

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Bloomberg L.P.,)	
Complainant,)	MB Docket No. 11-104
)	
v.)	
)	
Comcast Cable Communications, LLC,)	
Defendant.)	

**APPLICATION FOR REVIEW OF
COMCAST CABLE COMMUNICATIONS, LLC**

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Comcast Cable Communications, LLC (“Comcast”), pursuant to 47 C.F.R. § 1.115, hereby applies for review and reversal of the May 2, 2012 Media Bureau Memorandum Opinion and Order granting in part the above-captioned complaint by Bloomberg L.P. (“Bloomberg”).¹

I. INTRODUCTION AND SUMMARY

The Commission adopted the news neighborhooding condition (the “Condition”)² in the context of a robust written record and after detailed presentations by and discussions with the parties, which must inform the interpretation of the Condition. In particular, the record showed that neighborhooding news channels was a practice among some multichannel video programming distributors (“MVPDs”), such as DirecTV, Dish Network, FiOS, and U-Verse, who on average placed between 10-15 news channels together on their lineups. The record also established that other cable operators, such as Comcast, generally did *not* neighborhood news channels, although they might have begun to do so as they transitioned to digital technology. In

¹ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Memorandum Opinion and Order, DA 12-694 (rel. May 2, 2012) (the “*Order*”).

² *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, 4358, Appendix A § III.2 (2011) (the “Condition”) (“*Comcast-NBCUniversal Order*”).

light of this record and to counteract any perceived incentive of Comcast, *post-transaction*, to favor its newly affiliated news networks (MSNBC and CNBC), the Commission adopted a “narrowly tailored” Condition that would take effect only “if” the newly formed entity “undertook” place news or business news channels in “a” single neighborhood. It was against *this* backdrop, and on *this* record, that Comcast agreed to the Condition, understanding the Commission’s intent to be that the Condition addressed newly formed digital neighborhoods where adding a network would entail relatively little disruption.

There is, however, a complete disconnect between the Bureau’s construction of the Condition and the Commission’s stated objectives in adopting the Condition, as reflected in the *Comcast-NBCUniversal Order*. Contrary to basic principles of statutory construction,³ the Bureau reads in isolation certain words of the Condition and thereby imposes new obligations on Comcast well beyond anything articulated by the Commission or supported by the underlying record. It determined that the Condition applied to numerous *pre-existing* channel lineups that contain as few as *four* news channels within any five adjacent channel positions. As a result, the decision forces Comcast, regardless of any deliberate news neighborhooding, to relocate Bloomberg TV (“BTV”) into pre-existing groupings of channels in hundreds of lineups throughout the country, many of which have been in existence for years or even decades prior to the *Comcast-NBCUniversal Order*.

The Bureau’s decision is fundamentally flawed for several reasons. *First*, the Bureau adopted Bloomberg’s artificial and arbitrary definition of a news neighborhood without providing any objective justification, and without even analyzing or acknowledging the extensive evidence submitted by Comcast on industry practices concerning neighborhooding. *Second*, in

³ See *Bloomberg L.P. v. Comcast Cable Communications, LLC, Answer of Comcast Cable Communications, LLC*, MB Docket No. 11-104 (July 27, 2011) (“Answer”) ¶ 34 & nn.56-57.

applying the Condition to pre-existing groupings of news channels, the decision ignored the plain language and purpose of the Condition, as well as the record on which the Condition was based and the Commission’s analysis and justification for the Condition in the *Comcast-NBCUniversal Order*. In so doing, it untethered the Condition from any transaction-specific harm. *Third*, the Bureau improperly disregarded Comcast’s First Amendment arguments. The Condition no longer resembles the narrowly tailored remedy that the Commission adopted and articulated, and to which Comcast agreed. Instead, it has been transformed to require a substantial re-engineering of Comcast’s lineups, which disregards long-standing expectations of subscribers and networks, exposes Comcast to more complaints by other third parties and more resulting upheavals among settled channel slots, and wrongly infringes upon Comcast’s editorial discretion. The resulting Condition is so far afield from the one the Commission articulated and Comcast understood that it had accepted that it goes far beyond a foreseeable “interpretation” to instead make brand new law.

The Bureau’s approach virtually ensures that Comcast – without having engaged in any discriminatory activity – could now face additional “neighborhooding” claims from other news channels, compounding the upheaval that this *Order* will cause. Yet the *Order* simply ignores this issue. Ironically, the only way Comcast could avoid this result (other than blowing up its existing lineups) is to affirmatively neighborhood all news channels – the precise obligation the Commission declined to adopt.

II. PROCEDURAL BACKGROUND

As part of its approval of the Comcast/NBCUniversal transaction in 2011, the Commission adopted the news neighborhooding Condition, which provides:

If 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.⁴

The record developed in connection with the Commission's adoption of the Condition revealed that some MVPDs, such as DirecTV, Dish Network, FiOS, and U-Verse, have had a practice of deploying news neighborhoods with an average of 10-15 news channels together on their lineups.⁵ The record (including submissions by Bloomberg) also established that Comcast did not generally engage in neighborhooding,⁶ but that Comcast was testing, on a handful of systems, a "Master Channel Line-Up" or "MCLU" that groups 16 news channels together – including, in each case, BTv.⁷ Further, the record showed that Comcast was expected, in the normal course, to expand the MCLU after the transaction.⁸

In light of this record, the Commission declined to require Comcast "to affirmatively undertake neighborhooding"⁹ and rejected Bloomberg's proposals to define a "news neighborhood" as three news channels within five channel positions or to incorporate language contemplating multiple "neighborhoods."¹⁰ The Commission instead adopted a "narrowly

⁴ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4358, Appendix A § III.2.

⁵ See Answer Ex. 7 (Testimony of Gregory Babyak) at 2 (explaining that "[n]eighborhooding" refers to an industry practice of putting all program channels in the same genre adjacent to one another in the channel line-up" and referring to the practices of DirecTV, Dish Network, Verizon and AT&T); see also Answer Ex. 8 (Petition to Deny of Bloomberg L.P.) at 29.

⁶ See Answer ¶ 58; see also Answer Ex. 8 (Petition to Deny of Bloomberg L.P.) at 29 & n.97.

⁷ See Answer Ex. 11 (Letter from Michael H. Hammer to Marlene H. Dortch (the "Oct. 22 *Ex Parte*")).

⁸ *Id.*

⁹ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4287 ¶ 122.

¹⁰ In December 2010 and January 2011, Bloomberg proposed a condition providing that if Comcast carried news channels in a neighborhood, it would have to include all independent news channels in that neighborhood. See Answer Ex. 13 (Letter from Matthew B. Berry to Marlene H.

tailored,” “program carriage discrimination” requirement designed to counteract any increased incentive or ability of Comcast “to discriminate against or foreclose unaffiliated programming.”¹¹ The Commission made clear that the Condition “would only take effect if Comcast-NBCU *undertook* to neighborhood its news or business news channels. . . .”¹² In short, the Commission reasonably decided to adopt a narrowly tailored requirement that Comcast include BTV (and potentially others) in neighborhoods similar to the MCLU that Comcast might create “now or in the future.”

Undeterred, Bloomberg’s complaint sought a Commission order directing Comcast to move BTV to any channel grouping containing four news networks within five adjacent channel positions on any headend located in the top 35 Nielsen Designated Market Areas (“DMAs”).¹³ Comcast argued that the Condition did not apply to channel groupings of four news networks within five channel positions and demonstrated further that Bloomberg’s interpretation of the Condition was inconsistent with: (i) the plain language of the Condition and the *Comcast-NBCUniversal Order*; (ii) the record before the Commission; (iii) Bloomberg’s own advocacy before the Commission during the Comcast/NBCUniversal proceeding; and (iv) the Commission’s intent to minimize disruptions to consumers and other programming networks.¹⁴

Dortch (the “Dec. 20 *Ex Parte*”)); Answer Ex. 16 (Letter from Markham C. Erickson to Marlene H. Dortch (the “Jan. 19 *Ex Parte*”)). In doing so, Bloomberg sought to define a news “neighborhood” as “a block of channels including at least *three* news channels located within five contiguous and adjacent channel positions,” Answer Ex. 13 (Dec. 20 *Ex Parte*) (emphasis supplied), and suggested that the new obligation would extend to multiple news “neighborhoods” on a cable system, Answer Ex. 16 (Jan. 19 *Ex Parte*).

¹¹ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4282 ¶ 110, 4289 ¶ 124.

¹² *Id.* at 4288 ¶ 123 n.295 (emphasis supplied).

¹³ *See Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Complaint, at 21 (filed June 13, 2011) (“*Compl.*”).

¹⁴ Answer ¶¶ 39-98.

The Media Bureau released its *Order* on May 2, 2012, granting Bloomberg’s complaint in part. Specifically, the *Order* concluded that: (i) the Condition applies to the channel lineups existing on Comcast’s systems at the time the Commission adopted the *Comcast-NBCUniversal Order* as well as future channel lineups; (ii) four news or business news channels within any five adjacent channel positions constitutes a news neighborhood for purposes of the Condition; and (iii) if a Comcast system has more than one news neighborhood, the Condition obligates Comcast to carry BTV in at least one such neighborhood, but not in all news neighborhoods, in any particular neighborhood, or in one consolidated news neighborhood.¹⁵ The Media Bureau, therefore, ordered Comcast within 60 days to begin carrying BTV within a news neighborhood “on each headend in the top-35 most populous [DMAs] that (i) carries Bloomberg Television, (ii) has a grouping of at least four news channels within a cluster of five adjacent channel positions . . . , and (iii) does not include [BTV] within a news neighborhood.”¹⁶

III. STATEMENT OF ERRORS

As discussed below, the Bureau’s construction and application of the Condition conflicts with the plain language of the Condition, with Commission policy and precedent, and with the record. Comcast urges the Commission to reverse the *Order*, which erred in multiple ways:

- The Bureau erroneously concluded that a grouping of four news or business news channels within any five adjacent channel positions constitutes a news neighborhood for purposes of the Condition – despite the fact that this was inconsistent with Bloomberg’s own advocacy before the Commission, which assumed that Comcast did *not* currently neighborhood, but would increasingly do so in the future.
- The Bureau erroneously concluded that the Condition applies to channel groupings existing on Comcast’s systems at the time the Commission released the *Comcast-NBCUniversal Order*.

¹⁵ *Order* ¶ 2.

¹⁶ *Id.* ¶ 27.

- The Bureau’s construction of the Condition would infringe on Comcast’s constitutionally protected editorial discretion.

IV. THE BUREAU ERRED IN CONCLUDING THAT FOUR NEWS NETWORKS ON FIVE ADJACENT CHANNEL POSITIONS IS A NEWS NEIGHBORHOOD

The Media Bureau erred in finding that a news neighborhood is comprised of at least four news networks located within five adjacent channel positions. This definition is untethered from the Commission’s articulated intent and has no support from any record evidence. It is thus untenable. First, the Bureau itself acknowledges that its definition causes many lineups to include multiple news neighborhoods, a result that is inconsistent with the plain language and purpose of the Condition. Second, the Bureau’s definition of a news neighborhood not only finds no roots in, but directly *conflicts* with, the record in this proceeding. Instead, the record demonstrates that a news neighborhood can only reasonably be understood – and *was* understood by Comcast and the Commission – to encompass channel groupings far larger than the four-within-five standard adopted by the Bureau. Finally, the Bureau’s construction and application of the Condition will result in significant customer disruption – an issue the Bureau simply ignored but one which the Commission expressly sought to minimize in drafting the Condition.

A. The Bureau Admits That Its Definition of a News Neighborhood Is at Odds with the Plain Language of the Condition.

To begin, the Bureau’s conclusion that four news channels in any block of five adjacent channel positions constitute a “neighborhood” is fundamentally at odds with the plain language of the Condition. The Bureau admits that its definition of a news neighborhood results in many Comcast lineups actually containing multiple news neighborhoods.¹⁷ But the concept of multiple news neighborhoods is at odds with the language of the Condition, which refers to “a news neighborhood” *in the singular*. It is also fundamentally inconsistent with the very concept of

¹⁷ *Order* ¶ 17.

“neighborhooding” – placing all (or at least most) channels of a kind in a *single* location for viewers to more easily access.

The Bureau itself recognizes that the Commission deliberately crafted the Condition to apply only to “a single news neighborhood,” not multiple news neighborhoods. The Bureau states that the Condition “is triggered if Comcast carries news channels ‘in a neighborhood,’ and any other news channel then must be carried ‘in that neighborhood.’”¹⁸ The Bureau also concedes, however, that the Condition language “appears to contemplate a single news neighborhood” and “does not . . . provide a clear remedy in a situation involving multiple news neighborhoods.”¹⁹ Implicit in this concession is the conclusion that the Condition does not contemplate – and should not be construed to create – multiple news neighborhoods.

B. The Bureau’s Definition of News Neighborhood Is Arbitrary and Conflicts with the Record in this Proceeding.

The Bureau’s definition of a news neighborhood should also be reversed as wholly arbitrary. The Condition defines a news neighborhood 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.”²⁰ In defining a news neighborhood, the Bureau concluded that while “four news channels *may not* represent a significant percentage of Comcast’s news channels on

¹⁸ *Id.* ¶ 19 (quoting *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4358, Appendix A § III.2). The Commission’s choice of the singular (“a neighborhood”) was plainly intentional. *See* Answer ¶¶ 67-69. Indeed, Bloomberg had proposed a neighborhooding condition that expressly envisioned multiple news neighborhoods. On January 18, 2011, the day the Commission adopted the Order, Bloomberg proposed the following “Change to Condition Language”: “Comcast must carry all independent news and business news channels in that AND ALL SUCH neighborhoods.” Answer Ex. 16 (Jan. 19 *Ex Parte*) (emphasis supplied, capital letters in original). The Commission declined to adopt such language.

¹⁹ *Order* ¶ 19.

²⁰ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4358, Appendix A § III.2.

every headend, it does represent a significant number of news channels in the context of the news neighborhooding condition.”²¹ The record is bereft of any support for this conclusion.

To the contrary, the record *refutes* that conclusion. As Comcast demonstrated in its Answer, the analysis of how many news networks constitutes a “significant number or percentage” properly turns 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.”²² In determining the appropriate number of channels that constitute a news neighborhood, it is necessary to look to the *evidence* before the Commission at the time the Condition was adopted, which showed that news neighborhoods typically consisted of 10-15 news channels. The Condition was also necessarily based on the sole evidence in the record related to news neighborhooding by *Comcast* – i.e., the MCLU, which had 16 news channels. Finally, as Comcast explained, the relevant terms must be interpreted in light of the Commission’s stated desire to produce a “narrowly tailored” Condition that would avoid undue disruption for consumers, networks, and for Comcast.²³

The Bureau, without analysis, rejected Comcast’s definition of the term “significant,” finding it “too nebulous and limiting.”²⁴ The Bureau then went on to adopt its own nebulous and entirely circular – and unsupported – definition: that is, a “grouping of at least four news channels in any five channel positions is important because it is large enough to attract viewers in search of news programming.”²⁵ The Bureau never explained why this definition is any more

²¹ *Order* ¶ 13 (emphasis supplied).

²² *Answer* ¶ 53.

²³ *Id.* ¶¶ 52-56.

²⁴ *Order* ¶ 13.

²⁵ *Id.*

precise than the more studied definition proposed by Comcast’s industry expert – which draws on a wide-ranging analysis of industry practice.²⁶ Even more problematic, the Bureau failed to cite any record evidence to support its assertion that four news channels will “attract viewers in search of news programming.” And it simply ignored the disconnect between the “news neighborhooding” examples in the record before the Commission – which support the finding that no fewer than 10-15 channels is a neighborhood – and the Bureau’s entirely new interpretation, which encompasses much smaller groupings. This lack of analysis and due consideration is a classic example of arbitrary decision-making and should be reversed.²⁷

The D.C. Circuit has made clear that in determining whether a given variable is “significant” an agency must engage in a “ factually-specific inquiry which takes into account a multitude of factors,” including analysis and consideration of “economic and social implications.”²⁸ An agency should not confine itself to a “mathematical straitjacket”²⁹ in determining whether a variable is “significant,” and such an analysis cannot “be determined by a precise standard meted out . . . and mechanically applied.”³⁰

Had the Bureau undertaken the kind of searching review required in this case, it would have come to the conclusion that a grouping of four news networks within five channel positions

²⁶ See Answer Ex. 4 (Egan Decl.) ¶¶ 15-23.

²⁷ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency must consider all “important aspects of the problem” and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”).

²⁸ *United States v. Lancaster*, 6 F.3d 208, 210 (4th Cir. 1983); see also *Michigan v. EPA*, 213 F.3d 663, 677 (D.C. Cir. 2000); *Sierra Club v. EPA*, 540 F.2d 1114, 1122 (D.C. Cir. 1976) (noting that the term “‘significant’ . . . only has meaning when . . . economic and social implications are analyzed and considered”).

²⁹ *Michigan v. EPA*, 213 F.3d at 667 (quoting *Indus. Union Dep’t., AFL-CIO v. Am. Petrol. Inst.* (“Benzene”), 448 U.S. 607, 655 (1980) (plurality opinion)).

³⁰ *Lancaster*, 6 F.3d at 210.

is not a “significant number or percentage” of news networks. *First*, it is beyond question that four channels constitute only a small minority of the news channels that Comcast carries.³¹ The *Order* essentially concedes this point. Comcast’s Answer included detailed channel placement analyses (supported by expert testimony) demonstrating that Comcast headends carrying BTV in the relevant DMAs carry far more news networks.³² Given the wide variety of news channels available to Comcast’s subscribers, four is not a “significant number or percentage” even from a purely arithmetic standpoint, and certainly not when the broader implications of the Condition are considered.

Second, a grouping of four news networks does not come close to constituting the type of 10–15 channel “news neighborhoods” that are found on the systems of MVPDs that do group their news channels by genre, which Bloomberg *itself* introduced into the record before the Commission. Four distributors – Verizon, AT&T, DirecTV, and Insight Communications³³ – typically carry news neighborhoods of 15, 14, 12 and 13 news channels on their respective channel lineups.³⁴ These distributors, which set the industry standard for news neighborhooding, each place more than 70 percent of their total news channels in a “neighborhood” on 80 percent or more of their channel lineups.³⁵ Time Warner Cable likewise places more than 70 percent of news channels in a “neighborhood” on approximately 53 percent of its channel lineups, and Dish

³¹ Answer ¶ 40.

³² *Id.* Ex. 5 (Israel Decl.) ¶ 18.

³³ Insight Communications, like Time Warner Cable, introduced a channel lineup organized by themes in connection with its launch of revamped digital service. *See* Answer Ex. 22.

³⁴ *See* Answer Ex. 8 (Petition to Deny of Bloomberg L.P.) at 29; Answer Ex. 4 (Egan Decl.) ¶ 15.

³⁵ *See* Answer Ex. 4 (Egan Decl.) ¶ 19; Answer Ex. 5 (Israel Decl.) Table A-III. The channel lineups surveyed were those carrying BTV in the 26 of the top 35 DMAs in which Comcast operates. *Id.*

Network carries nearly 60 percent of news channels (10 of 19 news channels) in substantially adjacent channel positions on 100 percent of its channel lineups.³⁶ The remaining large MVPDs, including Comcast, have few channel lineups that cross even a 60 percent threshold, and thus offer news neighborhoods on few, if any, systems.³⁷

The record before the Commission regarding neighborhooding on Comcast systems, set forth in Bloomberg's own advocacy, made clear that Comcast and other cable operators – which contain similar legacy groupings of four news channels – did not “neighborhood” news channels. Yet the Media Bureau now cites these legacy groupings as *evidence* of neighborhooding.³⁸ Moreover, its definition of a news neighborhood results in a finding that such neighborhoods are pervasive on Comcast's and all cable operators' channel lineups, a conclusion that is plainly at odds with the record and represents clear error.³⁹

C. The Bureau's Definition of News Neighborhood Is Not Narrowly Tailored and Does Not Avoid Viewer Disruption

As noted above, the Commission declined “to adopt a requirement that Comcast affirmatively undertake neighborhooding,” and opted instead for a “narrowly tailored condition” that applied only to “a significant number or percentage” of news networks. As the Bureau itself recognized, the Commission intended to minimize any disruption to consumers and television networks that would result from large scale realignments of Comcast's systems in order to accommodate BTV: “[T]he Commission ‘narrowly tailored’ the news neighborhooding condition to limit major channel realignments and the cost and customer disruptions associated

³⁶ Answer Ex. 4 (Egan Decl.) ¶ 20.

³⁷ *Id.* ¶ 21.

³⁸ *See Order* ¶ 12.

³⁹ *See Bloomberg L.P. v. Comcast Cable Communications, LLC, Surreply of Comcast Cable Communications, LLC*, MB Docket No. 11-104 (filed Sept. 27, 2011) (“Surreply”) ¶¶ 11-15; Surreply Ex. 1 (Egan Suppl. Decl.) ¶¶ 57-59.

with those realignments.”⁴⁰ Moreover, it is well established that questions of viewer disruption strongly implicate the public interest⁴¹ and the Commission has stayed the effect of an Initial Decision in another program carriage case, in part, to avoid “potential disruption to consumers and any affected third-party programmers.”⁴²

Yet the Bureau declined to address *in any way* issues related to the customer and network disruption associated with defining a news neighborhood as four news networks on five adjacent channels on the grounds that Comcast is not required to place BTV “in a neighborhood below channel 100 if there is another neighborhood above channel 100.”⁴³ The Bureau’s failure to consider consumer disruption was clear error, not least because there was evidence in the record that on a significant number of lineups, Comcast would have no choice but to relocate BTV or other independent news networks into a neighborhood below 100.⁴⁴

Further, as Comcast demonstrated in its Answer, the problem with relying on a four-within-five standard for defining a news neighborhood is that it represents an *ongoing* source of incessant and increasing disruption.⁴⁵ The number of independent news networks covered by the Condition is not fixed. New independent news networks may be launched, news networks that are now affiliated with Comcast may be spun off, and existing independent networks may change to a news format. If left uncorrected, the Bureau’s incorrect definition could well result

⁴⁰ *Order* ¶ 21.

⁴¹ *See WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263, 12268 (MB 2010) (providing that disruption to viewers relates to the public interest).

⁴² *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, *Order*, FCC 12-50, ¶ 5 (rel. May 14, 2012).

⁴³ *Order* ¶ 23 & n.85.

⁴⁴ *See Answer Ex. 5 (Israel Decl.) Table II*. As is often recognized, an agency ruling is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

⁴⁵ *See Answer* ¶¶ 75-76, 86.

in additional independent news network “request[ing] to be placed in existing neighborhoods”⁴⁶ and thus require endless reshuffling of channel lineups. The Bureau’s Order contains no discussion or guidance on this issue, and completely ignores the hardship imposed on other networks that must be displaced to satisfy Bloomberg’s whims.

This is not a speculative concern. As the record shows, there is no reason to think there are available unoccupied channel slots around all of the putative news neighborhoods defined by the Bureau, particularly in the 1-99 channel range. Indeed, in that range, many of these slots around “news neighborhoods” are occupied by broadcast stations with statutory must-carry rights and cable networks with long-settled channel positions, some of which have a contractual right to a particular channel placement that would render a requirement to move these channels particularly unfair.⁴⁷ Relocating broadcast stations with must-carry rights is, of course, out of the question and relocating cable networks to accommodate ongoing requests by independent news networks would have a domino effect throughout the affected system’s lineup, magnifying the costs and customer disruption inherently associated with any channel relocation. As the data presented in Comcast’s Answer show, relocating even a modest number of independent news networks to news neighborhoods could well require Comcast to displace unaffiliated networks from their established channel positions on a large number of lineups.⁴⁸ Moreover, to find new homes for these dislocated networks, Comcast may well be required to displace *other* networks from their established channel positions.

Further, based on its experience, Comcast expects that this kind of broad displacement engendered by the Bureau’s construction and application of the Condition would confuse and

⁴⁶ *Order* ¶ 8.

⁴⁷ *See Answer* ¶ 72; *Answer Ex. 3 (Kreiling Decl.)* ¶ 6; *Answer Ex. 4 (Egan Decl.)* ¶ 33.

⁴⁸ *See Answer* ¶¶ 78-79.

frustrate customers unable to find their favorite channels.⁴⁹ Indeed, undisputed evidence in the record demonstrates that, while some MVPDs have made substantial changes to their channel lineups in recent years, those changes resulted in significant customer confusion, even though the MVPDs took extensive measures to educate consumers as to upcoming channel changes.⁵⁰

These issues are far less likely to present a problem in a new neighborhood assembled in a capacious, digital channel range in upper channel numbers, as illustrated by Comcast's MCLU. In implementing the MCLU, Comcast sought to minimize customer disruption by limiting channel realignments to programming networks in higher channel positions, which are typically digital and high-definition tiers of service.⁵¹ Doing so allowed Comcast to avoid realigning networks within the 1–99 channel range, where disruption to customers and networks resulting from channel moves would be far more substantial.⁵² In addition, Comcast's MCLU aligned news channels only in higher, capacious digital channel ranges that are capable of accommodating additional news networks that might later emerge.⁵³ By aligning news channels in this manner, Comcast's MCLU ensures that news channels can be added to the grouping in the future without the disruption resulting from the Bureau's interpretation of the Condition.

The Bureau made no attempt to address any of this detailed factual record in arriving at its arbitrary definition of a news neighborhood. This failure is plain error and requires reversal.⁵⁴

⁴⁹ See Answer ¶¶ 80-82.

⁵⁰ See *id.* ¶ 80 (citing Answer Exs. 20 & 25).

⁵¹ See Answer ¶ 23 & n.34; Answer Ex. 3 (Kreiling Decl.) ¶¶ 6, 22.

⁵² See Answer ¶ 23.

⁵³ See *id.* ¶ 24.

⁵⁴ See *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

V. THE BUREAU ERRED IN CONCLUDING THAT THE CONDITION APPLIES TO CHANNEL GROUPINGS THAT EXISTED ON COMCAST’S SYSTEMS AT THE TIME THE COMMISSION ADOPTED THE *COMCAST-NBCUNIVERSAL ORDER*

The Media Bureau also erred in finding that the Condition is “not limited to channel lineups constructed after approval of the transaction, but also applies to lineups present on Comcast’s systems at the time the *Comcast-NBCU Order* was released as well as future lineups.”⁵⁵ The Bureau’s finding is contrary to (i) the plain language of the Condition itself; (ii) the language and policies of the *Comcast-NBCUniversal Order*; and (iii) the record on which the Condition was based, which influenced both Comcast’s *and* the Commission’s understanding of the Condition as accepted and adopted. Instead, the better interpretation of the Condition is to prohibit post-transaction discrimination in the placement of independent news networks in news neighborhoods. For these reasons, the *Order* should be reversed.⁵⁶

A. The Bureau’s Interpretation of the Condition Is Contrary to the Plain Language of the Condition

The Condition, by its terms, requires Comcast to relocate independent news networks if it “now or in the future carries news and/or business news channels in a neighborhood.”⁵⁷ A “news neighborhood” is, in turn, 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.”⁵⁸ The most natural reading of this language is that it requires Comcast to include independent news networks such as BTV in any broad groupings of news channels it may have been in the process of introducing as the Commission released the *Comcast-NBCUniversal Order* (*i.e.*,

⁵⁵ Order ¶ 5.

⁵⁶ 47 C.F.R. § 1.115(b)(2)(i).

⁵⁷ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4358, Appendix A § III.2.

⁵⁸ *Id.* (emphasis supplied).

“now”) and similarly broad groupings of news channels that Comcast might introduce thereafter (i.e., “in the future”). This is particularly the case in light of the fact that Comcast could reasonably be expected, in the ordinary course, to expand its MCLU after the transaction.

Indeed, this reading is required by the Condition’s inclusion of the word “placing.” That word plainly refers to an affirmative action – *i.e.*, moving networks in a way that *creates* a news neighborhood. By choosing the word “placing” (as opposed, for example, to “*having been placed*” or some other similar verb form that would have encompassed Comcast’s conduct prior to the Comcast/NBCUniversal transaction), the Commission indicated that it intended the Condition to be triggered only if Comcast took affirmative steps to create a news neighborhood after the transaction closed. This reading properly gives meaning both to the “now or in the future” language and the verb “placing” as they are used in the Condition.⁵⁹ Moreover, as discussed below, it is also consistent with the text of the *Comcast-NBCUniversal Order*, which explained the Condition as protecting unaffiliated news networks if the new entity – Comcast-NBCUniversal – “undertook” to engage in news neighborhooding.⁶⁰

Comcast raised all of these arguments in its Answer,⁶¹ but the Media Bureau failed adequately to grapple with them and in many cases simply ignored them. Indeed, the Bureau’s own *Order* is actually inconsistent on the question of whether the Condition is meant to address pre- or post-transaction conduct. In one section of the *Order*, the Bureau concludes that the Condition applies to existing Comcast channel line-ups,⁶² but in another it recognizes that the

⁵⁹ See *Corley v. United States*, 556 U.S. 303, 314 (2009) (recognizing as “one of the most basic interpretive canons, that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .’”).

⁶⁰ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4288 ¶ 123 n.295.

⁶¹ See Answer ¶¶ 90-92.

⁶² See *Order* ¶¶ 7-8.

purpose of the Condition is to preclude Comcast from engaging in discriminatory conduct following the transaction:

Treating the condition as inapplicable where there are multiple neighborhoods would defeat the purpose of the condition, which is *to prevent Comcast from forcing independent news channels into isolated channel positions while placing affiliated news networks in clearly delineated neighborhoods.*⁶³

In other words, under this Bureau construction, the Condition is designed to prevent Comcast from favoring affiliated news networks by “placing” them in neighborhoods, while “forcing” independent news networks into isolated channel positions. It follows then that the Condition does not apply where Comcast is passively continuing the status quo arrangement of channels that were assigned long before (sometimes decades before) Comcast acquired control of NBCUniversal and its affiliated news channels.

B. The Bureau’s Interpretation of the Condition Conflicts with the Language and Policy of the *Comcast-NBCUniversal Order*

It is well-established that the Commission generally does not use transaction conditions as a remedy for pre-transaction conduct.⁶⁴ There is nothing in the *Comcast-NBCUniversal Order* even remotely suggesting that the Commission intended to deviate from this long-standing policy in order to interfere with Comcast’s *existing* channel lineups. To the contrary, the Commission indicated that it adopted conditions “to mitigate the potential harms the proposed combination might otherwise cause[.]”⁶⁵

⁶³ *Id.* ¶ 20 (emphasis supplied). At a minimum, the *Order* is internally inconsistent and the Commission must look to the record underlying the *Comcast-NBCUniversal Order* to resolve this ambiguity. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

⁶⁴ Section 303(r) of the Communications Act authorizes the Commission “to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits” and the Commission has thus “imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions” *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4249 ¶ 25.

⁶⁵ *Id.* at 4240 ¶ 4.

Consistent with these general principles, the *Comcast-NBCUniversal Order* plainly states that the Condition “would only take effect if Comcast-NBCU undertook to neighborhood its news or business news channels, which therefore would indicate that there was some value to neighborhooding despite additional search capabilities.”⁶⁶ The Commission’s use of the language “would only take effect if” and “undertook” leaves no doubt that an affirmative act of relocation would be required to trigger the Condition, consistent with the “placing” language in the Condition itself. There is no way that Comcast-NBCUniversal could indicate “that there was some value to neighborhooding” by doing *nothing* and simply maintaining the status quo.

Reinforcing this conclusion, the Commission’s rationale for adopting the Condition focused on remedying post-transaction *discrimination* by the combined entity:

We agree that the vertical integration of Comcast’s distribution network with NBCU[niversal]’s programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming. We conclude that the adoption of a non-discrimination requirement, a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement will mitigate any public interest harms.⁶⁷

Thus, the Condition was designed solely as a remedy for specific post-transaction discriminatory actions (by the new entity) that might potentially cause public interest harm, *i.e.*, post-transaction neighborhooding that excluded Bloomberg and other independent news channels. The passive continuation of status quo arrangements of channels established long before Comcast acquired control of NBCUniversal cannot constitute post-transaction conduct governed by the Condition.

Remarkably, the Media Bureau *completely ignores* these critical provisions of the *Comcast-NBCUniversal Order* in its decision. Instead, it focuses exclusively on the “now or in

⁶⁶ *Id.* at 4288 ¶ 123 n.295.

⁶⁷ *Id.* at 4282 ¶ 110.

the future” language in the Condition, concluding that Comcast’s obligation to relocate independent news networks could be triggered by Comcast’s channel lineups as they existed at the time the Condition became effective without further action on Comcast’s part.⁶⁸ But this result is plainly inconsistent with language in the *Comcast-NBCUniversal Order* and the Bureau erred in failing even to acknowledge, let alone address, this inconsistency.⁶⁹

The Bureau’s attempt to show that the Condition is a merger-specific remedy is flatly wrong. The Bureau speculates (without identifying any basis in the text of the Condition or the *Comcast-NBCUniversal Order*) that the Condition was designed to address the possibility that “the vertical integration resulting from the [Comcast/NBCUniversal transaction] immediately change[d] Comcast’s incentive to negotiate changes in current lineups.”⁷⁰ The Bureau seems to be suggesting that the Condition is to remedy potential discrimination in channel placement negotiations. But this is not the case.

As discussed, the Condition was designed to take effect only if “Comcast-NBCU undertook to neighborhood its news or business news channels.”⁷¹ The Commission adopted a separate condition to deal with possible discrimination in channel placement negotiations. Specifically, the Commission conditioned the transaction on a restatement of the program carriage rules that “Comcast not discriminate in video programming distribution on the basis of affiliation or non affiliation of vendors in . . . channel placement.”⁷² There can be no such possibility of discrimination resulting from Comcast passively continuing the status quo

⁶⁸ *Order* ¶ 5.

⁶⁹ *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (a decision is arbitrary and capricious if the agency fails “to consider an important aspect of the problem”).

⁷⁰ *Order* ¶ 8 n.31.

⁷¹ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4288 ¶ 123 n.295.

⁷² *Id.* at 4287 ¶ 121.

arrangement of channels that were assigned long before Comcast acquired control of NBCUniversal. Regardless, if Bloomberg believed that Comcast's decision not to change BTV's channel position was discriminatory, its remedy lay not in the Condition, but in a program carriage complaint proceeding in which it bears the burden of showing "that it was discriminated against on the basis of affiliation or non-affiliation."⁷³

C. The Bureau's Interpretation of the Condition Is Inconsistent with the Record Before the Commission

The record before the Commission further reinforces the conclusion that the Condition was intended to remedy post-transaction discrimination, not to require widespread realignment of existing channel lineups. Nowhere in the *Comcast-NBCUniversal Order* does the Commission suggest that the Condition was intended to apply to Comcast lineups as they existed at the time the Comcast/NBCUniversal transaction closed. To the contrary, the Commission expressly declined to interfere with Comcast's existing channel lineups, rejecting Bloomberg's call to require Comcast to "affirmatively undertake neighborhooding." This omission is notable given that Comcast filed in the record detailed channel lineups for dozens of its systems, from which the Commission could have made findings regarding Comcast's existing lineups.

Perhaps even more significantly, Bloomberg's own advocacy before the Commission during the Comcast-NBCUniversal proceedings supports the notion that the Condition is triggered only if Comcast takes affirmative steps to create a news neighborhood after the close of the transaction. Until very late in the process, Bloomberg argued in favor of a Commission mandate to require Comcast to "reorganize its channel placement alignment so that business news channels are adjacent and contiguous to CNBC and any similar Comcast business news

⁷³

Id.

channels. . . .”⁷⁴ Bloomberg’s rationale was that “[m]odern distribution systems” (i.e., fiber- and satellite-based systems without legacy analog cable architecture and channel lineups) typically have news neighborhoods,⁷⁵ and cable systems “are *expected to adopt* neighborhooding as they transition to digital technology.”⁷⁶ Bloomberg argued that Comcast acquiring control of CNBC and MSNBC would remove Comcast’s natural incentives to neighborhood and result in Comcast hindering neighborhooding on its systems.⁷⁷ Bloomberg, therefore, demanded that the Commission require Comcast to create a business news neighborhood.

In other words, the record underlying the *Comcast-NBCUniversal Order* (and thus the Condition) reflected neighborhooding not as conduct Comcast was currently engaged in (except on a trial basis with regard to the MCLU), but rather as something that it could reasonably be expected to broadly undertake *in the future*. Nowhere in the record of that proceeding is there any indication that BTV even *alleged* that Comcast had a news or business news neighborhood from which BTV was excluded. In fact, the only neighborhooding activity ascribed to Comcast was so-called “partial neighborhooding” of sports, not news or business news.⁷⁸

Once again, the Bureau completely ignores this record, providing another ground for reversal of the *Order*.

⁷⁴ Answer Ex. 8 (Petition to Deny of Bloomberg L.P.) at 33.

⁷⁵ *Id.* at 29; *see also* Answer Ex. 8A (Bloomberg Response to Petitions to Deny and Comments) at 2; Answer Ex. 9 (Bloomberg Reply to Opposition) at 30.

⁷⁶ Answer Ex. 8 (Petition to Deny of Bloomberg L.P.) at 29 (emphasis supplied); *see also* Answer Ex. 8 (Marx Report) ¶ 94; Answer Ex. 9 (Bloomberg Reply to Opposition) at 30.

⁷⁷ *See* Answer Ex. 8A (Bloomberg Response to Petitions to Deny and Comments) at 3. *See also* Answer Ex. 7 (Testimony of Gregory Babyak) at 2 (“Although other MVPDs are expected to transition to neighborhooding as they transition to fully digital technology, as a result of the transaction, Comcast will have a strong disincentive to hinder this pro-consumer development on its systems . . .”).

⁷⁸ Letter from Stephen Diaz Gavin, Patton Boggs LLP, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (Sept. 30, 2010).

VI. THE BUREAU'S CONSTRUCTION OF THE CONDITION INFRINGES ON COMCAST'S CONSTITUTIONALLY PROTECTED EDITORIAL DISCRETION.

Remarkably, the Bureau also gave virtually no consideration to the First Amendment issues raised by its interference with Comcast's editorial discretion concerning channel placement. Indeed, it refused to conduct any First Amendment scrutiny at all because, according to the Bureau, Comcast agreed to the Condition and has some flexibility regarding how to neighborhood BTV.⁷⁹ The Bureau goes on to assert that the Condition promotes a substantial governmental interest in diversity, competition, and independence in the news programming marketplace and is narrowly tailored to ensure that independent news networks are not excluded from neighborhoods.⁸⁰ This treatment of Comcast's constitutional rights is wholly inadequate.

As should be apparent from its Answer, Comcast did not voluntarily agree to the Condition as revised in the manner suggested by the Bureau in the *Order*.⁸¹ The Bureau suggests that the plain language of the Condition should have made clear to Comcast the Condition's implications, as defined in the *Order* – but the *Order* is based on a freshly-minted interpretation of a “news neighborhood” that is unmoored from the record and that fails to reflect the targeted, antidiscrimination concerns reflected in the *Comcast-NBCUniversal Order*. In other words, this is *not* how Comcast *or* the Commission, against the relevant backdrop, would have understood the Condition as agreed to and finalized. Further, the notion that the *Order* gives Comcast some flexibility, in some circumstances, ignores the fact that there are over 130 situations in which there is only one news neighborhood on a system and Comcast has no choice but to move BTV

⁷⁹ See *Order* ¶ 23 & n.83.

⁸⁰ See *id.*

⁸¹ Comcast is not contending that the Commission was without authority to adopt the Condition, but only that the Bureau's construction and application of the Condition infringes on Comcast's constitutionally protected editorial discretion.

into that neighborhood.⁸² More generally, the *Order* forces Comcast to carry BTV in an incorrectly defined, pre-existing news neighborhood on almost 400 lineups across 35 DMAs, or be subject to Commission sanction.⁸³ Comcast must strive to accommodate BTV in these lineups in a way that will also enable it to respond if other independent news networks ask to be positioned in a news neighborhood in the future.⁸⁴

The Bureau's interpretation of the Condition would undoubtedly fail First Amendment scrutiny. The protections of the First Amendment extend to the "exercis[e] [of] editorial discretion over which stations or programs to include in [the cable operator's] repertoire,"⁸⁵ and require the Commission to give considerable deference to Comcast's editorial decisions.⁸⁶ Government mandated carriage is subject to a "measure of heightened First Amendment scrutiny."⁸⁷

Moreover, the Commission has recognized that "any attempt to distinguish between different types" of networks "is likely to raise Constitutional concerns."⁸⁸ This is precisely what the Media Bureau has done, however, in distinguishing between those networks covered by the

⁸² See Letter from Arthur J. Burke, Esq., Davis Polk & Wardwell LLP, Counsel for Comcast Cable Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, & Exhibit 1, MB Docket No. 11-104 (May 22, 2012).

⁸³ See *id.*; see also *New York v. United States*, 505 U.S. 144, 176 (1992) ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

⁸⁴ See *Order* ¶ 8.

⁸⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*") (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 473 U.S. 488, 494 (1986)).

⁸⁶ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) ("[W]e are unable to ignore Congress' stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by . . . cable operators . . .").

⁸⁷ *Turner I*, 512 U.S. at 641.

⁸⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, 22 FCC Rcd 17791, 17840 ¶ 69 (2007).

Condition and those that are not.⁸⁹ Thus, the Bureau was obligated to be certain that *any* action it required here was narrowly tailored to serve a compelling government interest.⁹⁰ For the reasons set forth above, however, there is no such compelling government interest to support the Bureau's interpretation of the Condition, because the record contains no evidence that Comcast has engaged in any discrimination against BTV as a result of the transaction.

The Bureau casually brushed these constitutional limitations aside and construed the Condition as applying to existing Comcast channel lineups despite the Commission's directive that the Condition should be triggered only if Comcast undertook to place news networks in a neighborhood on the day the Condition took effect or thereafter. The Bureau further defined news neighborhoods in a way that resulted in systems carrying multiple neighborhoods and creating the potential for significant disruption to customers and third-party programmers. Under these conditions, it is clear that Bureau's definition of a news neighborhood as four news channels within five adjacent channel positions is *not* narrowly tailored to serve a compelling government interest. This is particularly so in comparison to the choice of defining a news neighborhood with reference to the MCLU and common industry practice, which would have resulted in far larger neighborhoods and would be far less intrusive.

VII. CONCLUSION

For the foregoing reasons, the Commission should reverse the *Order* and deny Bloomberg's complaint.

⁸⁹ See *Order* ¶¶ 14-16.

⁹⁰ *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988) (First Amendment prohibits compelled speech "absent compelling necessity, and then, only by means precisely tailored").

Respectfully submitted,

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June 1, 2012

VERIFICATION

I, Arthur J. Burke, do hereby declare and state under penalty of perjury as follows:

1. I am a partner in the law firm of Davis Polk & Wardwell LLP, and
2. I have read the foregoing Application for Review of Comcast Cable Communications, LLC. To the best of my personal knowledge, information, and belief, the statements made in this Application for Review, other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This Application for Review is not interposed for any improper purpose.

June 1, 2012

/s/ Arthur J. Burke

Arthur J. Burke

CERTIFICATE OF SERVICE

I, Arthur J. Burke, hereby certify that, on June 1, 2012, copies of the attached “Application for Review of Comcast Cable Communications, LLC” were filed through the Commission’s Electronic Comment Filing System and served by hand delivery to the following:

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In addition, a copy of the attached “Application for Review of Comcast Cable Communications, LLC” was served by email to:

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/s/ Arthur J. Burke
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