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NSR Policy: C-Band and Congress, Settlement Direction in TMUS/S, and more antitrust variables for Elliot and AT&T

September 16, 2019 by Blair Levin

In this weekend update we discuss how Congress is the sleeping giant of the C-Band policy, what might cause it to wake up, and how investors may be misreading the timing window for such action. We also discuss why the potential impact of the states' attorneys generals' new activism against big tech likely hurts, instead of helps, settlement discussions in the T-Mobile/Sprint litigation (and preview an upcoming call on the trial). We close with a discussion of the three variables investors should be looking at in gaming out antitrust concerns related to any AT&T divestitures that might follow Elliot Management's campaign to get AT&T to refocus and deconsolidate.

C-Band: Will Congress Act, React, or Just Tweet?

The FCC process to reallocate C-Band spectrum proceeds apace, with the various meetings occurring in the Commissioners Offices and the staff working on preparing an item—penciled in for the November meeting but likely, in our view, to slip to December. We think it will ultimately involve a traditional multi-round FCC style auction (with uncertainty as to who actually runs it) of at least 300 MHz, a strong possibility of several tranches in terms of clearing dates, and some of the proceeds used for rural fiber backbones, though not as much as proposed in the ACA coalition plan. That is, the plan is likely to take various bits and pieces suggested by different parties with many details still be worked out. *(For a detailed look at Intelsat, please see the note from our colleague Vivek Stalam on the company. (LINK))*

But will Congress Interfere? But one of the big questions for investors is whether Congress will effectively preempt the FCC's action and mandate specific features of that reallocation. Of particular importance for investors is whether Congress will act to limit the amount that the CBA members can receive. The general view in the market appears to be that the Congress is fundamentally irrelevant,[1] as it is highly unlikely to pass any legislation that will affect the ultimate outcome. That view was reinforced this week by the reports that House Telecommunications Subcommittee head Michael Doyle said that his subcommittee would not be doing anything on C-Band this month—focusing instead on the FCC's mapping woes—but would pick up on the C-Band in October. Further, Doyle noted "if we want to pull something out of the House, we've got to make sure that we're looking at the Senate, too." As the Senate is even less likely to act than the House, investors took that as a sign that no Congressional action was the most likely outcome.

We agree in part but think investors are somewhat confused about the way that Congress acts to address agency activities. We agree that actual legislation is the least likely outcome. We see almost no chance of legislation before the FCC itself announces it proposal and votes on it.

Congress tends to react rather than act and acts in a variety of ways. But investors should understand that

Congress is much better at reacting than acting. Most members are content to wait and see what the FCC actually proposes. Once the FCC proposal is made public, it will be much easier for advocates of a different plan to garner attention and support, as the contrast with the known and the relative upsides and downsides become clearer. While legislation is the loudest form of influence, there are others, including hearings, letters and publicity campaigns.

Congress has longer window than commonly believed. Further, while many investors appear to believe that the window of opportunity for Congressional action ends when the FCC votes, that is not the case. Congress could act anytime up until the commencement of the auction.

CBA advocates suggest that in light of the importance of a quick auction for winning 5G, Congress cannot take action that results in any delay. We agree that argument has currency in the current climate, but we don't see it as conclusive. Further, it is not clear—in light of various litigation risks—that a narrowly targeted legislative action would necessarily delay deployment.

Major Congressional focus: Who gets the money? Major Pai focus: How to avoid Congressional criticism. Ultimately, Congress is going to care more about the money than any other issue. The current CBA plan involves what they view as a simple negotiation with Chairman Pai as to how much the CBA members will voluntarily contribute to the United States Treasury. Certainly, negotiating a single number with one person is easier than negotiating principles and various numbers with a Congressional committee.

Still, we don't see that CBA/FCC Chair negotiation as simple. Pai understands that he is likely to be second-guessed by both Democrats and certain Republicans, such as Senator John Kennedy of Louisiana. While Pai currently retains the support of Senate leadership, the greater the amount that the sale is perceived to likely garner, the greater the attention the Congress will pay. Every increase in the Street's perception of the ultimate amount to be raised in the auction will increase the Hill's interest.

Further, in dealing with a negotiation in a political context, the explanation for the resolution generally includes some kind of principle or precedent other than "we were afraid we would lose in court if we asked for more," an explanation that may contain truth but likely go down poorly in front of an oversight committee. There are no easy precedents here. There is no law directly on point nor an auction precedent that captures precisely the dynamic here. Still, we would guess that Pai would need an explanation he can defend before agreeing to a number.

In short, we think investors are correct in thinking that Congress is unlikely to pass legislation but in error in thinking legislation is the only vehicle for influence and that the deadline for Congressional involvement is the FCC vote.

TMUS/S/DISH: Odds of settlement going up or down?

DOJ Antitrust Chief Makan Delrahim apparently told some people in New York this past week that the states were likely to settle the case. We don't find it surprising that he said so;[2] we simply find it wrong. Further, if anything, we think the odds continue to go down. [3] Somewhat surprisingly to us, we can cite an authority that in the past has been more optimistic about a settlement: Charles Gasparino. This week he tweeted "SCOOP: @TishJames rebuffing attempts by @TMobile @sprint to reach settlement on state AG merger breakup lawsuit, believes cos have offered no meaningful concessions. Stalled talks increases odds that case goes to trial in federal court." Of course, he would have known that earlier if he had listened to our call with Gene Kimmelman (LINK). But welcome back Charles, we have missed your scoops on the deal!

We don't know Mr. Delrahim's explanation for believing the states will settle but we have heard from some the argument that in light of the states' new investigations of tech giants Google and Facebook, their financial and resources will be taken up on those endeavors and the political upside of continuing the battle against the mobile merger is diminished.

We see some logic there but come to the opposite conclusion. As to the financial resources, we think the states have already committed the necessary resources to the trial and while they are not dealing with an infinite amount of money, the number of states involved in each issue assures an adequate budget. As to the human capital, the trial is significantly outsourced so while state personnel have a role, the combination of the trial and the investigations will not overstretch the combined antitrust staffs.

But the major reason we disagree is that the states now have an even greater incentive to prove their mettle. Taking an antitrust matter to trial and winning—particularly when the DOJ was willing to settle—would provide more leverage both in the public mind and in the mind of the tech companies' lawyers than would a compromise settlement. In other words, the upside of trying and winning is now even greater, while the downside of settling is greater as well.

Further, we think in the case of California—and certainly some of the others such as New York—the level of comity between them and the DOJ Antitrust Division has gone down even further in light of the Division's reported investigation of the car companies for working with the California on emission limits. We know that the DOJ tried to get the states not to sue and then, to settle. Those efforts failed. We would assume that such efforts are ongoing. The escalating tensions between the states and the DOJ on issues where the states see the DOJ as increasingly political reduce, rather than increase, the odds of settlement

To be clear, none of these developments affect the odds at trial; they only affect the odds of getting to trial. Further, we expect the companies to continue their efforts to achieve a settlement up until the moment the trial begins and possibly beyond. We just don't see any signs that the odds are either high or going up.

Reminder: On Thursday, September 19 at 10 a.m. we will be hosting a call with an antitrust lawyer who tried an antitrust case in front of the judge presiding over the T-Mobile/Sprint litigation. New Street Research sales will send details early this week.

Elliot and AT&T: Antitrust issues for other divestitures?

Last week, in the wake of Elliot Management's letter to AT&T signaling the beginning of an activist campaign designed to raise AT&T's stock by causing it to narrow its focus on winning at 5G, there was significant speculation about potential divestitures. We wrote about the potential antitrust and regulatory reaction to a DISH/DirecTV combination (LINK) and why the facts having changed significantly since the 2002 rejection of that deal should provide some hope—but far from certainty—that the deal this time could obtain government approval.

But that is not the only potential divestiture that might emerge from Elliot's effort. One could envision, if the Elliot effort gains steam—and at this point we have no insight into whether or not it will—there are a number of content and wireline assets that could also be divested. We will focus on the content ones, as those are the ones we have fielded the most questions about and we think wireline divestitures are likely not to raise antitrust concerns.

In playing out the scenarios for different divestitures, there are several significant variables. The first is who is in the White House when the decision is made. We don't think the Elliot effort will have any immediate impact. Given the time it takes to get a deal approved by the DOJ—six months in the case of Disney/Fox to 15 months in the case of T-Mobile/Sprint/(DISH)—we are already getting close to a point in time when any deal theoretically already risks being decided by the Administration of whoever is taking the oath of office in January 2021. Obviously, a Trump DOJ might look at any deal differently than, say, a Warren DOJ.[4]

How would they look at it differently? Of course, all antitrust deals are fact specific. Still, if one knew nothing else about such details, merger advocates would prefer being in front of a Trump DOJ (and if applicable, an FCC). Warren (and other Democrats) have signaled they want tougher antitrust enforcement. The first deals to be announced carry a specific risk of being a test case for how seriously to take such campaign pronouncements. But the Trump DOJ has demonstrated in the AT&T/TWX litigation (and in some subtle ways in the Disney v. Comcast battle over Fox), the answer depends on a second big variable.

That variable is who is the buyer? There are a number of media companies—such as the now merged Viacom and CBS—who would likely not present a problem for buying other media assets. Trump's DOJ—in approving Disney/Fox already signaled a willingness to allow consolidation in that realm. Further, the lack of an internet distribution channel, and therefore vertical issues, would also likely meet the approval of the Warren DOJ who might view AT&T reducing its content portfolio as a welcome deconsolidation.

The harder cases involve the buyer being Comcast or tech companies. In the case of Comcast, we don't see the Trump administration having serious content consolidation issues[5] in light of its view of Disney and Fox. It would be an even easier analysis if Comcast's purchase was limited to HBO, as it doesn't currently have a significant presence in the streaming video market,[6] which is increasingly competitive. We don't, however, dismiss the possibility of the DOJ finding an antitrust reason to oppose Comcast's bid, with the real motivation being to punish the owner of MSNBC.[7]

In the case of the tech companies, the analysis is tougher. Again, it depends on the deal but we think in light of ongoing investigations and politics, any deal involving Google, Facebook, or Amazon as a buyer faces significant risks. Apple is easier but investors should remember that any antitrust review gives the government jurisdictions the opportunity to attach various conditions to any deal approval, so any deal risks the government attempting to get concessions on a number of other fronts, from treatment of sellers on the platform to privacy, among others.

Finally, investors should consider one other variable: the willingness of the companies to take the case to the courts and all the way to the Supreme Court. While the Supreme Court has shown a willingness to uphold Trump's view on a number of political issues, the Court is also very pro-business and we think would likely reject efforts by either a Trump or Warren DOJ to expand antitrust doctrine to reject deals that the last 40 years of the Bork-inspired consumer welfare jurisprudence has allowed to close.

Our updated valuation comp sheets can be found HERE.

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1. A belief that on general principles, we see as justified. But as discussed further, general principles may not predict specifics.

2. As we have noted before, many in DC, particularly those raised in the media-centric culture of the Hill, seem to be expressing a prediction when they are really expressing a preference (i.e., "the states will settle" translates to "I hope to God the states settle.") Mr. Delrahim demonstrated this tendency with every one of his comments about the likely outcome of the AT&T trial and appeal.

3. Somewhat surprisingly to us, we can cite an authority that in the past has been more optimistic about a settlement: Charles Gasparino. This week he tweeted "SCOOP: @TishJames rebuffing attempts by @TMobile @sprint to reach settlement on state AG merger breakup lawsuit, believes cos have offered no meaningful concessions. Stalled talks increases odds that case goes to trial in federal court." Of course, he would have known that earlier if he had listened to our call with Gene Kimmelman (LINK). But welcome back Charles, we have missed your scoops on the deal!

4. We note Warren for two reasons. First, the prediction market currently ranks her as the most likely to win the nomination, a data point we find more insightful than polling. Second, Warren, who gave a major speech on antitrust in June of 2016, has pushed the Democrats to embrace the goal of a reinvigorated antitrust policy. In that way, she serves as the best example to contrast with Trump, though we think both the nomination and the election are too far in the distance to have any kind of confidence in the outcome.

5. The one serious problem would be with CNN. When Murdoch was contemplating buying Time-Warner Entertainment, he noted the purchase would not include CNN. While it is not strictly for antitrust reasons, we think it would be difficult for either Comcast or Fox to buy CNN under any Administration.

6. Comcast plans to join soon, but given the number of competitors and their relative market share, those plans should not foreclose buying an existing streaming service. As to HBO's premium channel offering, that is also a market that appears robustly competitive and Comcast buying it would not reduce the number of competitors.

7. A simple solution would be for AT&T to sell any content assets to Murdoch. We are not saying that Murdoch gets everything he wants from this DOJ but, to quote a prominent DC official, 'a lot of people are telling us" that Murdoch gets everything he wants from this DOJ. Of course a sale to Murdoch would raise the strategic question of why Murdoch just sold a bunch of similar assets to Disney, so we don't think it's likely. We are just spit balling possible scenarios here.