

Rationales For and Against FCC Involvement in Resolving Internet Service Provider Interconnection Disputes

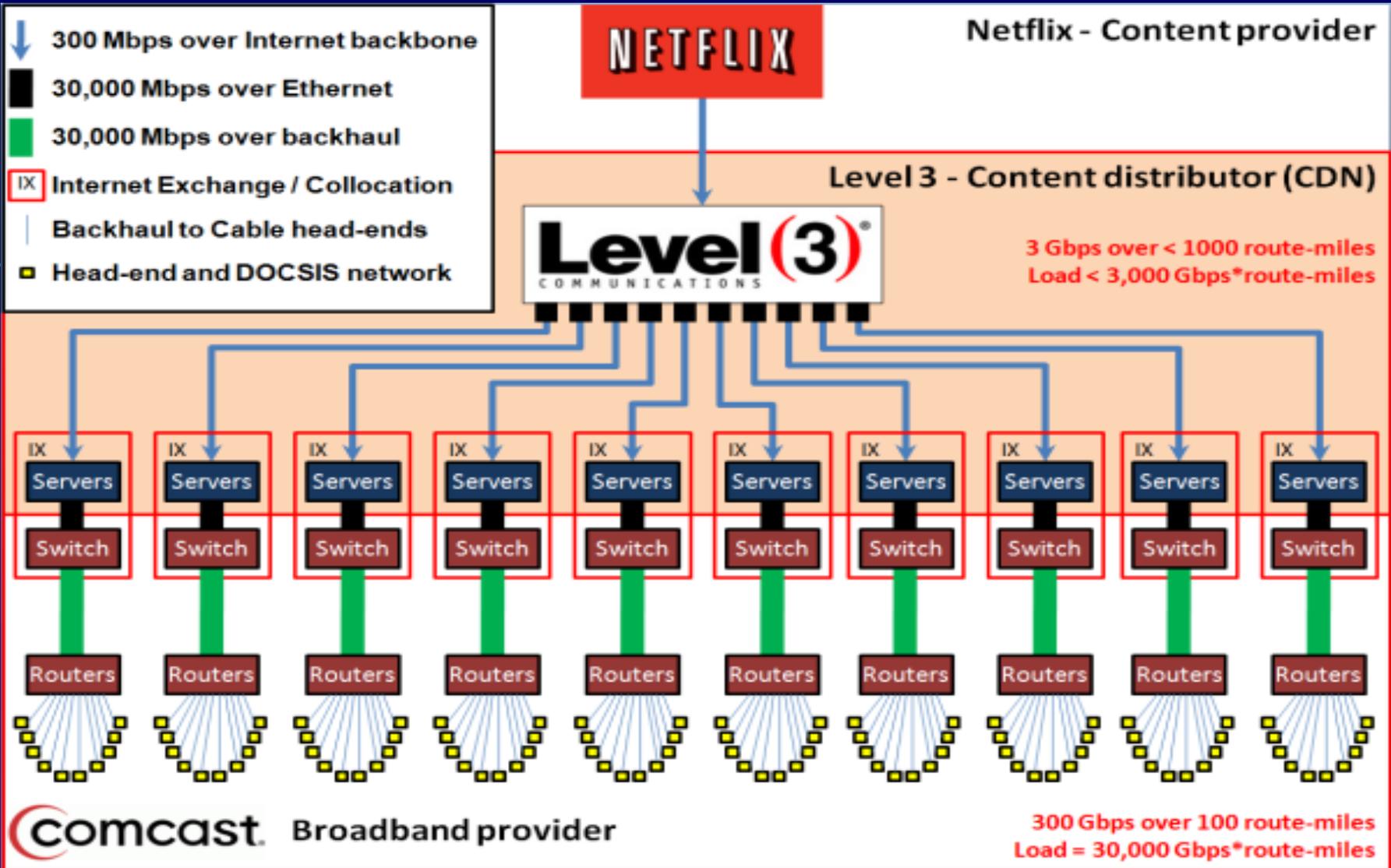
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**Rob Frieden, Pioneers Chair and Professor of Telecommunications and Law
Penn State University
rmf5@psu.edu**

**Web site : <http://www.personal.psu.edu/faculty/r/m/rmf5/>
Blog site: <http://telefrieden.blogspot.com/>**

Internet Interconnection

- ISPs provide end users with access to and from the Internet cloud, but also secure upstream connections on a paid (transit) or barter (peering) basis.
- In this two-sided market, ISPs face different levels of competition, and increasingly want to diversify through quality of service and price discrimination.
- Much of the network neutrality debate has concentrated on the ISP-end user relationship, but two recent disputes involve upstream interconnection issues.
- Comcast has imposed a surcharge on Level 3 in light of much higher downstream traffic generated as a result of Level 3 becoming Netflix's primary Content Distribution Network ("CDN").
- Fox Broadcasting briefly denied Cablevision's Long Island broadband subscribers access to video content available via the Hulu web site to secure greater leverage in "retransmission consent" negotiations.
- Disputes like these may become more numerous raising the question whether the FCC should intervene.



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

A Recent “Smoking Gun”?

For added leverage in a dispute over compensation for retransmission of broadcast content, Fox temporarily blocked access to specific web sites by all Long Island Cablevision customers, including broadband-only subscribers. Network neutrality concerns have focused on ISP access issues, but in this case the content provider targeted and blocked end user access.

We notice that you are attempting to access Fox content on Hulu. Unfortunately this content is currently unavailable to Cablevision customers.

We look forward to bringing Fox content to Cablevision customers again soon.

Four Phases in Internet Development

- 1) Incubation--government administration, first through the United States Defense Department and later through the United States National Science Foundation and universities and research institutes throughout the world (1980s-1995);
- 2) Privatization--governments eliminate financial subsidies obligating contractors to assess whether and how to operate commercially (1995-1998);
- 3) Commercialization—private networks proliferate as do ventures creating software applications and content that traverse the Internet. The “dotcom boom” triggers irrational, excessive investment and overcapacity (1998-2001); and
- 4) Diversification—after the dotcom bust and market re-entrenchment, Internet survivors and market entrants expand the array of available services and ISPs offer diversified terms, conditions and rates, including price and quality of service discrimination needed by “mission critical” traffic having high bandwidth requirements, e.g., full motion video content. ISPs and even content providers can use deep packet inspection to identify traffic for “better than best efforts,” and other forms of prioritization at one extreme and blockage/throttling at the other.

Does the FCC Have Jurisdiction to Resolve Internet Cloud Disputes?

Arguments in Favor:

While the ISP-end user link constitutes a largely unregulated information service, upstream constitutes telecommunications service, subject to Title II of the Communications Act.

The FCC has streamlined long haul telecommunications service regulation, but is statutorily constrained from abandoning requirements that carriers price service on fair terms and conditions without unreasonable discrimination.

The Commission has direct statutory authority to resolve service complaints, both in terms of blocked access to content by end users and allegations of discriminatory pricing.

While prone to over-extend its ancillary authority, the FCC has a direct statutory link for resolving cable television retransmission content disputes (Title VI) that morph into end user content blocking, e.g., Fox could not prevent Cablevision subscribers from erecting antennas.

Does the FCC Have Jurisdiction to Resolve Internet Cloud Disputes?

Arguments Against:

The FCC lacks jurisdiction over Internet transactions at all levels.

The Internet has thrived thanks to government incubation and timely privatization.

The Comcast-Level 3 dispute involves a peering contract.

The Cablevision-Fox dispute involves a content access and carriage dispute for which Congress favors market-driven negotiations with limited FCC review.

These two disputes do not trigger network neutrality concerns, because the parties have voluntarily entered into commercial interconnection negotiations, not common carriage. ISPs can de-peer or migrate from barter to payment and video content providers can decide when and how intermediaries can secure access.

What Should the FCC Do?

- Provide its “good offices” to resolve disputes when a stakeholder files a complaint. While most conflicts will get resolved through commercial negotiations, intractable disputes do occur necessitating limited, ad hoc intervention.
- Reframe the debate away from open Internet and network neutrality to straightforward resolution of interconnection disputes.
- Had the Cablevision-Fox dispute persisted the FCC could have invoked its Title VI jurisdiction to frame the matter in terms of the duty to deal in good faith established by must carry/retransmission rules. The FCC would have had a solid foundation for invoking ancillary jurisdiction if necessary.
- The FCC wisely refrained from immediately intervening in the Comcast-Level 3 dispute. Had a service disruption occurred the FCC could have framed the dispute as interconnection between two telecommunications carriers subject to Title II.

Case Precedent

A significant body of case law supports FCC jurisdiction to remedy interconnection disputes, including ones that involve ventures or services not squarely subject to Title II oversight.

Madison River—Digital Subscriber Line service provider (a rural telephone company) obligated to provide subscribers with access to competing Internet-based telephony service providers.

Data Roaming—Title II/III regulated cellphone companies have a duty to deal with other small, rural carriers so that subscribers outside their home service territories can continue to make and receive both voice and data calls.

Pole Attachments—electric companies and other non-telecommunications ventures have a duty to provide cost-based access to utility poles and conduits.

Truth in Billing—any wire- or radio-based service provider must render truthful bills even for information service charges. Verizon recently agreed to refund \$52.8 million in Internet access charges with no dispute whether the FCC had jurisdiction to remedy years of fraudulent fees.

Conclusions

The FCC has lawful statutory authority to remedy disputes among carriers and between carriers and subscribers when the parties cannot reach a timely settlement. This authority covers both telecommunications services and information services.

However, the Commission must act with restraint in light of limited statutory authority to act prospectively instead of responding to a complaint. Most disputes can get resolved through commercial negotiations.

Intractable disputes may increase, particularly ones where stalling favors one side. For these type problems the FCC has lawful authority to investigate and attempt to remedy anticompetitive and discriminatory practices.