

CableFAX Daily™

Thursday — September 5, 2013

What the Industry Reads First

Volume 24 / No. 172

Not Standing: Court Vacates Part of FCC Program Carriage Order

The standstill victory in **Time Warner Cable** and **NCTA's** challenge of **FCC** program carriage rules may not be the biggest news. That provision was vacated to the FCC, with the agency able to try to re-establish it if it so chooses. Perhaps more interesting in Wed's long-awaited opinion from the 2nd Circuit might be this statement: "There is no denying that the video programming industry is dynamic and that the level of competition has rapidly increased in the last two decades. In light of these changes, some of the Cable Act's broad prophylactic rules may no longer be justified." Retrans consent reform pushers could be heard shouting, "Amen!" The opinion went on to note that while the court is upholding the program carriage rules, it also "encourage[s]" the FCC to reevaluate program carriage as warranted by increased competition in video programming. Look for cable to reference those sentences repeatedly in future proceedings. TWC and NCTA both jumped on the idea Wed, with the MSO saying it is "gratified that the Court has called into question the future viability of the entire program carriage regime" and that it recognized that "the FCC should consider whether MVPDs possess market power before imposing program carriage obligations in response to individual complaints." All of this stems from an Aug '11 FCC program carriage order that revised the regime for complaints, creating among other things a standstill provision. It was the most controversial rule change. Under it, a programmer filing a carriage complaint against an operator may also file a petition requesting a temporary standstill of price, terms and other conditions of the existing contract. Cable argued that the order was based on a '07 NPRM that made no mention that a standstill provision was under consideration. Then-FCC commish *Robert McDowell* dissented to the standstill, saying that the agency didn't provide adequate notice for comment under the Administrative Procedure Act. The court agreed, sending the provision back to the Commission, which could try to re-craft the standstill to meet the APA requirements. Wed's opinion didn't weigh in on whether the FCC had the power to implement a standstill provision, though it did say that even if the agency has issued standstill in other contexts, "it is not clear that it has the authority to issue such an order under the program carriage regime." The 2nd Circuit, which heard oral arguments last Oct, rejected cable's argument that the rules violate operators' First Amendment rights. The court said the FCC's rules were OK for intermediate scrutiny vs strict scrutiny because the agency's regime for identifying discrimination serves important govt interests in promoting competition, and the rules are narrowly tailored not



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THE MAGAZINE

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CABLEFAX DAILY (ISSN 1069-6644) is published daily by Access Intelligence, LLC ● www.cablefax.com ● 301.354.2101 ● Editor-in-Chief: Amy Maclean, 301.354.1760, amaclean@accessintel.com ● Exec Editor: Michael Grebb, 323.380.6263, mgrebb@accessintel.com ● Editor: Joyce Wang, 301.354.1828, jwang@accessintel.com ● Community Editor: Kaylee Hultgren, 212.621.4200, khultgren@accessintel.com ● Advisor: Seth Arenstein ● Assoc Publisher: Amy Abbey, 301.354.1629, aabbey@accessintel.com ● Sales Mgr: Susan Kim, 301.354.2010, skim@accessintel.com ● Dir of Market Dev: Laurie Hofmann, 301.354.1796, lhofmann@accessintel.com ● Prod: Jo Fato, jfato@accessintel.com ● Diane Schwartz, SVP Media Comms Group ● Scott Gentry, Dir of Bus Dev, sgentry@accessintel.com ● Group Subs: Amy Russell, 301.354.1599, arussell@accessintel.com ● Sub Questions, Client Services: 301.354.2101, clientservices@accessintel.com
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to burden more speech than is necessary. FCC acting chairwoman *Mignon Clyburn* said she was pleased the court upheld the rules against the constitutional challenge, adding that the Commission is free to adopt a standstill in accordance with APA. "As the Commission pointed out—and the court agreed in rejecting the cable industry's arguments—these rules remain necessary to prevent anticompetitive conduct by video programming distributors, and they empower consumers to access a rich and diverse mix of programming," she said. A win on First Amendment grounds would have far-reaching implications. "While must-carry is still potentially vulnerable in court, we believe it would have been even more so if TWC/cable had succeeded in their program-carriage First Amendment arguments," **Stifel Nicolaus** analysts said. "Today's ruling should thus be a relief for small broadcasters dependent on must-carry, and we don't see any change to broadcaster incentives to participate in the two-sided broadcast/wireless 'incentive' auction the FCC is developing." It doesn't appear any programmer has actually sought to use the standstill provision since it was enacted in Feb '12. **GSN** filed a carriage complaint against **Cablevision** in Oct '11, before it went into effect. An FCC ALJ hearing on GSN's complaint is on hold as the 2 sides follow this case as well as **Tennis Channel's** petition for a rehearing of a DC Circuit decision rejecting the FCC's order in the net's **Comcast** carriage complaint (See below).

In the Courts: The US Court of Appeals for the DC Circuit on Wed denied **Tennis Channel's** petition for a rehearing in the case involving its carriage complaint against **Comcast**. In May, a 3-judge panel found the MSO didn't discriminate against Tennis on the basis of affiliation, throwing out the **FCC's** decision that the operator had violated program carriage rules. Tennis petitioned for a rehearing en banc in July. "The DC Circuit Court of Appeals found 3-0 that Comcast did not discriminate against the Tennis Channel. We are gratified the full court agreed with the panel's decision," a Comcast spokesperson said. Tennis could not be reached immediately for comment.

Deals: **Cox Comm** is purchasing **EasyTEL Comm**, a provider of voice, data and video services to commercial customers in Tulsa. After the deal closes, Cox Business will have a network in the Tulsa market that covers some 95K fiber route miles and connects more than 21K on-net buildings. **Waller Capital** served as exclusive financial adviser to Cox.

Googlism: Two years after announcing its fiber plan, **Google** said in a blog post it will light up 44 more fiberhoods across both KS and MO this fall. It will compete with operators like **Time Warner Cable** and **AT&T U-Verse**. The latest fiberhood in the Kansas City area is Roeland Park. The city council OKed Google's plan to bring fiber to its citizens this week, although like other previously announced fiber communities, it set no timeline for when the services would be available.

Carriage: It's been a busy couple months for **INSP**. The latest carriage deal with **Comcast** added more than 750K HHs in the MSO's Keystone region, including PA, MD, WV and OH. It follows earlier carriage agreements with **Bright House** and **NCTC**. The net is now available to more than 75mln HHs across the country.

Online: After a year of redesigning and testing, **Charter** completed a Website makeover. The new Charter.com features streamlined displays expected to make it easy for users to find, compare and complete orders online or learn more about the company's offerings. -- **AMC Networks'** "Walking Dead" is headed to college. The net, education tech firm **Instructure** and the **University of California, Irvine** will jointly produce a massive open online course (MOOC) examining topics like public health, social sciences and physics through the lens of a hypothetical zombie apocalypse. The free, 8-week online course, titled "Society, Science, Survival: Lessons from AMC's 'The Walking Dead,'" will be offered on Instructure's MOOC platform, Canvas Network, and will be taught by UC Irvine faculty.

Research: While telco and satellite TV providers worldwide saw "robust" sub growth in the 1st half of '13, cable's growth was nearly flat, according to **ABI Research**. In total, 23mln new subs were added during the period, a 3% YOY increase. Meanwhile, while Asia-Pacific is expected to continue to be the main contributor of sub net additions, the North America pay-TV market is growing at its slowest rate, with any growth mainly driven by telco providers. ABI expects global pay-TV subs to reach 895mln by the end of the year, generating service revenue of \$245bln. By the end of the year, telco TV service revenue market share is expected to reach 14% while cable TV providers service revenue market share could potentially decrease to 46%. -- **Time Warner Cable's** latest stipend, as part of its Research Program on Digital Communications, will support a research initiative titled "National Broadband Plan—An LGBT Perspective." The project, a collaboration between the LGBT Technology Partnership and **Jessie Daniels of Hunter College**, seeks to increase understanding of the broadband and digital communications needs of LGBT communities and offer recommendations on how regulators can

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address those needs and ensure inclusion. TWC's research program has made 21 awards to 29 researchers to date. The next deadline for stipend applications is Nov 1.

Ratings: The summer finale of "Pretty Little Liars" (Aug 27) goes down as the net's #1 telecast in **ABC**

Family history for 18-34s (2.1mln), 12-34s (3.3mln) and women 18-49 (2.3mln), based on Live+3 ratings. It was the most-tweeted series in Aug (3mln tweets by more than 800K uniques), with the finale the most tweeted ep in TV history (1.9mln).

-- With more than 2.9mln viewers in Live+SD, **TNT's** real-life crime series "Cold Justice" made the list of basic cable's top 10 unscripted series launches for the year-to-date. The docu-drama bagged 942K 25-54s for its premiere ep.

On the Circuit: **Time Warner Cable's David Rone**, pres of sports, news and local programming, will serve as co-chair of **NAMIC's** annual conference, joining **A+E Networks Nancy Dubuc**. TWC chmn/CEO **Glenn Britt** will be featured in a "Master Class" session leadership during the conference (Oct 8-9, NYC). In addition, **Craig Collins**, TWC svp of small and medium business sales, was appointed to NAMIC's board of advisers. -- **Time Warner Cable's** security chief **Brian Allen** will discuss lessons learned from Super Storm Sandy during **SCTE's** annual luncheon on Oct at the SCTE **Cable-Tec Expo**.

CableFAX Daily Stockwatch

Company	09/04 Close	1-Day Ch	Company	09/04 Close	1-Day Ch			
BROADCASTERS/DBS/MMDS								
21ST CENTURY FOX:	31.95	0.24	GOOGLE:	871.63	11.25			
DIRECTV:	58.38	(0.19)	HARMONIC:	7.38	0.18			
DISH:	45.86	0.06	INTEL:	22.64	0.57			
DISNEY:	61.11	0.18	JDSU:	13.70	0.77			
GE:	23.17	0.11	LEVEL 3:	22.92	0.22			
MSOS								
CABLEVISION:	17.93	0.17	MICROSOFT:	31.20	(0.69)			
CHARTER:	124.56	1.51	RENTRAK:	24.01	(0.72)			
COMCAST:	43.06	0.32	SEACHANGE:	10.56	0.42			
COMCAST SPCL:	41.53	0.21	SONY:	20.81	0.40			
GCI:	9.14	0.07	SPRINT NEXTEL:	6.65	(0.03)			
LIBERTY GLOBAL:	79.11	0.17	TIVO:	11.94	0.09			
LIBERTY INT:	23.17	0.38	UNIVERSAL ELEC:	31.07	0.57			
SHAW COMM:	23.18	0.44	VONAGE:	3.13	(0.01)			
TIME WARNER CABLE:	109.91	0.66	YAHOO:	28.07	0.29			
WASH POST:	573.35	(0.52)	TELCOS					
PROGRAMMING								
AMC NETWORKS:	62.40	0.67	AT&T:	33.74	0.42			
CBS:	54.60	1.10	VERIZON:	46.78	0.77			
CROWN:	3.13	0.01	MARKET INDICES					
DISCOVERY:	76.92	(0.42)	DOW:	14930.87	96.91			
GRUPO TELEVISIA:	25.55	0.14	NASDAQ:	3649.04	36.43			
HSN:	53.57	(0.47)	S&P 500:	1653.08	13.31			
INTERACTIVE CORP:	50.77	1.06	TECHNOLOGY					
LIONSGATE:	36.20	0.57	ADDVANTAGE:	2.46	0.01			
SCRIPPS INT:	74.50	0.13	ALCATEL LUCENT:	3.04	0.18			
STARZ:	25.34	0.10	AMDOCS:	37.08	0.20			
TIME WARNER:	61.99	0.63	AMPHENOL:	76.36	1.01			
VALUEVISION:	5.05	0.08	AOL:	33.11	0.26			
VIACOM:	80.33	0.30	APPLE:	498.69	10.11			
WWE:	10.20	0.30	ARRIS GROUP:	15.86	0.25			
TECHNOLOGY								
ADDVANTAGE:	2.46	0.01	AVID TECH:	5.54	0.13			
ALCATEL LUCENT:	3.04	0.18	BLNDER TONGUE:	0.85	(0.05)			
AMDOCS:	37.08	0.20	BROADCOM:	25.92	0.74			
AMPHENOL:	76.36	1.01	CISCO:	23.77	0.29			
AOL:	33.11	0.26	CONCURRENT:	7.86	0.12			
APPLE:	498.69	10.11	CONVERGYS:	17.71	0.28			
ARRIS GROUP:	15.86	0.25	CSG SYSTEMS:	23.92	0.27			
AVID TECH:	5.54	0.13	ECHOSTAR:	42.20	1.02			
BLNDER TONGUE:	0.85	(0.05)						
BROADCOM:	25.92	0.74						
CISCO:	23.77	0.29						
CONCURRENT:	7.86	0.12						
CONVERGYS:	17.71	0.28						
CSG SYSTEMS:	23.92	0.27						
ECHOSTAR:	42.20	1.02						

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WEDNESDAY, OCTOBER 9, 2013 ~ NEW YORK MARRIOTT MARQUIS

Think about that for a minute...

Now Is the Time

Commentary by Steve Effros

Seeking action from the federal government, especially these days, is often a thankless task. Getting all the gears in the right positions, making sure everything is set up and lubricated just right, and taking into account all the other things that are going on at the same time often makes it an exercise in futility.

Nevertheless, I think now is the time for the cable industry to make a concerted effort to get some significant changes made in the way the FCC regulates us. For a variety of reasons, including recent events and the increasingly obvious fact that the current rules and regulations simply don't comport with current reality, we may be in that "sweet spot" where some things could actually get done.



I am thinking of two things in particular; first, modest changes to the interpretation of the FCC's rules that will allow cable companies to offer delivery of broadcast signals to customers who want them, but allow those who don't to "opt out." Second, elimination of the "integrated security" and CableCARD mandates that the Commission can do at any time by simply determining, as I think is obvious, that they didn't achieve their objective and the private marketplace has, in a different way.

Notice that in both cases I am not recommending that we seek Congressional changes. That's just not in the cards. Groups like the ACA are doing yeoman service keeping issues like retransmission consent in front of Congress, but there's no real expectation that Congress—especially this Congress—will actually do anything about it. However individual Members can certainly help by asking the FCC to act where it can, and that's what I think we should be doing right now.

On the retrans/broadcast signal issue, there's a simple

problem and a simple solution. With the advent of digital broadcast transmission, and as Time Warner just proved with its recommendation to customers that they get antennas for broadcast reception during the recently resolved blackout by CBS, antennas in a lot of places work. This is my old recommendation of "retranstennas." But there's one hitch; the FCC interprets its rules to say that if a cable operator delivers a "basic" broadcast signal to one customer, that broadcast signal must be delivered to all customers. Hence if a subset of your customers want to simply switch to antennas to get most of their local broadcast signals, they can't do it if some others want you to continue delivering those signals. They would wind up paying for them anyway, because of the legal interpretation. The FCC could change that. They should.

Now before you overload my email, I know that the broadcaster response is to insist on a retrans contract that says the operator has to pay for all subscribers even if some don't receive the channel. But that gets us to some very interesting antitrust issues that the broadcasters would then have to explain. Not a perfect solution, but certainly the start of one. The time is right because of the well-publicized efforts of Time Warner Cable. Let's take advantage of them.

I don't have to take too much time on the CableCARD issue. It was a bad idea in the first place, never really vetted in Congress, and given the high level of competition for MVPD delivery today by entities that don't have to comply, the underlying intention of creating a single CE marketplace is no longer even applicable. Get rid of it. The Commission could do that. It should. Now's the time.

Steve

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(Steve Effros was President of CATA for 23 years and is now an advisor and consultant to the cable industry)

Celebrate and Reach the Most Influential Minorities in Cable

Publication Date: October 7, 2013

Advertising Contact: Amy Abbey, Associate Publisher
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Ad Space deadline: September 12

Artwork due: September 20

www.CableFAX.com

