

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2013

Released: September 26, 2013

By the Commission: Chairwoman Clyburn issuing a statement; Commissioner Pai approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we affirm Media Bureau orders that direct Comcast to place Bloomberg Television in news neighborhoods, consistent with a condition of the Comcast-NBCU Order.¹ We agree with the Bureau’s decision that four news or business news channels

¹ Bloomberg L.P. v. Comcast Cable Communications, 27 FCC Rcd 4891 (MB 2012) (“News Neighborhooding Order”); Bloomberg L.P. v. Comcast Cable Communications, 27 FCC Rcd 9488 (MB 2012) (“Clarification

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within any five adjacent channel positions qualifies as a news neighborhood, regardless of whether the channel grouping existed before or was created after the *Comcast-NBCU Order*. We reject a challenge from Comcast that the Media Bureau's interpretation of the condition infringes Comcast's First Amendment rights. We also find unpersuasive Bloomberg's argument that, if Comcast's channel lineup has more than one news neighborhood, the condition obligates Comcast to carry independent news and business news channels in all of those neighborhoods. We also reject a contention by Bloomberg that the Media Bureau wrongly categorized some networks as news. Finally, we affirm the Bureau's determination that its initial Order dealt with the issue of carriage of the standard definition ("SD") version of Bloomberg Television in SD neighborhoods and we clarify that the condition generally applies separately to SD and high definition ("HD") networks; that is, if Comcast carries both an SD and HD version of an independent news network, each is treated as a different channel and is independently entitled to carriage in an SD or HD news neighborhood respectively, where an SD or HD news neighborhood exists.

II. BACKGROUND

2. The Commission approved the assignment and transfer of broadcast, satellite, and other radio licenses from the General Electric Company to Comcast on January 18, 2011, subject to certain conditions intended to ensure that the transaction served the public interest.² With respect to the "neighborhooding" of programming, the Commission adopted a narrowly tailored condition intended to prevent Comcast from discriminating against unaffiliated news networks:

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.³

The Commission defined an "independent news channel" as

a video programming network that is (i) unaffiliated with Comcast-NBCU or any of its affiliates or subsidiaries, (ii) unaffiliated with one of the top 15 programming networks, as measured by annual revenues, and (iii) 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.⁴

The Commission called this "narrowly tailored" condition appropriate "in accordance with the special importance of news programming to the public interest."⁵

3. Bloomberg filed a Complaint on June 13, 2011, requesting that the Media Bureau order Comcast to move Bloomberg Television⁶ to any grouping containing four news channels within a cluster of five adjacent channel positions on any headend located in the top 35 Nielsen Designated Market Areas

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Order). In the *Comcast-NBCU Order*, the Commission granted the application of Comcast, General Electric Company, and NBC Universal, Inc. to assign and transfer control of licenses from General Electric Company to Comcast. *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238 (2011) ("*Comcast-NBCU Order*").

² *Comcast-NBCU Order*, 26 FCC Rcd 4238.

³ *Id.* at 4358 (App. A, Sec. III.2).

⁴ *Id.* at 4287, n.292.

⁵ *Id.* at 4287, ¶ 122.

⁶ Throughout this Order, the term "Bloomberg Television" refers to the standard definition version of Bloomberg Television ("Bloomberg SD").

(“DMAs”).⁷ On May 2, 2012, the Media Bureau issued the *News Neighborhooding Order*,⁸ in which the Bureau decided (i) that a grouping of four news channels within a cluster of five adjacent channels qualifies as a “significant number or percentage of news and/or business news channels” and therefore constitutes a neighborhood for purposes of the news neighborhooding condition;⁹ (ii) that the condition applies to the channel lineups existing on Comcast’s systems at the time the Commission adopted the *Comcast-NBCU Order* as well as future channel lineups;¹⁰ (iii) that the term “news channel” refers to a channel carrying general interest news programming;¹¹ and (iv) that, if a Comcast system has more than one news neighborhood, the condition obligates Comcast to carry independent news and business news channels in at least one news neighborhood of Comcast’s choosing.¹² Accordingly, the Bureau directed Comcast to place Bloomberg Television in a news neighborhood on headends in the top-35 DMAs that carry Bloomberg Television and have a news neighborhood.¹³

4. Both parties filed applications for review of the *News Neighborhooding Order* on June 1, 2012. Bloomberg seeks review of (i) the Bureau’s interpretation that, on systems with multiple news neighborhoods, Bloomberg Television is entitled to carriage in a single news neighborhood, rather than all news neighborhoods; (ii) the Bureau’s decision to allow Comcast to choose the news neighborhood in which it will place Bloomberg Television; and (iii) the Bureau’s inclusion of certain channels as news networks. Comcast seeks review of (i) the Bureau’s definition of “news neighborhood” as four news channels within a cluster of five adjacent channels; (ii) the application of the condition to lineups existing on Comcast’s systems at the time the Commission adopted the *Comcast-NBCU Order*; and (iii) the Media Bureau’s interpretation of the condition in light of the First Amendment to the Constitution.

5. An additional issue has arisen with respect to whether Bloomberg Television must be carried in an SD or HD news neighborhood.¹⁴ In its initial application for review, Bloomberg stated that the relief it sought in its complaint was placement of the standard definition version of Bloomberg Television (“Bloomberg SD”) in SD news neighborhoods.¹⁵ In response to that application for review,

⁷ Complaint at 22.

⁸ *News Neighborhooding Order*, 27 FCC Rcd 4891.

⁹ *News Neighborhooding Order*, 27 FCC Rcd at 4895-7, ¶¶ 9-13.

¹⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4894-5, ¶¶ 7-8.

¹¹ *News Neighborhooding Order*, 27 FCC Rcd at 4897-9, ¶¶ 14-16.

¹² *Id.* at 4899-4902, ¶¶ 17-23. The Bureau stated that, if Bloomberg demonstrated that Comcast had discriminated in its choice of neighborhood, then Bloomberg could file a program carriage complaint pursuant to the *Comcast-NBCU Order*, where Bloomberg would need only “show that it was discriminated against on the basis of its affiliation or non-affiliation”; Bloomberg would not need to “prove that it was unreasonably restrained from competing, as it would under our program carriage rules.” *Id.* at 4901, ¶ 22.

¹³ *Id.* at 4903, ¶ 27.

¹⁴ The complaint and responsive pleadings before the Media Bureau indicated that Comcast carried Bloomberg Television in standard definition but not high definition (and incorrectly noted that Comcast did not have a license to carry Bloomberg Television in high definition). Complaint at 10, ¶ 23 (“BTV HD is not currently carried by Comcast.”); Reply at 21. Comcast elected to carry Bloomberg Television in high definition in the wake of the *News Neighborhooding Order*, in some instances to place it in a high definition news neighborhood. Letter from David H. Solomon and J. Wade Lindsay, Counsel to Comcast Cable Communications, LLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 3 (June 19, 2012). It appears that Comcast has a license to carry Bloomberg Television in high definition at Comcast’s discretion. See Comcast’s June 18 Opposition at 4, n.7.

¹⁵ See Bloomberg June 1 Application for Review at 5, n.15 (“Bloomberg’s Complaint dealt exclusively with the placement of its standard definition feed and Bloomberg reserves the right to seek further relief in the event that Comcast fails to honor the requirement that it place in news neighborhoods all independent news channels, such as BTV for its high definition feed.”). The parties limited their analysis and arguments before the Bureau to the

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Comcast filed a petition for stay and stated that, on some headends, it planned to comply with the *News Neighborhooding Order* by placing the HD version of Bloomberg Television (“Bloomberg HD”) in an HD news neighborhood rather than placing Bloomberg SD in a SD news neighborhood. Comcast asserted that “Bloomberg’s Application for Review has created substantial uncertainty and confusion regarding what may ultimately be required for compliance with the [*News Neighborhooding Order*] in this and other situations that may arise prior to Commission review.”¹⁶ Therefore, Comcast sought a stay of the *News Neighborhooding Order* pending a Commission ruling on this issue.¹⁷ At a meeting with Commission staff on June 14, 2012, the parties agreed that Comcast would move Bloomberg SD to SD neighborhoods on headends that do not have HD neighborhoods.¹⁸ The parties could not agree on how to proceed with respect to the remaining headends, and asked the Commission for guidance on how the *News Neighborhooding Order* applied to them.¹⁹ On August 14, 2012, the Bureau released an Order (“*Clarification Order*”) to clarify that placing Bloomberg HD in an HD news neighborhood, in lieu of placing Bloomberg SD in an SD neighborhood, would not satisfy the *News Neighborhooding Order*.²⁰ The Bureau did grant Comcast a stay of the *News Neighborhooding Order* with respect to certain headends²¹, however, to “avoid potential disruption to consumers and any affected third-party programmers in the event that the Commission subsequently reverses or modifies the [*News Neighborhooding Order*].”²²

6. Both parties filed applications for review of the Bureau’s *Clarification Order*. Bloomberg’s application for review requests that the Commission lift the stay, and Comcast requests that the Commission reverse the *Clarification Order* to allow Comcast to satisfy the *News Neighborhooding Order* by placing Bloomberg HD in an HD news neighborhood. Comcast also requests, to avoid the burden of rearguing this issue in a separate proceeding, that the Commission now decide how the news neighborhooding condition applies in general to independent news networks with both SD and HD feeds.²³ We resolve all the issues raised by the parties in this Memorandum Opinion and Order.

III. DISCUSSION

7. As explained in further detail below, we generally deny the applications for review. We find that the Bureau properly interpreted the language and the purpose of the news neighborhooding condition, and properly analyzed the facts in the record. We reject Comcast’s argument that the *News*

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application of the neighborhooding condition to Bloomberg SD. Complaint at 10, ¶ 23; Answer of Comcast, nn.32, 71 (filed July 27, 2011).

¹⁶ See Motion for Expedited Stay of Comcast Cable Communications, LLC at 10-11 (filed June 8, 2012).

¹⁷ See Motion for Expedited Stay of Comcast Cable Communications, LLC (filed June 8, 2012).

¹⁸ See Letter from David H. Solomon and J. Wade Lindsay, Counsel to Comcast Cable Communications, LLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 1, 4 (June 19, 2012).

¹⁹ See Bloomberg L.P.’s Response to the Media Bureau’s Request for Additional Information Regarding High Definition News Neighborhoods, MB Docket No. 11-104 (filed June 19, 2012); Letter from David H. Solomon and J. Wade Lindsay, Counsel for Comcast Communications LLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket No. 11-104, at 4 (June 19, 2012).

²⁰ *Clarification Order*, 27 FCC Rcd 9488.

²¹ The Bureau stayed the *News Neighborhooding Order* on its own motion 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 whether those neighborhoods are HD or SD), and (iv) has no vacant channel adjacent to any SD news neighborhood.” *Clarification Order*, 27 FCC Rcd at 9491-2, ¶ 10.

²² *Clarification Order*, 27 FCC Rcd at 9492, ¶ 11.

²³ Comcast’s September 13 Application for Review at 14-15.

Neighborhooding Order infringed on its First Amendment rights. We affirm the Bureau's finding that the *News Neighborhooding Order* considered only the issue of whether Bloomberg SD is entitled to carriage in an SD news neighborhood, and thus that Comcast must carry Bloomberg SD in an SD news neighborhood on headends that have at least one SD news neighborhood. We interpret the condition more generally to mean that SD and HD feeds of an independent news network are considered different channels and are separately entitled to carriage in SD or HD news neighborhoods, respectively. In addition, we make one minor clarification of the *News Neighborhooding Order*, finding that, on systems with multiple headends, Comcast must carry Bloomberg in a news neighborhood on each headend that has a news neighborhood. Below, we address each application for review of the *News Neighborhooding Order* individually. We then address the applications for review of the *Clarification Order* together because they both generally concern how the news neighborhooding condition applies to SD and HD news networks and neighborhoods.

A. Bloomberg's Application for Review of the *News Neighborhooding Order*

8. Bloomberg seeks Commission review of four aspects of the *News Neighborhooding Order*. First, Bloomberg requests that we require Comcast to carry Bloomberg Television in all news neighborhoods.²⁴ Second, Bloomberg alternatively requests that we allow Bloomberg to choose the neighborhood in which Comcast must place Bloomberg Television.²⁵ Third, Bloomberg asks that we declare that Current TV and other networks are not news networks.²⁶ Lastly, Bloomberg requests that we clarify that Comcast must carry Bloomberg Television in every headend's lineup if Comcast has multiple headends serving a single system.²⁷ As we explain below, we reject Bloomberg's challenges to the *News Neighborhooding Order*, but we grant its request that we clarify that, if Comcast has multiple headends on a single system, the condition applies to each headend serving that system.

1. Application of the News Neighborhooding Condition to Headends with Multiple News Neighborhoods

9. In the *News Neighborhooding Order*, the Bureau decided that, on headends that include multiple news neighborhoods, Comcast must carry Bloomberg Television in one news neighborhood that Comcast chooses, rather than every news neighborhood in the headend's lineup.²⁸ To be sure, as the Bureau acknowledged, the condition does not explicitly contemplate the existence of multiple news neighborhoods.²⁹ And Bloomberg is correct that one possible reading of the language of the condition is that Comcast must place independent news channels in every news neighborhood it carries.³⁰ We find, however, that such a reading is not compelled by the language and would be unduly burdensome. Moreover, as discussed further below, reading the condition as Bloomberg proposes not only is unnecessary to achieve the purpose of the condition, but would, as a practical matter, lead Comcast either to create a single news neighborhood or eliminate all news neighborhoods (a result the Commission did not intend). If every independent news network can insist on being included in every news neighborhood, Comcast will have the choice of either creating only one news neighborhood (or multiple, identical ones,

²⁴ Bloomberg's June 1 Application for Review at 7-18.

²⁵ Bloomberg's June 1 Application for Review at 18-19.

²⁶ Bloomberg's June 1 Application for Review at 20-22.

²⁷ Bloomberg's June 1 Application for Review at 19-20.

²⁸ *News Neighborhooding Order*, 27 FCC Rcd at 4899, ¶ 17.

²⁹ *News Neighborhooding Order*, 27 FCC Rcd at 4900, ¶ 19-20.

³⁰ Bloomberg's June 1 Application for Review at 8-12.

a clearly irrational choice) or rearranging its lineup to eliminate all news neighborhoods as defined by the condition.

10. The Bureau's conclusion that the language of the condition "contemplates[s] a single news neighborhood and does not, as Bloomberg contends, provide a clear remedy in a situation involving multiple news neighborhoods" is reasonable.³¹ Bloomberg's argument that the Bureau did not point to any specific language in the condition to support its conclusion³² incorrectly characterizes the Bureau's finding that "the condition does not clearly address the situation in which Comcast has established multiple news neighborhoods in the same channel lineup."³³ Because the express language of the condition does not unambiguously address the situation where multiple news neighborhoods are in the same channel lineup, it was appropriate for the Bureau to consider the meaning of the condition within the context of industry practice.

11. The record in the *Comcast-NBCU Order* supports the Bureau's reading of the condition to require carriage of unaffiliated news networks in a single news neighborhood: the Commission did not adopt Bloomberg's proposed language for the condition that would require Comcast to "carry all independent news and business news channels in that AND ALL SUCH neighborhoods."³⁴ As the Bureau stated, "[t]he Commission's decision not to adopt a requirement that Comcast carry independent news channels in all news neighborhoods indicates that the Commission did not intend to impose that requirement."³⁵ Therefore, we believe the Bureau reasonably chose to apply the condition by requiring Comcast to carry independent news and business news channels in a single neighborhood of its choosing. As the Bureau reasoned, the Commission "narrowly tailored" the condition in the *Comcast-NBCU Order* to "limit major channel realignments and the cost and consumer disruptions associated with those realignments."³⁶

12. We also find unavailing Bloomberg's argument that the Bureau's interpretation violates the rule of statutory construction, set out in Section 1 of the United States Code, that "the singular generally includes the plural."³⁷ Section 1 states that this principle of statutory construction does not apply if "the context indicates otherwise."³⁸ The fact that the Commission declined to adopt proffered language that would require that the condition be applied to "ALL SUCH neighborhoods" evidences the Commission's intent that the "singular" was not intended to include the "plural" in this case. Moreover, as explained below, the goal of the condition was to ensure that independent news programming is carried "in close proximity to other channels of the same genre." That goal is accomplished when the independent news programming is carried in one news neighborhood and must be balanced against the increased burden, cost, and consumer disruption that would result if we were to construe the condition more broadly. Given the Commission's chosen language, the purpose of the condition, and the costs and burdens associated with implementation of the condition, we find that the Bureau correctly concluded that

³¹ *News Neighborhooding Order*, 27 FCC Rcd at 4900, ¶ 19.

³² See Bloomberg's June 1 Application for Review at 11.

³³ *News Neighborhooding Order*, 27 FCC Rcd at 4900, ¶ 20.

³⁴ Letter from Markham C. Erickson, Counsel to Bloomberg, L.P., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (filed January 19, 2011).

³⁵ *News Neighborhooding Order*, 27 FCC Rcd at 4900, n.72.

³⁶ *News Neighborhooding Order*, 27 FCC Rcd at 4901, ¶ 19. See also *Comcast-NBCU Order*, 26 FCC Rcd at 4287-8, ¶ 122.

³⁷ Bloomberg's June 1 Application for Review at 9-11; Bloomberg's June 28 Reply at 2-3 (citing 1 U.S.C. § 1).

³⁸ 1 U.S.C. § 1. See also Comcast's June 18 Opposition at 6 (quoting *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) and citing Singer & Singer, *Sutherland Statutory Construction* § 47:34 (7th ed. 2007)).

the better reading of the news neighborhooding condition is that Comcast is required only to place an independent news channel in one news neighborhood.³⁹

13. Requiring Comcast to place Bloomberg Television in every news neighborhood it carries is unnecessary to achieve the purpose underlying the condition and would afford Bloomberg more relief than the Commission contemplated. The Bureau correctly concluded that the condition was intended to prevent Comcast from neighborhooding “its newly affiliated news channels while isolating independent news channels outside of any news neighborhood.”⁴⁰ Bloomberg misconstrues the condition’s narrow purpose by suggesting that the condition requires Comcast to place Bloomberg Television in every channel position as advantageous as the channel positions of Comcast’s affiliated news channels.⁴¹ The news neighborhooding condition supplements the Commission’s carriage complaint process available to address affiliate-based discrimination harms beyond the scope of the news neighborhooding condition. As the Bureau points out, Bloomberg can file a program carriage complaint with a reduced burden of proof under the *Comcast-NBCU Order* if Bloomberg believes that Comcast has placed Bloomberg Television in a discriminatory manner.⁴² To read the news neighborhooding condition to require Comcast to place independent news and business news channels in every neighborhood on a system would grant Bloomberg a windfall while unduly burdening Comcast. The Commission “narrowly tailored” the condition to remedy a specific harm—the isolation of an unaffiliated news channel.

14. It would also be inconsistent with common industry practice to require carriage of Bloomberg Television in more than one news neighborhood. Comcast does not typically place news networks in more than one neighborhood; for that matter, Comcast does not typically place any programming network in more than one channel location.⁴³ We agree with Comcast that “[p]lacing [Bloomberg Television] in every ‘news neighborhood’ on a lineup would not be ‘equitable’: it would favor [Bloomberg Television] over almost every other news network, none of which is consistently

³⁹ See *infra* ¶¶ 9-11. But see ¶¶ 37-39 below regarding separate treatment of SD and HD channels. We also dismiss Bloomberg’s argument that the Commission used the terms “a” and “that” to refer to the plural as well as the singular in other contexts of the *Comcast-NBCU Order*, and therefore must have intended to do so here. See Bloomberg’s June 1 Application for Review at 10 (quoting a condition of the *Comcast-NBCU Order* that states that if Comcast provides or makes available a set-top box that has “a capability that enables a customer to access a Specialized Service, the requirements of Sections IV.E.1 & 2 shall apply to that Specialized Service,” and arguing that the condition applies to set-top boxes that provides access to one or more specialized services). Even though the Commission used “a” and “that” to refer to the plural elsewhere in the *Comcast-NBCU Order*, the context of the news neighborhooding condition, as explained above, indicates that the better reading of this condition is that Comcast is required only to place an independent news channel in one news neighborhood.

⁴⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4901, ¶ 21. See also *Comcast-NBCU Order*, 26 FCC Rcd at 4287-8, ¶ 122.

⁴¹ Bloomberg’s June 1 Application for Review at 12-13.

⁴² *News Neighborhooding Order*, 27 FCC Rcd at 4901, ¶ 22 (citing *Comcast-NBCU Order*, 26 FCC Rcd at 4287-8, ¶¶ 121, 123; 47 C.F.R. § 76.1301(c)). We reject Bloomberg’s assertion that we should grant it carriage in every news neighborhood to ease the administrative burdens it would face if it had to file program carriage complaints to complain of discriminatory channel placement. Bloomberg’s June 1 Application for Review at 17-18. There is no mention of the easing of administrative burdens in the text of the condition. To the contrary, in the *Comcast-NBCU Order*, the Commission chose to establish a limited neighborhooding condition and to allow independent news channels to bring fact-specific claims of discrimination, with a reduced burden of proof, in the event Comcast treats them unfairly.

⁴³ See Bloomberg Channel Lineup Analysis (provided to Media Bureau staff and Comcast counsel on June 14, 2012). As we explain below, we consider SD and HD feeds of a network to be different channels, and therefore we do not consider placing the SD feed of a network in a SD news neighborhood and the HD feed of a network in an HD news neighborhood to be placing a network into more than one news neighborhood, as Bloomberg suggests. Bloomberg’s June 28 Reply at 3-4.

present in multiple news neighborhoods.”⁴⁴ In the *Comcast-NBCU Order*, the Commission made clear that it wanted to protect independent news channels from anticompetitive harm,⁴⁵ but *Comcast-NBCU Order* cannot reasonably be read to provide Bloomberg with benefits that exceed those that Comcast offers its affiliated channels. Therefore, we conclude that industry practice also supports the Bureau’s interpretation.

15. Requiring Comcast to place independent news and business news channels in every news neighborhood may result in Comcast having no news neighborhoods as they are defined by the condition. Reading the condition to require Comcast to carry independent news channels in every news neighborhood would be overly burdensome on headends in which Comcast has a news neighborhood with an open adjacent channel (where Comcast would be able to place Bloomberg Television) and another news neighborhood that does not have an open adjacent channel,⁴⁶ as is the case with most of the channel lineups at issue. As Comcast points out, it faces other carriage obligations (such as required carriage of must-carry and PEG channels) that further limit the available slots below channel 100, where Comcast often carries a news neighborhood without an open adjacent channel.⁴⁷ The goal of the condition was not to force Comcast to forgo neighborhooding news channels altogether rather than relocate a network that currently has a channel position below 100 to another position on the lineup in order to accommodate the new independent news network, when a less burdensome alternative exists. Changes to the lineup may be necessary to achieve the purpose of the condition in cases in which Comcast carries only one news neighborhood and it is in a crowded part of the channel lineup;⁴⁸ it is not necessary in cases in which Comcast has multiple news neighborhoods and it would be easier to place Bloomberg Television in one rather than the other. Accordingly, we reject Bloomberg’s argument that a balance of the benefits and burdens entitles it to carriage in every news neighborhood.

16. *Conclusion.* As explained above, the Bureau correctly concluded that the language and purpose of the condition support the Bureau’s interpretation of the condition to require Comcast to carry Bloomberg Television in a neighborhood, but not every news neighborhood. This will prevent Comcast from isolating independent news channels, consistent with the purpose of the condition and industry practice, without subjecting Comcast to burdens not contemplated when the Commission approved the transaction.

2. Allowing Comcast to Choose the Neighborhood

17. Bloomberg next challenges the Media Bureau’s decision to allow Comcast to choose the news neighborhood in which it places Bloomberg Television, reasoning that the decision will allow Comcast to favor affiliated networks.⁴⁹ We disagree. As we explain above, and the Bureau explained in the *News Neighborhooding Order*, the purpose of the condition is to prevent isolation of an independent news channel when other news channels are grouped in neighborhoods.⁵⁰ We agree with the Bureau that, “[i]f we were to require Comcast to place Bloomberg in every news neighborhood or allow Bloomberg,

⁴⁴ Comcast’s June 18 Opposition at 6.

⁴⁵ *Comcast-NBCU Order*, 26 FCC Rcd 4285-4289, ¶¶ 116-124.

⁴⁶ See Bloomberg’s June 1 Application for Review at 13-14; Comcast’s June 18 Opposition at 10.

⁴⁷ Comcast’s June 18 Opposition at 12 (explaining that federal law requires Comcast to carry broadcast channels on certain channel numbers and local franchising authorities require Comcast to carry public, educational, and governmental access channels on certain channel numbers).

⁴⁸ See *infra* ¶ 29.

⁴⁹ Bloomberg’s June 1 Application for Review at 18.

⁵⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4900-4901, ¶ 21. *Comcast-NBCU Order*, 26 FCC Rcd at 4285, 4287-8 ¶¶ 116, 122.

along with any other independent news and/or business news channel invoking this condition, to choose its neighborhood, Comcast could face major realignments of its channel lineups,” which “[w]e do not believe the Commission contemplated . . . in the *NBCU-Comcast Order*.”⁵¹ We reject Bloomberg’s critique of the *News Neighborhooding Order* for “fail[ing] to consider the importance of placing independent news channels in the most viewed neighborhoods and similarly fail[ing] to recognize the importance of [Bloomberg Television]’s location in relation to its largest competitor, CNBC, which is now affiliated with Comcast.”⁵² The news neighborhooding condition did not impose an obligation on Comcast to arrange channel placement on the basis of competitor status. In addition, Comcast correctly notes that nothing in the *Comcast-NBCU Order* suggests that the Commission intended to benefit independent news programmers such as Bloomberg by allowing them to pick their channel positions.⁵³ Indeed, the text of the condition does not mention anything about the location of particular competitors or “most viewed neighborhoods.”⁵⁴ The Commission did not adopt Bloomberg’s recommendation that the Commission require Comcast to locate independent business news channels “adjacent and contiguous to CNBC and any similar Comcast business news channels at each position where such channel is carried.”⁵⁵ Accordingly, we agree with the Bureau’s conclusion that “the news neighborhooding condition is most reasonably interpreted to require Comcast to carry all independent news channels and business news channels, including Bloomberg Television, in a news neighborhood, but does not require Comcast to carry such channels in every news neighborhood or in a particular neighborhood of Bloomberg’s choosing.”⁵⁶

18. As discussed above, the Commission intended to protect against potential discrimination through program carriage conditions, and the Bureau committed to “expeditiously and closely scrutinize[]” any carriage complaint that Bloomberg files.⁵⁷ In such a proceeding, whether Comcast chose to locate Bloomberg’s channel in a news neighborhood separate from CNBC or in news neighborhood with channels with substantially different characteristics may be relevant. If presented to us, we would consider the Nielsen ratings of news channels in Comcast’s news neighborhoods (i.e., the neighborhood that includes the complainant and those that do not) as well as any other facts as potentially probative evidence in a fact-specific determination as to discrimination.⁵⁸ The Bureau’s interpretation both gives Comcast a measure of flexibility and the editorial discretion to manage its lineup obligations and protects Bloomberg Television from discriminatory placement. Therefore, we conclude that the Bureau’s decision is consistent with the policy goals the Commission established when it adopted the condition. Accordingly, we find that the Bureau prudently concluded that it should consider any allegations of discriminatory placement on a fact-based record instead of deciding *a priori* that Comcast will discriminate against Bloomberg Television and place it in a detrimental neighborhood.

⁵¹ *News Neighborhooding Order*, 27 FCC Rcd at 4900-4901, ¶ 21.

⁵² Bloomberg’s June 1 Application for Review at 14.

⁵³ Comcast’s June 18 Opposition at 11.

⁵⁴ See Comcast’s June 18 Opposition at 14-15.

⁵⁵ See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56, Petition to Deny of Bloomberg L.P. at 33 (filed June 21, 2010).

⁵⁶ *News Neighborhooding Order*, 27 FCC Rcd at 4900, ¶ 20.

⁵⁷ *News Neighborhooding Order*, 27 FCC Rcd at 4901, ¶ 22.

⁵⁸ We note that any probative evidence on that point would have to be reviewed in the context of the full record to determine whether Comcast engaged in the type of discriminatory conduct actionable under Section 616 of the Act. 47 U.S.C. § 536.

3. News Channels

19. We affirm the Bureau's conclusion that Current TV and Link TV are news channels. The *Comcast-NBCU Order* defines 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."⁵⁹ In the underlying complaint proceeding, the parties disagreed about what constituted a news channel for purposes of the condition.⁶⁰ In the *News Neighborhooding Order*, the Bureau held that the "the term 'news channels,' as used in the condition, refers to 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." Based on this definition, the Bureau concluded that Bloomberg erred in analyzing whether Comcast was carrying Bloomberg Television in news neighborhoods on the relevant headends, by "exclud[ing] news channels like BBC World News, Current TV, Link TV, and MHz Worldview from its analysis" of news neighborhoods, because those networks meet the definition.⁶¹ Bloomberg argues that the Bureau either ignores Bloomberg's evidence regarding the nature of Current TV and Link TV, or incorrectly modifies and applies the definition of news channel.⁶² Therefore, Bloomberg asks us to redefine the meaning of "news channel" under the news neighborhooding condition.⁶³

20. We find that the Bureau correctly concluded that Current TV and Link TV are news channels within the meaning of the condition. The Bureau concluded, based on program schedules provided by Comcast, that Current TV and Link TV's "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."⁶⁴ Bloomberg seeks to refute the Bureau's finding that Current TV is a news channel by pointing to a blog post that criticized some of its content,⁶⁵ a statement from a media company executive who did not consider Current TV to be a news channel based on his "review of Current TV's website and programming schedule,"⁶⁶ and a statement from a Communications professor that "Current TV is not in the same league as MSNBC or CNN."⁶⁷ The Media Bureau reasonably concluded, however,

⁵⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4288, n.292.

⁶⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4898, ¶ 14 ("Comcast asserts that Bloomberg excludes certain news channels from its analysis of channel lineups, which (i) paints an inaccurate picture of whether a channel grouping represents a significant percentage of news channels on a given headend, and (ii) does not accurately reflect whether Comcast already carries Bloomberg Television in a news neighborhood. Comcast argues that Bloomberg wrongly excluded from its analysis a number of channels that meet this definition, including PEG channels, weather channels, foreign news channels, Current TV, and sports news channels. Bloomberg responds that Comcast seeks to define those channels as news channels 'to minimize the percentage of news channels carried in the neighborhoods identified by Bloomberg.'").

⁶¹ *News Neighborhooding Order*, 27 FCC Rcd at 4899, n.60.

⁶² Bloomberg's June 1 Application for Review at 20-22.

⁶³ Bloomberg's June 1 Application for Review at 20-22. To the extent that the Bureau did not adequately justify its conclusion that Current TV and Link TV are news channels, as Bloomberg argues, we do so here. See Bloomberg's June 28 Reply at 5.

⁶⁴ *News Neighborhooding Order*, 27 FCC Rcd at 4898, ¶ 15.

⁶⁵ See Reply of Bloomberg at 28-29 (filed Aug. 30, 2011) (citing <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/06/current-tv-watching-comcast-bloomberg-fight-closely.html>).

⁶⁶ Reply of Bloomberg at Exhibit B, ¶ 26 (filed Aug. 30, 2011).

⁶⁷ Reply of Bloomberg at Exhibit D, ¶ 19 (filed Aug. 30, 2011).

based on programming schedules for the news networks at issue, that those channels were news channels within the definition in the condition.⁶⁸ We find no error in the Bureau's conclusion that Current TV and Link TV are news networks. Although Current TV and Link TV's schedules may not focus heavily on breaking news reporting, both Current TV and Link TV air "programming [that] is focused on public affairs . . . reporting and analysis during the hours from 6:00 a.m. through 4:00 p.m. in the U.S. Eastern Time Zone."⁶⁹ Therefore, we conclude that the Media Bureau correctly applied the term "news channel" as defined by the news neighborhooding condition and we affirm its decision to include news channels like Current TV and Link TV in its analysis of whether Bloomberg Television was contained in a news neighborhood.

4. System/Headend Distinction

21. In the *News Neighborhooding Order*, the Media Bureau pointed out that, while the news neighborhooding condition refers to a "system's channel lineup," Bloomberg analyzed channel lineups on a headend-by-headend basis; the Bureau presumed that the difference between systems and headends was "irrelevant" in this context.⁷⁰ In its application for review, Bloomberg requests that we clarify that Bloomberg Television must be carried in each news neighborhood on each headend on systems with multiple headends.⁷¹ In its Opposition, Comcast states that it "intends to implement the Order with regard to each individual channel lineup that contains a news neighborhood in the relevant DMAs," and that "Bloomberg's request for clarification is therefore moot."⁷² Though it appears there is no dispute as to the proper interpretation of this provision, we clarify this point as Bloomberg requests and find that interpreting the condition to apply on a headend-by-headend basis is appropriate.

B. Comcast's Application for Review of the *News Neighborhooding Order*

22. Comcast seeks Commission review of three aspects of the *News Neighborhooding Order*. First, Comcast challenges the Bureau's definition of a "news neighborhood" as arbitrary and bad policy.⁷³ Second, Comcast argues that the condition does not apply to channel groupings that existed at the time of the transaction.⁷⁴ And finally, Comcast argues that the Bureau's construction of the condition infringes on Comcast's editorial discretion as protected by the First Amendment.⁷⁵ For the reasons set forth below, we find that Comcast's challenges have no merit.

⁶⁸ Surreply of Comcast Cable Communications, LLC at Exhibit 1, Attachments A-D (filed Sept. 27, 2011).

⁶⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4288, n.292. See, e.g., <http://www.linktv.org/schedule/> (listing programming between the hours of 6:00 a.m. and 4:00 p.m. in the Eastern Time Zone that is almost exclusively News & Current Affairs or documentary programming regarding public affairs); <http://current.com/schedule/> (listing programming between the hours of 6:00 a.m. and 4:00 p.m. in the Eastern Time Zone that focuses heavily on documentary programming regarding public affairs). See also <http://current.com/shows/vanguard/> ("'Vanguard' is a no-limits documentary series whose award-winning correspondents put themselves in extraordinary situations to immerse viewers in global issues that have a large social significance."); <http://www.linktv.org/mosaic> ("The Peabody Award-winning daily compilation of television news reports from the Middle East"). See also Comcast's June 18 Opposition at 16-17 (stating that Current TV and Link TV carry serious documentaries, discussions, speeches, legislative sessions, and panels, and arguing that if this does not qualify as "public affairs" programming, "then it is not clear how any party could ever say with certainty what would").

⁷⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4892, n.2.

⁷¹ Bloomberg's June 1 Application for Review at 19-20.

⁷² Comcast's June 18 Opposition at 19, n.61.

⁷³ Comcast's June 1 Application for Review at 7-15.

⁷⁴ Comcast's June 1 Application for Review at 16-22.

⁷⁵ Comcast's June 1 Application for Review at 23-25.

1. Definition of a News Neighborhood

23. In the *News Neighborhooding Order*, the Media Bureau decided that “four news or business news channels within any five adjacent channel positions qualifies as a ‘significant number or percentage of news and/or business news channels’ and therefore constitutes a neighborhood for purposes of the news neighborhooding condition.”⁷⁶ Comcast argues that this interpretation runs counter to the plain language of the condition and does not properly analyze the word “significant” in the context of the condition.⁷⁷ Comcast also argues that the Bureau’s interpretation is inconsistent with the Commission’s intent in the *Comcast-NBCU Order*, which Comcast maintains was to define a neighborhood as a grouping of all or nearly all of Comcast’s news channels. We reject Comcast’s arguments.

24. *Language of the Condition.* The news neighborhooding condition states that, “[i]f 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.”⁷⁸ Comcast contends that the term “news neighborhood” refers to a single grouping of news channels, where Comcast would locate all or most of the news networks it carries.⁷⁹ Accordingly, Comcast’s main arguments against the Bureau’s interpretation of the language of the condition are (1) that the condition applies only where Comcast carries one grouping of news channels, and (2) that a grouping of news channels is not “significant” unless it contains all (or at least an overwhelming majority) of the news programming in that one grouping.⁸⁰

25. We reject Comcast’s argument that the condition applies only when Comcast carries a single grouping of news channels. Contrary to Comcast’s assertion, the language of the condition could reasonably be read to encompass both situations, *i.e.*, where a headend has a single news neighborhood or has multiple news neighborhoods. There is nothing in the language itself that suggests the condition applies only when a single large neighborhood exists and, indeed, such an interpretation would be at odds with the purpose of the condition. While Comcast may be correct that a common purpose of a neighborhood is to place “all (or at least most) channels of a kind in a *single* location for viewers to more easily access,”⁸¹ the purpose of the condition was to prevent Comcast from placing some news channels in neighborhoods and leaving independent news and business news channels out of neighborhoods to their detriment.⁸² This discrimination can take place regardless of the number of news neighborhoods Comcast has in a lineup. Moreover, if Comcast were correct that the condition applies only when a channel lineup has a single neighborhood,⁸³ Comcast could easily evade the condition by creating two neighborhoods that both exclude independent news channels. Adopting Comcast’s interpretation thus

⁷⁶ *News Neighborhooding Order*, 27 FCC Rcd at 4891, ¶ 2. As the Bureau explained, it concluded that four news channels in five adjacent channel positions represents a significant *number* of news channels, rather than a significant percentage: “Although four news channels may not represent a significant percentage of Comcast’s news channels on every headend, it does represent a significant number of news channels in the context of the news neighborhooding condition.” *News Neighborhooding Order*, 27 FCC Rcd at 4897, ¶ 13.

⁷⁷ Comcast’s June 1 Application for Review at 7-9; Comcast’s June 28 Reply at 1-2.

⁷⁸ *Comcast-NBCU Order*, 26 FCC Rcd at 4358 (App. A, Sec. III.2).

⁷⁹ Comcast’s June 1 Application for Review at 8-12.

⁸⁰ Comcast’s June 1 Application for Review at 7-11.

⁸¹ Comcast’s June 1 Application for Review at 7-8.

⁸² *See supra* ¶ 13; *News Neighborhooding Order*, 27 FCC Rcd at 4899-4902, ¶¶ 17-23.

⁸³ Comcast’s June 1 Application for Review at 8.

could render the condition essentially meaningless.⁸⁴ Accordingly, we conclude that the Bureau properly applied the news neighborhooding condition to lineups that have multiple news neighborhoods.

26. We also conclude that the Bureau properly interpreted the word “significant” in the context of the condition. We agree with Comcast 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.’”⁸⁵ The Bureau’s analysis of the word “significant” does exactly that. The Bureau agreed with Comcast that, “in this context, the most relevant definitions of the word ‘significant’ are ‘having meaning’ and ‘important.’”⁸⁶ But the Bureau rejected Comcast’s argument that a reasonable consumer would consider only a grouping of more than 10 news channels to have meaning or to be important.⁸⁷ As Bloomberg states in its Opposition (and supported with expert statements in the Complaint proceeding), viewers tend to “flip” between channels using the channel up and channel down commands on their remotes, as well as by looking at nearby channels on programming guides.⁸⁸ This phenomenon supports the Bureau’s conclusion that four news channels in any five adjacent channel positions is significant; that is, it is “important” from a network’s perspective because viewers tend to stay within neighborhoods, and these neighborhoods “have meaning” to viewers because they mean that the viewer does not need to wander the channel lineup in search of lone news networks.⁸⁹ Accordingly we are not persuaded by Comcast’s argument that “the analysis of how many news networks constitutes a ‘significant number or percentage’ properly turns on whether ‘customers, encountering a given number of news channels in adjacent channel positions, would assume that other news channels will not be found elsewhere on the system.’”⁹⁰ As the Bureau stated, “a grouping of [four news channels in five adjacent positions] can be ‘important’ and ‘have meaning’ even if a reasonable consumer would assume that other channels with like content are available at other channel positions on the headend . . . because it is large enough to attract viewers in search of news programming.”⁹¹ Therefore, we find that the Bureau reasonably concluded that a concentration of

⁸⁴ See Bloomberg’s June 18 Opposition at 4.

⁸⁵ Comcast’s June 1 Application for Review at 10 (quoting *United States v. Lancaster*, 6 F.3d 208, 210 (4th Cir. 1983)).

⁸⁶ *News Neighborhooding Order*, 27 FCC Rcd at 4897, ¶ 13. The mere fact that there are neighborhoods that consist of 10 to 15 channels on some cable systems does not axiomatically imply that neighborhoods of four news channels within a cluster of five adjacent channels is not significant. As Bloomberg explains, networks benefit from being located close to other networks of the same genre and do not necessarily have to be in large, 10-to-15 channel neighborhoods in which consumers might expect to find all news channels. Bloomberg’s June 18 Opposition at 9-10.

⁸⁷ *News Neighborhooding Order*, 27 FCC Rcd at 4897, ¶ 13.

⁸⁸ Bloomberg’s June 18 Opposition at 9-10 (citing Reply of Bloomberg at Exhibit B, ¶ 18; Exhibit C, ¶¶ 14, 15; Exhibit E, ¶ 19; Exhibit F, ¶¶ 13, 15, 17 (filed Aug. 30, 2011)).

⁸⁹ Although the issue is not before us, we note that the term “neighborhood” as defined under our condition would also cover a cluster of fewer than four channels where the cluster represents a “significant percentage” of the news channels carried on that system. For example, if Comcast were to purchase a system with a small number of channels that included a total of four news channels, then a cluster of three news channels substantially adjacent to one another would be a “significant percentage” of the news channels carried on that system, even under Comcast’s expert’s definition of “significant percentage.” See Answer of Comcast at Exhibit 4 at 12 (filed July 27, 2011) (“DirecTV, Verizon, AT&T U-Verse, and Insight have set the industry standard for news channels in a news neighborhood at 70% or more of all news channels in the lineup.”). We believe viewers’ tendency to “flip” – *i.e.*, navigate through the line-up using the channel up and channel down commands on their remotes – makes clustering important on any system, large or small, and thus our condition applies to any system, regardless of size, where a grouping of news channels has significance. See ¶ 26, *supra*.

⁹⁰ Comcast’s June 1 Application for Review at 9 (quoting Answer of Comcast at ¶ 53).

⁹¹ *News Neighborhooding Order*, 27 FCC Rcd at 4897, ¶ 13.

four news channels within five adjacent channel positions is significant and constitutes a news neighborhood under the condition.⁹²

27. *The Commission's Intent.* We also reject Comcast's arguments that the *News Neighborhooding Order* is inconsistent with the Commission's intent in the *Comcast-NBCU Order*.⁹³ Comcast argues that the record in the *Comcast-NBCU Order* demonstrates that the Commission intended that the condition apply only to Comcast's Master Channel Lineup ("MCLU"), which includes "a capacious, digital channel range in upper channel numbers"⁹⁴ that "groups sixteen news channels together—including, in each case, [Bloomberg Television]."⁹⁵ In support of this position, Comcast argues that: (1) the record before the Commission in the *Comcast-NBCU Order* indicated that news neighborhoods typically consist of 10 to 15 channel clusters of news networks,⁹⁶ and (2) the Commission called the condition "narrowly tailored," and therefore intended to minimize disruption to Comcast, its subscribers, and television networks that Comcast carries.⁹⁷ As explained below, we conclude that the Bureau properly rejected Comcast's argument that the Commission intended the condition to apply only to such a grouping of nearly all of its news channels.

28. We disagree with Comcast's position that the news neighborhooding condition applies only to single, large news neighborhoods. The *Comcast-NBCU Order* does not refer to the MCLU or any other cluster of more than 10 news channels that some of Comcast's competitors carry.⁹⁸ The Commission was aware of Comcast's MCLU trials,⁹⁹ yet, instead of defining a news neighborhood with reference to the MCLU or similarly sized groupings of channels, it chose to define a news neighborhood as "a significant number or percentage of news and/or business news channels substantially adjacent to one another."¹⁰⁰ In so doing, the Commission considered the burdens this approach would impose on Comcast, including potential channel realignments, and found that, "in accordance with the special importance of news programming to the public interest,"¹⁰¹ the condition was necessary to protect independent news programmers.¹⁰² We agree with the Bureau that reading the condition to apply only to news neighborhoods of more than 10 channels would exclude many groupings of a "significant" number of news channels.¹⁰³ Moreover, such an interpretation would eviscerate the protections that the

⁹² An agency is entitled to substantial deference when it must draw numerical lines. *See National Association of State Utility Consumer Advocates v. FCC*, 372 F. 3d 454 (D.C. Cir. 2004); *see also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977) (line drawing performed by the Commission will receive deference unless the lines drawn "are patently unreasonable, having no relationship to the underlying regulatory problem").

⁹³ Comcast's June 1 Application for Review at 11-15.

⁹⁴ Comcast's June 1 Application for Review at 15 ("Comcast's MCLU aligned news channels only in higher, capacious digital channel ranges that are capable of accommodating additional news networks that might later emerge. By aligning news channels in this manner, Comcast's MCLU ensures that news channels can be added to the grouping in the future without the disruption resulting from the Bureau's interpretation of the Condition.").

⁹⁵ Answer of Comcast at ¶ 22.

⁹⁶ Comcast's June 1 Application for Review at 11-12.

⁹⁷ Comcast's June 1 Application for Review at 12-15.

⁹⁸ Comcast's June 1 Application for Review at 12-15 (citing Answer of Comcast at ¶¶ 23-24).

⁹⁹ *See* Letter from Stephen Diaz Gavin, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56, at 8-9 (filed December 8, 2010).

¹⁰⁰ *Comcast-NBCU Order*, 26 FCC Rcd at 4284-9, ¶¶ 116-124.

¹⁰¹ *Comcast-NBCU Order*, 26 FCC Rcd at 4287, ¶ 122.

¹⁰² *See* Bloomberg's June 18 Opposition at 14.

¹⁰³ *News Neighborhooding Order*, 27 FCC Rcd at 4897, ¶ 13.

Commission found necessary to protect unaffiliated news channels and to which Comcast agreed¹⁰⁴ by enabling Comcast to easily evade the condition.

29. Comcast argues that the *News Neighborhooding Order* is not narrowly tailored and requests that instead we read the news neighborhooding condition to apply only when Comcast does not need to “reshuffl[e] channel lineups.”¹⁰⁵ We deny that request. As explained below, the Bureau considered the burdens of requiring Comcast to place independent news in groupings of four news channels in five adjacent channel positions. The Commission adopted a “narrowly tailored” condition that imposes no more burdens than necessary to protect independent news from isolation when Comcast carries news neighborhoods.¹⁰⁶ The Bureau concluded that allowing Comcast to choose one existing news neighborhood in which to carry an independent news channel would limit the burden on Comcast while protecting independent news channels from isolation.¹⁰⁷ The Bureau specified that its “interpretation of the news neighborhooding condition will not, absent a showing of discrimination, require Comcast to reorganize channel positions to place Bloomberg Television in a neighborhood below channel number 100 if there is another neighborhood above channel 100.”¹⁰⁸ This demonstrates that the Bureau gave due consideration to Comcast’s concerns about channel changes below channel 100; the Bureau correctly recognized that the news neighborhooding condition is narrowly tailored, but not tailored in such a way as to remove all burdens that Comcast may face.¹⁰⁹ For these reasons, we reject Comcast’s argument that the news neighborhooding condition should apply only to the 16 channel news neighborhood on its MCLU or only to 10 or more channels.

2. Applicability to Existing Channel Lineups

30. We also reject Comcast’s challenge to the Bureau’s decision that the condition applies to Comcast’s lineups as they existed on the date of the *Comcast-NBCU Order*, in addition to any lineups created after the *Comcast-NBCU Order*.¹¹⁰ The Bureau decided that “the plain language of the condition suggests that the Commission intended that the condition would apply to Comcast’s existing channel

¹⁰⁴ Comcast should have raised any arguments it had about the burdens of adjusting its channel lineups to accommodate independent news networks before it agreed to the condition. If Comcast believed that the condition was too burdensome, it had the option to reject the conditional grant of its application and the matter would have been set for hearing. *See* 47 C.F.R. § 1.110. Comcast cannot challenge a condition that was essential to the Commission’s approval now that it has benefited from the transaction’s completion. *See infra* ¶ 35; *see also* Bloomberg’s June 18 Opposition at 14.

¹⁰⁵ Comcast’s June 1 Application for Review at 14.

¹⁰⁶ *Comcast-NBCU Order*, 26 FCC Rcd at 4282, ¶ 110; *News Neighborhooding Order*, 27 FCC Rcd at 4902, ¶ 23. Moreover, we agree with Bloomberg’s argument that the condition is narrowly tailored because the Commission limited the condition to news channels. Bloomberg’s June 18 Opposition at 17.

¹⁰⁷ *News Neighborhooding Order*, 27 FCC Rcd at 4900-1, ¶¶ 20-1.

¹⁰⁸ *News Neighborhooding Order*, 27 FCC Rcd at 4902, n.85.

¹⁰⁹ Comcast and Bloomberg have each raised detailed arguments about the level of burden associated with Comcast’s channel realignments: Bloomberg points out that Comcast frequently moves channels, and Comcast argues that those changes are usually outside of the 1-99 channel range. *See, e.g.*, Comcast’s June 1 Application for Review at 11-15; Bloomberg’s June 18 Opposition at 15-17; Comcast’s June 28 Reply at 3. The Commission and Comcast already considered the burden that the news neighborhooding condition would have on Comcast, and concluded that the condition was necessary to balance against public interest harms because 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.” *Comcast-NBCU Order*, 26 FCC Rcd at 4282, ¶ 110. Thus, it would be inappropriate for us to reconsider those burdens long after the Commission and Comcast agreed to the condition and Comcast has reaped the benefits of the transaction.

¹¹⁰ Comcast’s June 1 Application for Review at 16.

lineups,” because the condition is triggered if Comcast “now ... carries’ news channels in a neighborhood.”¹¹¹ Comcast makes three main arguments to support its contrary interpretation. First, Comcast argues that the language of the condition expressly contemplates action on Comcast’s part before it is triggered.¹¹² Second, Comcast asserts that the Commission typically uses transaction conditions to protect against post-transaction activities and indicated it was doing so in the *Comcast-NBCU Order*. Finally, Comcast argues that the Bureau interpreted the condition to prevent a harm that it was not intended to prevent. We reject all of Comcast’s arguments.

31. *Language of the Condition.* The Media Bureau correctly interpreted the language of the news neighborhooding condition that states that if Comcast “now or in the future carries news and/or business news channels in a neighborhood” to mean that the condition applies to neighborhoods that existed at the time of the transaction. As the *News Neighborhooding Order* said, “Comcast’s argument that the condition applies only to future lineups would read out of the condition the term ‘now... carries’ and, thus, would be contrary to the Commission’s stated intent regarding the condition’s applicability.”¹¹³ Comcast points out that the condition defines a news neighborhood as “placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup,” and argues that this language requires Comcast to move a channel in order to trigger the condition.¹¹⁴ We disagree. As Bloomberg correctly indicates, the word “placing” is used in defining what it means to carry news or business news channels in a neighborhood, and the verb used in the condition’s triggering clause is “carries,” which does not require any affirmative movement of channels.¹¹⁵ We reject Comcast’s argument that use of the word “placing” in the definition of a news neighborhood means that Comcast needed to affirmatively place channels after the transaction to trigger the condition. Instead, the condition’s triggering verb is the word “carries,” and the condition is triggered if Comcast “now or in the future carries news and/or business news channels in a neighborhood.” Accordingly, Comcast’s carriage of news and/or business news channels in a neighborhood at the time of the transaction triggered the condition without any further action on Comcast’s part.

32. *Language of the Comcast-NBCU Order.* The text of the *Comcast-NBCU Order* supports the conclusion that the condition applies to neighborhoods that existed at the time of the transaction. In its application for review, Comcast points out that Commission said the condition “would only take effect if Comcast-NBCU undertook to neighborhood its news or business news channels.”¹¹⁶ Therefore, Comcast argues, the condition was meant solely to remedy post-transaction discriminatory actions by the entity formed as a result of the transaction.¹¹⁷ We disagree. Comcast has taken this sentence out of context. Footnote 295 of the *Comcast-NBCU Order* states:

Comcast-NBCU argues that evolving interactive guides and navigation features have the potential to make neighborhooding less important in the future, as viewers may find programming through a search function. Our condition, however, would only take effect if Comcast-NBCU undertook

¹¹¹ *News Neighborhooding Order*, 27 FCC Rcd at 4895, ¶ 8.

¹¹² Comcast’s June 1 Application for Review at 17-18.

¹¹³ *News Neighborhooding Order*, 27 FCC Rcd at 4895, ¶ 8.

¹¹⁴ Comcast’s June 1 Application for Review at 17-18; Comcast’s June 28 Reply at 4-5.

¹¹⁵ See Bloomberg’s June 18 Opposition at 19-20.

¹¹⁶ Comcast’s June 1 Application for Review at 19 (quoting *Comcast-NBCU Order*, 26 FCC Rcd at 4288, n.295). See also Comcast’s June 28 Reply at 4-5.

¹¹⁷ Comcast’s June 1 Application for Review at 19.

to neighborhood its news or business news channels, which therefore would indicate that there was some value to neighborhooding despite additional search capabilities.¹¹⁸

In this context, it is clear that the Commission intended to respond to Comcast's argument that future advances in search technology used to find programming could render neighborhooding obsolete. The Commission stated that if Comcast neighborhooding its news despite search technology improvements, then neighborhoods must still have some value. Nothing in the footnote suggests that the Commission intended for that statement to have any broader significance than simply responding to Comcast's argument or, in particular, to limit the scope of the condition to neighborhoods created post-transaction.¹¹⁹

33. *Purpose of the Condition.* We also conclude that applying the news neighborhooding condition to existing news neighborhoods is consistent with the Commission's intent in the *Comcast-NBCU Order*. As the *News Neighborhooding Order* recognized, the transaction changed Comcast's incentives with respect to the neighborhooding of independent news channels.¹²⁰ That is, post-transaction, placing *or maintaining* independent news networks outside of news neighborhoods may benefit Comcast's newly affiliated news networks.¹²¹ As Bloomberg explained in the record before the Bureau,¹²² and as the Bureau recognized in the *News Neighborhooding Order*,¹²³ networks benefit from being placed close to other networks of the same genre. Comcast argues that we should interpret the condition to govern only its actions to exclude news channels from news neighborhoods newly created after the transaction changed Comcast's incentives. In effect, Comcast argues that the *Comcast-NBCU Order* blessed all preexisting Comcast channel lineups as nondiscriminatory. This interpretation renders the condition and its purpose hollow. It is well established on this record that, at the time the transaction was consummated, Comcast had news neighborhoods on hundreds of headends. In this regard, the Bureau noted that, "[a]fter the *Comcast-NBCU Order* was adopted and the 'neighborhooding condition' became effective, Bloomberg requested to be placed in existing neighborhoods, and Comcast refused that request."¹²⁴ The Bureau determined that Comcast's incentive and ability to discriminate on the basis of affiliation significantly increased for unaffiliated news programming now that Comcast is affiliated with NBCU, which owns several news networks.¹²⁵ The Bureau also found that this increased incentive and

¹¹⁸ *Comcast-NBCU Order*, 26 FCC Rcd at 4288, n.295 (citing Letter from Michael Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 4-5 (filed Oct. 22, 2010)).

¹¹⁹ Moreover, as Bloomberg points out, Comcast concedes that the condition applies to certain neighborhoods that existed at the time of the transaction. Bloomberg's June 18 Opposition at 19.

¹²⁰ *News Neighborhooding Order*, 27 FCC Rcd at 4895, n.31.

¹²¹ *News Neighborhooding Order*, 27 FCC Rcd at 4895, n.31. See also *id.* at 4901, ¶¶ 21-22; Bloomberg's June 18 Opposition at 21.

¹²² Reply of Bloomberg at 17 (filed Aug. 30, 2011) (stating that "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, channels benefit simply from being located in close proximity to other channels of the same genre" (citations omitted)).

¹²³ *News Neighborhooding Order*, 27 FCC Rcd at 4901, n.74.

¹²⁴ *News Neighborhooding Order*, 27 FCC Rcd at 4895, ¶ 8. Bloomberg's June 18 Opposition at 20-22.

¹²⁵ For example, because Comcast had nothing to gain by disadvantaging one news programming network against another before it acquired NBCU, a decision to place a news programming network outside a news neighborhood before the transaction is likely to have been based on a valid business justification and not based on affiliation. In that scenario, over time the out-of-neighborhood news programming network may acquire more viewers, thus improving its ability to negotiate with Comcast for a more favorable neighborhood placement in the future. After acquiring NBCU, however, Comcast has an incentive to advantage its affiliated news programming networks, such as CNBC and MSNBC, by declining to neighborhood a popular competing news programming network, even if by doing so Comcast risks losing the right to carry the network. This is because any subscribers Comcast might lose as

(continued....)

ability to discriminate was not limited solely to a sub-category of newly-created, post-transaction news neighborhoods, but, instead applied to all independent news channels and all news neighborhoods of whatever vintage. To balance against such an anticompetitive effect, the Bureau found that the condition was intended to apply equally to all independent news programmers and all news neighborhoods. Regardless of Comcast's incentives when it created a pre-transaction news neighborhood, it now has an incentive to discriminate against an independent news channel by denying a post-transaction request to place that channel in a neighborhood.

34. We also disagree with Comcast's argument that the Commission intended to rely only on the program carriage complaint process to address discrimination existing at the time of the merger.¹²⁶ To the contrary, as explained above, the Commission decided that the changes in Comcast's incentives and abilities with regard to discriminatory neighborhooding of news channels required this additional specific relief. Accordingly, we conclude that the Bureau properly considered these incentives, consistent with the purpose of the news neighborhooding condition.

3. First Amendment Challenge

35. We reject Comcast's claim that the *News Neighborhooding Order* is a violation of Comcast's editorial discretion.¹²⁷ As the Bureau stated, "Comcast voluntarily assented to this condition knowing that it might affect some of its carriage choices."¹²⁸ If Comcast thought the condition was too burdensome, it had the option to reject the conditional grant of its application and the matter would be set for hearing.¹²⁹ The condition was a prerequisite to the Commission's approval of the transaction, to which Comcast agreed; therefore, having secured the benefit of the Commission's conditional approval, Comcast is now foreclosed from challenging the condition.¹³⁰ Comcast does not dispute that the Commission has the authority to adopt and enforce the news neighborhooding condition.¹³¹ We find Comcast's claim that it was unaware that this condition would impact Comcast, its programming partners,

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a result of losing access to an independent news network would be offset by the increased proceeds Comcast would gain from increased viewership of its affiliated networks.

¹²⁶ Comcast's June 1 Application for Review at 20-21.

¹²⁷ Comcast's June 1 Application for Review at 23.

¹²⁸ *News Neighborhooding Order*, 27 FCC Rcd at 4902, ¶ 23 (citing *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, 15811-12, ¶ 49 (MB 2008), *rev'd on other grounds*, 25 FCC Rcd 18099 (2010) ("*MASN Case*").

¹²⁹ See 47 C.F.R. § 1.110 (where the Commission without a hearing grants any application with conditions, the action of the Commission shall be considered as a grant of such application unless the applicant, within 30 days of issuance of the grant, files with the Commission "a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing . . ."). See also *Central Television, Inc. v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987) (finding that under the prescribed procedure set forth in section 1.110 of the Commission's rules, "Acceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance").

¹³⁰ *Central Television*, 834 F.2d at 190 (having secured the benefit of an FCC order conditionally approving a transfer application, the applicant is foreclosed from later challenging the terms of the condition); *MASN Case*, 23 FCC Rcd at 15811, ¶ 49 ("As an initial matter, we note that TWC, as part of the Commission's grant of its applications in the Adelphia transaction, voluntarily assented to a condition that it knew might result in mandatory carriage. Consequently, TWC is now foreclosed from challenging the very conditions that were prerequisite to that grant.").

¹³¹ See Comcast's June 28, 2012 Reply at 5 ("Comcast has never contended that the Commission was without authority to adopt the condition"); Comcast's October 9, 2012 Reply at 4-5 ("Comcast has never challenged the Commission's authority to enforce the condition").

and its subscribers¹³² unpersuasive, as the condition plainly imposes a carriage obligation on Comcast even if it does not explicitly address each and every one of the possible contingencies associated with that obligation. In any event, the condition on its face is fully consistent with constitutional requirements – a point Comcast does not dispute.¹³³ And given that this is a reasonable construction of the condition to which Comcast voluntarily agreed, no First Amendment issue should arise.¹³⁴ In any event, we reject Comcast’s argument that the manner in which the condition was implemented by the Bureau raises First Amendment concerns. Under the intermediate scrutiny test applicable here, the news neighborhooding condition is permissible “if the government’s interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.”¹³⁵ The neighborhooding condition, and the manner in which it was implemented by the Bureau, furthers the substantial government interests in promoting diversity, competition, and independence in the news programming marketplace by preventing Comcast from exploiting its market power to inhibit independent news competitors from drawing audiences away from Comcast’s affiliated news networks. The Commission found the proposed transaction posed a threat to competition because “the combination of Comcast, the nation’s largest cable service provider and a producer of its own content, with NBCU, the nation’s fourth largest owner of national cable networks, will result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks.”¹³⁶ The Commission stated that “Comcast’s extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming.”¹³⁷ The neighborhooding condition, and the manner in which the Bureau implemented it, thus furthers the substantial government interest in promoting diversity, competition, and independence in the news programming marketplace by preventing Comcast from using its “significant market share in distribution” to “limit access to customers for any network it wishes to disadvantage”¹³⁸ by placing some news channels in neighborhoods and leaving independent news and business news channels out of

¹³² Comcast’s June 1 Application for Review at 23-25; Comcast’s June 28 Reply at 5.

¹³³ See Comcast’s October 9, 2012 Reply at 4-5 (Comcast is not contending “that the Condition *on its face* infringes Comcast’s First Amendment rights”).

¹³⁴ See *Erie Telecommunications Inc. v. City of Erie, PA*, 853 F.2d 1084, 1096-1099 (3rd Cir. 1988) (holding that a cable operator waived its First Amendment rights in connection with its execution of a general release terminating all disputes arising out of a franchise agreement; the court rejected the contention that the operator was unaware of its First Amendment rights at the time the release was executed given that, by that time, a number of federal courts and commentators had recognized and specifically discussed the First Amendment rights of cable television operators”).

¹³⁵ *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (provisions of the Cable Act that regulate speech based on affiliation with a cable operator – as opposed to the views contained therein – are subject to intermediate scrutiny).

¹³⁶ *Comcast-NBCU Order*, 26 FCC Rcd at 4284.

¹³⁷ *Comcast-NBCU Order*, 26 FCC Rcd at 4284-85 (explaining that “Comcast is the nation’s largest multiple system operator (MSO), with nearly 24 percent of MVPD subscribers nationwide” and that “Comcast’s market share in some of the nation’s highest-ranked DMAs is considerably greater--for example, Comcast’s market share is as much as 62 percent in the Chicago DMA and 67 percent in the Philadelphia DMA”). The Commission further found that the “transaction also increases Comcast’s incentives to discriminate in favor of its affiliated programming [because] [u]pon consummation of the transaction, Comcast will compete with an increased pool of unaffiliated programming vendors offering content that viewers might consider substitutes for its affiliates’ programming content and against which it could potentially pursue foreclosure or discrimination strategies in order to favor that content.” *Id.* at 4285-86.

¹³⁸ *Comcast-NBCU Order*, 26 FCC Rcd at 4285-86. See also *id.* at 4287 (by “disadvantaging rival programming networks, Comcast can increase subscribership or advertising revenues for its own programming content”).

neighborhoods to their detriment.¹³⁹ In addition, the condition, and the manner in which it was implemented by the Bureau, is narrowly tailored to assure that independent news channels are not excluded from neighborhoods altogether, while affording Comcast the editorial discretion to construct a single neighborhood, multiple neighborhoods or none at all.¹⁴⁰ In originally crafting the condition, the Commission declined requests from parties commenting on the transaction to impose broad remedial conditions on Comcast, such as specific channel placement requirements, instead finding that a “narrowly tailored neighborhooding requirement will mitigate any potential public interest harm.”¹⁴¹ As Bloomberg notes, the condition applies only to news channels, and it does not distinguish between networks based on the message of the speaker.¹⁴² The manner in which the Media Bureau interpreted the condition is likewise narrowly tailored. As discussed above, on headends with multiple news neighborhoods, the Media Bureau decision leaves to Comcast the discretion to choose which news neighborhood or neighborhoods in which to place independent news channels.¹⁴³ Along with this decision, the Bureau declined Bloomberg’s expansive reading of the condition, rejecting its arguments that independent news channels should be permitted to choose their neighborhoods, are entitled to placement in every news neighborhood used in Comcast’s lineups, and/or are entitled to be located “adjacent and contiguous to CNBC and any similar Comcast business news channels at each position where such channel is carried.”¹⁴⁴ For all these reasons, the Bureau’s implementation of the news neighborhooding condition is fully consistent with the First Amendment. Accordingly, we reject Comcast’s constitutional claims.

C. Bloomberg and Comcast’s Applications for Review of the *Clarification Order*

36. The *Clarification Order* established that the Bureau considered only the issue of whether Bloomberg SD is entitled to carriage in an SD news neighborhood on Comcast’s channel lineup.¹⁴⁵ The Bureau stated that “whether and how the news neighborhooding condition applies to HD news channels or neighborhoods was not raised in the Media Bureau proceeding, and the *News Neighborhooding Order* did not address the application of the condition with respect to HD news channels and neighborhoods.”¹⁴⁶ Thus, under the Bureau order, Comcast must place Bloomberg SD in a SD news neighborhood. Comcast seeks review of the Bureau’s conclusion that the instant proceeding applies only to the SD news neighborhood and requests that we instead allow it to satisfy the *News Neighborhooding Order* by placing Bloomberg HD in an HD neighborhood, while placing Bloomberg SD outside of a news neighborhood.¹⁴⁷

37. We affirm the Bureau’s decision that the *News Neighborhooding Order* considered only the issue of whether Bloomberg SD is entitled to carriage in an SD news neighborhood. As the Bureau stated, “the relief Bloomberg sought in its complaint was necessarily limited to SD carriage under the news neighborhooding condition, because Comcast did not carry Bloomberg HD before release of the

¹³⁹ See *supra* ¶¶ 13, 25; *News Neighborhooding Order*, 27 FCC Rcd at 4899-4902, ¶¶ 17-23.

¹⁴⁰ *Comcast-NBCU Order*, 26 FCC Rcd at 4287 (declining to require Comcast to affirmatively undertake neighborhooding and instead requiring channel placement for independent news only where Comcast itself has decided to use news neighborhoods in its lineups). See *MASN Case*, 23 FCC Rcd at 15811-12, ¶ 49. (citing *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996)).

¹⁴¹ *Comcast-NBCU Order*, 26 FCC Rcd at 4282, 4288.

¹⁴² Bloomberg’s June 18 Opposition at 23-24.

¹⁴³ See *supra* ¶¶ 17-18.

¹⁴⁴ *Id.*

¹⁴⁵ *Clarification Order*, 27 FCC Rcd at 9491, ¶ 9.

¹⁴⁶ *Clarification Order*, 27 FCC Rcd at 9491, ¶ 9.

¹⁴⁷ Comcast’s September 13 Application for Review at 7-14.

[*News Neighborhooding Order*].¹⁴⁸ The Bureau analyzed only data regarding headends with SD news neighborhoods in the *News Neighborhooding Order*,¹⁴⁹ and the parties focused on Bloomberg SD and SD neighborhoods in their pleadings before the Bureau.¹⁵⁰

38. Although the Bureau orders did not consider the issue of how the condition applies to independent news channels with both SD and HD feeds, we agree with Comcast that we should “take[] this opportunity to provide guidance on what the Condition requires in lineups that carry [Bloomberg HD] and/or contain HD neighborhoods,” because “there would be no public interest or administrative benefit from the Commission deferring resolution of this issue.”¹⁵¹ We conclude that SD and HD networks will be treated as separate channels and each entitled to carriage pursuant to the terms of the condition. The Commission has established that SD and HD versions of the same network are not adequate substitutes for one another.¹⁵² In the record before the Bureau, Comcast itself recognized that SD and HD networks are “distinct services,”¹⁵³ and it has made similar arguments before the Commission in other contexts.¹⁵⁴ Accordingly, we conclude that the SD and HD versions of independent news networks covered by the news neighborhooding condition, including Bloomberg SD and Bloomberg HD, are separate and distinct news networks, and both are entitled to carriage in SD or HD news neighborhoods, respectively, on the headends on which Comcast carries them.

39. In the *Clarification Order*, the Bureau acknowledged that the Commission had not “addressed the implementation of the news neighborhooding condition” with respect to headends with SD and HD neighborhoods.¹⁵⁵ The Bureau also recognized that a decision on how the condition applies on those headends would “affect how Comcast must handle similar requests from other independent news networks.”¹⁵⁶ To “provide the Commission an opportunity to resolve the issues on review,” the Bureau stayed Comcast’s obligation to comply with the *News Neighborhooding Order* on headends that (i) carry Bloomberg SD, (ii) do not carry Bloomberg SD in an SD news neighborhood, (iii) have multiple news neighborhoods, and (iv) have no vacant channel adjacent to any SD news neighborhood, as Comcast requested.¹⁵⁷ In its September 13 Application for Review, Bloomberg requested that we lift the stay with

¹⁴⁸ *Clarification Order*, 27 FCC Rcd 9488, 9491, ¶ 9.

¹⁴⁹ *News Neighborhooding Order*, 27 FCC Rcd at 4903, n.88.

¹⁵⁰ Complaint at 10, ¶ 23; Answer of Comcast, nn.32, 71 (filed July 27, 2011).

¹⁵¹ Comcast’s September 13 Application for Review at 14-15.

¹⁵² See *Review of the Commissions Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 784-5, ¶¶ 54-55, affirmed in part and vacated in part sub nom. *Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“MVPD subscribers do not consider SD programming to be an acceptable substitute for HD programming. The SD and HD versions of the same network have different technical characteristics and sometimes even different content.” (footnotes omitted)). See also *Verizon Telephone Companies v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, 26 FCC Rcd 13145, 13148, ¶ 4 (MB 2011) *aff’d Verizon Telephone Companies v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, 26 FCC Rcd 15849 (2011).

¹⁵³ Surreply of Comcast at 13, ¶ 24 (filed Sept. 27, 2011).

¹⁵⁴ See *Petition for Stay Pending Judicial Review of Comcast Cable Communications, LLC, The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, at 5 (filed July 30, 2012); Letter from Michael H. Hammer, counsel for Comcast, to Marlene H. Dortch, FCC MB Docket No. 10-56 at 17 (filed Oct. 18, 2010).

¹⁵⁵ *Clarification Order*, 27 FCC Rcd at 9491-2, ¶¶ 10-11.

¹⁵⁶ *Clarification Order*, 27 FCC Rcd at 9491-2, ¶¶ 10-11. The parties refer to this category as the “Bucket 2B” lineups. *Clarification Order*, 27 FCC Rcd at 9491-2, ¶¶ 10-11, n.28.

¹⁵⁷ *Clarification Order*, 27 FCC Rcd at 9491-2, ¶¶ 10-11.

respect to those lineups.¹⁵⁸ We have now addressed how the news neighborhooding condition applies on headends where Comcast has both SD and HD news neighborhoods. Accordingly, we lift the stay that the Bureau granted Comcast in the *Clarification Order*, and direct Comcast to place Bloomberg SD in an SD news neighborhood on all headends in the top-35 DMAs that have at least one SD news neighborhood.

IV. CONCLUSION

40. For the reasons explained above, we find that the Bureau made no material mistakes of fact or law. We also lift the stay that the Media Bureau imposed in the *Clarification Order*. Accordingly, we direct Comcast to carry, within 60 days of the release date of this Order, Bloomberg Television SD in an SD news neighborhood on each headend in a top-35 DMA that includes such a neighborhood.

V. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i) and (j), 5, 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155, 303(r), 309, 310(d), and Sections 1.3, 1.115, 76.7, and 76.1302 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.115, 76.7, 76.1302, that the Applications for Review filed by Comcast Cable Communications, LLC on June 1, 2012 and September 13, 2012 and filed by Bloomberg, L.P. on June 1, 2012 **ARE DENIED AND DISMISSED** as described above.

42. **IT IS FURTHER ORDERED** that the Application for Review filed by Bloomberg, L.P. on September 13, 2012 **IS GRANTED** to the extent set forth above. Comcast Cable Communications, LLC **IS ORDERED** to carry Bloomberg Television in standard definition within a standard definition news neighborhood on each headend in the top-35 most populous Nielsen Designated Market Areas that (i) carries Bloomberg Television in standard definition, and (ii) has a grouping of at least four standard definition news channels within a cluster of five adjacent channel positions within sixty days of the release of this Order, as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵⁸ Bloomberg's September 13 Application for Review at 7-19.

STATEMENT OF
ACTING CHAIRWOMAN MIGNON CLYBURN

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

Anyone around in early 2011 knows that I had many concerns about the Comcast-NBC Universal deal, which combined the nation's largest cable operator with the nation's fourth largest owner of national cable networks. Ultimately, I voted to approve the transaction because I believed that if the parties lived up to their voluntary commitments and the conditions we imposed on them, the deal would result in more benefits to consumers than harms. That's why I am pleased that we are taking this step today to hold Comcast to one of its commitments.

In the Order approving Comcast-NBCU, the Commission recognized that as a combined entity, they would have "increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."¹ The Commission expressed concern that Comcast-NBCU could "reduce the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits."² The Commission recognized that news programming is particularly important to the public interest. Therefore, the Commission adopted the news "neighborhooding" condition to guard independent news channels from anticompetitive behavior and to help ensure a vibrant marketplace of ideas.

In general terms, "neighborhooding" refers to the practice of grouping similarly themed TV channels together, such as sports, children's programming, or news. Today's decision interprets the news neighborhooding condition in the most reasonable way. It is an interpretation that is supported by the record. It is an interpretation that aligns with industry and consumer practices. And most importantly, it is an interpretation that protects independent news channels from anticompetitive harms, as the Commission intended.

When the Commission adopted this condition, my colleagues and I were concerned that Comcast-NBCU would include its affiliated programming in news neighborhoods and leave an independent news channel on an island to itself. The record in this proceeding corroborates our concern. Comcast overwhelmingly includes affiliated programming in neighborhoods of four news channels in five adjacent channel positions. CNBC is included in a news neighborhood in 99 percent of lineups that have news neighborhoods. For MSNBC, it's 98 percent.³ This is for good reason: the record also reflects that consumers tend to "flip" between channels, particularly during breaking news events.⁴ Consumers' tendency to "flip" also explains why a grouping of four news channels in five adjacent channel positions is so significant. Once a viewer finds a channel grouping like that, she is unlikely to hunt around the dial for other news channels. So, to sum up, if you are a news channel, you'd better be located in the "news neighborhood," or viewers are going to be significantly less likely to find you. And Comcast now has an

¹ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, 4284, ¶ 116 (2011).

² *Id.* at 4285, ¶ 116.

³ Letter from David H. Solomon and J. Wade Lindsay, Counsel for Comcast Cable Communications, LLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at Attachment A, page 2 (filed June 21, 2012).

⁴ Bloomberg's June 18 Opposition at 9-10 (citing Reply of Bloomberg at Exhibit B, ¶ 18; Exhibit C, ¶¶ 14, 15; Exhibit E, ¶ 19; Exhibit F, ¶¶ 13, 15, 17 (filed Aug. 30, 2011)).

incentive to keep its competitors, like Bloomberg Television, out of those news neighborhoods to deter viewers from flipping to them. With this Order, we ensure that Comcast treats Bloomberg Television comparably to its affiliated news channels. This will allow Bloomberg Television to compete on an equal footing with its Comcast-affiliated competitors.

As a final note, my colleagues and I frequently stress that it is always important for the Commission to act swiftly on complaints. It is particularly important for us to resolve news neighborhooding complaints in a timely manner because the condition will expire in less than four and a half years. This was a complex proceeding with an extensive record, and it is unusual to receive four applications for review in a proceeding with only two parties. But if the Commission receives additional complaints that allege violation of the news neighborhooding condition, the groundwork laid in resolving this complaint should allow us to act on those more swiftly. Moreover, I hope that my colleagues will act quickly on other matters involving conditions adopted in connection with this transaction. Doing so will help safeguard the public as the Commission intended when it adopted the conditions in 2011.

I wish to thank the Media Bureau staff for their work on this item.

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

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).

news channels in *that neighborhood*).⁷ The *Order* forthrightly acknowledges that “the condition does 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

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

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).

problem, and limited the condition's effect to those few systems where Comcast arranges its news or 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).