The FCC's New Power to Adjudicate Interconnection Disputes: "Just and Reasonable" Should Mean "Bill-and-Keep"

Erik Estrada

Karin Ross

Follow this and additional works at: https://digitalcommons.du.edu/dlrforum

Recommended Citation

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.
THE FCC’S NEW POWER TO ADJUDICATE
INTERCONNECTION DISPUTES: “JUST AND REASONABLE”
SHOULD MEAN “BILL-AND-KEEP”

BY ERIK ESTRADA† AND KARIN ROSS*  

Effective policy initiatives solve problems and do not create more of them.¹ On February 4, 2015, Thomas Wheeler, Chairman of the Federal Communications Commission (FCC), released his proposed rules regarding the Open Internet and Net Neutrality in an op-ed published in Wired Magazine.² A fact sheet released by the FCC on the same day accompanied this op-ed (Fact Sheet).³ This Fact Sheet noted that the FCC, for the first time, will have the power to adjudicate interconnection disputes between internet service providers (ISPs) and “edge providers” (e.g., content providers) if such ISPs are not acting in a “just and reasonable” manner.⁴ ISPs, such as Comcast or Verizon, provide access to the Internet by connecting users to their networks. Interconnection refers to the physical linking of one carrier’s network with the equipment and facilities of another “for the mutual exchange of traffic.”⁵ Interconnection is a significant issue for the FCC because an ISP can control the Internet content that reaches its customers. If a customer of an ISP wants certain Internet content, but the ISP has elected not to deliver such content, either through its network or by not allowing it through its interconnection points with the rest of the Internet, then the customer will not be able to view the desired content without changing ISPs. If a customer only has one ISP provider (the case for about 75% of U.S. households at

† Erik Estrada, Esq. earned a Bachelor of Arts from the University of Colorado, a Master of Public Administration from the University of Colorado School of Public Affairs, a Juris Doctor from the University of Denver Sturm College of Law, and a Master of Laws from the Boston University School of Law. He is a Senior Corporate Counsel with Level 3 Communications, Inc. (Level 3).  
* Karin Ross earned a Bachelor of Arts from the University of Pennsylvania, and is a Juris Doctor candidate at the University of Colorado School of Law. She is a Law Clerk with Level 3.

1. The views reflected in this note are those of the authors, however, the authors acknowledge the inherent conflict of interest that exists in addressing a topic that may impact their employer. In the interest of full disclosure, it is publicly known that Netflix is a customer of Level 3.


4. See id. Because the FCC is comprised of three Democrats and two Republicans, it is likely that Chairman Wheeler’s proposed rules will be adopted when the Commission meets on February 26, 2015. See generally FEDERAL COMMUNICATIONS COMMISSION, Commissioners from 1934 to Present, FCC LEADERSHIP, http://www.fcc.gov/leadership/commissioners-1934-present (last visited Feb. 15, 2015) (identifying past FCC Commissioners and the party affiliation of each); Cf. FEDERAL COMMUNICATIONS COMMISSION, Open Meetings, FCC EVENTS, http://www.fcc.gov/open-meetings (last visited Feb. 15, 2015) (providing a schedule of public meetings).

25 Mbps of capacity), then this customer is out of options.\(^6\) Given the importance of interconnection, the power to adjudicate interconnection disputes is a positive policy change for the FCC and one that, if correctly implemented, will further the policy goals of both equity and efficiency.\(^7\) Accordingly, the FCC should provide both ISPs and edge providers with additional guidance related to this just and reasonable standard. Such additional guidance will help to ensure that this general conduct standard is both implemented and administered fairly and efficiently amongst ISPs and edge providers, which in turn, will help avoid future interpretation problems related to this standard.

The Fact Sheet related to Chairman Wheeler’s proposed rules notes that the FCC’s power to adjudicate interconnection disputes is derived from Title II of the Communications Act of 1934 (Title II) and Section 706 of the Telecommunications Act of 1996 (Section 706).\(^8\) Title II governs the regulation of “common carriers,” and imposes upon them a robust set of obligations.\(^9\) Notably, under Title II, the FCC “may prescribe such rules and regulations as may be necessary in the public interest.”\(^10\) Section 706 relates to broadband and gives the FCC authority to “promote competition in the local telecommunications market,” and “remove barriers to infrastructure investment.”\(^11\) Based on the foregoing authority, the Fact Sheet states: “For the first time the Commission would have authority to hear complaints and take appropriate enforcement action if necessary, if it determines the interconnection activities of ISPs are not just and reasonable, thus allowing it to address issues that may arise in the exchange of traffic between mass-market broadband providers and edge providers.”\(^12\) Chairman Wheeler wants the FCC to enforce this just and reasonable standard on a case-by-case basis.\(^13\) The FCC’s overarch-
ing goals with respect to this case-by-case approach will be to “protect consumers, competition, free expression, and innovation.”

The FCC’s power to adjudicate interconnection disputes is positive policy change for the Commission because it will allow the FCC to monitor the activities of ISPs. ISPs sell consumers access to all of the content on the Internet, however, ISPs do not have access to all of that Internet content. Consequently, ISPs can only honor the foregoing promise by interconnecting with other providers. While interconnection is a significant issue, opponents of this change in position by the FCC argue that the market can address interconnection activities on its own. In fact, this “invisible hand” reasoning may explain why Chairman Wheeler’s proposed rules did not initially address interconnection disputes. Opponents, for instance, reference the agreement between Netflix and Comcast as evidence of the free market working. In 2014, Netflix entered into an interconnection deal directly with Comcast to better ensure that its content would reach its subscribers, and that such content would be delivered without latency. When addressing this deal, Netflix’s CEO stated, “Without strong net neutrality, big ISPs can demand potentially escalating fees for the interconnection required to deliver high quality service.” He further explained, “[t]he big ISPs can make these demands—driving up costs and prices for everyone else—because of their market position.” This dynamic between ISPs and edge providers demonstrates the problem that Chairman Wheeler is trying to solve by addressing interconnection activities, namely that blocking and discrimination can occur at the point of interconnection. Thus, in Chairman Wheeler’s final draft, he noted that the FCC will have the power to adjudicate interconnection disputes. The FCC needs to monitor interconnection activities in order for it to obtain its overarching Net Neutrality goals of “no blocking,” “no throttling,” and “no paid prioritization.” Accordingly, if most of the nearly 4 million people who commented on the FCC’s proposed Net Neutrality rules desire the same vision for the Internet, then the

19. Id.
20. See source cited supra note 5.
21. Id.
FCC’s power to adjudicate interconnection disputes is a positive policy change for the Commission.\textsuperscript{22}

While the FCC’s power to adjudicate interconnection disputes is a positive policy change for the Commission, the FCC needs to provide ISPs, edge providers, and others, such as attorneys representing these entities, with additional guidance related to the just and reasonable standard. Such additional guidance will help to ensure that this general conduct standard is implemented and administered equitably and efficiently across the Internet. With most policy debates, there is a trade-off between equity and efficiency.\textsuperscript{23} Here, however, the FCC is in a unique position to further both policy goals by simply providing additional guidance related to this just and reasonable standard. In fact, the case-by-case approach proposed by Chairman Wheeler related to this general conduct standard is generally opposed by both proponents and opponents of his set of rules.\textsuperscript{24} Instead of dealing with interconnection disputes solely on a case-by-case basis, the FCC should promulgate additional rules or guidelines that address what this just and reasonable standard actually means. Administrative agencies frequently promulgate additional guidance after a particular rule is adopted. Similarly, here, the FCC should provide additional guidance related to this general conduct standard so that ISPs, edge providers, and others may have more certainty with respect to whether their interconnection activities are just and reasonable.

In the past, the FCC has promulgated additional guidance for its standards, such as the standard of “reasonable network management,” because such guidance provides greater clarity for ISPs and edge providers with respect to the intent of such standards.\textsuperscript{25} For example, the FCC in its 2010 Open Internet Order adopted the “reasonable network management” standard, and then provided a definition for such standard: “A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.”\textsuperscript{26} Similarly, here, the FCC should provide greater clarity regarding the just and reasonable standard.\textsuperscript{27} For example,

\textsuperscript{22} See source cited supra note 4.
\textsuperscript{23} See source cited supra note 9.
\textsuperscript{24} See source cited supra note 15.
\textsuperscript{25} See Report and Order: In the Matter of Preserving the Open Internet Broadband Industry Practices, 10-201 FCC Rcd 17905 (2010) (“Legitimate network management purposes include: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user’s choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network. The term ‘particular network architecture and technology’ refers to the differences across access platforms such as cable, DSL, satellite, and fixed wireless.” Id. at 17952 (citations omitted)).
\textsuperscript{26} See id. at 17952 (emphasis added).
\textsuperscript{27} MCI Telecomm. Corp. v. F.C.C., 675 F.2d 408, 414 (D.C. Cir. 1982) (“Implementation is as critical to a policy’s success as theoretical design.”).
in *MCI Telecomm. Corp. v. FCC*, the U.S. Court of Appeals for the District of Columbia, when addressing just and reasonable, asserted: “[a] basic principle used to ensure that rates are ‘just and reasonable’ is that rates are determined on the basis of cost.” Accordingly, if just and reasonable rates are rooted in actual costs, then the FCC should adopt a “bill-and-keep” cost structure in which ISPs would recover their network and interconnection costs from their customers, and edge providers would recover their network and interconnection costs from their subscribers.28 Put simply, these network and interconnection costs represent part of the actual costs of doing business for ISPs and edge providers, respectively. A bill-and-keep structure will also help ISPs avoid the inherent conflict of interest that exists when delivering both their own content, such as Comcast delivering content from NBC Universal, and the content of other edge providers.29 Moreover, the FCC is moving toward a bill-and-keep framework.30 For these reasons, the FCC should assert that a just and reasonable practice related to interconnection activities is one that is based on a bill-and-keep cost structure.

Chairman Wheeler wants the FCC to have the power to adjudicate interconnection disputes, which signals a major change in policy that has the unique opportunity to further the policy goals of both equity and efficiency. However, additional guidance from the FCC is essential for proper implementation. The Fact Sheet provides that the Commission will have the authority to determine whether interconnection activities of ISPs are just and reasonable. Additional guidance related to this general conduct standard will give ISPs, edge providers, and others more clarity with respect to their interconnection activities. Defining this standard in terms of a bill-and-keep framework, which the FCC is already moving towards, is one way for the FCC to achieve the policy goals of both equity and efficiency.31

28. *See Declaratory Ruling: In the Matter of Connect America Fund Developing a Unified Intercarrier Compensation Regime* 26 FCC Rcd 17934 (Feb. 11, 2015) at note 22 (“‘under a bill-and-keep regime, ‘carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary.’”); *see also In the Matter of Connect America Fund*, 26 FCC Rcd 17663, 2011 WL 5844975, at *13 (Nov. 18, 2011).
29. *See* 10-201 FCC Rcd 17905, 17915 (2010) (“[B]roadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users. A broadband provider might use this power to benefit its own or affiliated offerings at the expense of unaffiliated offerings.” *Id.* at *13*(citation omitted)).
30. *See* 26 FCC Rcd at 17676 (“T[he] Commission is in the process of transitioning to a default bill-and-keep framework where carriers look to their end users to cover the costs of the network.” *Id.* at *13*(citation omitted)).
31. *See supra* note 30 and accompanying text.