

Rationales For and Against FCC Involvement in Resolving ISP Interconnection Disputes

Rob Frieden

Internet Service Providers (“ISPs”) provide end users with access to and from the Internet cloud. In addition to providing the first and last mile carriage of traffic, ISPs secure upstream access to sources of content via other ISPs typically on a paid (transit), or barter (peering) basis. Because a single ISP operates in two separate segments of traffic routing, both the terms and conditions of network interconnection and the degree of marketplace competition can vary greatly. In this double-sided market, ISPs typically have many transit and peering opportunities upstream to content providers, but downstream end users may have a limited choice of ISP options for first and last mile Internet access. Regardless of the scope of retail Internet access competition, consumers generally select only one ISP to handle all traffic requirements.

The variability of competitiveness in the market for upstream and downstream Internet access has motivated some stakeholders to claim that federal government agencies, such as the Federal Communications Commission (“FCC”), should intervene to remedy market failures and existing or potential anticompetitive practices. The so-called Network Neutrality debate has focused largely on the retail, ISP-to-end user link with advocates claiming that ISPs have the ability and incentive to favor affiliates in the delivery of traffic to subscribers.

The Network Neutrality debate occasionally addresses upstream routing discrimination, but the likelihood of anticompetitive practices are tempered by the fact that consumers and retail ISPs have access to a competitive marketplace for long haul carriage of Internet traffic. Notwithstanding such upstream competition, content eventually routes through a single retail ISP to end users. Advocates for regulatory intervention have expressed new concerns that the process used to secure upstream access to content, may suffer from the same sort of discrimination or anticompetitive practices as allegedly has occurred at the retail level.

Recently a long haul ISP, Level Three, sought FCC intervention to resolve a traffic dispute with Comcast. Level Three had contracted with Netflix to serve as a primary Content Delivery Network (“CDN”) distributor of online movies thereby substantially increasing the volume of traffic that Level Three needs retail ISPs like Comcast to deliver to its subscribers. In response to the increase in terminating traffic generated by Level Three, Comcast imposed a surcharge. Level Three objected to it being singled out for a surcharge asserting that Comcast had installed an Internet toll booth for only certain traffic that happens to compete with Comcast’s pay per view cable television service.

Under ordinary circumstances when the volume of traffic between Internet peers changes and becomes unbalanced, the carrier generating more traffic than it receives

bears the financial obligation to compensate the terminating carrier. However peering ISPs typically seek to balance out the traffic if possible in lieu of resorting to a monetary settlement. For CDNs that concentrate on the downstream delivery of content, an offsetting upstream flow of traffic may not be available to forestall a surcharge. However in the dispute between Level Three and Comcast, Level Three operates a large transcontinental network that could handle more upstream traffic from Comcast had Comcast elected to offset the Netflix downstream traffic volume.

Level Three appears to want the FCC to resolve the traffic dispute by prohibiting Comcast from imposing a surcharge, on top of the Internet access charges Comcast's subscribers pay. Comcast frames the issue narrowly as a peering matter between an upstream ISP and the ISP providing last mile termination.

This paper will examine the terms and conditions under which Internet carriers switch and route traffic for each of several links between a source of content, e.g., Netflix, and the delivery of that content to consumers via a retail ISP. The paper concludes that for each networking element commercial terms and conditions apply and that the FCC may lack direct statutory authority to intervene based on its determination that the largely unregulated information service classification applies to much of what constitutes Internet access. Additionally the FCC may appropriately forebear from regulating disputes regarding long haul telecommunications capacity, like that offered by carriers such as Level Three, because sufficient competition favors industry self-regulation. Similarly for peering disputes upstream from a retail ISP the marketplace appears sufficiently competitive for ISPs to pursue remedies free of regulatory intervention.

Despite substantial reasons not to intervene, the FCC nevertheless might have to clarify its understanding of what subscribers of retail ISP services can expect to receive. Under truth in billing and other consumer safeguards the Commission might require ISPs to explain what a subscription guarantees not only in terms of transmission speed and downloading capacity, but also what subscribers can expect their ISPs to do when receiving content requiring downstream termination. The paper concludes that both Netflix customers and retail ISP subscribers expect their service providers to guarantee delivery of movies and all sorts of Internet traffic respectively. For physical delivery of DVDs Netflix must pay the U.S. Postal Service and for delivery of streaming bits Netflix must pay that Level Three. But for Internet traffic involving two or more ISPs, the paper examines whether other retail ISPs providing last mile delivery of content violate their service commitments to subscribers by demanding additional payment from upstream carriers.