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WHAT THE INDUSTRY READS FIRST

Back at It: Sixth Circuit Hears Title II Oral Arguments

Thursday's round of the net neutrality boxing match had less fervor surrounding it compared to previous bouts. There were no protestors stationed outside of the courthouse in downtown Cincinnati, no large-scale awareness campaigns online and the courtroom had plenty of open seats as cases were made. By the end of the one-hour hearing, at least one of the judges indicated that they thought both sides had solid arguments.

"I think there are good arguments on both sides, and I think there's a lot of ambiguity here," Judge *Richard Griffin* said.

The legal battle between ISPs and the **FCC** in the Commission's latest attempt to classify broadband as a Title II service hit the Sixth Circuit Court of Appeals on Thursday morning for oral arguments. While petitioners argued the major questions doctrine is viable and relevant in this case, there was more of a focus on the text of the Telecommunications Act of 1996 and whether it gives the FCC the authority to make such a change.

Jeff Wall, a partner at **Sullivan & Cromwell** representing associations and ISPs, opened his argument by saying the FCC's order presents a major question. However, he was quickly stopped by Judge *Raymond Kethledge*, who said he'd rather spend time talking about the actual text of the Telecom Act and what power it could potentially give the FCC.

"I'll just tell you upfront, I'm much more interested in what the words mean this morning than a doctrine which makes us look to something other than what the words mean," Kethledge said.

"We can talk about that later, maybe, but speaking for myself I'm going to be pretty impatient until we actually talk about the words."

Griffin then chimed in and pondered if using major questions still applies to net neutrality in a post-Chevron Doctrine world, but with the Supreme Court not touching major questions, Wall argued the Chevron decision doesn't undermine it.

Wall was also asked whether telecommunications transmission is defined as only the transmission of information, or does it offer more than that. Wall said if it involves interacting with information, then it should be classified as a Title I information service. He referenced the Computer II framework that was established in 1976 to separate basic and enhanced services as well as the Modification of Final Judgement decree that stemmed from the 1974 antitrust lawsuit *United States v. AT&T*. Additionally, he said "no one" thought of broadband as a telecommunications service until 2015.

"The question is, is it only [the transmission of data] ... or does it offer some kind of capability to the person using the service to interact with electronic information, information online. And that has always been a central feature of what started as enhanced service under Computer II, and then became information services in the MFJ that was then codified in the '96 act," Wall said.

The FCC argument was led by its Deputy General Counsel and Litigation Division Chief *Jacob Lewis*. He, unsurprisingly, argued that the order is not a major question but rather a statutory interpretation, adding that major questions applies when it involves an unexpected act to obtain power—and this order

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Contact Ellen Kamhi at
917.626.5574 or
ekamhi@accessintel.com



wasn't unexpected. That's when Griffin chimed in and asked if the FCC's previous changes of stance on net neutrality show the order is ambiguous and thus Congress should be the one to determine whether broadband is a Title I or II service. Lewis reiterated that the Commission has the authority to place broadband under Title II because major questions doesn't apply.

"We're the Federal Communications Commission. This was a Communications Act. These are fundamental definitions in the Communications Act. It would hardly be a surprise to anybody, including Congress, that the Commission would have to identify the services that are telecommunications services and information services," Lewis said.

Lewis equated the petitioners' argument to confusing a highway versus the destination. Kethledge—who ran point for most of the hearing—said he's still focused on the capabilities that broadband offers and how much that plays a role in how it's classified.

"When I read your brief, it seems to me you're saying that the broadband provider does not itself generate, transform, process, etc. information. And therefore, it's not providing an information service," Kethledge said to Lewis. "To be very candid with you, the problem I have—and I always want people to tell me why I'm wrong—the problem I have with that is the word 'capability,' that a broadband service is an information service not only if it's doing the generating and processing, but if it offers a capability for the end user to have those things happen to information."

Up next to deliver arguments was *Daniel Woofter* of **Goldstein, Russell & Woofter** on behalf of intervenors including **Public Knowledge**, **Free Press**, **New America's Open Technology Institute** and the **Benton Institute for Broadband and Society**. He brought up Griffin's question on whether the order is ambiguous because of the FCC's change in view, saying it skews the other way because Brand X showed net neutrality isn't a major question.

"There are multiple decisions now that said that the best reading of this statute is that BIAS is a telecommunications service," Woofter said. "You have the dissent from Justice [Antonin] Scalia in Brand X. You have the concurrence from Judge [Patricia] Millet in Mozilla. You have City of Portland—you have multiple textualist judges saying, 'No no, a pet store that sells puppies with leashes is not just offering leashes.'"

Wall closed the arguments by labeling the FCC's order as a power grab. "It's about unlocking a suite of government powers to take an industry that has historically been unregulated by the federal government," he said. "It is taking [the industry] into a world of heavy-handed regulation that will extend far beyond net neutrality. It will extend to everything about the internet. Judge [Brett] Kavanaugh made this point ... He said it wrests control of the internet from consumers and ISPs and puts it in the government. And he said that's indisputably a major rule under any plausible conception of the test."

Now, industry stakeholders will await the decision from the three judges before more appeals are potentially made and the net neutrality merry-go-round continues.

COMCAST EXPLORING SPINNING OFF CABLE NETWORKS

Comcast NBCUniversal is considering spinning off its cable networks into a well-capitalized company owned by its shareholders in a move it says would allow those entities to better take advantage of changes in the media landscape. The possibility was floated by **Comcast Corp.** President *Mike Cavanagh* during Thursday's 3Q24 earnings call, though he said the company isn't ready to talk about specifics and will check back in when firm conclusions have been reached. As for opportunities the new venture could explore, he highlighted partnerships in streaming and other ways to establish the best path forward for video assets as consumer behavior changes. For now, a study is going to be commenced to look at whether it's a good idea at all. "The questions about how to do it are the reason we're announcing here that we want to study it. There are a lot of questions to which we don't have answers," Cavanagh said. "So we want to do the work, and we want to do the work with transparency around it. Rumors fly and we expect that, but we want our shareholders to understand what we're willing to look at." He noted the industries in which Comcast NBCU plays in are all in states of transition, and the company has a strong hand. But at the same time, Cavanagh believes there may be smart ways to play some offense when you combine Comcast NBCU's balance sheet, the current management team and its asset mix. When it came to broadband subscribers, net losses reached 87,000 in the quarter. But when you exclude ACP-related subscriber loss, Comcast would have reported 9,000 broadband net additions. Of the 96,000 ACP-related customer losses, CFO *Jason Armstrong* said approximately one-third of those were direct losses experienced in the quarter while the other two-thirds reflect the reserve Comcast took for the number of subscribers it expects will turn in the coming months due to non-pay or delinquency status. The operator is continuing to grow its footprint, and projects that it will add more than 1.2 million new homes passed this year. **Xfinity Mobile** continues to grow with domestic lines increasing 20% YOY to 7.5 million and net additions reaching 319,000 in the third quarter. **Peacock** paid subscribers rose 29% YOY to 36 million with net additions in the quarter reaching three million. Domestic video customer net losses were 365,000, and while there's no doubt it is still on a downward trend, Comcast did see some improvement in the segment this quarter. **Comcast Cable** President/CEO *Dave Watson* attributed some of that to continued stabilization in video, churn reduction as Comcast continues to push Xfinity Mobile bundles

and high engagement numbers from moments like the Olympics. The Now TV platform, which includes more than 40 live channels, a growing number of integrated FAST channels and a subscription to Peacock Premium for \$20/month, is also being adopted at a steady rate.

GREATREX NAMED NCTA CHAIR

Cox Communications President *Mark Greath* was elected as Chairman of **NCTA – The Internet & Television Association's** board, with outgoing NCTA chair/**Midco** CEO *Pat McAdaragh* to serve as interim Secretary. Former **Paramount** CEO *Bob Bakish* had previously served as Secretary, but left the board shortly after stepping down from his post in late April. *Chris McCarthy*, Co-CEO of Paramount Global and President & CEO of **Showtime/MTVE Studios**, was elected to serve as an At-Large Programmer Director for a two-year term. **Charter** President/CEO *Chris Winfrey* was elected as Vice Chairman, with **Comcast** Connectivity & Platforms President/CEO *Dave Watson* tapped as Treasurer. **Sjoberg's Inc** President/CEO *Richard Sjoberg* was re-elected to serve as a Rural/Midsize System Director for another two-year term. Incumbents *Paul Buccieri*, President & Chairman of **A+E Networks Group**, will serve another two-year term and *Suzanne Scott*, CEO of **Fox News Media**, was elected for one year to finish out the remaining term of a seat previously vacated. **CommScope** President & CEO *Chuck Treadway* was elected to serve a two-year term. Other directors who serve on the NCTA Board were not subject to reelection.

MAX COMES TO SLING TV

DISH and **HBO** appear to have completely buried the hatchet. DISH removed HBO from its lineup in 2018 due to a dispute with then-parent WarnerMedia. The two didn't settle their spat until 2021, signing an agreement that made HBO Max and HBO available to DISH subscribers. But the deal didn't extend to vMPVD **Sling TV**. Now, thanks to a new deal with **Warner Bros. Discovery**, Sling TV users can add the **Max** Ad-Free plan to their subscription starting at \$16.99 per month. Sling is also offering a new bundle that provides new and existing customers a \$5 monthly discount when they subscribe to Sling Blue with Max or Sling Blue + Orange with Max.

CARRIAGE

Paramount+ launched a pop-up channel this month on **Vizio's** WatchFree+ that

features free access to select episodes of Paramount+ series such as "Tulsa King," "Dexter," "Frasier" and "Special Ops: Lioness." Vizio said the pop-up has generated hundreds of thousands of sessions, with Vizio's Content Connections driving viewers into the Paramount+ app and click-through rates above average industry benchmarks. – **Newsmax** is now live on **Molotov**, one of France's leading TV platforms, launching days before the U.S. election. The deal gives Newsmax access to 19 million Molotov users in France and French-speaking territories, with subscribers able to tune into the channel via the platform's free tier.

SAMBATV SNAGS SEMASIO

Audience insight firm SambaTV has acquired Semasio, which specializes in contextual targeting and audience data. SambaTV said the move bolsters its position in AI-powered, privacy-first advertising solutions across digital and connected TV platforms. Semasio, with over 100 customers in 50 countries across North America, Europe, and Asia Pacific, maintains over 1 billion stable user profiles globally and analyzes over 2.5 billion web pages each month, enabling advertisers to optimize campaigns in both ID-based and ID-less environments. Semasio will continue to operate as an independent business led Zac Pinkham who has been appointed general manager. The financial terms of the agreement were not disclosed.

DIRECTV'S ELECTION HQ

DirecTV will once again create an "Election HQ" for Election Day that features live feeds of **Fox News**, **CNN**, **MSNBC** and **Newsmax** alongside stats like Senate and House breakdowns by party and state-by-state Presidential projections powered by the Associated Press. DirecTV satellite customers with a Genie device will be able to access "Election HQ" which will be identical on channels 71 and 200. DirecTV Stream customers using a Gemini or Gemini Air device will have access to the same simultaneous news feeds but through a preloaded app that will automatically appear in their "Featured Apps" carousel. The election app marks the beta test for multiview functionality on DirecTV's streaming platform. Election HQ will be available from Nov. 4 until the presidential election results are definitive.

BASIC CABLE P2+ PRIME RANKINGS* (10/21/24-10/27/24)		
MON-SUN	MC US AA%	MC US AA (000)
FNC	0.885	2808
ESPN	0.652	2069
MSNBC	0.409	1296
CNN	0.295	936
TNT	0.235	746
HALL	0.219	695
HGTV	0.173	550
INSP	0.157	497
USA	0.148	469
DISC	0.136	430
NWSMX	0.119	379
ESPN2	0.119	377
TLC	0.119	376
FOOD	0.113	357
HIST	0.112	354
TBSC	0.109	346
HALLMYST	0.102	323
ID	0.090	285
TVLAND	0.089	283
GSN	0.077	244
WETV	0.074	233
A&E	0.071	226
AMC	0.070	223
FX	0.069	220
BRAVO	0.069	218
LIFE	0.067	214
REELZ	0.065	205
NAN	0.062	196
NATGEO	0.059	187
BET	0.059	186
OXY	0.057	181
ADSM	0.056	179
SYFY	0.056	176
FRFM	0.055	175
NFL	0.049	155
TRAVEL	0.048	153
PRMNT	0.048	151
FETV	0.047	150
MTV	0.047	149
SNDNCE	0.043	136
COM	0.042	132
FX2	0.041	131
IFC	0.040	128
CMT	0.039	124
DSNY	0.036	115
APL	0.036	115
GAF	0.036	114

*P2+ L+SD rankers are based on national Nielsen numbers, not coverage.