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

Cablefax Daily™

Thursday — January 17, 2019 | What the Industry Reads First | Volume 30 / No. 011

Shutdown Watch: Arguing Over Whether Court Should Hear Oral Arguments

INCOMPAS, the trade association whose members include **Amazon**, **Twitter**, **T-Mobile** and **Netflix**, is objecting to an attempt from the **FCC** to postpone oral arguments in the net neutrality challenge from their currently scheduled date of Feb 1. The FCC filed a motion Tuesday to move the date due to the government shutdown. With the argument date fast approaching, the court is expected to rule quickly. And petitioner INCOMPAS believes precedent is on its side. "During the 2013 government shutdown, this Court denied similar requests to stay oral argument," INCOMPAS said in an opposition filed with the DC Circuit on Wednesday. The group said there were at least 16 cases during the 2013 shutdown in which the government sought to delay arguments, with every one of those motions denied and the government participating in arguments every time. In fact, on Monday the court denied an unopposed motion by the **Dept of Agriculture** to stay oral arguments scheduled for Jan 25 over obtaining animal welfare records. Similarly, the court denied a motion to stay oral arguments earlier this month in a case involving the **FAA**. However, in that instance, Senior Circuit Judge *A Raymond Randolph* would have granted the delay, saying that there was no emergency at play in the case that involves the safety of human life or the protection of property. That is the key criteria, he said, for government employees to work voluntarily under the law. "The majority opinion, which itself contains no legal analysis, relies on orders denying stays during shutdowns. But those orders also contain no legal analysis," Randolph wrote in his dissent. "*Charles Dickens* had a few words about this form of argumentation: 'Whatever is is right'; an aphorism that would be as final as it is lazy, did it not include the troublesome consequence, that nothing that ever was, was wrong." The FCC said intervenor **Digital Justice Foundation** and respondent-intervenors, including **NCTA**, **ACA** and **USTelecom**, don't oppose staying arguments. The FCC's motion, which notes petitioners oppose the delay, cited **DOJ** guidance instructing govt attorneys to request active civil cases be postponed until funding is available. INCOMPAS, which objected to the FCC nixing Title II status for ISPs, argued that ultimately it's past time to settle the matter. "Due to the FCC's misguided and unlawful repeal of the network neutrality rules, consumers are at risk of substantial harm from ISPs, which may now interfere with access to lawful internet content without the restraint of net neutrality," INCOMPAS wrote. "The repeal of the rules also threatens edge providers, as

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 ● Associate Editor: Mollie Cahillane, 212.621.4951, mcahillane@accessintel.com ● Acct. Exec: Olivia Murray, 301.354.2010, omurray@accessintel.com ● VP Marketing: Amy Jefferies, 301.354.1699, ajefferies@accessintel.com ● Director of Marketing: Kate Schaeffer, kschaeffer@accessintel.com ● Prod. Mgr: Joann Fato, jfato@accessintel.com ● Diane Schwartz, SVP Media Comms Group, dschwartz@accessintel.com ● Group Subs or Subscription Questions, Client Services: 301.354.2101, clientservices@accessintel.com ● Annual subscription price: $1,699.97/year ● Access Intelligence, LLC, 9211 Corporate Blvd., 4th Floor, Rockville, MD 20850

they are facing the risk of blocking, throttling and other practices by ISPs, which may have services competing with edge provider services." Assuming nothing changes, oral arguments are slated to get underway at 9:30am ET on Feb 1 before Circuit Judges *Patricia Millett*, *Robert Wilkins* and *Stephen Williams* (*Obama*-appointee Wilkins replaces *Clinton*-appointee *Judith Rogers*, who was initially assigned the case).

Revamped Regulations: *Rep Anna Eshoo* (D-CA) introduced a bill Tuesday that would overturn **FCC** regulations limiting the authority of local governments to regulate the deployment of 5G wireless infrastructure. The new rules, which took effect on Jan 14, were adopted in August and September and limited the abilities of cities and states to regulate small cell sites such as pole attachments. The rules have already received backlash from local governments. A coalition of nearly 100 cities, towns, counties and associations of localities formed to sue the FCC, saying it does not have the authority to issue those regulations. *Rep Jackie Speier* (D-CA) is a cosponsor of Eshoo's bill. -- *Sen Marco Rubio* (R-FL) introduced a data privacy bill Wednesday aimed at protecting consumer rights. The American Data Dissemination Act uses the Privacy Act of 1974 as a framework, attempting to provide clear protections against intrusions from players in the internet economy. Rubio also penned an op-ed, posted by *The Hill*, to discuss the need for Congress to address consumer data privacy. "Tech industry leaders should encourage responsible legislation that provides clear rules for companies to operate under and prevents future scandals," Rubio wrote. "While we may not have a consensus in Congress, we must begin to offer solutions. Because this is the only way we can regain the public's trust."

STIRRing The Pot: **Sinclair** entered the streaming game Wednesday with national, ad-supported service **STIRR**. The service will offer 20 national networks, including **Cheddar**, **Dove Channel** and sports net **Stadium** (partially owned by Sinclair). It also includes a VOD library and a local channel based on a user's location that features programming provided by the local Sinclair TV station. STIRR plans on adding linear networks monthly, totaling more than 50 by the end of the year, and it plans to develop its on original channels. The service is launching on **iOS** and **Android** devices, **Amazon Fire TV**, **Apple TV**, **Roku** and on the web.

Net Positive: **Netflix's** price hikes on Tuesday have been generally viewed as credit positive. **Moody's Investors Service** believes the action will increase EBITDA and operating cash flow, reducing the company's leverage and negative free cash flow. This is consistent with the company's previous expectations for the rating upgrade in April 2018. Based on the assumption that the majority of subs sign up for the standard offering ($9) and it does not lose subs, the pricing action should increase EBITDA by about $1bln over the next year.

Where Are You?: Just days after **House Commerce** chmn *Frank Pallone* (D-NJ) requested (and was denied) an emergency briefing from **FCC** officials on what's being done regarding reports of mobile carriers selling customer geolocation data, Republican committee members fired off letters to **Zumingo, Microbilt, T-Mobile, AT&T, Sprint** and **Verizon** asking for increased transparency. "We are deeply troubled because it is not the first time we have received reports and information about the sharing of mobile users' location information involving a number of parties who may have misused personally identifiable information," Ranking Member *Greg Walden* (R-OR) and other GOP leaders wrote.

Putt Putt: **NBC Sports Group** is combining the business services offered by the Golf brands portfolio under one umbrella. **Golf Business Solutions**, debuting on Jan 23 in conjunction with the **PGA Merchandise Show**, will act as a comprehensive offering of the services previously individually provided by **GOLFNOW**, **Golf Advisor**, **Revolution Golf**, **Golf Academy** and **Golf Am Tour**. Services will include tech and operations, brand management, advertising, sponsorships, event planning and management and content development.

Shutdown Streaming Relief: Furloughed government employees may have a lot more free time on their hands right now if they're deemed non-essential. So why not partake in some binge-watching? That's the philosophy behind a **CuriosityStream** promotion offering two free months of the nonfiction SVOD service to government employees with the promo code "shutdown."

Pirate Central: **beIN Media Group** published a website calling out Saudi Arabia-based **beoutQ** for allegedly pirating sports and entertainment content, including beIN channels, since August 2017. The beIN said it will regularly update the site, which also targets Riyadh-based satellite provider **Arabsat**, which distributes the channel.

Back-End Business: **Juniper Networks** and **IBM** have agreed to a $325mln deal that will see the latter managing Juniper's existing infrastructure, applications and IT services to reduce costs as it moves to the cloud. The seven-year deal will see the IBM Services Platform with Watson integrated into the company's support systems, including data centers, help desks and voice networks. Juniper Networks will also use IBM's cognitive technologies to create an agile IT environment to drive efficiency, cost savings and facilitate the move to the cloud.

Mid-Vid Ads: **Wurl** launched an ad monetization solution for connected TVs Wednesday. The AdSpring for Connected TVs product allows video producers to insert mid-roll ads on linear and VOD programming to be distributed to any video service or device.

Animal Kingdom: Ahead of the four-network premiere of "Dynasties," **BBC America** released five 15-second spots featuring each of the five species featured in the series. The spots play on pop culture as well; in one, emperor penguins march on frozen terrain with the words "for these warriors, winter is always coming" appearing, in a clever nod to "Game of Thrones." The show premieres on BBC America, **AMC**, **IFC** and **SundanceTV** at 9pm on Saturday.

Ratings: **Syfy's** "Deadly Class" has garnered 2.7mln pre-linear views across platforms ahead of its linear premiere Wednesday night. The premiere episode was available commercial-free via Syfy On Demand, at Syfy.com and through the Syfy and **USA** apps as well as **YouTube**, **Facebook** and **Twitter**. -- The premiere of **WE tv's** "Marriage Boot Camp: Hip Hop Edition" on Jan 10 scored nearly 1.3mln total viewers in L+3, becoming the highest premiere for the franchise since its fifth season among W25-54, W18-49, A25-54 and total viewers.

Programming: General contractor *Rachel Street* is breathing new life into the City of Brotherly Love in **DIY's** "Philly Revival." Starting Jan 26 at 9pm, Street will revamp Philadelphia's historic homes while restoring its original features. -- **WGN America** picked up "Dog's Most Wanted," an unscripted series featuring bounty hunter *Duane "Dog" Chapman*. This will mark the first unscripted series on WGN America in over five years. The series will begin production in early 2019.

People: **Nexstar** extended the employment agreement it has with pres/CEO/chmn *Perry A Sook* through Feb 28, 2023. Sook founded Nexstar in 1996 and has held all three positions since its founding. -- *Paul DeBenedittis* is joining the **Nickelodeon** team as evp, programming and content strategy. Based in Nick's Burbank studio, he'll lead the content and programming strategies as well as media planning for Nick nets. DeBenedittis most recently acted as svp, programming strategy for **Disney Channels Worldwide**. -- **Discovery** upped *Loren Ruch*, *Betsy Ayala* and *Lynn Sadofsky*, three leaders in its lifestyle brands. Ruch will now act as group svp of production & development for **HGTV**, Ayala is now svp of production & development for HGTV and Sadofsky has been boosted to svp of production & development for **Food Network**.

Think about that for a minute...

No Hue, No Cry

Commentary by Steve Effros

Remember when cable rates were the subject of major headlines whenever an increase was announced? The large-type would feature "5%" or "10%" and the quotes from "consumer advocates" and officials would be predictable: The "cable monopoly" would be proclaimed the problem for the "outrageous" increases that happened almost annually. The industry would explain the cost of bringing programming to subscribers was increasing at a faster rate than the annual increase, and that wouldn't in any way calm the troubled waters.

Jump to today. Netflix just announced a more than 18% increase in the cost of its most popular subscription tier. This comes barely a year after the last increase. No front-page headlines, no hue and cry, we haven't heard anything yet from the folks who used to argue that the reason for repeated rate increases is solely because the company is a "monopoly." Why?

It's pretty simple. The "logic" behind calling the rate decisions of cable operators rapacious was far more political theatre than anything else. Costs dictated prices. We can easily see that today with Netflix, which put out an official statement saying the reason for the large jump in prices is because they've had to spend so much money to maintain their position against their competitors. And spending is one thing they have been doing a lot of; almost $12 billion in a recent 12-month period. Pre-existing debt of over $8 billion with a new offering out for another $2 billion, and no end in sight for the increasing costs of new original programming.

This time the naysayers have an obvious problem. They can't just make a (somewhat inaccurate) allegation that a "monopoly" company is simply charging whatever it wants to charge. Netflix has Hulu (Disney and Comcast) Dish (AT&T) YouTube (Google) Amazon Prime (Amazon) and probably soon Apple, NBC and a host of others competing for subscriber eyeballs. Sure, Netflix got there sooner, and got the benefit of using a lot of programming from many of those folks who are now going to be competitors, but their program libraries are now going to go into competitive "walled gardens," so Netflix has to pay for new programming, and is passing those costs on to customers, just like the cable folks tried to explain years ago, to no avail.

Are we now going to hear calls for rate regulation of the new walled garden providers? Remember, all their programming is going to likely be exclusive to their own platform. Are price increases on entertainment product and delivery going to be considered "essential," and thus subject to government scrutiny? I doubt it. There is little viable legal theory left for such a move, although I have no doubt that some will want to try. After all, even the "monopoly" cable guys, though they have not been "sole providers" to most of their customers for many, many years, now have lots of competition from satellite, broadband, and soon, if you believe the hype, even 5G!

Nope, as we can easily see from the lack of front-page headlines about the most recent Netflix rate increase, the days of political hue and cry are waning when it comes to video delivery entertainment costs.

What we are going to see, going forward, is more product, more choice, but at a higher cost, and that cost will continue to escalate. Not because of "monopoly" theory, but because even with, and particularly because of robust competition, costs go up and inevitably, consumers will pay the bill.

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