

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
and)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
)	

COMMENTS OF COGENT COMMUNICATIONS GROUP, INC.

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INTRODUCTION

Cogent Communications Group, Inc. (“Cogent”) submits these comments in response to the Commission’s May 15, 2014 Notice of Proposed Rulemaking in its *Protecting and Promoting the Open Internet* docket.¹ As set forth in Cogent’s prior comments in this proceeding,² Cogent strongly supports the adoption of enforceable rules that will protect the transformational role that the Internet has come to occupy in virtually every sphere of American life, and ensure that the Internet remains an open platform for all forms of communication, innovation, and economic growth.

A diverse set of voices—including consumers, industry participants, investors, innovators, policy makers, and scholars—has endorsed the concept of an open Internet while, at the same time, offering widely divergent ideas on how to achieve that foundational goal. In deciding which of these ideas to accept and use as the basis for promulgating final rules, Cogent believes the Commission must keep in mind two key principles.

First, the rules that come out of this proceeding must be sufficiently robust to address the myriad ways in which an open Internet can be (and, indeed, has been) impeded. In particular, limiting the reach of the new rules to conduct that occurs only within a broadband Internet service provider’s (“ISP”) proprietary network fails that test. A defining characteristic of the Internet is the ubiquity of connectivity it facilitates, allowing end users connected to one network

¹ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014) (“NPRM”). Cogent also is submitting these comments simultaneously in the *Framework for Broadband Internet Service* proceeding (GN Docket No. 10-127). See Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service, GN Docket No. 10-127, Public Notice, DA 14-748 (May 30, 2014).

² Cogent Communications Group, Inc.’s March 21, 2014 Comments, GN Docket No. 14-28 (“Cogent 3/21/14 Comments”).

to reach end users or edge providers connected to a multitude of other networks.³ Therefore, to be effective, and to achieve the goals the Commission repeatedly has articulated, the new rules must explicitly apply to the exchange of traffic at the interconnection points where content requested by ISP subscribers is delivered to ISP networks by edge or transit providers.

In the 2010 *Open Internet Order*,⁴ the Commission noted that the now-vacated rules were not intended “to affect existing arrangements for network interconnection, including existing paid peering arrangements.”⁵ In the NPRM, the Commission tentatively concludes that it should maintain this approach.⁶ In the same paragraph of the NPRM in which it states this tentative conclusion, the Commission asks: “[H]ow can we ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside of the scope of the rules as proposed?”⁷ The answer to that question is that the Commission cannot. There is no way to prevent such evasion under the proffered approach. The discriminatory conduct the NPRM aims to address can and does occur just outside the last mile—at the interconnection points where content requested by ISP subscribers is delivered to ISP networks by edge or transit providers. Thus, the only way to prevent evasion of the rules the Commission proposes is to remove the artificial distinction that provides a safe harbor for conduct antithetical to an open Internet at interconnection points. Failure to correct this critical omission from the *Open Internet Order* will defeat the very purpose of this proceeding and ultimately necessitate yet another rulemaking to address these issues.

³ “It is important to always remember that the Internet is a collection of networks, not a single network.” NPRM, para. 5.

⁴ *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (the “*Open Internet Order*”).

⁵ *Open Internet Order*, 25 FCC Rcd at 17944, para. 67 n.209.

⁶ NPRM, para. 59.

⁷ *Id.*

Second, the rules that come out of this proceeding must be supported by a legal framework that provides the strongest immunization possible against another reversal by the D.C. Circuit. That framework is found in Title II of the Communications Act. The Commission has been wrestling with the proper regulatory approach to an open Internet for a decade.⁸ During that time, the importance of, and need for, regulatory clarity and finality has increased in tandem with the evolution of the Internet into the indispensable mode of communication in the United States. Reclassifying broadband ISPs as providers of essential “telecommunications services” is consistent with the roles they serve, what the Internet is today, and the ever-increasing importance it will have in the foreseeable future. Reclassification also will provide the regulatory flexibility to address present and future practices that can imperil an open Internet, without discouraging investment or innovation.

Title II reclassification does not, as some of its more hyperbolic opponents suggest, portend a heavy-handed set of rules that will discourage investment in, much less pose an existential threat to, the Internet. What reclassification would do is provide the Commission with the unmistakable regulatory authority to craft and implement the type of open Internet rules that were vacated by the *Verizon* court.⁹ Reclassification would also permit the Commission to adopt

⁸ See, e.g., Michael K. Powell, Chairman, Federal Communications Commission, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (last visited July 14, 2014); In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, and Internet Over Cable Declaratory Ruling, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (“*Internet Policy Statement*”); In the Matter of Broadband Industry Practices, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (2007); In the Matters of Preserving the Open Internet and Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13067-69, 13100-15, paras. 10, 16, 88-141 (2009); *Open Internet Order*, 25 FCC Rcd at 17905, para. 1; NPRM, paras. 11-24.

⁹ *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014). If such rules were so draconian, one would not expect to see both Comcast and AT&T embracing them and offering to follow them in connection with their efforts to acquire Time Warner Cable and DirecTV, respectively. Applications and Public Interest Statement, Comcast Corp. and Time Warner Cable, Inc., MB Docket No. 14-57 (Apr. 8, 2014) at 163 (“Comcast’s obligation [by virtue of

other, related rules without the omnipresent concern about whether it is inching too close to the common carrier line. Moreover, while reclassification would allow the Commission to address certain aspects of Internet data *transmission*, it would not allow the Commission to regulate in any manner the actual *content* of such transmissions (e.g., streaming videos requested by ISP subscribers or articles on the New York Times’ website). To be clear, the choice before the Commission is not Title II reclassification or the abandonment of open Internet rules. The rules proposed in the NPRM—and, critically, the extension of those rules to practices associated with the interconnection of networks in the manner described below—can be promulgated under Sections 706(a) and (b) of the Telecommunications Act of 1996.¹⁰ Rather, the choice before the Commission is whether to rely on an untested legal basis that may limit the Commission’s future ability to act in the public interest, or to embrace a time-tested and established regulatory framework that provides ample justification for today’s open Internet rules and the flexibility to assess and address new developments in a timely manner as the Internet evolves. Given the importance of the Internet to our civic, commercial, and personal lives, the latter choice will best protect the Internet’s openness for present and future generations.

The balance of these comments are organized as follows: Section I provides some background on Cogent’s business; Section II explains why the new rules must apply to the exchange of traffic between last-mile broadband ISPs and other networks and services;

commitments made in connection with its acquisition of NBC Universal] to abide by all of the Open Internet rules, therefore, protects against any anticompetitive concerns arising from the transaction regarding the provision of high-speed Internet access services.”); Description of Transaction, Public Interest Showing, and Related Demonstrations, AT&T Inc., MB Docket No. 14-90 (June 11, 2014) at 8 (“AT&T will adhere to the Commission’s Open Internet protections established in 2010 for three years after closing, regardless of whether the Commission re-establishes such protections for other industry participants following the D.C. Circuit’s vacatur of those rules.”). Cogent’s comments in this proceeding are not intended to address issues associated with the serious, and perhaps irreparable, public interest concerns raised by the proposed Comcast-Time Warner Cable or AT&T-DirecTV transactions. Cogent will address such issues at the appropriate time in those transfer proceedings.

¹⁰ See Cogent 3/21/14 Comments at 23-31.

Section III addresses the rationale for, and issues associated with, Title II reclassification; and Section IV discusses the substantive rules and various procedural issues raised in the NPRM.

COMMENTS

I. Cogent's Business

Cogent is a multinational Tier 1 Internet service provider, headquartered in Washington, D.C., and consistently ranked as one of the top five networks in the world. It offers facilities-based, low-cost, high-speed Internet access and Internet Protocol ("IP") communications services to businesses across thirty-eight countries.¹¹ Cogent generates approximately half of its annual revenue from the sale of Internet access to commercial end-users (most of whom are small and medium-sized businesses), and the other half from the sale of data transit services. Its core business philosophy always has been that Internet bandwidth should be marketed, sold and purchased as a commodity. Consistent with this guiding principle, Cogent has leveraged superior technology to provide Internet bandwidth in large quantities, at high speeds, at industry-leading and ever-lower prices, and without regard to the sources of the bits of data that move across its network.

The portion of Cogent's business most relevant to this proceeding is the on-net services that Cogent sells to its net-centric customers who typically purchase multiple 10 Gigabit-per-second connections at multiple locations. These customers include various bandwidth-intensive users like universities, other Internet service providers, telephone and cable television companies, web hosting companies, content delivery networks, and commercial content providers. Through its interconnection with over five thousand such customer networks that access the entire Internet through Cogent, and its exchange of traffic with thirty-eight peer networks, Cogent ensures that

¹¹ See Cogent 3/21/14 Comments at 3-6 for a more detailed discussion of Cogent's business.

its customers and the customers of other ISPs can exchange traffic. This system—the exchange of traffic among networks—is commonly referred to as interconnection, and is what enables Internet users to reach essentially any content available on the Internet.

Networks can connect with one another through two primary types of arrangements: peering and transit.¹² Among the larger, global networks like Cogent, interconnection historically has taken the form of settlement-free peering. Under this model, which has been customary since the inception of the Internet, Cogent and the ISPs with whom it peers on a settlement-free basis (e.g., Deutsche Telekom, Verizon) are each compensated by their own customers to whom they have sold access to the entire Internet. That is, the networks who are settlement-free peers exchange traffic, but not compensation.¹³

II. To Be Meaningful, and to Achieve the Commission’s Goals, the Rules Must Reach Beyond the Limit of a Broadband ISP’s Proprietary Network

The Commission has tentatively concluded that its proposed rules should not apply to “the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data”¹⁴ In the NPRM, the Commission seeks comment on its tentative conclusion that it does not “propose to expand the scope of the open Internet rules in *any fashion* to regulate traffic exchange.”¹⁵

¹² Peering agreements between ISPs are necessary in order to exchange traffic. Without peering agreements, each ISP would have to buy Internet access from every other ISP in order for its customers to exchange content, such as email, with customers of other ISPs. Larger ISPs exchange traffic and interconnect their networks by means of direct private connections referred to as private peering. By contrast, smaller ISPs must typically pay for transit services to exchange traffic or peer with networks they cannot reach on their own.

¹³ Cogent does not sell or purchase peering nor does it purchase transit services to reach any portion of the Internet.

¹⁴ NPRM, para. 59. To that end, the Commission is proposing to reiterate its 2010 conclusion that the rules should not apply to “existing arrangements for network interconnection[.]” *Id.* (citing *Open Internet Order*, 25 FCC Rcd. at 17944, para. 67 n.209).

¹⁵ NPRM, para. 83 (emphasis added).

Without addressing traffic exchanges between last-mile broadband ISPs and other networks, the Commission would perpetuate a loophole that would swallow the rule.

Both the Commission's 2010 decision, and its current intention to continue to ignore entirely Internet traffic exchange in this context, appear to rest on at least two false premises. First, the Commission seems to believe that an extension of open Internet rules beyond the confines of a broadband ISP's own network will somehow necessitate regulating all aspects of Internet traffic exchange. That does not have to be the case. There are various elements of Internet traffic exchange that can and, indeed, should be left to industry participants to work out among themselves.¹⁶ It does not follow, however, that every aspect of Internet traffic exchange should be deemed to be outside the open Internet rules. The aspects of Internet traffic exchange that directly implicate the Commission's decade-long effort to "protect and promote the Internet as an open platform for innovation, competition, economic growth, and free expression,"¹⁷ should be addressed by new open Internet rules.

Second, the Commission simply cannot achieve the goals it has long articulated, and which the D.C. Circuit and legions of commentators have endorsed,¹⁸ if it draws an impenetrable boundary around each ISP's network and decrees that the open Internet rules apply only inside those individual boundaries. Over the past year, there have been numerous accounts detailing

¹⁶ For example, Internet protocol standards developed among industry participants already address the more technical aspects of interconnection and, thus, there is no need at this time for the Commission to regulate with respect to issues such as the location of peering points or which available standard Internet options (e.g., multiple exit discriminators) are used.

¹⁷ NPRM, para. 11.

¹⁸ *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 4 (setting forth general Internet policy principles intended "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet."); *Open Internet Order*, 25 FCC Rcd at 17944, para. 43 (adopting rules "consistent with the common understanding of broadband Internet access service as a service that enables one to go where one wants on the Internet and communicate with anyone else online"); *Verizon*, 740 F.3d at 644-46 (finding that the Commission had adequately justified the adoption of open Internet rules that would preserve and facilitate the "virtuous cycle" of innovation, demand for Internet services, and deployment of broadband infrastructure).

consumers’ challenges in accessing content from edge providers of their choosing. While Netflix is the most prominent example of this, it is not the only one.¹⁹ Indeed, as recently as last month, Chairman Wheeler recognized the issue in announcing the Commission’s plan to study Internet congestion issues.²⁰ While there is nothing wrong with the Commission “collecting information” and “looking under the hood,”²¹ no additional information is needed to understand that, if last-mile broadband ISPs face no limitation on their practices vis-à-vis interconnection and traffic exchange with other networks, then they will have an easy path, should they choose to take it, to block content or degrade content or connections—the very acts this proceeding is seeking to address.²² Put another way, the categorical exclusion of all aspects of Internet traffic exchange from this rulemaking is the functional equivalent of granting broadband ISPs the license to materially undermine open Internet principles.

If all of the Internet content that consumers have paid for and thus reasonably expect to receive was housed within an ISP’s own proprietary network, then the dichotomy the Commission has created in the past, and proposes to maintain, might make sense. But that, of course, is not how the Internet—often and accurately characterized as a network of networks—functions. Instead, when an ISP’s customer sends a request through that ISP for Internet content, that request is handed off to at least one, if not many more, other networks to route it to the

¹⁹ See, e.g., Zachary M. Seward & Herman Wong, *YouTube, Following Netflix, is now publicly shaming internet providers for slow video*, Quartz, <http://qz.com/230603/youtube-like-netflix-is-now-publicly-shaming-internet-providers-for-slow-video/> (July 5, 2014); Jon Brodtkin, *Why YouTube buffers: The secret deals that make—and break—online video*, Ars Technica, <http://arstechnica.com/information-technology/2013/07/why-youtube-buffers-the-secret-deals-that-make-and-break-online-video/> (July 28, 2013).

²⁰ Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (June 13, 2014) at 1 (“The bottom line is that consumers need to understand what is occurring when the Internet service they’ve paid for does not adequately deliver the content they desire, especially content they’ve also paid for.”) (“Wheeler June 13, 2014 Statement”).

²¹ *Id.*

²² Indeed, there is nothing in the NPRM that would prevent ISPs from simply treating the proposed rules “as permission to allow Internet performance to deteriorate” at interconnection points. See Level 3 Commc’ns, LLC Apr. 24, 2014 *Ex Parte* Submission, GN Docket No. 14-28, at 2.

intended recipient and then return the requested content or data via the ISP to the ISP's customer. The rules as proposed would leave free from any oversight the sending and receiving of content over the last-mile ISP's interconnections with other networks. As a result, the very conduct the rules seek to prevent—"bad acts such as blocking content or degrading access to content"²³—will remain possible, if not probable, unless the proposed rules are adjusted in the manner described below.²⁴

III. Title II Reclassification is the Optimal Way to Ensure an Open Internet

Today's Internet is characterized by the critical and expanding roles it plays in various facets of Americans' personal, commercial and civic lives, and the rapid pace at which these roles, and the technologies that enable them, evolve. This combination of centrality and dynamism calls for a regulatory approach that provides both legal certainty and regulatory flexibility.²⁵

Legal certainty is important because it assures all participants in the Internet ecosystem of the solid and sustainable basis for the open Internet rules, thus reducing the likelihood that yet another set of rules will be unable to survive the virtually inevitable court challenge. Regulatory flexibility is important because any rules that affect the Internet must be amenable to modification as the Internet's technological bases and the marketplace evolve.

²³ Wheeler June 13, 2014 Statement at 1.

²⁴ Netflix agrees. In a recent meeting with senior Commission staff, "Netflix explained that Open Internet rules will not be effective if broadband access providers can simply shift blocking, degradation and discrimination upstream to where the broadband access providers interconnect with the rest of the networks that constitute the global Internet. Consumers cannot receive the content and applications of their choosing if broadband Internet access providers limit connections with the networks that serve that content or those applications." Netflix June 18, 2014 *Ex Parte* Submission, GN Docket No. 14-28; *see also* Cogent Communications Group, Inc. Apr. 1, 2014 *Ex Parte* Submission, GN Docket No. 14-28, at 1 (explaining that large, vertically integrated broadband providers have an incentive to steer their subscribers toward their own on-demand services (e.g., Verizon's Redbox Instant or Comcast's XFINITY On Demand) and away from competitive services offered by unaffiliated edge providers (e.g., Netflix, YouTube or Skype)).

²⁵ Of course, such a regulatory approach might be unnecessary were the dominant broadband ISPs not entrenched local monopolies facing, in many instances, little or no competition.

Cogent submits that reclassification of broadband Internet service as a “telecommunications service”—including both broadband Internet access for consumers and the services broadband ISPs furnish to edge providers²⁶—is the most straightforward and effective way to provide this legal certainty and regulatory flexibility. At the same time, it provides the optimal way to meet the Commission’s open Internet goals.

Some proponents of open Internet principles have suggested variations on reclassification, perhaps in the hope that such partial measures would be more palatable to the Commission or certain critics of reclassification. Examples include the petition filed by Mozilla and the proposals set forth by Columbia Professors Wu and Narechania.²⁷ Both of these proposals are directionally correct, and both are a substantial improvement over the existing “information services” classification. However, both also leave open questions as to the precise contours of the Internet distribution chain that are included in their respective reclassification approaches.²⁸ Thus, some uncertainty that exists in the current regulatory environment would continue.

Rather than perpetuate uncertainty, the Commission should seize the opportunity the D.C. Circuit has opened and embrace Title II reclassification. Doing so now will provide the Commission with clear authority to promulgate the types of rules set forth in the NPRM, but will

²⁶ See NPRM, para. 148 (seeking comment on Title II reclassification). See also Cogent 3/21/14 Comments at 2-3. With respect to the services furnished to edge providers, the Commission has stated: “We understand such service to include the flow of Internet traffic on the broadband providers’ own network, and not how it gets to the broadband providers’ networks.” NPRM, para. 151. That distinction makes sense if it means that the Commission does not view an edge provider’s relationship with a transit provider unaffiliated with an ISP, for example, as being within the service an ISP is providing to such an edge provider. If, however, the Commission intends the use of the term “own network” to mean that a last-mile broadband provider’s interconnection with other networks is somehow not part of the service being furnished to edge providers, then such a conclusion is mistaken and will allow for an end run around the open Internet rules.

²⁷ NPRM, para. 152 (citing Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52 (May 5, 2014), and Letter from Tim Wu and Tejas Narechania, Columbia University, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (Apr. 14, 2014)).

²⁸ Both proposals also assume there is some reason Title II reclassification is unavailable and, as such, search for a palatable second best solution. There is no reason to do that.

not in and of itself mandate any other rules or requirements. This is an important point often overlooked by reclassification critics.²⁹ Nothing about Title II reclassification requires the Commission to do anything differently than what it is currently proposing. The Commission can implement reclassification and then forebear from adopting any rules other than those currently proposed in the NPRM, subject to the important modifications discussed in these comments.³⁰

Some will ask, why go through the process of reclassification—and open the Commission to the attacks that are sure to follow—if only to adopt a set of rules that can be implemented under alternative authority? There are several reasons to do so. First, it provides a tested and proven legal basis for the type of rules the Commission is now considering. Second, reclassification will put the Commission in a position to react quickly to future changes that necessitate modifying the existing rules or adopting different ones. Third, it will provide the Commission with the predicate to consider the necessity for different regulatory approaches to interconnection issues, including the terms and conditions pursuant to which the networks that comprise the Internet exchange traffic and the compensation, if any, associated with those traffic exchanges.³¹ Fourth, should the competitive conditions for consumer broadband ISP service warrant it, Title II reclassification would give the Commission the basis to consider a regulatory approach that would afford consumers a greater measure of choice (or, in some cases, any choice) as to how their Internet content is delivered. Fifth, and perhaps most importantly, over eighty years of experience has proven that Title II regulations can be applied surgically and deftly to address specific problems as they arise.

²⁹ See, e.g., AT&T Services, Inc. May 9, 2014 *Ex Parte* Submission, GN Docket No. 14-28.

³⁰ As discussed below, Cogent suggests certain clarifications and modifications to the proposals in the NPRM.

³¹ For example, the Commission might decide to consider whether it would promote its open Internet goals by defining parameters for settlement-free peering relationships among Internet networks.

Before turning to the specific rules under consideration, it is important to underscore that while Title II reclassification represents the most certain path forward, it is not the only legal predicate for the open Internet rules. Section 706(a) and (b) provide sufficient authority for the Commission to adopt the type of rules discussed in the NPRM and below.³² Nonetheless, Section 706 simply does not provide the breadth of authority and flexibility that would come with reclassification. Therefore, the Commission should not box itself into a legal framework that may hamper its efficacy later, if it can achieve all of its present goals now while also preserving its ability to react to future circumstances.

IV. Rules to Protect and Promote the Open Internet

As reflected in the caption assigned to this proceeding, the purpose and effect of any rules adopted by the Commission—whether under Title II or Section 706—must be to protect and promote an open Internet. For the reasons explained above and in Cogent’s March 21 submission, neither that purpose nor effect can be achieved if the Commission ignores interconnection points where content requested by ISP subscribers is delivered to broadband ISP networks by edge or transit providers. Likewise, a regulatory scheme that focuses only on the exchange of traffic among networks, but ignores practices within an ISP’s own network, would also fail to achieve the Commission’s goals. Accordingly, the Commission must address both inter- and intra-network practices in order to ensure that the Internet remains “America’s most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment.”³³

³² See Cogent 3/21/14 Comments at 23-31.

³³ NPRM, para. 1.

In the NPRM, the Commission specifically proposes to revive its “no-blocking” rule, to devise a legal standard to assess “commercial reasonableness,” and to enhance the existing transparency rule. Cogent addresses each proposal in turn.

A. The No-Blocking Rule

An ISP blocking access to lawful Internet content is the antithesis of an open Internet. Cogent supports the adoption of the no-blocking rule, including the clarification proposed in the NPRM, subject to certain important qualifications.³⁴

The proposed rule states: “A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”³⁵ As explained by the Commission, this rule “does not preclude broadband providers from negotiating individualized, differentiated arrangements with similarly situated edge providers (subject to the separate commercial reasonableness rule or its equivalent). So long as broadband providers do not degrade lawful content or service to below a *minimum level of access*, they would not run afoul of the proposed rule.”³⁶

Cogent does not oppose allowing individualized, differentiated arrangements between an edge provider and an ISP network.³⁷ But in order for such arrangements to harmonize with open Internet principles, ISPs must guarantee a “minimum level of access” for edge providers that

³⁴ Of course, as a company that generates approximately half of its annual revenue from the provision of Internet access, Cogent will be subject to the no-blocking rule, just like other ISPs.

³⁵ NPRM, App. A, sec. 8.5. Embedded within the no-blocking rule are certain definitions (i.e., “block” and “reasonable network management”) which are discussed below. *See* Section IV.B *infra* (discussing the need for a precise definition of “reasonable network management” that encompasses interconnection with other networks).

³⁶ NPRM, para. 89 (emphasis added). The need to carefully craft this modification to the 2010 rule to specifically sanction “individualized, differentiated arrangements” so as to assiduously avoid common carriage illustrates why Title II reclassification is a simpler approach.

³⁷ *See* Cogent 3/21/14 Comments at 33.

cannot, or choose not to, enter into such arrangements.³⁸ In other words, whether or not an edge provider pays for any sort of “prioritization,” it must be able to reach and be reached by the customers of any ISP. This requirement—which is critical to the reasonable and timely deployment of broadband to all Americans—underscores why the open Internet rules must reach interconnection or peering agreements between last-mile broadband ISPs and other networks. No matter how “minimum level of access” is defined, if last-mile broadband ISPs are able to allow the interconnection points with other networks to become congested to the degree that bandwidth-intensive content cannot be sufficiently transmitted to the ISPs’ customers, then the requirement will be meaningless.

As the Commission recognizes, a minimum level of access must “ensure that all users have access to an Internet experience that is sufficiently robust, fast, and effectively usable.”³⁹ In other words, the proposed rule would preclude literal blocking and functional blocking, the latter being degradation to a point below a particular level of access. The key question, of course, is how to define a “minimum level of access.”

While “best effort” and “objective, evolving ‘reasonable person’” standards⁴⁰ have the advantages of being flexible and used in other areas of the law, both suffer from the problem of being too vague and, potentially, subject to manipulation or gamesmanship.⁴¹ As such, both also

³⁸ The Commission agrees: “[W]e 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.” NPRM, para. 97. The Commission should clarify that the phrase “their end-user subscribers” quoted here refers to an ISP’s subscribers, not an edge provider’s subscribers.

³⁹ NPRM, para. 98. This concept is also incorporated in the proposed definition of “block.” See NPRM, App. A, sec. 8.11(a). Cogent agrees with that proposed definition.

⁴⁰ NPRM, paras. 102 and 104.

⁴¹ See, e.g., Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, Symposium: Who Is the Reasonable Person?, 14 Lewis & Clark L.R. 1233, 1233, 1235 (2010) (noting that the reasonable person standard “has played a critical role in many different aspects of private law, criminal law . . . and public law,” but is “the common law’s most enduring legal fiction” and “for almost as long as his storied existence, the reasonable person has also been the subject of critique and even ridicule”); Robert E. Scott & George G. Triantis,

have the potential to lead to frequent and protracted disputes about intent and interpretation. In contrast, a standard that is tethered to an objective or quantitative measurement avoids (or at least minimizes) the potential for disputes.

Cogent submits that a “minimum level of access” must be defined in a way that covers the full range of edge providers and end users, so as to allow the most bandwidth-intensive applications to perform as designed and the most bandwidth-intensive end users to receive the Internet service for which they paid. Without such access, edge providers—including nascent start-ups attempting to reach and find an audience—may not have the ability, incentive or capital to “build[] services that compete with current or future offerings of the cable or telecommunications companies that can directly impact a consumer’s experience of a new service.”⁴² Thus, from an edge-provider perspective—particularly for those without individualized, differentiated arrangements—“minimum level of access” should be measured by reference to the network connections between an ISP and the networks with which the ISP directly interconnects.

Specifically, to ensure a “minimum level of access,” Cogent proposes that ISPs should be obligated to add sufficient port capacity at interconnection points such that no sustained packet

Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 818-19 (2006) (arguing that “best efforts” language, a familiar feature in contracts, reduce front-end transaction costs but can lead to back-end enforcement costs due to the vagueness of the term).

⁴² Brad Burnham/Union Square Ventures May 6, 2014 *Ex Parte* Submission, GN Docket No. 14-28, at 2 (Founder of prominent venture firm stating, “So, I can’t imagine that we will risk our investors’ capital in companies that will now be vulnerable to the whims of a gatekeeper that has the technology and incentive to discriminate against our [portfolio] companies’ services.”). As the Commission itself has recognized, “Innovation is the chief driver of American economic growth, which means that Americans lose if the opportunity to innovate is curbed.” NPRM, para. 8. See also Yancey Strickler, *FCC’s ‘fast lane’ Internet plan threatens free exchange of ideas*, Wash. Post, http://www.washingtonpost.com/opinions/kickstarter-ceo-fccs-fast-lane-internet-plan-threatens-free-exchange-of-ideas/2014/07/04/a52ffd2a-fcbc-11e3-932c-0a55b81f48ce_story.html (July 4, 2014) (CEO and co-founder of “crowdfunding” platform Kickstarter arguing that the Commission’s proposed rules allowing paid prioritization would create a world of “enormous logistical and financial hurdles” where Internet start-ups will “succeed or fail not on the basis of their passion or service but on whether they have the resources and desire to pay the big Internet carriers”).

loss occurs.⁴³ Because the cost of adding such ports—which in several cases Cogent has already offered to pay—is extremely modest, the burden imposed on ISPs would be minimal.⁴⁴ In addition, a “minimum level of access” should be defined as “no difference between the packet loss experienced by the consumer from outside-the-network and inside-the-network services.” If adopted, this standard would limit the ability of ISPs—including Cogent—to throttle the delivery of content and provide a check on the ability of ISPs to force edge providers to use more expensive Internet “fast lanes.” Thus, if a last-mile ISP’s interconnection points with other networks were not congested, then that ISP would be deemed to be providing edge providers (who can reach the ISP’s customers through one or more networks that interconnect with the ISP) a “minimum level of access.”⁴⁵

From an end-user perspective, “minimum level of access” should be measured in terms of “the speed ISPs use in marketing their broadband service,”⁴⁶ or other quantitative measurements such as latency or packet loss data. The enhanced transparency rule that Cogent advocated in its

⁴³ This obligation would apply only to the relevant ports and routers, not to the networks behind the routers. In other words, this proposal is not seeking to mandate network upgrades or improvements within an ISP’s own network facilities. It is focused only on the equipment directly associated with the exchange of Internet traffic among networks. It is also worth noting that Cogent, as an ISP, would bear the same types of costs under this proposal as other ISPs.

⁴⁴ On March 21, 2014, Cogent offered to pay the hardware costs required for Verizon, Comcast, AT&T, and Time Warner Cable to upgrade their connections with Cogent, thereby ensuring “adequate capacity to deliver quality service to the customers of Cogent and [the] ISPs.” Cogent, *Cogent Offers to Pay Capital Costs Incurred by Major Telephone and Cable Companies Necessary to Ensure Adequate Capacity*, <http://www.cogentco.com/en/news/press-releases/631-cogent-offers-to-pay-capital-costs-incurred-by-major-telephone-and-cable-companies-necessary-to-ensure-adequate-capacity> (Mar. 21, 2014).

⁴⁵ Conceptually, this is similar to the proposal Cogent advanced in its prior comments in this docket with respect to remedying “sustained states of congestion.” See Cogent 3/21/14 Comments at 31-33. Essentially, an ISP that exhibits a “sustained state of congestion” would fail, under the definition proposed above, to maintain a “minimum level of access.” See also Public Knowledge May 2, 2014 *Ex Parte* Submission, GN Docket No. 14-28 at 4 (“[A] duty to maintain a basic level of service for subscribers of necessity includes a responsibility with regard to maintaining links with other networks.”).

⁴⁶ Federal Communications Commission, 2014 Measuring Broadband America: Fixed Broadband Report at 5, available at <http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf> (last visited July 14, 2014).

earlier comments,⁴⁷ if adopted by the Commission, will provide an important source of data from which these measurements can be obtained in evaluating whether end users are getting a “minimum level of access.”

Regardless of the specific definition or measurement adopted, it is essential they recognize the dynamic nature of the Internet and, to that end, provide a mechanism by which the Commission can revisit any quantitative standards on a frequent basis to ensure that they are consistent with then-current technology.

B. The Standard for “Commercial Reasonableness”

While blocking is the bluntest instrument by which an ISP can interfere with an open Internet, it is far from the only instrument. There are numerous practices a last-mile broadband ISP can undertake short of outright blocking an edge provider that can degrade an end user’s experience with—and thus likelihood to seek out in the future—services offered by a particular edge provider.

As both the Commission and D.C. Circuit have recognized, broadband ISPs have both the incentives and ability to engage in such practices.⁴⁸ Indeed, those incentives are even more pronounced today than at the time the *Open Internet Order* was released.⁴⁹ For example, since that time, Comcast completed its acquisition of NBCU (giving it additional and more prominent content to shield from competition), and the popularity of OVD streaming services, including some highly acclaimed original programming, has increased (posing a greater competitive threat

⁴⁷ See Cogent 3/21/14 Comments at 20-23.

⁴⁸ *Open Internet Order*, 25 FCC Rcd at 17916, paras. 20-37 (finding that broadband Internet providers have the incentives and ability to limit Internet openness, and that they have done so in the past); *Verizon*, 740 F.3d at 645 (finding 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.”).

⁴⁹ See, NPRM, para. 44 (asking whether changes in the marketplace since 2010 have affected broadband providers’ incentives to discriminate).

to ISP-owned content).⁵⁰ In light of these incentives and abilities, Cogent strongly agrees that “[s]eparate and distinct from the no-blocking rule” the Commission should “establish[] an enforceable legal standard for broadband provider practices” in order “to preserve Internet openness, protect consumers, and promote competition.”⁵¹

The text of the rule proposed in the NPRM is, at a general level, a sound approach. It states: “A person engaged in the provision of fixed broadband Internet access services, insofar as such person is so engaged, shall not engage in commercially unreasonable practices.

Reasonable network management shall not constitute a commercially unreasonable practice.”⁵²

In order for such a rule to sufficiently serve the overarching public policy goal of an open Internet, it is critical that the Commission make several points clear in adopting the rule.

⁵⁰ See T.C. Sottek, *Netflix challenges the TV establishment with Emmy wins for ‘House of Cards,’* The Verge, <http://www.theverge.com/2013/9/22/4759754/netflix-challenges-the-tv-establishment-with-emmy-wins-for-house-of> (Sept. 23, 2013) (in 2013, original Netflix programming earned 14 Emmy nominations, House of Cards won best directing in a drama series Emmy, and Netflix plans to produce at least five original series per year and budgeted \$300 million for original series *House of Cards*, *Hemlock Grove*, and *Orange Is The New Black*); Bill Carter, *Emmy Nominations Cross a Few Lines*, N.Y. Times, <http://www.nytimes.com/2014/07/11/arts/television/2014-emmy-nominations-game-of-thrones-true-detective-among-the-honored.html> (July 10, 2014) (recently reporting that Netflix received 31 Emmy nominations in 2014, including 13 for *House of Cards* and 12 for *Orange Is The New Black*); Andrea Peterson, *The \$4.38 billion reason it’s so hard for U.S. cord-cutters to watch the Olympics online*, Wash. Post., <http://www.washingtonpost.com/blogs/the-switch/wp/2014/02/06/the-4-38-billion-reason-its-so-hard-for-u-s-cord-cutters-to-watch-olympics-online/> (Feb. 6, 2014) (“[W]hile NBC is streaming all of the events live online, full access to the livestream will only be available to paying cable subscribers.”); cf. Sandvine, *Global Internet Phenomena Report: 1H 2014*, at 5, available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf> (last visited July 14, 2014) (reporting that real-time entertainment constitutes approximately 63% of peak period Internet traffic in North America and that “cord cutters” consume eleven times as much streaming content over typical Internet users; further reporting that per subscriber bandwidth usage in North American has nearly doubled from 2011—when Comcast completed its acquisition of NBCU—to the present).

⁵¹ NPRM, para. 110. Here again, the benefit of Title II reclassification is apparent. The reason the Commission is compelled to revisit its 2010 “no unreasonable discrimination rule” is because the D.C. Circuit concluded that this rule (along with the earlier iteration of the no-blocking rule) amounted to common carriage regulation. *Verizon*, 740 F.3d at 656-59. Notably, though, the D.C. Circuit did not question the policy predicate that led the Commission to adopt the 2010 rules. However, because the Commission is saddled with the baggage of the prior, and now outdated, “information services” classification, its ability to proactively address threats to the open Internet is artificially constrained.

⁵² NPRM, App. A, sec. 8.7. “Reasonable network management,” as proposed, would be defined as follows: “A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network purpose, taking into account the particular network architecture and technology of the broadband Internet access service.” *Id.* at App. A, sec. 8.11(g).

First, this proposal should operate separately from the proposed no-blocking rule.⁵³ That proposed rule, through its incorporated concept of a “minimum level of access,” sets a baseline for the provision of broadband ISP service. The “no commercially unreasonable practices” rule sets an overall behavioral standard for broadband ISPs. Thus, these two rules serve different, but complementary, purposes. Indeed, it is for that reason that the individualized, differentiated arrangements permitted under the new proposed no-blocking rule should themselves be subject to the “no commercially unreasonable practices” rule. Moreover, because the Commission’s no-blocking rule has already been struck down by the D.C. Circuit, it is possible that the Court of Appeals will reject the current attempt to reinstitute it even with the carve-out for individualized, differentiated arrangements. If that happens, the policy goals that underlie both the NPRM and the *Open Internet Order* will be best served if the “no commercially unreasonable practices” rule is able to stand on its own.

Second, the Commission must ensure that “reasonable network management” does not become the exception that swallows the rule. Specifically, the Commission should make clear that an ISP cannot rely on reasonable network management as a defense to insulate its interconnection practices from the rule’s prohibitions. The Commission should instead make clear that “reasonable network management” extends to a last-mile broadband ISP’s network management practices at interconnection points with other networks.⁵⁴ The Commission should also make clear that it is not a reasonable network management practice for an ISP to engage in

⁵³ See NPRM, para. 117.

⁵⁴ In that respect, promulgating and enforcing the new rule in this manner is consistent with the Commission’s statement in the *Open Internet Order* that “its rules did not apply beyond ‘the limits of a broadband provider’s control over the transmission of data to or from its broadband customers.’” NPRM, para. 59 (citing *Open Internet Order*, 25 FCC Rcd at 17933, para. 47 n.150). That is true because it is well within “the limit of an [ISP’s] control” to decide to maintain its interconnections with other networks in a manner that avoids congestion and degradation of content originating outside the ISP’s network. Whether that decision is made, of course, directly implicates the transmission of data to and from end users.

conduct that interferes with the ability of end users and edge providers to exchange data using particular intermediary networks. This clarification to the proposed rule, like the rule proposed by Cogent in its earlier comments, would provide the Commission a critical and powerful tool to exercise its authority under either Section 706 or Title II.⁵⁵

To harmonize the Commission’s proposed rule and Cogent’s earlier proposal, Cogent suggests that the Commission state explicitly that “**it shall not be a commercially reasonable practice for a broadband ISP to maintain a sustained state of congestion at any interconnection points between a broadband ISP’s network and another network with whom it interconnects.**”⁵⁶ In adopting this crucial clarification to the no commercially unreasonable practices rule, a number of points bear emphasis and should be reflected in the Commission’s final rulemaking:

- This rule does not mandate that a broadband ISP interconnect with any other particular network. Rather, the ISP’s obligation to remedy a sustained state of congestion applies only to the flow of traffic between an ISP and another network with whom it already has chosen to interconnect.
- A broadband ISP should not be permitted to condition its compliance with this rule by demanding that another network—with whom it peers on a settlement-free basis—prospectively agree to pay for the exchange of traffic as a condition of

⁵⁵ See Cogent 3/21/14 Comments at 31-33. The principles discussed here with respect to reasonable network management should apply equally to the use of that phrase in the no-blocking rule. See NPRM, App. A sec. 8.5.

⁵⁶ As with Cogent’s original proposal, this variation does not impose common-carrier regulations on an ISP, and it is consistent with the D.C. Circuit’s reasoning in *Cellco P’ship v. F.C.C.*, 700 F.3d 534 (D.C. Cir. 2012). As in *Cellco*, the Commission’s prohibition against commercially unreasonable practices still “leaves substantial room for individualized bargaining and discrimination in terms.” *Id.* at 548. In particular, while this rule would require ISPs to remedy sustained states of congestion at interconnection points, it would also allow ISPs to negotiate and enter into individualized agreements to serve customers and carry traffic “without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.” *Id.* (quoting *Data Roaming Order*, 26 FCC Rcd 5411, 5433, para. 45 (2011)).

ameliorating the sustained state of congestion. This is not tantamount to mandating settlement-free peering.⁵⁷ Rather, it is a mechanism to ensure that the open Internet is not threatened by a broadband ISP's effort to extract payment from another network, the interconnection with whom is necessary to give the ISP's customers access to the entire Internet—something they were sold and purchased.

- In seeking to determine whether a sustained state of congestion exists, whether in response to a complaint or on its own initiative, the Commission will be greatly aided by the adoption of an enhanced transparency rule along the lines proposed in Cogent's March 21 submission.⁵⁸
- Putting the onus on a broadband ISP to remedy a sustained state of congestion with interconnecting networks is a prophylactic measure to ensure that broadband ISPs do not allow their interconnection points to become congested to the point that edge providers are effectively forced to enter into individualized, differentiated arrangements. It is self-evident that the only way to reach the customers of a particular broadband ISP such as Comcast or Verizon is through their last-mile facilities. In an environment in which certain edge providers may choose to enter into one-on-one arrangements for a dedicated connection to a network, it is therefore imperative that others have the ability to decline that

⁵⁷ While codifying a bill-and-keep system among Tier 1 Internet networks would be sound policy and consistent with current and historical practice, it is not something that is incorporated in the above proposal. It is, though, yet another example of something the Commission can and should explore under a Title II regulatory regime.

⁵⁸ Cogent 3/21/14 Comments at 20-23. In particular, Cogent's fourth proposal will be useful for this purpose. *See id* at 21-22.

choice and still be able to reach—and, crucially, be reached by—all ISP customers.

- Incorporating the requirement that a broadband ISP remedy a sustained state of congestion into the no commercially unreasonable practices rule is also entirely consistent with the minimum level of access concept that the Commission has proposed in the context of the no-blocking rule. Both requirements recognize that, in order for Americans to continue to realize the promise and benefits of an open Internet, it is essential that broadband ISPs be precluded from engaging in practices that adversely impact the ability of end users to transmit to and receive from edge providers any lawful Internet content of their choosing and to do so in a way that is “robust, fast, and effectively usable.”⁵⁹

Third, Cogent believes the Commission and interested constituencies will benefit if further clarification of what is (or is not) commercially unreasonable is developed over time through case-by-case determinations. The various players in the Internet ecosystem operate in an environment characterized by rapid change and disruptive new technologies and applications. In such an environment, it is difficult to identify in advance all types of conduct that should be deemed commercially unreasonable. Rather, the Commission should ensure that there is a quick and cost-effective dispute-resolution mechanism in place so that it can promptly adjudicate allegations of commercial unreasonableness, whether initiated by a complainant or the Commission itself.⁶⁰ Moreover, case-by-case resolution avoids a scenario under which the

⁵⁹ NPRM, para. 101.

⁶⁰ See Section IV.D, *infra*, for a discussion of dispute-resolution issues. In assessing whether a particular practice is commercially unreasonable, some or all of the types of factors identified in the NPRM may be appropriate for consideration, depending upon the particular practice being challenged. See NPRM, paras. 129-34. However, the ultimate question should always be whether a challenged practice is impeding the ability of edge providers to reach end users or vice versa.

Commission would need to formally amend the open Internet rules each time it concludes that a practice is or is not commercially unreasonable.

A case-by-case adjudicative approach still allows the Commission to establish prospective and proscriptive guidelines. Most importantly, as discussed above, the Commission should explicitly address the relationship between a sustained state of congestion at interconnection points and commercial unreasonableness. Likewise, it makes sense now to “adopt a rebuttable presumption that a broadband provider’s exclusive (or effectively exclusive) arrangement of prioritizing service to an affiliate would be commercially unreasonable[,]”⁶¹ given the obvious incentives for ISPs to favor affiliated services versus competitive, unaffiliated services.⁶²

C. The Enhanced Transparency Rule

The existing transparency rule, which was not disturbed by the *Verizon* decision, is conceptually sound and directionally accurate but suffers from a lack of specificity. In its prior comments, Cogent set forth several recommendations for improving the existing rule with respect to the data disclosed through participation in the Measuring Broadband America (“MBA”) program and the need for additional disclosures about network management practices, including practices concerning the management of interconnection points.⁶³ Further, Cogent identified a

⁶¹ NPRM, para. 126.

⁶² See *Open Internet Order*, 25 FCC Rcd at 17915-17926, paras. 21-31, 35-36 (discussing evidence of, including the Comcast-BitTorrent dispute, ISPs’ incentives and abilities to favor affiliated services). The Commission should reject AT&T’s suggestion “that the Commission exclude from its review of particular practices any agreement between a broadband provider and an edge provider if the agreement is not exclusive and if the edge provider is not an affiliate of the broadband provider.” NPRM, para. 141 (citing AT&T Mar. 21, 2014 Comments at 3). Creating a safe harbor for such agreements potentially could insulate from review agreements between the nation’s dominant last-mile broadband ISPs and major edge providers. In light of the market power enjoyed by the ISPs, the Commission should not preemptively conclude that such agreements have no ability to be structured in a manner that is inconsistent with open Internet principles. Indeed, it is precisely such unaffiliated agreements that the Commission is examining in its current inquiry into Internet congestion. See Wheeler June 13, 2014 Statement at 1 (noting that the Commission has received agreements between Comcast and Netflix and Verizon and Netflix).

⁶³ See Cogent 3/21/14 Comments at 10-19.

series of additional disclosure obligations that should apply to broadband ISPs.⁶⁴ Each of these proposed disclosure obligations was designed to increase the utility of the information disclosed to the Commission and the Internet community at large, as well as consumers.

Cogent supports the Commission's proposed transparency rule.⁶⁵ In particular, new disclosure requirements concerning congestion are an important development.⁶⁶ However, while meaningfully improved over the prior iteration, the proposed rule can be further improved with additional guidance that clarifies what information must be disclosed. To that end, whether in the text of the rule itself or in the order adopting it, the Commission should expressly identify the disclosures proposed in Cogent's prior comments as among the type of information that broadband ISPs must disclose in order to comply with the new rule.

It is worth emphasizing that an enhanced transparency rule will serve two critical purposes. First, and most obvious, it will provide timely and accurate information about the deployment of broadband service in America to interested persons. Second, a comprehensive and clearly defined transparency regime may very well deter some or all of the conduct that poses a threat to an open Internet. For example, as detailed in Cogent's prior comments, recent events indicate that certain ISPs are failing to augment capacity of interconnection ports between the ISP and particular Internet backbones.⁶⁷ When such practices occur at the same time as total traffic continues to expand, broadband customers cannot receive the advertised speed when they download content that is delivered by a backbone whose interconnection ports are being

⁶⁴ See *id.* at 19-23.

⁶⁵ See NPRM App. A., sec. 8.3.

⁶⁶ See *id.* at sec. 8.3(b) ("In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall include meaningful information regarding the source, timing, speed, packet loss, and duration of congestion."). See also NPRM, para. 83 (seeking comment on Cogent's transparency proposals).

⁶⁷ Cogent 3/21/14 Comments at 18-19; see also Level 3 Commc'ns Comments, GN 14-28, Mar. 21, 2014 at 7-10.

constrained. While an obvious solution is for last-mile ISPs to upgrade their congested interconnection ports with Cogent and other backbone networks, under the current transparency rule there is no requirement that these ISPs even disclose the problem. Absent such disclosures, end users who have options for broadband ISPs lack important information required to make informed choices about their purchase of broadband ISP services.

The importance of these two purposes cannot be overstated. Therefore, the Commission is correct to “propose that the consequences of a failure to comply with [the] transparency rule should be significant and include monetary penalties.”⁶⁸ If the monetary penalty is going to be viewed as anything other than a small cost of doing business, then it should be substantial. In addition, because the degree to which a penalty is “substantial” varies with the size of the firm subject to that penalty, the Commission should adopt a penalty structure that is based on a percentage of an ISP’s broadband revenue, rather than a fixed dollar amount.⁶⁹

D. Enforcement and Dispute Resolution

An effective enforcement and dispute-resolution system will provide a vehicle for the Commission to (1) make available guidance as to questions that arise under the new open Internet rules and (2) promptly address alleged violations of those rules. (Given the rapid evolution of the Internet, justice delayed is justice denied.) In implementing such a system, the Commission should focus on both elements.

As to the first prong—advance guidance—the Commission should adopt a process akin to the Department of Justice Antitrust Division’s business review procedure or the Federal Trade

⁶⁸ NPRM, para. 87.

⁶⁹ The Commission should also require that an officer of a broadband ISP certify that the ISP is in compliance with the transparency rule. This is conceptually similar to the certifications that accompany SEC filings under the Sarbanes-Oxley Act. Sarbanes-Oxley Act § 906, 18 U.S.C. § 1350 (requiring CEO and CFO to provide, with each periodic report required under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, a written statement certifying “that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer”).

Commission’s advisory opinion program.⁷⁰ Here, the Commission should establish a procedure by which a broadband ISP could seek an opinion from a designated Commission bureau as to whether a proposed course of conduct is consistent with the open Internet rules. To be of the greatest utility, the Commission should release to the public the ISP’s inquiry and the Commission staff’s response. This procedure should also permit the Commission to seek additional information or data, if necessary, to address the inquiry. Further, the Commission should release its responses to such inquiries within a short period of receiving them. While this procedure should be made available for any facet of the open Internet rules, it is likely to be especially helpful with respect to the enhanced transparency rule.⁷¹ Indeed, one of the shortcomings of the existing transparency rule is the relative absence of guidance on what practices comply with the rule.⁷²

With respect to the second prong—dispute resolution—the Commission should maintain the tripartite approach of Commission-initiated investigations, informal complaints and formal complaints. This approach has the advantage of providing a range of dispute-resolution tools, and allows for a case-by-case analysis that evaluates the “totality of the circumstances to consider alleged violations” of the rules.⁷³ Because of the Internet’s ubiquity, Cogent agrees that

⁷⁰ See NPRM, para. 165; see also United States Dep’t of Justice, Introduction to Antitrust Division Business Reviews, available at <http://www.justice.gov/atr/public/busreview/276833.pdf> (last visited July 14, 2014) and Federal Trade Comm’n, Advisory Opinions, <http://www.ftc.gov/policy/advisory-opinions> (last visited July 14, 2014).

⁷¹ For example, one can see this process being used by a broadband ISP to inquire as to whether a particular disclosure plan it is contemplating using complies with the enhanced transparency rule.

⁷² The Enforcement Bureau and Office of General Counsel issued a single advisory in 2011. See *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411. That guidance, while somewhat helpful, left many questions unanswered. See Cogent 3/21/14 Comments at 8-9. Cogent believes that having the Enforcement Bureau and OGC issue such advisories in the future would be useful, see NPRM, para. 167, but that such advisories should be a complement to, not a replacement for, the advanced guidance process discussed above.

⁷³ NPRM, para. 168.

the dispute-resolution mechanism for addressing violations of the open Internet rules “must be accessible to a diverse array of affected parties.”⁷⁴ In order to ensure such access, the Commission should make clear that participants throughout the Internet distribution chain have standing to challenge broadband ISP practices that are alleged to violate the open Internet rules. For example, Internet backbone networks that interconnect and/or peer with a broadband ISP should have standing to initiate a complaint.⁷⁵ Likewise, edge providers who have opted not to enter into a contractual arrangement with an ISP need standing to initiate a complaint. And, in markets where more than one option for broadband ISP service exists, competitors to a broadband ISP should have standing to initiate a complaint. While the foregoing list is not exhaustive, it is intended to provide concrete examples of the types of entities that must be afforded standing to initiate a dispute before the Commission in order to facilitate effective and efficient enforcement. The Commission should also consider the utility of appointing a third-party monitor to verify that any violations of the open Internet rules are remedied in a timely manner, whether it be a failure to provide appropriate disclosures under the transparency rule or the implementation of commercially unreasonable practices, such as sustained congestion at interconnection points.

Lastly, with respect to enforcement and dispute resolution, the Commission should explore mechanisms by which it can accelerate all forms of dispute resolution pertaining to the open Internet rules.⁷⁶ Time is of the essence in the dynamic and fast-paced Internet world, and

⁷⁴ NPRM, para. 170.

⁷⁵ With access to the type of information that would be available with the adoption of an enhanced transparency rule, entities like backbone networks will have the insight and expertise to identify and bring to the Commission’s attention practices that contravene the rule, but may not be evident to edge providers, consumers or even Commission staff.

⁷⁶ Advocates of weaker Commission enforcement in this area often argue that those injured by conduct that violates open Internet principles can pursue antitrust remedies through the courts. That argument is essentially an effort to allow offending ISPs to escape liability. First, the contracts used by the dominant ISPs typically contain

an enforcement or dispute-resolution process that lingers too long risks undermining the very goals that this proceeding was initiated to achieve.

CONCLUSION

Cogent agrees that “[p]reserving the Internet as an open platform for innovation and expression while providing certainty and predictability in the marketplace is an important responsibility of [the Commission].”⁷⁷ Any rules the Commission promulgates must ensure that broadband ISPs cannot do indirectly (i.e., just outside the last mile) what they are prohibited from doing directly (i.e., within their own networks). Moreover, Title II reclassification provides a proven regulatory framework within which to address the Commission’s proposed open Internet rules, and the flexibility to assess and address new developments in a timely manner as the Internet evolves. Finally, Cogent strongly supports the Commission’s efforts to revive the no-blocking rule, establish an enforceable standard for commercial reasonableness, and enhance the existing transparency rule.

mandatory arbitration clauses and class-action waivers that effectively foreclose access to the courts. Second, even where such contractual impediments do not exist, private antitrust enforcement is not a substitute for the Commission’s prospective application of open Internet rules to address these issues. Antitrust cases often take too long and cost too much to be effective—especially in the rapidly evolving Internet business—and relief may come too late to remedy the competitive harm to consumers, as well as edge providers who might not survive a sustained period of having their access to ISP customers degraded or denied.

⁷⁷ Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules (Feb. 19, 2014) at 1, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-325654A1.pdf (last visited July 14, 2014).

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