

The Costs and Benefits of Regulatory Intervention in ISP Interconnection Disputes: Lessons from Broadcast Signal Retransmission Consent Negotiations

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Regulating the Evolving Broadband Ecosystem

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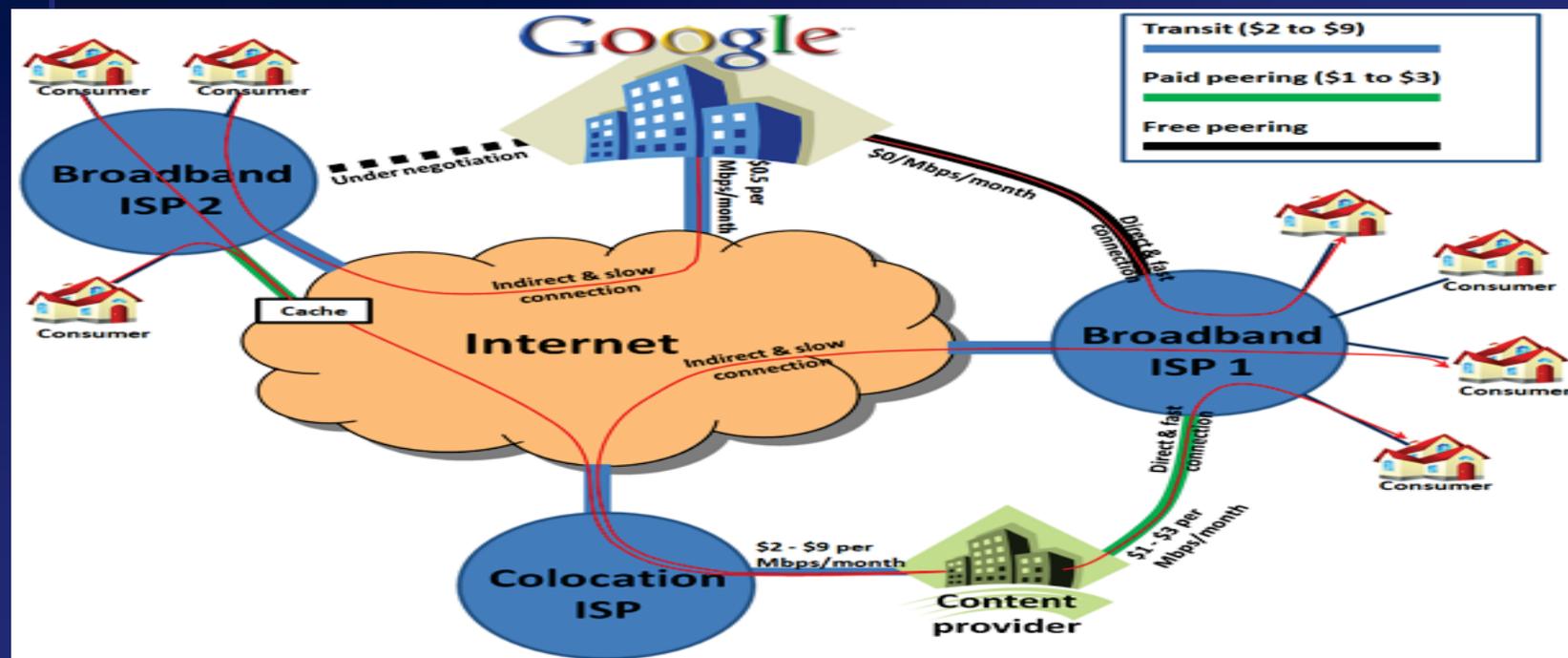
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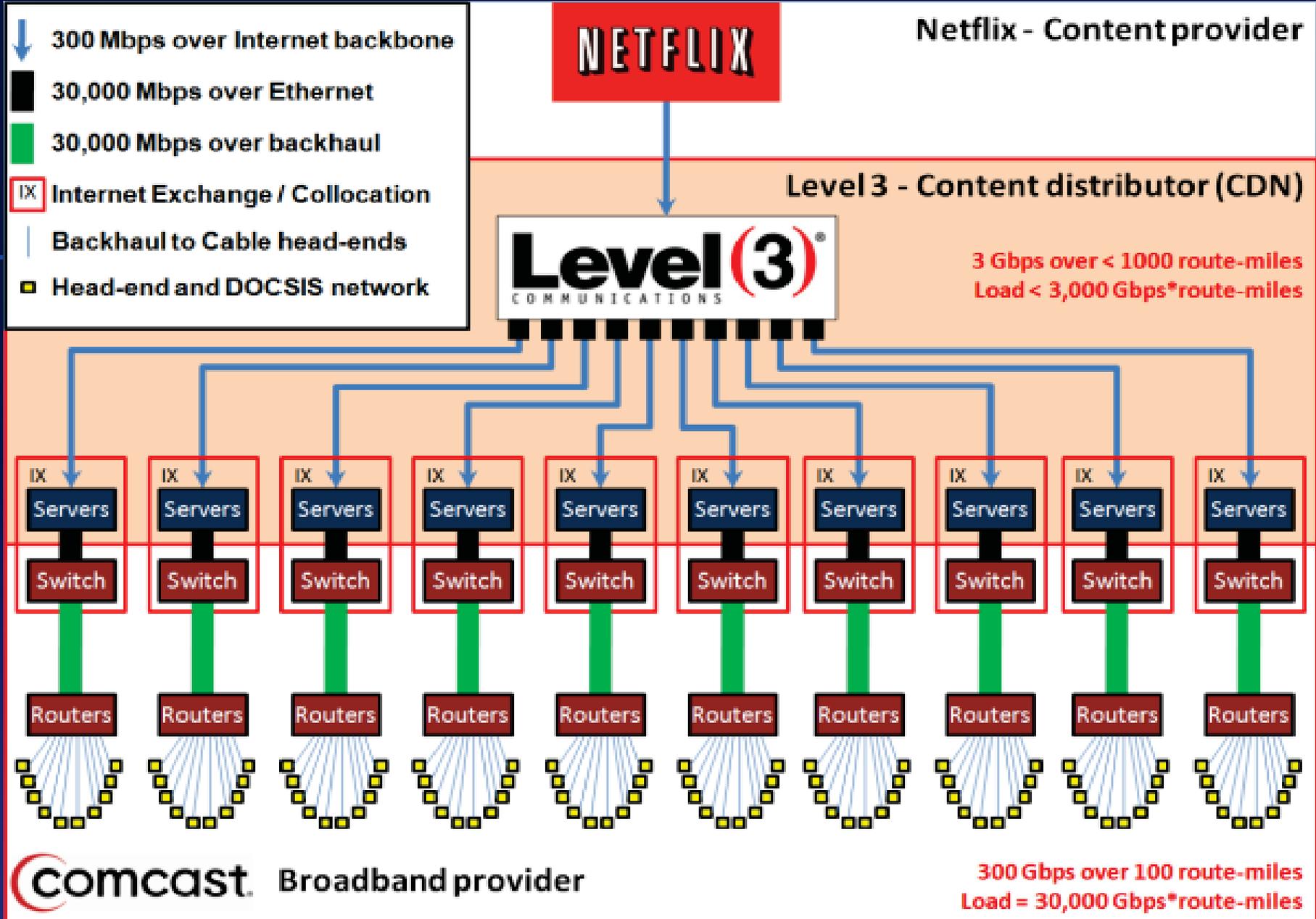
The Retransmission Consent Negotiation Process

- Congress created a framework acknowledging public benefits in both broadcast signals and carriage, but left it to stakeholders to determine the specific value.
- Broadcasters (“significantly viewed” in a locality) can secure compulsory carriage by Multichannel Video Programming Distributors (“MVPDs”), but no compensation flows upstream.
- Alternatively broadcasters can eschew “must carry” and negotiate compensation for their consent to the retransmission of their signals by MVPDs.
- These process looks like an “arranged” marriage, or partnership as the FCC forecloses duplication of broadcast network content and syndicated programming such as *Jeopardy* and *Wheel of Fortune*. This locks MVPDs into having to deal with a single source of content, e.g., the local affiliate of ABC, CBS, Fox, NBC, etc.
- Retransmission consent payments provide compensation for “must see” television content; the MVPD absorbs the cost of delivery to end users.

Internet Interconnection and Compensation Ecosystem

- The Internet requires seamless interconnection between servers, routers and broadband subscribers using the telecommunications transmission networks of many, often-unaffiliated operators.
- Increasingly diverse set of carriers negotiate compensation arrangements that cover the cost of delivery and not the content.





Source: George Ou, Digital Society, <http://www.digitalsociety.org/2010/12/division-of-labor-between-broadband-and-cdn/>

Scope of FCC Involvement in Retransmission Consent Negotiations

Section 325(b)(3)(A) of the Communications Act, as amended, expressly authorizes the FCC “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”

The FCC has narrowly interpreted this mandate to authorize non-substantive, procedural oversight designed to determine whether the parties have negotiated in good faith.

The FCC eschews rate setting, mandating binding arbitration and even maintaining signal carriage during a dispute that has run past a deadline.

The Commission assesses good faith based on specific, objective criteria, e.g., whether a party showed up to negotiate, and based on “totality of the circumstances.”

The Commission recently prevented broadcasters with the largest market share from negotiating as a bloc.

Additionally it will consider whether to reduce or eliminate rules that prevent MVPDs from securing content from non-local broadcasters (“leapfrogging”).

Scope of FCC Involvement in ISP Interconnection and Compensation Negotiations

The FCC generally refrains from directly interfering with ISP negotiations, but has attempted to impose network neutrality/open Internet rules that foreclose flexibility, e.g., to prioritize traffic for additional compensation.

On two occasions, the D.C. Circuit Court of Appeals has reversed the FCC on grounds that it lacked direct or indirect (“ancillary jurisdiction”) statutory authority to impose the functional equivalent of common carrier duties, e.g., a prohibition on unreasonable discrimination and other unfair practices.

The FCC now emphasizes Sec. 706 of the Communications Act, as amended, and the holding in *Cellco Partnership v. FCC*, 700 F.3d 534, 541 (D.C. Cir. 2012), to support an open Internet and to authorize the Commission to assess the commercial reasonableness of any deviation from baseline, best efforts routing.

The Commission will need to demonstrate that it has promoted the goals of Sec. 706 (widespread and equitable broadband access) without imposing common carrier duties.

Consumers Want Conduit Neutrality Except When They Don't

- Most consumers favor Internet Service Provider (“ISP”) neutrality and the application of “best efforts” routing protocols. In the absence of congestion, the status quo provides a level competitive playing field between content providers and distributors in terms of “access to eyeballs.”
- New bandwidth intensive applications, such as IPTV and OTT increase the probability of congestion and degradation of service quality, even in the absence of deliberate efforts by an ISP to “throttle” bandwidth hogging subscribers, or to disadvantage competitors.
- IPTV consumers have a quick pain threshold for QOS degradation; full motion video cannot become a slide show, or lose packets.
- IPTV consumers welcome QOS enhancements, including ones that offer “better than best efforts” prioritization of “mission critical” bitstreams, e.g., “live” programming such as sporting events and award telecasts.
- Companies, such as Akamai, Limelight Networks and Level 3, have generated no controversy when they enhance traffic delivery from the Internet cloud to the “retail” ISP for final delivery. The debate has focused on the “last mile” and the threat to competition, innovation and Internet value.

ISPs Want to Offer Paid Prioritization

- ISPs' largely unregulated status promotes innovative ways to accommodate mission critical bits, but QOS and price discrimination can become a readily available way to favor corporate affiliates and ventures willing and able to pay surcharges. Many ISP parents face revenue challenges, e.g., Verizon and the decline in demand for wired telephony; Comcast and the decline in demand for cable television.
- Retail ISPs provide an exclusive, last mile conduit, because consumers typically chose only one carrier to provide all access to and from the Internet cloud. The FCC asks whether this a "terminating monopoly."
- Last mile access competition remains limited: a DSL, hybrid fiber-coax, or fiber optic carrier and a cable modem carrier. Satellite options are slower, more expensive, require equipment purchase or leases and have latency (signal delay) challenges. 4th Generation terrestrial wireless offers a more expensive and still comparatively slower option and have significant caps on usage; consider the impact of a 1-2 Gigabyte monthly cap vs. an "unlimited" or 250 Gigabyte wireline cap.
- Opponents of paid prioritization expect ISPs to nudge, or push content and application providers to better than best efforts service tiers by generating artificial congestion from standard service.
- ISPs can target individual ventures and bitstreams for QOS problems and consumers may not know whom to blame.

More Likelihood for Traffic Imbalances and Compensation Disputes

- Retail ISPs no longer will simply accommodate ever increasing downloading volumes. They have imposed rate increases on both sides of their market: downstream by tiering retail service based on bit delivery speeds and monthly downloading allotments and by targeting upstream ISPs and even content sources for surcharges.
- Some economists have tried to prove that when operating in a double-sided market a venture cannot extract two monopoly rents without harming profitability, but it remains unclear whether ISPs are so constrained when they can raise rates on both sides.
- Unclear whether a startup venture with a tiny fraction of Netflix's traffic volume can still rely on "plain vanilla" best efforts routing.
- As retail ISPs seek greater compensation, subscribers may wonder what their \$40-75 subscription guarantees. Can one lawfully expect high QOS delivery of Netflix traffic, or is this outcome contingent on increasingly probable surcharge demands?

Netflix-Comcast

Once an advocate for network neutrality, Netflix has opted for higher QOS through a paid peering arrangement with Comcast. Netflix directly interconnects with Comcast at many locations thereby reducing the number of networks and routers typically used. Virtually overnight Netflix traffic congestion problems evaporated thanks to lower latency and faster delivery speeds.

Paid peering, providing “Most Favored Nation” treatment of specific traffic streams, has triggered a vigorous debate over what constitutes reasonable price and QOS discrimination.

Netflix’s payments to Comcast are offset in part by reduced or eliminated payments to CDNs, but the accrual of more revenues for retail ISPs raises concerns about rising bottleneck/last mile control.

Will surcharge demands and better than best efforts become the new normal even for venture with modest traffic volumes previously accommodated by the standard best efforts model?

Consequences of the Netflix-Comcast Deal

Pressure to Upgrade--More better than best efforts routing options with the possible risk that content sources with far less volumes than Netflix might face severe pressure to migrate from standard, best efforts delivery.

Higher Broadband Profit Margins--Broadband rate increases through tiering transmission bit rate and download allotments. Likely substantial narrowing in the gap between wireline (200 or more Gbytes) and wireless (250 Mbytes to 10 Gbytes).

More Subscriber Options for Avoiding Download Debits--ISPs will “soften the blow” of stingy download caps with expanded opportunities for “sponsored data” by content and service providers who pay the retail ISP in lieu of it metering the download.

ISPs Demand More Incentives to Upgrade--ISPs will leverage network upgrades in exchange for better interconnection terms with content providers, CDNs and upstream carriers.

More Interconnection Compensation Disputes—Lots of finger pointing when QOS declines. Was Netflix to blame when it made the entire 2d season of House of Cards available for “binging,” or was it cheapskate CDNs, or something nefarious at the last mile?

Lessons From Retransmission Consent Negotiations

The Good News: Commercial negotiations can resolve most disputes with limited, if any harm to consumers and without regulator intervention. Netflix may have buyers remorse, but it negotiated for, and received what it considered necessary. Cable operators capitulate at the start of the regular NFL season so subscribers do not miss “must see” television.

The Bad News: Broadband access has become a near essential. Any access dispute resulting in network balkanization, or blockage can cause significant and immediate harm to consumers. Commercial negotiations typically end up in yet higher cable television and broadband subscription rates. If broadband has become a necessity, rates will continue to increase, absent government-mandated subsidization.

The FCC has displayed discipline and modesty by refraining from making substantive decisions affecting commercial transactions, instead relying on non-structural and procedural requirements focusing on requiring good faith and preventing stakeholders from stalling.

Case precedent supports FCC efforts requiring good, faith, transparency, truth in billing and reporting. It does not support the FCC substituting its commercial judgment for that of the negotiating parties. For example, Comcast can opt to place an unaffiliated sport channel (covering tennis) to a more expensive and less viewed programming tier than an affiliated sport channel (covering golf). *Midwest Video II* reversed the FCC when it tried to mandate channel access by a large set of potential users instead of a small and specific, deserving group, e.g., local broadcasters.

Conclusions and Recommendations

The FCC will continue to struggle to find a lawful way to impose ground rules on ISP interconnection and compensation arrangements.

The Commission should rely on commercial negotiations, and refrain from second guessing the commercial reasonableness of arrangements. Upon receiving a complaint, the FCC should use transparency, truth in billing and reporting requirements to assess whether bad faith exists, especially for better than best efforts, specialized arrangements.

Consumers can expect to pay more for both content and delivery services. MVPD bundling may require payment for undesired content, but when ISPs meter traffic consumers pay on the basis of what they presumably want to download.

ISPs appear to have solidified their control over the Internet ecosystem, despite the conventional wisdom that content rules. When content demand triggers congestion, the content provider and its subscribers end up paying more.

ISPs will frame content prioritization as a necessary to manage a scarce resource, while opponents will accuse ISPs of creating scarcity and rationing a resource that previously managed to deliver content without surcharge or congestion.

Increasing advocacy for reclassification of Internet access as a public utility, common carrier service. However, common carriers can engage in “reasonable” discrimination. ISPs probably can offer paid traffic prioritization, provided it’s available to all “similarly situated” carriers and content providers.