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WHAT THE INDUSTRY READS FIRST

USF Upheaval: Fifth Circuit Finds FCC Program Unconstitutional

Wednesday's Fifth Circuit ruling that the FCC's Universal Service Fund is unconstitutional as it's currently administered sets up a fight at the U.S. Supreme Court. And it brings even more uncertainty to talks on the Hill around USF reform following the demise of the Affordable Connectivity Program's broadband subsidy.

"In the Telecommunications Act of 1996, Congress delegated its taxing power to the Federal Communications Commission. FCC then subdelegated the taxing power to a private corporation. That private corporation, in turn, relied on for-profit telecommunications companies to determine how much American citizens would be forced to pay for the 'universal service' tax that appears on cell phone bills across the nation. We hold this misbegotten tax violates Article I, § 1 of the Constitution," the en banc decision read.

USTelecom, the Competitive Carriers Association and the NTCA-The Rural Broadband Association said the decision "could put at risk the availability and affordability of essential communications services for millions of rural Americans, low-income consumers, and community anchor institutions." FCC Chairwoman Jessica Rosenworcel said it upends decades of bipartisan support for the FCC program to help the least connected in the country. "The opinion reflects a lack of understanding of the statutory scheme that helped create the world's best and most far-reaching communications network. We will pursue all available avenues for review," she said.

Public interest advocate and Affordable Broadband Campaign spokesperson Gigi Sohn fretted that the ruling could have "catastrophic" consequences on low-income Americans. "This, coupled with the lapse in funding for the Affordable Connectivity Program, is a slap in the face to low-income families, rural America, schools and libraries that rely on USF-funded programs to get online. The digital divide in this country will grow from a valley to a gorge, leaving untold Americans excluded from modern life—from telemedicine, work opportunities, homework, online learning and community," she said. "It is a disgrace that this country seems incapable of providing affordable broadband to all. We look forward to the U.S. Supreme Court overturning this decision and urge the Congressional USF Working Group to act quickly to solve this."

New Street Research's Blair Levin believes nothing will change right now since the Fifth Circuit did not vacate the FCC order. Instead, it remanded the proceeding to the FCC for further proceedings, which could mean the status quo remains until the Supreme Court weighs in.

"The Supreme Court has already overturned several other Fifth Circuit decisions that themselves disrupted existing precedent. We think the Supreme Court will do the same here," New Street said in a note that also referenced how the Sixth and Eleventh Circuits upheld the current USF funding mechanism, creating a split in the circuits. "If we are wrong about what the Supreme Court will do and the Fifth Circuit decision stands, it will severely complicate Congress' effort at reform,

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as the Court based its decision on Constitutional grounds. It narrows the options beyond what the current working groups are discussing and will make it difficult to create a system that could adjust to changes in the market.”

At an **INCOMPAS** webinar Thursday, **Morgan Lewis Partner Russell Blau** suggested that this decision could be the next legal upheaval following the Supreme Court’s overturning of the Chevron doctrine. “The next shoe [to drop] could be narrowing the nondelegation doctrine, which says that there are limits on what Congress can delegate to an agency and that it has to provide clear limits and boundaries on what the agency can do,” he said. Questions over the nondelegation doctrine were raised in the Fifth Circuit USF contribution challenge.

One bit of certainty is that the courts are going to be a lot busier. “There’s going to have to be a slew of cases that get to the Supreme Court to clarify the nuances here in any given area of law,” **Venable’s Craig Gilley** noted during the INCOMPAS event. “This change does give you more arrows in your quiver. There are options here that were not available a year ago. There are arguments that will be amplified in briefs that would have been given maybe a paragraph before, because this new landscape gives you more traction in fighting an agency in particular areas.”

Hogan Lovells Partner Michele Farquhar added that it also means the general counsel offices at the FCC and other agencies will be busier as well. “They’ll have to think harder about how to approach issues, and I think they’ll be getting more visitors,” she said. “I think in many cases where it matters to my clients, I’ve got to make sure that they visit the GC’s office too.”

NBA, WNBA INK MEDIA DEALS

At long last, the **NBA’s** media rights saga is over—at least for now. The league announced it has renewed its rights agreement with **Disney** and struck new deals with **NBCUniversal** and **Amazon**. The news comes after the league denied **TNT Sports’** attempt to match an agreed package, but TNT Sports has said it’s taking action. “We have matched the Amazon offer, as we have a contractual right to do, and do not believe the NBA can reject it,” TNT Sports said in a statement. “We think they have grossly misinterpreted our contractual rights with respect to the 2025-26 season and beyond, and we will take appropriate action.” The 11-year agreements will kick in beginning with the 2025-26 season. Disney will have 80 NBA regular-season games across **ABC** and **ESPN**, with 20 games going to ABC and up to 60 games on ESPN. ABC and ESPN will telecast 18 games in the first two rounds of the NBA Playoffs each year in addition to one of the two Conference Finals series in 10 of the 11 years under the agreement. ABC will remain the home of the NBA Finals. All NBA games on ABC/ESPN will also be

The **WHO** and the **WHY**

CFX’s spotlight on recent new hires & promotions



**LOUISE
Pentland**
SVP/GENERAL COUNSEL
ROKU

3 THINGS TO KNOW

- Louise is trading in her Mickey Mouse ears for an executive role with Roku. She began on Tuesday and will replace Stephen Kay, who’s set to retire in November after spending over a decade with Roku. The two will work together on a transition process. Louise will report to Founder/CEO Anthony Wood.
- She arrived from Disney where she was EVP/Chief Counsel for Disney Experiences and Products. That role tasked Louise with oversight of all legal and regulatory matters for the segment’s business, which includes global theme park destinations, cruise operations, global consumer products operations and e-commerce platforms. Additionally, she managed a global team of around 400 people, which included employees in Disney’s JV companies in China and Japan.
- Prior to Disney, Louise spent more than seven years with PayPal as EVP, Chief Business Affairs and Legal Officer and then EVP/Senior Advisor to the CEO. She also had a 16-year stay at Nokia that culminated with her serving as EVP/Chief Legal Officer for six years. Beyond the office, Louise is a non-executive director at Experian, Hitachi and Pacific Life.

available on the yet-to-be-released ESPN direct-to-consumer product. NBCU will have up to 100 regular-season games per season. Over half of the games will air on NBC on Sunday and Tuesday nights, and NBCU will have the league’s opening-night doubleheader each year and at least two games on MLK Day. **Peacock** will stream a doubleheader each Monday night of the season. A big change to come is the NBA All-Star Game, the Rising Stars Challenge and All-Star Saturday Night will go to NBC after spending the past 21 years at TNT. The NBA All-Star Celebrity Game, NBA Draft and Draft Lottery will remain with Disney. NBC’s playoff slate will include one of the two Conference Finals series in six of the 11 years on a rotating basis with Amazon starting next season. Amazon’s piece of the pie includes 66 regular-season games on Prime Video. That’ll entail Thursday night doubleheaders starting in January, Friday evening doubleheaders, select Saturday afternoon games, at least one Black Friday game and the quarterfinals and semifinals of the NBA Cup. Prime Video will also have all six NBA Play-In Tournament games, and it’ll stream approximately 1/3 of the first and second rounds each year. The agreement also means the WNBA

has its next group of media partners. Disney, Amazon and NBCU will start in the 2026 season, with the three distributing over 125 regular-season and playoff games each season. Disney platforms (ABC, ESPN or ESPN2) will have a minimum of 25 regular-season games, NBCU will have 50 and Prime Video will take 30. Disney will have two first-round series per year while NBCU and Prime Video will telecast one first-round series per year. Semifinals and finals will rotate among the three. The WNBA is expected to add more media partners.

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T-MOBILE PUTS A RING ON METRONET

T-Mobile and global investment firm **KKR** made it official following last week's rumblings, announcing an agreement to establish a JV to acquire fiber provider **Metronet**. The deal is expected to close in 2025, with T-Mobile expected to invest approximately \$4.9 billion at closing to acquire a 50% equity stake in the JV and 100% of Metronet's residential fiber retail operations and customers. As part of the transaction, the JV will also acquire **Oak Hill Capital's** existing stake, with Oak Hill to re-invest to retain a minority position. Metronet Co-Founder **John Cinelli** will also retain a minority position once the deal closes. Following the transaction's close, Metronet will become a wholesale services provider for its retail customers and 100% of its residential fiber retail operations and customers will transition to T-Mobile. It has a footprint that passes 2 million homes and businesses across 17 states, with a target of 6.5 million homes passed by the end of 2030 under the new ownership structure. "This is a unique opportunity and a smart, capital-efficient deal that enables T-Mobile to profitably build on our success in broadband and provide fast, affordable and reliable connectivity options to millions more customers nationwide as a complement to our wireless growth strategy," **Mike Sievert**, CEO of T-Mobile, said on a statement. It comes on the heels of a similar JV arrangement with **EQT** to acquire FTTH provider **Lumos**, with T-Mobile viewing both deals as complementary to its fixed wireless internet solution. **New Street** pegs Metronet's value at \$4.6 billion based on applying its calculation of \$2,167 per location for Frontier.

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DOJ WEIGHS IN ON DIRECTV'S NEXSTAR ANTITRUST SUIT

The **Department of Justice** has filed an amicus brief in **DirectTV's** Second Circuit appeal of a lower court decision granting **Nexstar's** motion to dismiss the provider's antitrust lawsuit. It's calling on the appeals court to right a wrong. "The district court's unduly narrow understanding of the injuries that can result from price-fixing agreements led its antitrust-standing analysis astray," the DOJ wrote this week. "This Court should correct that legal error not only to apply the law properly in this case, but also to ensure that the universe of private plaintiffs that may seek redress for their injuries from pricefixing conspira-

cies is not unduly limited." DOJ is not taking a position on the ultimate merits of the claim, but it's urging the appeals court to correct the district court's holding in its antitrust-standing analysis that the sole type of injury for which a private consumer plaintiff can recover in a pricefixing case is the payment of supracompetitive prices. In March, the U.S. District Court for the Southern District of New York dismissed **DirectTV's** antitrust claims for lack of antitrust standing. **DirectTV's** lawsuit claimed that **Nexstar** is violating federal antitrust law by engaging in an illegal conspiracy with **Mission** and **White Knight** to manipulate, raise and fix prices of retransmission consent fees for broadcast TV stations. The opinion by judge **Kevin Castel** said that since **DirectTV** did not enter into deals with **Mission** or **White Knight**, it lacked standing since it did have to pay what it alleges to be "supracompetitive" fees. Instead, its losses came from customers who may have left the service because it was no longer carrying those broadcast stations.

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NTIA OPENS DIGITAL EQUITY ACT COMPETITIVE GRANT PROGRAM

NTIA has kicked off the next step in the Internet for All initiative, releasing a Notice of Funding Opportunity from the Digital Equity Act Competitive Grant Program and making an initial \$910 million available to support community projects and initiatives geared toward closing the digital divide. It's the first funding opportunity for the \$1.25 billion grant program. Eligible applicants include political subdivisions of states, native entities, certain nonprofits, community anchor institutions, local educational agencies and workforce development organizations. Additionally, U.S. territories are eligible to apply for funding in a separate set-aside, and partnerships are among the entities allowed to apply. "This program is the beating heart of what we are trying to achieve in our Internet for All efforts," **NTIA Administrator Alan Davidson** said during a press conference held in Pittsburgh on Wednesday. "Each state and territory has, for the first time in our history, a digital equity plan. We didn't have that before. That's a new one because of this program." Applications are due by Sept. 23, while U.S. territory applications are due by Oct. 22. **NTIA** anticipates beginning awarding grants under this NOFO by the winter, and the association expects to issue awards made under the Competitive Grant Program on a rolling basis.

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STANKEY TALKS TOUGH THREAT ENVIRONMENT, CONVERGENCE

AT&T CEO **John Stankey** told investors on the company's Q2 2024 earnings call Wednesday that no one is more disappointed in the data breaches and outages that plagued the company during the period. While he knows the provider has disappointed its customers, he believes **AT&T** has done the right things in responding to each challenge. He said teams have been responsive and transparent with customers around each circumstance and learnings are being taken away internally

from each instance. “We are operating in an incredibly dynamic environment on two fronts. One, we’re changing a lot in our business, which is necessary, and I’m proud of the progress we’re making. But it comes with a lot of moving parts and the threat environment we’re in is a really, really difficult environment,” Stankey said. “Good companies just like ours are all having to learn some new things and are seeing new threats and new environments that they have to adjust to.” The majority of the call wasn’t about what went wrong, instead focusing on AT&T’s dedication to converged offerings across its footprint. AT&T now passes 27.8 consumer and business locations with fiber, and it recorded 239,000 AT&T Fiber net adds in the quarter. It also reported 419,000 postpaid phone net adds, and the data shows that customers within AT&T Fiber footprints are more likely to subscribe to both mobile and broadband service. Stankey said nearly four out of every 10 AT&T Fiber households also choose AT&T as their wireless provider, and as a result, its share of postpaid phone subscribers within its AT&T Fiber footprint is approximately 500 basis points higher than the company’s national average. “Our combined customers are happier customers. They have lower churn and they have longer lifetime values,” Stankey said. “Why race to convergence? Because that’s a good way to make money and it’s a good way to keep customers in the fold.”

GROUPS PLEAD WITH RAIMONDO ON BEAD LOW-COST PLAN

ACA Connects, the **Fiber Broadband Association** and 30 other broadband associations and industry groups sent a letter to Commerce Secretary *Gina Raimondo* with ongoing concerns over the aspects of the BEAD program tied to affordability. Of particular concern is **NTIA**’s program guidance strongly encouraging states to set a fixed price of \$30/month for the low-cost service options sub-grantees must offer to potential subscribers. “For a broad cross-section of America’s rural broadband providers, the \$40 rate is completely unmoored from the economic realities of deploying and operating networks in the highest cost, hardest-to-reach areas that BEAD funding is precisely designed to reach,” the letter read. “To make matters worse, our understanding is that those State broadband offices that have taken a measured approach and sought to base their proposed rate for the low-cost broadband service option in economic reality have been subsequently advised by NTIA to lower the proposed rate.” The organizations asked her to take several remedial steps to ensure the success of the BEAD program, including requiring each state to revise the low-cost service option rate proposed or approved in initial proposals so the rate is more reasonably tied to providers’ realistic costs. They also requested that NTIA issue a blanket waiver of the low-cost service option rate approved in initial proposals and a clarification that the rate approved in each state’s initial proposal lasts for two years.

FOX NEWS WANTS IN ON HARRIS-TRUMP DEBATE

With how much has happened since the last presidential debate, it’s hard to think about the next one, but **Fox News** is planning ahead. Fox News President/Executive Editor *Jay Wallace* and VP, Politics *Jessica Loker* sent a letter to the campaigns of Vice President *Kamala Harris* and former president *Donald Trump* proposing a presidential debate on Sept. 17. “We are open to discussion on the exact date, format and location—with or without an audience,” the letter read, adding that *Bret Baier* and *Martha MacCallum* would be the network’s choice of moderators. President Biden and Trump had agreed to a Sept. 10 debate on **ABC**, but after Biden dropped out, Trump has been pushing for Fox News to host and calling ABC biased.

MLB NETWORK LATEST TO LAUNCH DTC PRODUCT

MLB Network is the latest entrant into the direct-to-consumer space, launching its own offering that’ll come with live games, studio shows, player access and special features. It’s initially priced at \$5.99/month, but fans can choose an “MLB Network + At Bat” option for \$6.99/month. That option includes all MLB Network content and all features of an MLB At Bat subscription such as live game audio for all MLB teams, live Minor League Baseball Games and access to “MLB Big Inning.” Current and future paid subscribers of **MLB.TV**’s all-teams package and single-team package in the U.S. will be able to stream MLB network for the remainder of the 2024 season.

VERIZON SUNDAY TICKET

Verizon is feeling the football fever already, announcing that starting today, select customers are able to get **NFL Sunday Ticket** for free this 2024-25 season in addition to a discount on **YouTube TV**’s Base Plan and access to weekly ticket opportunities for every NFL game. Folks eligible include new mobile customers who purchase a select phone on the Unlimited Plus and Unlimited Ultimate plans, or existing customers of those plans who purchase a select phone and add a line. New Home Internet customers who sign up for the Fios 1 Gig or 2 Gig, 5G Home Plus or LTE Home Plus plans can get the deal. Sunday Ticket is priced at \$449/year.

FIBER FRENZY

Twin Valley is building its fiber network in Solomon, Kansas, as part of a multi-million-dollar project. Residential and business customers will get 8 Gbit symmetrical speeds with no data caps or residential contracts. – **Lumos** unveiled plans to expand into Ohio through a \$230 million investment to build nearly 2,000 miles of its fiber optic network. It’ll start with the areas of Mahoning and Trumbull Counties. Engineering work for the project will begin in late 2024.

Think about that for a minute...

Things Happen

Commentary by Steve Effros

OK, I saved the editors from trying to decide whether they could leave the original title of this column. It started with an “S.” You get the idea. We’ve witnessed a couple of weeks that necessitate shaking your head and recognizing that things don’t always go according to plan, that folks make mistakes, that situations can drastically change and there’s no such thing as perfection.

Focusing on technology, I have to say that I simply don’t understand why it is that we can accept the notion that “things happen” when it comes to politics or the weather or crazy folks, but when it comes to something like telecommunications or computers or our interconnectedness it always seems to come as a major shock when dislocations happen because something went wrong. I have bad news; it always will.

Last week a minor error in the coding of an “update” for a lot of computers around the world wound up creating a major problem for some folks. CrowdStrike’s usually successful efforts to monitor and secure computers using Microsoft’s programming, ummm, went awry. That, in turn, resulted in an estimated 8.5 million computers worldwide being affected. That’s quite an error!

Yes, airline schedules were seriously compromised. The television pictures of folks stuck at airports said it all. And of course there were a whole lot of businesses that got the famous “blue screen of death” when the routine update didn’t do what it was supposed to do. And, yes, while the “fix” was identified very quickly, since it has to be manually effectuated on each individual computer it’s going to take some time before the mess gets cleaned up. No question, those big companies are liable for the damage caused. Those mistakes define their cost of doing business.

What I don’t understand is both why folks are surprised by this and the seeming assumption that it can be avoided. How, exactly, can “human error” be avoided in all cases? It can’t. There will always be situations where someone simply makes a mistake. It’s not terrorism, it’s not intentional, it’s not malicious, they’re not evil. There’s no conspiracy. It’s just a mistake. So hearings and regula-

tions and hand wringing are simply not going to change a truism of humans; mistakes happen. In this case it was a bad piece of code, however it happened to impact a critical place; the core of a whole lot of computers. Most of the time that core program is successfully protecting the computer from malicious actors. In this case it screwed things up unintentionally. S... happens!

Could it have been avoided? Well, yes, there could have been more thorough testing of the update before its full-blown release. In this case there is a reasonable “fix” to avoid the issue happening again. But in many cases it’s unlikely there will be “fixes” that make any economic sense. I listened to one Harvard expert suggesting that the “problem” was that “big” companies have become too dominant, like CrowdStrike, which services a substantial part of the business world with computer security. When something bad is caused by them, it happens on a very large scale. His solution: require that multiple companies provide those services, don’t allow one to get big. But doesn’t that just open us up to having multiple interconnected mistakes? Would smaller companies be able to pay the liability repair bill, or just go out of business? Then everyone loses. Does that help?

Telecommunications is not unique. Think of the power company that has to replace hundreds of poles after a hurricane. What would the “solution” look like? Redundant companies and poles which could all be blown down? Nope, “things” are always going to happen. The response has got to include that we, the users, accept that, and be prepared when they do.



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