

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

APPLICATION FOR REVIEW

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EXECUTIVE SUMMARY

Bloomberg hereby seeks review of one narrow aspect of the August 14, 2012 action of the Media Bureau. In that Order, the Bureau agreed with Bloomberg that its complaint against Comcast was limited to standard definition (“SD”) carriage of Bloomberg Television (“BTV”) on Comcast’s channel lineups (“Complaint”). As such, the Bureau appropriately clarified that the relief granted by the Bureau’s *Neighborhood Order* under this Complaint was similarly limited to SD carriage.

After agreeing with Bloomberg that its complaint was explicitly limited to carriage of its SD signal and did not address high definition (“HD”) carriage of BTV, however, the Bureau nonetheless incorrectly stayed on its own motion such implementation. The effect of the stay is to allow Comcast to continue to flout the terms of the news neighborhooding condition included in the Comcast-NBC Universal Merger Order.

Nearly 20 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 “wiped off the clock” 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.

The *Clarification Order* produced the anomalous result of agreeing with Bloomberg that the relief granted in its May 2nd *Neighborhood Order* applied only to the SD feed of BTV and agreeing with Bloomberg that under the May 2nd *Neighborhood Order* Comcast was already required to move BTV into news neighborhoods on an additional 59 channel lineups by July 1st, but then staying the relief that had already been ordered. Specifically, the Bureau stayed implementation of the *Neighborhood Order* in markets where Comcast has only one SD news neighborhood and an HD neighborhood. Although the issue of whether Bloomberg should be moved into multiple SD news neighborhoods

is currently on review, the Bureau incorrectly stayed 59 markets which only have one SD news neighborhood.

Since there is only one SD news neighborhood on these channel lineups and those channel lineups are not otherwise impacted by the issues raised in Bloomberg's Initial Application for Review, the stay should be lifted. Comcast should be directed to immediately neighborhood BTV in all of those markets.

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APPLICATION FOR REVIEW

Bloomberg L.P. (“Bloomberg”) hereby seeks Commission review of one narrow aspect of the Order released by the Media Bureau (“Bureau”) on August 14, 2012, in the above-captioned docket (“*Clarification Order*”).¹ In that Order, the Bureau agreed with Bloomberg that its complaint against Comcast Cable Communications, LLC (“Comcast”) was limited to standard definition (“SD”) carriage of Bloomberg Television (“BTV”) on Comcast’s channel lineups (“Complaint”). As such, the Bureau appropriately clarified that the relief granted by the Bureau’s *Neighborhood Order*² under this Complaint was similarly limited to SD carriage.

After agreeing with Bloomberg that its complaint was explicitly limited to carriage of its SD signal, however, the Bureau nonetheless incorrectly stayed on its own motion such implementation. The effect of the stay is to allow Comcast to continue to flout the terms of the news neighborhooding condition included in the Comcast-NBC Universal Merger Order.³ Bloomberg

¹ *Bloomberg L.P. v. Comcast Cable Communications, LLC, Memorandum Opinion and Order*, DA 12-1338 (MB Aug. 14, 2012) (“*Clarification Order*”).

² *Bloomberg L.P. v. Comcast Cable Communications, LLC, Memorandum Opinion and Order*, 27 FCC Rcd 4891 (MB 2012) (“*Neighborhood Order*”).

³ *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*”).

respectfully requests that the Commission consider and expeditiously grant the relief Bloomberg requests herein.

The sole issue raised in this Application for Review is the stay of neighborhooding implementation on the remaining Comcast channel lineups that only have one SD news neighborhood below channel 100 (“Bucket 2B”). In the *Neighborhood Order*, the Bureau recognized the importance and urgency of requiring Comcast to comply with the Merger conditions, explicitly requiring Comcast to “carry [BTV] in a news neighborhood on any headend that carries [BTV], has a news neighborhood as defined herein, and does not include [BTV] within a news neighborhood.”⁴ The Commission can and should require Comcast to continue to move forward with this relief granted in the *Neighborhood Order* and the *Clarification Order*, particularly in light of the time-limited nature of the *Merger Order* conditions.⁵

I. INTRODUCTION AND BACKGROUND

Nearly 20 months ago, the Commission approved, with conditions, the assignment and transfer of broadcast, satellite, and other radio licenses from the General Electric Company to Comcast. Comcast willingly accepted the Commission’s conditional approval of the Merger.⁶ The conditions that Comcast voluntarily accepted included the so-called “news neighborhooding”

⁴ *Neighborhood Order*, ¶ 6.

⁵ *Id.* at 4903, ¶¶ 26 & 27; *Clarification Order*, ¶ 3. In any event, however, the instant Application for Review should in no way delay Commission consideration of the issues raised by both Comcast and Bloomberg in their applications for review of the *Neighborhood Order*.

⁶ 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 (filed Jan. 21, 2011) (“Consistent with Section 1.110 of the Commission’s Rules, Applicants accept as binding the conditions and enforceable commitments included in the MO&O and expressly waive any right they may have to challenge the Commission’s legal authority to adopt and enforce such conditions and commitments (reserving, of course, their right to challenge the interpretation or application of those conditions and commitments in particular circumstances).”).

condition, whereby “if Comcast now or in the future carries news and/or business news channels in a neighborhood . . . Comcast must carry all independent news and business news channels in *that* neighborhood.”⁷

The Commission found the Merger served the public interest only if it was subject to specific conditions to protect independent news programmers. In recognition of the special importance of news, the Commission adopted a news neighborhooding condition to prevent Comcast from discriminating against unaffiliated news networks like BTV that compete with the news networks, including CNBC, that Comcast acquired in the Merger from General Electric.

Specifically, the news neighborhooding condition requires that:

If Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup, **Comcast must carry all independent news and business news channels in *that* neighborhood.**⁸

As has been well detailed,⁹ after Comcast refused BTV’s request to be carried in the then-existing news neighborhoods, Bloomberg filed a Complaint with the Commission on June 13, 2011.¹⁰ Bloomberg requested that the Commission order Comcast to move BTV to every news neighborhood on any headend located in the top-35 Nielsen Designated Market Areas (“DMAs”).¹¹

After a long and exhaustive pleading cycle, and nearly 11 months after Bloomberg filed its Complaint, the Bureau issued the *Neighborhood Order* in which it found that “Bloomberg has demonstrated that on at least some of its systems Comcast neighborhoods news channels on certain

⁷ *Merger Order* at 4288, ¶ 122 (emphasis supplied).

⁸ *Id.* (emphasis supplied); *see also id.* at App. A, § III.2.

⁹ Application for Review of Bloomberg, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 1, 2012) (“Initial Application for Review”).

¹⁰ Complaint, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 13, 2011) (“Complaint”).

¹¹ *Id.* at 22.

headends and does not carry [BTV] in a neighborhood on those headends, as required by the news neighborhooding condition of the [*Merger Order*].”¹² The Bureau further concluded that:

(i) the condition is not limited to channel lineups constructed after approval of the transaction, but also applies to lineups present on Comcast’s systems at the time the [*Merger Order*] was released, as well as to future lineups; (ii) a grouping containing four news or business news channels within a cluster of five adjacent channel positions qualifies as a “significant number of news or business news channels” for purposes of the news neighborhooding condition; (iii) the term “news channel” in the condition refers to general interest news programming and not to specialty news channels dedicated to a sub-genre of news programming (such as channels devoted to sports or weather news) or Public, Educational, and Governmental access channels (“PEG”); and (iv) for purposes of compliance with the condition, Comcast is obligated to carry an independent news programming channel in at least one news neighborhood, but is not required to carry a particular network channel in all news neighborhoods, or in a particular neighborhood, or in one consolidated news neighborhood.¹³

Accordingly, the Bureau directed Comcast, with respect to headends in the top-35 DMAs, to:

(i) within sixty days of the release of this [*Neighborhood Order*], carry [BTV] in a news neighborhood on any headend that carries [BTV], has a news neighborhood as defined herein, and does not include [BTV] within a news neighborhood...¹⁴

On June 14, 2012, Bloomberg and Comcast met with Bureau staff regarding implementation of the *Neighborhood Order*. Based on data submitted by Comcast regarding channel lineups, the parties categorized channel lineups into “buckets” and agreed on certain aspects of implementation. First, the Bureau directed Comcast to neighborhood BTV on the channel lineups in markets with

¹² *Neighborhood Order* at 4894, ¶ 5.

¹³ *Id.* Bloomberg believes the decision not to require Comcast to carry BTV in all news neighborhoods conflicts with the plain terms and intent of the news neighborhooding condition. On June 1, 2012, Bloomberg filed an Application for Review of the *Neighborhood Order* to request review and other issues.

¹⁴ *Neighborhood Order* at 4894, ¶6. In addition, the Bureau directed Comcast to: “provide to Bloomberg and the Commission a list of those headends that are subject to the requirements of subparagraph (i);” and “provide to Bloomberg and the Commission channel lineup information about any headend listed in response to subparagraph (ii) that already carries [BTV] within a news neighborhood” within 14 business days after the release of the *Neighborhood Order*. *Id.*

only one SD news neighborhood that have vacant channels adjacent to the news neighborhood (Bucket 1) by July 1, 2012, and in markets with only one SD news neighborhood without a vacancy near it (Bucket 2A) by August 15, 2012.¹⁵ The parties agreed and the Bureau stayed markets that contained two SD neighborhoods. The remaining lineups were defined as those lineups with one SD neighborhood and one HD neighborhood (Bucket 2B).¹⁶

As a result of the *Neighborhood Order* and *Clarification Order*, Comcast now carries BTV in some, but not all, of Comcast's SD news neighborhoods.

In the *Clarification Order*, the Bureau properly concluded that “the *Neighborhood Order* decided only the issue of whether BTV's SD programming [] is entitled to carriage in an SD ‘news neighborhood’ on Comcast’s channel lineup.”¹⁷ In spite of this decision, the Bureau arbitrarily decided to “stay the effectiveness of other aspects of the *Neighborhood Order* pending Commission

¹⁵ *Clarification Order*, ¶ 8.

¹⁶ While these categories generally describe the various buckets, the detailed definitions were the following: Comcast was required to neighborhood BTV in the news neighborhood on channel lineups where the only news neighborhood is an SD news neighborhood with a nearby vacant channel and that news neighborhood is below Channel 100 (Bucket 1) no later than July 1, 2012. Comcast was required to neighborhood BTV in news neighborhoods on channel lineups that have as their only news neighborhood an SD news neighborhood below Channel 100, but have no vacant channel near the news neighborhood (Bucket 2A). Bucket 2B is defined as channel lineups with only one SD news neighborhood and that news neighborhood is below Channel 100, and an HD news neighborhood. Originally, 65 channel lineups were designated as Bucket 2B. However, Comcast identified a vacant channel near the SD news neighborhood in six of those lineups, and has represented to the Commission that it would neighborhood BTV on those channel lineups no later than July 1, 2012. Letter to William T. Lake, Chief, Media Bureau, FCC, from David H. Solomon, Wilkinson Barker Knauer LLP, MB Dkt. No. 11-104 at n.44 (filed June 21, 2012) (“Comcast has already agreed to relocate BTV on those six lineups by July 1, 2012”). Therefore, 59 channel lineups remain in Bucket 2B. Bucket 3 includes all other channel lineups that are required to be neighborhooded.

¹⁷ *Clarification Order*, ¶ 3 (emphasis supplied).

review,”¹⁸ including implementation of neighborhooding BTV on channel lineups with one SD neighborhood and one HD neighborhood (Bucket 2B).

Bloomberg greatly appreciates the work of the Bureau in recognizing Comcast’s egregious violations of the terms of the news neighborhooding condition included in the *Merger Order* and in recognizing that the Complaint only dealt with SD news neighborhoods. Bloomberg is filing this Application for Review, however, to request that the Commission lift the stay for the Comcast channel lineups in Bucket 2B and respectfully requests that Comcast be directed to immediately move BTV into the sole SD news neighborhood on each of the channel lineups in these 59 channel lineups.

II. RELIEF REQUESTED

The Commission should promptly lift the stay on the Bucket 2B channel lineups and direct Comcast to carry BTV in the only SD news neighborhood on each channel lineup in Bucket 2B. In addition, especially because the news neighborhooding condition is only effective for less than five-and-one-half more years, Bloomberg requests that the Commission act expeditiously in order to avoid further delay in implementing the relief contained in the *Merger Order* and directed by the Bureau in the *Neighborhood Order*.

III. STANDING

Section 1.115(a) of the Commission’s rules states that “[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.”¹⁹ Bloomberg filed the complaint that the Bureau’s *Neighborhood Order* granted in part,

¹⁸ *Clarification Order*, ¶ 1.

¹⁹ 47 C.F.R. § 1.115(a).

which was explained by the Bureau in the *Clarification Order*.²⁰ Therefore, Bloomberg is aggrieved by the *Clarification Order* and has standing to file this Application for Review.

IV. QUESTIONS FOR REVIEW

1. Whether the administrative stay should be lifted for those channel lineups in Bucket 2B since the Bureau's arguments for adopting an administrative stay are inconsistent with its clarifications adopted in the *Clarification Order*?

2. Whether the adoption of an administrative stay is in the public interest?

V. STANDARD OF REVIEW

Section 1.115 of the Commission's rules specifies the factors which warrant Commission consideration of the application for review and reversal of error by a delegated authority like the Bureau.²¹ This Application for Review is appropriate because the Bureau's *Clarification Order* includes certain erroneous findings, and contains actions that are contrary to Commission's precedent or policy.

VI. ARGUMENTS

A. The Adoption of an Administrative Stay for Bucket 2B is Inconsistent with the Bureau's Analysis in the *Neighborhood Order*, *Clarification Order* and Commission Precedent

The Bureau explained that "the *Neighborhood Order* decided the issue of whether BTV's SD programming [] is entitled to carriage in an SD 'news neighborhood' on Comcast's channel lineup. The issue of whether and how the news neighborhooding condition applies to HD news channels or neighborhoods was not raised in the Media Bureau proceeding, and the *Neighborhood Order* did not

²⁰ *Clarification Order*, ¶ 1.

²¹ (1) The action taken pursuant to delegated authority is in conflict with the statute, regulation, case precedent, or established Commission policy; (2) The action involves a question of law or policy that has not previously been resolved by the Commission; (3) The action involves application of a precedent or policy which should be overturned or revised; (4) An erroneous finding as to an important or material question of fact; (5) Prejudicial procedural error. 47 C.F.R. § 1.115(b)(2).

address the application of the condition with respect to HD news channels and neighborhoods.”²²

The Bureau’s analysis could not be more clear: Bloomberg requested SD relief for BTV and BTV-SD should be neighborhooded in SD neighborhoods.

The Bureau nevertheless inexplicably granted a stay on its own motion of implementation of the *Neighborhood Order* in those markets with one SD and one HD news neighborhood. The *Neighborhood Order* clearly directed Comcast to place BTV in at least one news neighborhood on all its channel lineups. The *Clarification Order* made clear that the complaint and subsequent Bureau decision only dealt with SD news neighborhoods. The channel lineups in Bucket 2B only have one SD news neighborhood. Accordingly, the Bureau erred by adopting an administrative stay for those channel lineups and Comcast should be directed to neighborhood BTV on those channel lineups immediately.

1. The Bureau failed to articulate a rational basis for granting a stay for Bucket°2B channel lineups.

The Bureau has failed to articulate a rational basis for granting a stay on those channel lineups with an SD news neighborhood and an HD news neighborhood in Bucket 2B.

First, neither the Complaint nor the *Clarification Order* provides such a basis. The Bureau acknowledges (i) that Bloomberg’s Complaint did not request relief in HD news neighborhoods and (ii) that its analysis and *Neighborhood Order* only considered SD neighborhoods.²³ Accordingly, there is no rationale here for granting the stay.

Second, the Bureau required Comcast to neighborhood BTV on all of the other channel lineups with only one SD neighborhood. The Bucket 2B channel lineups similarly have only one SD neighborhood. These SD news neighborhoods are no different than the other channel lineups

²² *Clarification Order*, ¶ 3.

²³ *Id.*, ¶ 9.

(Bucket 1 and 2A) which also have only one SD neighborhood. Therefore, neighborhooding should proceed on the Bucket 2B channel lineups.

Third, the absence of a vacant channel near the SD news neighborhood was not a factor in the Bureau's reasoning. Specifically, the Bureau directed Comcast to neighborhood BTV on channel lineups with only one SD news neighborhood, with or without a vacant channel near the SD news neighborhood. The Bureau did provide different timelines for implementation when there was no vacancy near the SD news neighborhood, but irrespective of the vacancies available, the Bureau ordered Comcast to place BTV in the only SD news neighborhood.²⁴

Fourth, the presence of an HD news neighborhood was similarly not dispositive. The Bureau directed Comcast to neighborhood BTV on those channel lineups that had only one SD news neighborhood with a vacant channel nearby, despite the fact that six of those channel lineups also have an HD news neighborhood. This action provides additional support for lifting the stay on Bucket 2B. Because the Bureau directed Comcast to neighborhood BTV on the six channel lineups originally included in Bucket 2B, which have one SD news neighborhood with a vacancy nearby and one HD news neighborhood, the presence of an HD neighborhood was not a factor in the Bureau's decision.

The Bureau's justification for the stay is also inconsistent with its analysis in the *Neighborhood Order* where it directed Comcast to neighborhood BTV "within sixty days of the release of [the *Neighborhood Order*]." The Bureau is required to follow Commission precedents, including its own,²⁵

²⁴ Bloomberg would similarly work with Comcast to identify a reasonable timeline for implementation in these additional 59 markets.

²⁵ *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 620 (D.C. Cir. 1982) ("Although an agency has flexibility to reexamine its previous holdings, such changes must be rationally and explicitly justified."); *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806-09 (1973); *Office of Communication etc. v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977). This requirement ensures

and cannot now say that the same facts support both neighborhooding in some channel lineups with only one SD news neighborhood and a stay for other channel lineups with only one SD news neighborhood. The Bureau stayed the requirement to neighborhood BTV on the Bucket 2B channel lineups with no vacant channel in or near the only SD news neighborhood because it thought it may cause consumer disruption. The Bureau, however, ordered neighborhooding to proceed on Bucket 2A channel lineups where the only SD news neighborhood did not have a vacant channel in or near that news neighborhood. The only difference between the Bucket 2A and Bucket 2B channel lineups is the Bucket 2B channel lineups also have an HD neighborhood, which is not relevant in this proceeding because Bloomberg only requested neighborhooding for its SD channel and the Bureau agreed.

As a result, the Bureau has not articulated any rational basis for staying the implementation of neighborhooding on Bucket 2B channel lineups. A stay for the remaining channel lineups in Bucket 2B is wholly inconsistent with the Bureau's directive to neighborhood BTV on the channel lineups in Bucket 1, Bucket 2A, and six of the channel lineups from Bucket 2B. Therefore, the stay should be lifted for the remaining channel lineups in Bucket 2B. The principle is simple: the news neighborhood condition should be implemented immediately wherever there is only one SD news neighborhood.

2. Consumer Disruption Is Not a Rational Basis for Granting a Stay

In the *Neighborhood Order*, the Bureau stated that "Comcast voluntarily assented to [the neighborhooding] condition knowing that it might affect some of its carriage choices."²⁶ The *Clarification Order* indicates that a stay is justified because of the "disruption" that channel changes

"that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law." *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

²⁶ *Neighborhood Order*, ¶ 23.

may cause as a result of the implementation of the neighborhooding condition to which Comcast “voluntarily assented.”²⁷ Based on the Bureau’s reasoning, the stay could never be lifted because the channel changes that Comcast agreed to make when it accepted the neighborhooding condition may be disruptive for customers. This conclusion is simply incorrect.

As Bloomberg has repeatedly stated, Comcast overstates the amount of consumer disruption from moving a channel. Bloomberg’s expert found that Comcast changed channels at least 10,625 times in an eleven month period,²⁸ and frequently changed channels in channel positions 1-99 despite the fact that Comcast claimed such changes are difficult.²⁹

The stay of neighborhooding on the Bucket 2B channel lineups should be lifted because it is no more disruptive for customers to implement neighborhooding on the Bucket 2B channel lineups than it was to implement neighborhooding on the Bucket 2A channel lineups. In both cases, there are no vacant channels in or near the only SD news neighborhood. The only difference between the two buckets is that the Bucket 2B channel lineups also have an HD news neighborhood. The Bureau expressly determined that the presence of an HD news neighborhood is not relevant in this proceeding because Bloomberg only requested SD relief in its Complaint, and the Bureau determined that only SD relief is warranted based on Bloomberg’s request and Commission precedent.³⁰

²⁷ See *Clarification Order*, ¶ 10.

²⁸ Reply at 52.

²⁹ *Id.* at 52-63; Opposition to Motion for Leave to File Surreply, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 at 16-19 (filed Oct. 7, 2011).

³⁰ *Clarification Order*, ¶ 3; *Tennis Channel, Inc., v. Comcast Cable Communications, LLC*, 27 FCC Rcd 8508, 8543, ¶ 91(2012)(finding that the channel placement remedy ordered by the ALJ was not justified by the record because “[w]hen Tennis Channel sought broader carriage from Comcast, it did not seek better channel placement. In the proceedings before the ALJ, Tennis Channel never sought better channel placement as a remedy. Because channel placement was not at the heart of the dispute between Comcast and Tennis Channel, and because Tennis Channel did not seek better channel

3. Comcast is not likely to succeed if it appeals the HD issue

Although Comcast may appeal the HD issue, it is not likely to succeed and thus Comcast's appeal provides no basis for the stay.

Commission precedent has consistently treated SD and HD channels differently.³¹ The D.C. Circuit upheld the Commission's determination to extend the rebuttable presumption that "an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in [s]ection 628(b)" to Regional Sports Network ("RSN") programming.³² The finding was based on the record demonstrating that SD is not a substitute for HD programming. ("Citing consumer survey data, evidence from cable operators' marketing campaigns touting the carriage of HD programming, and record comments describing the rapidly growing demand for HD televisions, the Commission found that 'the record shows that MVPD subscribers do not consider [standard definition (SD)] programming to be an acceptable substitute for HD programming', and that 'HD programming has thus become an important part of a competitive MVPD offering.'")³³ More recently, the Commission affirmed that it would continue to treat SD and HD programming differently.³⁴

placement as a remedy, the record on the effect of Tennis Channel's placement was underdeveloped. . . . Therefore we disagree with the ALJ that equitable channel placement is an appropriate remedy based on the record developed in this case.").

³¹ See, e.g., *Review of Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746, 785, ¶ 55 (2010) ("2010 Program Access Order"), *aff'd in part and vacated in part sub nom. Cablevision Systems Corp. et al. v FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("Cablevision Systems"). See also *AT&T Servs., Inc. & Southern New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. & Cablevision Sys. Corp.*, Order, 26 FCC Rcd 13206, 13209, ¶ 4 (MB 2011); *Verizon Tel. Co. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13145, 13148, ¶ 4 (MB 2011).

³² *Cablevision Systems*, 649 F.3d at 717, 703.

³³ *Id.* at 717 (citing *2010 Program Access Order* at 784-85).

³⁴ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, 27 FCC Rcd 8581, 8588-89, ¶ 20 (2012) ("In the 14th Report, we discussed vertical integration

In addition, Commission precedent dictates that Bloomberg is limited to the relief it requested³⁵ and Bloomberg only requested neighborhooding for BTV-SD. The record is clear that Bloomberg only requested SD relief. Indeed, Comcast’s own experts limited their analysis to SD neighborhoods.³⁶ The Bureau expressly affirmed that the presence of an HD news neighborhood is not relevant in this proceeding because Bloomberg only requested SD relief in its Complaint.³⁷ Moreover, in other cases, Comcast itself has argued that the Commission should not grant relief that has not been requested.³⁸

in terms of affiliations between programming networks and MVPDs. Specifically, we identified the number of national video programming networks affiliated with one or more MVPDs. Similarly, we reported on regional programming networks affiliated with MVPDs. We also differentiated between the availability of standard definition (“SD”) and high definition (“HD”) versions of individual networks consistent with recent Commission decisions.”).

³⁵ *Tennis Channel*, *infra*, n. 38.

³⁶ Answer of Comcast Cable Communications, LLC, *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Dkt. 11-104 (filed July 27, 2011) (“Comcast Answer”), Ex. 4, Declaration of Michael Egan, at Attachment A, 2 (“While they were categorized as news channels, HD news channels were not subsequently included for news neighborhood analysis.”); *id.* at Ex. at 5, Declaration of Mark A. Israel (“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.’”).

³⁷ *Clarification Order*, ¶ 9 (citing Complaint, at 10, ¶ 23 (“BTV HD is not currently carried by Comcast.”)); Reply at 21 (“Comcast does not widely carry BTV’s HD feed”); *see also* Bloomberg L.P.’s Response to Comcast Cable Communications, LLC’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 at 2 (filed June 21, 2012) (“The Bureau should find that the relief granted in the *Complaint Order* is limited to Bloomberg Television’s standard definition channel in SD neighborhoods because that was the relief Bloomberg requested, the record only addressed SD neighborhood characteristics, and there is no reason to grant relief beyond that requested in the Complaint.”).

³⁸ Exceptions to Initial Decision of Comcast Cable Communications, LLC, *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Dkt. No. 10-204 at 38 (filed Jan. 19, 2012) (“*Comcast Exceptions*”)(“The Initial Decision, however, awards relief that goes far beyond redressing that supposed harm. Curing Tennis Channel’s supposed competitive injury does not require compelling Comcast to grant Tennis Channel any particular channel placement. *Indeed, Tennis Channel did not even seek such relief in its complaint . . .*” (emphasis supplied)).

4. Bloomberg’s Initial Application for Review does not provide a basis to stay implementation of neighborhooding on the Bucket 2B channel lineups

Bloomberg’s appeal does not provide a basis to stay implementation. As further support for staying the implementation of neighborhooding on the Bucket 2B channel lineups, the Bureau states: “The arguments raised on review by Bloomberg could lead to a channel placement remedy that conflicts with the Bureau’s interpretation.”³⁹ Bloomberg’s Initial Application for Review raises, among other issues, the argument that BTV should be neighborhooded in **all** news neighborhoods on Comcast’s channel lineups in the top-35 DMAs that carry BTV. Yet if the Commission rules in Bloomberg’s favor, Comcast will be required to neighborhood BTV into more, not fewer, news neighborhoods and in all SD news neighborhoods. This fact directly undercuts the Bureau’s reasoning for staying the implementation of neighborhooding for the channel lineups in Bucket 2B. The channel lineups in Bucket 2B only have one SD news neighborhood. As a result, a ruling in favor of Bloomberg on its Initial Application for Review will not change where BTV needs to be neighborhooded on those channel lineups. Therefore, the stay should be lifted for Bucket 2B because those channel lineups are not impacted by the issues raised in Bloomberg’s Initial Application for Review.

The Bureau states, in part, that it stayed the neighborhooding of BTV on the Bucket 2B channel lineups based on arguments raised by Bloomberg in its application for review of the *Neighborhood Order*, such as “whether the Bureau should have decided that BTV is entitled to choose the news neighborhood in which it is carried.”⁴⁰ Based on the Bureau’s reasoning, the stay only makes sense where there are multiple SD news neighborhoods. If a channel lineup has only one SD news neighborhood – even if it has an HD news neighborhood – Bloomberg has no choice of

³⁹ *Clarification Order*, ¶ 11.

⁴⁰ *Id.*, ¶ 10.

neighborhood because it only requested, neighborhooding in SD news neighborhoods.⁴¹ The channel lineups in Bucket 2B have only one SD news neighborhood. None of the issues raised in Bloomberg's Initial Application for Review impact the neighborhooding of BTV in the only SD news neighborhood on these channel lineups. Therefore, the Bureau's analysis does not support the Bucket 2B stay and the stay should be lifted.

In the *Neighborhood Order*, the Bureau granted Bloomberg's Complaint almost in its entirety,⁴² and then explained in the *Clarification Order* that Bloomberg only requested carriage in SD news neighborhoods.⁴³ Staying the implementation of neighborhooding on the Bucket 2B channel lineups implies that Bloomberg may be entitled to neighborhooding in an HD news neighborhood in the context of this proceeding. Such a result would be inconsistent with the *Clarification Order*, the *Neighborhood Order*, and the relief requested by Bloomberg in its Complaint. Therefore, the Commission should lift the stay for Bucket 2B and order Comcast to neighborhood BTV in the only SD news neighborhood below Channel 100 on the channel lineups in Bucket 2B.

B. The Administrative Stay is not in the Public Interest for Bucket 2B

The stay is overly broad and includes channel lineups with one SD news neighborhood and one HD news neighborhood where the SD news neighborhood is not implicated by other issues raised on appeal by Bloomberg. In these cases, the Bureau is preserving Bloomberg's right to choose between being neighborhooded in the SD or HD news neighborhood, which is relief beyond what Bloomberg requested in its complaint and is inconsistent with Commission precedent. Preserving a right that Bloomberg has not tried to exercise is absurd and deprives the public the benefits of neighborhooding. Moreover, it ignores the fundamental principle espoused by the

⁴¹ *Id.*, ¶ 3.

⁴² *Neighborhood Order*, ¶ 6.

⁴³ *Clarification Order*, ¶ 3.

Commission in creating the news neighborhood condition in the first place, i.e., that the public interest is served by having independent news channels carried in news neighborhoods.

Furthermore, a stay is extraordinary relief and should be granted only in limited circumstances. Commission precedent requires that stays be narrowly tailored and provide only the most minimal relief necessary in order to promote the public interest. The Communications Act, the Cable Act and the news neighborhooding condition are all designed to promote competition and protect independent programmers. Staying neighborhooding on channel lineups that are not implicated by an issue raised in Bloomberg's Initial Application For Review is inconsistent with the public interest, the promotion of competition, and the protection of independent programmers. The news neighborhooding condition was designed to alleviate the favoritism of vertically integrated new networks and the stay is contrary to that relief. Accordingly, the stay should be lifted for the channel lineups in Bucket 2B since those channel lineups are not impacted by any of the issues raised in Bloomberg's Initial Application for Review and there is only one SD news neighborhood in which BTV can be neighborhooded.

Nearly 20 months have passed since the news neighborhooding condition was adopted and 15 months have passed since Bloomberg filed its Complaint. Moreover, the *Neighborhood Order* directed Comcast to neighborhood BTV more than three months ago. Most recently the *Clarification Order* directed Comcast yet again to neighborhood BTV. While on paper, Bloomberg has been successful in its efforts to secure neighborhooding, the reality only reflects limited relief. As explained in the *Merger Order*, neighborhooding benefits consumers, promotes competition, and protects independent programmers. The channel lineups in Bucket 2B are not implicated by the issues in Bloomberg's Initial Application for Review so a stay is not in the public interest.

In response to a similar argument by Comcast that implementation of a program carriage order would be burdensome, the Commission recognized that Comcast makes channel changes

often. “These are hardly extraordinary burdens for a cable operator (much less the largest cable operator in the Nation); they are part of the day-to-day activities of its business.”⁴⁴ The Commission further noted that “implementation of the [program carriage] remedy in this case would require ‘nothing more than the type of business decision Comcast makes routinely with many channels.’”⁴⁵ Neighborhooding BTV on the Bucket 2B channel lineups involves a small fraction of the disruption that is caused by the thousands of channel lineup changes that Comcast voluntarily makes every year and is comparable to the steps that Comcast took to neighborhood BTV on the channel lineups in Bucket 2A.⁴⁶ Now is the time to continue pushing forward with the implementation of the news neighborhooding condition. The stay on the implementation of neighborhooding the channel lineups in Bucket 2B should be lifted.

Bloomberg received only limited relief after winning each round at the Commission. Bloomberg prevailed in its Complaint. Moreover, the *Clarification Order* provided further direction to Comcast on how to neighborhood Bloomberg. However, the public interest is not being served by further delaying neighborhooding BTV for all the reasons stated in the *Merger Order*.

C. A Stay is Contrary to the Commission’s Finding Regarding the Special Importance of News and that the Neighborhooding Condition Was Necessary to Protect the Public Interest

The stay of Bucket 2B is not appropriate because of the special importance of news and the Commission’s finding that the neighborhooding condition was necessary to protect the public

⁴⁴ Opposition of Federal Communications Commission to Petitioner’s Emergency Motion for Stay of Agency Order, 18, *Comcast Cable Communications, LLC v. FCC*, No. 12-1337 (D.C. Cir. Aug. 16, 2012).

⁴⁵ *Id.*, (citing *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, DA 12-1311, ¶ 39 (OGC Aug. 9, 2012)).

⁴⁶ Comcast moved networks *at least 10,625 times* in an approximately eleven-month period in 2010 and 2011. Reply of Bloomberg L.P. to Answer of Comcast Cable Communications, LLC, *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Dkt. 11-104 at 52, Ex. A, ¶ 106 (filed Aug. 30, 2011) (“Reply”).

interest. 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.

Indeed the FCC has recognized that cable news channels are playing an increasingly important role in keeping the public informed. In fact, viewers are shifting from network news to cable news networks.⁴⁷ Adam Jones, the then Senior Vice President of NBC News, stated at Columbia University’s May 2010 Transitioned Media Conference: “Network news viewership is in irreversible decline... [and the] traditional network news business model is broken.”⁴⁸ “[T]he [television] audience is shifting away from broadcast television to cable and the internet, both of which are drawing off viewers and advertisers.”⁴⁹ The FCC reports that “[t]he number of cable subscribers increased steadily for 25 years, from 9.8 million in 1975 to 66.25 million in 2000, and then declined only slightly over the next nine years, to 62 million in 2009.”⁵⁰ With the decreasing popularity of broadcast television, cable news networks, such as BTV, fill the investigative reporting void created by local news operations. The FCC concluded that investigative reporting conducted by local news outlets is “important but increasingly rare.”⁵¹

⁴⁷ FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* (July 2011) at 103, available at <http://www.fcc.gov/info-needs-communities> (“Future of Media Report”) (“With the rise of cable news 30 years ago, the audience for network news began to erode. Today the combined audience for ABC, CBS, and NBC’s evening news broadcasts is less than 20 percent of the overall television audience—and trends show a continuing loss of about one million viewers per year. Network newscasts still reach a much larger audience than any particular cable news shows, but the abundance of choices has and will continue to erode the reach of network news.”).

⁴⁸ Future of Media Report at 102 (alteration in original).

⁴⁹ Future of Media Report at 102.

⁵⁰ Future of Media Report at 109.

⁵¹ Future of Media Report at 87.

With such a steady decline in local news investigative reporting, it is important for the FCC to foster development of investigative journalism by cable news networks, including BTV.

Accordingly, lifting the stay on the implementation of neighborhooding BTV on the channel lineups in Bucket 2B is in the public interest because it will provide the public with improved access to Bloomberg's investigative reporting at a time when viewers are shifting to cable and such reporting is declining on local television stations. Moreover, neighborhooding is essential to protect such independent news as the vast majority of viewers looks to neighborhoods--and lower placed neighborhoods--for their news first.⁵²

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. The stay causes further delay which calls into question the effectiveness of the news neighborhooding condition to promote and protect independent sources of news and information.

⁵² Reply at 16 (“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.”). Moreover, location of the SD news neighborhood below Channel 100 substantially increases viewership. As discussed in the attached Declaration from Dr. Ali Yurukoglu, for example, the news neighborhood below Channel 100 in the Sacramento DMA has 95% of the viewership, while the SD news neighborhood above Channel 100 has 2.2% of the viewership. On certain lineups in Orlando, the only SD news neighborhood below Channel 100 has 95% of the viewership while the SD news neighborhood above Channel 100 only has 3.8% of the viewership.

VII. CONCLUSION

WHEREFORE, in light of the foregoing, Bloomberg respectfully requests that the Commission direct Comcast to carry BTV in the SD news neighborhood on the channel lineups in Bucket 2B.

Respectfully submitted,

BLOOMBERG L.P.

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Dated: September 13, 2012

**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)	
)	

DECLARATION OF ALI YURUKOGLU

I, Ali Yurukoglu, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Ali Yurukoglu. I am currently an Assistant Professor of Economics in the Graduate School of Business at Stanford University in Stanford, California and a Faculty Research Fellow for the National Bureau of Economic Research. I received a Ph.D. in Economics from New York University in 2009.

2. I conduct research on topics in industrial organization. Much of my research has analyzed the cable and satellite television industries. Particularly relevant for this proceeding, I have evaluated conditions of demand and supply within the cable television industry and the consequences of regulation on economic outcomes in cable markets. I have published academic articles in such outlets as the *American Economic Review*. My works include: “The Welfare Effects of Bundling in Multichannel Television Markets,” (with Gregory S. Crawford), forthcoming, *American Economic Review*. I have attached my CV as Appendix A to this Declaration.

3. For the National Bureau of Economic Research (“NBER”), I was chosen as a Faculty Research Fellow. The NBER is the largest economics research organization in the United States.

4. On January 18, 2011, the Federal Communications Commission (“FCC” or “Commission”) approved, with conditions, the assignment and transfer of broadcast, satellite, and other radio licenses from the General Electric Company to Comcast Cable Communications, LLC (“Comcast”).¹ Comcast consummated the approved transactions subject to the Commission’s conditions.

5. The conditions that Comcast voluntarily accepted included the so-called “news neighborhooding” condition, whereby “if Comcast now or in the future carries news and/or business news channels in a neighborhood...,” Comcast is required to carry all independent news channels in that news neighborhood.²

6. On June 13, 2011, Bloomberg L.P. (“Bloomberg”) filed a complaint with the FCC alleging that Comcast was not complying with the news neighborhooding condition. The FCC granted the Complaint in large part on May 2, 2012.³ In the *Neighborhood Order*, the FCC directed Comcast to “carry Bloomberg [Television] in a news neighborhood on certain headends, and direct[ed] Comcast to file more information to confirm the facts necessary to determine whether

¹ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd 4238 (2011) (“*Merger Order*”).

² *Merger Order*, ¶ 122.

³ *Bloomberg L.P. v. Comcast Cable Communications, L.P., Memorandum Opinion and Order*, 27 FCC Rcd 4891 (MB 2012) (“*Neighborhood Order*”).

relief is appropriate on other headends.”⁴ Specifically, with respect to headends in the top-35

Designated Market Areas (“DMAs”) the *Neighborhood Order* directed Comcast to:

(i) within sixty days of the release of this Order [i.e., by 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; (ii) within 14 business days after the release of this Order [i.e., by 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 after the release of this Order [i.e., by 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.⁵

7. On August 14, 2012, the FCC explained in the *Clarification Order* “that the *Neighborhood Order* decided only the issue of whether BTV’s SD programming [] is entitled to carriage in an SD ‘news neighborhood’ on Comcast’s channel lineups. The issue of whether and how the news neighborhooding condition applies to HD news channels or neighborhoods was not raised in the Media Bureau proceeding, and the *Neighborhood Order* did not address the application of the condition with respect to HD news channels and neighborhoods.”⁶ The FCC also adopted a stay: “we stay, on our own motion, the effectiveness of the *Neighborhood Order* with respect to any headend that (i) carries BTV SD, (ii) does not carry BTV SD in an SD news neighborhood, (iii) has multiple news neighborhoods (regardless of whether those neighborhoods are HD or SD), and (iv) has no vacant channel adjacent to any SD news neighborhood.”⁷

⁴ *Neighborhood Order*, ¶ 2.

⁵ *Neighborhood Order*, ¶ 6.

⁶ *Bloomberg L.P. v. Comcast Cable Communications, L.P., Memorandum Opinion and Order*, DA 12-1338, ¶ 3 (MB rel. Aug 14, 2012 (“*Clarification Order*”).

⁷ *Clarification Order*, ¶ 3.

8. I was recently asked by Bloomberg to calculate the average share of total news viewership for each SD news neighborhood on Comcast's cable systems in the top-35 DMAs that have two SD news neighborhoods and carry BTV not in an SD news neighborhood. I conducted my analysis using "channel lineup data" provided by Tribune Media Services ("TMS") and publicly-available Nielsen Media Research ("Nielsen") ratings information from the website "TV By the Numbers" (<http://tvbythenumbers.zap2it.com/category/news/cable-news/>). After Bloomberg obtained the data from TMS, I was provided with access to it so that I could conduct my analysis. The data provided information on channel lineups for all of the major providers of multichannel video programming ("MVPD") within the United States as of February 24, 2012.

9. In my experience, TMS is generally considered a reputable and reliable source of cable channel lineup data for economic research projects. TMS collects channel lineup information from individual cable and satellite television systems; verifies, cleans, and standardizes the data; and then licenses it to firms for a variety of reasons, most commonly for the provision of electronic program guides across media. It is my understanding that TMS regularly polls MVPDs for channel lineup information. Comcast's xfinitytv web site (<http://xfinity.comcast.net/tv-listings>) also states "TV listings by Tribune Media Service," which suggests that Comcast itself relies upon TMS data for its cable system lineups, in particular, and, therefore, TMS data can be considered reliable.

10. The data provided to Bloomberg by TMS came in the form of three relational databases. The databases separately report information maintained by TMS as of May 4, 2011 and February 24, 2012. The first database ("lineup") reports information at the level of a headend id-device-channel position. A headend is a facility operated by a cable system that, among other things, receives television programming (usually by satellite), organizes that programming into channel

lineups, and distributes those lineups to devices (usually) attached to customers' televisions according to the type of service they have purchased from the system.

11. The second database ("headend") reports information at the level of the headend-zip code. It reports, among other things, the zip codes served by each headend, the community served in that zip code, the Designated Market Area ("DMA") for that zip code, the rank of that DMA among the 210 DMAs in the United States, and the Multiple System Operator (MSO) that owns that headend (e.g., Comcast Cable Communications, LLC). A DMA is a definition of television markets maintained by Nielsen.

12. The third database ("station") reports information at the level of the station for each station offered on any headend. It reports the channel name for that station and a corresponding id number assigned by TMS.

13. To create the raw dataset used in the analysis, I read in each of these relational databases using Stata, a widely used Econometric software package, kept one zip code for each headend, kept only those headends indicated as being owned by Comcast and merged the databases together according to their common fields (headend id and station number).

14. Using the definition of "independent news channel" from the *Neighborhood Order*⁸, I next defined the set of possible news, business news, and public affairs channels that were to be the focus of my analysis. I began by identifying the most widely available (national) news, public affairs, and business news channels. These included but were not limited to: (a) the most widely available national cable news networks - Cable News Network ("CNN"), Fox News Channel, Headline News, and MSNBC, (b) national cable public affairs networks - CSPAN, CSPAN2, and CSPAN3, and (c)

⁸ *Neighborhood Order*, ¶ 6 (defining an "independent news channel" as "a channel unaffiliated with Comcast or a top-15 programming network 'whose programming is focused on public affairs, business or local news reporting and analysis during the hours from 6:00 a.m. through 4:00 p.m. in the U.S. Eastern Time Zone'"). .

national cable business news networks - CNBC, BTV, Fox Business Channel, and CNBC World. I also identified (a) High-Definition (“HD”) feeds of those channels, (b) local, state, and regional news and public affairs channels, (c) an international news channel - CNN International - and (d) a single on-demand news channel. These were determined to be news, business news, and/or public affairs channels, based on individual examination of channel names and information on the types of programming provided on specific channels, by both me and my research support team. I did the analysis separately for two cases: (1) including Current TV and BBC World News as news channels and (2) excluding Current TV and BBC World News as news channels.

15. An initial examination of the channels provided by each headend on each channel position illustrated an important issue with the raw TMS data: there were many instances of multiple channels being offered on a single channel position. This was an important problem, as defining a channel neighborhood necessarily requires accurate information on which channel(s) are being provided on which channel positions.

16. Further examination of the data indicated that most of these instances were due to headends providing multiple channel lineups according to the device households were using to receive the programming. Channels being delivered to different devices naturally shared channel positions as, for example, channel 5 for a headend’s Analog device need not have the same channel as channel 5 for that headend’s Digital device.

17. To address this problem, I first defined a channel lineup as the set of channel positions provided by each device on a particular headend. For example, there may be two channel lineups on a headend: one delivered to Analog devices (with 73 channel positions) and one delivered to Digital (non-rebuild) devices (with 536 channel positions).

18. For each headend that provided more than one lineup that included a Digital (non-rebuild) lineup, I kept that lineup. This decision was made because Comcast is migrating quickly to all-digital systems, and digital lineups are therefore more relevant for the future than are analog lineups. For the one headend that had an Analog and Cable-ready TV lineup, I kept the Analog lineup.

19. Including a single lineup per Comcast headend resolved many, but not all, of the instances of multiple channels per channel position. Given the importance of accurately identifying which channel was in a channel position for the purposes of defining channel neighborhoods, I determined to resolve all of these instances. I did so in three steps.

20. First, I determined if the duplicated channels on a given channel position were effectively the same channel. I determined this was so if they shared the same channel name and then dropped all but one of the repeated channels for each channel position.

21. Second, I determined if at least one of the channels on the duplicated channel position was a possible news channel. If none were a possible news channel, then it was not going to influence how I later calculated neighborhoods of news channels and it didn't matter if it was a duplicated channel position.

22. Third, I resolved the last remaining duplicates, which included a possible news channel. Some of the problems arose due to different feeds of CNN en Español (Mexico and US vs. United States) being provided in the same channel position. I decided to treat these as the same channel by dropping one of them and renaming the other, "CNN en Español – All Feeds". For the remaining headends, the appropriate channel lineup was found by comparing the headend id and community name from the TMS data to channel lineups for that community on the Comcast website. The Comcast website was reviewed, and it was determined which of the channels listed for

the duplicated channel positions appeared to be listed in that position according to the lineup for that community.

23. All of these steps resulted in the final dataset on which I performed my analysis of Comcast's neighborhoods of news, business news, and public affairs channels.

24. I next analyzed whether neighborhoods of news, business news, and public affairs channels, as defined by *Neighborhooding Order* as "channels whose programming during the hours from 6:00 a.m. to 4 p.m. is focused on reporting and analysis relating to public affairs or local affairs of general interest or relating to business. ... [B]usiness news channels are the only specialty news channels – new channels that do not provide public affairs or local news of general interest that the Commission intended to include in the news neighborhood analysis." For convenience, I will refer to neighborhoods of news, business news, and public affairs channels as "news neighborhoods" in the balance of this declaration.

25. In the *Merger Order* approving the Comcast-NBC Universal Merger, the Commission defined a neighborhood as a "significant number or percentage of news and/or business news channels that are substantially adjacent to one another in a system's channel lineup..."⁹ For purposes of the news neighborhooding condition, the Commission explained in the *Neighborhooding Order* that a neighborhood is "a grouping containing four news or business news channels within a cluster of five adjacent channel positions."¹⁰ Thus, four contiguous news channels and four news channels within five relative channel positions constitute a news neighborhood.

26. I first determined the set of news channels which would be counted in the definition of news neighborhoods. This consisted of all SD national news, public affairs, and business news

⁹ *Merger Order*, ¶ 122.

¹⁰ *Neighborhooding Order*, ¶ 5.

channels as well as all local, state, and regional news and public affairs channels. I will refer to this set of channels as “news channels” for the balance of this declaration.

27. Second, I determined how calculations of neighborhoods should handle blank channels between channel positions reported in the TMS data. I considered two possibilities. First, I considered the actual channel position as reported by TMS in the definition of news neighborhoods. This treated a blank channel as a gap between adjacent channels. For example, news channels in positions 48, 50, 51, and 52, with channel 49 blank would not have qualified as a neighborhood under a neighborhood definition that required four news channels to be contiguous. Alternatively, I considered *relative* channel positions in the definition of a news neighborhood. In this case, I simply listed all the channels on a headend in order of their reported channel position and assigned to them a new index, which I called their relative channel position, when calculating a neighborhood. For example, the same four channels occupied relative channel positions 46, 47, 48, and 49. Under this alternative definition of channel position, they did qualify as a neighborhood under a neighborhood definition that required four news channels to be contiguous.

28. I use the definition of a neighborhood based on the second method, relative channel position, in the balance of this declaration. I did so to reflect what I felt households are likely to believe to be a neighborhood based on their television usage. Many households likely decide what to watch by flipping through television channels. If so, then what matters to their perception of a neighborhood are the relative positions of channels, not their absolute channel numbers.

29. Having defined the news channels which would count in the calculation of news neighborhoods and the metric – relative channel position – that would define adjacency of channels in a channel lineup, I next defined news neighborhoods.

30. As noted above, the *Neighborhooding Order* defined a neighborhood as “a grouping containing four news or business news channels within a cluster of five adjacent channel positions.” In essence, a news neighborhood, therefore, is any group of channels that, based on their relative channel position on a Comcast channel lineup, include (1) at least four contiguous news channels or (2) at least four news channels in a group of five channel positions.

31. In what follows, I briefly describe how I implemented these definitions. Locating news neighborhoods was easiest for groups of news channels that were contiguous in Comcast’s channel lineups. To do so, I defined a “pod” of channels as a collection of like channels (news or non-news) that were adjacent in a Comcast channel lineup. The type of the first pod in any channel lineup depends on whether the first channel in that lineup is a news channel or a non-news channel. Most lineups begin with a non-news channel and so the first pod was typically a non-news pod. For expositional convenience, suppose that the first pod is indeed a non-news pod. I then examined the next channel in the channel lineup. If it, too, was a non-news channel, then it was added to the first pod, making a pod of two non-news channels. I then examined the next channel in the channel lineup.

32. This process continued until I came across a channel of a type different than that of the current pod. Suppose for convenience this happened in the eighth channel position. Since the first pod was a non-news pod, the eighth channel must have been a news channel. This defines the end of the first, non-news, pod (which was a pod of seven channels) and the beginning of the first news pod. As always, I continued by examining the next channel in the channel lineup. If it was a news channel, it was added to the second pod, making it a news pod of two channels. If it was a non-news channel, the second pod was a news pod with only one channel, and the non-news channel marked the beginning of the third pod (or the second non-news pod). This process

continued, adding channels to the previous pod if the channel was the same type as the previous channel in the channel lineup or defining a new pod if the channel was a different type as the previous channel in the channel lineup, until the end of the channel lineup.

33. By construction, pods must alternate between news pods and non-news pods. I defined a news neighborhood (based on contiguous channel groups) to be a news pod of at least four channels.

34. I next extended the definition of a news neighborhood to allow for a single non-news channel within a group of at least four news channels. Based on the definition of neighborhoods using pods as defined above, a group of news channels on positions 32, 33, 35, and 36 with a non-news channel on position 34 would not qualify as a news neighborhood. The previous definition of pods would define that group of channels as a news pod of two channels (channels 32 and 33) followed by a non-news pod of one channel (channel 34) followed by a news pod of two channels (channels 35 and 36).

35. To allow for news neighborhoods with a single non-news channel among news channels, I created an additional (broader) definition of news pods and re-calculated neighborhoods. I began by identifying all non-news pods of one channel that were not at the beginning or end of a channel lineup; by construction, each of these one-channel non-news pods was located between two news pods. I then examined whether the sum of news channels in the two pods on either side of the (singleton) non-news pod contained at least 4 news channels. If so, I called the combination of the two news pods surrounding the singleton non-news pod a “news pod allowing one non-news channel” and also defined this as a news neighborhood.

36. In the example above, this meant that channels 32-36 would now qualify as a news neighborhood even though one of those channels (channel 34) was a non-news channel.

37. Using this definition of news neighborhood, I analyzed how many Comcast headends in the top-35 Nielsen DMAs carry BTV, but not in a news neighborhood, and contain two SD news neighborhoods.

38. I next used the publicly-available Nielsen ratings information from the website “TV By the Numbers” (<http://tvbythenumbers.zap2it.com/category/news/cable-news/>) to obtain a random sample of 50 days of daily (total day, persons above 2 years old) viewership ratings from the past 12 months for CNBC, CNN, Fox Business News, Fox News Channel, Headline News, and MSNBC. The sample size of 50 provides estimates of each rated channel's viewership with margins of error between 2 and 10 percent of their average viewership numbers.

39. Nielsen tracks CNN International, some local news channels, and there is some evidence that it tracks Current TV, but publicly available data was not available. Nielsen does not track the other news channels that are in some of the news neighborhoods. I made assumptions for the viewership of these channels as a proportion of viewership of Fox Business News.

40. I assumed that all other news channels have the viewership of Fox Business News divided by 4 for the results reported here. I did the same analysis assuming the viewership of these other channels is equal to Fox Business News' viewership and also Fox Business News' viewership divided by 6. The results from these two other cases are not qualitatively different. The development of a more accurate assumption using more popular non-rated channels (Bloomberg, Current, Local News such as NECN, NY1, and News Channel 8) and channels with essentially zero viewership (CSPAN2, CSPAN3) was not possible based on publicly available Nielsen data. I decided that between 1/6th and 1 of Fox Business News is a reasonable interval.

41. I calculated the sum of average viewership of the news channels for each headend, and the same for each news neighborhood on each headend. The total viewership does not equal

100% because there is some news viewership that does not belong to a neighborhood (non-neighborhooded news channels).

42. The numbers are not exact because they are based on national viewership, and not tailored to each headend's local viewership. (For example, Fox News could have a higher share in southern DMA's, and the number for southern headends does not reflect that).

43. Finally, there is some sampling error in the national ratings which is unknown because "TV By the Numbers" does not report the margin of error in Nielsen's estimates.

44. These steps resulted in the final dataset of news channels that I used in performing my analysis of Comcast's neighborhoods of news and public affairs channels.

45. My analysis, including the assumption that the news channels for which ratings were unavailable from a publicly-available source had viewership equal to Fox Business News divided by 4, reflects the following:

(a) For Headend ID FL58808 (Celebration), in the Orlando-Daytona Nielsen DMA, the SD news neighborhood below Channel 100 ("Orlando Below Channel 100 SD News Neighborhood") contains the news networks CNN (channel 40), CNBC (channel 43), CSPAN (channel 45), MSNBC (channel 42), Headline News (channel 41), and Fox News (channel 44). The combined viewership of the Orlando Below Channel 100 SD News Neighborhood is 95.0%.

(b) For Headend ID FL58808 (Celebration), in the Orlando-Daytona Nielsen DMA, the SD news neighborhood above Channel 100 ("Orlando Above Channel 100 SD News Neighborhood") contains the news networks CSPAN2 (channel 104), CSPAN3 (channel 105), Fox Business News (channel 106), and Current TV (channel 107). The combined viewership of the Orlando Above Channel 100 SD News Neighborhood is 3.9%.

(c) For Headend ID CA04597 (Acampo), in the Sacramento-Stockton-Modesto Nielsen DMA, the SD news neighborhood below Channel 100 (“Sacramento Below Channel 100 SD News Neighborhood”) contains the news networks CNN (channel 20), CNBC (channel 18), CSPAN (channel 15), CSPAN2 (channel 16), MSNBC (channel 17), Headline News (channel 21), and Fox News (channel 19). The combined viewership of the Sacramento Below Channel 100 SD News Neighborhood is 95.1%.

(d) For Headend ID CA04597 (Acampo), in the Sacramento-Stockton-Modesto Nielsen DMA, the SD news neighborhood above Channel 100 (“Sacramento Above Channel 100 SD News Neighborhood”) contains the news networks CSPAN2 (channel 109), CSPAN3 (channel 110), California Channel (channel 108), and Current TV (channel 107). The combined viewership of the Sacramento Above Channel 100 SD News Neighborhood is 2.2%.

Ali Yurukoglu
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Dated: September 13, 2012

Appendix A

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AFFILIATIONS

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EDUCATION

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Thesis Title: *Price Discrimination and Vertical Relationships in Multichannel Television.*

Committee: Ariel Pakes, Luis Cabral, John Asker, Allan Collard-Wexler

Completed coursework for M.S. in Mathematics.

B.A. in Economics and Math, Northwestern University, 2004 (Honors in Economics).

SCHOLARSHIPS, HONORS AND AWARDS

2011 Fletcher-Jones Faculty Scholar

2009 Review of Economic Studies Tour

2009 Harold W. MacDowell Award

2008-2009 Jules I. Bogen Fellowship

2006-2007 NYU Stern Entertainment, Media, and Technology Department Doctoral Dissertation Grant

SEMINARS AND CONFERENCE PRESENTATIONS

2012 Duke Empirical Micro Jamboree

2011 Harvard, Hebrew University Jerusalem, Ben Gurion University

2010 IOS at AEA Meetings, UCSC, IFN Stockholm, Cisco Systems, Business Decisions

Conference Vancouver, UC Berkeley

2009 Stanford GSB, Yale SoM Marketing, Princeton, Columbia GSB, UCLA, Duke, MIT Sloan,

Chicago GSB Marketing, Northwestern, Drexel, LSE, Brown Econometrics of Demand

Conference, Munich CES iFo, ULB, Oxford, Yale, UMN, FRB Minneapolis (One week visit),

University of Chicago, UW Madison, UC Davis, MIT, BU

2008 NBER Summer Institute – IO, IIOC

RESEARCH PAPERS

The Welfare Effects of Bundling in Multichannel Television (with Gregory S. Crawford)

American Economic Review, Vol. 102, No. 2, April 2012

Combines earlier papers:

Bundling and Vertical Relationships in Multichannel Television (Job Market Paper)

The Welfare Effects of Bundling in Multichannel Television (with Gregory S. Crawford)

Medicare Reimbursements and Shortages of Sterile Injectable Pharmaceuticals

WORK IN PROGRESS

Political Activity by Regulated Electric Utilities (with Claire Lim)

Vertical Integration in Multichannel Television (with Greg Crawford, Robin Lee, and Michael Whinston)

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 13st day of September, 2012, a copy of the foregoing Application for Review has been served via first-class U.S. mail, postage pre-paid, to the following:

Neil Smit
President
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Justin Smith
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A handwritten signature in black ink, reading "Carly T. Didden". The signature is written in a cursive style with a long horizontal flourish extending to the right.