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Updated: Netflix Gets Hammered Over 'Throttling'

But Free Press says Netflix is free to deliver video any way it likes

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With Netflix [apparently having discriminated in its delivery of Internet video to wireless carriers AT&T and Verizon](#), after those carriers had been accused of doing the video degrading, there was plenty of input from industry players.

The pushback was particularly strong given [Netflix's push for net neutrality rules](#) that prevent ISPs from discriminating and require them to tell customers how they are managing their networks.

There have long been rumblings, sometimes not so quietly in the case of Comcast, alleging Netflix intentionally congested traffic to wired ISPs in peering disputes. Netflix has denied it.

[The reaction started with AT&T](#) not long after Netflix's conduct was [reported in *The Wall Street Journal*](#), but that reaction did not include FCC Chairman Tom Wheeler, who declined to comment. The FCC [has been investigating ISP zero rating plans](#), which critics say is a form of discrimination by favoring one form of content over another.

AT&T top D.C. executive James Cicconi was not reticent: "We're outraged to learn that Netflix is apparently throttling video for their AT&T customers without their knowledge or consent," he said in a statement.

A former top FCC official conceded Netflix's conduct may not be under the FCC's purview, but suggested that did not get it off the hook.

"When Netflix pointed the finger at ATT & Verizon it had three fingers pointing back at itself," said Adonis Hoffman, chairman of Business in the Public Interest and former chief of staff to FCC commissioner Mignon Clyburn. "Throttling traffic without notifying the customer is a violation of the principles of net neutrality 101, and they failed. Even though edge providers are technically not covered, transparency is a best practice."

Randolph May of free market think tank Free State Foundation had plenty to say.

"There are many different reasons to be concerned about the discovery that Netflix has been engaged over a period of years in throttling the speed of its videos accessed Verizon and AT&T wireless subscribers," May said. "First is just Netflix's complete lack of transparency about the practice, especially in light of its strident advocacy against treating Internet communications differentially. Netflix's hypocrisy in this regard is pretty stunning, if perhaps not surprising."

The FCC has rules that require ISP transparency about how they handle their broadband traffic, but the FCC has consistently said edge provider conduct is beyond its reach.

"Second is the light Netflix's actions shed on the FCC's faulty approach to 'Open Internet' regulation. The FCC only concerns itself with practices of the ISPs, not the so-called edge providers, and this leads to a double standard. I'm not in favor of most of the FCC's newly-adopted Internet regulation (except reasonable disclosure requirements), and I don't really want to see Netflix's practices regulated by the FCC either. But by acting in the way it does, the FCC lends itself to becoming part and parcel of Netflix's hypocrisy.

"Third, you can bet you will see this double-standard — and the hypocrisy — recur, sooner or later, in the realm of privacy regulation, where the FCC wants to adopt a regime that will facilitate differential privacy regulation for Internet market participants."

Berin Szoka of TechFreedom was equally as unhappy and, like May, saw it as symptomatic of something larger.

"Yesterday, Netflix admitted the company has long been throttling its traffic for AT&T and Verizon customers without their knowledge or consent," he said. "Two years ago, Netflix led the fight to get the FCC to require transparency about precisely such practices, and to ban throttling as inherently harmful. It also claimed that Comcast was effectively throttling Netflix traffic simply by failing to offer unlimited, free interconnection to Netflix — something companies like Netflix have always had to pay for. With the help of comedian John Oliver, Netflix rallied an angry mob that ultimately succeeded in getting President Obama to tell the FCC to dramatically expand 'net neutrality' to include interconnection — saying that throttling should be defined 'from a consumer's perspective,' regardless of who was doing it or how it worked."

"It turns out Netflix was really saying 'Net neutrality for thee, but not for me,'" continued Szoka. "The only question is whether Netflix was throttling user traffic at the time, or if it only decided to do so later. To be clear, there's nothing inherently wrong with Netflix's throttling. 'Throttling' video speeds may sound scary, but it can benefit consumers for the very reasons Netflix cites today. So why didn't Netflix just disclose the practice? Was Netflix afraid the angry mob it helped create would turn on it? And where was its talk of 'striking a balance that ensures a good streaming experience' when it was lobbying the FCC to ban throttling outright?"

"Make no mistake, the importance of this revelation for U.S. Internet policy goes well beyond Netflix and the all-too-common practice of corporate hypocrisy in Washington," said Fred Campbell, director of Tech Knowledge. "Policymakers in the U.S. have systematically excluded Netflix and all other "over-the-top" companies from Internet, privacy, and video regulations that would otherwise apply based on the presumption that over-the-top companies lack the incentive or ability to engage in discriminatory or anticompetitive behavior that could harm consumers or competition. Netflix just proved that presumption is dead wrong."

Scott Cleland, president of Precursor LLC and chairman of Netcompetition, a broadband company-backed e-forum, said the revelation could have wide implications.

"For the last several years that Netflix has relished the role of Grand Net Neutrality Inquisitor accusing ISPs of throttling Internet traffic in alleged violation of net neutrality, Netflix actually has been secretly throttling its Internet-leading traffic in ways that it never disclosed to either its users, the public, or to the FCC/FTC," he said.

"This incredible net neutrality revelation could have lots more repercussions than many appreciate at first glance." To check out Cleland's second glance, [click here](#).

Doug Brake, telecom policy analyst at the Information Technology and Innovation Foundation, suggested it was no harm, no foul on Netflix's part, but that means ISPs should not be in the net neutrality doghouse for managing their traffic.

"First of all, this is pretty clearly not a violation of the net neutrality as currently implemented by the Federal Communications Commission (FCC)," [he blogged Friday](#). Nor should it be a violation of any rules. These are Netflix's video streams, and it should be able to manage its data however it thinks will best please its customers. But what is good for the Netflix goose should be good for the gander: If Netflix is free to manage its traffic to better serve consumers, Internet Service Providers (ISPs), who are in an even better position to understand the traffic patterns and dynamics at play within the network itself, should be able to do the same. Same customers, same practice, same good outcome, but as it stands today, only one is unlawful."

Matt Wood, policy director for Free Press did not see it as a net neutrality violation either, but wasn't suggesting that got ISPs off the hook.

"The bottom line for me is that net neutrality prevents carriers from dictating what we say to each other. It doesn't dictate what we say to each other ["we" including Netflix as a speaker]," he told B&C/Multichannel News. "Netflix is free to transmit its content however it wants. If users want to leave that behind because they don't like that, that's fine. I'm not here to defend anything Netflix is doing, but you can't shoehorn this into net neutrality because it is not about the carrier in the middle interfering with content."

"Netflix suggests it was doing this to spare wireless users from burning through their carrier-imposed data caps. That's not a bad idea, but it's still off-putting. If Netflix was limiting transmission speeds and picture quality for its users without telling them, as appears all too likely, that's a bad thing. Period, full stop. Companies should be transparent with their customers and empower them to make their own choices."

Wood followed up with more input [in a blog post](#):

"News broke Thursday that Netflix has been throttling video streams for its own customers when they're watching on mobile devices and networks....Netflix responded with its own post, staying away from the term "throttling" but revealing that its "default bitrate for viewing over mobile networks has been capped globally at 600 kilobits per second."

"Is that a good thing for Netflix users? Maybe, maybe not. But whatever it is, it's *not* a Net Neutrality violation. Plain and simple. Anyone who tells you that it is — or that this practice undermines the case for Net Neutrality rules — is either in the business of misleading you, woefully ignorant of the law, or both.

"Sadly, that is correct," said Seton Motley, president of Less Government in response to the Free Press analysis. "Because the FCC's huge power grab - doesn't apply to 'edge providers' like Netflix. Only ISPs are subject to this heinous onerousness: "ISPs could receive a hefty fine under the net neutrality rules for similar practices, but Netflix faces no such danger, at least not for the throttling itself. The net neutrality rules only apply to ISPs..., not to companies...like Netflix or Google Inc."

How's that for un-equal protection before the law? Except this isn't law - it's agency regulatory fiat," said Motley. "We're already WAY off the Constitutional map - here there be monsters."

While Wheeler did not comment, he has said before when asked about what seem questionable practices by edge providers that, unlike ISPs, Web surfers have choice among Web sites, but generally not among ISPs.