obligate the merged entity's directors to police anticompetitive behavior. Officer and director fiduciary duties include the duty of loyalty, which has been described as follows:

> the duty of loyalty, in essence, "mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."[47]

Thus, as a matter of law, loyalty is owed to the company and its shareholders, not third parties. Therefore, the fiduciary duties of the merged entity's officers and directors provide no meaningful protection for the public from anticompetitive conduct by Comcast-NBCU.

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[47] Walt Disney Co. Derivative Litigation, 907 A.2d 693, 751 (Del. Ch. 2005) (hereinafter, "Disney") (emphasis added). Another fiduciary duty is that of due care. The fiduciary duty of due care requires that directors of a Delaware corporation "use that amount of care which ordinarily careful and prudent men would use in similar circumstances."

Delaware has codified the business judgment rule, 8 Del. C. § 141(a) which

> [C]reates a presumption that a director acted in good faith. In order to overcome that presumption, a plaintiff must prove an act of bad faith by a preponderance of the evidence. ...A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. Disney at 755 (footnotes omitted).

The standard is based on the concept of gross negligence. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). In Delaware, a violation of fiduciary duties of officers and directors must be proven in court using a "preponderance of the evidence" standard. Disney at 755. The process is hardly conducive to efficient resolution of a claim that GE-appointed directors failed in their fiduciary duties.

II. COMCAST-NBCU HAS THE ABILITY AND INCENTIVE TO PURSUE ANTICOMPETITIVE FORECLOSURE STRATEGIES AGAINST BLOOMBERG

The Opposition incorrectly states that Comcast-NBCU would not have the ability or incentive to foreclose BTV because (1) television business news is not the relevant antitrust market; (2) the Report prepared by Dr. Leslie Marx, former Chief Economist of the Commission (hereinafter, the "Marx Report") used incorrect values to calculate certain revenues and profits; and, (3) the economic literature does not support the conclusion that vertically integrated MVPDs discriminate against unaffiliated programming. The Opposition and its supporting documentation are incorrect on all of these points. BTV's Petition contained substantial evidence of a television business news market, and its conclusion is bolstered by further studies set forth in the Marx Rebuttal Report.[48] Dr. Marx demonstrates that her calculations are sound. Finally, Dr. Marx demonstrates that economic literature, and, indeed, the Israel-Katz Report itself,[49] support the conclusion that MVPDs discriminate against independent programming.[50]

A. Vertically Integrated MVPDs, Including Comcast, Discriminate Against Unaffiliated Programming.

Comcast's opposition incorrectly states "[t]here is no Evidence that Vertically Integrated MVPDs Discriminate Against Genre Programming."[51] It further claims, "the evidence does not support the hypothesis that vertically integrated MVPDs tend to deny carriage to, or otherwise disadvantage, networks with which they are not affiliated, particularly those that are 'similar' to

[48] Rebuttal Report by Leslie M. Marx (hereinafter "Marx Rebuttal Report") Exhibit 2 at 17-35, § D.1.

[49] The correct results of the Israel-Katz analysis become clear after correcting an error in coding. Marx Rebuttal Report at 13–14.

[50] Marx Rebuttal Report at 9-11.

[51] Opposition at 172.

integrated networks."[52] This conclusion is not only unsupported by the academic literature, but is not even supported by Comcast's economists. In their rebuttal report, Drs. Israel and Katz conclude:

> [M]any existing studies of carriage seek to answer the question: Is a vertically integrated MVPD more likely to carry the networks with which it is integrated than are other MVPDs? There is broad consensus in the literature that … the answer to this question is generally "yes"….[53]

In an attempt to show that Comcast does not behave like other vertically integrated cable operators, which tend to exclude rival program services, Drs. Israel and Katz perform a version of the analysis proposed by Austan Goolsbee in a 2007 media ownership study for the FCC. Goolsbee argues that in more competitive markets (i.e., those with a high DBS share), it is less likely to see distributors favor their own networks and discriminate against rival content. Drs. Israel and Katz purport to show that Comcast does the opposite, i.e., that it actually carries more of its networks in markets with a high DBS share (and less in those with a low DBS share), and argue that this implies Comcast is not behaving in a discriminatory manner. However, as Dr. Marx brought to the attention of the Department of Justice on July 29, 2010, in performing their empirical analysis, Drs. Israel and Katz make the error of defining the telephone company entry into the MVPD market ("telco") share to be "missing" rather than zero in locations where there is no telco presence, and then used a statistical package that automatically omitted any observations that are missing. As a result, the regression they originally reported (Table VI.1)

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[52] Id.

[53] Comcast Opposition, Exhibit 2, Israel and Katz, Economic Analysis of the Proposed Comcast-NBCU-GE Transaction, at 110-112 (July 21, 2010) (hereinafter, "Israel-Katz Rebuttal").

was based only on markets with no telco entry, which one would expect to be systematically different from markets with telco entry. When this mistake is corrected, the sample size increases from 5,335 observations to 43,870 observations (increasing the sample by 87%), and the regression coefficient that is the basis for Drs. Israel and Katz's original conclusion is no longer statistically significant.

After Dr. Marx noted the coding error and the significantly different results derived from corrected coding, Comcast filed an amended regression with the Commission on August 13, 2010. As Dr. Marx had discovered, correctly coding the regression analysis to include the telco_share variable yields opposite results.[54]

Drs. Israel and Katz's uncorrected results yielded a positive and significant Comcast_dbtelco coefficient and a negative Comcast coefficient.[55] They argued that these coefficients demonstrated that there was no evidence of anticompetitive carriage decisions by Comcast. As the Marx Rebuttal Report shows, when one allows for separate effects of DBS and telco shares, rather than combining them, the relevant telco coefficient is negative and significant, which Goolsbee's analysis would view as evidence of "the anti-competitive explanation of [Comcast's] propensity to carry their own networks."[56]

Drs. Israel and Katz's August 13, 2010 supplemental analysis, correcting the coding error, thoroughly undermines their original opinion and supports fully Dr. Marx's report. Drs. Israel and Katz now transparently attempt to obfuscate. Their own corrected analysis

[54] Marx Rebuttal Report at 12-14.

[55] Israel-Katz Rebuttal, ¶ 146.

[56] Marx Rebuttal Report at 4.

demonstrates "that Comcast engages in strategic foreclosure, with data pointing to the anticompetitive explanation for their propensity to carry their own networks."[57] Rather than acknowledge the opposite results that a correct analysis yields, Drs. Israel and Katz claim that they show "there is not a robust, stable relationship between rival MVPD's share in a DMA and Comcast's carriage rate of its own networks."[58] It is difficult to comprehend how correcting an incorrect calculation leads to a result that is not "robust." Each of Drs. Israel and Katz's analyses in fact demonstrate that "Comcast would have an incentive to exclude rival networks as it favors its own affiliated networks."[59]

B. Bloomberg's Economic Report Provided Substantial Evidence of a Business News Market.

In the Economic Report prepared in support of the Petition,[60] Bloomberg's economist, Dr. Marx, presented significant evidence supporting the finding of a business news market as the relevant market for antitrust analysis. Specifically, the Marx Report provides an extensive review of qualitative evidence showing business news networks are viewed as substitutes by consumers, advertisers, distributors, and industry insiders. The Marx Report included two empirical studies – a demand-side substitutability analysis and a critical loss analysis – that support a business news market definition.[61] The Marx Report demonstrates that business news networks have no close substitutes with respect to content, appearance, or audience.

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[57] Id. at 14.

[58] Letter from Michael H. Hammer, Counsel for Comcast Corp to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 13, 2010).

[59] Marx Rebuttal Report at 16.

[60] Petition, Exhibit 3 (hereinafter "Marx Report").

[61] Marx Report at 22-23.

- Viewers can immediately discern the unique features of business news and realize that they are not available anywhere else. These features include streaming stock, futures and currency prices, prices on foreign exchanges, interviews with business leaders, in-depth coverage of business news, and an intense focus on the economy and the stories that move markets.
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- Business news channels command a premium for advertising during peak business news hours – e.g., before the opening bell of the stock market.
- Fox and NBC felt business news was so different from general cable news that each created separate channels for both.
- Smaller MVPDs that are capacity constrained typically carry either CNBC or BTV, but not both, because they regard them as interchangeable and substitutable in the minds of their viewers.
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- CNBC and BTV routinely compete against each other over on-air personalities and production people, as well as for guests and interviews.
- People like Jeff Zucker and Rupert Murdoch have recognized in statements they have made to the press that business news is a separate market.
- From a distribution perspective, Bloomberg's economist demonstrated that business news networks comprise a relevant economic market under the SSNIP test.

Comcast has presented no credible evidence that refutes Dr. Marx's conclusion that business news is a relevant antitrust market. The Marx Rebuttal Report refutes the straw man arguments made in the Opposition.

First, Comcast's suggestion in the Opposition that Dr. Marx's analysis is "flawed" reflects a misunderstanding of the antitrust market definition. The market definition considers the degree to which consumers would continue to purchase a product if a hypothetical monopolist raised its prices. As Dr. Marx explains in her rebuttal, substitution away from the

hypothetical monopolist's product can be direct or indirect.[62] In the case of indirect substitution, an MVPD would raise its price in response to an increase in the cost of a business news network, with subscribers potentially substituting away from the MVPD's more expensive service.[63] In the case of direct substitution, the MVPD would potentially decide not to carry a business news network in response to a price increase.[64]

Dr. Marx's analysis of MVPD carriage decisions directly addresses direct substitution effects and, contrary to Comcast's assertion, is relevant to the market definition. The probit analysis Dr. Marx performed shows that business news networks are substitutes for one another from the perspective of distributors. This is indicated in Dr. Marx's probit analysis by a significant negative coefficient on carriage of BTV as an explanatory variable for the carriage of CNBC and a significant negative coefficient on carriage of CNBC as an explanatory variable for the carriage of BTV.[65] The analysis focuses on single-system cable operators to control for system size. Thus, the data show that small MVPDs are less likely to carry one business news channel if they carry the other.[66] The probit analysis shows a positive relation between CNBC and general news networks and between BTV and general news networks. This reflects the fact that general news networks are at least weaker substitutes for business news networks than

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[62] Marx Rebuttal Report at 17.

[63] Id.

[64] Marx Rebuttal Report 17-18.

[65] Id. at 19-21.

[66] Marx Rebuttal Report at 19. ("[F]or capacity-constrained cable operators, the strong substitutability of the two networks is stronger than the incentive to provide more networks and more variety for business news.").

business news networks are for each other.[67] As Dr. Marx shows,[68] performing a similar analysis, including children's networks, as suggested by Comcast's economists, does not change the result that CNBC and BTV are the most significant substitutes for each other.[69] Indeed, even adding all expanded basic networks does not change the result that CNBC and BTV are the most significant substitutes for each other.[70] The analysis clearly demonstrates the substitutability of CNBC and BTV.

Significantly, the analyses by Comcast's economists Drs. Israel and Katz on this point do not include BTV, which undermines their ability to opine on the substitutability between BTV and CNBC. First, they merely provide irrelevant regressions (CNBC regressed on Teen Nick,[71] and Disney regressed on Nickelodeon), which generate irrelevant results.

Second, Comcast's economists, Drs. Israel and Katz criticize Dr. Marx's use of the SSNIP test, despite the fact that Comcast's other economists conceded that "it is critical to show that a hypothetical monopolist of the candidate relevant market would pass the SSNIP test."[72] Comcast argues that Dr. Marx should have implemented the hypothetical monopolist analysis

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[67] Id. at 22-23. In fact, Dr. Marx relies, in part, on figures from the Israel-Katz Report to demonstrate these relationships. See id.

[68] Marx Rebuttal Report at 19-20.

[69] "[T]he relation between CNBC and Bloomberg TV remains negative and significant. Furthermore, all other relations with basic/expanded basic networks are positive or insignificant except those with Toon Disney and Cartoon Network, but even in these cases, the coefficient on CNBC is more than twice as large." Id. at 20.

[70] Id. at 21.

[71] Formerly "Nick Games & Sport" (or Nick GAS or just GAS) in early 2007, replaced in December, 2007, by "The N," replaced in September, 2009, by "Teen Nick".

[72] Opposition, Exhibit 1, Rosston and Topper, The Proposed Comcast-NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition at 31¶58 (citing Draft Revised Horizontal Merger Guidelines at 9-10.

using a bargaining model.[73] However, the analysis using a price-setting model and a bargaining model turn on essentially the same point: whether an MVPD will lose a sufficient number of subscribers if it does not carry any business news. For a price-setting model, the analysis asks whether an MVPD will lose a sufficient number of customers if it drops all business news that it is willing to pay at least a 10% higher price for business news. For a bargaining model, the analysis asks whether an MVPD's "disagreement payoff" if it drops all business news would be sufficiently reduced (from losing a sufficient number of customers) that the associated bargaining outcome would give the hypothetical monopolist at least a 10% higher price. The analysis provides an answer for the threshold on how many subscribers an MVPD must lose, which is {{ }} of the **price-setting model** (provided in the Marx Report) and {{ }} for the **bargaining model** (provided in the Marx's Rebuttal Report).[74] The threshold is achieved if business news viewers spending more than 18-20% of their total viewing time watching business news choose to cancel their subscriptions when their MVPD drops all business news. Meeting the threshold does not require that viewers with trivial business news viewership switch video providers, but rather it requires only that business news viewers who spend approximately one-fifth or more of their total viewing time watching business news react to the loss of that programming by switching or dropping MVPD service.[75] Therefore, under either a price-setting or a bargaining model, Comcast would not be constrained by potential loss of subscribers to discriminate against BTV in the provision of business news.

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[73] Opposition at 170.

[74] Marx Rebuttal Report at 25.

[75] Id. at 26.

The Rosston and Topper Report erred in stating that Dr. Marx included only three business news networks in her Report, and that television business news advertising is the relevant antitrust market. The Rosston and Topper Report criticizes Dr. Marx for failing to conduct a SSNIP test on the business news advertising market. In fact, Dr. Marx states that she did not conduct a study on the television business news advertising market because the data is not available. Moreover, Rosston and Topper's report criticizes Dr. Marx's analysis as too narrow, when the DOJ Guidelines expressly recognize that a relevant market may only consist of a few companies. Rosston and Topper's own Exhibit 12 supports the finding of a business news market when it found that only four channels — three sports and one military — has a higher median income and greater percentage of male viewers. The Israel/Katz study also supports the finding of a distinct business news audience when they found that CNBC had the greatest percentage of older viewers and male viewers. {{

[76]}}

In the Marx Rebuttal Report, Dr. Marx refutes Rosston and Topper's incorrect statements and further demonstrates that many advertisers agree that there are no close substitutes for advertising on business news networks. To demonstrate this point, Dr. Marx has included data showing that advertisers pay a premium to advertise on "prime time," which on business news stations corresponds with the opening bell of the U.S. stock market.[77] {{

[76] {{ }}

[77] Marx Rebuttal Report at 31-32.

}} Finally, Rosston and Topper incorrectly state Dr. Marx's premise with respect to bundled advertising, when Dr. Marx made the point that only a small discount would draw high-value advertisers to Comcast's networks. Since Comcast already uses bundling, its anticompetitive strategy is feasible. Once Comcast owns CNBC, it will have the incentive to protect it through bundling advertising.[78]

C. Comcast Has An Incentive to Foreclose BTV.

With respect to the analysis of Comcast's incentives to deny carriage to BTV, the key question is whether Comcast would lose sufficiently few BTV viewers if it dropped BTV that the gains from increased CNBC viewership would outweigh the lost subscriber fees. Drs. Israel and Katz correctly note that different parameter values result in different thresholds for the number of BTV viewers who would switch or drop MVPD service. The Marx Report used parameter

[78] Comcast alleges that FCC precedent does not support a business news market. Opposition at 168. That the Commission has not yet specifically defined a business news market does not preclude its doing so in the context of what is the largest media merger it has ever considered, especially when antitrust precedent accepts such more narrowly tailored programming markets. There is, however, ample antitrust precedent for the proposition that a media outlet serving a particular content niche can constitute a relevant antitrust market. DOJ's 2003 Univision consent order, which alleged a relevant market for Spanish-language radio, is a recent example, while the Supreme Court's NCAA decision similarly upheld a market definition focused on the distinct demand for college football telecasts. Department of Justice, Justice Department Requires Univision to Make Divestitures to Complete Acquisition of Hispanic Broadcasting Corporation, available at http://www.justice.gov/atr/public/press_releases/2003/200871.htm (last viewed 8/18/2010); National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S 85, 90-91 (1984). Comcast's argument misses the point that product market definition is a fact-specific exercise. Where, as here, viewers, distributors and advertisers have no comparable substitutes for a programming category like business news networks, that category comprises a relevant economic market.

values based on publicly available data. Drs. Israel and Katz recalculate the thresholds using Comcast-provided confidential values for two of the parameters, but they fail to also use the Comcast-provided confidential data for a third parameter. Using all three of the confidential values produces a threshold that remains above the switching value used by Drs. Israel and Katz to claim they achieved a reversal of the results. As a result of Comcast's omission, its analysis on this point should be disregarded.

Comcast also incorrectly asserts that Bloomberg provided "no data and no documents" to support its assertion that Comcast operates in DMAs "particularly important for business news."[79] Table 2 to the Marx Report shows that Bloomberg's losing access to Comcast subscribers would mean losing the majority of all potential subscribers in 6 of the top 15 DMAs. Moreover, of the 16 cities designated "Major national business centers" or higher in the Ranally city ratings, Comcast is the dominant MSO in 11.

Bloomberg has demonstrated that business news is a distinct market in which Comcast will have every competitive incentive to foreclose BTV. This potential for anticompetitive harm must be prevented by imposing the specific neighborhooding requirements requested by Bloomberg.[80]

III. NEIGHBORHOODING IS NECESSARY TO RESTRAIN COMCAST'S ANTICOMPETITIVE INCENTIVES

If the Commission determines to grant the Application, incentives to engage in anticompetitive behavior created by the Merger compel imposition of specific carriage

[79] Opposition at 165.

[80] Petition, Exhibit 2 at 1.

conditions to ameliorate the harm to the business news market. Bloomberg's proposed conditions, including neighborhooding, would address the harm to the business news market by requiring carriage of all existing business news networks, including BTV, on contiguous and adjacent channels on all tiers where CNBC is carried.[81]

CNBC is one of the most valuable assets that NBCU brings to the merger. CNBC is critical to the Transaction because of the significant profits it already brings.[82] As of March 2008, its profits were an estimated $333 million.[83] The Joint Venture plainly has a significant incentive to protect these profits – which are fueled by CNBC's longstanding dominance of the business news programming market – from competitors.

While the FCC is always concerned about a merger's impact on unaffiliated content, as described in Bloomberg's Petition, discrimination against BTV is different from discrimination

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[81] Bloomberg's BTV network is not the only channel that will suffer from the creation of strong incentives to engage in anticompetitive behavior upon the closing of the Merger. Accordingly, in addition to the neighborhooding condition with respect to existing business news networks like BTV and Fox Business, the FCC could require Comcast to neighborhood all networks that compete with NBC networks being acquired, specifically including CNBC, MSNBC, Bravo, Chiller, CNBC World, mun2, Oxygen Media, Sleuth, Syfy, Universal HD, USA Network, the Weather Channel, A&E Television Networks and ShopNBC. This is clearly a valid remedy for potential harms to any competitive independent network that arise out of this Transaction.

[82] Petition at 3; see also Application at 1 ("At the heart of NBCU's content production is the National Broadcasting Company ("NBC"), the nation's first television broadcast network and home of one of the crown jewels of NBCU, NBC News.").

[83] Jessi Hempel, CNBC Feels Your Pain, CNNMoney.com, Apr. 3, 2008, available at http://money.cnn.com/2008/03/31/news/companies/cnbc_pain.fortune/ (last viewed May 29, 2010) ("profits have increased 36% to $333 million since Hoffman joined, according to media research firm SNL Kagan"); Andrew Edgecliffe Johnson, CNBC Profits From A Crisis, FT.com, Jan. 27, 2010, available at http://cachef.ft.com/cms/s/0/58992544-0b77-11df-8232-00144feabdc0,s01=1.html?SID=google (last visited June 4, 2010) ("NBC Universal does not disclose such numbers, but CNBC is reputed to have become its second-most lucrative channel after USA Networks, with an operating profit of between $300m and $400m. As such, it serves as a microcosm of what Comcast sees in NBC Universal.").

against other unaffiliated channels. Bloomberg is the only remaining independent source of news and information. It has more editorial staff than the New York Times and the Wall Street Journal combined and more international bureaus than CNBC, CNN, and CBS combined. Bloomberg has invested significantly to become a premiere business news network. Fostering diverse voices among the nation's journalistic outlets is critical to the Commission's public interest review, i.e., the Commission must "ensur[e] that a diversity of voices is made available to the public."[84] The very real risk that the Joint Venture will not permit BTV to compete with CNBC through neighborhooding threatens the viability of BTV and the public interest.

Comcast has a history of discrimination against unaffiliated programming networks.[85] CNBC and BTV are fierce competitors.[86] With CNBC's unique status as the single largest business news network, this Transaction raises a concern that Comcast will use its vast cable distribution plant to favor this news channel over others. Preventing discrimination against unaffiliated, independent business news networks is inherently – and obviously – a Transaction-

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[84] General Motors Corp. and Hughes Elec. Corp. and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 483-84 ¶ 16 (2004) (emphasis added) (hereinafter "NewsCorp.").

[85] See NFL Enters. LLC v. Comcast Cable Comme'ns, LLC, Program Carriage Complaint, File No. CSR-7876-P (May 6, 2008); TCR Sports Broad. Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); *see also* Dish Network L.L.C. v. Comcast Corporation, et al., Arbitration Demand (Am. Arbitration Ass'n Jan. 27, 2010) The Tennis Channel, Inc., Program Carriage Complaint, File No. CSR-8258-P (Jan. 5, 2010); In re Wave Division Holdings, LLC, et al. v. Comcast Corp, et al., Program Carriage Complaint, CSR 8257-P. See also John Eggerton, *Stanford, San Bruno File Program Access Complaint Against Comcast*, BROADCASTING & CABLE, Dec. 29, 2009, available at <http://www.broadcastingcable.com/article/441950-Stanford_San-Bruno_File_Program_Access_Complaint_Against_Comcast.php>.

[86] ||

|| See Declaration of Gregory Babyak, Exhibit 1.

specific concern. The most narrowly tailored remedy to address this Transaction-specific concern is to require the Joint Venture to put their business news competitors adjacent to CNBC, wherever CNBC appears, so that consumers have a reasonable opportunity to choose between them. For these reasons, the neighborhooding[87] condition proposed by Bloomberg, i.e., carriage of all existing business news networks, including BTV, on contiguous and adjacent channels on all tiers where CNBC is carried, is the appropriate remedy to ensure that this Transaction is in the public interest.

A. Absent the Transaction, Comcast Would Have Had the Incentive to Neighborhood Bloomberg.

Despite Comcast's general history of discrimination against unaffiliated programming networks, Comcast would have had an incentive to neighborhood BTV with other news networks but for the Transaction. As a result of the Transaction, Comcast will become affiliated with a business news channel. Absent that affiliation, Comcast would have had a natural incentive to neighborhood Bloomberg for at least two reasons. First, as MVPDs transition to digital systems, the general trend is to locate programming of the same genre on adjacent channels. Newer U.S. MVPDs that use satellite and telecommunications based facilities, including DirecTV, Dish, FiOS, and U-verse, place children's programming, shopping, cooking, business news, and 24-hour cable news channels in the same channel neighborhoods.[88] Time Warner Cable is likewise placing channels in genre-based neighborhoods as it transitions to digital technology.[89]

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[87] See Bloomberg Petition at 29 ("'Neighborhooding' is the industry practice of placing channels of the same genre adjacent to one another in the system's channel line-up.").

[88] See DirecTV Channel Lineup, available at http://www.directv.com/DTVAPP/epg/theGuide.jsp; Dish Network Channel Lineup, available at http://www.dishnetwork.com/downloads/Channel-Lineup/StandardHDChannelGuide.pdf;

But for the merger, Comcast, too, would have had incentive to follow this trend and neighborhood BTV with CNBC and other business news channels. Indeed, clustering programming choices in genre-based neighborhoods is beneficial to consumers. First, it makes searching for programming easier. CNBC and Bloomberg also provide differing viewpoints and services to a highly valuable and sought-after subscriber segment.[90] Although both offer business news, they provide different opinions and viewpoints so as to create a choice for viewers.

Without an incentive to favor CNBC over BTV, it would have been advantageous for Comcast to neighborhood CNBC and BTV. The placement of the channels in the same neighborhood would have increased competition between the two channels, increasing Comcast's leverage in carriage negotiations with CNBC. If there are two competitive, well-known business news channels, it increases an operator's ability to negotiate favorable terms with one of the channels. Even if there is a disagreement with one channel, Comcast would still be able to serve viewer demand for business news with the remaining channel. There is no question that neighborhooding would make BTV more competitive.

On European systems where neighborhooding has been implemented, BTV provides significant competition to CNBC.

Verizon FiOS Channel Lineup, available at http://www22.verizon.com/Residential/FiOSTV/ChannelLineup/ChannelLineup.htm?zipCode=22039; AT&T U-Verse Channel Lineup, available at http://www.att.com/u-verse/.

[89] See Bloomberg Petition at 29 n.97; see also Marx Report at 28-29.

[90] The stiff competition for on-the-air talent that exists among CNBC, BTV and Fox Business News, demonstrates the competitive nature of the business news market. See Exhibit 1.

WEEKLY VIEWERS ON NEIGHBORHOODED EUROPEAN SYSTEMS (Table 1)

	Bloomberg weekly viewers	CNBC weekly viewers
France	317,000	235,000
Germany	867,000	646,000
Italy	303,000	313,000
Spain	182,000	195,000
UK	418,000	479,000

Source: EMS

Similarly, on U.S. satellite systems where channels are neighborhooded, the competitive constraint imposed by BTV on CNBC is significantly enhanced.

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As noted by MASN, itself a victim of Comcast's anticompetitive practices, "When a particular network is many channels away from the cluster of related programming, viewers that 'hover' around the cluster are much less likely to navigate to the outlying channel. This behavior can have a substantial effect on a network's viewership, ratings, and advertising revenue."[91]

[91] Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, MB Docket No. 10-56, at 5 (June 21, 2010).

B. The Applicants' Contention that Vertically Integrated MVPDs Do Not Discriminate Using Channel Placement Decisions Is Belied by the Record Evidence that Such Practices Would be Profitable.

Bloomberg asserted "that integrated MVPDs have historically favored their own networks to the detriment of unaffiliated networks serving similar audiences."[92] Comcast disputes this claim, arguing, "the evidence does not support the hypothesis that vertically integrated MVPDs tend to deny carriage to, or otherwise disadvantage, networks with which they are not affiliated, particularly those that are 'similar' to integrated networks."[93] As Dr. Marx points out, Comcast's conclusion is not only wholly unsupported by the academic literature, it is not even supported by Comcast's economists. In their rebuttal report, Drs. Israel and Katz conclude:

> [M]any existing studies of carriage seek to answer the question: Is a vertically integrated MVPD more likely to carry the networks with which it is integrated than are other MVPDs? There is broad consensus in the literature that … the answer to this question is generally 'yes'….[94]

While the Applicants also argue that such a practice would be unprofitable, findings of Congress, the Commission, other economists, and Comcast's past practices show otherwise. Congress found that "[a] cable system has a direct financial interest in promoting those channels on which it sells advertising or owns programming… there is an economic incentive for cable systems to deny carriage to [competing] local broadcast signals, or to reposition broadcast

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[92] Opposition at 167.

[93] Id. at 172.

[94] Israel-Katz Report at 142.

signals to disadvantageous channel positions, or both."[95] The Commission, too, was likewise unequivocal. "[V]ertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[96] Dr. Marx's analysis supports the findings of Congress and the Commission.

> The evidence from the empirical industrial organization literature that vertically integrated MVPDs use denial of access to the most favorable program tier and denial of carriage to disadvantage non-integrated programmers that compete with their vertically integrated programmers suggests that Comcast may have an incentive to devalue non-integrated programming to reduce competition for its integrated programming, with potential harm to consumers and competition. In particular, the literature supports that Comcast will have the incentive and ability to take actions aimed at competitors to CNBC and CNBC World, including BTV, that harm competition in TV business news programming. The diminishment or elimination of BTV as a competitor would allow Comcast-NBCU to increase the advertising rates it charges for CNBC and/or to increase the license fees it charges to MVPDs, with the expected negative consequences for consumers and advertisers.[97]

Accordingly, Dr. Marx concludes that the Transaction creates a significant incentive for Comcast to reduce BTV's competitive impact by withholding desirable channel locations near CNBC from BTV. The findings by Congress, the Commission, and the Commission's own former chief economist are supported by the record of Comcast's anticompetitive conduct. The Commission may look at Comcast's own past behavior in this regard. The Commission is well

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[95] Cable Television Consumer Protection and Competition Act of 1992, H.R. Rept. No. 102-628, LEXSEE 102 H RPT 628 at *93 (1992) (emphasis added); see also Bloomberg Petition at 30 (quoting Turner Broad. Sys. Inc. v. FCC, 910 F. Supp. 734, 753 (D.D.C. 1995) ("[i]nterlocking ownership of cable operation and programming interests" exacerbate this problem).

[96] Implementation of Sections 12 and 19 of the Cable Television Consumer Prot. and Competition Act of 1992, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

[97] Marx Report at 27.

familiar with Comcast's history of discriminatory channel placement decisions.[98] The numerous pending carriage complaints demonstrate that Comcast has refused to negotiate fairly with unaffiliated competing networks until it is forced to do so by the specter of litigation. In sports programming, for example, in the Washington, D.C. market, Comcast ensured that it placed its own regional Comcast Sports Channel beside ESPN in its channel line-up. Comcast likewise placed its national sports channel, Versus (Channel 7), immediately adjacent to sports channels ESPN-2 (Channel 8), ESPN (Channel 9), and the Comcast Sports Channel (Channel 10). Comcast relegated the principal feed of MASN, in which it owns no interest, to channel 42.[99]

In short, the Applicants' protestations that affiliation-based channel placement discrimination is not a threat to the public interest in this Transaction ring hollow when examined against the reality of independent analysis and the history of Comcast's anticompetitive behaviour. Only neighborhooding as proposed by Bloomberg can prevent such affiliate based channel discrimination.

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[98] NFL Enterprises LLC v. Comcast Cable Comm'ns, LLC, Program Carriage Complaint, ¶ 4, File No. CSR-7876-P (May 6, 2008); see also TCR Sports Broad. Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); The Tennis Channel, Inc., Program Carriage Complaint, File No. CSR-8258-P (Jan. 5, 2010).

[99] In Philadelphia, Comcast has prevented Dish Network and DirecTV from carrying Comcast's regional sports network (which include Phillies, Flyers and Sixers games) on their satellite systems. In July, Dish announced that it will file a complaint against Comcast. According to Dish, "Dish Network has requested access to deliver Comcast SportsNet Philadelphia to our customers; however Comcast has refused to enter into good-faith discussions. Comcast's refusal clearly demonstrates a disturbing pattern of discriminatory behavior". Dish: We will file Comcast complaint over sports, http://www.philly.com/inquirer/breaking/business_breaking/20100730_Dish__We_will_file_Comcast_complaint_over_sports.html (last viewed 8/18/2010).

C. The Applicants' Assertion that Bloomberg Seeks to Extract Superior and Unjustified Terms of Carriage Ignores the Standard Industry Practice and Public Interest Harms the Unconditioned Transaction Will Cause.

In an effort to sidestep the substance of Bloomberg's public interest arguments, the Applicants have taken to accusing Bloomberg of abusing this proceeding to "extract superior and unjustified terms of carriage."[100] First, the Applicants' argument is based on Bloomberg's current channel placement on Comcast systems (in a digital service tier rather than an expanded basic service tier), which is irrelevant. As Bloomberg described in its Petition, all digital MVPD systems neighborhood programming genres, including business news.[101] Comcast itself asserts that it is transitioning to all digital service for expanded basic.[102] After consummation of the Transaction, as demonstrated in the Petition, the Joint Venture will have an incentive and ability to benefit itself at Bloomberg's expense by withholding channel placement in the same genre neighborhood as CNBC. BTV's current channel position is unrelated to the Transaction's anticompetitive effect, which will grant Comcast-NBCU the ability and incentive to discriminate in order to protect CNBC.

Indeed, if Comcast were willing to state that it would make a voluntary commitment to place Bloomberg in a genre neighborhood with CNBC, it might alleviate some concerns. Comcast's unwillingness to state that it will do so is telling. Nowhere does Comcast dispute the

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[100] Opposition at 173-74.

[101] See Petition at 28-29.

[102] Comcast has stated in the Application that it is migrating expanded basic channels to digital (so-called "Project Cavalry" markets, which will be complete across approximately 80 percent of Comcast's footprint by the end of this year). Application at 18 n. 19. See also, e.g., Digital Cable Service with On Demand from Comcast, http://www.comcast.com/corporate/Learn/DigitalCable/digitalcable.html?fss=digital.

incentive that it will have to favor CNBC over Bloomberg, nor does Comcast-NBCU give any assurance it will not behave in such a manner. Comcast-NBCU's silence in this regard is deafening.

The Applicants blithely assert that the neighborhoodiug remedy is inappropriate because "Bloomberg is essentially demanding full equality with CNBC which it has not earned in the marketplace."[103] To the contrary, Bloomberg demands a fair opportunity to compete on a level playing field. Unilaterally isolating one's competitor iu a channel far removed from one's own dominant programmer (or, of course, burying the competitor) does not make for a fair marketplace.

Consumers benefit from robust competition in uews programming, including business news. BTV's business news coverage contains a substantial amount of political news and opinion, as well as other news events that impact the economy and the business world. Business news is important to consumers in the U.S. who iucreasiugly manage their own portfolios and depend upon being able to evaluate competing sources of information about developments that will affect their financial future.

The public interest will be protected if the Commission requires independeut and affiliated programmiug channels to compete with one another ou a level playing field. Like baseball, fair competition requires, at least, that both teams are on the field. You cannot play fairly if your competitor *is* trapped in the dugout.[104]

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[103] Opposition at 174.

[104] Ironically, baseball demonstrates how Comcast keeps its competition in the dugout. In the Washington and Baltimore markets, wheu Comcast could not retain the rights to carry the Baltimore Orioles on its own sports network, it specifically sought to exclude the carriage over

The Applicants seek to obfuscate the public interest harms the Transaction will cause absent appropriate conditions by arguing that Bloomberg "is attempting to use this transaction review as leverage to renegotiate its channel placement."[105] In fact, CNBC is not merely a "proven performer." CNBC has market dominance, and this Transaction will result in Comcast-NBCU having every possible incentive to unlawfully reduce competition and reinforce that dominance. Without the imposition of specific conditions such as neighborhooding as proposed, the Transaction will create significant anticompetitive incentives to harm competitors like BTV.[106] By imposing conditions, however, the Commission can maintain a level playing field and permit BTV and other business news channels to provide strong competition to CNBC, which, in turn, will improve the quality of service these channels provide to the public.

D. Pursuing a Vertical Foreclosure Strategy Against Bloomberg Would be Profitable.

The Applicants criticize Dr. Marx's vertical foreclosure model that measures gains to CNBC from a distribution-foreclosure strategy against losses to Comcast's cable operations from dropping Bloomberg.[107] They suggest further that denying carriage to unaffiliated networks would not foreclose that network from the majority of the MVPD marketplace.[108] Neither argument is supported by the facts.

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the Comcast MVPD system of the Washington Nationals and Baltimore Orioles on the competing sports network, MASN.

[105] Opposition at 175.

[106] See also Marx Report at 30.

[107] Opposition at 171.

[108] Id. at 164-165.

BTV's target audience is comprised principally of residents of large metropolitan areas, including Chicago, Philadelphia, Boston, Washington, D.C., San Francisco and New York. In ten of the top fifteen DMAs, Comcast is the dominant MVPD with control of 40 to 65 percent of the total pay television subscribers.[109] Without adequate distributions in these markets

[][110] Unless the Commission adequately conditions the merger, Comcast-NBCU will have a stranglehold over would-be business news challengers to CNBC. Moreover, []

]] Advertisers, however, typically purchase advertising time on a national basis. If Comcast declined to carry BTV, BTV would be less attractive to advertisers due to the reduced likelihood of reaching a national audience without Comcast's significant reach in major metropolitan areas. {{

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A foreclosure strategy against Bloomberg would thus []

]] The Applicants' argument that Dr. Marx's model does not support the profitability of such a strategy to Comcast-NBCU relies on arbitrarily substituting various values in her models.[111] If "correct" values are input and the CPM adjustment factors employed by Comcast's own economists, Drs. Israel and Katz are used,

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[109] See Marx Report at 15-16.

[110] Id. at 27 and 81.

[111] Opposition at 171.