

# Bloomberg

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October 7, 2011

Via Hand Delivery

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Dear Chairman Genachowski:

Bloomberg, L.P. (“Bloomberg”) hereby submits its opposition to Comcast’s Motion For Leave to File Surreply, which was filed on September 27, 2011.

Over eight months ago, the Commission released its Order approving with conditions the Comcast-NBCU merger. That Order only contained one condition concerning the carriage of unaffiliated programming that did not reflect a voluntary commitment on the part of Comcast. Specifically, the Commission required that “[i]f Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.” In its press release announcing its approval of the Comcast-NBCU merger, the Commission notably highlighted this news neighborhooding condition.

Following the Commission’s adoption of its Order, on behalf of Bloomberg I personally reached out to Comcast to discuss implementation of the news neighborhooding condition. Among other things, I offered to allow Comcast to place Bloomberg TV (“BTV”) in news neighborhoods in phases. Unfortunately, Comcast made it clear to me that it had no interest in discussing implementation of the condition, let alone in actually implementing it, because Comcast did not believe that the FCC had required it to do anything it wasn’t already doing.

In interpreting the condition to be meaningless, Comcast has taken the position that the phrase “now or in the future” actually means “in the future” and that “a significant number or percentage” of news channels actually refers to “all or a significant majority” of news channels. Additionally, while the Commission defines a “neighborhood” as “a significant number or percentage” of news channels, Comcast argues that whether the number or percentage of news channels is “significant” should be determined by whether they are in a neighborhood.

For these reasons, Bloomberg was forced to file a complaint at the Commission on June 13, 2011 in order to require Comcast to comply with the news neighborhooding condition. The authorized

pleading cycle set forth in the Commission's rules for this complaint proceeding concluded at the end of August: Comcast has filed its Answer, and Bloomberg has filed its Reply. Now, it is imperative that the Commission promptly resolve Bloomberg's Complaint.

Comcast's attempt to file a Surreply four weeks after the close of the pleading cycle set forth in the Commission's rules is part of a transparent pattern on the part of Comcast to forestall the day when it finally will be required to abide by the news neighborhooding condition. First, Comcast refused to implement the condition, forcing Bloomberg to come to the Commission and to participate in a time-consuming process. Next, Comcast asked the Commission to refer Bloomberg's Complaint to an Administrative Law Judge, a step that would delay the final resolution of Bloomberg's Complaint for as much as one to two years. And now, Comcast seeks to prolong the pleading cycle in the complaint proceeding and reargues points it lost in the merger review process, for example asserting the neighborhooding condition to which Comcast agreed impinges on its First Amendment rights.

The news neighborhooding condition is scheduled to be in effect for only seven years. Over ten percent of this time period has already passed and Comcast is still not abiding by the condition. This delay has already caused Bloomberg commercial harm. Each additional day of delay further damages our company.

More significantly, delay does damage to the public. The delay, and Comcast's assertions that the conditions have no real-world impact, raises fundamental questions about whether Comcast is required to abide by all of the conditions placed on the Comcast-NBCU merger or just those to which it voluntarily agreed ahead of time. More broadly, allowing Comcast to continue to ignore straightforward conditions raises questions about the potential effectiveness and meaning of future conditions in future mergers. The public is entitled to have the protections of the merger conditions that were deemed necessary to safeguard the public interest.

When the Commission adopted the Comcast-NBCU Order, Bloomberg applauded the Commission's commitment to preserving independent news outlets and remains grateful for the strong action that the Commission took to remedy an important harm associated with Comcast's acquisition of BTV's main competitor, CNBC. Unfortunately, Comcast has chosen to ignore the Commission by refusing to comply with the condition adopted in furtherance of those goals. It is therefore vital for the Commission to take swift action to resolve Bloomberg's Complaint.

Sincerely,



Daniel Doctoroff  
President and Chief Executive Officer  
Bloomberg L.P.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Complaint of

BLOOMBERG L.P.

v.

COMCAST CABLE COMMUNICATIONS, LLC

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) MB Docket No. 11-104  
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To: The Chief, Media Bureau Federal Communications Commission  
Bureau / Office

**OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY**

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
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In re Complaint of	)	
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BLOOMBERG L.P.	)	MB Docket No. 11-104
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v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC	)	
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To: The Chief, Media Bureau

**OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY**

Bloomberg L.P. (“Bloomberg”) hereby opposes the “Motion for Leave to File Surreply” filed September 27, 2011 by Comcast Cable Communications, LLC (“Comcast”).<sup>1</sup> In another transparent attempt to forestall compliance with the news neighborhooding condition contained in the Comcast-NBCU Merger Order, Comcast has sought leave to file a Surreply a full *four weeks* after the close of the pleading cycle established by the Commission’s rules. *See* 47 C.F.R. § 76.1302. Having already “run out the clock” on ten percent of the time during which the news neighborhooding condition is scheduled to be in effect, the Commission should not countenance Comcast’s latest delaying tactic. As explained below, Comcast’s Surreply principally repeats arguments that it already made in its Answer or raises new points that Comcast was required to raise in its Answer. Accordingly, Comcast’s motion does not demonstrate the “extraordinary circumstances” necessary to justify the filing of a Surreply, *see* 47 C.F.R. § 76.7(d), and should be

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<sup>1</sup> Bloomberg’s Opposition is timely filed. 47 C.F.R. § 1.45(b).

denied.<sup>2</sup> The Commission then should proceed to grant expeditiously the relief requested in Bloomberg's Complaint.

**I. BLOOMBERG DID NOT RAISE A NEW DEFINITION OF "SIGNIFICANT" IN ITS REPLY**

As its initial justification for seeking leave to file its Surreply, Comcast claims that Bloomberg introduced a new definition of the term "significant" in its Reply, one pegged to the "viewership, advertising revenues, and brand recognition" of news channels. *See* Surreply at ¶ 6. In advancing this argument, however, Comcast glaringly overlooks paragraph 77 and footnote 43 of Bloomberg's Complaint. That passage: (1) contains a definition of "significant" as "having or likely to have influence or effect" as well as "important;" and (2) discusses the fact that "the most widely viewed and most lucrative news channels are generally carried" in the channel groupings identified by Bloomberg. *See* Complaint at ¶ 77 & n.43. In its Answer, Comcast made no effort to rebut Bloomberg's argument that the presence of these news channels "reinforces the conclusion that these neighborhoods contain a significant number or percentage" of news channels. Complaint at ¶ 77. Accordingly, Comcast is not allowed a second bite at the apple to address this argument in a Surreply. *See In re Time Warner Entm't-Advance/Newhouse P'ship*, 26 FCC Rcd 3840, 3841 (MB 2011) (granting leave to file surreply to address specific claims that complainant "made for the first time in its Reply"); *Saunders v. District of Columbia*, 711 F. Supp. 2d 42, 60-61 (D.D.C. 2010) ("surreply may be filed only . . . to address new matters raised in a reply.") (citing *United States ex rel. Pogue v. Diabetes Treatment Ctrs. Of America*, 238 F. Supp. 2d 270, 276-77 (D.D.C. 2002)).

In any event, Bloomberg has consistently supported a numerical approach to defining a neighborhood in this complaint case. According to the definition set forth in the news

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<sup>2</sup> To the extent that the Commission decides to grant Comcast's motion, Bloomberg asks that the Commission consider the substantive responses to the Surreply contained in this Opposition. *See, e.g., In re Corridor Television, LLP v. DISH Network, LLC*, 26 FCC Rcd 7705, n.4 (MB 2011).

neighborhooding condition, any channel grouping containing a significant number *or* significant percentage of news channels qualifies as a neighborhood. Bloomberg has taken the position that a significant number of news channels is four or more and a significant percentage is thirty-three percent or more of such channels. *See, e.g.*, Complaint at ¶¶ 75-76. Consequently, Comcast's hyperbolic accusation that Bloomberg is advocating that the Commission "eschew a 'numerical' analysis" of what constitutes a neighborhood is utterly baseless. *See* Surreply at ¶ 6.

Bloomberg has also repeatedly stressed in this proceeding that an analysis of whether groupings of news channels are sufficiently large that they are not the products of chance is integral to determining the existence of a neighborhood. As noted by industry expert Susan Arnold, "the touchstone of . . . neighborhooding is whether the operator is intentionally placing channels of a similar genre near each other in an effort to increase overall viewership." Reply, Ex. F, ¶ 16. Moreover, given that the word "significant" is used in the definition of the word "neighborhood," and a "neighborhood" is a group of channels organized by genre, a definition of "significant" that differentiates an effort to group channels by genre from the random placement of channels is precisely the most logical definition for this use of "significant" and is the definition most consistent with the purpose of the news neighborhooding condition. And Bloomberg has conclusively demonstrated that groupings of at least four news channels in a block of five channel positions found on Comcast headends result from a deliberate decision to group news channels by genre. *See* Complaint at ¶ 75, Reply at 37.

Furthermore, even if the Commission does not utilize such a definition of "significant" in this proceeding, but instead chooses to look to the definition of significant as "having meaning" and "important," Bloomberg has also been clear that the Commission should use a numerical analysis. As Bloomberg previously explained, "[a] grouping of at least four news channels . . . is important because it is large enough to attract viewers in search of news programming," Reply at 15, a

proposition that Comcast nowhere disputes. The Commission, therefore, need not go any further to determine that the channel groupings identified by Bloomberg on Comcast headends contain a “significant number” of news channels.

It is certainly true, however, that the meaning of the word “significant” can have a qualitative aspect as well as a quantitative aspect, *see Hodges v. Abraham*, 253 F. Supp. 2d 846, 853 (D.S.C. 2002) (“Significance can be viewed in either quantitative or qualitative terms”), and that the channel groupings identified by Bloomberg are more important and have more influence because they include the most popular news channels in the cable market. For example, the five channels most commonly found in these groupings (CNN, HLN, Fox News, CNBC, and MSNBC) are the five most watched news channels in the United States and account for over █% of the annual revenues of national cable news networks. *See* Reply at 16. Indeed, Comcast itself maintained in its Answer that the Commission should assess the significance of a channel grouping “in part, on whether customers, encountering a given number of news channels in adjacent channel positions, would assume that other news channels will not be found elsewhere on the system.” Answer at ¶ 53. And as explained in Bloomberg’s Reply (and nowhere rebutted in Comcast’s Surreply), “to the extent that a viewer finds the four or five most widely known cable news channels in one place, he or she may very well not think to look for other news channels.” Reply at 17.

Comcast, moreover, argued in its Answer that the definition of a neighborhood must be determined in part by industry practices and standards. *See, e.g.*, Answer at ¶ 55. It is, therefore, relevant, under Comcast’s own view of the case, that channel groupings containing the most popular news channels are easily recognizable to those within the industry as neighborhoods. *See* Reply at 16. Although Bloomberg believes that it is the specific definition of the term neighborhood contained in the news neighborhooding condition that applies in this case rather than any definition used by industry professionals (if one even exists), *see* Reply at 31, Comcast argued in its Answer that

industry practices are relevant to how the Commission should interpret the term neighborhood. Accordingly, Bloomberg was entitled to respond to that point and argue in its Reply that industry practices bolster its position. *See* 47 C.F.R. § 76.1302(e) (“reply . . . shall be responsive to matters contained in the answer”). The declarations of James Trautman, Susan Arnold, Douglas Ferguson, David Goodfriend, and Don Mathison each support that argument.

Finally, it is worth noting that in contrast to the definitions of “significant” advanced by Bloomberg in this proceeding, Comcast clings in its Surreply to an approach that even its expert Michael Egan concedes is “unique.” Surreply, Ex. 1 at ¶ 5. Specifically, Mr. Egan now contends that “[a] ‘significant’ number of news channels is a number that reaches the threshold necessary to transform a news group into a news ‘neighborhood.’” Surreply, Ex. 1 at ¶ 6. Likewise, he contends that a “significant” percentage of news channels is a percentage that “transforms a group into a neighborhood, thereby achieving the MVPD’s objectives constituting the essence of a neighborhood.” *See id.* at ¶ 11. This, to say the least, is a novel way of interpreting a defined term (and an entirely circular approach as well). Rather than using a word in the definition (“significant”) to elucidate the meaning of the term being defined (“neighborhood”), Comcast is using the term being defined (“neighborhood”) to determine the meaning of a word in the term’s definition (“significant”). The Commission should reject Comcast’s invitation to utilize such an unusual (not to mention counterintuitive) interpretive methodology.

**II. THE ONLY WAY TO RESOLVE THIS CASE WITHOUT DECIDING WHETHER CERTAIN NETWORKS ARE NEWS CHANNELS IS TO RULE FOR BLOOMBERG UNDER THE “SIGNIFICANT NUMBER” PRONG OF THE NEIGHBORHOOD DEFINITION.**

In its Surreply, Comcast devotes considerable attention to discussing whether certain networks qualify as news channels. *See* Surreply at ¶¶ 22-32. Comcast already set forth the basis of its disagreement with Bloomberg on the categorization of particular channels in its Answer, and Bloomberg responded to Comcast’s arguments in its Reply. *See* Reply at 21-31. As a result, there is

no justification under the Commission's rules for allowing Comcast to have the last word on this issue in a Surreply.

Before turning to the merits of Comcast's arguments regarding the classification of news channels, it is important to note those areas of substantial importance where the parties agree. In this proceeding, Bloomberg has identified channel groupings on 369 headends that have at least four news channels but do not include BTV. *See* Complaint, Ex. G; Reply, Ex. H. Bloomberg has also listed all of the channels that it counted as news channels in these channel groupings. *See* Complaint, Ex. H; Reply, Ex. H. Significantly, Comcast agrees that all of the fifteen networks designated by Bloomberg as news channels that are found in these channel groupings are, in fact, news channels. These networks are CNN, HLN, CNBC, MSNBC, Fox News, C-SPAN, C-SPAN 2, C-SPAN 3, CLTV, New England Cable News, CTN Connecticut Public Affairs, News Channel 8, Northwest Cable News, Pennsylvania Cable Network, and Pittsburgh Cable News Channel. Moreover, in the interest of narrowing the scope of the issues disputed by the parties and expediting the resolution of its Complaint, Bloomberg is prepared to concede for purposes of this proceeding that The Weather Channel should be counted as a news channel.<sup>3</sup>

To be sure, the parties disagree about the proper categorization of many other networks. And while Comcast strongly urges the Commission to refrain from deciding whether these contested networks qualify as news channels, *see, e.g.*, Surreply at ¶ 22, Comcast ignores one critical consideration: the only way for the Commission to avoid making such determinations in this proceeding is to decide this case in favor of Bloomberg based on the "significant number" prong of

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<sup>3</sup> Bloomberg continues to believe that local weather feeds, such as Weatherscan Local, which principally display textual radar images and textual weather forecasts, do not qualify as news channels because, among other things, they do not provide "reporting and analysis" regarding "local news" in any conventional sense. *See* Reply at 26, 30, n.84.

the neighborhooding definition, which Bloomberg has consistently advocated in this case and is supported by substantial evidence, as has been demonstrated by Bloomberg.

As set forth above, there are two separate avenues by which a grouping of news channels can qualify as a neighborhood under the news neighborhooding condition: (1) by having a significant number of news channels; *or* (2) by having a significant percentage of news channels. Given that Comcast does not dispute that any of the channel groupings identified by Bloomberg contain at least four news channels, then all of the channel groupings on all 369 headends previously listed by Bloomberg would qualify as neighborhoods pursuant to the definition contained in the news neighborhooding condition if the Commission were to conclude that four is a “significant number” of news channels.<sup>4</sup> Thus, in that scenario, the Commission would not have to resolve the proper categorization of any of the disputed channels. Indeed, even if the Commission were to conclude that five (but not four) news channels is a significant number, Bloomberg would still prevail with respect to 347 headends based on the “significant number” prong of the neighborhood definition.<sup>5</sup>

Moving to the “significant percentage” prong of the neighborhood definition, as Bloomberg has previously articulated in response to Comcast, Bloomberg strongly disagrees with Comcast’s position that the phrase “significant percentage” should be interpreted to mean a “substantial majority” of news channels. *See* Surreply, Ex. 1 at ¶ 8. As Bloomberg explained in its Reply, the phrase “significant percentage” is generally not used in the law to refer to a majority, let alone a

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<sup>4</sup> In addition, groupings on fourteen additional headends would qualify as neighborhoods once the Weather Channel is counted as a news channel. *See* Reply at 30. These headends are listed in Exhibit A, and the news channels carried on those headends are listed in Exhibit B.

<sup>5</sup> If this were to occur, Bloomberg, in the interest of bringing this proceeding to a prompt conclusion, would commit to withdrawing its Complaint with respect to the remaining 37 headends (rather than requiring the Commission to determine whether the channel groupings on these headends qualify as neighborhoods because they contain a “significant percentage” of news channels).

“substantial majority.” *See* Reply at 19. Comcast does not dispute this fact, but rather asks the Commission to ignore the common usage of “significant percentage” in favor of a *sui generis* approach.<sup>6</sup> This request, however, is not consistent with the Commission precedent. *See, e.g., In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 20239, 20249 (2007) (finding “approximately 30 percent” to be “a significant percentage”); *In re Replacement of Part 90 by Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 14 FCC Rcd 8642, 8651 (1999) (finding 30 percent to be “a significant percentage”); *In re Application of Xenia Broad. Inc.*, 13 FCC Rcd 21714, 21720 (MB 1998) (finding 36.4 percent to be a “significant percentage”); *In re Applications of WNNE Licensee, Inc.*, 13 FCC Rcd 12677, 12691 (MB 1998) (finding thirty percent to be “a significant percentage”); *In re Telecommunications Services Inside Wiring*, 13 FCC Rcd 3659 (1997) (finding 33% to be “a significant percentage”); *In re Application of Pennino Broadcasting Corp.*, 12 FCC Rcd 10752, 10756 (1997) (finding 31.4% to be a “significant percentage”); *In re Application of Tri-Valley Broadcasters, Inc.*, 11 FCC Rcd 4719, 4721 (1996) (finding 29.2% to be a “significant percentage”). Had the Commission intended for the percentage prong of the neighborhood definition to require more than fifty percent of news channels, the Commission would have used the term “majority” rather than the term “significant percentage” in the news neighborhooding condition. And had the Commission intended for the percentage prong to require significantly more than fifty percent of news channels, the Commission would have used the term “substantial majority.”

Even if, however, the Commission were to agree with Comcast’s claims that (1) only ten or more channels is a “significant number” of news channels *and* (2) a “significant percentage” for purposes of the news neighborhooding condition is sixty percent or more, the Commission would

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<sup>6</sup> This is yet another example of Comcast’s disingenuous claimed basis for a surreply, when, in fact, Bloomberg was in its Reply addressing arguments from the Answer.

still be required to determine the appropriate categorization of the disputed channels in this proceeding. This is so because if the Commission were to side with Bloomberg and conclude that none of these channels were news channels, then there would be some headends where Comcast would have groupings of at least sixty percent of news channels that do not include BTV and where Bloomberg would thus still be entitled to relief.

Turning to the channels whose categorization is under dispute, while Bloomberg does not believe that it is necessary to recount in this pleading the points that it made about the disputed channels in its Reply, there are a few points made in Comcast's Surreply that should be addressed.

*First*, Comcast's allegation that Bloomberg excluded from its analysis English-language international news networks is incorrect. *See* Surreply at ¶ 26. Rather, Bloomberg counted these networks as news channels in its revised analysis, *see* Reply at n.80.

*Second*, Comcast's allegation that Bloomberg's experts did not review, on a network-by-network basis, the programming aired on the disputed networks is false. Rather, both David Goodfriend and Susan Arnold reviewed programming schedules for each of these networks. *See* Reply, Ex. C at ¶ 34, Ex. F at ¶ 28 .

*Third*, while Bloomberg has specifically identified each of its experts that reviewed the programming aired on the networks under dispute, Comcast has failed do so. Instead, Mr. Egan reports that three unidentified "cable industry programming and operations executives" categorized the programming in question. *See* Surreply, Ex. 1 at ¶ 12. The Commission must disregard such unsubstantiated hearsay, especially when it could be coming from Comcast employees.

*Fourth*, Comcast's contention that Comcast 100 does not air any programming before 1:00 PM in the Eastern Time Zone is incorrect. Comcast 100 airs paid programming between 6:00 AM

and 1:00 PM in the Eastern Time Zone, *see* Reply, Ex. C at ¶ 34, Ex. F at ¶ 28,<sup>7</sup> and it is, therefore, erroneous for Comcast to continue to maintain that Comcast 100 “focuses” on news programming between 6:00 AM and 4:00 PM in the Eastern Time Zone.

*Fifth*, while Comcast continues to argue half-heartedly that HD news networks, sports news networks, and foreign-language news networks should be counted as news channels, *see* Surreply at 22, the analyses conducted by its own experts do not include such networks as news channels. *See* Surreply, Ex. 1 at ¶ 17. Moreover, if one were to count all of these channels as news channels for purposes of the news neighborhooding condition, even the groupings of news channels present in Comcast’s Indiana experiment, would *not* have a “significant percentage” of news channels using the sixty-percent threshold advocated by Comcast. And because Comcast has conceded that these channel groupings are news neighborhoods, it is estopped from arguing in this proceeding that HD news networks, sports news networks, and foreign language news networks should count as news channels.<sup>8</sup>

*Sixth*, Comcast provides no meaningful rebuttal to Bloomberg’s textual argument that the phrase “reporting and analysis” applies to public affairs, business, and local news programming in the definition of a news channel. Rather, this rebuttal is provided in the expert declaration of Michael Egan, *see* Surreply at ¶ 21, whom Comcast has represented as an individual with expertise in the cable television industry, not the legal profession. As such, the Commission should disregard it. Moreover, Mr. Egan’s response falls wide of the mark. Given that reporting and analysis is the

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<sup>7</sup> *See, e.g.*, <http://tvlistings.zap2it.com/tvlistings/ZCSGrid.do?stnNum=55975&channel=100> (last visited Oct. 5, 2011).

<sup>8</sup> *See Contech Constr. Prods. v. Heierli*, 764 F. Supp. 2d 96, 106 (D.D.C. 2011) (“The doctrine of judicial estoppel bars a party from asserting a position in court proceedings that is clearly inconsistent with a position previously taken in the same... proceedings.”) (internal quotations omitted) (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 293-94 (5th Cir. 2004)).

hallmark of news, there is no reason to think that the Commission intended for a channel providing neither type of programming to qualify as a news channel. Indeed, reporting is such an elemental component of news that Bloomberg and others call those who perform this task “reporters”.

Moreover, Comcast offers no explanation for why the Commission would want to classify a channel about the history of business as a news channel, which would be the case if the phrase “reporting and analysis” did not apply to public affairs and business programming. *See* Reply at n.66.

Additionally, if Comcast is correct that the phrase “reporting and analysis” does not apply to “public affairs” or “business” programming, then a channel consisting of paid programming promoting various corporations would appear to qualify as a news channel under the Commission’s definition.

*Seventh*, while Bloomberg does not agree with many of the categorization decisions made by Comcast’s unidentified cable television executives, even were the Commission to concur with their analysis Bloomberg does not believe that the World multicast feeds and Current TV would qualify as news channels. A network’s programming is not “focused” on news programming between 6:00 AM and 4:00 PM if only a bare majority of its programming consists of news. To the extent that a network airs a substantial amount of programming that clearly does not constitute news, such as *POV: Kings of Pastry* and *Boxing Gym*, as well as movies such as *True Romance* and *Point Break*, *see, e.g., Surreply, Ex. 1, Attachments A & C*, it should not qualify as a news channel for purposes of the news neighborhooding condition. It is also worth noting that Comcast does not even include Current TV in the large grouping of news channels that is part of its Indiana experiment, groupings that Comcast concedes are news neighborhoods. Rather, it places Current TV next to *E!*, *Style*, and *TLC*.<sup>9</sup>

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<sup>9</sup> *See* XFINITY – VIEW NEW LINEUP, <http://www.comcast.com/xflinup/lineup/html> (last visited Oct. 3, 2011) (containing channel lineups for Logansport, Indiana; Peru, Indiana; and Wabash, Indiana).

**III. THE ARGUMENTS RAISED BY COMCAST IN ITS SURREPLY ADDRESSING BLOOMBERG'S ADVOCACY DURING THE MERGER PROCEEDING ARE REPETITIVE, WITHOUT MERIT, AND SHOULD BE DISREGARDED**

In its Reply, Bloomberg explained why its position here is consistent with its prior advocacy before the Commission in the Comcast-NBCU Merger proceeding. *See* Reply at 38-41. That section of the Reply was directly responsive to the claim set forth in Comcast's Answer that Bloomberg was trying to pull "a transparent bait-and-switch," *see* Answer at ¶ 61, and thus is allowed under the Commission's rules. *See* 47 C.F.R. § 76.1302(e) ("reply . . . shall be responsive to matters contained in the answer"). Consequently, the Commission should not grant leave to file a Surreply that repeats Comcast's arguments on this point solely so that Comcast can have the last word on the subject. *See In re Armstrong Utilities, Inc.*, 21 FCC Rcd 13475, n.3 (MB 2006) (granting a motion to strike a Surreply, in part, because it did "not raise any issues that were not already discussed in the original pleadings").

Regardless of whether the Commission chooses to accept Comcast's Surreply, Comcast's position has no merit. As explained in the Reply, Bloomberg sometimes used the term "neighborhood" during the Comcast-NBC Merger proceeding "as shorthand for 'putting *all* program channels in the same genre adjacent to one another in the channel lineup.'" *See* Reply at 41; Surreply at ¶ 15. Bloomberg did so because it was advocating for a condition that would have required Comcast to put *all* channels of a particular genre – business news – together. *See* Reply at 41. The Commission, however, did not adopt that definition of neighborhood in its Order. Rather, subsequent to all of the pleadings cited by Comcast, the Commission defined a neighborhood to be "a *significant number or percentage*" of news channels "substantially adjacent to one another in a system's channel lineup."<sup>10</sup> That is the definition applicable in this proceeding, and the argument that

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<sup>10</sup> *In re Applications of Comcast Corp., General Electric Co., and NBC Universal Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4358 (App. A, Sec. III.2) (2011).

Bloomberg is somehow estopped by its prior advocacy from invoking it here, *see* Surreply at 16, is absurd.

Moreover, Bloomberg made clear in its advocacy during the merger proceeding that a neighborhood could consist of only four channels of the same genre. *See* Reply at 39. While Comcast now complains that one of the examples cited by Bloomberg involved a four-channel sports neighborhood, *see* Surreply at n.18, that is beside the point. The neighborhood specifically mentioned by Bloomberg, which had Versus on Channel 7, ESPN2 on Channel 8, ESPN on Channel 9, and Comcast SportsNet on Channel 10, *see* Reply at 39, both had *four* sports channels and *did not include a majority* of the sports channels present on that headend. Bloomberg, therefore, could not have possibly conceded in the merger proceeding that a neighborhood either must have more than four channels of a particular genre or must contain the majority of channels in a particular genre (let alone all of them).

Additionally, Bloomberg never conceded in the merger proceeding that Comcast did not employ neighborhooding. Rather, Bloomberg specifically alleged at the time that “Comcast [was] itself [] using neighborhooding to cause competitive harm to programmers in competition with them by denying competitive channels access to neighborhoods.” *See* Reply at 40. Furthermore, Bloomberg could not have possibly conceded in the merger proceeding that Comcast does not have news neighborhoods pursuant to the definition set forth in the news neighborhooding condition since that definition had yet to be written (an intervening development that Comcast conveniently ignores).

Moreover, while Comcast argues that Bloomberg should be prohibited from arguing that Comcast neighborhoods news channels on the basis of judicial estoppel, that doctrine is simply inapplicable here. “Judicial estoppel applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed, and is

especially so if the change in position prejudices a party who acquiesced in the position formerly taken.” *In re Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 19 FCC Rcd 13494, 13500 (2004). Bloomberg meets none of these requirements. Bloomberg did not assume a successful position in a legal proceeding: the Commission did not adopt the condition that Bloomberg advocated in its Petition to Deny (or any later filing). Bloomberg has not assumed a different position here: it argued previously that Comcast neighborhoods channels, including news channels, and maintains that position today. Moreover, Bloomberg’s positions in the merger proceeding were informed by the condition it requested the Commission to impose, including its own proposed definition of “neighborhood.” The Commission did not adopt Bloomberg’s proposed condition. Now, Bloomberg’s arguments are informed by the condition and definition of “neighborhood” that the Commission, in fact, adopted. Finally, Comcast never acquiesced to Bloomberg’s position in the merger proceeding, which the voluminous record in the merger proceeding makes patently clear. By its terms, the doctrine of judicial estoppel therefore does not apply here.<sup>11</sup>

In its Surreply, Comcast also distorts the declaration of industry expert James Trautman. *See* Surreply at ¶ 13. In his declaration, Mr. Trautman stated that it “makes no sense” to conclude that the practice of a minority of MVPDs, such as DirecTV, Verizon FiOS, and AT&T U-Verse,

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<sup>11</sup> Even if the Commission should take the position that the requirements for the application of judicial estoppel are met, the doctrine is discretionary, and the Commission need not apply it. *See In re Comcast of Potomac, LLC*, 24 FCC Rcd 8919, 8925 (2009) (need not apply doctrine when prior statements were not “intended to deceive the Commission... or to make a mockery of the regulatory system”); *see also Ajaka v. Brooks America Mortg. Corp.*, 453 F.3d 1339, 1344 (11th Cir. 2006) (“Judicial estoppel is intended to be a flexible rule in which courts must ‘take into account all of the circumstances of each case in making our determination’...”) (citing *Palmer & Clay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1307, n.17 (11th Cir. 2005)). Here, Bloomberg has neither attempted to deceive the Commission — its prior filings are accessible to all — nor has it made a mockery of the regulatory system. Taking the circumstances described above into account, the Commission should not permit Comcast to sidestep its obligations under the neighborhooding condition with spurious legal assertions.

represents an *industry standard* for neighborhooding. *See* Reply, Ex. B at ¶ 11. Rather, those providers are more appropriately viewed as operating at the “cutting edge” of neighborhooding. *See id.* There is no inconsistency between Mr. Trautman’s views, and Bloomberg citing to such MVPDs’ groupings of channels as examples of neighborhood. In the merger proceeding, Bloomberg referred to such groupings along with smaller groupings of channels of the same genre on Comcast systems as examples of neighborhoods for the simple reason that both types of groupings qualify as neighborhoods. Bloomberg also cited to these examples *before* the Commission had set forth the definition of a neighborhood applicable in this proceeding.

Finally, as explained in the Reply, the news neighborhooding condition, as properly interpreted by Bloomberg, does remedy a transaction-specific harm. Notably, Comcast argued during the merger proceeding that the Commission should not adopt a news neighborhooding condition because such a condition would not be merger-specific. *See, e.g.*, Letter from Michael H. Hammer, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 10-56 (filed Oct. 22, 2010), at 5. The Commission, however, appropriately rejected that argument. Absent the transaction, Bloomberg pointed out that, given trends within the industry, Comcast would begin to move BTV to be near CNBC (and thus into existing news neighborhoods) on its channel lineups. *See* Reply at 10 (citing Bloomberg’s Petition to Deny). Because of Comcast’s ownership of CNBC, however, it now does not have the same incentive to do so (and indeed has a competitive incentive to keep BTV as far away from CNBC as possible). As a result, the news neighborhooding condition ameliorates a transaction-specific harm by requiring Comcast to do what it likely would have done absent its merger with NBCU. *See* Reply at 10.

**IV. THE NEW DATA SUBMITTED BY COMCAST BOLSTERS BLOOMBERG'S POSITION THAT COMCAST FREQUENTLY RELOCATES CHANNELS**

In its Reply, Bloomberg demonstrated that Comcast frequently moves the channel position of networks on its headends, including those located between channels 1-99. *See* Reply at 52-63. This information was directly responsive to Comcast's contention that being required to abide by the plain meaning of the news neighborhooding condition would impose enormous burdens upon it. *See* Answer at ¶¶ 71-87. As such, Bloomberg's channel change analysis was properly included in its Reply. *See* 47 C.F.R. § 76.1302(e) ("reply . . . shall be responsive to matters contained in the answer").<sup>12</sup>

Although Comcast claimed in its Answer that it avoids moving networks between channels 1-99 because of alleged disruption, *see* Answer at ¶ 82, and that it is not an MVPD that has made substantial changes to its channel lineups in recent years, *see* Answer at ¶ 80, Comcast chose not to include *any* statistical data to support these assertions. As a result, the Commission should not allow Comcast to withhold this data from its Answer and instead provide it in a Surreply.

In any event, even if the Commission chooses to consider Comcast's new information regarding channel changes, Comcast's data actually bolsters Bloomberg's position. While Comcast claims that such changes are "exceedingly rare," *see* Surreply at 18, the facts tell an entirely different story.

- *First*, Comcast nowhere challenges Professor Gregory Crawford's finding that Comcast moved networks *at least 10,625 times* between June 2010 and May 2011. *See* Reply at 52.
- *Second*, Comcast's own expert, Dr. Mark Israel, finds that Comcast relocated networks in the 1-99 range [REDACTED] *times* in the top 35 DMAs between June 2010 and June 2011. *See* Surreply, Ex. 2 at Table 1. This conclusion is consistent with Professor Crawford's calculation that networks between channels 1-99 had been moved *930 times* in the top 35 DMAs between

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<sup>12</sup> Nevertheless, Bloomberg continues to believe that Comcast's allegations regarding the burdens imposed by the news neighborhooding condition "have no place in this proceeding because they address whether the news neighborhooding condition should have been imposed in the first place rather than what the condition means." Reply at 50.

June 2010 and May 2011 (a period one month shorter than was measured by Dr. Israel). *See* Reply, Ex. A at ¶ 109.

- *Third*, Comcast does not dispute Professor Crawford's finding that Comcast moved networks in the 1-99 range 1,752 times in all DMAs between June 2010 and May 2011.<sup>13</sup> *See* Reply, Ex. A at ¶ 108.
- *Fourth*, Comcast admits that it relocated networks between channel positions 1-99 on the majority of its headends in the top 35 DMAs during just a single twelve-month period. *See* Surreply at ¶ 35, Ex. 2 at Table 1.
- *Fifth*, according to Comcast's own data, the majority of Comcast's headends in the top 35 DMAs (55%) experienced 2.96 channel relocations on average in the 1-99 range over the course of just twelve months. *See* Surreply, Ex. 2 at Tables 1-2 ([REDACTED] channel changes on [REDACTED] headends).

Moving from aggregate numbers to specific examples, Comcast maintains in its Surreply that the examples provided by Bloomberg of Comcast relocating its affiliated news and/or sports channels in the 1-99 range are "atypical and uninformative." *Id.* at ¶ 37. Notably, Comcast does not offer an explanation for why *each* of these channel lineups was changed but instead generally asserts that in *most* cases channels were relocated to match "the lineups of nearby headends" or because they "underwent upgrades to their physical plant." *See Id.* at ¶ 35. Even channel changes undertaken for these reasons, however, would still impose the same kind of alleged burdens (*e.g.*, customer care) as would any relocation undertaken to comply with the news neighborhooding condition. Comcast, however, voluntarily chose to make these changes, which benefited Comcast-controlled programming, notwithstanding these alleged burdens, so the examples provided by Bloomberg in its Reply are quite informative.

Furthermore, to the extent that Comcast attempts to create the impression that it only relocates channels in the 1-99 range on headends serving few subscribers, *see, e.g., id.* at ¶ 37, such an

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<sup>13</sup> Contrary to the claim contained in Comcast's Surreply, *see* Surreply at ¶ 35, Bloomberg never contended that the 1,752 figure applied to channel changes only in the top 35 DMAs. Rather, Bloomberg was clear that this figure encompassed all DMAs. *See* Reply at 52-53, Ex. A. at ¶¶ 108-109.

implication is highly misleading. In the first place, with respect to the example from the Detroit DMA provided in the Reply, *see* Reply at 55-56, Dr. Israel reports that particular headend serves over [REDACTED] subscribers, *see* Surreply, Ex. 2 at Table 3, an amount that is over [REDACTED] times the number of subscribers served by the average Comcast headend.<sup>14</sup> And notwithstanding the large number of subscribers served by the headend, Comcast voluntarily chose to relocate [REDACTED] channels in the 1-99 range there during a twelve-month period. *See* Reply, Ex. I.

There are numerous other instances of Comcast moving channels in the 1-99 range on headends serving large numbers of subscribers between 2010 and 2011. To provide just a few more examples:

- In one of the largest Comcast headends in the Philadelphia DMA, which serves [REDACTED] communities, Comcast relocated: (1) TBS from channel [REDACTED] to channel [REDACTED]; (2) the Home Shopping Network from channel [REDACTED] to channel [REDACTED]; (3) FX from channel [REDACTED] to channel [REDACTED]; and (4) EWTN from channel [REDACTED] to channel [REDACTED].
- In one of the largest Comcast headends in the Chicago DMA, which serves subscribers in [REDACTED] different ZIP codes, Comcast moved ESPN from channel [REDACTED] to channel [REDACTED].
- In its largest headend in the New York City DMA, which serves subscribers in [REDACTED] New Jersey communities, Comcast moved the Weather Channel from channel [REDACTED] to channel [REDACTED] and WNYE from channel [REDACTED] to channel [REDACTED].
- In its third largest headend in the Atlanta DMA, which serves [REDACTED] communities, Comcast moved Bravo from channel [REDACTED] to channel [REDACTED] and AMC from channel [REDACTED] to channel [REDACTED].

In short, the facts are clear. Comcast commonly moves networks located between channels 1-99 on its own accord. It did so at least 1,752 times between 2010 and 2011, and these changes occurred on the majority of its headends during that time period. These changes, moreover, are not isolated to a small number of headends that have few subscribers. Accordingly, Comcast cannot

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<sup>14</sup> According to the most recent figures available, Comcast has approximately [REDACTED] subscribers and 1,014 headends. Thus, the mean Comcast headend serves approximately [REDACTED] subscribers.

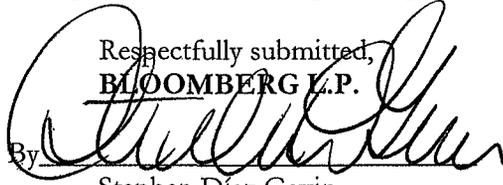
seriously maintain that any channel relocations it must undertake to abide by the news neighborhooding condition represent too great a burden for the company to bear.

Finally, Comcast criticizes Bloomberg for submitting an expert declaration explaining that it would be easy from an engineering perspective for Comcast to relocate BTV into news neighborhoods. *See* Surreply at ¶ 39. That declaration, however, was directly responsive to Comcast's inaccurate claim in its Answer that "substantial physical engineering work" would need to be performed "at each affected system headend each time a relocation was required." *See* Answer at ¶ 85. To be sure, Bloomberg welcomes Comcast's belated concession in its Surreply that the physical engineering costs associated with abiding by the news neighborhooding condition are "low." *See* Surreply at ¶ 39. This concession, however, would not have occurred had Bloomberg not submitted its own expert declaration and pointed out that Comcast had blatantly mischaracterized its own witness's declaration in its Answer. *See* Reply at 65.

## V. CONCLUSION

For all of the foregoing reasons, the Commission should deny Comcast's motion for leave to file its Surreply and without delay grant the relief requested in Bloomberg's Complaint.

Respectfully submitted,  
**BLOOMBERG L.P.**

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Dated: October 7, 2011



# EXHIBIT A

REDACTED - FOR PUBLIC INSPECTION

**REDACTED PURSUANT TO REQUEST FOR  
CONFIDENTIAL TREATMENT**

# EXHIBIT B

**REDACTED PURSUANT TO REQUEST FOR  
CONFIDENTIAL TREATMENT**

**CERTIFICATE OF SERVICE**

I, Jillian Gibson, do hereby certify that copies of the attached "Opposition to Motion for Leave to File Surreply" were served on the parties listed below by electronic mail and/or hand delivery this 7th day of October 2011:

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