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Current Telecom Developments

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Challengers File First Suit against Net Neutrality Order

On Monday, USTelecom and Alamo Broadband filed the first of what is expected to be a flurry of legal challenges against the FCC's decision last month to reclassify broadband Internet services as telecommunications services pursuant to Title II of the 1934 Telecommunications Act.

Eleven days after the FCC publicly released the 300-plus page order, USTelecom, a trade group representing many of the top Internet service providers (ISPs) in the U.S., filed suit in the D.C. Circuit Court. At the same time, Alamo, a Texas-based ISP, submitted its petition for review to the Fifth Circuit Court of Appeals in New Orleans. Both appellants claim that the order—which prohibits the blockage, throttling and prioritization of lawful web content and imposes Title II common carrier regulations on broadband ISPs with FCC forbearance—is "arbitrary, capricious, and an abuse of discretion" within the meaning of the Administrative Procedure Act (APA). Although the 60-day filing window for judicial appeals of FCC rulemaking orders does not open until such orders are published in the *Federal Register*, USTelecom and Alamo told both courts that they were filing at this time "in an abundance of caution," as the FCC outlined the Title II rules in an accompanying declaratory ruling for which the appeals period ends on the tenth day after FCC release. Because the FCC posted the Title II order to its website on March 12, the filing deadline for the declaratory ruling portion of that order would be March 23. The order, meanwhile, has yet to be published in the *Federal Register*.

Asserting, "we do not believe the [FCC's] move to utility-style regulation invoking Title II authority is legally sustainable," USTelecom President Walter McCormick maintained, "we are filing . . . to protect our procedural rights in challenging the recently-adopted open Internet order." A spokesman for the FCC countered, however, that "the petitions for review filed today are premature and subject to dismissal."

Supreme Court to Consider DirecTV Class Action Dispute

Without issuing further comment, the U.S. Supreme Court agreed Monday to review legal claims brought by DirecTV against the decision of the California state appeals court to allow a class action lawsuit to proceed against the direct

satellite service provider. The suit challenges DirecTV's practice of imposing early termination fees (ETFs) on customers who prematurely cancel their service contracts with the company.

The case at hand, *DirecTV Inc. v. Imburgia*, began in 2008 when a pair of DirecTV customers filed a complaint alleging that DirecTV violated California state law by imposing ETFs on customers. Although DirecTV pointed to clauses in its customer contract requiring arbitration in such disputes, a Los Angeles trial court granted the petitioners' motion for class action status based on California consumer protection laws that prohibit contract clauses deemed to be "unconscionable." DirecTV later sought relief before the California Court of Appeals, arguing that the Los Angeles court decree conflicts with a 2013 ruling of the U.S. Court of Appeals for the Ninth Circuit, which concluded that the Federal Arbitration Act (FAA) preempts California state law against unconscionable contracts. The state appeals court, however, ultimately ruled for the class action litigants, observing, "if the customer agreement expressly provided that the enforceability of the class action waiver 'shall be determined under the (non-federal) law of your state without considering the preemptive effect, if any, of the FAA,' then that choice of law would be enforceable." Arguing that the Ninth Circuit case in question "cites no authority to the contrary," the state appeals panel determined that the Los Angeles court "properly denied the motion to compel arbitration."

Requesting Supreme Court review, DirecTV cited previous case precedents in favor of arbitration that include the high court's 2011 decision in *Conception v. AT&T Corp.* In that case, the justices struck down a California state appeals court ruling invalidating provisions in the AT&T wireless subscriber contract that required customers to resolve grievances through binding arbitration. The Supreme Court will take up the DirecTV matter during its upcoming term in October.

Hutchison Whampoa Strikes $15 Billion Deal for O2

Officials of Telefonica confirmed their agreement on Tuesday to sell O2, the Spanish carrier's British wireless unit, to Hutchison Whampoa of Hong Kong in a cash deal valued at £10.25 billion (US$15.3 billion).

Following in the wake of BT's recent $19.1 billion pact to acquire Everything Everywhere (EE), the largest provider of mobile network services in the United Kingdom (UK), Tuesday's agreement represents the second major transaction to impact the British wireless sector in a month. Hutchison already owns Three, a key competitor against EE, O2 and Vodafone in the UK market. In addition to leapfrogging EE as the largest wireless carrier in the UK with 33 million subscribers, the combination of O2 and Three would reduce the number of British national wireless carriers from four to three. Although competition authorities in the UK have previously stated their preference for four national wireless operators, executives at O2 voiced confidence that the deal will be approved within a year.

Under the terms of the agreement, Telefonica will receive an initial cash payment of $13.83 billion for O2. At a later date, Hutchison will remit an additional payment of up to $1.49 billion that will be determined by the performance of the merged entity and its ability to meet prescribed cash flow targets. As Hutchison managing director Canning Fok boasted that the merger "will create a business with unmatched scale and strength," Dave Dyson, the CEO of Three UK, projected that: "Three's leadership in mobile data together with O2's strength on network coverage . . . will bring very real benefits to businesses and consumers throughout the UK."

European Union to Develop Digital Single Market Strategy

Members of the European Union (EU) College of Commissioners emerged from an orientation meeting on Wednesday with plans to develop regulatory and other strategies toward a single, EU-wide market for digital network and e-commerce services.

Complaining that "digital services too often remain confined to national borders" and that digital opportunities throughout the EU are often thwarted by barriers that range from "geo-blocking or cross-border parcel delivery efficiencies to unconnected e-services," the commissioners agreed to create a "Digital Single Market Strategy" by May that will focus on three goals. The first area for action is improvement of consumer and business access to digital goods and services. To that end, the European Commission (EC) will strive to (1) facilitate cross-border e-commerce, (2) eliminate geo-blocking practices through which video sharing websites limit access to their content to certain countries, (3) modernize copyright law "to ensure the right balance between the interests of creators and those of users or consumers," and (4) simplify value-added tax arrangements to boost cross-border business activities. As part of its second goal, which is to shape the environment for robust digital networks and services, the EC said it would review current media and telecommunications rules to encourage investment in infrastructure and improve spectrum coordination among EU member states. To bring about its third goal of establishing a digital economy with "long term growth potential," the EC is urging swifter development of standards that ensure "interoperability for new technologies."

Canadian Regulator Mandates Cable à la Carte

In a development watched closely on both sides of the U.S.-Canadian border, the Canadian Radio-television and Telecommunications Commission (CRTC) voted late last week to require operators of cable, satellite and Internet protocol television networks to offer à la carte program options by the end of next year that will allow customers to select and pay for the channels they want.

As in the United States, multichannel video program distributors (MVPDs) in Canada are facing increasing competitive pressure from Netflix and other web-based streaming services that offer a low cost or no-cost alternative to traditional cable services while providing users with streamlined viewing options. Canada's top three MVPDs—BCE, Inc., Rogers Communications and Shaw Communications—have all responded in recent months with online streaming services of their own that they have offered exclusively to their cable subscribers. Notwithstanding these moves, CRTC said it felt compelled to "take positive steps to bring about greater choice and flexibility in the Canadian television system" as the nation's cable operators have shown a lack of willingness to "move to more flexible packaging options on their own."

Capping 18 months of consultations and hearings, the CRTC decided last Thursday to implement the à la carte regime in two stages. During the first stage, which begins in March 2016, MVPDs will be required to offer a basic cable package to customers which would be capped at maximum monthly rate of C$25 and include local broadcast stations as well as the top U.S. networks. Additional channels may be offered through small, bundled packages or on a pay-as-you-go, à la carte basis. Starting in December 2016, MVPDs will be required to offer subscribers an à la carte option as an alternative to any bundled package offering that is available, and viewers will be able to continue with bundled channel packages if they prefer. MVPDs must also carry independently-owned channels as part of at least one channel package. The CRTC also adopted a code of conduct for retransmission negotiations among MVPDs and broadcasters under which channels "cannot be unduly withdrawn from subscribers as a result of a commercial dispute at the wholesale level."

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