

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

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Federal Communications Commission  
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MB Docket No. 11-104

In the Matter of )  
)  
**BLOOMBERG L.P.** )  
Complainant )  
v. )  
**COMCAST CABLE COMMUNICATIONS, LLC** )  
Defendant )  
To: The Commission

**RECEIVED - FCC**

JUN 26 2012

Federal Communications Commission  
Bureau / Office

**BLOOMBERG L.P. PARTIAL OPPOSITION TO MOTION FOR EXPEDITED STAY  
OF COMCAST CABLE COMMUNICATIONS, LLC**

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**EXECUTIVE SUMMARY**

Nearly eighteen months have passed since the Commission approved the Comcast/NBCU merger with the condition that, in order to protect the public interest, Comcast must include independent news channels like BTV in its news neighborhoods. Through its tactics of delay and denial, Comcast has reduced more than 20% of the time in which it must comply with the news neighborhooding condition that is only scheduled to be in effect for seven years. Given that the clock is ticking, each day of delay is yet another day that Comcast does not have to implement the relief adopted by the Commission and implemented by the Bureau in the *Complaint Order*. It is thus imperative that the Commission ensure that Comcast implement the neighborhooding condition as soon as possible.

As discussed herein, Bloomberg and Comcast have reached agreement on implementation of the news neighborhooding condition on certain channel lineups and a stay for others. For the remaining contested channels (Bucket 2B), Bloomberg opposes the Motion for Stay. A Motion for Stay in this limited circumstance is not appropriate because Comcast has failed to satisfy the burdens for the Commission to grant a stay and because of the special importance of news and the Commission's finding that the condition was necessary to protect the public interest.

Comcast has not demonstrated that it is likely to succeed on the merits of its case. Comcast argues that the Bureau erred in finding that the Condition applies to existing news neighborhoods. The news neighborhooding condition applies "if Comcast now or in the future carries news and/or business news channels in a neighborhood." "Now" means "at the present time or moment" and the Condition applied as of the time Comcast accepted it. 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.

Comcast does not show irreparable harm. Its Motion for Stay is based entirely on what may happen if Bloomberg's Application for Review is granted. Moreover, for the category of channel lineups where Bloomberg opposes a stay, Comcast cannot demonstrate harm because the total number changes required significantly less than the number of channel moves that Comcast routinely makes.

Finally, the condition on its face is narrowly tailored. 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 creates in the future. Comcast customers ultimately will 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.

For these reasons, Bloomberg respectfully requests that the Commission deny the Motion for Stay for Bucket 2B channel lineups, and direct Comcast to implement the news neighborhooding condition for those channel lineups. When the Bureau confirms that Comcast may not fulfill its obligations by only placing BTV in an HD neighborhood, the channel lineups at issue are not implicated in Bloomberg's appeal. Further delay would call into question the effectiveness of the news neighborhooding condition to promote independent sources of news and information.

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**BLOOMBERG L.P. PARTIAL OPPOSITION TO MOTION FOR EXPEDITED STAY  
OF COMCAST CABLE COMMUNICATIONS, LLC**

**I. INTRODUCTION AND SUMMARY**

Bloomberg L.P. (“Bloomberg”) hereby partially opposes the Motion for Expedited Stay of Comcast Cable Communications, LLC (“Comcast” or the “Company”),<sup>1</sup> of the implementation of the news neighborhooding condition set forth in the Media Bureau’s Order in response to a complaint filed by Bloomberg in June, 2011.<sup>2</sup> The *Complaint Order* directed Comcast to:

(i) within sixty days of the release of this Order[, July 1, 2012], carry Bloomberg Television in a news neighborhood on any headend that carries Bloomberg Television, has a news neighborhood as defined herein, and does not include Bloomberg Television within a news neighborhood;<sup>3</sup>

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<sup>1</sup> See Motion for Expedited Stay of Comcast Cable Communications, LLC, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 8, 2012) (“Motion for Stay”).

<sup>2</sup> *Bloomberg, L.P. v. Comcast Cable Communications, LLC, Memorandum Opinion and Order*, DA 12-694 (MB rel. May 2, 2012) (“*Complaint Order*”). The news neighborhooding condition was adopted in the Commission’s order approving Comcast’s acquisition of NBCU Universal. See *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, 4288 (2011) (“*Merger Order*”).

<sup>3</sup> *Complaint Order* at 4, ¶ 6. The *Complaint Order* also required “(ii) within 14 business days after the release of this Order [May 22, 2012], provide to Bloomberg and the Commission a list of those headends that are subject to the requirements of subparagraph (i); and (iii) within 14 business days

Comcast has requested a stay of the *Complaint Order*. As is set forth in further detail below, Bloomberg and Comcast have agreed to limit the scope of the stay in certain significant respects. The parties are in dispute, however, over what happens to certain channel lineups once the Media Bureau issues a decision on the HD news neighborhood issue. If the Bureau appropriately decides that Bloomberg only requested that its SD signal be neighborhooded, it does not support a stay for the channel lineups which have only a single SD news neighborhood as described below.

In any event, Comcast and Bloomberg have only agreed in part on the scope of the stay. Accordingly, with respect to the channels as set forth below, Bloomberg opposes the grant of any stay of Comcast's obligation to comply with the *Complaint Order*.

## II. BACKGROUND

On May 22, 2012, Comcast provided to Bloomberg and filed with the Commission a letter<sup>4</sup> that Comcast says identifies, as required by the *Complaint Order*,<sup>5</sup> (1) "any headend that carries Bloomberg Television, has a news neighborhood as defined herein, and does not include Bloomberg Television within a news neighborhood,"<sup>6</sup> (2) "channel lineup information about any headend listed [that does not include BTV in a news neighborhood],"<sup>7</sup> and (3) "channel lineup information about any headend ... that already carries Bloomberg Television within a news neighborhood."<sup>8</sup>

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after the release of this Order [May 22, 2012], provide to Bloomberg and the Commission channel lineup information about any headend listed in response to subparagraph (ii) that already carries Bloomberg Television within a news neighborhood." *Id.* at 13, ¶ 24.

<sup>4</sup> 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) (listing {█} headends on Exhibit 1 and {█} headends on Exhibit 2) ("May 22 Letter").

<sup>5</sup> *Id.*, ¶ 28.

<sup>6</sup> *Id.* at 4, ¶ 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

On June 1, 2012, Comcast told the Commission it could implement the Bureau's directive to neighborhood Bloomberg Television ("BTV") "without overly disruptive channel relocations in approximately 250 of the affected lineups" and needed an extension of time for 130 more.<sup>9</sup> In the 250 cases in which Comcast acknowledges it has an open channel slot within or adjacent to a news neighborhood, 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)."<sup>10</sup> Comcast also requested a "45-day extension of time (until August 15, 2012) to complete a subset of the channel realignments required by the [*Complaint Order*]."<sup>11</sup>

Bloomberg and Comcast both filed Applications for Review of the *Complaint Order*.<sup>12</sup> In its Application for Review, Bloomberg argued that the Bureau incorrectly allowed Comcast to place BTV in only one news neighborhood on systems with multiple news neighborhoods.

On June 8, 2012, Comcast filed its Motion for Stay requesting that the Commission stay implementation of the entire *Complaint Order* pending full Commission review.<sup>13</sup> In Comcast's Request for Stay, it stated that it was prepared to implement the Complaint Order but for Bloomberg's Application for Review. Bloomberg's "challenges to the *Order* makes it enormously

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<sup>9</sup> Motion for Partial Extension of Time of Comcast, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 at 2 (filed June 1, 2012) ("Comcast Motion for Extension of Time"). Bloomberg filed a Motion for Extension of Time to respond to Comcast's Motion for Extension of Time on June 14, 2012.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> Application for Review of Bloomberg, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 1, 2012) ("Bloomberg Application for Review"); Application for Review of Comcast, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 1, 2012) ("Comcast Application for Review").

<sup>13</sup> Motion for Stay at 3.

complicated and risky for Comcast to proceed with compliance on its original timetable and to deal with potential requests by other independent news networks.”<sup>14</sup>

On June 14, 2012, Bloomberg and Comcast met with the Media Bureau to discuss Comcast’s Motion for Stay (“June 14 Meeting”). During the meeting, Bloomberg offered a compromise proposal for implementing the *Complaint Order* on those channel lineups that are not affected by the issues raised in Bloomberg’s Application for Review. The Media Bureau also requested additional information from each party regarding whether carrying BTV only in an HD news neighborhood meets the requirements of the *Complaint Order*. Bloomberg and Comcast each filed their positions on the issue with the Commission on June 19, 2012,<sup>15</sup> and responded to each other’s submissions on June 21, 2012.<sup>16</sup>

The May 22 Letter provided Comcast’s channel lineups that have a news neighborhood but do not carry BTV within a news neighborhood (Exhibit 1) (“May 22 Data”)<sup>17</sup> and the channel lineups that carry BTV within a news neighborhood (Exhibit 2).<sup>18</sup> Bloomberg used the May 22 Data to identify channel lineups that are not implicated by issues raised in Bloomberg’s Application for

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<sup>14</sup> Motion for Stay at 2.

<sup>15</sup> Bloomberg’s Response to the Media Bureau’s Request For Additional Information Regarding High Definition News Neighborhoods, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 19, 2012) (“Bloomberg HD Filing”); Letter from David H. Solomon and J. Wade Lindsay, Counsel for Comcast, to William T. Lake, Chief, Media Bureau, FCC, MB Dkt. No. 11-104 (filed June 19, 2012) (“Comcast HD Filing”).

<sup>16</sup> Bloomberg’s Response to Comcast’s Letter Responding to the Media Bureau’s Request for Additional Information Regarding High Definition News Neighborhoods, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 21, 2012) (“Bloomberg HD Response”); Letter from David H. Solomon and J. Wade Lindsay, Counsel for Comcast, to William T. Lake, Chief, Media Bureau, FCC, MB Dkt. No. 11-104 (filed June 21, 2012) (“Comcast HD Response”).

<sup>17</sup> See May 22 Letter.

<sup>18</sup> See *id.* 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 an HD channel lineup, Bloomberg objects and reserves its right to have BTV moved to an SD neighborhood below channel 100.

Review. Bloomberg provided copies of those lineups to Comcast and Commission staff during the June 14 Meeting.

Specifically, Bloomberg’s expert, Dr. Ali Yurukoglu, analyzed the {█} channel lineups listed in the May 22 Data, which Comcast claims are the only channel lineups where BTV is carried but not in a news neighborhood.<sup>19</sup>

Dr. Yurukoglu identified {█} of the channel lineups where the only vacant channel is near an SD news neighborhood below Channel 100 (“Bucket 1”).<sup>20</sup> He also identified {█} channel lineups that have as their only news neighborhood an SD news neighborhood below Channel 100, but have no vacant channels near that news neighborhood (“Bucket 2A”).<sup>21</sup> There are another {█} channel lineups that have both an SD news neighborhood below Channel 100 and an HD news neighborhood, but there is no vacant channel near either news neighborhood (“Bucket 2B”).<sup>22</sup> Finally, there are {█} remaining channel lineups.

As Comcast has stated, it first wanted to use vacant channels to fulfill its news neighborhooding obligation. Bloomberg proposed that Comcast be required to neighborhood BTV on the {█} Bucket 1 channel lineups with a vacancy near a lower neighborhood by the July 1,

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<sup>19</sup> During the Complaint proceeding, Comcast and Bloomberg both used Tribune Media Service (“TMS”) data to analyze Comcast’s channel lineups. For reasons that are unknown to Bloomberg, Comcast provided the May 22 Data to Bloomberg and filed it with the Commission using a proprietary Comcast CLS ID that does not match-up to any of the data fields in the TMS channel lineup data. Bloomberg respectfully requests that Comcast provide to Bloomberg and file with the Commission the zip code associated with each CLS ID on Exhibit 1 and Exhibit 2 in the May 22 Data. Using zip codes, Bloomberg will be able to match and verify the May 22 Data against the TMS channel lineup data that both parties used during the Complaint proceeding.

<sup>20</sup> *Id.* at 8, Ex. A, ¶ 25 (The channel lineups from the May 22 Data included in Bucket 1 are available in binders Part 1, Volumes I-III.).

<sup>21</sup> *Id.* at 8, Ex. A, ¶¶ 27-29 (The channel lineups from the May 22 Data included in Buckets 2A and 2B are available in binders Part 2, Volumes I-II.).

<sup>22</sup> *Id.* at 8, Ex. A, ¶ 30.

2012, deadline imposed by the *Complaint Order*.<sup>23</sup> Bloomberg also agreed to a 45-day extension of time to August 15, 2012, in order for Comcast to neighborhood BTV on the {█} Bucket 2A channel lineups and the {█} Bucket 2B channel lineups. Bloomberg agreed to stay the {█} lineups in Bucket 3.

In principle, Bloomberg and Comcast agreed during the June 14 Meeting to neighborhood the Bucket 1 channel lineups by July 1, 2012, the Bucket 2A channel lineups by August 15, 2012, and a stay for the remaining {█} channel lineups.<sup>24</sup> For the {█} channel lineups in Bucket 2B involving channel lineups with an HD news neighborhood, Bloomberg and Comcast agreed to let the Bureau decide whether the *Complaint Order* allows Comcast to neighborhood BTV in only HD news neighborhoods. If HD neighborhoods alone are insufficient, then BTV will need to be neighborhooded on the {█} Bucket 2B channel lineups by August 15, 2012. If neighborhooding in HD alone is allowed, then neighborhooding for {█} Bucket 2B channel lineups will be stayed but Comcast will neighborhood BTV-HD on the {█} channel lineups that only have an HD news neighborhood by August 15, 2012.

Comcast's counterproposal moves forward on certain channel lineups included in Bloomberg's compromise approach, but then takes a "heads I win, tails you lose" approach with respect to HD. Comcast agrees to Bloomberg's {█} channel lineups in Bucket 1, {█} channel lineups in Bucket 2A, and a stay for the remaining Bucket 3 {█} channel lineups.<sup>25</sup> It also proposes to neighborhood BTV on {█} additional channel lineups from Bucket 2B where there is a vacant channel next to the below channel 100 news neighborhood. On the HD neighborhood issue, if the Bureau rules in favor of Comcast, then Comcast proposes a stay for the

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<sup>23</sup> *Complaint Order* at 13, ¶ 24.

<sup>24</sup> See Bloomberg HD Filing at 9; see also Comcast HD Filing at 2.

<sup>25</sup> See Comcast HD Filing at 2; see also Comcast HD Response at 8-9.

remaining {█} channel lineups in Bucket 2B and it will neighborhood BTV-HD on the {█} channel lineups with only an HD news neighborhood by August 15, 2012. If the Bureau rules in favor of Bloomberg on the HD issue, then Comcast offers the same proposal: a stay for the remaining {█} channel lineups in Bucket 2B and it will neighborhood BTV-HD on the {█} channel lineups with only an HD news neighborhood by August 15, 2012.

With respect to Bucket 2B, Comcast is really offering nothing to Bloomberg. Regardless of which party wins the HD issue, Comcast is only willing to neighborhood {█} channel lineups from Bucket 2B. This is contrary to Bloomberg's principles underlying its proposal and the reasons why the Bureau agreed to address the HD issue. Once the Bureau decides the HD issue, the parties will be able to determine, under the proposal agreed to at the June 14 Meeting, if neighborhooding for Bucket 2B will need to be completed by August 15, 2012, or if the parties will agree to a stay for the channel lineups in Bucket 2B.

Comcast's proposal for the remaining {█} channel lineups in Bucket 2B conflicts with the principle that neighborhooding should proceed for channel lineups where neighborhooding is not impacted by Bloomberg's Application for Review. If the Bureau rules favorably on the HD issue for Bloomberg, then for the channel lineups in Bucket 2B, the only relevant news neighborhood is the SD news neighborhood. And this neighborhood is not impacted by any of the issues raised in Bloomberg's Application for Review.<sup>26</sup> Therefore, BTV should be neighborhooded on the remaining {█} channel lineups in Bucket 2B by August 15, 2012.

Bloomberg opposes the grant of a stay of the neighborhooding condition for the {█} channel lineups in Bucket 2B in the event that the Bureau decides the HD issue in Bloomberg's favor. A grant of a stay is unnecessary because none of the issues raised in Bloomberg's Application

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<sup>26</sup> This includes the issue of certain contested news channels.

for Review will be at issue if Bloomberg wins on the HD issue, Comcast's stated purpose for needing a stay of the *Complaint Order*.

Comcast is willing to concede neighborhooding {█} channel lineups in Bucket 2B in order to get a stay for the remaining channel lineups in Bucket 2B. Likewise, Bloomberg is willing to agree to a stay for {█} channel lineups in Bucket 2B in order to get neighborhooding for the remaining {█} channel lineups if the Bureau decides the HD issue in its favor.

Nearly eighteen months have passed since the Commission approved the Comcast/NBCU merger with the Condition that, in order to protect the public interest, Comcast must include independent news channels like BTV in its news neighborhoods.<sup>27</sup> The Commission limited the news neighborhood condition to seven years from the date of the *Merger Order*. In addition, more than a year after Bloomberg filed a complaint to require Comcast to implement that Condition, BTV is still not carried in Comcast's news neighborhoods. Thus, through its tactics of delay and denial, Comcast has shaved more than 20% of the time period in which it must comply with the news neighborhooding condition. In accordance with the agreement between Bloomberg and Comcast, Bloomberg opposes the Motion for Stay for the {█} channel lineups in Bucket 2B if Bloomberg wins on the HD issue. A Motion for Stay in this limited circumstance is not appropriate because: (i) Comcast's past efforts to delay implementing the Condition; (ii) Comcast has failed to satisfy the burdens for the Commission to grant a stay; and (iii) the special importance of news and the Commission's finding that the Condition was necessary to protect the public interest. The FCC should deny Comcast's Motion for Stay as set forth above.

Any aggrieved party may file an application for review to the full Commission of a decision made pursuant to delegated authority. Both Comcast and Bloomberg have done so in response to the *Complaint Order* on aspects of the decision with which it disagrees. However, such review is not a

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<sup>27</sup> *Merger Order* at 4288, ¶ 122.

reason to stay implementation of the Condition, which is already long overdue. Comcast is required to comply with the *Complaint Order* unless and until a stay is granted; the filing of an application for review does not stay the underlying order subject to review.

Moreover, the bases on which Comcast relies to justify a stay are without merit.

If Comcast found the *Merger Order's* news neighborhooding condition too burdensome, it could have filed a petition for reconsideration of the Condition with the Commission<sup>28</sup> or rejected the Commission's grant of its application and the neighborhooding condition and proceeded to an administrative hearing.<sup>29</sup> 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."<sup>30</sup> 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.

Second, Comcast has not demonstrated that it is likely to succeed on the merits of its case. Comcast argues that the Bureau erred in finding that the Condition applies to existing news neighborhoods. The news neighborhooding condition applies "if Comcast now or in the future carries news and/or business news channels in a neighborhood."<sup>31</sup> "Now" means "at the present

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<sup>28</sup> See 47 C.F.R. § 1.106.

<sup>29</sup> See 47 C.F.R. § 1.110. Comcast accepted the grant in the *Merger Order* with the conditions adopted by the Commission. Section 1.110 of the Commission's Rules "does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions." *Central Television, Inc. v. FCC*, 834 F.2d 186, 190 (D. C. Cir. 1987).

<sup>30</sup> Letter from Kathryn A. Zachem (Comcast Corp.), Ronald A. Stern (General Electric Co.), and Richard Cotton (NBC Universal, Inc.) to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56, at 1 (filed Jan. 21, 2011) ("Comcast Merger Letter").

<sup>31</sup> *Merger Order* at 4288, ¶ 122.

time or moment” and “under the present circumstances.”<sup>32</sup> Therefore, the Condition applied as of the time Comcast accepted it and consummated the Merger. The Bureau rejected Comcast’s view that the Commission intended to “refer to channel lineups Comcast was introducing at the time the merger closed (the MCLU) and any groupings constructed in the future.”<sup>33</sup> 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.”<sup>34</sup> Comcast’s allegations that the Bureau erred in finding that four news channels in five adjacent channel positions is a news neighborhood fails as well. The Bureau’s interpretation of the Condition is consistent with the plain language of the Condition while Comcast’s interpretation is not. Comcast’s allegation that the Bureau’s interpretation of the news neighborhooding condition conflicts with the record is equally unavailing. The Bureau reviewed the significant evidence submitted in the complaint proceeding and found Bloomberg’s evidence persuasive. The Bureau’s decision discussed this evidence at length in the *Complaint Order* to support its conclusion that four news channels in five adjacent channel positions is a significant number of news channels.<sup>35</sup>

Third, Comcast does not, and cannot show, irreparable harm. Its Motion for Stay is based entirely on what may happen if Bloomberg’s Application for Review is granted. Moreover, for the category of channel lineups where Bloomberg opposes a stay, Comcast cannot demonstrate harm because the total number of lineups at issue is {█} which are well within the range of channel moves that Comcast routinely makes.

Fourth, Comcast’s Motion for Stay does not support its contention that, if Bloomberg prevails in its Application for Review, additional channel lineup moves will be required. Rather, the

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<sup>32</sup> *Complaint Order* at 4, ¶ 7, citing Bloomberg Complaint at 20-21.

<sup>33</sup> *Id.* at 5, ¶ 7.

<sup>34</sup> *Id.* at 5, ¶ 8.

<sup>35</sup> *See id.* at 5-6, ¶ 9.

data in Comcast's own filing demonstrate that if Bloomberg prevails in its Application, the net number of news neighborhoods for which BTV qualifies is reduced. Specifically, Comcast's filing first says that 140 channel lineups will still have one news neighborhood.<sup>36</sup> Therefore, the total number of changes required to implement the neighborhooding condition will not change for these markets; rather, Comcast's options of placement will be reduced.<sup>37</sup> If Bloomberg prevails in its Application, 20 existing neighborhoods containing BTV are eliminated, but at least one neighborhood remains on the channel lineup. Therefore, BTV will need to be moved to the remaining neighborhood.<sup>38</sup> That number, however, is more than offset by the fact that 27 neighborhoods will be eliminated and BTV will not be required to be neighborhooded on those channel lineups.<sup>39</sup> Thus, under Comcast's own view of this case, if Bloomberg prevails, Comcast will need to neighborhood BTV in seven fewer cases than it would under the terms of the *Complaint Order*.

Finally, the Condition on its face and in its application is narrowly tailored. 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.<sup>40</sup> Additionally, the Condition is "narrowly tailored" because it does not apply to any programming genre, but specifically applies to news. It is narrower still because it only benefits a subcategory of news channels – independent news -- rather than all news

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<sup>36</sup> See Motion for Stay at 7.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 8 (If BTV is currently neighborhooded and Bloomberg's Application for Review is granted and BTV's current news neighborhood is disqualified, then BTV will need to be neighborhooded in a different qualifying news neighborhood.).

<sup>39</sup> *Id.*

<sup>40</sup> *Merger Order* at 4287, ¶ 122.

channels. The Bureau further limited the subcategory of news channels that can avail themselves of the relief provided by the Condition by clarifying that weather and sports are not eligible under the Condition's definition of news channel. Thus, the potential number of channels that could benefit from the Condition is narrowly limited.

### III. STANDARD OF REVIEW

Comcast itself "acknowledges that this situation does not precisely fit into the traditional test for a stay."<sup>41</sup> A stay is an extraordinary, equitable remedy<sup>42</sup> that requires the petitioner to show that (1) it has made a strong showing that it is likely to prevail on the merits of its appeal; (2) without such relief, it will be irreparably injured; (3) the issuance of a stay will not substantially harm other parties interested in the proceedings; and (4) the public interest requires grant of a stay.<sup>43</sup> The *Holiday Tours* case found that "a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a **substantial** case on the merits.

In what can only be described as a gross understatement, Comcast acknowledges that "this situation does not precisely fit into the traditional test for a stay."<sup>44</sup> Indeed, it may be the first time in history that a party argued that likelihood of failure on the merits was justification for a stay. That, in essence, is exactly what Comcast does. Although Comcast argues that its Application for Review is likely to succeed on the merits, all of its claims of alleged injury to it will occur only if the Commission grants **Bloomberg's, rather than Comcast's** Application for Review. The Commission has upheld the denial of a motion for stay when the party did not show it would prevail on the

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<sup>41</sup> Motion for Stay at 12.

<sup>42</sup> *Implementation of Section 224 of the Act, Order*, 26 FCC Rcd 7792, 7793 (2011) ("*June 1 Order*").

<sup>43</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 921 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*"), as modified by *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Holiday Tours*").

<sup>44</sup> Motion for Stay at 12.

merits.<sup>45</sup> Moreover, as discussed below, Comcast's request for stay fails under all four prongs of the test.

#### IV. COMCAST HAS FAILED THE FOUR-PART TEST FOR STAY

##### A. Comcast Will Not Prevail On The Merits Of Its Application

Comcast's arguments were addressed and properly rejected by the Bureau in the complaint proceeding and by the Commission during the merger proceeding. Therefore, the likelihood that Comcast will prevail on the merits is remote.

##### 1. Comcast must neighborhood "Now."

The news neighborhooding condition applies "if Comcast now or in the future carries news and/or business news channels in a neighborhood."<sup>46</sup> "Now" means "at the present time or moment" and "under the present circumstances."<sup>47</sup> 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."<sup>48</sup> 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."<sup>49</sup> In addition, the Bureau's interpretation is the only

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<sup>45</sup> *Powell Meredith Communications Co., Memorandum Opinion and Order*, 19 FCC Rcd 12672, 12675-76 (2004); *Shaw Communications Inc., Memorandum Opinion and Order*, 24 FCC Rcd 5852, 5855 (2009) ("[W]e have already found that Lunderville is not likely to prevail on the merits. Accordingly, we need not inquire further into the other factors necessary for grant of a stay."); *see also Sainte Partners II, LP, Memorandum Opinion and Order*, 20 FCC Rcd 14723, 14725 (WTB 2005).

<sup>46</sup> *Merger Order* at 4288, ¶ 122.

<sup>47</sup> *See* Reply of Bloomberg to Answer of Comcast, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 at 4 (filed Aug. 30, 2011) ("Bloomberg Reply").

<sup>48</sup> *Complaint Order* at 5, ¶ 7.

<sup>49</sup> *Id.* at 5, ¶ 8.

interpretation consistent with the cardinal rule of statutory construction that a statute should be interpreted so that none of its terms are superfluous.<sup>50</sup>

Comcast did not dispute on the record that the word “now” means “at the present time or moment.”<sup>51</sup> 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.”<sup>52</sup> 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”).<sup>53</sup> 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*

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<sup>50</sup> 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 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); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 482 (1980).

<sup>51</sup> 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).

<sup>52</sup> 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).

<sup>53</sup> See Answer of Comcast Cable Communications, LLC, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 at 45, ¶ 91 (filed July 27, 2011) (“Answer”); see also Comcast Application for Review at 16-17.

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 in a system's channel lineup."<sup>54</sup> Comcast contends that the word "placing" "plainly refers to an affirmative action"<sup>55</sup> 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.<sup>56</sup> 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,"<sup>57</sup> 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.<sup>58</sup>

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<sup>54</sup> Comcast Application for Review at 16 (emphasis omitted).

<sup>55</sup> *Id.* at 17.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 16 (emphasis omitted).

<sup>58</sup> Comcast's reliance on a footnote discussing the terms "would only take effect" and "undertook," and fails. *See* Bloomberg Reply at 7-8.

**2. The plain language of the Condition supports the Bureau’s finding with respect to a “significant number” of news channels**

Comcast’s contention that the Bureau’s definition of news neighborhood is at odds with the plain language of the Condition is incorrect.<sup>59</sup> 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.”<sup>60</sup> In the Comcast-NBC Universal *Merger Order*, 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 Commission defined the term to refer to channel groupings where a “significant number or percentage” of news channels are located “substantially adjacent” to one another.<sup>61</sup> 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 further 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*.”<sup>62</sup> Comcast’s emphasis on the fact that the Condition refers to the term “neighborhood” in the singular ignores

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<sup>59</sup> See Comcast Application for Review at 7.

<sup>60</sup> Bloomberg Reply at 41-42 (emphasis in original).

<sup>61</sup> 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.

<sup>62</sup> Comcast Application for Review at 7.

the basic rule of statutory construction that the singular generally includes the plural,<sup>63</sup> which is expressly set forth at the very beginning of the U.S. Code.<sup>64</sup>

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.<sup>65</sup> 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*.”<sup>66</sup> 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 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...’”<sup>67</sup>

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<sup>63</sup> 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”).

<sup>64</sup> Bloomberg Reply 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”).

<sup>65</sup> Bloomberg Reply at 43.

<sup>66</sup> *Merger Order* at 4363 (emphasis added).

<sup>67</sup> Comcast Application for Review at 8.

It is entirely reasonable, moreover, that a channel lineup could have more than one news neighborhood.<sup>68</sup> 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.<sup>69</sup>

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”<sup>70</sup> cannot be correct. In the *Complaint Order*, the Bureau merely states that the 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.<sup>71</sup> 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.

### **3. The *Complaint Order* is supported by the record.**

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

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<sup>68</sup> See Bloomberg Reply at 42, Ex. D, ¶ 23.

<sup>69</sup> *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.” Bloomberg Reply at 42, Ex. B, ¶ 16. See also *id.* at 42, Ex. C, ¶ 20.

<sup>70</sup> Comcast Application for Review at 8.

<sup>71</sup> *Complaint Order* at 10, ¶ 19.

“important.”<sup>72</sup> 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.

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.”<sup>73</sup> 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.”<sup>74</sup> 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%,<sup>75</sup> and that the probability that such a channel grouping would occur by chance as often as it did is infinitesimal.<sup>76</sup>

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.”<sup>77</sup> 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

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<sup>72</sup> *Complaint Order*, at 7, ¶ 13.

<sup>73</sup> *Merger Order* at 4288, ¶122.

<sup>74</sup> *Complaint, Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 at 18, ¶ 75 (filed June 13, 2011) (“Complaint”).

<sup>75</sup> *See id.*; *see also* Ex. F, ¶ 53.

<sup>76</sup> *See id.* at 19, ¶ 75; *see also* Ex. F, ¶ 53.

<sup>77</sup> *Id.* at 19, ¶ 76.

standard definition news channels in that neighborhood.<sup>78</sup> Bloomberg demonstrated that this distribution of channels results from a deliberate decision to group news channels together.<sup>79</sup> 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.<sup>80</sup> The Bureau’s decision discussed this evidence in the *Complaint Order*.<sup>81</sup> 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.

Finally, Comcast also erroneously argues that there is “no support” in the *Complaint Order* for the conclusion that Comcast may not satisfy the neighborhooding Condition by placing BTV in an HD neighborhood, but instead must place BTV in an SD neighborhood.<sup>82</sup> However, the Bureau clearly did not consider the placement of BTV in an HD neighborhood as adequate to meet the

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<sup>78</sup> *See id.* at 19, ¶¶ 76, Ex. F, ¶ 49.

<sup>79</sup> 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 16 (citing to Complaint 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.

<sup>80</sup> 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.

<sup>81</sup> *See Complaint Order* at 6, ¶¶ 9-10.

<sup>82</sup> Motion for Stay at 11.

requirements of the neighborhooding Condition. In footnote 88 of the *Complaint Order*, the Bureau explained that Comcast’s expert, Mark Israel, indicated in his analysis that “there are at least 106 cable headends in the relevant DMAs that carry Bloomberg Television, have a news neighborhood, and do not include Bloomberg in a neighborhood”<sup>83</sup> and concluded that “there is no factual dispute about whether these headends carry Bloomberg outside of a neighborhood.”<sup>84</sup> By his own admission, Mr. Israel’s analysis explicitly did not consider the existence of HD news neighborhoods and whether BTV was carried in any HD neighborhoods in these 106 systems.<sup>85</sup> Therefore, by adopting Mr. Israel’s analysis and requiring Bloomberg to be neighborhooded based on an analysis that did not even consider HD neighborhoods, the Bureau has made it clear that it did not consider HD neighborhoods and that Comcast cannot fulfill its neighborhooding requirements by placing BTV in an HD neighborhood. It would be illogical to allow Comcast to meet its obligations set forth in the *Complaint Order* for these 106 systems by adding BTV to an HD neighborhood when the existence of HD neighborhoods was not even part of the Bureau’s analysis or Comcast’s expert’s own analysis that was the basis for indentifying these 106 systems.

**4. Contrary to Comcast’s claims, the Condition is narrowly tailored.**

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.<sup>86</sup> This claim is substantially exaggerated and belied by experience. Such policy arguments have no place in this proceeding

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<sup>83</sup> *Complaint Order* at 13, n.88.

<sup>84</sup> *Id.*

<sup>85</sup> Answer, Ex. 5 at 4, ¶16 (“For the purposes of my analysis, I consider only standard-definition English-language channels identified as carrying news programming to be defined as ‘news channels.’”).

<sup>86</sup> See Comcast Application for Review at 12-14.

because they address whether the Commission should have adopted the 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,<sup>87</sup> or rejected the Commission’s grant of its application and proceeded to an administrative hearing.<sup>88</sup> 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.”<sup>89</sup> 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.

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 BTV “without overly disruptive channel relocations” in over 60% of the affected lineups and needed an extension

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<sup>87</sup> See 47 C.F.R. § 1.106.

<sup>88</sup> See 47 C.F.R. § 1.110.

<sup>89</sup> Letter from Kathryn A. Zachem (Comcast Corp.), Ronald A. Stern (General Electric Co.), and Richard Cotton (NBC Universal, Inc.) to Marlene H. Dortch, Secretary, FCC, MB Dkt No. 10-56 at 1 (filed Jan. 21, 2011) (“Comcast Merger Letter”).

of time to implement the Bureau's Order for the rest.<sup>90</sup> 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)."<sup>91</sup> 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."<sup>92</sup> 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,<sup>93</sup> and can neighborhood BTV in the rest of the lineups within 45 days, its claims of customer disruption are demonstrably overstated.<sup>94</sup>

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.<sup>95</sup> In the 35 most-populous DMAs, networks were relocated at least 6,806 times.<sup>96</sup> At least 3.6% of networks were relocated during just this eleven-month period.<sup>97</sup> Bloomberg showed that Comcast also regularly relocates networks below channel 100,<sup>98</sup> which it

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<sup>90</sup> Comcast Motion for Extension of Time at 2.

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 1.

<sup>93</sup> *See* 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.

<sup>94</sup> 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.

<sup>95</sup> Bloomberg Reply at 52, Ex. A, ¶ 106.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Bloomberg Reply at 52-53, Ex. A, ¶ 108.

claimed were particularly difficult.<sup>99</sup> 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.<sup>100</sup> 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.”<sup>101</sup>

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 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.<sup>102</sup> 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.

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<sup>99</sup> See Comcast Application for Review at 14.

<sup>100</sup> Comcast's brief reference to the Commission's stay in the Tennis Channel 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.

<sup>101</sup> *Merger Order* at 4287, ¶ 122.

<sup>102</sup> See *id.*

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."<sup>103</sup> 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.<sup>104</sup>

**B. Comcast Has Not Shown And Cannot Show Irreparable Injury**

Comcast's claim that it will suffer significant, immediate, and irreparable injury is false. A party must show that the alleged harm is "both certain and great; ... actual and not theoretical..."<sup>105</sup> "Bare allegations of what is likely to occur" do not meet the test, because "the test is whether the harm 'will in fact occur.'"<sup>106</sup> "Economic loss 'does not, in and of itself, constitute irreparable

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<sup>103</sup> Comcast Application for Review at 13-14.

<sup>104</sup> 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*, 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).

<sup>105</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>106</sup> *Id.*

harm.”<sup>107</sup> Moreover, “[m]ere injuries, however substantial in terms of money, time and energy expended in the absence of a stay, are not enough.”<sup>108</sup> In this particular case, Comcast is using the potential for harm in the future as an excuse to do nothing now. It is akin to arguing that because it should not pay its \$100 bill now because it might owe more than \$100 in the future.

Comcast claims that if the Commission adopts any part of Bloomberg’s Application, its compliance efforts “would have been pointless.”<sup>109</sup> Comcast also claims “the complexity and cost of implementing the [Complaint] Order is substantial, and the negative effects of the decision on Comcast’s business will be large and impossible to undo.”<sup>110</sup> Comcast offers no proof as to either the complexity or costs of implementation. “[T]o demonstrate irreparable harm, Petitioners must provide ‘proof indicating the harm is certain to occur in the near future.’”<sup>111</sup> Its allegations, moreover, conflict significantly with its statements that it could implement the Condition in more than half the markets by the deadline and only needed a brief extension of time to implement in the remaining markets.<sup>112</sup>

The evidence of harm that Comcast alleges is not immediate, nor is it certain to happen. Such speculative and hypothetical injury does not establish a basis for granting a stay.

Taking Comcast’s specific complaints point by point, Comcast’s first argument is that it needs a stay now because it will need to move BTV into additional lineups if the Commission requires BTV to be neighborhooded in all news neighborhoods. The *Complaint Order* however does

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<sup>107</sup> *Id.*

<sup>108</sup> *Virginia Petroleum Jobbers*, 259 F.2d at 925.

<sup>109</sup> Motion for Stay at 12.

<sup>110</sup> *Id.* at 15.

<sup>111</sup> *June 1 Order* at 7794 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>112</sup> See Comcast Motion for Extension of Time. Comcast conceded in its Surreply that the physical engineering costs associated with abiding by the news neighborhooding condition are “low.” See Surreply of Comcast Cable Communications, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. 11-104 at 20-21, ¶ 39 (filed Sept. 27, 2011) (“Surreply”).

not compel Comcast to move BTV to all news neighborhoods now. And Comcast utterly fails to explain how delaying adding BTV to all news neighborhoods could possibly result in immediate harm to it. In fact, Comcast suffers no harm by delaying such implementation until the Commission rules on the Applications for Review.

Comcast states that, if the Commission agrees with Bloomberg that CurrentTV, Link TV, MHz Worldview and BBC World News are not news networks, then Comcast would be required to relocate BTV in {█} additional channel lineups, and {█} more where it would have relocated BTV only to find that the neighborhood no longer qualifies as a neighborhood.<sup>113</sup>

Comcast can easily address these harms by locating BTV in a neighborhood without these channels at the outset. Similarly, Comcast's claim that it would face a "second round" of relocation if the Commission finds that the neighborhooding condition cannot be satisfied using HD neighborhoods is equally unavailing. The solution is to avoid neighborhooding BTV in HD neighborhoods if a channel lineup has an SD neighborhood. The speculative harms that Comcast claims are largely within Comcast's control. Therefore, neither of these alleged harms should be a basis for granting a stay.

As noted above, if the Commission ultimately finds that BTV was not entitled to be moved into certain neighborhoods, Comcast can move them back. Moreover, Comcast's complaints about the burdens of channel movements ring hollow in light of the record evidence that Comcast regularly (and voluntarily) relocates channels on its headends and is able to manage the burdens associated with those changes.<sup>114</sup>

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<sup>113</sup> Motion for Stay at 16.

<sup>114</sup> Bloomberg introduced evidence in the Complaint proceeding that Comcast moved networks *at least 10,625 times* in a recent approximately eleven-month period. Bloomberg Reply, Ex. A, ¶ 106. The statistic only counted those networks that were moved from one location on the channel lineup to another or were given a second location and did not count networks that were added or dropped from headends during these eleven months. In the 35 most-populous DMAs where Bloomberg has

With respect to some channel lineups in Bucket 2B, costs and inconvenience may result because other channels will need to be moved. This does not, however, reach the level of irreparable harm required by *Virginia Petroleum Jobbers*. In fact, the number of channel changes cannot be more than {{REDACTED}}. Such channel movements are not substantial and are well within the record evidence in this proceeding, including Comcast's own admissions, that it changes channel positions, including those below channel 100, often.<sup>115</sup>

Comcast's Motion for an Extension of Time implies that Comcast is negotiating with programmers near existing news neighborhood in order to implement the Bureau's directive. Comcast has provided no reason to stop that process which will be necessary in any event to implement the Condition. As Comcast's June 1 filing made clear, partial implementation of the *Complaint Order* is achievable by the deadline and Comcast only needs another 45 days to implement the remainder of the changes.

Comcast's claims that it would be harmed from a second news network coming forward requesting to be neighborhooded is purely hypothetical and therefore too speculative to be the basis for grant of a stay. During the nearly 18 months since the *Merger Order* was adopted, Bloomberg is aware of no other news network that has requested to be neighborhooded. Comcast's pleadings do

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requested to be neighborhooded, 3.6% of all networks were relocated in the eleven month period, and those same networks were relocated at least 6,806 times. *Id.* Bloomberg submitted evidence that Comcast moved networks *at least 1,752 times* in channels below 100 and at least 2.8% of such networks were relocated in that channel range. Bloomberg Reply, Ex. A, ¶ 108. With respect to headends located in the 35 most-populous DMAs, at least 2.4% of networks between channels 1-99 were moved from 2010 to 2011. Comcast's own expert, Dr. Mark Israel, finds that Comcast relocated networks in the 1-99 range {{REDACTED}} times in the top 35 DMAs between June 2010 and June 2011. *See* Surreply, Ex. 2 at Table 1. Comcast admits that it relocated networks between channel positions 1-99 on the majority of its headends in the top 35 DMAs during just a single twelve-month period. *See* Surreply, ¶ 35, Ex. 2 at Table 1. according to Comcast's own data, the majority of Comcast's headends in the top 35 DMAs (55%) experienced 2.96 channel relocations on average in the 1-99 range over the course of just twelve months. *See* Surreply, Ex. 2 at Tables 1-2 ({{REDACTED}} channel changes on {{REDACTED}} headends).

<sup>115</sup> *See* Bloomberg Reply at 52-53.

not indicate that there is any such request pending. Moreover, where there is demonstrated below the balance of the equities militates strongly against the stay, Comcast has a heavy burden of demonstrating a substantial likelihood of success on the merits in order to justify a stay.”<sup>116</sup>

**C. Bloomberg Will Suffer Substantial Harm If The Commission Stays Implementation Of The Condition**

Comcast also fails the third part of the test – harm to third parties interested in the outcome of the proceedings that would arise from grant of a stay. Comcast attempts to turn the third part of the *Virginia Petroleum Jobbers* standard on its head into one whereby harm would accrue to third parties *unless* a stay were to be granted. As the principal party interested in the proceeding, it is harm to Bloomberg that must be analyzed. Clearly grant of a stay would cause harm to Bloomberg by further delaying the relief granted by the Commission nearly 18 months ago and which is already time limited. Effectively, Comcast has “burned off the clock” 20% of the seven years of the neighborhooding condition relief that the Bureau has already determined Bloomberg is entitled to receive. Further delay in implementing the condition is actual harm to Bloomberg. However, even analyzing this factor from the perspective of other programmers, there would be no significant harm to third parties. For example, on those systems in which Comcast will have to move a channel to place BTV in a news neighborhood, the displacement of a channel will not result in the removal of the channel from a Comcast cable system; rather only its relocation. Similarly, there is no burden on the consumer seeking a relocated channel. As Bloomberg has demonstrated, Comcast makes thousands of channel changes every year on its systems. Further, as previously noted, Comcast has conceded that it could accomplish the change in over 60% of the affected lineups without any

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<sup>116</sup> *Game Show Network, L.L.C. v. Cablevision Systems Corp.*, Order, 26 FCC Rcd 16471, 16476, n.44, citing *McSurley v. McClellan*, 697 F.2d 309, 217 (D.C. Cir. 1982) (stay denied for failure to meet burden of substantial likelihood of success).

significant disruption.<sup>117</sup> Thus, even under Comcast’s inverted “third party harm” standard, Comcast fails to demonstrate significant harm to any party except Bloomberg.

The news neighborhooding condition remedies transaction-specific harm. During the merger proceeding, Bloomberg argued that absent the transaction, Comcast would begin to move BTV to be near CNBC (and thus into existing news neighborhoods) on its channel lineups. Now, because of Comcast’s ownership of 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.<sup>118</sup> 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. A stay would directly harm Bloomberg because it would permit Comcast not to neighborhood BTV, which is contrary to what Comcast would have done absent the merger and what the neighborhooding condition was, at least in part, designed to ameliorate.

In the *Merger Order*, the Commission acknowledged that “the vertical integration of Comcast’s distribution network with NBCU’s programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming.”<sup>119</sup> The Commission concluded “that the adoption of a non-discrimination requirement...and a narrowly tailored neighborhooding requirement will mitigate any potential public interest harms.”<sup>120</sup> The imposition of a stay directly contradicts the Commission’s stated purpose for adopting the news neighborhooding condition – to prevent discrimination against unaffiliated programming networks. A stay will cause significant harm to Bloomberg, as an independent programmer, because Comcast

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<sup>117</sup> Comcast Motion for Extension of Time.

<sup>118</sup> Petition to Deny of Bloomberg, *Comcast Corp., General Electric Co., and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses*, MB Dkt. No. 10-56, at 29-30 (Erratum filed June 24, 2010) (“Bloomberg Petition to Deny”).

<sup>119</sup> *Merger Order* at 4282, ¶ 110.

<sup>120</sup> *Id.*

will be able to continue abusing its market power “to reduce competition from rival video programming networks....”<sup>121</sup>

The news neighborhooding condition is only scheduled to be in effect for seven years,<sup>122</sup> and Comcast has spent nearly eighteen months of that time fighting a straightforward interpretation of the Condition. Given that the seven-year clock is currently ticking, each day of delay is yet another day that Comcast does not have to implement the relief adopted by the Commission and implemented by the Bureau in the *Complaint Order*. It is, therefore, imperative that the Commission ensure that Comcast implement the neighborhooding condition as soon as possible.<sup>123</sup> Any further delay would call into question the effectiveness of the news neighborhooding condition to promote independent sources of news and information.

Moreover, according to Comcast’s own expert, Mark A. Israel, Comcast carries its affiliated programming network, CNBC, in both an SD and an HD neighborhood 81% of the time on Comcast’s channel lineups in the top 35 DMAs that have at least one SD and at least one HD neighborhood.<sup>124</sup> The dual SD and HD neighborhooding numbers are equally as impressive for BTV’s largest competitors: CNN (76%), Fox News (79%), Fox Business News (56%), HLN (52%), and MSNBC (38%).<sup>125</sup> Therefore, granting a stay that will continue to delay neighborhooding for BTV will cause it significant harm since its largest competitors, including CNBC, are neighborhooded in not one but two neighborhoods.

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<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 4381 (App. A, Sec. XX).

<sup>123</sup> Bloomberg Reply at 4.

<sup>124</sup> Comcast HD Response, Decl. of Mark A. Israel, at 2 (“CNBC is carried in at least one SD neighborhood *and* at least one HD news neighborhood in 81% of such lineups....” (emphasis in original)).

<sup>125</sup> *Id.* at 2-3.

**D. The Public Interest Favors Implementation Of The News Neighborhooding Condition.**

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.”<sup>126</sup> Implementation of the news neighborhooding condition will benefit consumers by promoting greater access to a wide variety of diverse news sources.

As Bloomberg noted in the Complaint proceeding, because viewers use their 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,<sup>127</sup> channels benefit simply from being located in close proximity to other channels of the same genre.<sup>128</sup> 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. Indeed, industry executive Susan Arnold explains that “news channels benefit even more from neighborhooding than do other genres because . . . ‘news aficionados’ tend to flip between news networks more frequently than do viewers of movie, drama, sports, or other long-form programming.”<sup>129</sup> 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

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<sup>126</sup> *Merger Order* at 4287, ¶ 122.

<sup>127</sup> *See* Bloomberg Reply at 18, Ex. E, ¶ 19.

<sup>128</sup> *See id.* at 17, Ex. B, ¶ 18; Ex. C, ¶¶ 14, 15; Ex. F, ¶¶ 13, 15. According to research, male viewers are more likely to find programming by flipping channels while female viewers are more likely to use guides. *See id.*, Ex. D, ¶ 22.

<sup>129</sup> *Id.* at 18, Ex. F, ¶ 17.

viewers].”<sup>130</sup> Comcast ignores the value of neighborhooding for consumers. In the long run, its customers will benefit from an expanded news neighborhood where more channels will be organized by genre.<sup>131</sup>

The Commission must enforce conditions in order to protect the public interest and so companies know there are penalties for non-compliance. Stay is an equitable remedy. As demonstrated herein, Comcast has failed to meet the four-part test for a stay and the balance of the equities requires a stay of the { [REDACTED] } channel lineups still in dispute. The Commission should deny this contested portion of Comcast’s Motion for Stay.

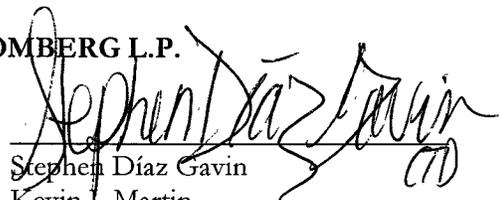
## V. CONCLUSION

For the foregoing reasons, Bloomberg respectfully requests that the Commission deny the Motion for Stay for Bucket 2B channel lineups, and direct Comcast to implement the news neighborhooding condition for those channel lineups.

Respectfully submitted,

**BLOOMBERG L.P.**

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Dated: June 26, 2012

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<sup>130</sup> *Id.* at 18, Ex. C, ¶ 14.

<sup>131</sup> *Id.* at 71, Ex. C, ¶ 19 (“[T]he addition of other news channels into the existing neighborhoods on Comcast headends will be a benefit to consumers as it will become a larger neighborhood with news channels grouped more logically and news channels easier to find.”).

**CERTIFICATE OF SERVICE**

I, Carly T. Didden, certify on this 26th day of June, 2012, a copy of the foregoing Bloomberg L.P. Partial Opposition to Motion for Expedited Stay of Comcast Cable Communications, LLC has been served via first-class U.S. mail, postage pre-paid, to the following:

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A handwritten signature in black ink, appearing to read 'Carly T. Didden', is written over a horizontal line.