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WHAT THE INDUSTRY READS FIRST

All Rise: Sixth Circuit Judges Picked for Title II Hearing

The Sixth Circuit Court of Appeals revealed the three-judge panel that will hear oral arguments for ISPs' challenge of the FCC's Title II net neutrality order, and it's an all-GOP cast.

Judges *John Bush*, *Richard Griffin* and *Raymond Kethledge* will be taking on the latest edition of the net neutrality battle, which is scheduled for Oct. 31 at 8:30am in Cincinnati. Bush was nominated to his seat by President *Donald Trump* back in 2017, while Griffin and Kethledge were nominated by President *George W. Bush* in 2005 and 2008, respectively

Kethledge is arguably the most notable of the three, having been part of Trump's final three options to replace former Supreme Court Justice *Anthony Kennedy* in 2018. It won't be Kethledge's first time handling a major case for cable either. He issued the decision for the *City of Eugene et al. v. FCC*, which upheld the Commission's definition of franchise fees.

In the *City of Eugene's* case, the court affirmed the FCC's 2019 order revamping cable franchise fees, agreeing with the agency's determination that local franchising authorities can't collect fees on cable operators' broadband revenues. The court found the value of most nonmonetary, cable-related obligations in a franchise agreement between an operator and franchising authority are a franchise fee and subject to the Cable Act's 5% cap on franchise fees, though it did determine that noncash cable-related exactions should be assigned a monetary value for the purpose of counting them toward the

5% cap. It said those exactions should be valued at marginal cost and not fair market value.

What won't be utilized this time around in the net neutrality legal carousel is the Chevron Doctrine that was [struck down by the Supreme Court](#) in June. Chevron was used by the court in 2005 to uphold the FCC's order to classify broadband as a Title I service under Brand X. Kethledge has been a longtime critic of the now-overturned Chevron doctrine. In a 2017 [article](#) in the *Vanderbilt Law Review*, he wrote that Chevron created "a palpable sense of entitlement among executive agencies, particularly when they show up in court." Though he hadn't personally had to use Chevron's second step for the court to defer to any reasonable interpretation made by an agency, that doesn't mean the agencies in question didn't want to.

"From those cases, it seems to me that the agency is not trying to answer the same question that we are. The court tries to find the best objective interpretation of the statute, based on the statutory text," Kethledge wrote. "The agency instead asks if there is a colorable interpretation that will support the policy result that the agency wants to reach. When judges engage in that kind of analysis, we call it judicial activism."

His unfavorable stance against Chevron remained on display this past July. During oral arguments for the *State of Tennessee v. Xavier Becerra*, Kethledge expressed doubt on whether a ruling made while Chevron was active still applies to a challenge to a federal agency regulation that would require Title X-funded family planning clinics to refer patients to abortion

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providers if they request it.

What could be used, however, is the Supreme Court's major questions doctrine. ISPs objecting to the FCC's latest net neutrality order said the Commission was wrong to classify broadband as a Title II service because it incorrectly assumed the major questions doctrine wasn't applicable.

FCC OPENS NOTICE OF INQUIRY ON IMPACT OF DATA CAPS

The **FCC** is officially looking into broadband data caps and their place, or lack thereof, in the internet landscape. The agency released a Notice of Inquiry Tuesday to launch a formal proceeding into the practice and if it interferes with the competitive environment or consumers' ability to easily access broadband. "We first seek comment on current trends in consumer data usage. We next seek comment on the impact of data caps on consumers, consumers' experience with data caps, and how consumers are informed about data caps on service offerings," the FCC wrote in the NOI. It also looks to examine the impact of data caps on competition as well as its legal authority to take action regarding data caps. FCC commissioner *Brendan Carr* released a statement that with this action, the FCC is starting itself down a path of directly regulating rates. "Prohibiting customers from choosing to purchase plans with data caps—which are more affordable than unlimited ones—necessarily regulates the service rates they are paying for," he said. "Today's NOI is legally infirm, too, for want of statutory authority. Indeed, the Sixth Circuit has stayed the FCC's Title II decision, which is based on the same claims of authority that the FCC invokes today." **NCTA** argued flexible pricing options that are market-driven actually benefit customers at the end of the day. "Those who use less data can choose lower-cost options reflecting common-sense economics," the association said in a statement. "Instead of launching a proceeding that needlessly questions the accepted, pro-consumer benefits of more competitive options, the FCC should return its focus to clearing the real obstacles that impede our national drive to bring internet to all." **Public Knowledge** stood on the other side of the argument, supporting the FCC's move and calling data caps one of the most mysterious and abusable limits for consumers using broadband. SVP *Harold Feld* said in a statement that despite the widespread use of data caps for both mobile and wireline broadband, there is currently virtually no way to know how they impact individuals. "Even in our daily lives, people increasingly use video calling and video streaming as part of their professional and personal lives. Are bandwidth caps preventing people from using the applications they need?.. Right now, we have no way to know," he said.

"The FCC has both the authority and the responsibility to investigate these questions whether or not broadband is a Title II telecommunications service or Title I information service."

FRONTIER SHAREHOLDERS STAND AGAINST VERIZON BUY

One of **Frontier's** top shareholders isn't on board with **Verizon's** proposed purchase of the provider. **Copper Investors**, which currently owns approximately 800,000 of the company's shares, sent a letter to Frontier's board Tuesday expressing its strong opposition to and intention to vote against the transaction because it believes Verizon's offer of \$38.50 per share significantly undervalues Frontier and fails to adequately compensate stockholders for the deal's expected synergies. It believes Frontier's standalone value is 24-62% above Verizon's proposed price. "Frontier does not require strategic partners. To the contrary, the Company has the strategy, expertise and access to funding to complete the planned network build to 10 million fiber passings," Copper noted in the letter. It also laid out how much Verizon stands to benefit from the transaction. Verizon has committed to at least \$500 million in cost synergies by 2029, and churn benefits alone are likely to equate to at least half of the identified cost synergies. Other material sources of value include Frontier's net operating losses, which equates to an approximately \$1 billion cumulative cash tax shield. "Finally, Verizon will be able to immediately re-finance Frontier's debt which we believe could save up to \$270 million per year. This is also a cost saving that we believe Frontier would be able to access as a standalone entity, as the improved cash flow profile of the business would lead to lower cost of debt," the letter said. "In addition to these synergies, Verizon will be able to economically convert several million additional copper passings to fiber beyond the current 10 million plan." Copper isn't alone with major shareholders **Cerberus** and **Glendon Capital** also expected to vote against the Verizon-Frontier combination. Even some analysts have spoken out against it. "We have been urging the Frontier shareholders to reject the deal at \$38.50 and ask for a higher price. We have shown that the deal is accretive to Verizon shareholders with conservative synergies up to a price of \$71," **New Street Research** said in a note to clients.

MAX EXPANDS DISTRIBUTION

Warner Bros. Discovery is launching **Max** in seven new markets next month. Come Nov. 19, Max will be rolled out in Hong Kong, Indonesia, Malaysia, Philippines, Singapore, Thailand and Taiwan. The plans and pricing will look different from other

rates and vary by country and provider, with full details to be announced in the coming weeks. Folks can subscribe through the app, online or through select partners, which will also be unveiled in the next few weeks.

will have branding and signage throughout the studio as well as in-game broadcast features and commercial programming. The studio hosts a trio of live shows including “Bruins Face-Off Live,” “Bruins Overtime Live” and “Bruins Postgame Final Live.”

COMCAST NBCU OFFERS HURRICANE MILTON ASSISTANCE

Comcast NBCU is providing \$500,000 in cash and in-kind contributions to community organizations in Florida to assist with the devastation left in the wake of Hurricane Milton. \$250,000 in cash will go to 11 community-based organizations and the Florida Disaster Fund, and Comcast NBCU will provide \$250,000 worth of in-kind contributions via airtime for public service announcements to keep Floridians informed.

FIBER FRENZY

Ohio-based ISP NKTelco is expanding its Flight Fiber network to North Star, Ohio. Construction is underway and the company expects to connect customers by early 2025. – Zippy Fiber rolled out its colocation services to over 200 facilities across Idaho, Oregon and Washington. Zippy’s colocation offering enables low latency, reliability and security measures without a business needing extensive financial resources to construct and maintain its data. – A \$1.3 million boost is coming to GoNetspeed thanks to Connecticut’s allocation of the American Rescue Plan Act Capital Project Fund. The company will use the money to expand to an additional 283 locations throughout East Windsor and Meriden. – California provider Race Communications installed fiber to its first set of homes in Palmdale. Residents will be able to get the company’s offerings of up to 10 Gbps. The first phase of Race’s project will bring service to more than 6,000 residents.

WOW! REVEALS NEW SENIOR TERM LOAN

WOW! subsidiary WideOpenWest Finance, LLC, closed on a new super-priority credit agreement including a new Senior Term Loan in an aggregate principal amount of \$200 million with a group of existing lenders. The super-priority credit agreement will mature in Dec. 2028 and have priority over WOW!’s existing credit facility. The funding will be used to re-accelerate the provider’s greenfield fiber strategy. WOW! expects to reach 400,000 homes passed in greenfield markets by 2027.

WEEKLY RATINGS

Playoff baseball is giving a push in the cable ratings for the week of Oct. 7-13. ESPN recorded 2.86 million viewers P2+ in primetime during the week as college football, Monday Night Football and MLB postseason coverage continue. Fox News followed with 2.49 million and TBS third with 1.54 million, while MSNBC and Fox Sports 1 recorded 1.24 million and 1.18 million, respectively. In total day, Fox News topped the rankings with 1.56 million. ESPN came second with 878,000 and MSNBC third with 874,000. CNN had 558,000 for the week, and TBS rounded things out with 532,000.

GET WITH THE FLO

FloSports’ new streaming platform dedicated to college athletics launched Tuesday. FloCollege will offer live games from several Division-I, II and III conferences, with the 2024-25 season expected to have over 12,000 games streamed on the platform. Initial pricing is set at \$19.99 per month or \$107.88 per year.

PROGRAMMING

Apple TV+ animated preschool series “Wonder Pets: In The City” premieres globally on Dec. 13. The streamer also renewed “Slow Horses” for a sixth season. – Christina Haack’s “Christina in the Country” returns for a second season on Nov. 12 at 9pm on HGTV. The show, which attracted more than 12 million viewers in its first season, sees the designer build custom homes for clients in the Nashville area.

FUBO, THE ATHLETIC COLLAB

Fubo and The Athletic announced a multi-year partnership that’ll see the vMVPD become the sports publication’s first-ever streaming partner. Fubo will be implemented into live game blogs and other content on The Athletic’s website as a sports streaming destination. The Athletic will work with Fubo to provide an engaging content experience through custom in-content modules that feature relevant game information. Additionally, the two will jointly develop new product features on The Athletic platform that’ll be tailored toward enhancing the user experience.

PEOPLE

Charter Communications upped Rohan Kumar to SVP, Digital Sales & Retail. He’ll oversee Spectrum’s strategic retail relationships while also leading digital sales operations across the company’s website, digital call center and beyond. Kumar, who joined Spectrum in 2014, will continue to report to EVP, Sales Christian Ruiz.

NESN STUDIO ADDS WASABI

NESN is adding some Wasabi to its studio, but not the kind you can eat. The RSN struck a multi-year deal with Boston-based cloud storage provider Wasabi Technologies to make it the official studio sponsor of NESN’s home Bruins telecasts. Wasabi