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WHAT THE INDUSTRY READS FIRST

Round and Round: Let the Title II Debate Begin (Again)

That collective groan you heard Tuesday came from lawyers, analysts, reporters, and telecom execs gearing up for the fight that never ends—net neutrality, or more specifically Title II regulation. Though there are signs this latest bout may not have the vitriol of the past.

Case in point, a **MoffettNathanson** research note begins: "Net neutrality is back in the news. We'd hoped we'd never have to write about it again, so yesterday we tried to convince ourselves that we could ignore it this time. Sigh. No such luck." Perhaps analysts will help tamper down some of the hysterics this go-round, with *Craig Moffett* and team declaring that Title II is not something investors should worry about. **New Street Research**'s Blair Levin declared, "Like Hollywood franchise films, we think it will have a boffo box office in terms of press and policy world attention, but is unlikely to break new ground in terms of plot twists or market impact."

"I think that what we're seeing in the last 36 hours is a little bit of net neutrality fatigue. I think a lot of telecom lawyers, a lot of digital services companies, certainly we know the telcos, are not pleased to return to a topic that has been so hotly debated and contested," *Stephanie Joyce*, SVP and Chief of Staff for the **Computer & Communications Industry Association** [CCIA], said during a *Broadband Breakfast* online panel Wednesday.

It's hard at this point to imagine this latest Title II push producing public rallies, a cable stock sell-off or online protests that turn sites such as Etsy, Tumblr and Postmates red (though we note the previous organizer of such events, BattleForTheNet.com, is still in the mix). But it would be foolish to think it will just go away, with most betting on a protracted court battle.

For those who somehow missed the crux of the more than two-decade debate, the legal question boils down to whether the **FCC** has the authority to reclassify broadband from an information service to a Title II common carrier service, which comes with more regulations (though the FCC has pledged to forbear numerous rules, including price regulation).

"Some people think that question has already been answered by the [Title II] FCC-issued rules in 2015. Those rules were upheld by the DC Circuit, but it's important to note that the case did not reach the Supreme Court," **TechFreedom** President *Berin Szoka* said at the Broadband Breakfast event. The high court declined to hear challenges to the 2015 net neutrality rules in 2018 with the rules moot as a then-Republican controlled FCC had repealed them.

A lot is being made about the Supreme Court's position, particularly in light of May's Sackett v EPA decision signaling a shift in the court's approach to the Chevron doctrine, which compels federal courts to defer to a federal agency's interpretation of a statute delegated to the agency's authority. In the Sackett case, the court curtailed EPA's authority and has begun leaning on the major questions doctrine, which essentially says that courts must not interpret statutes as delegating major questions to agencies unless Congress clearly said so. The emphasis on the major questions doctrine resulted in *Obama*

Administration Solicitors General writing an entire analysis that declares Title II net neutrality rules would breach the doctrine.

"It would be difficult to argue that Title II reclassification wouldn't be a 'major change' after nearly 30 years of deregulation (only temporarily interrupted by the brief period of Title II from 2015 to 2017). The odds are high that the inevitable legal challenge to Title II reclassification would win under the Sackett standard," MoffettNathanson told clients.

Still, there are plenty of Title II proponents who are hopeful and New Street's Levin believes there are too many variables to have conviction on what the court does this time and whether the case will finally go the Supreme Court. CCIA supports a return to 2015's Title II regulatory regime for broadband and believes the courts are ready for affirm any reasonable FCC verdict with the proper tailoring of the rules, CCIA's Joyce said. And of course, FCC Chairwoman *Jessica Rosenworcel* believes Title II is the right path forward.

"When the court last looked at this issue, it said, 'Alright, FCC. If you don't want to have net neutrality policies, you can't stop the states from going ahead and building their own. So when Washington withdrew, states stepped in," Rosenworcel said at an *Axios* conference Wednesday, citing nearly a dozen states that have net neutrality laws, executive orders or contracting policies. "The truth is across the country we are living in a world with open internet policies in place but they're coming from state capitals and I think in a modern digital economy we should have a uniform, national law."

The WHO and the WHY

CFX's spotlight on recent new hires & promotions

DAVID
Berson
PRESIDENT/CEO
CBS SPORTS

3 THINGS TO KNOW

- David is adding CEO to his job title after spending 10 years as CBS Sports' President. He'll succeed Chairman Sean McManus, who will retire in April after leading the division for 27 years. Berson will be the seventh person to head up CBS Sports.
- He originally joined CBS Sports in January 2011 as EVP, CBS Sports and President, CBS Sports Network. David assumed the role of President two years later and, at the time, he was the youngest person ever to hold the title. Prior to CBS Sports he was at ESPN for 16 years, starting as an intern in college while attending the University of Michigan.
- David has been influential while overseeing CBS Sports' broadcast, cable, digital and streaming properties. He's charged with maintaining the division's relationships with partners like the NFL, NCAA, PGA Tour and UEFA. David's also had his hand in various rights agreements, including with the NFL for the Sunday AFC package and Thursday Night Football. If you're a fan of the annual NFL Wild Card Game on Nickelodeon, you can thank David for devising that prior to its debut in 2021.

PREPARING FOR A GOVERNMENT SHUTDOWN

With the odds increasing of a government shutdown, **NTIA** administrator *Alan Davidson* said his agency is planning in case it's not funded next week. "It's a giant distraction for our teams," he said during an appearance at an *Axios* event Wednesday. "It takes a lot of our attention away from all this work—from the work on AI and from the work on broadband. And it delays our work. Every week we're delayed it's another week that people aren't going to get the connections they need to thrive online." **FCC** Chairwoman *Jessica Rosenworcel* said her agency is doing an assessment now. "It's not good when the government shuts down, essential services come to a halt," she said, adding that it also hurts the agency's efforts to make the U.S. a leader in the space economy. "We've done a lot of good stuff, but I also need to hire a lot more satellite engineers, space experts, lawyers and economists. It's challenging. All of those people are in demand—remember this is a part of the economy that's growing, and I have to convince them to come work for the government." For the record, she didn't mention that the FCC has been waiting two-and-a-half years for a five-member Commission and now that it has one, a shutdown could delay the proposed Oct. 19 vote on her Title II rulemaking.

COMCAST, COX MEDIA GROUP REACH RETRANSMISSION DEAL

No blackout is in the cards for **Comcast** customers in **Cox Media Group** markets, with the two reaching a retransmission consent renewal this week that includes continued carriage of broadcast stations in Atlanta, Seattle and Jacksonville, FL. The same can't be said for former CMG stations in Spokane and Memphis that **INSP** affiliate **Imagicomm** bought last year. The stations have been dark on Comcast since Sept. 8. CMG wasn't as successful in its renewal negotiations with **DISH**, which hasn't carried its ABC, FOX, CBS and NBC stations in nine markets since November.

BYRON ALLEN READY TO MAKE DISNEY BUY

Allen Media Group Chair/CEO *Byron Allen* believes that if anyone could succeed in a bid to purchase assets from **Disney**, his com-

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pany would be able to get it done. He's bidding $10 billion for assets that include **National Geographic**, **FX**, the **ABC** broadcast network and some local stations, and he told **CNBC**'s "Power Lunch" in an interview Wednesday that he has banks and private equity firms ready to support such an acquisition. But he doesn't expect any news to break on a deal in the near term. "[Disney CEO *Bob Iger*]'s brought in some excellent consultants, *Kevin Mayer* and *Tom Staggs*. And they just said look, we're not ready," Allen said. "Bob and I have been talking about it for some time now that I've had interest in buying these stations and these particular networks, and we said we're ready to go when you're ready to go." He acknowledged that there may never come a time where Disney is fully ready to offload those assets, but his goal right now is to put Allen Media Group in a position where it has every chance to acquire the linear assets should they be made available. The opportunity to buy these networks doesn't come along every day, and he doesn't expect to be the only interested party. "There are some folks who they have to sell so they can fund their streaming initiatives. And we believe in linear and streaming, and if you're willing to sell your linear assets, we're there," Allen said. "You know, these are 100-year-old legacy companies who are having to reinvent themselves."

S&P: CABLE AD REVENUE AT LOWEST SINCE 2010

Considering the rise of ad-supported streaming services combined with continued cord-cutting, it's no surprise an **S&P Global Market Intelligence** report found gross advertising revenue in cable fell to $23.6 billion in 2022. That's the lowest mark since 2010 and a 3.4% decrease YOY. Sports networks, however, saw their value increase as scripted dramas and comedy shows migrate to streaming services. Sports networks saw combined ad revenue improve by 2.8% to $4.3 billion, but whether that trend sticks is to be seen with companies like **Warner Bros. Discovery** putting live sports on digital platforms. Looking ahead, S&P predicts gross ad revenue will drop 4.9% to an estimated $22.4 billion in 2023. While events like the Olympics and political elections will give future even years a boost, it might not be enough to stop that number from going below $20 billion in 2027—something that hasn't happened since 2007.

RATINGS

Fox News reclaimed the weekly primetime and total-day ratings thrones after being usurped by **ESPN** the past two weeks. It was a tight battle in prime as Fox News led the way with 1.74 million viewers P2+. ESPN was close behind at 1.6 million while **MSNBC** remained in the hunt with 1.24 million. **HGTV** and **Hallmark Channel** took spots No. 4 and 5 with 864,000 and 734,000, respectively. Total day was a similar story with Fox News claiming the top spot with 1.09 million and MSNBC second with 801,000. ESPN (704,000), HGTV (442,000) and **CNN** (419,000) filled the rest of the total-day top five. – Monday was a ratings success for **MSNBC**. The news net had 2.4 million total viewers P2+ in prime, beating out **Fox News**' 1.92 million and **CNN**'s 430,000. "The Rachel Maddow Show" at 9pm was the highest-rated cable news program of the day with 3.3 million total viewers. Additionally, the premiere of "Inside with Jen Psaki" scored 1.7 million total viewers during the 8pm hour. – It was another week of two Monday Night Football games on **ESPN** platforms and **NFL+**. The pair of contests averaged 21.91 million viewers combined when the two broadcasts overlapped. The Eagles vs Buccaneers on **ABC**, **ESPN+** and **NFL+** accounted for 13.72 million total viewers while the Rams vs Bengals had 9.03 million across ESPN, **ESPN2** and **ESPN Deportes**.

OPEN BETA FOR CNN MAX

It's take two for **CNN**'s foray into streaming. **CNN Max** made its debut on **Max** today as an open beta, and it arrives with a sizeable presence from its linear programming. It has more than 900 episodes of current and legacy CNN original programming. CNN Max's initial schedule for the fall includes morning shows "Early Start with Kasie Hunt" and "CNN This Morning" with Poppy Harlow and Phil Mattingly, as well as primetime programs "Anderson Cooper 360" and "The Course with Kaitlan Collins." More shows are set to make their premiere in the fall. "CNN NewsNight with Abby Phillip" will take CNN Max's 10pm slot ahead of "Laura Coates Live" at 11pm. Then on its weekend schedule, "First of All with Victor Blackwell" will slide into the 8am frame. "The Chris Wallace Show" and "Christine Amanpour" will make their debuts in the 10am and 11am spots, respectively.

AT THE COMMISSION

The **FCC** updated its small cable operator subscriber threshold Wednesday, setting the definition as a provider that serves less than 498,000 subscribers either directly or through affiliates. To meet that definition, providers must also not be affiliated with any entity whose gross annual revenues in the aggregate exceeds $250 million.

PEOPLE

Mark Garner was tapped as EVP, Head of Global FAST Channels for **A+E Networks**. It's a newly created position that'll see the 23-year A+E veteran focus on growing the network's FAST business internationally while building on its presence in the U.S. as well. Garner was most recently EVP, Global Content Partnerships and Business Development, where he helped with the monetization of A+E's library via partnerships with content distribution platforms. – *Ed Zimmermann* has been promoted to President, **Comcast Business**. He'll succeed *Bill Stemper*, who has led the division since its inception in 2006 and will now serve as Chairman Emeritus. Zimmermann has been along for a portion of that ride, most recently as CFO/Chief of Strategy for Comcast Business. He's also had stints across Comcast's Northeast and Beltway divisions.

Think about that for a minute...

Again

Commentary by Steve Effros

Yup, here we go again. It certainly wasn't any surprise, but it definitely is disappointing. The FCC is starting a new rulemaking on that wonderful old chestnut, "net neutrality." Of course I've been predicting that this would happen for a long time. The delay was simply that the fight over confirming the third Democrat on the panel, intended to be Gigi Sohn, didn't go well. The administration failed to convince enough members of the Senate to vote for her. The effort dragged on for almost two years.

Thus there was a tie on the Commission; two Democrats (one the Chair) and two Republicans. Given that the original net neutrality rules were written and adopted during a Democratic administration, and they were rescinded during a Republican administration, they needed that "third vote" to get yet another change. Once Gigi's name was finally withdrawn, the administration went with a far less polarizing nomination. Anna Gomez was confirmed by the Senate and was sworn in a few days ago. No surprise, the Chair of the Commission, Jessica Rosenworcel, has announced that there will be a new "NPRM" (notice of proposed rulemaking) on the FCC agenda in October.

Seriously, folks, the real question here is why! The original net neutrality rules were adopted based on the premise that internet service providers like AT&T, Comcast, Charter and the like were "monopoly" broadband providers and needed to be controlled. The fear was that they would engage in monopoly pricing, they would discriminate against some "edge" providers over others, charge for special, faster delivery and the like. The only problem with all that is the Commission, even back then, virtually acknowledged there was little if any evidence showing the ISPs were actually massively engaged in doing any of that. Indeed, the evidence was the opposite. There was no rational business plan that contemplated discriminating against some users over others.

But the "net neutrality" rules were adopted anyway. Then administrations changed and the rules were eliminated. There was never subsequent evidence that any of those expressed "fears" actually happened even absent the rules. So now, with administrations having changed once again, what's the rationale for adopting complex federal regulations? Commissioner Rosenworcel has already said that the new NPRM does not contemplate "rate regulation" even under "common carrier" rules (the shorthand is "Title II" regulation). There's lots of evidence now that there's plenty of competition for the delivery of broadband in most areas of the country and billions are being spent to create even more.

The "logic" that you need the government to regulate a monopoly provider of a "utility" service falls apart when there are multiple providers; wireline providers like Comcast, wireless providers for both cell phones and "fixed wireless" and in most urban areas there are multiple "cable" providers as well, not to mention satellite. So rate regulation doesn't make sense.

A side note here, with both telephone, when it was regulated as a monopoly and there was rate regulation, and cable television, the government regulated rates often were higher than in areas that were not regulated! Beware of what you ask for, you may get it!

Anyway, here we are again. Remember that when you hear about issues such as "controlling what you see" or "political censorship," "AI bias" or the like, that does NOT relate to this NPRM on "net neutrality!" Those issues or concerns have moved on. They apply far more directly to Elon Musk and "X," or Facebook or other "edge" providers, not the infrastructures used by the "Internet Service Providers" which would be regulated by any FCC adopted "net neutrality" rule. The Commission doesn't have jurisdiction over those "edge" providers of content. The ISPs just deliver the content, they don't control it. Unfortunately, I'm sure politicians, regulators, reporters and lobbyists will try to forget that simple distinction, again.

Steve

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