

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

Re: *Bloomberg L.P., Complainant v. Comcast Cable Communications, LLC, Defendant, MB Docket No. 11-104.*

In the *Comcast-NBCU Order*, the Commission approved the transfer of a number of licenses subject to a variety of conditions.¹ The present dispute involves the news-neighborhood condition, which requires that “[i]f 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.”² For purposes of this condition, a news neighborhood is “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.”³

I approve of almost all of the *Order*, which deftly handles several issues raised by Bloomberg and Comcast regarding that condition. But there is one aspect of the *Order* where I diverge from my colleagues. That is the determination that any “four news or business news channels within any five adjacent channel positions” constitute a news neighborhood.⁴ In my view, this interpretation expands the condition beyond its terms, to the detriment of Comcast, cable programmers, and ultimately consumers. It would not do much for the supposed beneficiary (Bloomberg). And it would simply underscore that the Commission’s authority to enforce the condition is questionable at best. I accordingly dissent in part.

First, interpreting the condition to create a four-channel neighborhood renders half of the condition superfluous. According to the *Comcast-NBCU Order*, a cluster of news channels (including business news channels) is a news neighborhood if and only if it contains either (a) a “significant number” of news channels or (b) a “significant . . . percentage” of news channels.⁵ And yet, the four-channel neighborhood largely reads the second clause out of the condition because practically every Comcast system has a cluster of four or more news channels. Indeed, under that interpretation, every single one of the systems at issue in Bloomberg’s complaint⁶ would qualify as having a neighborhood based on a “significant number” of news channels—leaving no purpose for the “significant . . . percentage” trigger.

Second, the four-channel neighborhood creates multiple neighborhoods where only one should exist. Most of the systems identified in Bloomberg’s complaint, for example, contain more than one four-channel neighborhood. But the condition’s trigger assumes that there will be only one neighborhood on each system (recall the proviso “[i]f Comcast . . . carries news and/or business news channels in a neighborhood”), as does the condition’s remedy (“Comcast must carry all independent news and business news channels in that neighborhood”).⁷ The *Order* forthrightly acknowledges that “the condition does

¹ *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4405–09 (2011) (App. C).

² *Id.* at 4358 (App. A, Sec. III.2); *see also id.* at 4287–88, para. 122.

³ *Id.* at 4358 (App. A, Sec. III.2); *see also id.* at 4287–88, para. 122.

⁴ *Order* at para. 23.

⁵ *Comcast-NBCU Order*, 26 FCC Rcd at 4358 (App. A, Sec. III.2).

⁶ Complaint of Bloomberg L.P. v. Comcast Cable Communications, LLC, MB Docket No. 11-104, at 22 & App. G (filed June 13, 2011) (seeking to apply the four-channel rule to “any Comcast headend in the top 35 most-populous DMAs that carry” Bloomberg SD, and identifying those systems).

⁷ *Comcast-NBCU Order*, 26 FCC Rcd at 4358 (App. A, Sec. III.2) (emphases added).

not explicitly contemplate the existence of multiple news neighborhoods,”⁸ but determines nonetheless that there is “nothing in the language itself that suggests the condition applies only when a single large neighborhood exists.”⁹ Indeed, the fact that many systems will have multiple four-channel neighborhoods creates a new question not contemplated by the rule—in how many neighborhoods “must” Comcast “carry all independent news and business news channels”? Although the *Order*’s answer—one, chosen by Comcast—is the right policy, the better answer would have been to avoid the question entirely by rejecting the four-channel neighborhood.

Third, the costs of requiring the four-channel neighborhood are significant. For Comcast, the rule means that it will have to alter the lineup of almost every system in the country to cluster Bloomberg (and other independent news channels) into a news neighborhood. For cable programmers carried by Comcast, the rule means a reshuffling of channel lineups, and potentially the confusion and/or loss of viewers. For consumers, the rule means learning a whole new channel lineup every time the condition is applied following a complaint against Comcast.

And for Bloomberg? True, it is now guaranteed placement in a four-channel neighborhood on every Comcast system. But the cure may be worse than the disease. After all, Comcast may create news neighborhoods consisting entirely of independent news channels—clustering Bloomberg next to C-SPAN, C-SPAN2, and C-SPAN3—and still comply with the condition. As such, the news-neighborhood condition is unlikely to “protect unaffiliated news channels”¹⁰ in any meaningful way.

Finally, expanding the application of the news-neighborhood condition may not be enforceable. No provision of the Communications Act gives the Commission the power to require or administer news neighborhoods. Nor are the license transfer provisions of the Act a viable source of authority. Those provisions only give us authority over the transfer of radio licenses, and the news-neighborhood condition remedies no conceivable harm arising from the transfers that were at issue.¹¹ And Comcast did not voluntarily commit to the news-neighborhood condition.¹² Whatever the wisdom of the condition when it was adopted, we should resist expanding its scope when its continued enforcement cannot be assured.

For these reasons, I would not apply the condition to four-channel neighborhoods. Instead, I would hold that a cluster of news channels cannot be a news neighborhood unless it has at least eight or more news channels or an absolute majority of such channels on a system. That definition would have fully effectuated the two-trigger language of the condition, eliminated the multiple-neighborhoods problem, and limited the condition’s effect to those few systems where Comcast arranges its news or

⁸ *Order* at para. 9.

⁹ *Id.* at para. 25.

¹⁰ *Id.* at para. 28.

¹¹ Although the Commission claimed authority to review the “transaction,” *see Comcast-NBCU Order*, 26 FCC Rcd at 4240, para. 2, the Communications Act does not afford us such broad authority. Instead, the Act charges the Commission with the much narrower task of reviewing the transfer of licenses (in this case, 12 private land mobile and private fixed microwave licenses, 63 broadcast licenses, and 74 satellite communications licenses), *see* 47 U.S.C. § 310(d), and the Telecommunications Act of 1996 charges the U.S. Department of Justice (not the Commission) with reviewing transactions writ large for potential antitrust violations, *see* Pub. L. No. 104-104, Title VI, § 601(b) (stripping the Commission of its ability to review transactions between telephone companies and eliminating the Clayton Act exemption for companies subject to Commission oversight).

¹² *Compare Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 120 (“[T]he Applicants voluntarily commit to several carriage obligations.”), *with id.* at 4287–88, paras. 121–22 (noting that “these commitments . . . are not sufficient to allay our concerns” and adopting the news-neighborhood condition).

business news channels in a manner consistent with the rest of the industry.¹³ Because the *Order* concludes otherwise, I respectfully dissent in part.

¹³ See Answer of Comcast Cable Communications, LLC, MB Docket No. 11-104, Exh. 4 at 5–16 (Declaration of Michael Egan) (analyzing the news channel placement patterns across the industry, demonstrating that multichannel video programming distributors that “neighborhood” their news channels cluster significantly more than four news channels together, and explaining that four-channel clusters are a vestige of cable’s analog era).