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What the Industry Reads First

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Title II: Will it Stay or No—and Then What?

The high-powered lawyers making cable's case against the FCC's Title II order sound pretty confident the decision will be overturned (even if it goes all the way to the Supreme Court), but they seem less certain when it comes to a stay that would prevent the rules from taking effect June 12. That's partly because it's hard to read the DC Circuit's feelings on granting stays, NCTA outside counsel and former assistant US Solicitor General *Miguel Estrada* said during a briefing with reporters Tues. The key will be to show irreparable harm. "We have a boatload of affidavits from providers outlining the burdens Title II is going to impose on them," Estrada said, adding it could be especially devastating to small operators who will need to hire counsel just to begin thinking about how to comply. Former US Solicitor Gen *Ted Olson*, who also is representing NCTA, cautioned that even if the industry shows harm the court may believe that an expedited court schedule could be the best path forward. What happens if the court doesn't grant the stay? Don't look for NCTA to appeal if it's not granted, as it will more likely focus on the overall challenge ahead. If the rules are allowed to go into effect, it opens up the FCC's adjudicatory complaint process, and NCTA chief *Michael Powell* expects companies to take advantage of it. "I've heard [in the press] the **Cogent** CEO claiming he's running there the 1st chance he gets. I don't know why we don't expect **Netflix** to run there the 1st chance it gets to collaterally attack deals that it's made since it has demonstrated the willingness to do that throughout this process," Powell said during Tues' briefing. "You're going to tell me that public advocacy groups aren't going to bring rate complaints? And then what's the Commission going to do? The law says it has to try and investigate and rule on them." A decision on the stay could come at any time. Estrada believes the court is likely to expedite the case, which means oral arguments could come as early as Dec or Jan. With that timetable, a decision could be issued in March or Apr. With multiple parties involved, it's unclear how the court will allocate the briefing, but the DC Circuit is known for being aggressive in calling for consolidation of arguments. That could mean cable and cellular having to team up to present one argument, even though they have some different opinions (for example, cable doesn't object to the rules applying to wireless). "It's just as hard for the other side who has a whole bunch of varied interests who want to be in this case," Powell added. "That means [handmade e-commerce site] **Etsy** has to find common ground with **Netflix**. I would argue that it's probably easier on our side than their side." NCTA believes the bright-line rules of no throttling, no blocking and

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no paid prioritization, can be accomplished using Sec 706 of the Communications Act. The trade assn is arguing that the FCC's Title II order oversteps its authority, defies Congress' classification of Internet in the Communications Act, violates the Administrative Procedure Act and lacked adequate notice on crucial aspects, such as classification. "This is not 20th Century regulation. This is 19th Century regulation," Olson said. "The consequences, unless reversed, are going to be to stifle investment, damage our economy, inhibit creativity, innovation and the technical miracle that broadband has brought about." NCTA continues to hope that legislation will be the ultimate solution. Powell was on the Hill Mon talking to leading Dems. "Litigation is sort of the sexy controversy, but the diligent and long work of legislative activity is ongoing," he said.

FCC Adopts Effective Competition Order: As expected, the **FCC** approved an order that assumes every market faces effective competition. As a result, franchise authorities won't be able to regulate basic rates unless they successfully demonstrate that cable is not subject effective competition from a competing provider. The Commission pointed to how DBS has captured nearly 34% of the market share as justification for reversing the effective competition presumption. The effective competition provision was enacted in '93, a time when incumbent cable ops had 95% of MVPD subs. Fast forward to today, the FCC has found effective competition in more than 99.5% of communities evaluated since the start of 2013. While the order was approved, commissioners *Mignon Clyburn* and *Jessica Rosenworcel* broke from fellow Dem *Tom Wheeler* and dissented in part. They, like **NAB**, believe the order should only apply to small cable operators. "I cannot support relief to larger providers particularly when doing so could harm consumers and unnecessarily increases the burdens on our local franchising authorities," Clyburn wrote in her dissent.

FCC Reform: **House Commerce** passed the **FCC** Process Reform Act on a voice vote Wed. The bill now includes 4 amendments, encompassing the 3 Democrat and 3 Republican proposals approved by the Communications subcmte. It's authored by subcmte chmn *Greg Walden* (R-OR) and *Adam Kinzinger* (R-IL). The amendments include one from Kinzinger that requires the FCC to publicize the text of any rule or other action no later than 24 hours after the chmn circulates them to commissioners. Another requires the FCC to release a description of any order completed at the Bureau level. **NCTA** praised the move and urged the full House to approve the legislation soon. "As the FCC considers critical technology and communications issues, this legislation encourages greater sunshine in FCC decision making so businesses can better invest and innovate and all Americans can access more information about policy decisions," the trade assn said.

Malone's Take: **Charter's** proposed acquisition of **Time Warner Cable** has an important wireless component, **Liberty Media** chmn *John Malone* said during the company's annual shareholder meeting Tues. It goes back to cable MSOs' spectrum deal with **Verizon Wireless** in 2012, which entails opportunities to partner with the telco on a wireless MVNO service. While TWC (and **Comcast**) was part of that deal, Charter was not. The Charter/TWC merger will enable a bigger Charter to potentially offer wireless services, Malone said. "The concept that Comcast, a greatly enlarged Charter and **Cox** could together offer a WiFi-optimized connectivity service with a default to a Verizon MVNO is an interesting concept," he said. And having a "meaningful third alternative" wireless carrier in the US mobile market, which is dominated by **AT&T** and Verizon, will please the regulators, he theorized. As far as regulatory hurdles on the merger, Malone believes "there's very little dirty underwear that anybody can find at the bottom of the suitcase," partly because the merging parties already dealt with the FCC on various issues during the failed Comcast/TWC merger.

Showtime Goes OTT: **Showtime** joined the lineup of programmers offering direct-to-consumer streaming services. The net is launching a standalone service in early July with **Apple** as its 1st partner. The service, also dubbed "Showtime," will be available for iPhone, iPad, iPod touch and **Apple TV** users for \$10.99 a month. The premium net is talking to additional platforms and providers. It will offer a 30-day free trial to new customers who sign up through Apple in July. The launch coincides with the new seasons of series "Ray Donovan" and "Masters of Sex," premiering July 12.

Yahoo Scores Deal: **Yahoo** scored exclusive rights from the **NFL** to live stream the Oct 25 Jacksonville Jaguars-Buffalo Bills game. The company reportedly paid \$20mln to host the 1st free, live global streaming of the regular-season game, which will be played in London. The stream will be available across Yahoo platforms, including **Yahoo Sports**, **Yahoo Screen** and **Tumblr**. NFL said the partnership will help extend its digital presence.

Hammer Honored: **NBCU** Cable Ent chmn *Bonnie Hammer* was awarded the Steven J. Ross Humanitarian Award by the **UJA-Federation of New York** at an event in NYC Tues eve—the 1st woman to receive the award. "I'm certain,

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not the last," she told the crowd of industry heavyweights. Hammer took the opportunity to recall a list of other "firsts" in her life. One was the first time she'd ever spoken before a large group of people. It, too, was sponsored by a Jewish organization and served kosher food and "carefully vetted liquor options." It was her Bat Mitzvah, and also the first time a girl was allowed the rite of passage at her parents' Temple. "Truth be told, my being the first Bat Mitzvah had less to do with an eagerness to read from the Torah than the desire to do what my brother had done," she said. "But it was a momentous day for me and, as hard as it is to imagine today, even more so for my Temple." The final first she recalled was her first encounter with anti-Semitism. While attending college in Lawrence, KS, she correctly identified the definition of the word "shibboleth" during a lecture, which she confessed she'd learned in Hebrew school. "That answer sealed my fate. I went from an 'A' average to flunking the class." Several more incidents and 2 years later he was fired, but it was life changing. "I may have flunked that class, but that experience taught me an important lesson that stayed with me ever since... That prejudice and discrimination, based on our differences, is an unfortunate fact of life. Looking back I realize how much that experience informed and influenced much of the work I have done during my career."

Cablefax Daily Stockwatch

Company	06/03 Close	1-Day Ch	Company	06/03 Close	1-Day Ch
BROADCASTERS/DBS/MMDS					
DIRECTV:	92.04	1.18	COMMSCOPE:	26.25	(0.08)
DISH:	70.81	(0.89)	CONCURRENT:	6.20	0.05
ENTRAVISION:	7.03	0.18	CONVERGYS:	25.24	0.28
GRAY TELEVISION:	16.09	(0.29)	CSG SYSTEMS:	32.54	0.62
MEDIA GENERAL:	17.08	0.01	ECHOSTAR:	51.02	0.01
NEXSTAR:	58.09	0.32	GOOGLE:	540.31	1.13
SINCLAIR:	30.69	0.49	HARMONIC:	7.12	0.24
MSOS					
CABLEVISION:	24.08	(0.22)	INTEL:	32.73	(0.54)
CHARTER:	171.24	(5.07)	INTERACTIVE CORP:	77.51	1.19
COMCAST:	59.32	0.50	JDSU:	13.07	0.16
COMCAST SPCL:	59.04	0.47	LEVEL 3:	55.98	0.33
GCI:	16.35	0.21	MICROSOFT:	46.85	(0.07)
GRAHAM HOLDING:	1061.81	(4.51)	NETFLIX:	621.66	(2.25)
LIBERTY BROADBAND:	52.82	(1.01)	NIELSEN:	45.35	0.63
LIBERTY GLOBAL:	55.82	(1.19)	RENTRAK:	67.19	(0.3)
SHAW COMM:	22.10	(0.3)	SEACHANGE:	7.25	0.18
SHENTEL:	32.19	0.34	SONY:	30.43	(0.11)
SHENTEL:	32.19	0.34	SPRINT NEXTEL:	4.75	0.06
TIME WARNER CABLE:	176.93	(1.65)	TIVO:	10.77	0.17
PROGRAMMING					
21ST CENTURY FOX:	33.64	0.23	UNIVERSAL ELEC:	52.87	0.46
AMC NETWORKS:	78.84	0.44	VONAGE:	4.91	0.08
CBS:	62.22	0.57	YAHOO:	43.21	0.06
CROWN:	4.36	0.10	TELCOS		
DISCOVERY:	33.97	0.02	AT&T:	35.03	0.67
DISNEY:	111.17	0.42	CENTURYLINK:	32.99	0.03
GRUPO TELEVISIA:	38.11	(0.62)	TDS:	29.91	0.33
HSN:	69.41	1.59	VERIZON:	49.08	(0.06)
LIONSGATE:	33.80	0.60	MARKET INDICES		
MSG:	86.27	1.36	DOW:	18076.27	64.33
SCRIPPS INT:	67.00	(0.47)	NASDAQ:	5099.23	22.71
STARZ:	41.70	0.60	S&P 500:	2114.07	4.47
TIME WARNER:	85.97	1.25			
VIACOM:	68.37	1.72			
WWE:	14.42	0.65			
TECHNOLOGY					
ADDVANTAGE:	2.33	(0.02)			
AMDOCS:	56.41	0.23			
AMPHENOL:	57.88	0.22			
AOL:	50.18	0.10			
APPLE:	130.12	0.16			
ARRIS GROUP:	33.84	0.66			
AVID TECH:	17.90	0.31			
BLNDER TONGUE:	0.94	0.13			
BROADCOM:	54.62	(0.19)			
CISCO:	29.09	0.01			

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Indecent Exposure

Commentary by Steve Effros

It's sometimes a bit breathtaking to listen to regulators and politicians rant and rail about the recalcitrant "ISP monopoly." You know the drill; we're too slow, we're too expensive, we haven't built out the newest, sexiest technology yet, "they" are "ahead" of us, and of course we should be spending lots more money doing those things but at the same time we should be charging less. Oh, and we're too big and powerful. Forget Google, Facebook, Apple and all the rest. There's a total reality disconnect going on here.

But sometimes the righteousness rises to a level that necessitates pointing out that the "emperor" has no clothes! And so it comes to pass that after the FCC helped scotch the Comcast/TWC merger (we can debate later if that one was too big or not—note that the Commission had to change the definition of "broadband" in the middle of the game in order to sustain its argument that the new company would be too dominant) a new proposed merger comes along, and once again, the FCC leadership is redefining its demands.

Tom Wheeler issued a statement saying: "In applying the public interest test, an absence of harm is not sufficient. The Commission will look to see how American consumers would benefit if the deal were to be approved." So now the Commission is going to set expectations of "consumer benefit" as the test to allow a merger like Charter/TWC, not just see if there is any legally demonstrable detriment that will occur from the proposal? While this has actually long been the case with the Commission demanding "concessions" and imposing conditions that would further whatever its current industrial policy goals entail, the Chairman has taken it another step. The Commission, apparently, is going to define what "benefits" it intends to require before allowing private businesses to move forward with otherwise



totally legal plans.

So what are these "benefits" the government wants? Well, we certainly know the ones they have been hammering at for a long time; more, faster broadband deployment, more broadband competition, and lower prices. Now what would be the most efficient way to achieve that? Well, might I suggest that rather than over-regulate the wired infrastructure, which takes many years to construct, you might employ the spectrum to add both competition and the technical ability for relatively quick deployment? Wireless broadband works. More folks use it today than ever before, and it's becoming the favored technology.

Now who might control that spectrum? The government. Whose spectrum is it? The public's. How long has the political class been clamoring for the reallocation of spectrum to use for just such things as broadband? Well, at least since the idea of "digital TV" was hatched to trigger that reallocation. And how successful has the government been? A decade and counting and we still haven't seen it happen! Will the government give up some of its own hoarding of spectrum to get it done? Not on a bet. Will it cost much more than it should since the eventual "auctions" are designed to maximize the cost of that reallocated spectrum? You bet. Who will pay higher prices? The public.

So the next time the folks at the FCC or on Capitol Hill start ragging on the cable telecommunications industry for not acting in the "public interest," point out to them that they're the ones who have both the means and the power to actually create what they're demanding, but they haven't. It's time to expose the hypocrisy.

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)

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