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WHAT THE INDUSTRY READS FIRST

Future Fate: USF Program Unsteady Amid Court Challenges

The future of the **FCC's** Universal Service Fund has been uncertain for some time, and a **Fifth Circuit** ruling last week has thrown another wrench into the mix.

The opinion was issued in response to **Community Financial Services Association of America vs. Consumer Financial Protection Bureau**, a case in which the petitioners challenged the bureau's funding structure as a violation of the Constitution's Appropriations Clause and the separation of powers between branches. The Fifth Circuit struck down much of the suit, but did agree that Congress ceded its power of the purse to the CFPB when it allowed the bureau to be funded by the Federal Reserve based on requests.

"Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it," the opinion stated. "The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau 'no longer dependent and, as a result, no longer accountable' to Congress and, ultimately, to the people."

So what does this have to do with the USF? The Fifth Circuit is set to issue an opinion on a petition in 2023 that similarly questions the FCC's use of the USF to fund agency activities. In January, **Consumers' Research, Cause Based Commerce, Inc.** and 11 individuals filed a petition for review with the Fifth Circuit challenging the Commission's approval of the

USF contribution factor for 1Q22.

The petitioners are seeking review of the approval and the proposed USF tax factor on the grounds that Congress's delegation to the FCC of legislative authority to raise and spend "nearly unlimited money" via the Universal Service Fund violates the Constitution. They also claim it is unconstitutional that Congress permitted the FCC to continue giving a private company—the **Universal Service Administrative Company**—the power to raise and spend uncontrolled USF funds.

The FCC filed its opening brief in June, arguing that the court lacks the jurisdiction to hear the claims put forth in the petition. "Petitioners are making a facial challenge to FCC rules that were adopted decades ago—rules on which countless parties have relied. The time period for seeking review of those rules has long expired," the agency said in the brief. The Commission also stood by its reliance on USAC for assistance in administering the universal service program, saying USAC is subordinate to the Commission and performs only ministerial tasks.

If the Fifth Circuit does rule against the legality of the USF program, Congress could act to appropriate funding to the FCC for the programs that most rely on the USF. Observers of Capitol Hill are split on whether or not that will happen, and much of that uncertainty is borne out of the impending midterm elections that seem poised to bring about change in both chambers of Congress. **New Street Research** is of the mind that should Republicans take control of the House, the

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priority will be on defunding various programs.

“Congress is unlikely to be ideologically and temperamentally capable of quickly and effectively responding to such a court decision,” New Street Research said in a note over the weekend. “This could mean a period of significant uncertainty as to the ability of beneficiaries to receive funds and the obligations of those paying into the system to pay.”

The impacts of a potential attack on USF vary based on each FCC program. The E-Rate program has emerged as one of the most at-risk programs as has the Affordable Connectivity Fund, which will likely see funding run out in 2024. The good news for the industry is that **NTIA**'s BEAD program and related initiatives will fill any potential holes left behind for the funding of broadband deployment in high-cost areas. We'll get a better idea of where the USF case is going before the end of the year. Oral arguments are scheduled to take place the week of December 5.

RETRANS BLACK FRIDAY

Nexstar and **Verizon**'s retransmission blackout heads into its second week, with Fios customers in 10 markets, including NYC and Philly, losing the broadcaster's stations on Friday, Oct. 14. This past Friday, 25 **Mission Broadcasting** stations in 21 markets went dark on **DirectTV**, **DirectTV Stream** and **U-verse** (Nexstar handles retrans negotiations for Mission). Oh, and on Friday, Oct. 7, DirecTV lost the **White Knight**-owned (also in a management arrangement with Nexstar) **NBC** station in Baton Rouge and **FOX** station in Tyler, Texas. Any bets on this Friday? Something to take note of is that DirecTV is getting very detailed with its messaging. For instance, its TVPromise.com site includes detailed viewing information for some of

the biggest upcoming sports events. The site is tailored by market, reminding impacted viewers in Scranton that the Penn State Nittany Lions-Minnesota Golden Gophers game remains available on **ABC** and that the Philadelphia Eagles are on a bye week. DirecTV is also letting customers know how various programs are available online and that services like **Tubi** may have many of the same shows or events and how there are often free trials for SVODs like **Paramount+**. DirecTV is offering customers a one-time credit of \$10.

NBCU CLAPS BACK AT WSJ

NBCUniversal is speaking out after a [WSJ article](#) from last week implied that all efforts to run ads on streaming services continue to be challenging. In a response posted Monday, NBCU President/Chief Business Officer, Advertising & Partnerships **Krishan Bhatia** said that it is true some streamers that are new to advertising are facing challenges around measurement and transparency, it is unfair to put all streamers into the same bucket. “Based on what we are seeing and the countless conversations our teams are having with marketers, the gloom and doom about AVOD is overhyped. Of course, that doesn't make for an eye-catching headline,” he said. Bhatia highlighted how the average 17 minutes per hour of ad time on linear has been cut down to figures as low as four or five minutes on streaming and digital tools like trading platforms and self-serve technologies are allowing direct-to-consumer brands and small businesses to actively participate in the marketplace. He also highlighted NBCU's efforts to diversify its measurement partners as a sign that progress is being made to more accurately measure campaign impact. “To realize the



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full potential of this transformation, we must recognize and adopt the innovation that already exists and seek out more partners building for the future,” Bhatia said. “When we do, we will accelerate the progress we’ve already made—but we must all see it, own it, and push it forward, together.”

‘HOUSE OF THE DRAGON’ RATINGS

HBO’s “House of the Dragon” posted the premium network’s biggest finale audience since the series finale of “Game of Thrones.” The GoT spinoff concluded its first season with 9.3 million viewers Sunday night across all platforms, according to a combination of **Nielsen** and first-party data. All episodes of the series are now averaging 29 million viewers in the U.S., more than tripling their average debut night audience with strong catch-up viewing. That’s not too far behind the average audience for Season 7 of GoT (32.8 million).

NEED FOR SPEED

Disney and **ESPN** signed a multi-year extension to keep **Formula 1** races on its networks through the 2025 season. In June, *Business Insider* reported **NBCUniversal**, **Amazon** and **Netflix** were [vying to acquire](#) F1’s rights starting in 2023, but the quickly growing sport is staying put. The renewed agreement with ESPN includes DTC rights, allowing the network to use **ESPN+** for additional content. At least 16 races will be broadcast on **ABC** and ESPN each season, and all race telecasts will remain commercial-free. Additionally, **ESPN Deportes** will be the Spanish-language home for F1 in the U.S. F1 is currently on pace to have a record-breaking season in viewership numbers, averaging 1.2 million viewers on ESPN networks through 18 races. That’s up from an average of 949,000 viewers over the 2021 campaign.

SHOW YOUR SKILLS

Two winners have been chosen in **Charter’s** World Cup soccer skills contest: 17-year-old *Jacynda Rueda* from West Covina, California, and 20-year-old *Ale Gómez* from New York City. The two submitted videos of them performing freestyle tricks, which will be used in a **Spectrum Mobile** commercial featuring Mexican soccer star Andrés Guardado. The ad will air during the upcoming FIFA World cup, which begins Nov. 20.

DIRECTV STREAM KICKS OFF NEW CAMPAIGN

DirectTV Stream is introducing a soccer-themed campaign for its Óptimo Más package today across digital and social media platforms. It’s headlined by a video spot titled “Fútbol and Action” featuring Colombian singer *Sebastián Yatra*, who highlights the package’s collection of 18 soccer leagues from 16 countries. Óptimo Más has over 55 channels in Spanish and more than 40 in English for a starting price of \$74.99/month.

FIBER FRENZY

WOW! is extending its fiber network to residents in Headland, Alabama. Customers can get symmetrical speeds up to 5 Gbps as well as WOW tv+ and mobile and landline phone services once the network construction is complete. – **Comcast** started construction in the public rights of way to bring the entire Xfinity and Comcast Business suite to Sumas, Washington. The \$4.2 million

project will add to the over 2.8 million homes and businesses that have access to Xfinity and Business products in the state.

FCC DENIES VERIZON COMPLAINT

When *Dr. Optatus N. Chailla* and his wife *Florence R. Parker Chailla* were unhappy with their **Verizon** service, they filed a formal complaint against **Verizon PA** with the Pennsylvania PUC, alleging the company provide faulty service and overcharged for service. The PUC granted the complaint in part, finding that the couple had experienced a series of service outages and delays, but denied the cramming, invasion of privacy and violations of consumer protection rights claims. The couple turned around and filed a complaint in Pennsylvania state court alleging that Verizon PA provided faulty internet service, but the court dismissed it on the ground that the parties’ agreement contained a mandatory arbitration clause. The Chaillas filed a complaint at the **FCC** in March 2022. On Monday, the Commission denied the claim, saying it lacks jurisdiction because Verizon PA did not provide interstate or foreign telecommunications service to the complainants and thus is not a common carrier. “While we dismiss the Complaint with prejudice because it does not comply with section 208, we also note that, as Verizon argues, the great majority, if not the entirety, of the Complaint would fail even if it named a common carrier,” said the order from the Acting Chief of the Enforcement Bureau.

‘TIS THE SEASON

Hallmark Media is deep in the holiday spirit, launching a custom gift guide “Hallmark Channel’s Gifts We Love to Give.” The 40-item guide features gifts inspired by this year’s Countdown to Christmas movies, ranging from a Swissmar cast iron fondue set to a personalized indoor snowball fight bucket.

PROGRAMMING

Xumo is rolling out two new seasonal channels: Halloween Horrors and Monsters & Nightmares. The former will be made up of mostly AVOD-exclusive movies such as “The Gravedigger,” “Hideout” and “While We Sleep” through the fall and beyond. Monsters & Nightmares will feature titles from **Magnolia Pictures’** SVOD service through October. Among those films are “All Good Things” with *Ryan Gosling* and “The Oxford Murders.” – **Fox News** is hosting a town hall on Nov. 1 featuring the Ohio U.S. Senate candidates Rep. *Tim Ryan* (D) and *J.D. Vance* (R). FNC chief political anchor *Bret Baier* and executive *Martha MacCallum* will serve as moderators in front of an audience of bipartisan voters, and MacCallum will host a preview of the town hall during “The Story” at 3pm on Tuesday. – **Fox Weather** will have a 10th-anniversary special looking back at Superstorm Sandy on Thursday. “Surviving a Superstorm: The Lessons of Sandy” will begin at 10pm and dissect the impact the storm had on New Jersey, New York and Connecticut.

PEOPLE

The **BBC** and **ITV** jv streamer **BritBox International** named former **Hulu** and **CBS Global Distribution Group** executive *Robert Schildhouse* as EVP, North America and GM, Group Marketing Services. He’ll lead the streaming service’s business growth in the U.S. and Canada as well as its global marketing services.