

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
BLOOMBERG L.P.) MB Docket No. 11-104
Complainant)
 v.)
)
COMCAST CABLE COMMUNICATIONS, LLC)
Defendant)

To: The Commission

**BLOOMBERG OPPOSITION TO APPLICATION FOR REVIEW OF COMCAST
CABLE COMMUNICATIONS**

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EXECUTIVE SUMMARY

The Commission should deny Comcast's Application for Review and direct Comcast to carry immediately Bloomberg Television ("BTV") in all news neighborhoods as defined by the *Complaint Order*. The Media Bureau's conclusions with respect to the issues raised by Comcast in its Application for Review were correct, based on substantial record evidence, and not in the least bit arbitrary.

The Bureau correctly determined that four news networks on five adjacent channel positions is a news neighborhood because that constitutes a "significant number" of news channels. This definition is squarely within the plain language of the news neighborhooding condition, is supported by substantial record evidence, and Comcast's attempts to claim otherwise are misguided. The Bureau properly rejected Comcast's contention that news neighborhoods consist of no fewer than 10 to 12 channels and all or a substantial majority of news channels.

The Bureau's definition of "news neighborhood" is narrowly tailored and will not burden consumers. The Condition does not require Comcast to affirmatively undertake neighborhooding, and only applies to a subcategory of news channels. In addition, the record in this proceeding demonstrates that Comcast makes channel changes frequently in the normal course of business and that many of the required changes can be implemented with minimal customer disruption. It made over 10,000 changes in one recent eleven month period. If Comcast truly believed that the news neighborhooding condition as written was too burdensome, it should have filed a petition for reconsideration with the Commission, or rejected the Commission's grant of its application and proceeded to an administrative hearing; instead, Comcast accepted the Condition as binding. Comcast cannot gain the substantial benefits resulting from its merger with NBCU and then contest, after the fact, the validity of the very conditions that allowed it to obtain those benefits.

The Bureau’s finding that the new neighborhooding condition applies to channels that existed on Comcast’s lineups at the time the Commission adopted the *Merger Order* is consistent with the plain language of the Condition, the policy of the *Merger Order*, and the record before the Commission. The Commission does not need to go any further than the text of the Condition to decide that the Condition covers existing news neighborhoods because the news neighborhooding condition expressly applies to all news neighborhoods that Comcast carries “now or in the future.” Even if the Commission chooses to go further, Comcast’s arguments for limiting the application of the news neighborhooding condition are not persuasive because the Condition clearly remedies transaction-specific harm. In addition, Comcast’s tortured “plain language” argument is nonsensical.

Finally, the Commission must reject Comcast’s constitutional arguments, as the Bureau did, because Comcast voluntarily accepted the conditions in accordance with the Commission’s rules. Comcast is now foreclosed under Section 1.110 of the Commission’s Rules from complaining that compliance with the news neighborhooding condition is too burdensome. The *Complaint Order* more than satisfies the intermediate scrutiny standard applicable to such regulation.

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I. INTRODUCTION

Bloomberg, L.P. (“Bloomberg”) opposes Comcast Cable Communications, LLC’s (“Comcast”) Application for Review of the Media Bureau’s decision that requires Comcast to neighborhood Bloomberg Television (“BTV”).¹ The Bureau considered and rejected Comcast’s arguments in the *Complaint Order*. The *Complaint Order* correctly applied the Federal Communication Commission’s (“FCC” or “Commission”) definition of “neighborhood”, determined the applicability of the Condition to Comcast’s existing lineups, and assessed the constitutionality of the Condition to Comcast. The Bureau’s findings are supported by the plain language of the Condition, substantial record evidence, and precedent.

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

II. THE BUREAU'S CONCLUSION THAT FOUR NEWS NETWORKS ON FIVE ADJACENT CHANNEL POSITIONS IS A NEWS NEIGHBORHOOD IS SUPPORTED BY THE LANGUAGE AND THE RECORD EVIDENCE

A. The Bureau's Definition Of News Neighborhood Squarely Falls Within The Plain Language Of The Commission's News Neighborhooding Condition.

Comcast's contention that the Bureau's definition of news neighborhood is at odds with the plain language of the Condition is incorrect.² Comcast's contention is based on the mistaken premise that "the concept of 'neighborhooding'" refers to "placing all (or at least most) channels of a kind in a *single* location."³ In the Comcast-NBC Universal *Merger Order*,⁴ the Commission did not define the term "neighborhood" in the news neighborhooding condition to refer to groups of *all* news channels or *most* news channels. Rather, the term refers to channel groupings where a "significant number or percentage" of news channels are located "substantially adjacent" to one another.⁵ Thus, Comcast's "concept" of a news neighborhood is irrelevant, as the plain language of the Commission's news neighborhooding condition clearly does not require all news channels in a single location.

Comcast also argues that "the concept of multiple news neighborhoods is at odds with the language of the Condition, which refers to a 'news neighborhood' *in the singular*."⁶ Comcast's

² Application for Review of Comcast Cable Communications, LLC, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104, at 7 (filed Jun. 1, 2012) ("Comcast Application for Review").

³ Reply of Bloomberg L.P. to Answer of Comcast Communications, LLC, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104, at 41-42 (filed Aug. 30, 2011) ("Bloomberg Reply") (emphasis in original).

⁴ 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 (2011) ("*Merger Order*").

⁵ See *Merger Order* at 4288, ¶ 122. Significantly, neither the Commission nor the Bureau made this a conjunctive test. A neighborhood could consist of either a significant number or percentage of news channels, a term subsequently defined by the Bureau and that differs in important respects from the term as defined by Comcast.

⁶ Comcast Application for Review at 7.

emphasis on the fact that the Condition refers to the term “neighborhood” in the singular ignores the basic rule of statutory construction that the singular generally includes the plural,⁷ which is expressly set forth at the very beginning of the U.S. Code.⁸

Consider if the Commission had adopted the following condition: “If Comcast now or in the future carries CNBC on *a system*, it must also carry all unaffiliated business news channels on *that system*.” Notwithstanding the use of the singular form, such a condition would not be interpreted to apply only if Comcast carried CNBC on a single system, but rather to mean that unaffiliated business news channels must be carried on any system where CNBC is carried. The same is true with the news neighborhooding condition.⁹ In fact, the Commission used the terms “a” and “that” to refer to the plural as well as the singular in another condition adopted in the *Merger Order*. If a Comcast set-top box has “a capability that enables a customer to access *a Specialized Service*,” then “the requirements of Section IV.E.1 & 2 shall apply to *that Specialized Service*.”¹⁰ This condition is not limited to situations in which a set-top box enables a customer to access only “one” Specialized Service, but also applies if a set-top box enables a customer to access multiple Specialized Services. The conditions that limit Comcast’s ability to discriminate in the offering of Specialized Services would apply to every Specialized Service accessible by the set-top box. Any other interpretation of the Condition would be wholly illogical. The principles of statutory construction, and the

⁷ Bloomberg Reply at 42-43; *See, e.g., Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 54 (2d Cir. 2003) (“The TREAD Act’s ‘a tire’ plainly means one tire, two tires, three tires, or all four tires, under the elementary rule of statutory construction that the singular . . . includes the plural”).

⁸ *Id.* at 43. *See* 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things”).

⁹ Bloomberg Reply at 43.

¹⁰ *Merger Order* at 4363 (emphasis added).

Commission’s use of the construction elsewhere in the *Merger Order*, belie Comcast’s claim that “the Commission deliberately crafted the Condition to apply only to ‘a single news neighborhood...’.”¹¹

It is entirely reasonable, moreover, that a channel lineup could have more than one news neighborhood.¹² If 40% of news channels were grouped together in one location and 40% in another, both neighborhoods would contain “a significant percentage” of news channels under any reasonable meaning of that term. Moreover, both neighborhoods would reflect a deliberate decision to organize news channels by genre and would generally be considered to be neighborhoods by those in the industry.¹³

Thus, Comcast’s claim that “[i]mplicit in this concession is the conclusion that the Condition does not contemplate—and should not be construed to create—multiple news neighborhoods”¹⁴ cannot be correct. In the *Complaint Order*, the Bureau merely states that condition language does not explicitly specify a remedy when two or more neighborhoods exist. Such a statement is a far cry from saying that only one neighborhood is permitted to exist.¹⁵ If Comcast’s construction of the Condition is adopted, the Condition would be void. If a neighborhood only exists when all or virtually all news channels are included, then Comcast’s exclusion of independent news channels from groupings of news channels would actually ensure that those groupings would not qualify as news neighborhoods, and the Condition would therefore not apply.

¹¹ Comcast Application for Review at 8.

¹² See Bloomberg Reply at 42, Ex. D, ¶ 23.

¹³ *Id.* at 42, Ex. B, ¶ 16. One of Bloomberg’s expert witnesses, James Trautman, explained, “it is perfectly reasonable for an MVPD to design multiple neighborhoods featuring channels within a broadly-defined genre such as news.” See also *id.* at 42, Ex. C, ¶ 20.

¹⁴ *Id.*

¹⁵ *Complaint Order* at 10, ¶ 19.

B. The Bureau’s Definition of News Neighborhood Is Not Arbitrary, Is Supported by Substantial Record Evidence, And Is Completely Consistent With The Record In This Proceeding.

The Bureau concluded that, while “four news channels *may not* represent a significant percentage of Comcast’s news channels on every headend, it does represent a significant number.”¹⁶ Comcast claims, however, that (i) the Bureau’s definition of news neighborhood is arbitrary and (ii) the record refutes that conclusion.¹⁷ Comcast argues that 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.’”¹⁸ The record in this proceeding, however, contains significant evidence that conclusively refutes Comcast’s interpretation.¹⁹

1. The Bureau’s Decision is Not Arbitrary and is Supported by Substantial Record Evidence.

“Arbitrary action, if it means anything, means action not based on facts or reason.”²⁰ After reviewing Bloomberg and Comcast’s evidence and arguments, the *Complaint Order* found that the most relevant definitions of the word “significant” are “having meaning” and “important.”²¹ It further found that, based on record evidence, four news channels in five channel positions met the standard for a news neighborhood. The Bureau’s decision is grounded in substantial record evidence and as such is based on facts and reason.

¹⁶ *Id.* at 7, ¶ 13 (emphasis added).

¹⁷ Comcast Application for Review at 8-9.

¹⁸ *Id.* at 9.

¹⁹ The Bureau found Comcast’s definition “too nebulous and limiting.” *Complaint Order* at 7, ¶ 13.

²⁰ *Mississippi River Fuel Corp. v. Fed. Power Comm’n*, 163 F.2d 433, 439 (1947). *Allentown Mack Sales v. Serv., Inc., v. NLRB*, 522 U.S. 359, 374 (1998) (“Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts set aside agency [decisions] which, ... are not supported by the reasons that the agencies adduce.”)

²¹ *Complaint Order*, at 7, ¶ 13.

The Bureau correctly found that a news neighborhood exists wherever at least four news channels are located in any block of five adjacent channel positions. Any Comcast headend with such a channel grouping has “a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup.”²² In the record, Bloomberg submitted that the term “significant” is defined to mean “of a noticeably or measurably large amount” and also “probably caused by something other than mere chance.”²³ The fact that most Comcast cable systems have groups of at least four news channels within a block of five adjacent channel positions supports the conclusion that such an arrangement is not random. Bloomberg introduced evidence that the probability that such a channel grouping would occur by chance on a single Comcast headend is only between 0.9-1.2%,²⁴ and that the probability that such a channel grouping would occur by chance as often as it did is infinitesimal.²⁵

Bloomberg also introduced substantial evidence that because more than three-quarters of Comcast headends carry between 10 and 12 standard definition news channels, four news channels is a significant number and a significant percentage; it is “of a noticeably or measurably large amount.”²⁶ It further introduced evidence that Comcast headends that carry BTV in the 35 most-populous DMAs and have a neighborhood that does not include BTV carry 33% or more of their standard definition news channels in that neighborhood.²⁷ Bloomberg demonstrated that this

²² *Merger Order* at 4288, ¶122.

²³ Complaint at 18, ¶ 75.

²⁴ See Complaint, *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104 at 18, ¶75 (filed June 13, 2011) (hereinafter, “Complaint”); *id.*, see also, Ex. F, ¶ 53.

²⁵ See *id.* at 19; see also Ex. F, ¶ 53.

²⁶ Bloomberg Reply at 19, ¶ 76.

²⁷ See *id.* at 19, ¶ 76, Ex. F, ¶ 49.

distribution of channels results from a deliberate decision to group news channels together.²⁸ The fact that such channel groupings often contain the most significant news channels in the cable news market reinforces the conclusion that these neighborhoods contain a “significant” number or percentage of news and/or business news channels.²⁹ The Bureau’s decision discussed this evidence in the *Complaint Order*.³⁰ Since the record contains substantial evidence that these conclusions are warranted, the Bureau’s decision cannot be arbitrary and indeed is the most logical and best supported reading of the Condition.

2. The Bureau cited record evidence to support its conclusion that four channels will attract viewers.

The *Complaint Order* says a neighborhood of four channels is important and has meaning in part because “it is large enough to attract viewers in search of news programming.”³¹ Comcast is mistaken when it says the Bureau failed to cite any record evidence to support its assertion that four news channels will ‘attract viewers in search of news programming.’ The *Complaint Order* specifically

²⁸ Bloomberg introduced evidence that the most widely viewed and most lucrative news channels are generally carried in groupings of at least four news channels in a block of five adjacent channel positions on Comcast headends. Specifically, the five most watched news channels in the United States are Fox News, CNN, HLN, MSNBC, and CNBC. Bloomberg Reply at Ex. E, ¶ 6. Comcast argued that the D.C. Circuit has held 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.’” Because the news neighborhooding condition addresses the most watched and the most profitable news channels in the U.S., the Bureau’s analysis adequately considered the “economic and social implications” when determining significance.

²⁹ Bloomberg specifically cited to definitions of “significant” similar to those proffered by Comcast and explained how they bolstered Bloomberg’s position that the channel groupings identified by Bloomberg contain a “significant number or percentage” of news channels. *See* Complaint at n.43 (quoting definition of “significant” as “having or likely to have influence or effect; important”), *id.*, ¶ 77 (quoting definition of “significant” as “of a noticeably or measurably large amount”). Bloomberg argued that 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. Bloomberg Reply at 15.

³⁰ *See Complaint Order*, ¶ 9, 10.

³¹ *Id* at 7, ¶ 13.

cites to Bloomberg's Reply which included not only Bloomberg's discussion of the matter, but citations to no less than four of Bloomberg's expert witnesses.³²

"[T]he touchstone for clustering or neighborhooding is whether the operator is intentionally placing channels of a similar genre near each other in an effort to increase overall viewership."³³ Bloomberg submitted substantial evidence that 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,³⁴ and that the same was true with respect to neighborhoods for sports and children's programming.³⁵ Bloomberg's proffered expert testimony that a "grouping of four or five channels of the same genre together in a lineup is not only a neighborhood but such an effective cluster that it makes it less likely that customers will look for other similar genre programming."³⁶

Bloomberg submitted evidence that the five news channels most commonly carried in the channel groupings identified by Bloomberg in its Complaint are Headline News ("HLN"), CNBC, CNN, Fox News, and MSNBC,³⁷ and that these five networks account for the vast majority of national cable news channels' revenues in the United States.³⁸ Bloomberg also submitted evidence that "the presence of these 'anchor networks' increases both the importance of the groupings from the perspective of subscribers and, correspondingly, increases the groupings' effectiveness in serving the purpose of a news neighborhood."³⁹ Thus, these channel groupings are where subscribers are

³² Bloomberg Reply at 15, referencing Ex. B (Decl. of James Trautman), Ex. C (Decl. of David Goodfriend), Ex. D (Decl. of Douglas Ferguson), and Ex. F (Decl. of Susan Arnold).

³³ Bloomberg Reply at 15, Ex. F, ¶ 16.

³⁴ See *id.* at 15, Ex. B, ¶ 9; Ex. C, ¶ 14; Ex. F, ¶ 16.

³⁵ See *id.* at 15, Ex. C, ¶ 18; Ex. F, ¶ 17.

³⁶ See *id.* at 15, Ex. D, ¶ 21.

³⁷ Bloomberg Reply at 16.

³⁸ *Id.*

³⁹ *Id.* at 16, Ex. B, ¶ 10; see also *id.*, ¶ 17; Ex. C, ¶ 17; Ex. D, ¶ 19; Ex. E, ¶¶ 17-18; Ex. F, ¶¶ 18-19.

most likely to turn to view news programming, and why they are easily recognizable to those within the industry as neighborhoods.

The Bureau's decision is supported by substantial evidence that four news channels located within five adjacent channel positions is a "significant number" of news channels because such an arrangement clearly results from a deliberate decisions to organize news channels by genre, they contain a sufficient number of news channels to be important to viewers in search of news programming, and contain news to which viewers are most likely to turn when they want to view news programming.

- 3. The Bureau's Decision Correctly Rejected Comcast's Contention that "No Fewer than 10-15 Channels is a Neighborhood."**
 - a. Comcast's assertion that consumers must presume no other news channels are carried is not supported by the record.**

Comcast maintains that the importance of a channel grouping, "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.'"⁴⁰ Comcast, however, provided no basis for such a definition and no evidence of how many (or which) news channels must be included in a grouping before a viewer will assume that other news channels are not located elsewhere on the system in the record in this proceeding. Thus, the Bureau was correct in finding Comcast's proposed standard too "nebulous."⁴¹

Bloomberg demonstrated that channels do not benefit from being located near others of the same genre only because a customer may reach the erroneous conclusion that there are not *any* other channels of that genre located outside of the neighborhood. Rather, because viewers use their

⁴⁰ Comcast Application for Review at 9.

⁴¹ Moreover, Bloomberg's evidence showed that 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, which supports the Bureau's conclusion even when applying Comcast's proposed standard.

remote controls to “flip” between channels as well as to pull up electronic programming guides that organize listings by channel number and automatically focus on the channel being viewed,⁴² channels benefit simply from being located in close proximity to other channels of the same genre because viewers are more likely to find them.⁴³ For example, a viewer watching a news channel at channel 40 will be far more likely to discover news programming on channel 41 than similar news programming on channel 135. While such a viewer may know in the abstract that there are other news channels located far from channel 40, he or she will be less likely to watch them if he or she does not encounter them while flipping channels or using the electronic programming guide. Bloomberg submitted expert testimony that demonstrated that “news channels benefit even more from neighborhooding than do other genres.”⁴⁴ Industry expert David Goodfriend notes that for this reason “during a breaking news story, channels not included in [a news] neighborhood are at a significant disadvantage, as they are much less likely to be found [by viewers].”⁴⁵ Thus, the Bureau was correct in finding that Comcast’s proposed standard was “too limiting.”

b. The Bureau correctly rejected Comcast’s contention that “no fewer than 10-15 channels is a neighborhood.”

Comcast contends that “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...”⁴⁶ In the complaint proceeding, Comcast

⁴² See *id.* at 17, Ex. E, ¶ 19.

⁴³ See *id.* at Ex. B, ¶ 18; Ex. C, ¶ 14, 15; Ex. F, ¶¶ 13, 15. (“news, aficionados’ tend to flip between news networks more frequently...”).

⁴⁴ *Id.* at 18, Ex. F, ¶ 17.

⁴⁵ *Id.* See also *id.* at Ex. C, ¶ 14.

⁴⁶ Comcast Application for Review at 11.

relied on “industry expert” Michael Egan,⁴⁷ whose analysis focuses exclusively on the “percentage” of news channels located together.⁴⁸ Since the Bureau found that four news channels in five adjacent channel positions was a significant “number” of news stations, and did not reach the “percentage” standard, the Bureau could have properly excluded Mr. Egan’s testimony. Despite that fact, the Bureau considered Mr. Egan’s testimony in its decision.⁴⁹

Mr. Egan’s testimony regarding the percentage of news channels required for a neighborhood is inconsistent with the definition contained in the Condition because it used a “*significant majority*” standard.⁵⁰ But the Commission instead used the term “significant percentage,” which is generally accepted in law to refer to percentages less than a majority.⁵¹

Bloomberg introduced evidence that Mr. Egan’s views were flawed because they are inconsistent with industry practice. Mr. Egan identified non-cable MVPDs DirecTV; Verizon; AT&T U-Verse; and Insight as setting the “industry standard” for neighborhooding.⁵² In doing so, Mr. Egan failed to quantify news channel groupings carried by cable operators,⁵³ or explain why the

⁴⁷ Answer of Comcast Cable Communications, LLC, *Bloomberg L.P. v. Comcast Cable Comm’n, LLC*, MB Dkt No. 11-104, at Ex. 4 (filed July 27, 2011) (“Answer”).

⁴⁸ See, e.g., *id.* at Ex. 4, ¶¶ 19-22.

⁴⁹ *Complaint Order* at 6, ¶ 11.

⁵⁰ Comcast Answer at Ex. 4, ¶ 13 (emphasis added).

⁵¹ See *supra* Bloomberg Reply, at 19-21. The phrase “significant percentage” is most often used to refer to percentages in the range of twenty-five to forty-nine percent. See, e.g., *Brio Corp. v. Meccano S.N.*, 690 F. Supp. 2d 731, 750 (E.D. Wis. 2010) (referring to 37.7% as a “significant percentage”); *Marsden v. Select Medical Corp.*, 2006 U.S. Dist. LEXIS 16795, *4 (E.D. Pa. 2006) (referring to 37.3%, 40.3%, and 46% as “significant percentage[s]”). Comcast’s use of the statement “four channels constitute only a small minority of the news channels that Comcast carries” is unsupported since Comcast failed to define that term or cite precedent for its assertion.

⁵² See Answer, Ex. 4, ¶¶ 19, 22.

⁵³ Bloomberg Reply at 33-34, Ex. A, ¶ 42. Bloomberg introduced record evidence that Cablevision, Charter, and Cox each carry groups of four, five, or six news channels below channel 100 on more than half of their headends. For example, on 97.7% of Cablevision headends that carry BTV and are located in the 35 most-populous DMAs, there are channel groupings located below channel 100 that contain four, five, or more news channels, and the vast majority of these neighborhoods

groupings of news channels carried by non-cable MVPDs “set the industry standard” while channel groupings employed by cable MPVDs do not.⁵⁴

Bloomberg cited to the FCC’s Enforcement Bureau comments in the Comcast-Tennis Channel dispute, which referred to Comcast’s groupings of sports channels as constituting neighborhoods.⁵⁵ Thus, the only FCC precedent on neighborhoods has found that a similar number of channels in the sports genre constitute a sports neighborhood.

4. Comcast’s characterization of Bloomberg’s advocacy during the pendency of the merger proceeding is both irrelevant and false.

Comcast argued that “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...did not “neighborhood” news channels.”⁵⁶ The characterization is irrelevant because Bloomberg’s pre-merger advocacy could not interpret a condition the Commission had not yet written.⁵⁷

Moreover, the characterization that Bloomberg made clear in its advocacy that a channel grouping must include many more than four channels, *e.g.*, 10-15, before it may constitute a

(90.7%) include exactly four news channels. On 63.0% of Charter headends that carry BTV and are located in the 35 most-populous DMAs, there are channel groupings located below channel 100 that contain four, five, six, or more news channels, and the vast majority of these neighborhoods (86.9%) include exactly four or five news channels. On 50% of Cox headends that carry BTV, there are channel groupings located below channel 100 that contain four or five news channels, and a substantial majority of these neighborhoods (72.2%) include exactly four news channels. *Id.* at Ex. A, ¶¶ 40-41.

⁵⁴ See Bloomberg Reply at 36, n.114.

⁵⁵ See *Tennis Channel, Inc. v. Comcast Cable Commc’ns., LLC*, MB Docket No. 10-204 File No. CSR-8258-P (July 8, 2011), Enforcement Bureau’s Comments, at 15 (“Golf Channel and Versus, Comcast’s affiliated networks, received broad distribution from Comcast and frequently occupy channel assignments in the same neighborhood of sports channels such as ESPN.”).

⁵⁶ *Id.* at 12.

⁵⁷ Indeed, the Commission never defined “neighborhooding” or “neighborhood” prior to the *Merger Order* adopted in January 2011.

neighborhood is transparently false. In its Petition to Deny, Bloomberg specifically pointed to a four-channel sports grouping on Comcast's Washington, D.C., system as an example of a neighborhood.⁵⁸

Likewise, Bloomberg referred to a grouping of four news channels (CNN, HLN, MSNBC, and CNBC) as constituting a neighborhood. Specifically, Bloomberg noted that, in Comcast's Indiana experiment, CNBC viewers will "generally continue watching CNBC at its initial position (Channel 36). As a result, BTV and Fox Business will be harmed since they have not been provided with channel positions *in that neighborhood*."⁵⁹

During the Commission's review of the Comcast-NBCU merger, Bloomberg also referred to the larger channel groupings as neighborhoods. But taking the position that a four- or five-channel grouping is a neighborhood is consistent with maintaining that a ten-channel grouping is a neighborhood. Bloomberg believes that both kinds of channel groupings constitute neighborhoods pursuant to the definition adopted by the Commission in the *Merger Order*.⁶⁰

⁵⁸ Bloomberg L.P. Petition to Deny, Comcast Corp., General Electric Co., and NBC Universal, Inc., for Consent to Assign Licenses and Transfer of Control of Licenses, MB Dkt No. 10-56 at 63-64 (Erratum filed June 25, 2010) ("Bloomberg Petition to Deny"). See also *id.* at 65 ("Comcast, too, is already creating neighborhoods on its systems. For example, on the Comcast system in the city of Washington, D.C., Comcast currently 'neighborhoods' sports channels. It lines up together Comcast's own Versus (Channel 7), ESPN2 (Channel 8), ESPN (Channel 9) and Comcast Sports (Channel 10)." [C]omcast itself is using neighborhooding to cause competitive harm to programmers in competition with them by denying competitive channels access to neighborhoods. In the Washington D.C. system, for example, when Comcast introduced its own Versus sports network, it placed it on a channel adjacent to the two principal ESPN channels, plus its own Comcast Sports Network (channels 7-10), while leaving MASN's principal channel more than 30 channels away.").

⁵⁹ Letter from Stephen Díaz Gavin, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56 at 8 (filed Dec. 8, 2010) ("Dec. 8, 2010 Ex Parte") (emphasis added).

⁶⁰ While Comcast claims that the premise of Bloomberg's advocacy before the Commission "was that Comcast did not 'neighborhood' news channels," that assertion is not correct. Rather, the premise of many of the quotes Comcast cherry-picks from Bloomberg's advocacy was that Comcast did not neighborhood BTV with CNBC, a premise that is indisputably true and Bloomberg was asking for a condition that would have required Comcast to group all business news channels together. See Bloomberg Petition to Deny, Ex. 2, at 1. The Commission, however, chose not to

C. The Bureau’s Definition Of “News Neighborhood” Will Not Burden Consumers

Comcast argued that the Bureau did not adequately consider potential disruption to consumers. The argument is incorrect and unsupported.

Comcast already argued that it should not be required to comply with the plain meaning of the news neighborhooding condition because of consumer burden.⁶¹ This claim is substantially exaggerated and belied by experience. Such policy arguments have no place in this proceeding because they address whether the Commission should have adopted news neighborhooding condition in the *Merger Order*, which Comcast accepted, rather than what the Condition means.

If Comcast believed that the news neighborhooding condition as written was too burdensome, it could have filed a petition for reconsideration with the Commission,⁶² or rejected the Commission’s grant of its application and proceeded to an administrative hearing.⁶³ It did neither of these things. Rather, it and NBCU “accept[ed] as binding the conditions and enforceable commitments included in the [*Merger Order*] and expressly waive[d] any right they may have to challenge the Commission’s legal authority to adopt and enforce such conditions and commitments.”⁶⁴ Accordingly, Comcast now may not complain that it is too burdensome for the company to comply with the news neighborhooding condition. Comcast cannot gain the substantial benefits resulting from its merger with NBCU and then contest, after the fact, the validity of the very conditions that allowed it to obtain those benefits.

require that all business news channels be grouped together, instead requiring independent news channels to be included in news neighborhoods.

⁶¹ See Comcast Application for Review at 12-14.

⁶² See 47 C.F.R. § 1.106.

⁶³ See 47 C.F.R. § 1.110.

⁶⁴ Letter from Kathryn A. Zachem (Comcast Corp.), Ronald A. Stern (General Electric Co.), and Richard Cotton (NBC Universal, Inc.) to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt No. 10-56 at 1 (filed Jan. 21, 2011) (“Comcast Merger Letter”).

In addition to the obvious point that Comcast took on such burdens when it agreed to the Condition, the argument fails for two reasons: 1) the record in this proceeding demonstrates that Comcast makes channel changes frequently in the normal course of business, and 2) Comcast's own view of implementing the news neighborhooding condition with respect to BTV can be accomplished with minimal disruption to consumers.

Comcast said it could implement the Bureau's directive to neighborhood Bloomberg Television ("BTV") "without overly disruptive channel relocations" in over 60% of the affected lineups and needed an extension of time to implement the Bureau's Order for the rest.⁶⁵ In over half the cases, Comcast planned to "add BTV to that open channel slot, while avoiding disruption to customers by temporarily 'dual-mapping' BTV (i.e., continuing to carry BTV in the channel position in which it is currently located)."⁶⁶ Comcast requested a "45-day extension of time (until August 15, 2012) to complete a subset of the channel realignments required by the [*Complaint*] Order."⁶⁷ Given that Comcast admits it can neighborhood BTV for more than half of the channel lineups it is required to complete by the Bureau's deadline,⁶⁸ and can neighborhood BTV in the rest of the lineups within 45 days, its claims of customer disruption are demonstrably overstated.⁶⁹

⁶⁵ Comcast, Motion for Partial Extension of Time, *Bloomberg, L.P. v. Comcast Cable Communications*, MB Dkt. No. 11-104 at 2 (filed June 1, 2012) ("Comcast Motion"). Bloomberg filed a Motion for Extension of Time to respond to Comcast's Motion for Extension of Time on June 11, 2012.

⁶⁶ Comcast Motion at 2.

⁶⁷ *Id.* at 1.

⁶⁸ Letter from Arthur J. Burke, Davis Polk & Wardell LLP, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 11-104 (filed May 22, 2012) ("May 22 Letter"). To the extent that Exhibit 2 of the May 22 Letter purports to exhibit compliance with the news neighborhooding condition by having already placed BTV in a high definition ("HD") channel lineup, Bloomberg objects and reserves its right to have BTV moved to a standard definition ("SD") neighborhood below channel 100.

⁶⁹ Based on a meeting June 14, 2012, with the Media Bureau staff, Comcast, and Bloomberg, the parties are exploring an alternative implementation plan and will present it to the Bureau in the near future. That plan, however, does not undermine the fact that implementation of the *Complaint Order's* directive to neighborhood BTV can be accomplished with minimal customer disruption.

In fact, the channel lineup changes required to implement neighborhooding for BTV is far less than the number of channel changes Comcast routinely makes in a year. Bloomberg introduced evidence in the record that Comcast moved networks *at least 10,625 times* in an approximately eleven-month period in 2010 and 2011.⁷⁰ In the 35 most-populous DMAs, networks were relocated at least 6,806 times.⁷¹ At least 3.6% of networks were relocated during just this eleven-month period.⁷² Bloomberg showed that Comcast also regularly relocates networks below channel 100,⁷³ which it claimed were particularly difficult.⁷⁴ There is no reason to believe that any customer confusion from neighborhooding BTV will be any worse than for the thousands of channel changes that Comcast has recently implemented, including those that benefitted Comcast affiliated channels.⁷⁵ Additionally, Comcast customers will ultimately benefit not only from an expanded news neighborhood where more channels will be organized by genre but also from independent news reporting being able to find an audience. In fact, the Commission has specifically recognized “the special importance of news programming to the public interest.”⁷⁶

⁷⁰ Bloomberg Reply at 52, Ex. A, ¶ 106.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Bloomberg Reply at 52-53, Ex. A, ¶ 108.

⁷⁴ *See* Comcast Application for Review at 14.

⁷⁵ Comcast's brief reference to the Commission's stay in the Tennis Chanel case is equally unpersuasive. The Tennis Channel case involves a completely different set of facts, including a channel placement remedy that was never sought by the complainant, no guidance on questions of compensation for the tier placement remedy, and an outstanding question of whether the complaint was time-barred. Conversely, in this case, Comcast frequently makes these types of channel changes in the normal course of business, and implementing the news neighborhooding condition can be accomplished with minimal disruption to consumers. Moreover, Bloomberg sought the specific remedy provided by the Commission in the *Merger Order*. *See* Tennis Channel, Inc., Complainant v. Comcast Cable Communications, LLC, Defendant, Order, MB Docket No. 10-204, FCC 12-50, ¶¶ 3, 5.

⁷⁶ *Merger Order* at 4287, ¶ 122.

Comcast claims the Bureau’s interpretation of the news neighborhooding condition must be wrong because the Commission’s description of the news neighborhooding condition as “narrowly tailored” is evidence that the Commission did not wish to require Comcast to relocate any channels. Such an intent, however, is nowhere expressed in the *Merger Order*. Rather, the *Merger Order* makes clear that the news neighborhooding condition is “narrowly tailored” because it does not represent “a requirement that Comcast affirmatively undertake neighborhooding” but rather obligates the company to place independent news channels in existing news neighborhoods and those it chooses to create in the future.⁷⁷ Additionally, the Condition is “narrowly tailored” because it does not apply to any programming genre but news, and because it only benefits a subcategory of news channels rather than all news channels.

Finally, Comcast claims that the Bureau’s definition “could well result in additional independent news networks ‘request[ing] to be placed in existing neighborhoods’ and thus requiring endless reshuffling of channel lineups.”⁷⁸ First, Comcast does not identify any such channels. Comcast does not, moreover, claim that any such channels have asked to be relocated pursuant to the news neighborhooding condition in the approximately seventeen months that it has been in effect. In addition, based on the substantial barriers to entry present in the cable news business, the likelihood that a multitude of new independent news networks will be created over the next five-and-a-half years is similarly remote – to qualify for neighborhooding, a news channel must contain programming focused on reporting and analysis and it seems unlikely that any such entity will appear.⁷⁹

⁷⁷ *Id.*

⁷⁸ Comcast Application for Review at 13-14.

⁷⁹ In its recent Future of Media Report, the FCC found that barriers to entry were reduced for news on the internet, but made no similar finding with respect to more traditional news, including cable television news. Steven Waldman and the FCC Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*,

III. THE BUREAU’S FINDING THAT THE NEWS NEIGHBORHOODING CONDITION APPLIES TO CHANNEL GROUPS THAT EXISTED ON COMCAST’S LINEUPS AT THE TIME THE COMMISSION ADOPTED THE MERGER ORDER IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CONDITION, THE LANGUAGE AND POLICY OF THE MERGER ORDER, AND THE RECORD BEFORE THE COMMISSION.

A. The Bureau’s Decision Comports With The Plain Language Of The Condition.

The news neighborhooding condition applies “if Comcast now or in the future carries news and/or business news channels in a neighborhood.”⁸⁰ “Now” means “at the present time or moment” and “under the present circumstances.”⁸¹ Therefore, the Condition applied as of the time Comcast accepted it and consummated the Merger. The Bureau properly rejected Comcast’s view that the Commission intended the Commission to “refer to channel lineups Comcast was introducing at the time the merger closed (the MCLU) and any groupings constructed in the future.”⁸² The Bureau properly found that Comcast’s interpretation “would read out of the condition the term ‘now...carries’ and, thus, would be contrary to the Commission’s stated intent regarding the conditions applicability.”⁸³ In addition, the Bureau’s interpretation is the only interpretation consistent with the cardinal rule of statutory construction that a statute should be interpreted so that none of its terms are superfluous.⁸⁴

June 2011, *available at* <http://www.fcc.gov/info-needs-communities>. Large investments are required to put together a newsgathering operation. In fact, Fox Business Channel, the last major business news network to launch, has been in operation for nearly four years and has yet to turn a profit. The State of the News Media 2011: An Annual Report on American Journalism, Cable: By the Numbers, *available at* <http://stateofthemediamedia.org/2011/cable-essay/data-page-2/> (last visited Aug. 28, 2011).

⁸⁰ *Merger Order* at 4288, ¶ 122.

⁸¹ *See* Bloomberg Reply at 4.

⁸² *Complaint Order* at 5, ¶ 7.

⁸³ *Id.* at 5, ¶ 8.

⁸⁴ *See, e.g., Bailey v. United States*, 516 U.S. 137, 146 (1995) (“[W]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (statutes should be interpreted “so as to avoid

Comcast did not dispute on the record that the word “now” means “at the present time or moment.”⁸⁵ Therefore, the Condition applies to those news neighborhoods that existed at the time that the *Merger Order* was adopted – “now” – as well as those that Comcast may create after that date – “in the future.”⁸⁶ Comcast suggests that the word “now” should be read to refer to the sixteen-channel news groupings that Comcast had introduced on an experimental basis in Indiana (“the MCLU”).⁸⁷ But in doing so, Comcast admitted that the news neighborhooding condition applies to its Indiana trials, which were created *before* the *Merger Order* was adopted. Thus, Comcast has *conceded* that the news neighborhooding condition actually applies to existing news neighborhoods, and is just objecting again to the definition of neighborhood.

In contrast, Comcast’s tortured “plain language” argument is nonsensical. The term “neighborhood” is defined in the news neighborhooding condition to mean “placing a significant number or percentage of news and/or business news channels substantially adjacent to one another

rendering superfluous any parts thereof”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (courts need to “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any possible construction which implies that the legislature was ignorant of the meaning of the language it employed.”). The Commission has often employed this canon of construction. See *Providing Eligible Entities Access to Aggregate Form 477 Data; Implementation of the Broadband Data Improvement Act of 2008; A National Broadband Plan for our Future, Order*, 25 FCC Rcd 5059, 5064 (2010); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, Order on Remand*, 16 FCC Rcd 9751, 9761-62 (2001); *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals; First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2620-21 (2001); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 482 (1980).

⁸⁵ Bloomberg Reply at 4. See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (“[W]e construe a statutory term in accordance with its ordinary or natural meaning.”); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993).

⁸⁶ See *J.D. v. Nagin*, 255 F.R.D. 406, 417 n.9 (E.D. La. 2009) (in the description of a certified class, interpreting “now or in the future” to refer both to children who were being detained at a facility when the complaint was filed as well as those who subsequently would be detained at that facility).

⁸⁷ See Answer at 45, ¶ 91; See Comcast Application for Review at 16.

in a system’s channel lineup.”⁸⁸ Comcast contends that the word “placing” “plainly refers to an affirmative action”⁸⁹ and that the Commission’s use of that term, therefore, means that it intended the condition to be triggered only if Comcast took affirmative steps to create a news neighborhood after the transaction closed.”⁹⁰ The word “placing,” however, is used in the Condition’s definition of neighborhood, and not the Condition’s trigger. The verb used in the Condition’s trigger clause is “carries,” which clearly does not require any affirmative movement of channels.

Moreover, while a neighborhood certainly results from “placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup,”⁹¹ this definition does not specify when the relevant “placing” must have occurred. In the case of an existing news neighborhood, it occurred in the past. With respect to a news neighborhood that has not yet been created, it will occur in the future. In short, the trigger clause’s “now or in the future” language, rather than the definitional term “placing,” contains the temporal element of the Condition.⁹²

B. The Bureau’s Interpretation Of The Condition Is Consistent With The Policy Of The Merger Order And The Record In This Proceeding

The Commission does not need to go any further to decide that the Condition covers existing news neighborhoods because the news neighborhooding condition expressly applies to all news neighborhoods that Comcast carries “now or in the future.”⁹³

⁸⁸ Comcast Application for Review at 16 (emphasis omitted).

⁸⁹ *Id.* at 17.

⁹⁰ *Id.*

⁹¹ *Id.* at 16.

⁹² Comcast’s reliance on a footnote discussing the terms “would only take effect” and “undertook,” and fails. *See* Bloomberg Reply at 7-8.

⁹³ *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (“Agency opinions, like judicial opinions, speak for themselves.”); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999) (“Rendered at the conclusion of all the agency’s processes and deliberations, [agency

Even if the Commission chooses to go beyond the text of the *Merger Order*, however, Comcast's arguments for limiting the application of the news neighborhooding condition are not persuasive. Comcast maintains that interpreting the Condition to apply to existing neighborhoods runs afoul of the Commission's policy to impose conditions only to address transaction-specific harms.⁹⁴ But the news neighborhooding condition, when properly interpreted to apply to existing news neighborhoods, does remedy a transaction-specific harm. During the merger proceeding, Bloomberg argued that absent the transaction, Comcast would have had the incentive to neighborhood BTV. Post-merger, because Comcast owns CNBC, it does not have the same incentive to do so and, indeed, has a competitive incentive to place BTV as far as possible from CNBC.⁹⁵ As a result, interpreting the Condition to apply to existing channel lineups ameliorates a transaction-specific harm by requiring Comcast to do what it likely would have done absent its merger with NBCU.

Comcast's argument rests on the erroneous premise that requiring it to make changes to its existing channel lineups cannot remedy a transaction-specific harm.⁹⁶ But the Commission adopted other conditions requiring such changes. The *Merger Order's* condition that requires Comcast to add "ten new independently owned-and-operated channels" to its systems within eight years⁹⁷ requires Comcast to alter its existing channel lineups. Under the theory presented by Comcast, the

opinions] represent the agency's final considered judgment upon matters of policy the Congress has entrusted to it."); see also *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute, a court should always turn first to one cardinal canon before all others... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.... When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'.")

⁹⁴ See Comcast Application for Review at 2-3.

⁹⁵ See Bloomberg Petition to Deny at 29-30.

⁹⁶ See Comcast Application for Review at 16-22.

⁹⁷ See *Merger Order* at 4358 (App. A, Sec. III.3).

Commission could not have imposed this condition. Yet, the independent programming condition, like the news neighborhooding condition, is designed to address a transaction-specific harm. Due to the Comcast-NBCU merger, Comcast now has less incentive to carry or add independent programmers' channels to its lineups. Therefore, the Commission accounted for the merger's likely impact on Comcast's future programming decisions by requiring it to add ten new independent channels. The same is true for the news neighborhooding condition. The Commission accounted for the merger's likely impact on Comcast's channel placement decisions by requiring Comcast to move BTV and other independent news channels into existing news neighborhoods because the merger reduced Comcast's incentive to move independent news channels to be near CNBC and other news channels.

IV. THE BUREAU'S CONSTRUCTION OF THE CONDITION IS CORRECT AND NOT SUBJECT TO CONSTITUTIONAL ATTACK.

The Commission must reject Comcast's constitutional arguments, as the Bureau did, because as noted above, Comcast voluntarily accepted the conditions in accordance with the Commission's rules.⁹⁸ If Comcast believed that the news neighborhooding condition as written was too burdensome, it could have filed a petition for reconsideration⁹⁹ or rejected the Commission's grant of its application and proceeded to an administrative hearing.¹⁰⁰ It did neither of these things.¹⁰¹ Rather, it and NBCU "accept[ed] as binding the conditions and enforceable commitments included

⁹⁸ See *Complaint Order* at 12, ¶ 23.

⁹⁹ See 47 C.F.R. § 1.106.

¹⁰⁰ See 47 C.F.R. § 1.110. A grant with conditions is effectively a denial. *Mobile Comm'n Corp. v. FCC*, 77 F.3d 1399, 1403-1404 (D.C. Cir 1996), cert. denied 117 S. Ct. 81 (1996). An applicant has the choice of fighting the denial or accepting the conditions. Comcast voluntarily accepted the conditions in lieu of a denial of the application.

¹⁰¹ The U.S. Circuit Court of Appeals has upheld the interpretation that the plain language of Section 1.110 of the Rules "does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions." *Central Television, Inc. v. F.C.C.*, 834 F.2d 186, 190 (D.C. Cir. 1987). And in MASN, the Commission held that this principle also applies to constitutional challenges, as noted in footnote 83 of the *Complaint Order*.

in the [*Merger Order*] and expressly waive[d] any right they may have to challenge the Commission’s legal authority to adopt and enforce such conditions and commitments.”¹⁰² Accordingly, Commission rules foreclose Comcast from complaining that compliance with the news neighborhooding condition is too burdensome now, after it already won the substantial benefits resulting from its merger with NBCU and after agreeing to an enforceable condition that allowed it to obtain those benefits.¹⁰³ Thus, while Comcast now argues that the Bureau’s interpretation of the Condition no longer reflects how it “would have understood the condition as agreed to and finalized,” this argument is no longer valid.

Even if the Commission reviews the Bureau’s *Order* through the prism of a First Amendment analysis, it more than satisfies the applicable intermediate scrutiny. It “advances important governmental interests...and does not burden substantially more speech than necessary to further those interests.”¹⁰⁴ The FCC has long established the substantial interest it has in the promotion of news programming. The neighborhooding condition “promotes the substantial government interest of promoting diversity, competition, and independence in the news programming marketplace.”¹⁰⁵ Moreover, it is narrowly tailored: (i) it does not represent “a requirement that Comcast affirmatively undertake neighborhooding” and (ii) it does not apply to any programming genre but news, and only benefits a subcategory—independent news. The Bureau *Order*’s interpretation of the Condition merely applies the policy that the Commission imposed and that Comcast agreed to. By finding that Comcast does not “carry Bloomberg in a news

¹⁰² Comcast Merger Letter, at 1.

¹⁰³ Permitting Comcast to avoid the terms of its own agreed-to condition would also send a signal to future merger applicants that transaction-imposed conditions are made to be broken. After all, if Comcast can escape culpability for impermissible conduct that runs afoul of a key condition that smoothed the way for a controversial transaction, under the guise of a post-hoc argument alleging constitutional infirmities, merging entities are likely to emulate Comcast’s behavior.

¹⁰⁴ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“Turner II”).

¹⁰⁵ *Complaint Order* at 12, n.83.

neighborhood on certain headends,”¹⁰⁶ and directing Comcast to remedy that anti-competitive concern, the Bureau applied the Commission condition in a manner that protects the public’s interest without substantially burdening Comcast’s editorial discretion. Thus, the *Complaint Order* passes any reasonable constitutional test under intermediate scrutiny.

Comcast attempts to argue that “the Bureau was obligated to be certain that *any* action it required here was narrowly tailored to serve a compelling government interest.”¹⁰⁷ First, contrary to Comcast’s assertions, the Condition here does not impact “which stations or programs to include in [the cable operator’s] repertoire,”¹⁰⁸ as Comcast has already chosen to carry BTV. Thus there is no government mandated carriage. Moreover, the Condition does not distinguish between networks based on the message of the speaker. Rather, because of concerns about discrimination by a vertically integrated operator, the Commission adopted certain conditions to protect a group of channels based on economic criteria—financial independence from a cable operator.¹⁰⁹

Respectfully submitted,

BLOOMBERG L.P.

¹⁰⁶ *Id.* at 1, ¶2.

¹⁰⁷ Comcast Application for Review at 25.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ The Supreme Court also applied the intermediate scrutiny standard to the “Must Carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992. The Commission’s condition agreed to by Comcast and enforced against it by the Bureau similarly represents and “industry-specific antitrust and fair trade” that is “narrowly tailored to preserve” the competitive interest of competing content producers that are subject to “concomitant risks of programming decisions driven by anticompetitive policies” of Comcast. *Turner II*.



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CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 18th day of June, 2012, a copy of the foregoing Bloomberg Opposition Application for Review of Comcast Cable Communications, LLC has been served via first-class U.S. mail, postage pre-paid, to the following:

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