substitute to address the harm that will occur here with the merger of the largest cable distributor and one of the largest programmers. Indeed, in the past, the Commission has adopted merger conditions to address the type of harms that would not be adequately resolved by the current program access and program carriage rules.[152]

By prescribing remedies beyond mere resort to the program access and program carriage rules, the Commission has acknowledged that, at times, the rules alone are an insufficient remedy. For example, in the DirectTV/News Corp merger,.the Commission imposed special commercial arbitration conditions that apply when negotiations for carriage of its regional sports networks failed.[153] Similarly, in the Adelphia/Time Warner merger, the Commission applied program access conditions requiring commercial arbitration of access disputes involving regional sports networks.[154] Both cases demonstrate that the Commission has recognized the potential for harms and discrimination can be so great as to need additional conditions. In this light, the mechanisms that BTV proposes to forestall discrimination against independent programmers are appropriate conditions.

Vertical integration of the cable industry is causing injury to independent content providers as they struggle, increasingly, against anticompetitive industry tactics. Approval of the

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[152] News Corp. at 676 App'x F; Adelphia at 8336 App'x B.

[153] News Corp. at 676 App'x F. The Commission first found it necessary to impose compliance with its program carriage and access rules as a separate condition to the merger. Id. at 677.

[154] Adelphia at 8336 App'x B; see also Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13, at *50 (Feb. 3, 1997) ("...Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable").

Application in this matter would serve only to continue a trend that is detrimental to a competitive and independent marketplace of ideas. To prevent the public interest harms detailed in this Petition, the Commission should deny the Application or impose significant conditions.

VI. IF THE COMMISSION GRANTS THE APPLICATION, IT MUST IMPOSE CONDITIONS TO PROTECT THE PUBLIC INTEREST.

A. The Commission has authority to impose conditions to address public interest considerations

Under Section 310(d) of the Communications Act, the Commission must find the merger in the public interest. If the Commission does not deny the Application, it must impose conditions to ensure that the public interest standard is met.

> Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction...Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act. Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.' Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits."[155]

After considering how a transaction may affect the promotion of competition as an element of its public interest analysis, the Commission may craft competition-specific remedies. The Commission has authority to "attach conditions to a transfer of licenses and authorizations in

[155] Applications of AT&T at ¶ 43 (2004).

order to ensure that the public interest is served by the transaction."[156] The Commission's ability to attach conditions to a license transfer application is broad and encompasses remedies beyond those available to the antitrust enforcement agencies.[157] The Commission may impose conditions which "in its judgment the public convenience and necessity may require" and are "not inconsistent with law as it may be necessary to carry out the provisions of the Act."[158]

The FCC could order, or the Transaction parties could agree to divest CNBC and other NBC news outlets in order to remedy the Transaction's harms. Absent such divestiture, the only way to protect independent business news programming is for the FCC to impose conditions that require Comcast-NBCU to provide BTV and other similarly situated independent programmers with the safeguards discussed below that will put them on an equal footing with CNBC.

1. <u>Neighborhooding of independent business news programming</u>.

The failure to neighborhood channels creates a distinct competitive advantage for channels within the neighborhood and a corresponding distinct disadvantage with respect to channels outside a neighborhood. As demonstrated in the Marx Report, the placement of BTV outside of CNBC's "channel neighborhood" decreases the probability that an MVPD subscriber watches BTV by [[[redacted]]] and decreases the hours spent watching BTV by [[[redacted]]]. Such decrease undermines BTV's ability to compete for views and advertisers.

[156] <u>AOL</u>, at 6556 ¶ 25.

[157] <u>Id</u>.

[158] <u>Id.</u> (<u>citing</u> 47 U.S.C. § 214(c); 47 U.S.C. § 303(r)).

In its public interest statement, Comcast and NBCU agreed voluntarily to add certain independent channels to its digital line-up once digital migration is complete in 2011.[159] BTV respectfully submits that such voluntary commitments are hollow unless such independent networks attain channel placement that puts them on a level playing field with similar content providers, particularly those owned by Comcast-NBCU. Therefore, BTV requests that if the Commission determines to grant the Application, it must condition the merger on neighborhooding (placing on contiguous, adjacent channels) of business news on all Comcast systems in all places in the channel line up where CNBC is located within six months of the Commission's decision or DOJ Consent Decree.

2. Competing business news programming must be carried on the same tier as CNBC.

Commission precedent recognizes the importance of carrying similar programming on the same cable program tier.[160] Failure to do so results in competitive harm for programming that is carried on a paid tier or higher-cost tier than other programming. In fact, BTV is only carried on cable systems' digital tiers, and where only analog service is available, BTV is not carried at all.[161] As a result, the Commission should require Comcast-NBCU to carry all competing unaffiliated business news networks on the same tier as CNBC and, as noted above, on contiguous, adjacent channels, wherever CNBC is carried.

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[159] See Application Public Interest Statement at 112.

[160] Fouce Amusement Enters., Inc. Licensee of Television Station KRCA, Riverside, California, For Carriage on Paragon Cable System Serving Garden Grove, Westminster, and Huntington Beach, California, and Paragon Cable, Modification of KRCA ADI Market for Must Carry Purposes, Memorandum Opinion and Order, 10 FCC Rcd 668 (1995).

3. Bloomberg's remedies are a reasonable response to the competitive harm posed by Comcast's control over the competitor with an 85% share of the business news market.

As previously set forth, the remedy simplest to implement and enforce from the perspective of the Commission would be the requirement that Comcast divest itself of its control over and any ownership interest in CNBC. Clearly, divestiture would eliminate any incentive of Comcast's to use its dominant position in the business news market to the detriment of its competitors. If the Commission were not to require Comcast's divestiture of CNBC, however, the alternative remedies proposed by Bloomberg are reasonable methods for the Commission to eliminate the harm to independent sources of news and information.

The proposed "neighborhooding" remedy -- requiring carriage of BTV and other business news networks in competition with CNBC (the "Business News Channels") by Comcast on channels located contiguously and adjacent to CNBC at each channel position where CNBC is located -- is grounded in the need to preserve independent, diverse sources of news and information programming. Bloomberg is the world's largest newsgathering organization, and BTV is the last major source of video news programming not affiliated either with an MVPD or a multi-channel programmer. Preservation of such diverse news sources is a fundamental piece of the architecture of the Commission's regulatory structure and merits use of a special remedy like neighborhooding to alleviate the harm that would otherwise be caused by Comcast's natural incentive to protect its hugely profitable CNBC channel from competition.

[161] "I conclude that carriage of CNBC on basic or expanded basic decreases the carriage rate for Bloomberg TV on that tier by close to two-thirds (63%) . . . ." Marx Report at 22.

Requiring carriage of particular channels, in this case the business news channels, in the interest of preservation of diverse, independent sources of news and information programming is hardly unprecedented. Although the "must carry" rules applied to over-the-air broadcast stations,[162] in ordering cable systems to carry the local broadcast signals, as well as provide carriage of leased access stations, Congress specifically intended to "assure the widest possible diversity of information sources are made available to the public."[163] Moreover, when it imposed the "must carry" obligation, Congress went further and required placement of channels on the same position as broadcast over-the-air,[164] demonstrating that Congress recognized channel placement as a similarly important objective. Indeed, Congress made findings that it would insist upon carriage and channel placement because "in the absence of rules **mandating carriage and channel positioning** ... some cable system operators have denied carriage or repositioned the carriage of some television stations."[165] Further, this was deemed necessary because a cable operator had a direct financial interest in promoting its own cable networks.[166] The Commission, in addition to imposing this requirement on cable MVPDs, has also determined to apply this to DBS operators,[167] with no significant difficulties encountered by either type of MVPD.

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[162] 47 U.S.C. § 534(a).

[163] H.R. Rep. No. 102-862 at 35 (1992).

[164] 47 U.S.C. § 534(b)(6).

[165] H.R. Rep. No. 102-862, Section 2(a)(10) (emphasis supplied).

[166] Id., at Section 2(a)(11).

[167] 47 C.F.R. §76.66.

More specifically, the importance of preserving competitive sources of news and information by requiring carriage of a competitive news channel has already been considered in the context of a merger between a cable MVPD and major programming distributor whose offerings included a major news service. When the Federal Trade Commission approved the merger of Time Warner, Inc. with Turner Broadcasting System in February 1997, the FTC expressly required Time Warner Cable to provide carriage to a competitor to Turner's CNN.[168]

Thus, it is evident that as an initial matter the requirement of carriage, including the particular placement of channels for the consumer, is a reasonable remedy which has already been employed. Taking the next step of carriage that involves neighborhooding, specifically including the requirement that Comcast carry the Business News Channels on all tiers where CNBC is carried, is a reasonable way of preventing the competitive harm that Comcast has the incentive to cause to the business news channels.

First, the reasonableness and feasibility of neighborhooding is demonstrated by the fact the MVPDs – even cable companies -- are already doing it. MVPDs regularly organize their channel placement around various genres, specifically including news, sports and children's programming. Specifically, the DirecTV and DISH channel line-up, as well as that of Verizon's FIOS and ATT's U-Verse are genre-based and they specifically cluster the business news programming of Bloomberg TV, CNBC, and Fox Business Network close to one-another. Comcast, too, is already creating neighborhoods on its systems. For example, on the Comcast

[168] Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13 (Feb. 3, 1997) ("...Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising Supported News and Information National Video Programming

system in the city of Washington, D.C., Comcast currently "neighborhoods" sports channels. It lines up together Comcast's own Versus (Channel 7), ESPN2 (Channel 8), ESPN (Channel 9) and Comcast Sports (Channel 10). This suggests that there is no technical impediment to neighborhooding.

Second, placing BTV and Fox Business on the same tier and on contiguous and adjacent channels to CNBC can be accomplished with a minimum of disruption to customers. An analysis of the channel changes made by Comcast to its own systems demonstrates that this occurs with sufficient frequency that it is not particularly disruptive to customers. In nearly every system analyzed, there has been at least one channel adjustment in the last five years. In six of the top ten DMA's, Comcast has made channel adjustments at differing frequencies throughout the past five years. In the New York market, the largest DMA, Comcast has frequently changed channel positions over the past three years, with instances of more than 50 channels changed at one time within the previous year. In other sizable markets, such as Miami (five instances where more than 30 channels changed in the past six years, with additional changes over seven years) and Baltimore (over 120 channels changed in August 2008; nearly 30 channels in April 2010), Comcast has changed channel positions multiple times within the past year. The history of Comcast's channel position adjustments throughout many of the largest markets clearly indicates that channel positions are adjustable and changes to channel positions are part of Comcast's operational practices. Moreover, in an increasingly digital environment,

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Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable").

these changes and rearrangements of channel positions can be accomplished with little technological difficulty.[169]

Third, Comcast cannot deny the value and importance of neighborhooding, in that Comcast itself is using neighborhooding to cause competitive harm to programmers in competition with them by denying competitive channels access to neighborhoods. In the Washington, D.C. system, for example, when Comcast introduced its own Versus sports network, it placed it on a channel adjacent to the two principal ESPN channels, plus its own Comcast Sports Network (channels 7-10), while leaving MASN's principal channel more than 30 channels away. To avoid the problem of Comcast's ability to use neighborhooding to cause competitive harm, Business News Channels must, therefore, be on contiguous and adjacent channels wherever CNBC is available for viewing on Comcast systems.

Fourth, there is no basis to the objection that Comcast makes about capacity restraints, especially given that nearly all Comcast systems (80% of the Comcast footprint) will have converted expanded basic service to digital by the end of 2010 and there are virtually no limitations on digital capacity.[170] In a digital system, it is technologically simple to ensure that channels are placed beside each other in all tiers. Thus, placement of existing Business News Channels on channels contiguous and adjacent to CNBC can be accomplished with a minimum

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[169] Data from Tribune Media Services. See charts in Exhibit 4 showing the channel changes by market by frequency of date.

[170] Application, at 18 n. 19; *see also* id. at 76-77 n.144.

of disruption. Indeed, in most of Comcast's top ten markets, there are even currently open channels within a few channel positions of CNBC.[171]

Thus, it is evident that Bloomberg's proposed remedy – neighborhooding of the Business News Channels with CNBC in all tiers where Comcast carries CNBC – is a reasonable remedy to constrain Comcast's ability to harm and discriminate against BTV. In the absence of the requirement that Comcast divest CNBC, this form of relief is the only means of preventing Comcast from using its competitive position to eliminate the last independent source of news programming.

4. The Commission should require mandatory carriage and non-discriminatory terms and conditions of carriage for independent news networks on Comcast digital platforms.

The Commission has long recognized the ability and incentive of vertically integrated programmers to discriminate against unaffiliated programming. In two decisions that involved the combination of a significant MVPD and the owner of significant broadcast and non-broadcast programming, the Commission adopted a condition to address concerns about unaffiliated programmers' ability to secure carriage. Specifically, in both Liberty Media/DirecTV and News Corp/Hughes Electronics Corp., the Commission adopted a condition that prohibited discrimination against unaffiliated programming services "in the selection, price, terms or conditions of carriage."

In this case, Comcast-NBCU will be subject to the Commission's program access rules. However, as discussed herein, the Commission's complaint rules do not address the needs of

[171] See Exhibit 4.

independent programmers in a timely or cost-efficient manner. Before the Commission approves the Transaction, it should adopt a specific condition that requires Comcast-NBCU to include nondiscriminatory terms and conditions of carriage of independent programmers so that anticompetitive conduct can be addressed in a timely, cost-effective manner, and, as with the other remedies, an accelerated dispute resolution system, as set forth in Exhibit 2.

5. The Commission must prohibit any restriction, limitation or disincentive on the ability of alternative business news networks to offer their content on other platforms, including the Internet.

a. Ban Limitations on TV Everywhere

TV Everywhere is a business model where access to programming is limited to authenticated cable system subscribers. For BTV, which makes its content available via television and the Internet, Comcast's proposed "TV Everywhere" could result in BTV being forced to decide between carriage on Comcast's systems and continuing to provide its highly valued content to its customers via the internet. This model could have a direct, serious impact on the ability of BTV viewers to access BTV programming. The Commission should adopt a condition that prohibits any restriction, limitation or disincentive on the ability of alternative business news networks to offer their content on other platforms, including the Internet.

b. Protect Internet Access

The Commission found that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice" [172] by degrading the quality of

[172] Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

transmission to customers using peer-to-peer networks. The recent D.C. Circuit decision determining that the FCC did not have authority over Comcast means that, until further regulation is imposed, Comcast could degrade signals of its users. BTV provides its content both via television and over the Internet. The vertical integration of Comcast with BTV's major competitor, CNBC increases the likelihood that such signal degradation could be used to negatively impact BTV's internet viewers. In the AOL-Time Warner merger, the Commission adopted a condition relating to anticompetitive use of the [instant messaging] function.[173] The Commission must adopt a similar condition to prevent Comcast-NBCU from reducing or degrading the quality of transmission of signals or feeds of competing business news networks on all Comcast platforms.

6. The Commission should prohibit Comcast from bundling advertising time on competing business news networks with advertising time on Comcast-owned networks.

The Commission has recognized that discrimination in advertising can impact diversity and that the Commission has jurisdiction to remedy such practices.[174] Comcast-NBCU's ability to bundle advertising time on competing networks with advertising on its own networks, solely by virtue of its carriage contracts with competing networks, results in an unfair competitive advantage that will ultimately starve BTV and other independent programmers from advertising

[173] "[O]ur condition gives AOL an incentive to interoperate by forbidding it from providing streaming video AIHS applications until it interoperates." AOL at 6626 ¶ 190. The Commission determined that "the risk of our not intervening now, however, is to risk the emergence of a significant new business needing regulation, a result we and Congress wish to avoid especially on the Internet and interactive services. AOL at 6626 ¶ 188.

[174] See Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd 5922 ¶ 49 n.100 (2008).

revenue they would achieve in the competitive market. In order for BTV and other independent programmers to survive after the proposed merger, the Commission must impose a condition prohibiting anticompetitive advertising bundling in order to ensure the merger is in the public interest.

Accordingly, the Commission should prohibit the sale of advertising on non-Comcast owned Business News Channels[175] such as BTV together with advertising on affiliated[176] Comcast networks as part of a bundled sale of advertising by Comcast without the consent of the competing Business News Channel. Similarly, the Commission should prohibit Comcast from offering discounts or other inducements to advertisers that are tied directly or indirectly to reducing or refraining from advertising purchases on any Business News Channel other than CNBC or any other similar Comcast Business News Channel. Only in this manner can Comcast be prevented from foreclosing competitors to Comcast's programming networks, specifically CNBC, from access to advertisers by eliminating BTV's ability to compete for advertisers on a level playing field.

[175] A "Business News Channel" shall be defined as a video programming network whose programming is focused on business and financial news reporting and analysis during the hours from 6:00 AM through 4:00 PM in the U.S. Eastern Time Zone, whenever U.S. securities and commodities exchanges are open and operating.

[176] Affiliate shall have the meaning set forth in 47 U.S.C. § 522(2).

7. The Commission should prohibit bundling for carriage of programming by Comcast

The Commission has recognized the potential harm from programming available for purchase through programmer-controlled packages.[177] As set forth in the Marx Report, the Transaction will provide Comcast with the incentive to discriminate against BTV by offering programming bundling opportunities involving CNBC. Accordingly, the Commission should prohibit Comcast from offering to any MVPD or requiring any MVPD to accept any combination of NBCU's and Comcast's network programming, as a condition of receiving more favorable licensing terms than Comcast offers on an "a la carte" basis.

[177] Tying Order; see also News Corp.

VII. CONCLUSION

Comcast and GE have failed to meet their burden to demonstrate that the Merger serves the public interest. The Commission must deny the Merger as presently proposed. In the alternative, if it determines to grant the Application, it can only do so with the imposition of the conditions set forth in Exhibit 2 to prevent the anti-competitive harm to BTV, the last independent source of news.

Respectfully submitted,

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(202) 457-6000

Dated: June 21, 2010

CERTIFICATE OF SERVICE

I, Jillian Gibson, a legal secretary at Patton Boggs LLP, hereby certify that on this 21st day of June, 2010, I caused true and correct copies of the foregoing Petition to Deny to be served by first-class mail on the following individuals:

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Exhibit 4

Summary
Comcast Channel Lineup Query Spreadsheets
Tuesday, June 22, 2010

Markets Queried:

DMA	Rank (2009-2010)
Baltimore, MD	27
Boston, MA	7
Chicago, IL	3
Denver, CO	16
Detroit, MI	11
Miami-Ft. Lauderdale, FL	17
Philadelphia, PA	4
Pittsburgh, PA	23
New York (NY & NJ)	1
San Francisco, CA	6
Seattle-Tacoma, WA	13
Washington, DC	9

Paragraph Summary:

In six of the top ten DMA's, Comcast has made channel adjustments at differing frequencies throughout the past five years. In the New York market, the largest DMA, Comcast has frequently changed channel positions over the past three years, with instances of more than 50 channels changed at one time within the previous year. In other sizable markets, such as Miami and Baltimore, Comcast has changed channel positions multiple times within the past year. The history of Comcast's channel position adjustments throughout many of the largest markets clearly indicates that channel positions are adjustable and changes to channel positions are part of Comcast's operational practices.

Summary of Results:

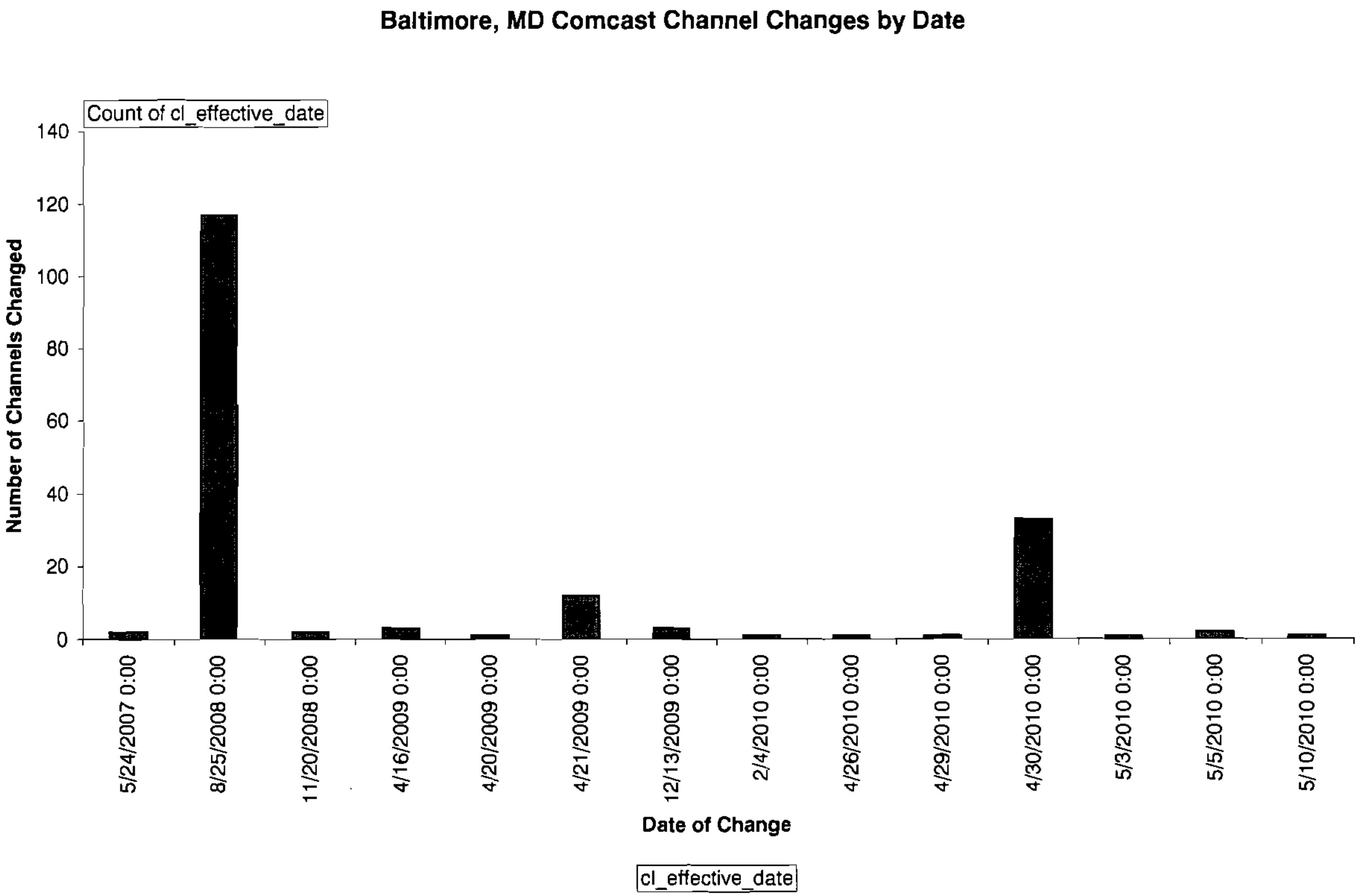
Markets with changes in Comcast lineup:

1) Baltimore, MD
    a. Approximately 120 channels changed on 8/25/2008
    b. Nearly 40 channels changed on 4/30/2010
2) Boston, MA
    a. System wide change in Brookline Community on 6/14/2006
    b. Small adjustments made throughout past 4 years
3) Chicago, IL
    a. More than 60 channels changed on 5/14/2003
    b. Small adjustments made throughout 2003-2008 (None after 2008)
4) Denver, CO
    a. Changes only made on specific dates (3 times in past year)
    b. System wide changes in April and June of 2010 (more than 100 channels changed)

5) Detroit, MI
    a. Small changes only made on specific dates (6 times in past 10 years)
    b. Largest number of changes at one time were 7 on 3/5/2010
6) Miami-Ft. Lauderdale, FL
    a. Three instances where more than 30 channels were changed over the past six years
    b. Adjustments to channel positions frequently made over the past 7 years
7) New York Market
    a. New York Section
        i. On June 2, 2010, nearly 60 channels were changed
        ii. Adjustments have been made periodically throughout last 3 years
        iii. On 12/5/2006 more than 70 channels changed
    b. New Jersey Part 2
        i. Five instances where more than 50 channels were changed in the past 6 years
        ii. Adjustments to channel lineup frequently made over the past 5+ years.
    c. New Jersey Part 3
        i. Three instances where more than 50 channels were changed in the past 6 years
        ii. Adjustments to channel lineup frequently made over the past 5+ years
    d. New Jersey Part 4
        i. Five instances of more than 50 channels being changed in the past 8 years
        ii. Changes in channel positions were frequently made over the past 3+ years
8) Philadelphia, PA
    a. More than 100 channels were changed at one time twice in the past 4 years
    b. Nearly 60 channels were changed on May 6, 2010
9) San Francisco, CA
    a. Only one channel changed on 4/27/2004 (Fox Sports en Espanol)
10) Seattle-Tacoma, WA
    a. System wide changes on 12/8/2009
11) Washington, DC
    a. Only changes made were HBO and SHOW on 1/5/2010

Markets with no changes in Comcast lineup based on available data:

1) New Jersey Part 1 (New York Market)
2) Pittsburgh, PA


Baltimore, MD Comcast Channel Changes by Date
Count of cl_effective_date
Number of Channels Changed
0
20
40
60
80
100
120
140
5/24/2007 0:00
8/25/2008 0:00
11/20/2008 0:00
4/16/2009 0:00
4/20/2009 0:00
4/21/2009 0:00
12/13/2009 0:00
2/4/2010 0:00
4/26/2010 0:00
4/29/2010 0:00
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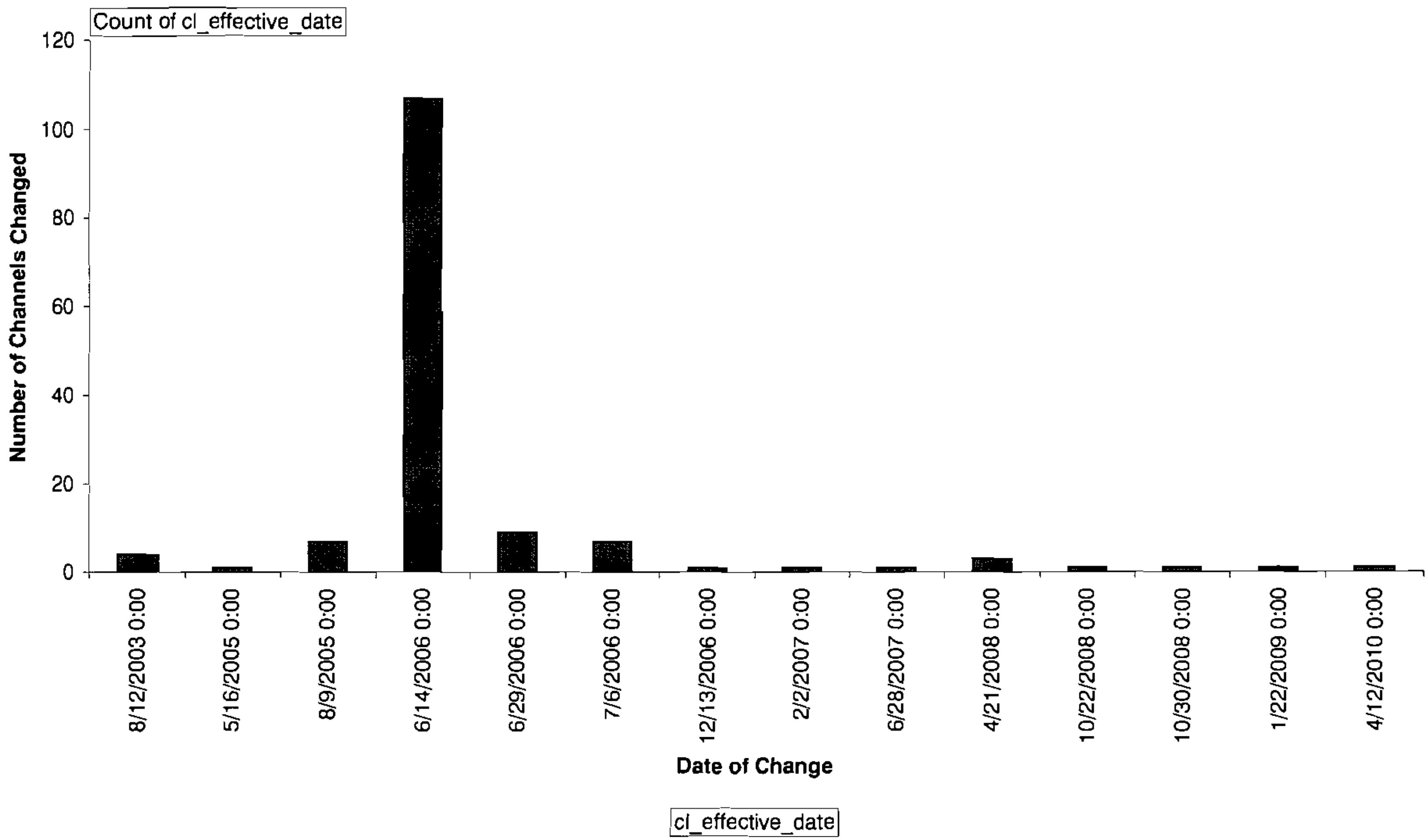
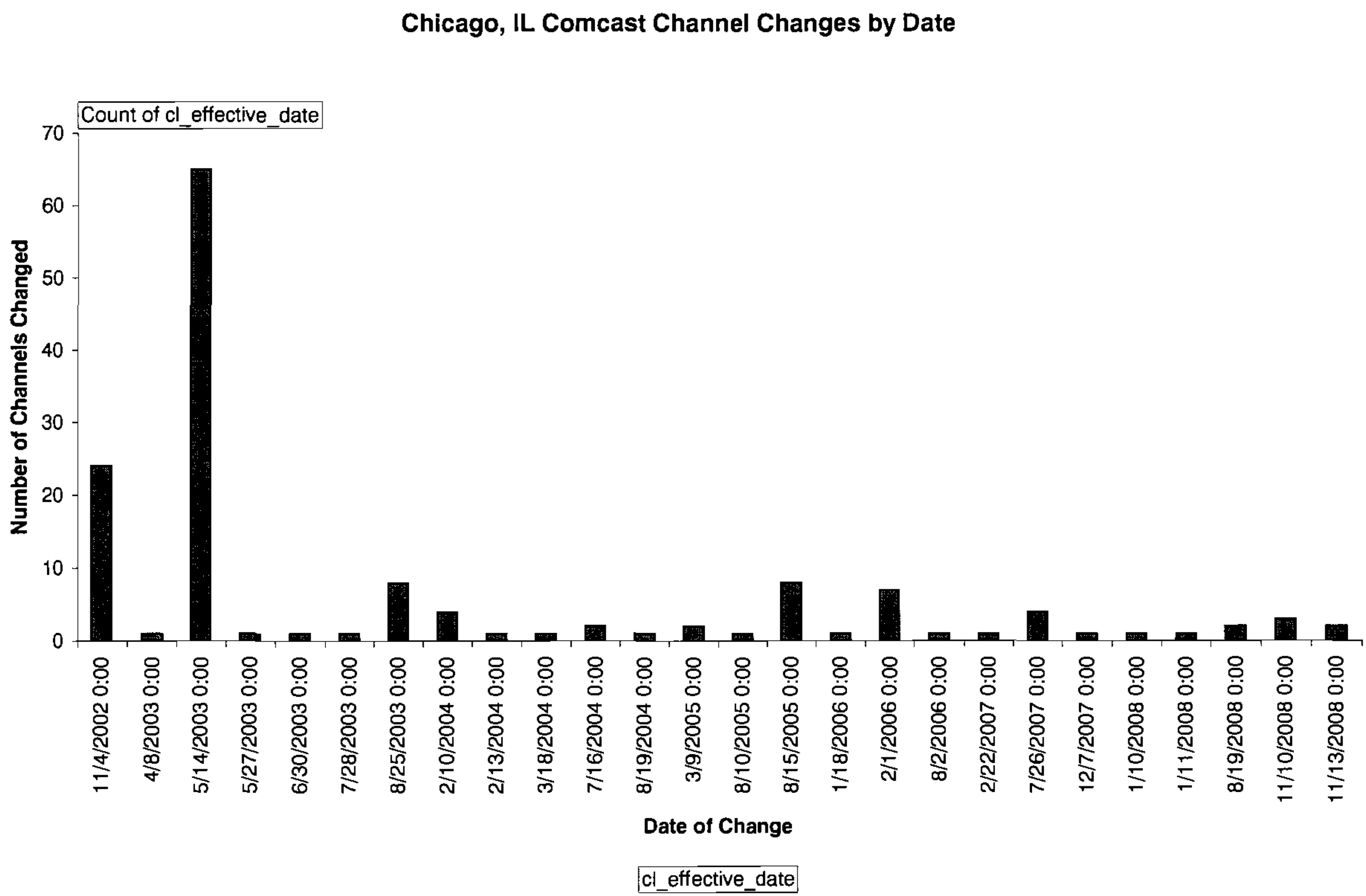
5/5/2010 0:00
5/10/2010 0:00
Date of Change
cl_effective_date

Boston Comcast Channel Changes by Date




Chicago, IL Comcast Channel Changes by Date
Count of cl_effective_date
Number of Channels Changed
0
10
20
30
40
50
60
70
11/4/2002 0:00
4/8/2003 0:00
5/14/2003 0:00
5/27/2003 0:00
6/30/2003 0:00
7/28/2003 0:00
8/25/2003 0:00
2/10/2004 0:00
2/13/2004 0:00
3/18/2004 0:00
7/16/2004 0:00
8/19/2004 0:00
3/9/2005 0:00
8/10/2005 0:00
8/15/2005 0:00
1/18/2006 0:00
2/1/2006 0:00
8/2/2006 0:00
2/22/2007 0:00
7/26/2007 0:00
12/7/2007 0:00
1/10/2008 0:00
1/11/2008 0:00
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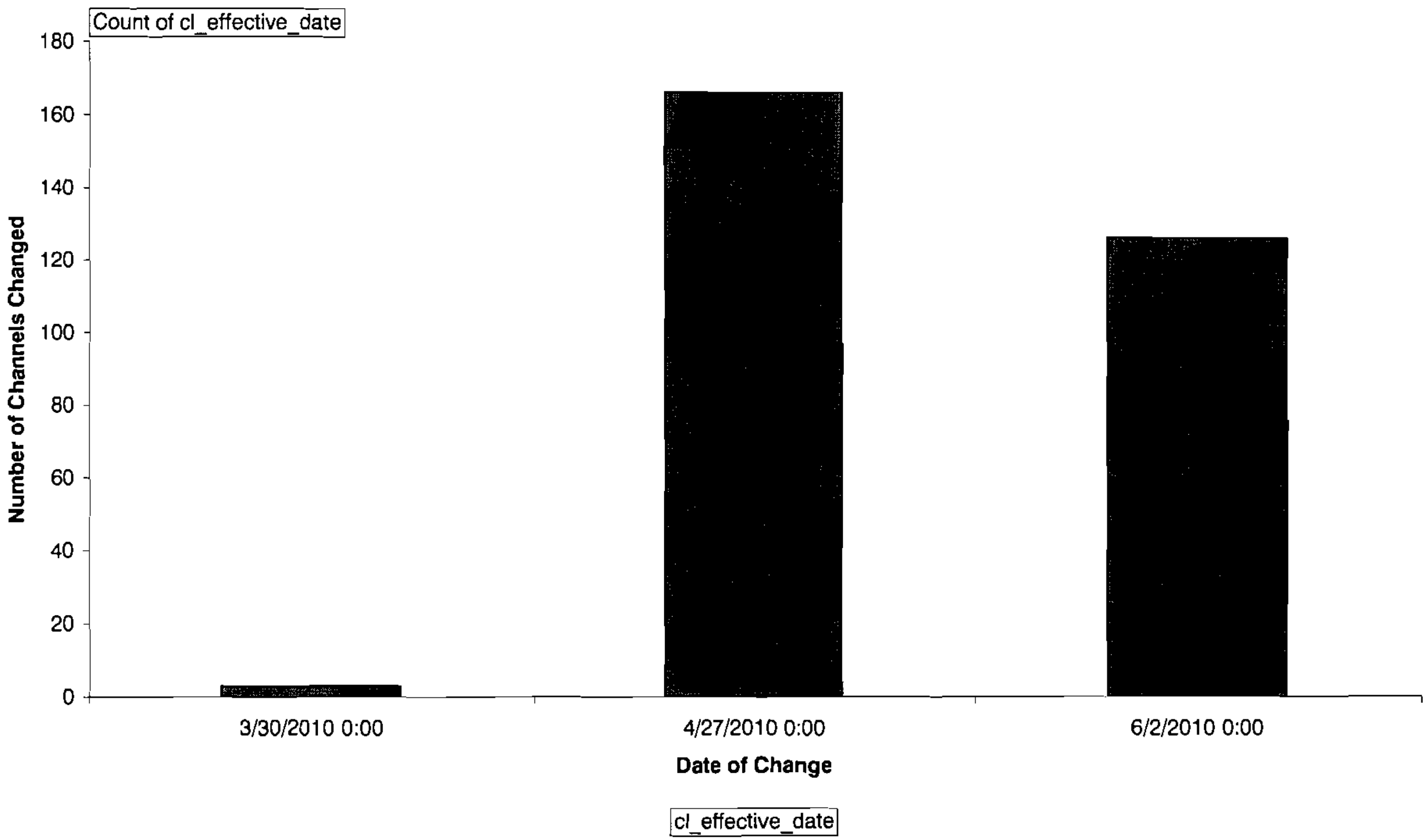
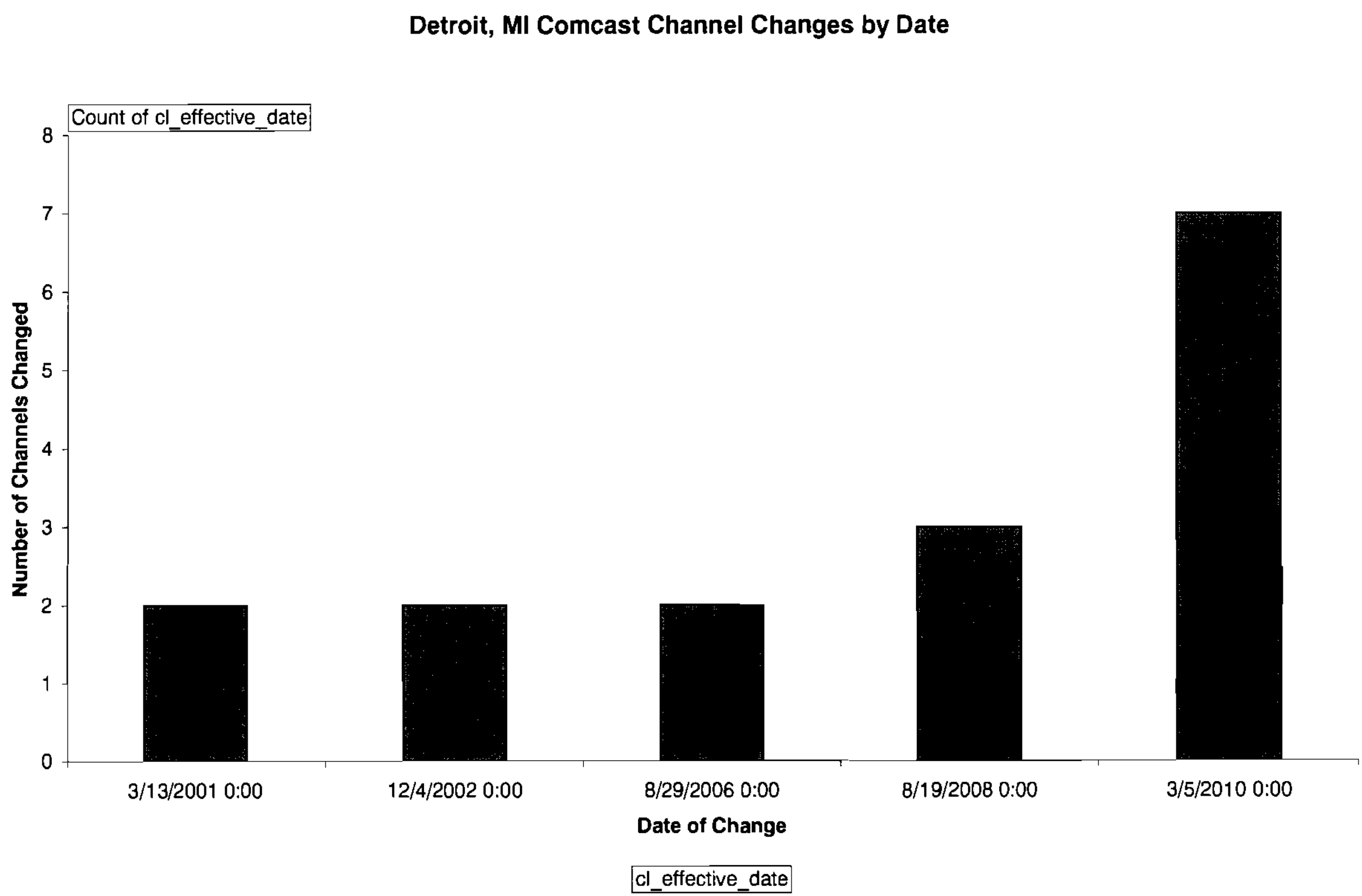
Date of Change
cl_effective_date

Denver, CO Comcast Channel Changes by Date




Detroit, MI Comcast Channel Changes by Date
Count of cl_effective_date
8
7
6
5
4
3
2
1
0
Number of Channels Changed
3/13/2001 0:00
12/4/2002 0:00
8/29/2006 0:00
8/19/2008 0:00
3/5/2010 0:00
Date of Change
cl_effective_date