How many OVDs initiated arbitration under the FCC Order² and the result of those arbitrations*

Since our First Annual Report, no OVDs have initiated arbitration under the FCC Order.

2. *How many OVDs appealed the result of any arbitration, and to which judicial bodies, if any, they appealed*

As reported in the First Annual Report (Dkt. 31), PCI appealed an arbitrator's decision to the Media Bureau of the Federal Communications Commission ("FCC") with respect to

¹ *United States et al. v. Comcast Corp. et al.*, 808 F. Supp. 2d 145, 149-50 (D.D.C. 2011).

² Memorandum Opinion & Order, *In re Application of Comcast Corp., General Elec. Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 F.C.C.R. 4238, 4364, App. A, § VII (2011) ("FCC Order"), available at < http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.doc >.

the arbitrator's denial of PCI's attorneys' fees and costs.³ Comcast also appealed the arbitrator's order.⁴ In November, after the First Annual Report, the Media Bureau released its order denying PCI's appeal and granting in part and denying in part Comcast's appeal.⁵ PCI, along with Comcast, has appealed the Media Bureau's order allowing Comcast to withhold programming that violates other contracts to the full Commission,⁶ which has not yet acted on the appeals. The FCC Order contains no time

³ Project Concord, Inc. Partial Appeal, *Project Concord, Inc. v. NBCUniversal Media, LLC*, Case No. 72 472 E 01147 11 (arbitration award), *In re Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, FCC MB Docket No. 10-56, at 7-8 (filed July 16, 2012), < <http://apps.fcc.gov/ecfs/document/view?id=7021990466> >.

⁴ NBCUniversal Media, LLC, Petition for *De Novo* Review, *Project Concord, Inc. v. NBCUniversal Media, LLC*, Case No. 72 472 E 01147 11 (arbitration award), *In re Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, FCC MB Docket No. 10-56, at 1-3 (filed July 30, 2012), < <http://apps.fcc.gov/ecfs/comment/view?id=6017098573> > (alleging arbitrator's decision went beyond requirements in FCC's Order to provide programming that is not covered by the Order and put it in breach of other contracts).

⁵ Media Bureau Order on Review, *In re Project Concord, Inc. v. NBCUniversal Media, LLC*, FCC MB Docket 10-56, 27 F.C.C.R. 15,109 (released Nov. 13, 2012), < http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-12-1958A1.pdf > (denying PCI attorneys' fees and costs, denying Comcast's effort to reduce scope of the covered programming, but granting Comcast relief for programming that violates other contracts). Under Section IV.E.1 of the FCC Order, the Media Bureau had extended its review for an additional sixty days. Media Bureau Order, *In re Project Concord, Inc. v. NBCUniversal Media, LLC*, FCC MB Docket No. 10-56, 27 F.C.C.R. 10,993 (Sept. 10, 2012) < http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-12-1468A1.pdf >.

⁶ Project Concord, Inc. Application for Review, *Project Concord, Inc. v. NBCUniversal Media, LLC*, Case No. 72 472 E 01147 11 (arbitration award), *In re Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, FCC MB Docket No. 10-56 (filed Dec. 13, 2012), < <http://apps.fcc.gov/ecfs/document/view?id=7022102399> > (appealing Media Bureau's decision to limit programming Comcast must provide to PCI in order to avoid violating contracts with others); NBCUniversal Media, LLC, Application for Review, *Project Concord, Inc. v. NBCUniversal Media, LLC*, Case No. 72 472 E 01147 11 (arbitration award), *In re Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, FCC MB Docket No. 10-56 (filed Dec. 13, 2012),

limit within which the Commission must act on the appeals, but it does require the claimant to “carry the relevant programming pending the FCC decision, subject to the terms and conditions of the arbitrator’s award.”⁷ Once rendered, the Commission’s decision will be appealable to a federal court of appeals.⁸

3. *How many OVDs sought permission from the Department of Justice to arbitrate under the Final Judgment and how many were granted permission*

In the past year, only one OVD – Sky Angel US LLC – requested permission from the Department of Justice to arbitrate under the Final Judgment. The Department did not grant it permission to arbitrate under the Final Judgment, deferring to the FCC process as contemplated by the Final Judgment (Dkt. 28, at IV(C)) and consistent with the expectations the Department previously described to the Court in its Competitive Impact Statement (Dkt. 4, at 32-33) and Supplemental Statement of the United States in Support of Entry of the Final Judgment (Dkt. 26, at 2-6) and also at the July 27, 2011 hearing.

4. *How many times the United States denied an OVD’s request to initiate arbitration under the Final Judgment, and how many of those denied subsequently elected to initiate arbitration under the FCC Order*

Since its First Annual Report, the Department has received one request from an OVD – Sky Angel – to arbitrate under the Final Judgment, which the Department subsequently denied. That OVD did not initiate arbitration proceedings under the FCC Order.

< <http://apps.fcc.gov/ecfs/document/view?id=7022101773> > (appealing FCC Media Bureau’s decision on scope of covered programming that it must provide to PCI).

⁷ FCC Order, 26 F.C.C.R. at 4369, App. A, § VII.E.1.

⁸ 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342-2344.

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Respectfully submitted,

/s/

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