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What the Industry Reads First

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Open Internet: Democratic Lawmakers Look to Litigate Rather than Legislate

With the FCC's vote on chmn *Ajit Pai's* "Restoring Internet Freedom" proposal less than a week away, the attacks are getting faster, stronger and higher in profile. On Wednesday, former FCC chmn *Tom Wheeler* joined Sen *Ed Markey* (D-MA) and Rep *Anna Eshoo* (D-CA) to decry the draft order as a plan that will "eviscerate" net neutrality protections. Organizers say more than 600 protests are planned for Thursday outside **Verizon** stores to try and stop the vote. "This is the successful culmination of a grand plan by the ISPs," Wheeler said in a call with reporters, claiming the proposal only serves to benefit **AT&T**, **Charter**, **Comcast** and Verizon. "It is a classic example of regulatory capture where the regulatory agency bends to the wishes of those they are supposed to oversee." Pai and those who support his plan, including **NCTA**, disagree, claiming it simply returns the landscape to how it was were before Wheeler's order in 2015. Wheeler's Open Internet Order classified broadband as a Title II common carrier service instead of a Title I information service. A 3-2 vote next week approving the rollback of Title II regulation seems inevitable, though there are many attempts to delay it. Legal challenges are certain after the vote, with opponents optimistic. "I believe the draft order is highly vulnerable to reversal as a matter of law, as a matter of policy, as a matter of fact," former FCC gen counsel *Jon Sallet* said during Wednesday's press call. Sallet successfully argued the previous FCC's viewpoint before the DC Circuit after **USTelecom**, **NCTA**, **ACA** and others challenged the 2015 rules. Those groups have asked the US Supreme Court to re-examine the DC Circuit ruling upholding the 2015 rules. Such action seems unlikely given the FCC's impending reversal of Title II. "I imagine [the high court] wouldn't want to go near this because of inefficiency. They'd probably rather wait for the appeal" this go-round, said *Angela Giancarlo*, a partner for **Mayer Brown** and former chief of staff for Republican FCC commish *Robert McDowell*. Her remarks on SCOTUS at the **Phoenix Center's** annual Telecom Symposium on Tuesday summed up the thoughts of the other attorneys on the Open Internet panel discussion. The big question with a new round of appeals is whether the FCC can succeed in reversing direction on the issue again in such a short time. "The order is helped by the fact there is so much precedent on the position," said *Tom Navin*, a partner at **Wiley Rein** and former FCC Wireline Competition Bureau chief. "They rely not just on new economic evidence, but they also rely on their own interpretation of the statute, which is more consistent with the precedent. I think they would argue that alone should be enough to get



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past arbitrary and capricious review because both the DC Circuit and Supreme Court seem to think the statute is sufficiently ambiguous for the FCC to have some latitude in how they interpret it.” One potential complication is that while the Supreme Court may not review the US Telecom decision that upheld Title II classification, the decision will still be on the books. It’s a subject Phoenix Center pres Lawrence Spiwak has tackled in writings. “I think USTelecom is one of the most dangerous cases that’s been around in a while in terms of getting agency discretion,” Spiwak said, arguing a future Democratic administration is likely to use the USTelecom decision to revert back to Title II once again. The concern of internet legislation flipping back and forth is why many are hoping Congress will step in. But Congress’ appetite to get involved is questionable. “There are political dynamics that make legislation difficult. People derive too much political benefit from there being this blazing dispute. But at some point, hopefully, Congress will step in,” said Jonathan Nuechterlein, a partner with Sidley Austin and former FTC gen counsel. Democratic lawmakers didn’t sound eager to start that process. “Right now, we are at the point of litigation, not legislation,” Markey said.

RSN Lawsuit: A small operator in Texas is raising objections to AT&T’s Houston RSN, filing an antitrust suit accusing the telco of artificially inflating the price of the network. EnTouch Systems, an ACA member with about 8K subs, alleges that AT&T has contracts and/or colluded to unreasonably restrain trade in violation of the Sherman Act and Cartwright Act. The suit comes in the wake of the Department of Justice’s lawsuit attempting to block AT&T’s acquisition of Time Warner, which raises similar antitrust concerns. The net at the center of the case is AT&T SportsNet SouthWest, home to the Astros and Rockets. It was previously a Comcast RSN, but AT&T and DirecTV (then separate companies) took over the channel in 2014 after Comcast SportsNet Houston filed for bankruptcy. EnTouch argues that DirecTV, as the largest pay-TV provider in the market, has the leverage to negotiate a lower per-sub rate but chooses not to—even though it opted not to carry the net when Comcast owned it. “The only viable explanation for DirecTV’s change of heart regarding the high per-subscriber rate is an intent among at least AT&T and DirecTV to unreasonably restrain competition by forcing competitor MVPDs (ie., MVPDs other than U-Verse and DirecTV) to pay an exorbitant rate for AT&T SportsNet,” the suit claims. An AT&T spokesperson said, “We’ve now reviewed the lawsuit, and we still don’t get it. EnTouch recently negotiated a very favorable deal to carry AT&T SportsNet Southwest, and it’s clear that the lawsuit has no merit.”

Advanced State: Comcast on Wednesday began offering its DOCSIS 3.1-capable xFi Advanced Gateway—equipped with its xFi network management platform—in the markets in which it provides 1 Gbps internet service. The operator noted in its announcement that there aren’t any connected devices on the market capable of receiving Gigabit speeds over WiFi, but asserted that such device “are coming.” The Advanced Gateway includes a 160 MHz-capable 8x8 antenna array and Mu-MiMo (Multi-user, Multi-input, Multi-output) technology, as well as Bluetooth LE,

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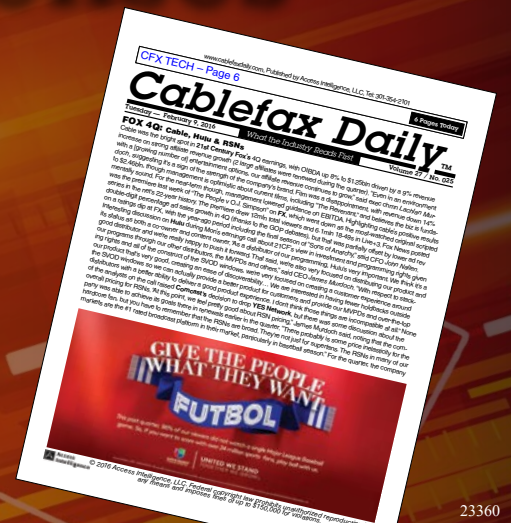
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Global Games: Liberty Global CEO *Mike Fries* doesn't anticipate the potential megadeal between **Disney** and **21st Century Fox** (which would reportedly include Disney acquiring all Fox-owned RSNs) having a significant impact on sports programming abroad given the fragmentation of the European market. "There are no **ESPNs** in Europe, and I don't think there ever will be," Fries said. The exec also downplayed the idea that a union could benefit Liberty Global competitor **Sky** (Fox is attempting to buy the 61% of Sky it doesn't already own). "We all carry Disney channels today, so we're big strategic partners, as are they [Sky]," Fries said.

ComScore-Fox Deal: ComScore renewed and expanded its license with **Fox Networks Group** to include linear TV ratings and its suite of Advanced Audiences segmentation. **FS1, FS2, FX, Nat Geo** and **Fox O&O** stations will now have access to ComScore's complete RAP API and Optimizer measurement insights.

Comcast Goes Classical: Music programmer **Stingray** is bringing Stingray Classica to **Comcast's** Xfinity On Demand service. The premium classical music SVOD offering—featuring a collection of ballets, operas and classical performances—will be available to Xfinity TV customers from Dec 4-10 for free and for \$6.99/month following the trial.

Feeling Curious: CuriosityStream, a documentary SVOD service created by **Discovery** founder *John Hendricks*, is coming to **Layer3 TV** subscribers through an app on the cable provider's platform. The deal adds 1,500 VOD titles to the Layer3 library, including "David Attenborough's Light On Earth" and "Stephen Hawking's Favorite Places," with 4K content coming in the near future. The app offers a mix of free previews and paid content, with plans starting at \$2.99/month.

Ratings: ESPN's College Football Playoff Selection Show on Sunday averaged 1.6mln viewers from 12-4pm ET, a 23% increase from the same timeslot last year. The show's first hour, during which the four participating teams were actually revealed, averaged 3mln viewers (up 14% YOY). The net's six CFP rankings shows throughout the regular season—five Tuesday evenings and this past Sunday afternoon—averaged 1.5mln viewers (up 22% YOY).

Programming: Epix renewed original spy drama "Berlin Station" for a third season on the heels of Sunday's Season 2 finale. The series is one of three scripted originals in Epix's current slate, along with comedy series "Graves" and "Get Shorty." A limited series, "The Truth About the Harry Quebert Affair," is also set to debut in 2018. -- **Viacom** is adding "Two and a Half Men" to the programming lineups of both **Nickelodeon's** Nick at Nite block and the soon-to-launch **Paramount Network**. The company acquired the rights to the sitcom's complete 12-season library and scheduled the show's Nick at Nite debut for Wednesday (Dec 6) at 1am. The show will subsequently debut on **Spike** (soon to be Paramount Network) on Dec 16 at noon. The show will continue to air on Nick in its 1am timeslot and move to weekday afternoons on Spike/Paramount. -- **Pop** greenlit a half-hour pilot titled "The Demons of Dorian Gunn," with production set to kick off in January. The comedy follows the titular protagonist, who abandons his life of leisure to protect humanity from monsters as they emerge from the gates of hell. -- **BET Networks** is launching a new award show, "The BET Social Awards," which will air Feb 11 at 10pm ET. The event will celebrate 2017's most memorable memes, hashtags and trends across popular social platforms. The host and categories will be announced at a later date. -- **CBS All Access**, the broadcaster's direct-to-consumer streaming service, greenlit a reboot of "The Twilight Zone" produced by **CBS Television Studios** in association with *Jordan Peele's Monkeypaw Productions* and *Simon Kinberg's Genre Film*. All Access' original content slate currently includes three series—"Star Trek: Discovery," "No Activity" and "The Good Fight." The "Twilight Zone" reboot is one of four additional series coming soon to the service.

Overachievers Under 30: Congratulations to **Cablefax's 4th annual class of Overachievers Under 30**, who were feted Wednesday afternoon in NYC. Colleagues, bosses and family members celebrated their achievements, which range from founding a successful experiential marketing agency to running complex financial transactions for a top US MSO to creating branded entertainment narratives for blue chip brands. The honorees shared some of the best professional advice they've received, including some good counsel that even the industry veterans in the room took note of. **Turner's Jasmine Clennon**, senior manager of ad innovation & programmatic solutions, cautioned against equating being busy with producing meaningful output. **Mirrored Media** founder/CEO *Justin Lefkovitch* reminded everyone that it's important to stop and celebrate the little wins along the way. Along those lines, **Nat Geo Wild** communications manager *Molly Mulrain* advocated for stepping back and looking at the big picture. She recalled one moment when boss *Jenn DeGuzman* stopped her and said, "Molly, it's PR not the ER." Congratulations to all of the 2017 Overachievers!

People: Univision promoted *Liz Sanderson* to the position of svp, strategy and insights. Since joining Univision in 2010, Sanderson has been focused on strategy in the consumer packaged goods, retail and shopper marketing categories. Prior to joining Univision, Sanderson spent 16 years with **Procter & Gamble**.

Think about that for a minute...

Jump or Get Shoved

Commentary by Steve Effros

I went out to Denver many years ago to meet with *John Malone*. The industry was getting a lot of heat over the service **TCI** was providing, and I wanted to talk to him about it. The complaints ran from customer service to the aging quality of their set top boxes. Other companies were upgrading rapidly. He said something to the effect of, "I'm not going to be shoved into using a 'new' technology that will be old in less than a year!"

At the time, the "new" **Intel 286** microchip was sweeping the market. Malone, however, had already seen the **386** chip and explained that it would make a fantastic difference in what cable could deliver, especially when it came to things like games. John was already looking at the nascent data market and wanted to jump in, but the immediate cost was a delay in getting new boxes in the field. So be it.

When you look at the speed of technical developments these days, the dilemma that Malone faced is happening ever more frequently. It's a question of whether we, who deliver and service that technology, decide to "jump" at the chance to do so, because we believe it is going to be successful, like broadband, or whether someone is trying to "shove" us in a particular direction, like fiber to the home, when it turns out that technology was not necessary to efficiently deliver service.

The fiber story is particularly fitting. Remember when **Google** made all that noise about Google Fiber? Not so noisy any more. As even Google found out, existing technologies, like HFC, fiber to the node, and now even wireless turn out to be either just as efficient or more so than FTTH.

Many folks argue, persuasively, that what Google was really doing was trying to "shove" the broadband industry



into building higher-capacity systems because Google wanted them for its other businesses. Probably so. They even got the "true believers" involved in insisting on now little-used Gigabit service, municipal builds and the like. They didn't appreciate that we had already initiated (prior to Google Fiber) technical plans that allowed for ultra-high speeds and capacity, like DOCSIS 3.1, using the systems already built.

There are lots of other examples of efforts to shove technology; 3D for instance. That one, promoted by the set manufacturers after the HD surge ended, wound up going nowhere. They then started pushing 4K, which has resulted in all the set manufacturers being essentially forced to build 4K sets, but consumers not getting much of an immediate benefit at all. Maybe that's called great marketing, but it's built on a false foundation.

The core technologies, such as broadband, digital and wireless were ones that the Malones of the world jumped at. The result was significant growth and massive change in the way we all communicate. But now the trend appears to be incremental change being promoted by one group or another for their own purposes. The most recent examples are probably ATSC 3.0 (the broadcasters want to get into two-way) and wireless "5G". If these technologies get pushed on consumers, we will have to pay for new devices to continue to enjoy the same services they have today. The technologies are certainly interesting, but how much will it cost, for instance, to put "microcells" on every other telephone pole in the country? And for what? We have to be more discerning about when to jump and when to avoid being shoved.

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. His views do not necessarily reflect the views of Cablefax.)

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