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WHAT THE INDUSTRY READS FIRST

To Be Or Not to Be: ISPs Argue FCC Preemption Over CA Net Neutrality

The battle over net neutrality is a lot like the Circle of Life. It simply will never end. The war over federal and state regulations of internet service continued Tuesday during a session of oral arguments at the Ninth Circuit Court of Appeals, where a panel of judges heard an appeal from **NCTA, ACA Connects, CTIA** and **USTelecom** of a district court order denying a preliminary injunction against the enforcement of California's net neutrality law.

The California Internet Consumer Protection and Net Neutrality Act of 2018 has been controversial since its introduction. The **FCC's** Restoring Internet Freedom Order, which was approved on a 3-2 vote in December 2017, re-classified broadband as an information service to be regulated under Title I of the Communications Act. California's legislation essentially restores the FCC's 2015 net neutrality protections within the state.

Shortly after its passage in 2018, **DOJ**, ISP associations and others filed for a preliminary injunction to prevent the enforcement of the California law. The case was put on hold until a federal court upheld the FCC's 2017 order. The DOJ dropped its challenge of the California law after Biden won election, but the ISP associations kept up the fight. The groups argued the FCC order pre-empted the state law and broadband providers would suffer irreparable harms should it go into effect. In February, the district court determined there was no conflict

between the FCC's 2017 decision and the state law, denying their request for a preliminary injunction. The law went into effect in April, with immediate ramifications including AT&T stopping sponsored data.

Plenty of eyes have been on California since the beginning of this saga, and that's unlikely to change until there's a resolution. Vermont and ISP lobbying groups have agreed to put a lawsuit involving that state's net neutrality legislation on ice until the Ninth Circuit has resolved the California case or November 15, whichever comes first. And let's not forget, this whole song and dance could prove a waste of time should President *Biden* appoint a Democratic commissioner to the final FCC seat. He has said publicly that he wants the Commission to restore net neutrality protections and re-classify broadband under Title II.

All that brings us to Tuesday. *Scott Angstreich*, counsel for the ISP associations, focused his arguments before a trio of Ninth Circuit judges on the FCC's broad authority over interstate service under its plenary authority. He cited California precedent that when the FCC regulates under Title I, state regulation of intrastate services is preempted when it undermines the existing interstate regime. Angstreich added that because the state has adopted the same broadband definition currently used by the FCC, California is regulating the same interstate service as the Commission and imposing rules on those services that the agency ultimately rejected.

Judges *Mary Schroeder* and *Danielle Forrest* didn't seem

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quite on board with Angstreich's arguments tied to the FCC's re-classification of broadband under Title I. Schroeder in particular questioned what pre-emptive authority could be directly tied to the re-classification. Counsel for the associations argued that the FCC has a number of statutory tools it can pull from to address broadband regulation.

"The decision about how to address broadband or how to address their precursor services has never been a dry, technocratic question. It's always been a result-oriented approach. What's the best way to regulate this kind of service assuming that the statute can reasonably be read to allow it?" Angstreich said.

Patty Lee, representing California attorney general Rob Bonta, fought back against the associations' plenary authority argument, saying it is taking existing statutes and precedents out of context.

"Going back to the basic structure of the [Communications Act], it does recognize the possibility of FCC authority over interstate communication services. However, there needs to be something explicit in the statute, in Title II, Title III, or Title VI that specifically authorizes the FCC to take regulatory actions with respect to those services," Lee said. "It is simply not correct that there is a bright line between interstate and intrastate service that is drawn in the Communications Act. The better reading, I think, is that when a service is Title I, it is left open for both the federal agency and for the states to regulate."

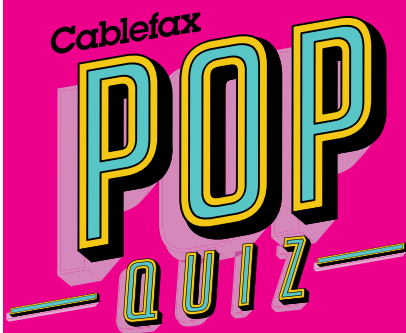
COMCAST TRACKING BEHIND ON SUB GROWTH

Comcast's stock dropped more than seven points Tuesday after CFO Mike Cavanagh signaled a slow down in 3Q21 broad-

band net adds during an investor conference appearance Tuesday. He cited a familiar reason, disruption tied to the COVID-19 pandemic and the rise of the Delta variant, for the slowdown in gross adds. Cavanagh still believes Comcast will trend in-line with historical averages for the third quarter, but the final numbers will likely fall behind 3Q19, a record quarter. "When you put the second and third quarter together of this year... we expect to be about 10% better combined for the trailing 6 months versus 2019, and we continue to see ourselves ahead of 2019 for the full year," he said. "Sooner or later, we're going to see COVID get behind us and see this quarterly volatility that we see as COVID-driven fall away." Based on Cavanagh's comments, **New Street Research** is now expecting 3Q21 net adds of 300,000 (previously 411,000) and 2021 net adds of 1.5 million (previously 1.7 million). "We are inclined to agree that the revision isn't specifically due to new competition from fiber or fixed wireless broadband, though we think the future impact from new fiber deployments is still not well understood by the market," the firm said in a note. "The explanation of depressed seasonal churn in 2Q21 translating into depressed seasonal gross adds in 3Q21 is certainly plausible."

A VIACOMCBS BALANCING ACT

At an Investor Day in February, **ViacomCBS** CFO Naveen Chopra indicated an anticipated \$5 billion in streaming content expenses by 2024, compared to \$1 billion in 2020. With 2021 nearly over, he can't say he's been proven wrong yet. "I think this year, streaming content expense will be more than double what it was in 2020," Chopra said during an investor conference appearance Tuesday. "If you step back, the reality is,



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our business is becoming more and more streaming-oriented. Streaming revenue will be roughly 15% of total company revenue this year, and obviously, meaningfully higher next year. So you'd expect that our streaming content expenses would grow as we lean more into streaming." Still, ViacomCBS sees streaming as a net addition to its business, not a replacement for linear. "The reality is, we monetize many viewers today in both our linear and streaming services," he said. "I think that will continue to be the case for many years because there is unique content available in both channels. And we're already seeing that when you think about the fact that the declines in affiliate viewership today are significantly smaller than the growth that we are seeing in streaming." As for the recent division of **Paramount's** Film and TV divisions, Chopra gave his seal of approval to new **Paramount Pictures** head *Brian Robbins* as well as **Showtime Networks** CEO *David Nevins*, who will have oversight of **Paramount Television Studios**. "David is someone that just has an incredible track record of creating culture-defining content that is both commercially successful and critically acclaimed. Now he will be able to do that with an even broader purview," Chopra said.

HIGHER SPEEDS, OPTIMUM ADVANTAGE

Altice USA's Altice Advantage Internet offering aimed at low-income households will roll out increased speeds in October under the name "Optimum Advantage Internet." The product will be available to eligible households across the **Optimum** and **Suddenlink** footprint with download speeds up to 50 Mbps at no additional cost. Existing and new customers will receive the service on a rolling basis next month. Optimum Advantage Internet is also eligible for coverage under the **FCC's** Emergency Broadband Benefit Program, which could bring the product to eligible homes affected by the pandemic at no cost to the customer.

CONNECTED DEVICE VOUCHERS UP FOR DEBATE

Sen *Raphael Warnock* (D-GA) and Rep *Donald McEachin* (D-VA) introduced legislation Tuesday that would authorize \$5 billion in funding over the next five years for vouchers that would help low-income consumers purchase connected devices. Under the Device Access for Every American Act, eligible consumers would receive a \$400 voucher to buy a computer or tablet every four years, and households can receive up to two vouchers during each four-year period.

DISH DIVES IN WITH IBM

DISH is tapping **IBM** to assist in the automation of its soon-to-be-launched 5G network. The provider will integrate IBM's AI-powered network orchestration software and services into the network, opening the door for constant performance optimization and dynamic prioritization of network fixes. IBM Global Business Services will also be managing the implementation and integration of support systems for enterprise customers.

OPENVAULT EBB INITIATIVE

SaaS technology provider **OpenVault** says it can help simplify operator participation in the Emergency Broadband Benefit program. The vendor offers EBB reporting capabilities that

include individual MAC addresses, billing accounts, total usage by month, upstream and downstream speeds and multiple years of history. The reporting abilities will be used to provide necessary information for operators to conduct auditing when participating in the government subsidy program. More than 5.5 million households have enrolled in EBB as of Sept 12.

COMCAST COMMITMENT TO SMB RISES

Comcast will award \$1 million in grants to 100 small businesses owned by people of color in the counties of King and Pierce, Washington. The announcement is part of Comcast's RISE initiative, a promise to award 13,000 Black, Indigenous and people of color-owned businesses across the country with grants, technology makeovers and marketing services by 2022. The two counties are a part of six markets including Houston, Miami, Oakland, the Twin Cities, and Washington, D.C. selected to award a \$10,000 grant to 100 local businesses from the RISE Investment Fund for a total of \$5 million across 600 businesses. Eligible businesses can apply for the next round of grants from Oct 1 to Oct 14. Winners will be notified in November.

RATINGS

ESPN's "MNF" coverage of the Baltimore Ravens at Las Vegas Raiders scored 15.292 million viewers across ESPN, ABC, ESPN2, and ESPN Deportes. It was ESPN's best Week 1 game since 2013. – **Fox News Channel** topped both primetime and total day ratings last week, with 2.268 million total viewers and 1.378 million total viewers, respectively. **ESPN** followed in both categories, with 1.952 million and 820,000 total viewers, respectively. **MSNBC** came in third in both categories with 1.01 million and 650,000 viewers, while **HGTV** took fourth in both categories with 1.081 million and 600,000. **TLC** (924,000) rounded out primetime ratings while **CNN** (532,000) closed out total day ratings. – Sunday's **MTV** 2021 VMAs saw total minutes consumed climb 9% to 1.4 billion from 1.29 billion a year ago. – US Open coverage on **ESPN** averaged 881,000 viewers in prime, up 33% from last year. The championships were up 13% for the entire two weeks of telecasts. – **Hallmark Channel's** Saturday premiere of movie "Roadhouse Romance" averaged 2.1 million total viewers and 258,000 W25-54. It was the number one most-watched entertainment cable program of the day and week among Total Viewers, W18+ and Households and the net itself the number one most-watched entertainment cable network in the Saturday 9-11pm timeslot among Total Viewers, W18+, W25-54, W18-49 and Households.

PROGRAMMING

HGTV ordered more than 30 new episodes of "Unsellable Houses," "Everything But the House" and "Inside Out," all set to return in 2022. – The Sunday edition of **Univision's** "Despierta América" launches this week at 8am ET on the net. "Despierta América en Domingo" will feature weekly news, unique segments and more. – The 11th season of "Bringing Up Bates" premieres Feb 10, 2022 at 9pm ET on **UPtv**. – Docu-series "Trial in the Outback: The Lindy Chamberlain Story," will debut in the U.S. and Canada exclusively on **Sundance Now** and **AMC+** with all three episodes Oct 12.