TMUS/S and C-Band Skirmishes on Many Fronts; Plus Quick Takes on Contribution Reform and Cert Battle Foreshadowing Conservative Rift on Net Neutrality Preemption

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The news this week causes us to think about the movie An American Tail, an animated feature in which the activities of immigrant mice[1] below deck mirror the activities of humans on the boat above also seeking safe harbor in the United States in 1885. The reason? This week in the nation's capital there was a steady stream of new data points in the main story that were just setting up the big event that will happen in December.[2] So in our world, below deck, there was a steady stream of news, some important,[3] some merely odd,[4] which are just setting up the big events in December.[5]

In this weekend update, we discuss these, including the implications for the TMUS/S deal of Colorado shifting sides, a DOJ filing in the Tunney Act Review, and DISH's third 5G RFP, as well as a follow-up on Arm licensing to Huawei. We also note that TMUS and S should be announcing a deal extension or renegotiation this week. On the C-Band side we discuss a number of Congressional activities, some curious Eutelsat and DISH filings, and briefly summarize the call we had last week on legal risks to an FCC decision.

We close with some quick takes on early signs that Contribution Reform will be on the agenda in the next few years, and some conservative Justices on the Supreme Court suggesting they too disagree with the legal rational for the FCC's failed effort to preempt states from regulating on net neutrality.

TMUS/S/DISH

TMUS (Actually DISH) Gets Colorado. TMUS convinced Colorado to withdraw from the state litigation against the deal and join the states supporting the DOJ's side. As a matter of political optics, it means that now both sets of states—those litigating to block the deal and those who joined the DOJ in support of the Consent Decree– are arguably bi-partisan, an improved situation for the deal proponents. As we approach the trial, however, political optics matter less and we don't think Colorado's move affects the probabilities of the outcome of the trial. Nor do we think it means that a material number of other states will join Colorado. As we suggested in our note right after the DOJ approved the deal (LINK) Colorado was in a unique position because, as the headquarters state for DISH, it had the most to gain from the prospect of hosting a fourth national wireless provider. As this week's announcement notes, the state's decision was based at least in part on DISH's commitment to keep its headquarters in Colorado for at least seven years.[6] While the announcement slightly increases the odds of a settlement before trial, we believe those odds remain significantly less than even.

DOJ urges Tunney Act Judge to move ahead, while undercutting the precedential value for New York trial. One of the theories we have heard from investors for why TMUS/S/DISH will win at the trial is that the

Judge in the Tunney Act Review (TAR) will issue his judgment before the trial judge does and, if the TAR judge blesses the settlement, that will tie the hands of the trial judge and the companies will prevail at the trial as well.

We believe that the TAR judge will likely act before the trial judge issues his decision and will likely bless the deal. We disagree with the third point, however, on the precedential importance of the TAR to the trial. In that regard, the DOJ basically conceded the point in its TAR pleading opposing the states' effort to delay the TAR proceeding until after the trial. Its pleading details how the TAR and the litigation involve different facts and legal standards, [7] with the TAR involving a "lower" standard. The DOJ did say that the outcome would be "highly relevant" to the trial judge. The point, however, was not that the TAR is binding legal precedent but simply because the TAR process would tell the trial judge the nature of the fix. In short, while we think the TAR will be modestly helpful to the companies, we caution investors not to see the outcome as determinative of the trial. [8]

DISH Puts Out Another RFP, Adding Evidence to "Likely" Prong. As discussed before, for the companies to win at trial, they will have to convince the judge that the DISH fix is "timely, likely, and sufficient." (LINK) The states and interveners have signaled that they will challenge the companies on all three. On the "likely" issue, the more DISH demonstrates its financial and other commitments to deploying the network, the more likely they are to win on that prong.

This week DISH took another step in that direction by issuing its third 5G Request for Proposal (RFP). This one focused on the physical work involved in building its nationwide 5G network, such as obtaining cell sites and construction permits, and climbing the cell towers to install the antennas. (For more on the our colleagues view that DISH is certain to build out the network, see this analysis.)

ARM licensing to Huawei. Earlier this month we reported on a meeting between Huawei and Arm designed to "reaffirm the continuing cooperation among Arm, Arm China and Huawei." As we discussed, while Huawei is currently dependent on Central Processing Unit technology from United States companies like Intel, future versions of Arm technology may enable China to become independent, or even compete with Intel several years from now on server class processors. This is interesting to us, due to the Administration's and the FCC's concern about Huawei's role in helping China gain 5G leadership and due to the common control of Arm and Sprint by Softbank.

This week we saw further evidence of Arm's growing relationship with Huawei, with news that Arm will allow Huawei to use Arm's technology in its new phones, on the grounds that "its key chip technology originated from the UK rather than the US." As Forbes noted, this is effectively a "lifeline" for Huawei. We admit that we are unclear as to the Administration's priorities in its national security and trade negotiations, [9] and we know that the Administration is conflicted on the general issue. Still, while we see no signs of linkage yet, we would surmise some on the White House security side are wondering why the Administration is helping a company on the antitrust side that is not helping them on their security and 5G leadership agenda.

Announcement on deal due this week. The merger agreement between TMUS and Sprint expires this coming week. We have not heard anything that causes us to believe the deal will not be extended; nor have we heard anything that causes us to believe it will be materially changed. We expect some kind of announcement this week, perhaps on the call Monday regarding TMUS quarterly earnings.

C-Band

Congressional activity continues with hearing, new legislation and a letter from Antitrust subcommittee. There will be another hearing on the C-band this coming week with Energy and Commerce Committee Chairman Frank Pallone, Jr. (D-NJ) and Communications and Technology Subcommittee Chairman Mike Doyle

(D-PA) convening one on Tuesday, October 29, at 10 a.m. The primary purpose will be to raise concerns about a CBA run auction and the possibilities of the sale proceeds primarily going to the CBA members. As with the Senate hearing earlier this month, we will be looking to see whether Congressional sentiment is shifting on a bi-partisan basis as to how the FCC should address those two issues.

New bi-partisan legislation. Representatives Mike Doyle(D-Pa.), Doris Matsui (D-Calif.), Bill Johnson (R-Ohio) and Greg Gianforte (R-Mont.) introduced a new C-Band related bill that would require the FCC to hold a public auction of C-band spectrum with a deadline of September 2022 for completion; allows for no less than 200 MHz and no more than 300 MHz of C-band spectrum; and ensures that incumbent C-band users will be protected. It does not discuss who gets the proceeds, though under current law, the expectation would be that various parties would be entitled to compensation for expenses.

A previous Matsui bill said that if 200MHz is cleared, CBA got 35% of total proceeds, if 300MHz is cleared, CBA got 75% of total proceeds. That bill also awarded an extra 5% for CBA providing the plan to FCC and taking steps to buy new satellites/equipment. By not including such a compensation plan in the bill, the drafters could be sending a signal to CBA that they should negotiate for a Congressionally approved compensation package.

Again, while we don't think legislation is likely to pass both chambers and reach the President's desk, the introduction of this bill, which now has bi-partisan support, suggests it could quickly pass the House in reaction to an FCC order that mandates a private sale.

House antitrust subcommittee chair sends a letter. In addition, the House antitrust subcommittee chairman sent a letter to Chairman Pai asking a series of questions about the C-Band process. While there are a number of questions, the crux of the letter, as one would expect from the antitrust subcommittee, appears to be questions about the FCC's analysis of the market structure after the auction. This involves questions, such as whether there should be a cap on what any one buyer can purchase, an issue which to date has not been at the forefront of the FCC discussions. We don't know whether the letter will elicit answers that provide advance indications of what the FCC is thinking but the proximity to the expected release date makes it more difficult to answer questions with the traditional "all options are on the table and we take your concerns seriously" type answer that generally is used earlier in the process. We note that the letter asks for answers by November 25 and if the item is to be voted on December 12, we think the item will be public by November 20.

Eutelsat sets a ceiling (or is it a floor?)[10]. In what we thought an odd ex parte, Eutelsat reported that it had recommended that the "Commission direct the proceeds of an auction first to compensate affected C-band customers (i.e., C-band earth station operators) for the costs of equipment modification or replacement, and to provide sufficient additional compensation to incentivize completing the transition quickly and cooperatively. If the Commission deems it necessary to require a contribution of any portion of the proceeds of an auction to the U.S. Treasury, it should impose that requirement only after the customer transition costs discussed above are addressed. Given the substantial impact on eligible satellite operators and the fundamental change to their authorizations, Eutelsat does not support a contribution mandate greater than 50 percent of the remaining proceeds."

We found this striking in a number of respects. First, by throwing out the 50% number, Eutelsat has started the public bidding as to what a "significant" voluntary contribution would be. We don't understand why Eutelsat thought it wise to do so at this time. Second, while Eutelsat might have thought it was setting a ceiling, the way public negotiations go, Eutelsat may have set something of a floor. While the FCC may accept a number less than 50%, if it does so, it could be seen as an incompetent negotiator, as a satellite company has already said it would accept 50%. Third, Eutelsat included the idea of the 50% being after "incentives." We don't know what it

means but obviously the interpretation of that factor can dramatically affect the result. If the incentives are a large number it raises the question of why should additional payments go to the satellite companies? If the incentives are a small number, then, again, Eutelsat has acted in a way that undercuts both their and CBA's negotiating leverage.

Having said that, we don't think the filing will ultimately affect the outcome. Eutelsat certainly doesn't have the political capital with the FCC or with other stakeholders necessary to move this idea to the front burner of discussions. Still, we acknowledge that data that we don't understand can be as meaningful as data we do. This is a case where the filing perhaps suggests a subterranean movement that we are missing, possibly relating to the internal politics at CBA.

DISH also files. DISH also filed in the C-Band proceeding. We also don't think the filing will be material to the FCC's final decision. It somewhat tracks T-Mobile's earlier filings, suggesting that DISH sees its network ambitions as in the near term tied to T-Mobile's prospects. It veers into other areas, such as the potential use of 12.2-12.7GHz band as replacement for C-Band. One explanation might be that by filing DISH is increasing its option value for being a litigant in any challenge to an FCC order. [11]

Conference call on legal risk. Finally we remind readers that last Monday we held a conference with former FCC Wireline Bureau Chief and noted telecommunications attorney Jeff Carlise on the legal risks to any C-Band order that the FCC adopts. As Mr. Carlise detailed, there are a number of issues, including standing, venue, and legal authority, that affect the resolution. As he further discussed, the issue is likely to be resolved through a court's decision on the motion for a preliminary injunction. The full transcript can be found here (LINK) and replay information can be accessed here (LINK).

Quick Thoughts

Contribution Reform at the FCC: States' Members of Joint Board Advocate expanding base.

One investor relevant issue—reform of the current contribution methodology to fund universal service—has been lying dormant for some time, but will likely become more front and center after the election. As the current level of 25%, and its upward trend, [12] are unsustainable, everyone in policy circles knows something has to be done. The problem is the politics are daunting, which is why the issue keeps getting kicked down the road. In that light we note the letter and a filing by the state members of the Federal-State Joint Board on Universal Service. The letter states, "The State Members of the Joint Board find that the [FCC] has the authority, and that it is in the public interest, to expand the contribution base to include a broader class of services that touch the public communications network, including Broadband Internet Access Service (BIAS)."

We also note that Senator Warren in her plan to improve rural broadband promises "I will require all telecommunications services to contribute fairly into the Universal Service Fund to shore up essential universal service programs," suggesting that she also wishes to reform the program. [13] The FCC does not appear to be currently working on this issue but, again, we expect that the next FCC will not be able to put it off.

Net Neutrality: SCOTUS Conservatives undercut FCC preemption argument. The Supreme Court just turned down a request from Minnesota to review a ruling by the 8th Circuit holding that the Federal Communications Commission's policy of not regulating information services supersedes the state's efforts to regulate Voice over Internet Protocol. The decision to deny cert was not surprising. Of relevance, however, is how Justice Thomas, joined by Justice Gorsuch, wrote an opinion agreeing with the denial but suggesting the justices might at another time want to take up the question of whether a federal agency's policy has the stature of a federal "law" that can supersede state laws under the Constitution's supremacy clause. This is relevant to

the recent DC Circuit opinion holding that the FCC's recent preempting of state net neutrality laws was invalid. It suggests that Supreme Court may not be sympathetic, on these grounds, to overturning the DC Circuit opinion or state laws. That in turns suggests that the industry might be facing different state laws on the matter for sometime.

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1. The protagonist mouse's family is from Ukraine. Coincidence? Yes. But in DC these days, it would not surprise us if some thought otherwise.

2. We trust we don't have to explain this.

3. That is, something similar to Ambassador Taylor's testimony, in that they will be relevant in December.

4. That is, something similar to a number of members of Congress protesting being excluded from a meeting that a large number of them were in fact allowed into, in that that event and other things that happened in our space will be irrelevant in December.

5. If you don't read much in the newspapers about the merger trial, slated to begin on December 9, or the FCC C-Band decision, currently slated (we are told) for the December 12 meeting, it may be because we think the first few weeks of December will be dominated by the public House hearings on impeachment. Again, our issues will be in the metaphoric deck below.

6. It was a big, big week for Colorado. Not only are they positioned to get a wireless corporate headquarters, but turns out they also are getting a Wall! Hmmm. If we start building walls between the states, that has to be bad for the travel industry but maybe it will be great for our sector as people increase the substitution of telecommunications for travel? (We recognize that the President now says he was kidding—and we simultaneously admit we are kidding about the impact on the sector—but we have to point out that when the President said we were building a wall in Colorado, nobody laughed. Instead they gave him a standing ovation. We thought that the reaction of the crowd was scarier than a President having a moment in which he demonstrated that geography is not his strong suit.)

7. For those of you who want the language we are referring to, the DOJ wrote, "While the S.D.N.Y. Litigation and this case both involve allegations that the transaction violates Section 7 of the Clayton Act, they present different legal questions under different statutes. In the S.D.N.Y. Litigation, Judge Marrero will be tasked with assessing the merits of the Litigating States' Clayton Act Section 7 claim. To do so, that court will evaluate the relevant markets at issue, analyze the anticompetitive effects alleged in those markets, and determine whether a remedy that would be in place if the merger were to proceed is sufficient to "restore the competition" lost as a result of the merger. In contrast, the merits of whether the transaction violates Section 7 of the Clayton Act are not at issue in this case. Under the Tunney Act, courts do not examine the transaction as a whole and determine whether or not it is anticompetitive. Instead, they determine whether, taking the allegations in the complaint as true, entry of the proposed settlement of the case as presented in the proposed Final Judgment would be "in the public interest." As the D.C. Circuit has explained, the review under the Tunney Act invokes a different, lower standard than the legal standards applied in Section 7 litigation because "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of the public interest.'" Thus, Section 7 litigation does not involve an analysis of whether a proposed settlement satisfies the Tunney Act's "public interest" standard, and there is no reason that Judge Marrero would reach this question in the S.D.N.Y. Litigation." The DOJ further noted, "There are several reasons why different standards are applied in Tunney Act cases and Section 7 litigation. For one, because "there are no findings that the defendant has actually engaged in illegal practices" in Tunney Act cases, it would be "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial." In contrast, Section 7 cases by definition do involve findings regarding the legality of the defendant's conduct. In addition, in Tunney Act reviews, "[r]emedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegations in the complaint have been formally made out is quite unwarranted."

8. On the other hand, if the TAR judge concludes that the fix is not in the public interest that is likely to lower the odds of the companies winning in the trial.

9. While the Administration and FCC continue to express deep concern about Huawei geographic expansion, the Administration has also seemed to back off in some ways, such as inviting American companies to apply for exemptions to the ban. Further, this is in the context of American negotiators sending mixed signals on the endgame, as well as whether non-trade issues are included in the quid pro quos being discussed.

10. Citing Paul Simon, the singer/song writer, not the long-time Illinois Senator.

11. Some have suggested that DISH, having been the beneficiary of the FCC's agreement that allowed the T-Mobile/Sprint deal to proceed, would not then file suit against the FCC on the C-Band. We find that argument to be historically and logically wrong. Companies acknowledge the brilliance of every decision they agree with and sue on the ones they don't all the time. Further, by the time DISH would have to decide whether to sue or not, the FCC order on the merger will be published and the trial will be done.

12. When Pai became Chair, less than three years ago, it was 16.7%.

13. We will publish a comprehensive analysis of the impact of a potential Warren presidency next weekend, which will be one year before the actual election. We think we are actually premature in publishing it then but you all keep asking about it so we, in the spirit of the customer is always right, we will honor your wishes. But doing it any earlier than a year before would have just been too, too early.