www.cablefaxdaily.com, Published by Access Intelligence, LLC, Tel: 301-354-2101

Cablefax Daily™

Wednesday — November 22, 2017 | What the Industry Reads First | Volume 28 / No. 225

Turkey Trot: FCC Draft Repeals Bright-Line Rules, Title II

During his tenure as an **FCC** commissioner, *Ajit Pai* made it clear on numerous occasions that he thought President *Obama* pressured a *Tom Wheeler*-led FCC to enforce a Title II framework on ISPs and that the then-chairman should have made a draft of the 2015 Open Internet rules available to the public before a vote. Now as agency chair, he gets to turn back the clock. Pai circulated a draft Tuesday to be voted on at the Dec 14 Open Meeting that would return ISPs to light-touch regulation under Title I. The order will be released to the public Wednesday (Nov 22)—22 days before the FCC vote. While **NCTA** and ISPs that challenged the FCC's 2015 order said they were generally OK with the bright-line rules of "No blocking; no throttling; no paid prioritization," the order on the table does away with them. That's not a surprise given that Pai and commish *Mike O'Rielly* have repeatedly said the agency doesn't have the authority for such restrictions—and it opens the door for Congress to decide if it wants to create such rules. ISPs applauded the action, but were quick to commit to preserving an open internet. "Any ISP that is so foolish as to seek to engage in gatekeeping will be quickly and decisively called out," said *Joan Marsh*, **AT&T** evp, regulatory & state external affairs. **Comcast** posted a blog declaring, "We do not and will not block, throttle, or discriminate against lawful content—and we will be transparent with our customers about these policies." Careful observers will note that prioritization is replaced in that statement by unlawful discrimination. According to FCC officials, the draft order requires ISPs to publicly disclose if they engage in blocking, throttling, affiliated prioritization and paid prioritization. Just because an ISP discloses it's engaging in a behavior doesn't mean that the behavior is OK. It will still face scrutiny from the **FTC** and **DOJ**, which have jurisdiction over anti-competitive behavior and internet practices. The draft also eliminates the so-called internet conduct standard, with FCC officials saying its vagueness and uncertainty have had a negative impact on innovation and investment. Other areas covered in the draft include pre-empting state and local rules that conflict with the federal deregulatory policies for broadband and returning mobile broadband to a private mobile radio designation so that mobile will no longer be under a Title II regime.

FCC Reaction: Of course, there's plenty of criticism of Tuesday's **FCC** draft order to repeal bright-line Open Internet rules and return ISPs to Title I regulation. Democratic commish *Mignon Clyburn* ran with the Thanksgiving theme: "In just two days, many of us will join friends and family in celebrating the spirit of Thanksgiving. But as we learned today the FCC

CABLEFAX DAILY (ISSN 1069-6644) is published daily by Access Intelligence, LLC ● www.cablefax.com ● 301.354.2101 ● Editorial Director: Amy Maclean, 301.354.1760, amaclean@accessintel.com ● Publisher: Michael Grebb, 323.380.6263, mgrebb@accessintel.com ● Associate Editor: Sara Winegardner, 301.354.1701, swinegardner@accessintel.com ● Community Editor: Alex Silverman, 212.621.4951, asilverman@accessintel.com ● Dir. of Bus Dev.: Rich Hauptner,203.899.8460, rhauptner@accessintel.com ● Acct. Exec: Olivia Murray, 301.354.2010, omurray@accessintel.com ●VP Marketing: Amy Jefferies, 301.354.1699, ajefferies@accessintel.com ● Marketing Manager: Charlotte Clay, 301.354.1710, cclay@accessintel.com ●Production Manager: Joann Fato, jfato@accessintel.com ● Diane Schwartz, SVP Media Comms Group, dschwartz@accessintel.com ●Group Subs or Subscription Questions, Client Services: 301.354.2101, client-services@accessintel.com ● Annual subscription price: $1,699.97/year ● Access Intelligence, LLC, 9211 Corporate Blvd., 4th Floor, Rockville, MD 20850

majority is about to deliver a cornucopia full of rotten fruit, stale grains, and wilted flowers topped off with a plate full of burnt turkey. Their Destroying Internet Freedom Order would dismantle net neutrality as we know it by giving the green light to our nation's largest broadband providers to engage in anti-consumer practices, including blocking, slowing down traffic, and paid prioritization of online applications and services." Colleague *Jessica Rosenworcel* called for public hearings before any changes are made to the rules. Online protests have popped up, including a plan for protests Dec 7 at **Verizon** stores (Verizon was chosen because chmn *Ajit Pai* used to be a lawyer for the company). Pai made his case for the draft in a *WSJ* op-ed Tuesday, warning readers not to "fall for the fearmongering." He said uncertainty surrounding the FCC's 2015 rules has slowed the introduction of new services, mentioning a "major company" that put a project on hold to build out its out-of-home WiFi network partly because it wasn't sure the FCC would approve the business model. An FCC official said the company is identified as **Charter** in the draft order. **House Commerce's** *Greg Walden* (R-OR) and *Marsha Blackburn* (R-TN) gave Tuesday's announcement a thumbs up, adding that they remain committed to "ensuring clear, permanent net neutrality rules through the legislative process, encouraging investment in broadband buildout, and closing the digital divide across America." A slew of Democratic lawmakers promised to wage war on the plan.

Access Denied: **DISH** says **CBS All Access**, the broadcaster's direct-to-consumer offering, is playing a significant role in the standoff threatening to deprive Americans of a Thanksgiving **NFL** game. DISH evp, marketing, programming and media sales *Warren Schlichting* told ***Cablefax*** on Tuesday that the satellite provider "would like to sell All Access" to its customers. Such an arrangement, however, is a non-starter for CBS. "We're trying to figure out how to not be at a disadvantage to the people actually supplying the content. You have your direct-to-consumer [product], you can sell it a la carte. Meanwhile, we're stuck carrying you across the country and have no access to the good stuff." It's an interesting contention given that only a few scripted shows, such as "Star Trek: Discovery," are exclusive to All Access, while all of CBS' sporting events and primetime shows are available on the broadcast net. Still, it raises questions about whether direct-to-consumer offerings are going to add another wrinkle to retrans discussions going forward. CBS declined to comment publicly on negotiations. "CBS is taking money from us—forced distribution money—and using it to create new content that then they favor CBS All Access," Schlichting said. CBS probably isn't thrilled with the fact that DISH earlier this year became the first MSO to offer customers a monthly discount to forgo local stations, instead encouraging them to access broadcast nets over the air. In response to the blackout, DISH is offering to provide and install antennas for its customers. Schlichting said the company ramped up its customer service efforts this week in case of a potential blackout. Interestingly, both parties in the dispute are encouraging consumers to sign up for All Access as an alternative way to maintain access to CBS content, including Thursday's Cowboys-Chargers game. "It's a good solution," Schlichting said. "I just wish we could sell it alongside CBS." Users who sign up for the OTT service are entitled to a month-long free trial. Whether that's long enough to cover the dark period remains to be seen. Schlichting reiterated that DISH offered CBS an extension with retroactive true-ups, asserting it was CBS that forced the blackout. "It's hard to believe they're doing it," he said. "Between declining viewership, *Charlie Rose*, NFL in question, and now they're going to take a bunch of folks down, I think that's a problem for them. Obviously, our subscribers aren't going to be happy either, but I don't know why they're doing this."

It's On: The only certainty after Monday's drama surrounding the **Department of Justice's** lawsuit seeking to block the **AT&T-Time Warner** merger is that we're in for an all-out legal battle with the potential to freeze M&A activity in the industry (particularly if the DOJ manages to win). **Wells Fargo Securities'** *Marci Ryvicker* called AT&T's defense of the deal in a press conference Monday night "compelling." The company showed video of a 2016 interview with recently appointed DOJ antitrust chief *Makan Delrahim*, in which the then-private citizen said of the deal, "I don't foresee an antitrust problem," pointing to the fact that it is a vertical merger. AT&T also made the case that the merger wouldn't eliminate any competitors in either the content or distribution spaces. Still, research firm **MoffettNathanson** believes AT&T could have its work cut out for it, writing, "Section 7 of the Clayton Act, as amended in 1950, is clear on this topic. Vertical mergers are held to the same anticompetitiveness standard as are horizontal ones. AT&T's counter-argument, that they have no intention of behaving anticompetitively (say, by withholding content from existing or potential competitors) is unlikely to be convincing to the courts." Moffett also wrote, "It is, in fact, very easy to imagine how a vertically integrated media company could use its proprietary access to content to thwart either existing competition (**Comcast, Charter, DISH Network**) or, perhaps even more importantly, emerging competition (a new vMVPD service from, say, Amazon, or Apple) by withholding 'must-have' content."

Fox Settlement: **21st Century Fox** agreed to a $90mln settlement of a shareholder claim related to the recent sexual harassment scandals at **Fox News**. The **City of Monroe Employees' Retirement System**, a Michigan-based Fox shareholder, filed its claim in Delaware last year. As part of the settlement, Fox agreed to establish the Fox News Workplace Professionalism and Inclusion Council, which will include two of the company's HR execs and four independent members. The council will advise the news net in its efforts to ensure a proper workplace environment, strengthen reporting practices, enhance HR training and further recruitment and advancement of women and minorities. It will also provide written reports that will be made public. -- Meanwhile, Fox News will debut a program hosted by nationally syndicated talk radio host *Mark Levin* in February. The hour-long "Life, Liberty & Levin," will air Sundays at 10pm ET. The net in a statement said Levin will "explore the fundamental values and principles ungirding American society, culture, politics and current events."

More FCC December Fun: Apparently tackling net neutrality on Dec 14 isn't enough. *Ajit Pai* also has teed up an **FCC** vote on an NPRM that would launch a comprehensive review of the national television multiple ownership rule. The proposal would seek to determine the future of the 39% national broadcast audience reach cap as well as the UHF discount. The FCC voted in April to reinstate the UHF discount, which means UHF station owners only have to attribute half those stations' audience toward the 39% cap. Critics say the move helps **Sinclair** with its $3.9bln **Tribune** merger, with Democratic commish *Jessica Rosenworcel* telling Congress last month the FCC's actions merit investigation. Pai's proposal examines whether the 39% cap and discount should be eliminated, retained or modified, with the chmn saying the two are "inextricably linked." Rosenworcel said Congress already has made it clear that the Commission isn't permitted to change or evade the cap. "This proposal is a giveaway to the largest station group at the expense of diversity, localism, and competition," she said.

Customer Caring: **Altice USA** opened its first customer experience center in the NY tri-state area, allowing consumers to interact with **Optimum** services and third-party merchandise. The first is located in Paramus, NJ, with a second center to open in the coming months in the Long Island hamlet of Bay Shore. Along with demos of its new, all-in-one Altice One box, the center features HSD demos, smart home connected products from **Nest**, a children's gaming/TV area and a 15-foot TV wall that shows the different places customers can use Optimum WiFi (including a selfie station featuring local areas where WiFi is available).

HBO on Philo: **HBO** will soon be available via recently launched non-sports skinny bundle **Philo**. In an interview with *Decider.com*, Philo CEO *Andrew McCollum* said HBO is "excited to be on board soon after launch." The premium net is an investor in the streaming company, which also counts **Viacom**, **Discovery**, **Scripps Network**, **A+E Networks** and **AMC Networks** as backers. McCollum said the company is in discussions to add other nets to Philo's lineup, which included 37 channels for $16 at launch last week.

Editor's Note: Your next issue of ***Cablefax Daily*** will arrive on Monday because of the holiday. **Cablefax.com** will keep you up-to-date with breaking news. Have a wonderful Thanksgiving!