

C-Band: Legislation Gains Momentum with Golden Carrot, While Ex Partes Suggest Buyers' Concern and CBA Acquiescence to FCC Auction

December 9, 2019 by Blair Levin

In this note we discuss why we think the odds of legislation dictating critical terms of the C-Band reallocation process are greater than we had previously thought, though much depends on several critical decisions of the Congressional Budget Office (CBO). In that light, the upcoming mark-up of the Thune/Wicker Bill is also more important than we had thought, both for what it reveals about the legislation but also for what, if anything, it tells us about how CBO is thinking about whether the C-Band auction can be scored for new expenditures, whether CBO believes that the score could be aided by a faster transition, and whether CBO believes that faster transition requires significant payments to the CBA members beyond relocation expenses.

In addition, we review several recent ex partes, which to us demonstrate an alignment of the key buyers the process has not enjoyed to date, but a difference in emphasis and no details about how to achieve their mutual objectives.

Possibility of legislation greater than we thought: whether it is good for CBA depends on CBO. When Chairman Pai announced he would favor an FCC run auction, Senators Thune and Wicker immediately announced legislation codifying that decision and, among other things, mandating that the FCC “capture for the taxpayer at least 50 percent of the fair market value of the spectrum.” At the time we thought it was a smart political move, basically signaling to the CBA that their efforts to run the auction had lost and they should not try to obtain more than 50% of the auction proceeds. We did not, however, think it likely that Congress would pass the bill.

Barrier to legislation is Congressional dysfunction, not partisan politics. We still don't think legislation will be enacted, but we think the odds are greater than we thought a week ago. Our view of the negative odds was not about the usual difficulty of bridging the partisan divide that has stalled a number of other legislative efforts. In this case, the Democrats, who favored the FCC run auction, were pleased with the Pai/Thune/Wicker decision on both the auction management and the increased proceeds for the government. There are differences but, as discussed below, those can be bridged.

The real problem is simply the dysfunctionality of Congress, which has not been passing much other than judges in the Senate and must-pass budget bills. In light of those dynamics we placed odds of something passing as well below even.

The golden carrot is not the collection of funds but the spending of funds. But there is one critical factor that actually may have the greatest impact on whether legislation gets over the finish line. That is the possibility that if Congress acts quickly and the CBO agrees, Congress can direct some or all of the funds that go to the United States to then be spent on some favorite causes. That is, if a bill does not pass, any auction proceeds

going to the United States go to deficit reduction and neither Congress nor the FCC can spend it on such things as supporting rural broadband. If, however, Congress does pass a bill and the CBO says that the auction was not contemplated in the original ten year CBO scoring in legislation that passed in 2012, Congress can determine that billions of dollars go to favorite programs without the members being accused of growing the debt.^[1]

All depends on CBO scoring. We do not intend to get into the arcane details of how the CBO scores auctions.^[2]

At a high level, however, investors should understand that about a decade ago, CBO scored all the auctions that it believed would be done in the next decade, meaning that none of the auction revenues in that period could be allocated for new spending. Unless CBO changes that position, the auction could happen no earlier than 1/1/2023 for there to be auction proceeds that could result in new spending. In that case, the motive for Congress quickly passing a bill disappears.

It appears, however, that the CBO may take the view that back when they did the original scoring, no one contemplated a C-Band auction and therefore, the auction revenues can now be scored and then spent. To make matters more complicated, the CBO is also evaluating whether, in order to make that finding, Congress needs to act before the FCC acts in order to be able to score the auction.

Combining the Republican and Democratic approaches. Last week, Democratic Senators Schatz, Markey and Cantwell introduced an “Investing in America’s Digital Infrastructure Act”. It is similar to Thune/Wicker in mandating that the FCC run the auction but requires less spectrum to be auctioned and gives the FCC more time to do so. It also directs the FCC to collect all the funds and directs the funds to be deposited either into a C-Band reimbursement fund, not to exceed \$2.5 billion to reimburse reasonable relocation costs, with the rest to be deposited into a “Digital Divide Trust Fund” which is to be used for various infrastructure and other uses to narrow various digital divides.

It is not difficult to conceive of merging the Schatz/Markey/Cantwell framework with the Thune/Wicker framework.^[3]

The differences are not great. But there is one difficult part.

Ay, there’s the rub: the transition. The problem, which has been the problem all along, is how to assure a quick, orderly transition.^[4] The question, as it has been all along, is how to accomplish that without the full cooperation and effort of the current satellite operators, as well as other stakeholders.

Key question: how does CBO view the need to pay CBA members for accelerating the transition? None of this is, on its face, good for the CBA members. Legislation would largely cut off the threat of litigation and, if the CBO allows scoring, it is likely not to result in a lot of money as money to CBA members could be seen as competing with congressional spending. Moreover, members of congress are unlikely to understand details of the transition and the ways in which satellite operators can accelerate that transition.

But there is a way in which the CBO process could end up being good for CBA members. The CBO will likely understand that the value of the spectrum, and therefore the score, depends on many factors but one of the most important is *when will the spectrum become available*. If, for example, the value of the spectrum if the spectrum is available in three years is \$50 billion (as predicted by our colleague Vivek Stalam ([LINK](#))), then the value of the spectrum if it is not available for ten years would likely be tens of billions less. If CBA can convince CBO to tell Congress that Congress will actually get to distribute more funds if the spectrum reallocation is accelerated, and that the best way to do that is to pay CBA members to accelerate the transition, then various forces will align and the framework for the auction, transition, and allocation of funds can be accomplished through legislation, with the FCC filling in the details and overseeing the auction and transition. In this scenario, the CBO essentially replaces the FCC as the key government institution providing expertise on what is the

rationale and the appropriate amount for the United States to pay the CBA members for an accelerated transition. If, however, CBO does not agree with the analysis of CBA or cannot convince Congress of its analysis, the CBA is likely to be better off if no legislation passes, as there is still sympathy for transferring incentive payments to the CBA members among the FCC majority.

What will happen? We don't know. The process is not subject to any kind of FCC *ex parte* process so we rely on what various people tell us, and that is all over the map. The thing we do think is knowable, however, is that the markup scheduled for Wednesday of this week may prove to be more important than we had previously thought. We will be looking for signs of political comity between the parties but, just as important, we will be looking for signs of how CBO views the CBA argument that paying its members for an accelerated transition is economically rational and signs for how CBO views the argument that the C-Band auction proceeds were not included in the original scoring and therefore should be allowed to be scored, and spent, anew.

Post Pai decision *ex partes*: the parties show their interest but not the details. We are now seeing a round of *ex partes* that occurred after Pai's announcement that he would recommend an FCC run auction. The *ex partes* are all consistent with our view that that decision will not be relitigated and that we are now just beginning a process in which the FCC has to create a completely new record to address the many questions that would not have been asked if the CBA ran the auction. The *ex partes* told us almost nothing about how they would answer those questions but they did tell us something about the parties' key concern.

AT&T: Focus on details of transition. We have long thought AT&T the most important "swing vote" in this proceeding so its filings, to us, carry considerable weight. In its most recent [filing](#), it appeared to direct the FCC to now focus on the transition, writing that in its meetings its representatives emphasized "the transition plan will be critical, and the Commission should therefore develop and supervise the transition plan itself after further comment. In particular, AT&T explained that the Commission should select a Transition Administrator that has experience managing these types of complex transitions. As AT&T noted, content providers will need to work with their affiliates to plan the upgrades that are needed and when and how to install the new equipment. Under Commission supervision, C-Band users should generate estimated costs and timelines that will allow the Commission, after notice and comment, to build a comprehensive transition plan, as it did in the 600 MHz auction. AT&T also urged the Commission to seek comment on draft service and technical rules in a further notice of proposed rulemaking."

Verizon: Focus on speed of spectrum clearing. Verizon's [ex parte](#) expressed support for an FCC auction, discussed the clearing process and, in doing so, "emphasized that the Commission should identify appropriate incentives for clearing and penalties for failing to meet its benchmarks and deadlines." Verizon was, and remains, the most important supporter of CBA but its *ex parte* tells us the debate over who should run the auction is over.

T-Mobile: Provide incentives to search for lower-cost solutions. T-Mobile [said](#) it now favors a straight forward auction, instead of its earlier proposal to run a reverse auction. It went on to advocate that the FCC "should require that individual satellite operators accommodate existing users, in the manner chosen by those users. Any spectrum relinquishment payments to satellite operators should be made only once satellite operators certify that end-user accommodation is complete. To the extent that satellite operators do not use all funds designated for user relocation, they may retain those funds. The quicker relocation occurs, the quicker satellite operators may access the relinquishment payment. By being permitted to retain excess user relocation funds, satellite operators will be incented to evaluate lower-cost options like fiber."

CBA: Surrenders on auction, but without giving up right to disagree. CBA's [ex parte](#) was quite brief but

non-argumentative, essentially signaling they are not relitigating the auction management decision. The ex parte reports that “the meeting participants discussed recent developments in the C-band proceeding, including Chairman Pai’s announcement that the FCC is interested in conducting a public auction, and how the CBA could work cooperatively with the FCC to develop an effective plan in the shortest possible timeframe and achieve the best outcome for the American public while protecting the interests of its users and the rights of its companies.”

Bottom line: Key buyers now more in alignment but don’t expect details until next year. For us, the key takeaway is the that the key buyers^[5] are closer to alignment than in the past, suggesting that the FCC has the opportunity to gain a consensus that eluded them in the first two years of this proceedings. Investors, however, should understand that the FCC has not yet asked a number of questions that go to the concerns of the buyers. We expect those questions to be asked in January but we do not expect detailed proposals until after the questions are asked.

Congressional investigation into POTUS/Pai conversation unlikely. Finally, we note that some have asked whether the C-Band process might be disrupted by a Congressional investigation into White House influence on the FCC Chairman’s decision, much as the question of White House influence on then Chairman Tom Wheeler’s decision to support Title II led to several congressional investigations. We think the risk is very low. First, the Republican investigations, while time consuming, did not disrupt Wheeler’s efforts. Second, perhaps more important, the Republican investigations involved process but their underlying concern was the actual policy. They would not have expended such energy if they also supported Title II. Here, the Democrats were largely in agreement with Pai’s decision to have the FCC run the auction and therefore their motives for investigating the process are limited.^[6]

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1. In a way, the whole exercise is absurd, as Congress, as it did in the case of the 2017 tax bill, often effectively spends money without worrying about increases in the deficit. So here, Congress could directly fund the needs they wish to fund. But within that absurd play, which does include some rules, such as “paygo” (requiring a source of funding) it simply is better to spend money when there is a source funding the expenditure, as there would be here.
 2. We decline to do so in part because they are not relevant and you are busy. But we also admit, even though we have had extensive dealings with the CBO, we are not sure we really understand how it actually operates and makes decisions. It is a murky process, often non-political, but then sometimes, very much so.
 3. We understand that the House Democrats are pulling together a bill that uses a similar framework but could differ in details.
 4. The Schatz/Markey/Cantwell bill calls for it conceptually, saying the FCC “shall clear electromagnetic spectrum...in a manner that ensures that persons or entities that used the spectrum before the clearing of the spectrum receive service that is equivalent to or better than the service received before the clearing of the spectrum; and...continuously throughout the clearing of the spectrum.” It does not tell the FCC how to do so. It reminds us of Will Rogers’ suggestion in 1914 to address the threat of German submarines by boiling the ocean, and when asked how he would do that, he replied “I’ve given you the solution. It’s up to you to work out the details.”
 5. Cable is also a key player and we think they are more in alignment with others as well, but cable interests have not filed since Pai’s announcement.
 6. This is not to say that Democrats did not notice the White House involvement and its apparent impact on Pai’s thinking. In conversations with Democratic sources, many recalled Pai’s critical statement following the investigation, released on March 1, 2016 accusing Wheeler of having “succumb to White House pressure and forfeited its independence.” Pai’s statement further said “It’s been said that sunlight is the best disinfectant. That’s certainly true here. ...Moving forward, the Commission must recommit itself to being a truly independent agency that makes decisions based on the facts and the law, not on the whims of any White House.” But while such memories may have caused Democrats to have a certain Karmic joy about how the wheels have turned, and while they might want to ask Pai about how he feels about those statements now, we doubt they will take action on the process that then affects the substance in terms of the timing or outcome of the auction.