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

by ROB FRIEDEN*

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I. Introduction

In light of constant technological innovation, but infrequent legislative updates, the Federal Communications Commission (the “FCC” or the “Commission”) faces a regulatory quandary. Should the Commission act on frequent requests that it apply existing regulations, or craft new ones to

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2. See, e.g., Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008), vacated, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC exceeded its statutory authority when responding to a complaint and imposing network neutrality rules).
resolve real or anticipated interconnection disputes between and among Internet carriers and content providers? Alternatively, should the FCC refrain from expanding its regulatory wingspan unless and until it receives explicit statutory authority? The answers to these questions substantially affect the telecommunications and information marketplace, thus triggering vigorous debate among stakeholders.

The ongoing question as to whether the FCC has a legislative mandate and compelling need to regulate the terms and conditions for an open Internet exacerbates the Commission's dilemma. Advocates for and against network neutrality frequently use hyperbole to make their case, but the FCC's decision whether to act will have profound consequences. Refraining from establishing rules may facilitate anticompetitive practices that harm consumers and the national economy. However, acting on the basis of unproven harms can impose costs and generate disincentives for investment in network upgrades.


FCC managers may favor intervention because doing so expands the scope and reach of the Commission’s regulatory wingspan, typically justifying more funding. On the other hand, FCC management needs to consider the impact of any regulatory initiative on its record in convincing appellate courts that statutory authority supports its action, or alternatively, that its decisions on whether and how to act under ambiguous statutory direction were reasonable.

Network neutrality poses particularly vexing challenges due to a combination of factors. Examples include broad gaps in statutory interpretation between interested parties, agitated consumers, complex and conflicting framing of the issues, and the nearly universal view that great harm will beset various stakeholders if the Commission intervenes or fails to do so. Advocates for regulatory action have not produced a large and compelling empirical record of harm. They instead rely on forecasts that biased networks will reduce the future value, accessibility, and utility of the Internet. Opponents argue that regulatory intervention to solve unproven harms imposes costs, including a net reduction in innovation and investment in Internet infrastructure and applications.

This article will consider what roles, if any, the FCC may lawfully assume to ensure timely and fair interconnection and compensation agreements between Internet carriers and content providers. The article will examine the FCC’s limited role in broadcaster-multichannel video programming distributors’ (“MVPDs”) retransmission consent negotiations with an eye toward assessing the applicability of this model for current and future disputes.

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6. For a frequently cited example of harmful operation of a biased and discriminatory network, see *Madison River Communications, LLC*, 20 FCC Rcd. 4295, 4296–97 (2005) (stating that a small independent telephone company agreed to a $15,000 monetary forfeiture and consent decree, and not to block Digital Subscriber Link customers’ access to competitor’s “Voice over the Internet Protocol” telephone service).

7. See, e.g., Susan P. Crawford, *Network Rules*, 70 LAW AND CONTEMP. PROBS. 51, 65 (2007) (explaining that if a network “makes an exclusive deal with any high-speed application source... then any other source will be second-best and may fail,” and new customers “with ideas for new online interactions may not be able to pay for any of these value-added services,” thereby increasing “the risks to as-yet-unborn technologies and interactions”).

8. E.g., Christopher Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO L.J. 1847, 1853–54 (2005) (“[P]rohibiting last-mile providers from deviating from network neutrality may actually harm consumers. Simply put, the current regime of flat-rate pricing and unrestricted access discourages innovation in network management.”).
The FCC has stated that it lacks jurisdiction to prescribe specific financial terms for broadcasters and MVPDs, to mandate binding arbitration, or to mandate interim carriage when the parties cannot reach closure and consumers no longer have access to "must see" video content, such as professional football games and other live programming. The FCC, however, has interpreted its statutory authority to ensure "good faith" negotiations as allowing it to constrain broadcasters' negotiating leverage by prohibiting the "Top Four" operators from joining in collective negotiations with cable operators.

9. See Amendment of the Commission's Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, 2727–28 (Mar. 3, 2011) ("We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."); see also id. at 2728–29 (citation and internal quotation marks omitted) ("[W]e believe that mandatory binding dispute resolution procedures would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act ("ADRA"), which authorizes an agency to use arbitration whenever all parties consent.").

10. The FCC explained that:

examination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute. Rather, Section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent. Furthermore, consistent with the statutory language, the legislative history of Section 325(b) states that the retransmission consent provisions were not intended "to dictate the outcome of the ensuing marketplace negotiations" and that broadcasters would retain the "right to control retransmission and to be compensated for others' use of their signals." We thus interpret Section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement.

Id. at 2728 (citations omitted).


12. Amendment of the Commission's Rules Relating to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, at *1 (2014) [hereinafter 2014 Revised Retransmission Consent Rules] (citations omitted) (revising the "retransmission consent" rules...to provide that joint negotiation by stations that are ranked among the top four stations in a market...and are not commonly owned constitutes a violation of the statutory duty to negotiate retransmission consent in good faith.").
Additionally, the FCC has identified two major unnecessary regulatory constraints on MVPDs’ content access in light of increased competition in the video programming marketplace. The Commission eliminated the duty to “blackout” delivery of duplicative broadcast network programming from distant stations. The Commission has also proposed to eliminate the requirement that MVPDs blackout syndicated programming, such as Jeopardy and Wheel of Fortune available from distant broadcast stations.

This article will recommend that the FCC not define, or interpret, what constitutes commercially reasonable interconnection and compensation agreements for video carriage by MVPDs, or Internet Service Providers (“ISPs”). This article will suggest that the FCC apply the elements in the retransmission consent model that limit the scope of its regulatory intervention to establishing structural requirements in negotiations without directly affecting the substantive terms of ISP agreements. Toward that end, the FCC should use simple reporting requirements to assess the timeliness of negotiations, and also provide a forum to identify and disclose instances where stalling and other tactics possibly evidence bad faith. This article concludes by suggesting that limited structural requirements constitute both lawful and effective safeguards that do not intrude on the commercial processes used by participants in the Internet ecosystem.

II. Technology, Design, and Market Imperatives Favor an Open Internet

References to the Internet as a “network of networks,” or “cloud,” recognize the numerous interconnections and compensation arrangements

13. Id. at *20.
14. The sports blackout rules had prohibited MVPDs from retransmitting the signal of a distant broadcast station carrying a sporting event within a protected local blackout zone if the event is not available live on a local television broadcast station. Sports Blackout Rules, 79 Fed. Reg. 63,547, 63,548 (Oct. 24, 2014) (to be codified at 47 C.F.R. pt 76). Local broadcasts typically are contingent on ticket sales for attendance at the game to reach 85% to 100% at least 72 hours before the event. Id. at 63,551.
15. See, e.g., 2014 Revised Retransmission Consent Rules, supra note 12, at *1 (“[W]e seek comment on whether to modify or eliminate the Commission’s network non-duplication and syndicated exclusivity rules in light of changes in the video marketplace since these rules were first adopted more than forty years ago.”).
17. The Internet cloud refers to the vast array of interconnected networks that make up the Internet and provide users with seamless connectivity to these networks and their content. “The increasing functionality of the Internet is decreasing the role of the personal computer. This shift is being led by the growth of ‘cloud computing’—the ability to run applications and store data on a service provider’s computers over the Internet, rather than on a person’s desktop computer.”
necessary to achieve a complete routing of traffic from content source, or storage location, to end users. Exempt from public utility common carrier regulatory requirements, ISPs regularly engage in commercial negotiations to reach interconnection agreements establishing the terms, conditions, and compensation rates for the delivery of traffic. As the Internet has evolved, these arrangements have diversified from a general baseline dichotomy of using barter (peering), or transfer payments (transiting). In particular, the downstream delivery of bandwidth intensive video content, such as Internet Protocol Television (“IPTV”),


18. One legal scholar explained the requirements needed to achieve Internet routing:

The Internet developed initially as an academic curiosity, based on a commitment to the “end-to-end principle.” This principle requires that all Internet traffic, whether an email, a Voice over Internet Protocol (VoIP) “call,” or a video stream, be treated equally and managed through “best efforts” connections. In such a network, data packets pass from one router to another without the prioritization of any particular packets. In practice, this means that Internet traffic reaches its destination at varying times, depending on the traffic levels of the relevant Internet communications links.


19. These services qualify for a largely unregulated status. The Communications Act of 1934, as amended, defines telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(53) (2014). Telecommunications is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Id. § 153(50). Title II of the Communications Act, as amended, 47 U.S.C. §§ 201–276, applies nondiscrimination and other common carrier requirements on telecommunications service providers. On the other hand, “information service” is defined as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Id. § 153(24).

20. See Michael Kende, The Digital Handshake: Connecting Internet Backbones, 11 COMM.LAW CONSPECTUS 45, 45 (2003) (“Internet backbone providers adopt and pursue their own interconnection policies, governed only by ordinary laws of contract and property, overseen by antitrust rules.”).


22. IPTV offers consumers with broadband connection options to download video files or view (streaming) video content on an immediate “real time” basis. Sky Angel U.S., LLC, 25
has triggered new arrangements.\textsuperscript{23} Completed interconnection agreements accommodate the interest of content providers and distributors in speedy, high quality delivery of traffic, as well as ISPs’ interest in profiting from their additional investment in the switching and routing capacity needed to handle such a massive increase in traffic volume. Content providers and downstream ISPs, however, increasingly disagree on who should pay for traffic carriage and on the rate of compensation, resulting in more disputes and occasional disconnections.\textsuperscript{24}

The proliferation of “mission critical” bit streams containing “must see” video has raised the stakes in negotiations among ISPs and between ISPs and content sources. ISPs have invested in substantial upgrades to accommodate subscriber demand for faster networks capable of handling full motion video, but content providers also have made substantial investments in products that consumers want to see. The combination of consumer intolerance for service degradation and the need to negotiate with specific ISPs providing “last mile” delivery of content to end users (“retail ISPs”) may place upstream ISPs and content ventures at a negotiation disadvantage. MVPDs appear to have a similar bargaining handicap in light of FCC rules that foreclose the option of finding a replacement source of specific content, for example, substituting a distant broadcast signal

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\textsuperscript{23} John Meisel, Reactions by Broadband Service Providers to the Growth of Video Streaming, 22 COMM\LAW CONSPECTUS 267, 267–68 (2014) (citations omitted) (explaining two events occurred in the last few years that accompanied “the increase in last-mile wireline speed: [f]irst, there is an explosion of streaming video as the Internet’s dominant form of traffic and, second, there is a reconfiguration of the links in how large applications and content providers transmit their data to the outer edges of broadband service providers’ networks.”).

\textsuperscript{24} See id. at 277 (stating “competing arguments for ‘who should pay who’ in interconnection arrangements”: (1) “one can try to identify who causes the traffic flow, end users or edge providers”; (2) “[e]dge providers argue that it is end users who demand/pull the data and, thus, it is the responsibility of the BSP to ensure that its subscribers have the ability to access data with sufficient capacity and functionality to accommodate the requests both within the local network and at points of interconnection with other networks”; and, (3) “BSPs counter that it is the responsibility of edge providers to ensure that the data arrives in a reliable and usable form to end users.”)
containing the same network, or syndicated programming as offered by a local station that has rejected MVPD compensation proposals.\footnote{25}{The FCC’s Network Nonduplication rules currently permit a local broadcast television station with exclusive rights to network programming to prohibit an MPVD from importing the same content available from another station. 47 C.F.R. § 76.92 (2014). Syndicated exclusivity rules prohibit an MVPD from importing non-network provided content, such as Jeopardy and Wheel of Fortune. 47 C.F.R. § 76.151.}

Both retail ISPs and broadcasters may perceive an advantage in stalling negotiations, perhaps with an eye toward enlisting broadband and MVPD subscribers as their advocates. On the other hand, these ventures may face the risk of consumer push-back and calls for regulatory intervention if they overplay their hand. Regardless of underlying strategic considerations, consumers have become increasingly inconvenienced as negotiations become more protracted and expensive in both the broadcast-MVPD\footnote{26}{See Gregory J. Vogt, Does Retransmission Consent Need Fixing? (Or Do Consumers Need Help So They Can Watch the Super Bowl, World Series, and Academy Awards?), 22 COMM LAW CONSPECTUS 108, 111 (2014) (“The reality is that the number of retransmission disputes is growing. This trend is likely to continue with increased competition among MVPDs and mounting involvement by networks in local affiliate retransmission negotiations.”).} and Internet arenas.\footnote{27}{For example, Netflix signed a paid peering agreement that may have resulted in higher payments to Comcast in light of its substantial increases in downstream delivery. See Press Release, Netflix, Comcast and Netflix Team Up to Provide Customers Excellent User Experience, Feb. 23, 2014, available at http://corporate.comcast.com/news-information/news-feed/comcast-and-netflix. One scholar explained “paid peering” as follows:

\begin{quote}
\emph{Paid peering}, for example, resembles normal peering in almost every respect, except that one network pays the other network even when the exchange of traffic is roughly the same. These more sophisticated agreements reflect the fact that while the traffic exchange may be equal, the cost of maintaining the networks’ respective infrastructures may be unequal. ISPs serving a smaller number of large internet content websites (known as “content networks”) have lower costs in maintaining their infrastructure than ISPs serving home users (“eyeball networks”), since residential neighborhoods require more equipment investment (such as wiring) and maintenance than commercial areas. These interconnection agreements create the economic incentives for ISPs to route internet traffic along the lowest-cost paths, which can sometimes have a discriminatory effect on certain types of content, applications, and services.
\end{quote}
Alexander Reicher, Note, Redefining Net Neutrality After Comcast v. FCC, 26 BERKELEY TECH. L.J. 733, 752 (2011) (emphasis added).} Consumers pay higher monthly subscriptions when MVPDs have to pay more for content, and when upstream ISPs and content providers have to pay more for delivery services.

Several high profile interconnection and compensation disputes have involved major broadcast networks, such as CBS; and cable television operators, such as Time Warner\footnote{28}{See Bill Carter, CBS Returns, Triumphant, to Cable Box, N.Y. TIMES, Sept. 2, 2013, available at http://www.nytimes.com/2013/09/03/business/media/cbs-and-time-warner-cable-end-}, leading ISPs, such as Comcast.
and Level 3\textsuperscript{29}; and major sources of content, such as Netflix.\textsuperscript{30} Protracted disputes, well covered by the news media, have made the issue of regulatory intervention more desirable to many consumers. To the FCC’s credit, it has refrained from overreacting with heavy-handed regulatory intervention. The Commission, however, has asserted the need for its involvement in retransmission consent negotiations between local television broadcasters and MVPDs,\textsuperscript{31} as well as in determining what constitutes baseline requirements for an “open” video marketplace and Internet.\textsuperscript{32}

As the markets for MVPD and IPTV services converge, the FCC may consider it necessary and prudent to establish rules designed to ensure good faith and fair dealing in both instances of content carriage. For example, the FCC has proposed that ISPs bear the burden of proving “commercially reasonable” deviations from the standard of nondiscriminatory, and “best efforts,” routing of Internet traffic.\textsuperscript{33} When parties reach a timely and

\begin{footnotesize}


\textsuperscript{31.} 2014 Revised Retransmission Consent Rules, supra note 12.

\textsuperscript{32.} 2014 Open Internet NPRM, supra note 4, at *2, *7–15. Additionally, section 706(b) of the Communications Act of 1934, as amended, section 1302(b) requires the FCC to conduct an annual assessment on whether access to advanced telecommunications capabilities, such as broadband, is available on a reasonable and timely fashion. 42 U.S.C. § 1302(b). If the FCC determines such access is inadequate, it shall then “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” Id.

\textsuperscript{33.} Id. at *2. Where ISP interconnection “conduct would otherwise be permissible under the no-blocking rule” barring the blockage of lawful content, the FCC proposed “to create a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices, asking how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether.” Id. Moreover, the FCC stated:

While the D.C. Circuit vacated the Commission’s rule prohibiting unreasonable discrimination by fixed broadband providers on the theory that it
uncoerced agreement, the Commission has little, if any, grounds to question the commercial reasonableness of the negotiated outcome.

A. Arguments For and Against Biased Networks

One can rarely find consensus on many assumptions about the Internet other than the near universal agreement that it has become a major medium for access to information, communications and entertainment ("ICE"). Different, and somewhat conflicting, analogies provide a baseline frame of reference. To some people, the Internet operates as an amorphous cloud that receives, stores, and delivers content.34 Other analogies depict the Internet as a series of tubes,35 a network of networks,36 a broadband communications supply chain,37 a hierarchy of operating standards and protocols, and a platform or interface for accessing content.38

The lack of consensus also extends to whether and how the Internet should operate. Network neutrality advocates support a public utility model where the FCC regulates ISPs as neutral conduit providers when transmitting the content of other providers.39 Opponents support market-
driven options where ISPs can discriminate on the basis of price, quality of service, and traffic routing priority. At its inception, the basic topology and operating parameters of the Internet favored openness, modularity, and a layered hierarchy of functions. This Internet architecture favors widespread diffusion of content and intelligence rather than concentration at core locations. The phrase “dumb pipe” may understate the intelligence of Internet networks, but the reference emphasizes a design favoring intelligence at the edges of networks, on users’ premises, rather than within the transmission links themselves.

The early emphasis on intelligence at the edge evidenced an appreciation that the Internet could become ubiquitous and essential only if consumers could access widely dispersed content using seamlessly interconnecting networks that jointly participate in the routing of traffic. Similarly, the protocols designed for the Internet favor connectivity and openness. The network of networks depiction of the Internet underscores network compatibility regardless of geographical location of content, who operates the networks used to route traffic, or the manufacturer or age of network equipment used. Concepts like “end-to-end” connectivity support best efforts routing throughout the entire Internet ecosystem.

Title II provisions would then be applied to broadband, but those provisions would be enough for the Commission to achieve its regulatory goals.


40. Christopher S. Yoo, Beyond Network Neutrality, 19 HARV. J.L. & TECH 1, 6 (2005) (arguing that the key inquiry “when deciding whether to impose network neutrality as a regulatory mandate,” is “whether circumstances exist in which deviations from network neutrality would create benefits that would be foreclosed if network neutrality were imposed.”); see also id. at 7 (“In the absence of a clear competitive harm, the standard response under competition policy is to forbear from categorically prohibiting the challenged practice and instead to evaluate its effect on competition on a case-by-case basis.”)

41. Christopher S. Yoo, Protocol Layering and Internet Policy, 161 U. PA. L. REV. 1707, 1711–12 (2013) (explaining how a layered and structured design architecture has costs, including potential losses in innovation and flexibility).

42. Frederick W. Pfister, Note, Net Neutrality: An International Policy for the United States, 9 SAN DIEGO INT’L L.J. 167, 171 (2007) (“Internet intelligence resides at the ends of the network. There, a user’s device or server does the heavy lifting and determines if the received data is intended for it. This leads to the phenomenon of the so-called ‘dumb’ network.”); see generally, J. H. Saltzer, D. P. Reed & D. D. Clark, End-to-End Arguments in System Design, 2 ACM TRANSACTIONS IN COMPUTER SYS., 277 (1984).


44. See David D. Clark & Marjory S. Blumenthal, The End-to-End Argument and Application Design: The Role of Trust, 63 FED. COMM. L.J. 357, 364–65 (2011); Mark A. Lemley
The decision by governments to underwrite development of the Internet through grants, subsidies, and early adoption of use helped support the concept of neutrality while deflecting, or ignoring, important issues about cost recovery.\textsuperscript{45} With taxpayers bearing the financial cost of network research and deployment,\textsuperscript{46} carriers could concentrate on expanding the Internet’s reach, accessibility, and capacity without paying much attention to the cost of upgrades and which carriers and users triggered the need for costly network upgrades. At its inception, the Internet operated as a shared and widely available medium with carriers keen on finding new partners in their shared mission of expanding geographical reach.\textsuperscript{47}

Carriers operating in the first generation of the Internet used a barter arrangement, often lacking comprehensive terms and conditions, when agreeing to interconnect their separate networks.\textsuperscript{48} This process of peering\textsuperscript{49} operated under the assumption that carriers’ traffic volumes were nearly equal,\textsuperscript{50} or that imbalances did not matter because government subsidies would defray costs.\textsuperscript{51} Put another way, the first ISPs assumed traffic metering was too costly or unnecessary.

A heritage favoring efforts to promote seamless network interconnections lives on despite changes in the Internet ecosystem—most notably the replacement of government subsidies by a largely commercial


\textsuperscript{45} See Whitt, supra note 38, at 701 (“[T]he Internet’s open architecture was a fundamental principle that was a hallmark of the government research effort, one that would not have come about if the Net had been created instead by private industry.”).

\textsuperscript{46} See Robert Pepper, \textit{Policy Changes Necessary to Meet Internet Development}, 2001 L. REV. MICH. ST. U. DET. C.L. 255, 255–56 (2001) (“[T]he Internet was developed with government subsidy... through government contracts.... The first real government involvement in developing the Internet, as we know it today, came from contracts that the National Science Foundation (NSF) gave to providers of network services.”).

\textsuperscript{47} For background on the history of Internet development, see Barry M. Leiner et al., \textit{A Brief History of the Internet}, INTERNET SOC’Y (2003), available at http://www.isoc.org/internet/history/brief.shtml; see also Frieden, supra note 3, at 273–83 (identifying and describing four phases in Internet development).

\textsuperscript{48} See Kende, supra note 20, at 52 (“[C]ompanies will peer when they perceive equal benefit from peering based on their own subjective terms, rather than any objective terms.”).


\textsuperscript{50} See Dirk Grunwald, supra note 3, at 427 (“Most... peering relationships have been historically ‘settlement free’ because they benefit both parties and because traffic demands were symmetrical.”).

\textsuperscript{51} See Philip J. Weiser, \textit{The Ghost of Telecommunications Past}, 103 MICH. L. REV. 1671, 1673 (2005) ("[T]he Internet was nurtured by government subsidies and it developed as it did—as an open platform for innovation—because of regulatory decisions made by the government, such as ensuring that the telephone lines that carried Internet traffic did not favor certain applications or uses over others.").
marketplace. Absent government subsidies, ISPs need to recoup sizeable and frequent investments in next generation network equipment from subscribers and other carriers. As the type and number of ISPs increased, new financial compensation arrangements evolved, particularly ones to address interconnection between carriers having no likelihood of equal traffic volumes. "Transiting" refers to arrangements where an ISP, lacking parity of traffic volume, capacity, subscribers, attractive content sources, switching resources, or geographical reach agrees to compensate another ISP for accepting traffic and routing it onward to other ISPs, or to the intended final destination.

As the Internet has privatized, commercialized, and diversified, ISPs have had to balance the primary goal of promoting greater accessibility and geographical coverage with perhaps more pedestrian, but essential, financial considerations. Absent a third party underwriter, ISPs must rely on revenue from their subscribers and other ISPs to recoup and earn a return on investments. Many ISPs, particularly the largest ones providing backbone transcontinental and transoceanic routes, faced the unenviable task of renegotiating peering agreements and replacing a "bill and keep," zero-transfer payment barter system, with one (such as transiting) that required payments.

It should come as no surprise that fully privatized ISPs, operating in a largely unregulated commercial environment, seek new revenue and profit centers. These carriers revisited the policy favoring "best efforts" routing and identified new avenues for diversification based on price, quality of service discrimination, and routing priority.

One can consider these new arrangements as sensible and as evidence of a maturing and diversifying Internet. Not all forms of price and quality


53. See Yoo, supra note 21, at 95 (2010) ("Network providers have also begun to enter into business relationships that go beyond peering and transit relationships that dominated the early Internet.").

54. Kende, supra note 20, at 50.


of service discrimination serve ulterior motives to favor corporate affiliates, or parties willing to pay a surcharge. Indeed, the torrent of downstream traffic, represented by full motion video content, necessitates accommodations because traffic for many carriers has become substantially asymmetrical: far more downstream than upstream traffic. For example, a new category of ISP, known as a Content Distribution Network ("CDN"),\(^\text{58}\) has a business plan for targeting video content sources and distributors—for example, Netflix—and providing them with the massive downstream bandwidth they require to reach subscribers.\(^\text{59}\)

On the other hand, any form of network bias—no matter how sensible, desirable, and commercially successful—runs counter to the still widely embraced concept that conduit neutrality should foreclose most, if not all, types of discrimination.\(^\text{60}\) Notwithstanding this general disposition, Internet subscribers most certainly want ISPs to promote greater certainty that "mission critical" bits arrive without degradation, particularly if congested network conditions exist. Netflix subscribers expect timely delivery of bandwidth-intensive video traffic. Their pain threshold for degraded service starts as soon as the content freezes or blurs. Similarly, network neutrality advocates do not appear to have a problem with content sources and distributors installing proxy servers or retaining the services of CDNs, such as Akamai, that use these devices to distribute content closer to end users.\(^\text{61}\) Such "better than best efforts" traffic routing reduces the number of routers traversed and the distance that traffic must travel to reach end users, as well as the total elapsed delivery time (latency).

It appears that network neutrality advocates concentrate on the last mile delivery of traffic by retail ISPs because of the assumption that these carriers have the greatest incentive and ability to discriminate in ways that

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59. Daniel A. Lyons, Internet Policy’s Next Frontier: Usage-Based Broadband Pricing, 66 Fed. Comm. L.J. 1, 8 (2013) ("To avoid transit fees and to route content more quickly to its destination, some content providers choose instead to purchase access from private content-delivery networks such as Akamai or Limelight, which also typically charge customers based on volume.").


61. Content providers and distributors can opt to negotiate directly with retail ISPs for the right to install ("co-locate") equipment on site, or alternatively secure the services of a company, such as Akamai, to negotiate, install and maintain the equipment. Netflix has sought the direct negotiation option with ISPs. See Ken Florance, Announcing the Netflix Open Connect Network, NETFLIX U.S. AND CANADA BLOG (June 4, 2012), http://blog.netflix.com/2012/06/announcing-netflix-open-connect-network.html.
harm consumers and competition. Advocates for network neutrality express concerns that, without regulatory oversight, ISPs providing the final leg of a complete end-to-end service will engage in anticompetitive practice. For example, retail ISPs may generate artificial congestion with an eye toward forcing upstream ISPs and content sources to pay surcharges for traffic routing that previously triggered neither congestion nor an additional duty to compensate the downstream carrier. Network neutrality proponents contend that, absent regulatory oversight, ISPs will engage in unreasonable price and quality of service discrimination to favor corporate affiliates while surcharging competitors. Such discrimination could generate artificial congestion that an ISP might create to handicap a specific ISP or content source unless, and until, they agreed to pay a surcharge.

B. Distinguishing Reasonable and Unreasonable Discrimination

Currently, the FCC has classified all forms of Internet access as information services not subject to Title II common carrier regulation.

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62. Washington Correspondent Grant Gross for IDG News Service explained network traffic congestion:

Traffic congestion at interconnection points between broadband providers and backbone providers doesn’t appear to be widespread, with congestion often just two or three hours a day, said David Clark, a senior research scientist at the Massachusetts Institute of Technology’s Computer Science and Artificial Intelligence Laboratory and one of the researchers investigating congestion complaints.

But in some cases, U.S. ISPs have experienced periods of congestion on interconnection points with backbone providers that last for months at a time, Clark said Wednesday. Still, many of the problems of congestion seem to point to disagreements over business arrangements related to mismatches between network capacity and demand, he said during a congressional briefing on traffic congestion.


Even if the FCC were to reclassify Internet access as a telecommunications service, subject to the nondiscrimination requirements contained in Title II,\(^{66}\) the Commission would still have to make ad hoc determinations on the reasonableness of particular carrier practices and whether a carrier offers "like services" on the same terms and conditions.\(^{67}\) The FCC has devoted decades to these endeavors, regularly having to defend its interpretation of what efforts telecommunications service providers must undertake consistent with their common carrier status.\(^{68}\) For example, the FCC undertook several regulatory initiatives to promote competition for local telecommunications services consistent with an explicit mandate contained in the Telecommunications Act of 1996. The FCC first received generally supportive appellate review of initiatives, but over time, intrusive and burdensome requirements, such as compulsory unbundling of service elements and below market pricing of access, failed to achieve sustainable competition as they created disincentives for investment in infrastructure upgrades by incumbent carriers.

The FCC has identified two options for securing direct statutory authority to regulated broadband services: (1) under Title II, the Commission reclassifies broadband as an information services, or (2) the Commission interprets section 706 of the Telecommunications Act of 1996\(^{69}\) as authorizing it to impose non-common carrier rules on ISPs. In either instance, the FCC cannot prohibit rates, terms, conditions, tiers,
features, carrier practices, and service options made available to all “similarly situated” carriers and consumers. Discrimination regularly satisfies the reasonableness criterion if end users, or other carriers, opt for a service, even on specialized terms and conditions. Discrimination may become unreasonable if the providing carrier itself makes the determination whether to apply terms and conditions selectively and arbitrarily. On the issue of Internet access, quality of service discrimination created by proxy server installations would pass muster because the venture providing this option typically offers it on a nonexclusive basis to anyone on commercially negotiated terms.

The certainty, however, that reasonable discrimination can and should occur, does not eliminate the possibility that ISPs unilaterally may opt to engage in unreasonable and unlawful discrimination. Due to the integrated nature of end-to-end routing, the FCC would have a difficult time distinguishing between degraded service caused by real congestion versus artificially created congestion. The former results when an ISP cannot handle peak traffic conditions as a result of insufficient bandwidth, switching capacity, and interconnection ports. The latter results when an ISP deliberately causes degraded service in handling specific content sources or types of content.

Should the FCC have any basis to get involved, its first function would be to conduct a forensic examination as to the cause of congestion or any other type of service interruption. But even before a threshold decision


71. The FCC may find it difficult to determine a single cause for temporary or chronic congestion and service degradation. For example, in early 2014 Netflix subscribers experienced deterioration in service that the company attributed to retail ISPs’ efforts to demand surcharge payments in light of increased traffic volume. Retail ISPs, such as Comcast, responded that they had undertaken no strategy to cause slower delivery speeds for Netflix traffic. ISPs claimed Netflix triggered congestion by releasing all episodes of blockbuster content instead of the conventional release of single episodes per week. Fitzgerald & Ramachandran, supra note 30 (“The hit political drama series of Netflix kept about 60,000 subscribers glued onto their screens on Valentine’s Day to watch the whole 13-hour production. However, the shifting behavior of consumers to watch videos on demand over the Internet is causing some clogged pipes on the information highway.”); see also Randell Suba, Netflix-Verizon Standoff: Only Net Neutrality Can Now Stop Video Slowdown, TECH TIMES (Feb. 23, 2014), http://www.techtimes.com/articles/3670/20140223/netflix-verizon-standoff-only-net-neutrality-can-now-stop-
whether and how the FCC should get involved lies the issue of what predictable outcomes can occur if the carriers and their clients work diligently to resolve disputes by themselves.

III. Broadcaster-MVPD Retransmission Consent Negotiations

Network neutrality opponents suggest that commercially driven negotiations between and among ISPs and content providers offer a more timely, efficient, and customizable solution in lieu of FCC intervention. This model constitutes the predominant way Internet carriers agree to handle the traffic generated by other carriers. With rare exception, the Internet cloud has maintained widespread, redundant, competitive, and efficient traffic routing upstream from retail ISPs that use peering and transit agreements, as well as specialized arrangements provided by ventures such as Akamai. Subscribers of broadband services typically do not experience service interruptions or degradation as a result of insufficient network capacity upstream from their retail ISPs. Ample competition exists as evidenced by significant reductions in the cost of long-haul broadband carriage.

Network neutrality advocates concentrate on the first and last mile of traffic provided by retail ISPs because these segments in the Internet ecosystem may lack all of the characteristics supporting fair and timely commercial arrangements. Retail ISPs use the same commercial negotiation models as their upstream counterparts, but also have the opportunity to exploit superior negotiating leverage in light of their status as the sole carrier that provides access from and to the Internet cloud for a significant percentage of end users.

The question whether fair commercial negotiations can occur between parties may arise, but the FCC would be hard pressed to generate lawful criteria for assessing what constitutes commercial reasonableness, particularly when the buyer and seller reach closure on terms. One can dismiss as buyer's remorse claims of unfair or coercive treatment

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72. Lyons, supra note 59, at 5–6 ("Absent a specific market failure . . . broadband providers should be free to experiment with usage-based pricing and other pricing strategies . . . . Public policies allowing providers the freedom to experiment best preserve the spirit of innovation that has characterized the Internet since its inception.").


nevertheless accepted by an ISP or content provider. However, consumers may suffer if a party lacks good faith in negotiations, knowing that stalling can bolster negotiating leverage and result in better terms at a later date. Bear in mind that consumers have a very low pain threshold for degradation in picture quality when streaming downloaded video content. Retail ISPs might attempt to extract more generous terms simply by refraining from making a conscientious effort to abate real congestion, or worse by actively taking steps designed to degrade bitstreams originating from the carrier or content source with which the ISP is negotiating.

A model exists for assessing the FCC’s role in promoting timely and good faith negotiations without direct intervention and interference with the commercial negotiation process or the substantive outcome. The Commission has a limited role specified by law in its oversight of negotiations between television broadcasters and MVPDs, such as cable television and Direct Broadcast Satellite operators, for the retransmission of broadcast television channels. The FCC can lawfully assess whether parties have negotiated in good faith, but cannot specify terms, mandate arbitration, or determine whether a negotiated settlement satisfies a commercially reasonable standard. Additionally the FCC cannot order the parties to maintain the status quo in terms of carriage rights and compensation terms after a contract renewal deadline.

The broadcaster-MVPD retransmission model has both similarities and differences compared to ISP interconnection and compensation negotiations. In both categories, the parties engage in a mutually beneficial transaction

75. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report, 28 FCC Rcd. 10496, 10503 (2013) (“As defined by statute, an MVPD is an entity that makes available for purchase multiple channels of video programming. Thus, the MVPD group includes cable operators, DBS operators, and telephone companies that offer multiple channels of video programming.”).
76. See Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, 2727–28 (2011) (“We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations.”).
77. The FCC explained that:
The Cable Television Consumer Protection and Competition Act of 1992 . . . amended the Communications Act, inter alia, to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. . . . [T]he statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission. Instead, the order concludes that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement.

that reaches closure in the vast majority of instances before interconnection and carriage must stop. The emphasis on retransmission consent, however, lies in payment for access to content, with the MVPD absorbing the cost of last mile delivery, while the ISP negotiations cover the cost of carriage with no compensation for the value of the content carried.

Both ISPs and MVPDs must confront industry and regulatory conditions that trigger deviations from a fully functioning and completely unfettered marketplace. Each group must deal with specific counterparts in an “arranged marriage” of sorts. ISPs have to negotiate with specific retail ISPs that provide the only last mile link for terminating traffic to end users. In the United States, most retail broadband subscribers choose between broadband options provided by incumbent cable television and telephone companies. Satellite broadband providers offer comparatively slower bit transmission speeds, have lower caps on allotted downloads per month, charge higher rates, and require payments for necessary receiving equipment. Additionally, higher latency—caused by the distance to and from satellites—can disrupt some uses. The newest generation of terrestrial wireless service provides a broadband option, albeit one with much smaller downloading allotments, making the per-megabyte cost of service significantly higher than wireline options. Broadband consumers typically subscribe to one carrier to handle all of their Internet access requirements.

78. For example, as the FCC stated:

In the Open Internet Order, the Commission found that providers of broadband Internet access service had multiple incentives to limit Internet openness. The Order concluded that the threat of broadband provider interference with Internet openness would be exacerbated by—but did not depend on—such providers possessing market power over potential subscribers in their choice of broadband provider. However, the Commission found that most residential customers have only one or two options for wireline broadband Internet access service, increasing the risk of market power, and found the future of mobile Internet access service as a competing substitute remained unclear. Moreover, the Commission emphasized that customers may incur significant costs in switching from one provider to another, thus creating “terminating monopolies” for content providers needing high-speed broadband service to reach end users.

2014 Open Internet NPRM, supra note 4, at 12 (citing 2010 Open Internet Order, supra note 4, at 17923–24).


A. Limited Structural Regulation of Retransmission Negotiations

The existence of MVPD market power and the importance of broadcasters' local service prompted Congress in 1992 to impose a mandatory, “must carry” right of carriage for broadcasters or the option to secure compensation from MVPDs. MVPD market share has declined since 1992 with the onset of new facilities-based competition and the option of using the Internet to deliver video programming. However, the FCC’s retransmission rules have not markedly changed. Broadcasters have substantially increased retransmission compensation demands now that the balance of power in negotiations has shifted in their favor. In the case of broadcast network owned and operated stations, MVPDs have agreed to carry several channels affiliated or owned by the broadcast network, regardless of their ratings or attractiveness to consumers.

While the FCC has statutory authority “to govern the exercise by television broadcast stations of the right to grant retransmission consent,” the Commission has limited its involvement to promoting good faith negotiations between local television broadcasters and MVPDs. This authority accords the Commission significant flexibility so long as it can identify an impediment to closure that raises questions whether a party has acted in good faith. The FCC has created two tests for its evaluation: (1) an objective test identifying specific violations of the good faith standard; and (2) a subjective test considering the totality of circumstances.

82. See, e.g., Edmund Lee, TV Subscriptions Fall for First Time as Viewers Cut the Cord, BLOOMBERG NEWS (Mar. 19, 2014), http://www.bloomberg.com/news/2014-03-19/u-s-pay-tv-subscriptions-fall-for-first-time-as-streaming-gains.html (“The number of Americans who pay for TV through cable, satellite or fiber services fell by more than a quarter of a million in 2013, the first full-year decline, according to research firm SNL Kagan. If the slide continues in the coming years, that means 2012 was the industry’s high point.”).
83. See Chairman Thomas Wheeler, OFFICIAL FCC BLOG, Protecting Television Consumers by Protecting Competition (Mar. 6, 2014), available at http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition (“The cost of these ‘retransmission consent agreements’ has skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years.”).
86. Id. § 325(b)(3)(C)(ii) (imposing a reciprocal duty to negotiate in good faith by broadcasters and MVPDs).

The following actions or practices violate a broadcast television station’s or multichannel video programming distributor’s (the “Negotiating Entity”) duty
In both retransmission consent and ISP interconnection negotiations, the balance of power skews to one group of negotiators based on their superior bargaining leverage. Broadcasters exclusively offer "must see" television content and retail ISPs control the last mile content distribution link exclusively relied upon by consumers. Broadcasters typically extract concessions from MVPDs in the form of increasing retransmission compensation because a significant percentage of MVPD subscribers will not tolerate the loss of particularly compelling, "must see" content, such as regular season professional football and other live programming. Additionally, the FCC's rules force MVPDs to secure retransmission consent only from local broadcasters because network non-duplication and syndicated exclusivity rules currently in force prohibit MVPDs from importing duplicative content from another distant station that offers the same syndicated programming or transmitting the same broadcast network programming. The substantial increase in retransmission consent revenues

to negotiate retransmission consent agreements in good faith: (i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and (vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

Moreover, see 47 C.F.R. § 76.65(b)(2)(2013) for the subjective criterion:

In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).

88. See Vogt, supra note 26, at 119 ("Expiration of retransmission consent agreements are now loud, public affairs punctuated by ad campaigns by the relevant MVPD and broadcast station, each blaming the other for any impasse in negotiations and the possibility of a blackout, in which the broadcaster will withdraw its programming from the MVPD."); see also Carter, supra note 28 (discussing a contract dispute between CBS and Time Warner Cable that affected the "owners of important television content, especially sports like N.F.L. football").

89. 47 C.F.R. §§ 76.92–76.130 (2013).
accrued by broadcasters evidences superior bargaining leverage that broadcasters have in light of many different types of MVPDs—cable, satellite, and telephone companies—all seeking to include such “must see” programming. MVPDs’ payments to broadcasters increased from $28 million in 2005, to $2.4 billion in 2012, a nearly 8,600% increase in seven years.  

B. New Limitations on the Structure of Retransmission Consent Negotiations

The FCC recently revised its good faith rules to prohibit the four broadcasters with the top market share from forming a single retransmission negotiating bloc for collectively negotiating with an MVPD. In response to substantial increases in retransmission consent compensation flowing from MVPDs to television broadcasters, the FCC has created new rules that curb the bargaining power of the broadcasters with the largest market shares.

The FCC prohibits any television broadcast station ranked among the top four stations, as measured by audience share, from negotiating retransmission consent jointly with another top four station, if the stations serve the same geographic market and are not commonly owned. Historic joint negotiation by these stations has probably contributed to higher retransmission consent fees because such negotiation reduces the competition between the stations that might occur if each station negotiated separately with an MVPD. The FCC also noted that the threat of losing programming from two or more top four stations at the same time creates a significant disincentive for MVPDs to reject broadcasters’ financial demands. To target collusive behavior effectively, the FCC defines “joint negotiation” as occurring when the broadcast station representative has received authority to negotiate, and represents the interests of two or more stations having the largest market share either explicitly or implicitly.

IV. The Prospect for Structural and Substantive Regulation of ISP Interconnections

ISPs that provide downstream delivery of content, particularly bandwidth intensive video, appear to have similarly advantageous negotiating leverage. In particular, retail ISPs operate as terminating

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90. Wheeler, supra note 83.
92. Id.
93. Id. at *5.
94. Id. at *10.
monopolies or gateways\textsuperscript{95} by providing the only link between content providers and a large percentage of end users. While retail broadband subscribers do have service options, they typically rely on only one carrier for all delivery services and are not quick to change carriers.\textsuperscript{96} The agreements by Netflix and Level 3, in their capacity as a CDN, to pay additional compensation to retail ISPs (such as Comcast and Verizon) for improved delivery to end users, support the conclusion that ISPs can extract higher rents for prioritizing traffic streams to provide greater assurance that congestion will not degrade service.\textsuperscript{97}

Unlike retransmission consent negotiations, ISP interconnection and compensation agreements do not clearly fall within the ambit of FCC oversight. Having no direct statutory authority for regulation of information services, the FCC has attempted to assert ancillary authority using Title I of the Communications Act.\textsuperscript{98} On two occasions, the District

\textsuperscript{95} Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) (citing 2010 Open Internet Order, supra note 4, at 17919) (validating the FCC’s conclusion that retail ISPs have market power to control access to their subscribers).

\textsuperscript{96} The D.C. Circuit explained that:

\begin{quote}
[a]s described by numerous commenters, and detailed more thoroughly in a Commission report compiling the results of an extensive consumer survey, the costs of switching include: “early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider’s equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website.”
\end{quote}

\begin{quote}
See Verizon, 740 F.3d at 647 (citing 2010 Open Internet Order, supra note 4, at 17924–25); FCC, Broadband Decisions: What Drives Consumers to Switch—Or Stick With—Their Broadband Internet Provider (FCC Working Paper, Dec. 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-303264A1.pdf). Moreover, the Commission emphasized, many end users may have no option to switch, or at least face very limited options: “[a]s of December 2009, nearly 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided” broadband service. 2010 Open Internet Order, supra note 4, at 17923. As the Commission concluded, any market power that such broadband providers might have with respect to end users would only increase their power with respect to edge providers. \textit{Id.} 97. See Netflix, supra, note 27.

\textsuperscript{97} The FCC relies on a claim of ancillary jurisdiction when the Commission lacks explicit statutory authority to regulate. See Chevron U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984). The Supreme Court supports deferral to the expertise of a regulating agency “if the intent of Congress is clear.” \textit{Id.} at 842–43. If “Congress has not directly addressed the precise question at issue,” and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, as long as it is reasonable. \textit{Id.} at 843–44. For example, the FCC successfully invoked ancillary jurisdiction to regulate cable television even before the Commission received a statutory mandate to do so. United States v. Sw. Cable Co., 392 U.S. 157 (1968) (affirming FCC regulation on the importing of distant broadcast signals by a cable television operator); United States v. Midwest Video Corp. 406 U.S. 649 (1972) (affirming FCC rules requiring cable television operators to
of Columbia Circuit rejected the FCC’s rationale as unlawfully imposing common carrier regulation. The court, however, did recognize that Section 706 of the Communications Act provides the FCC with authority to assess the market penetration of advanced telecommunications services, including broadband, and to take steps to promote more widespread access if the Commission identifies the need. This limited mandate allows the FCC to fashion rules that promote timely and widespread broadband access, provided the Commission does not impose common carrier responsibilities.

Using Section 706 as its primary basis for jurisdiction, the FCC has launched another rulemaking with an eye toward establishing lawful open Internet rules. The Commission proposes to oversee ISP interconnection and compensation arrangements to ensure that deviations from conventional nondiscriminatory best efforts routing satisfy a commercial reasonableness standard. Opting to concentrate on language in Verizon v. FCC, where the D.C. Circuit recognized a limited range of permissible regulatory oversight, the FCC has proposed rules that only the Democratic Commissioners consider necessary and lawful.
The 2014 Open Internet NPRM proposes to apply much of the same definitions, policies, rules, and complaint resolution procedures the FCC established in 2010. The Commission seeks to create more extensive ISP reporting requirements that it believes the Verizon case endorsed as lawful based on the FCC’s statutory authority to require ISPs to operate with transparency. The FCC also proposes to re-establish the rule prohibiting ISPs from blocking access to lawful content that the D.C. Circuit Court of Appeals rejected as impermissibly imposing common carrier duties on information service providers. The Commission seeks to prohibit blocking, including the implicit requirement that ISPs not engage in any discriminatory practices, at least for a base level of performance, which all subscribers and upstream sources of content have a right to expect. The Commission

106. See 2014 Open Internet NPRM, supra note 4, at *3 (stating that currently "there are no legally enforceable rules by which the Commission can stop broadband providers from limiting Internet openness" and "[i]t is in the absence of these protections for the open Internet that the Commission must act to ensure that new legally enforceable rules are put in place. That is a gap that must be closed as quickly as possible.").

107. See id. at *2 ("Per the blueprint [for lawful regulatory oversight] offered by the D.C. Circuit in its decision in Verizon v. FCC, the Commission proposes to rely on section 706 of the Telecommunications Act of 1996."). The 2014 Open Internet NPRM also proposes to "seriously consider the use of Title II of the Communications Act as the basis for legal authority." Id.

108. See id. at *3 (tentatively concluding that "the Commission should adopt the text of the no-blocking rule from the Open Internet Order with a revised rationale, in order to ensure that all end users and edge providers can enjoy the use of robust, fast and dynamic Internet access"); see also id. at *49 (tentatively concluding that "the same three means by which the Commission focused on potential open Internet violations after the adoption of the Open Internet Order, namely self-initiated investigation, informal complaints, and formal complaints, should be used as well to enforce any new open Internet rules").

109. See id. at *2 (tentatively concluding that "the Commission should enhance the transparency rule that was upheld by the D.C. Circuit so that the public and the Commission have the benefit of sunlight on broadband provider actions and to ensure that . . . the Internet community at large [have the information they need to understand the services they are receiving and to monitor practices that could undermine the open Internet").

110. The FCC explained its proposal as follows:

[T]he D.C. Circuit suggested that the Commission’s 2010 no-blocking rule could be interpreted as requiring broadband providers to “furnish . . . access to their subscribers generally” while “establishing a lower limit on the forms that broadband providers’ arrangements with edge providers could take”—and that under that interpretation the rule might not impose common carrier status on broadband providers. Consistent with the court’s ruling, we tentatively conclude that the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers.

See 2014 Open Internet NPRM, supra note 4, at *29.

111. Id. (citations omitted).
tentatively concluded "that the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers." The Commission attempts to show that a rule prohibiting blocking for service required to meet a threshold level of performance complies with the objectives contained in section 706(a)-(b) of the Telecommunications Act of 1996, and in Title II of the Communications Act, if the Commission opts to reclassify Internet access as a telecommunications service.

For services exceeding the baseline threshold, which the Commission tentatively analogizes to conventional "best efforts" traffic routing, the FCC sought comments about whether it should allow ISPs to categorize traffic streams so that some traffic can qualify for prioritization, provided that ISPs do not degrade the performance of standard traffic delivery. Specifically, the FCC proposed to allow:

broadband providers to engage in individualized practices, while prohibiting those broadband provider practices that threaten to harm Internet openness. Our proposed approach contains three essential elements: (1) an enforceable legal standard of conduct barring broadband provider practices that threaten to undermine

We seek comment on whether the Commission should rely on its authority under Title II of the Communications Act, including both (1) whether we should revisit the Commission's classification of broadband Internet access service as an information service and (2) whether we should separately identify and classify as a telecommunications service a service that "broadband providers . . . furnish to edge providers." For either of these possibilities, we seek comment on whether and how the Commission should exercise its authority under section 10 (or section 332(c)(1) for mobile services) to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service.

2014 Open Internet NPRM, supra note 4, at *42.

112. Id. The FCC also proposes to subject wireless broadband ISPs to a less restrictive anti-blocking policy consistent with its 2010 Order that prohibited blocking "lawful web content as well as applications that compete with the mobile broadband providers' own voice or video telephony services, subject to reasonable network management." See id. at *31.


115. The 2014 Open Internet NPRM invites comments on whether the FCC should reclassify Internet access from the largely unregulated information service to the telecommunications service, subject to Title II regulation that the Commission can calibrate by streamlining and forbearing from applying all common carrier requirements:

We seek comment on whether the Commission should rely on its authority under Title II of the Communications Act, including both (1) whether we should revisit the Commission's classification of broadband Internet access service as an information service and (2) whether we should separately identify and classify as a telecommunications service a service that "broadband providers . . . furnish to edge providers." For either of these possibilities, we seek comment on whether and how the Commission should exercise its authority under section 10 (or section 332(c)(1) for mobile services) to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service.

2014 Open Internet NPRM, supra note 4, at *42.

116. Id. at *30.

117. Id. at *29 (citing Verizon v. FCC, 740 F.3d 623, 652 (D.C. Cir. 2014)).
Internet openness, providing certainty to network providers, end users, and edge providers alike, (2) clearly established factors that give additional guidance on the kind of conduct that is likely to violate the enforceable legal standard, and (3) encouragement of individualized negotiation and, if necessary, a mechanism to allow the Commission to evaluate challenged practices on a case-by-case basis, thereby providing flexibility in assessing whether a particular practice comports with the legal standard.\textsuperscript{118}

Absent a reclassification of regulatory status, the prohibition against imposing common carrier requirements on ISPs obligates the FCC to introduce language that imposes duties that fall short of common carriage. Consequently, the Commission proposed a nuanced approach:

It would prohibit as commercially unreasonable those broadband providers’ practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects. At the same time, it could permit broadband providers to serve customers and carry traffic on an individually negotiated basis, “without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,” so long as such conduct is commercially reasonable.\textsuperscript{119}

The FCC’s approach requires great finesse. On one hand, it cannot impose clear common carrier duties on ISPs unless it reclassifies them as telecommunications service providers, a tactic guaranteed to trigger substantial opposition and litigation. On the other hand, the Commission has to create rules that achieve the desired outcome of allowing ISPs to engage in commercial negotiations that will provide specialized, arguably “better than best efforts,” routing options for single ventures without balkanizing and dichotomizing the Internet into fast lanes available to ventures with deep pockets and slow lanes available to ventures, including most startups lacking the financial resources to pay surcharges.

The FCC believes it can satisfy the prohibition on common carriage while also preventing unreasonable blockage and discrimination by applying case precedent in which the D.C. Circuit affirmed the imposition of private carrier interconnection requirements where commercially and technically feasible.\textsuperscript{120} The same court, which twice reversed the FCC

\textsuperscript{118} Id. at *33.

\textsuperscript{119} Id. at 34 (citing Verizon, 740 F.3d at 652).

\textsuperscript{120} See Celco P'ship v. FCC, 700 F.3d 534, 541 (D.C. Cir. 2012) (explaining several relevant features of data roaming rule, which "requires providers to "offer data roaming
open Internet rules, affirmed the Commission’s rules requiring cell phone companies to negotiate commercial terms and conditions for data roaming. The court agreed that even for private carriers, such as wireless ISPs, the FCC can impose reasonable, non-common carrier duties to deal, based on commercially negotiated, nonuniform terms and conditions.

The FCC broadly justifies the need for regulatory intervention based on the incentive and ability of ISPs to limit Internet openness in ways that may enhance individual carrier profitability, but at the expense of full use of the Internet ecosystem to spur innovation, competition, free expression, and infrastructure deployment. The Commission reminds readers that the Verizon court did not question this conclusion: the “D.C. Circuit found that the Commission ‘adequately supported and explained’ that absent open Internet rules, ‘broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment’.”

121. Data roaming allows wireless consumers the ability to access the Internet in locations outside their local service area using the broadband services of a carrier with which the customer’s carrier has an interconnection agreement.

122. Cellco P’ship, 700 F.3d at 548.

123. For example, the FCC stated:

In the Open Internet Order, the Commission found that providers of broadband Internet access service had multiple incentives to limit Internet openness. The Order concluded that the threat of broadband provider interference with Internet openness would be exacerbated by—but did not depend on—such providers possessing market power over potential subscribers in their choice of broadband provider. However, the Commission found that most residential customers have only one or two options for wireline broadband Internet access service, increasing the risk of market power, and found the future of mobile Internet access service as a competing substitute remained unclear.

2014 Open Internet NPRM, supra note 4, at *12.

124. As the FCC explained, “increasingly sophisticated network management tools enable providers to identify and differentiate the treatment of traffic on their own broadband Internet access service networks.” Id. at *15 (quoting Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014)). Moreover, the D.C. Circuit also agreed that “little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic.” 2014 Open Internet NPRM, supra note 4, at *12 (quoting Verizon, 740 F.3d at 646).

125. The FCC noted that the Verizon court “affirmed the Commission’s conclusions that vertically integrated broadband providers have incentives to interfere with competitive services and that broadband providers generally have incentives to accept fees from edge providers.” Id. at *12 (citing Verizon, 740 F.3d at 644–45).

126. Id. at *11 (quoting Verizon, 740 F.3d at 645); see also id. at *12 (quoting Verizon, 740 F.3d at 644) ("The D.C. Circuit found that the Commission’s assessment of broadband providers’
V. Lessons from the Retransmission Consent Rulemaking Process and Other Nonstructural Requirements

The FCC recently decided to prevent broadcasters from continuing to form negotiating blocs because it had at least some empirical evidence of a real and chronic problem. The Commission wisely chose to implement a lawful strategy to provide consumers with possible financial relief.\textsuperscript{127} The Commission could readily determine that the retransmission consent process has evolved into an easy way for broadcasters to generate higher revenues through increasing retransmission consent fees and by securing MVPD paid carriage of additional, possibly less desirable, nonbroadcast channels offered by television networks.\textsuperscript{128}

The FCC imposed a structural limitation that fits within the scope of regulatory oversight accorded the Commission by Section 325 of the Communications Act.\textsuperscript{129} The Commission refrained from imposing more aggressive regulatory intervention, such as the option of prescribing interim carriage requirements or mandating binding dispute resolution. All FCC Commissioners voted in favor of the rule changes, which is an increasingly rare outcome.

Other structural safeguards in the MVPD marketplace offer guidance on how the FCC can provide rules that enhance the ISP negotiating process without affecting the substantive terms. For example, when a broadcaster opts for compensation-free, "must carry" programming by MVPDs, the broadcaster secures the right to retain the same channel number when inserted into the inventory of MVPD content.\textsuperscript{130} Having abandoned a claim for compensation, broadcasters do not have to risk an MVPD decision to assign their signal to an unfavorable channel assignment far from sources of similar content.

\textsuperscript{127} See 2014 Revised Retransmission Consent Rules, supra note 12, at *4 (“With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.”).


\textsuperscript{129} 2014 Revised Retransmission Consent Rules, supra note 12, at *60 (interpreting section 325(b)(3)(A) of the Communications Act as authorizing the Commission to prevent broadcast stations having the top four market shares from jointly negotiating retransmission consent agreements).

The FCC has also addressed channel placement when imposing or incorporating conditions to a controversial merger. When the FCC approved Comcast’s acquisition of NBC Universal, the Commission applied a condition requiring Comcast to retain programming “neighborhoods” with networks offering similar content.\(^{131}\) The Commission reasoned that, without a procedure for requiring parity in channel placement, Comcast might opt to locate its owned or affiliated networks in favorable locations while relegating competitor networks to unfavorable channel assignments.\(^{132}\) The FCC required Comcast to comply with this channel placement commitment by placing the unaffiliated Bloomberg Business network in close proximity to the channel assigned to the affiliated CNBC network.\(^{133}\)

On the other hand, the FCC overreaches if and when it makes substantive decisions about where and how an MVPD offers specific types of content. For example, the D.C. Circuit reversed an FCC decision requiring Comcast to offer tier similar type content on the same programming, without regard to whether the company has an ownership interest in the network packaging the programming.\(^{134}\) The FCC required Comcast to place the unaffiliated Tennis Channel on the same programming tier as the company had assigned for its affiliated Golf Channel.\(^{135}\) The court reversed the FCC’s decision evidencing little concern that Comcast might intentionally have disadvantaged a competitor of its own programming. The court instead based its decision rejecting parity in channel placement on the failure of the FCC and the Tennis Channel to provide concrete evidence that Comcast gave up financial gain to penalize the Tennis Channel.\(^{136}\)

The Tennis Channel might have generated better ratings and more demand by Comcast subscribers to receive the channel if Comcast had not

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\(^{131}\) Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4241 (2011) (requiring Comcast to negotiate fairly with unaffiliated content providers for the carriage of their content).

\(^{132}\) Id.

\(^{133}\) Within one year of its merger approval, the FCC launched an investigation regarding whether Comcast violated a condition by refusing to assign Bloomberg Television a channel assignment in the same “community” of channels assigned to similar news and business news networks. See Bloomberg L.P. v. Comcast Cable Commc'ns, LLC, 27 FCC Rcd. 4891, 4891 (2012) (granting in part Bloomberg’s complaint that its 24-hour business news channel, Bloomberg Television, is an “independent news channel” covered by the “news neighborhood” condition adopted in the conditional approval of Comcast’s acquisition of NBC Universal).


\(^{135}\) Id.

\(^{136}\) Comcast Cable Commc'ns, 717 F.3d at 986.
placed the network on a more expensive and less viewed sports programming tier. That possibility, however, did not legally support the FCC’s attempt to level the competitive playing field for the two types of programming action that would usurp Comcast’s commercial judgment.

The FCC’s prudent and measured response to a problem in retransmission consent negotiations provides a proper model for how the Commission should respond to calls for aggressive and possibly intrusive regulatory oversight of ISP interconnection and compensation negotiations. The new retransmission consent rules respond to an identifiable and measurable problem: MVPD rate increases well in excess of a commonly used index of consumer prices, with recent increases raising the per channel cost of service.\(^{137}\) The rules fit within the scope of lawful regulatory action. FCC action did not impact the substantive aspects of negotiations, only their structure. Thus, by addressing procedure, the FCC can impact the negotiating process in ways that serve the public interest without unfairly and unlawfully imposing substantive terms and conditions.

Like retransmission consent agreements, the terms and conditions of ISP interconnection arrangements have a direct impact on consumers, both in terms of service rates and the sustainability of competition. The FCC assumes that consumers and the public interest will suffer in the absence of rules that constrain both the structure of interconnection negotiations and their substantive outcomes. When the Commission moves into the realm of substantive, commercial negotiations, it risks substituting its judgment on what is commercially reasonable for what two parties have negotiated at arm’s length.

Negotiations for retransmission consent and retail ISP traffic delivery to end users both require cooperation by a venture for which no readily available alternative exists. Unless the FCC repeals the network and syndicated exclusivity rules, MVPDs must negotiate with a specific local broadcaster. Likewise a CDN or conventional ISP must negotiate with specific retail ISPs for access to subscribers solely relying on that carrier for last mile delivery of content. Whether by regulation or market forces, these forced partnerships can confer superior negotiating leverage on one party: broadcasters with “must see” content and retail ISPs providing the

\(^{137}\) The FCC reported that the average monthly price of expanded basic cable service increased overall by 5.1% in the year ending January 1, 2013, while the average price per channel increased by 2.1%. Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Implementation of Section 3 of the Cable Television Consumer Prot. and Competition Act of 1992, MM Docket No. 92-266, DA 14-672, ¶ 1 (F.C.C. May 16, 2014), available at http://www.fcc.gov/document/report-average-rates-cable-programming-service-and-equipment-2. The Consumer Price Index increased 1.6% during the same period. Id. at ¶ 3.
content termination link selected by a significant percentage of broadband consumers.

Ventures perceiving a negotiating advantage surely want to exploit it, but the justification of regulatory intervention requires both statutory authority and empirical evidence that consumers suffer. Sections 325 and 706 of the Communications Act provide a variable degree of certainty as to whether statutory authority exists. To apply either section, the FCC has to compile an evidentiary record showing that consumer harm requires regulatory intervention. For retransmission consent negotiations, the FCC has erected a process to assess whether the parties have negotiated in good faith, using specific criteria and applying a macro-level assessment. The FCC can examine why the parties could not reach closure on commercial negotiations before a deadline triggered a “blackout.”

The FCC also has legal authority to respond to interconnection dispute complaints from ISPs and service degradation complaints from ISP subscribers. The Commission should compile an evidentiary record that includes a forensic examination of what has prevented the parties from reaching closure before consumers suffer outages and other types of service degradation. In many instances, the parties will dispute the causes for congestion and the manner in which it can be ameliorated. Without affecting the substantive terms contained in a new agreement, the FCC should impose light-handed structural safeguards that promote timely and transparent resolution of complaints presented to it by an aggrieved party.

The Commission can determine the causes for a dispute only if it has access to interconnection agreements and explanations from parties as to why an outage or congestion occurred, notwithstanding a previously acceptable and working arrangement. ISPs zealously shroud their interconnection arrangements for obvious and legitimate commercial reasons, but an in-camera investigation by the FCC, with redacted public

138. While rejecting the FCC’s Open Internet rules prohibiting discrimination and content blocking rules as too close to the imposition of common carrier requirements, the D.C. Circuit recently allowed the Commission to fashion rules that promote Internet innovation, accessibility and market penetration. Verizon v. FCC, 700 F.3d 623 (D.C. Cir. 2014). The court stated that the FCC “has more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.” Id. at 644. The court also concluded that the FCC’s finding that “Internet openness fosters the edge-provider innovation that drives this ‘virtuous cycle’ was likewise reasonable and grounded in substantial evidence.” Id. Clearly resolving complaints on an ad hoc basis support these judicially validated objectives. See id. The FCC reports that its 2014 Open Internet NPRM responds to consumer complaints: “In light of the consumer complaints discussed above, we also consider enhancements to the existing rule with respect to the content, form, and method of broadband providers’ disclosures to end users.” 2014 Open Internet NPRM, supra note 4, at *21; see also 47 C.F.R. §§ 8.12–8.17 (2013) (delineating the process for filing a formal complaint with the FCC).
disclosure, can help answer essential questions about what circumstances have changed so that previously satisfactory terms no longer work.

The FCC has lawful authority to ensure that consumers understand what services they are buying and what commitments ISPs make even without regulated tariffs. Such authority includes the lawful authority to determine why an ISP could not achieve its service commitments for all traffic, certain types of traffic, and specific upstream sources of traffic. If an ISP can no longer deliver bandwidth intensive video content at a sufficiently high speed to assure acceptable display on end user televisions, personal computers, smartphones, and tablets, then the ISP has a duty to explain the reason. If the degradation in delivery results from changed circumstances, including a substantial increase in the amount of capacity seeking downstream delivery, then the terminating carrier has provided the FCC with an adequate explanation. The Commission has lawful authority to examine the procedural and nonsubstantive reasons why the parties have failed to reach a timely resolution to a dispute, but not to prescribe commercial terms and conditions, or to determine whether the parties have reached a fair settlement despite the lack of parity in negotiating leverage.

The inability to affect substantive terms, in both retransmission and ISP carriage negotiations, may prevent the FCC from facilitating dispute resolution before content becomes temporarily unavailable to consumers. The lack of access by consumers, however, may generate the kind of consumer pushback and outrage that can force the parties to get serious. In light of widespread media coverage and consumer responses to outages, parties opting for a delay or bad faith strategy may suffer in the court of public opinion. For example, Netflix appears to reduce the superior negotiation leverage of retail ISPs simply by compiling and disseminating a scorecard that shows near term bit transmission performance of various carriers. Consumers of retail ISPs reported to have declining and inferior service may consider these possibly contestable statistics as solid proof that the retail ISP has caused congestion through neglect and the failure to make timely and necessary upgrades. While consumers may not “vote with


141. In a few retransmission negotiations, broadcast networks—such as Fox and CBS—have opted to block access to alternative sources of “must see” content by tracking the Internet Protocol address of consumers seeking content at a content aggregation site, such as Hulu, or the networks own web site. Brian Stelter, Internet Is a Weapon in Cable Fight, N.Y. TIMES, Oct. 19,
their dollars” in significant numbers by changing carriers, retail ISPs reported as derelict face a public relations and marketing dilemma possibly resolved by changing interconnection strategies. Lawsuits alleging commercial defamation by a content provider probably would compound the ISP’s problems.¹⁴²

It appears that ample options exist for most retransmission and ISP interconnection negotiations to reach closure without extensive delay and posturing. Considering the advantages of stalling service and bad faith negotiations, ventures have to assess the downsides of such strategy, including an extremely bad public image, particularly if they also want regulatory approval for commercial transactions, such as a merger. If the FCC can use discipline and modesty to refrain from making substantive decisions affecting commercial transactions, it will find that its nonstructural and procedural requirements can work effectively.
