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REDACTED – FOR PUBLIC INSPECTION

January 7, 2015

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90

Dear Ms. Dortch:

Pursuant to the Second Amended Modified Joint Protective Order [1] in the above-captioned proceeding, Cogent Communications Group, Inc. ("Cogent") hereby submits a public version of its reply comments.

The Highly Confidential version of Cogent's comments is being filed under separate cover and will be made available for inspection pursuant to the terms of the Joint Protective Order.

Please contact me should you have any questions regarding this matter.

Sincerely,

Robert M. Cooper
Counsel for Cogent Communications Group, Inc.

Enclosure

1 *In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Second Amended Modified Joint Protective Order, DA 14-1640 (Nov. 12, 2014).

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

In the Matter of	)	
	)	
Applications of	)	
	)	
AT&T Inc. and DIRECTV	)	**MB Docket No. 14-90**
	)	
For Consent To Assign or Transfer Control of Licenses and Authorizations	)	

REPLY COMMENTS OF COGENT COMMUNICATIONS GROUP, INC.

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January 7, 2015

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Cogent Communications Group, Inc. ("Cogent") submits these reply comments concerning the applications of AT&T Inc. ("AT&T") and DIRECTV (together, the "Applicants") for consent to assign or transfer control of licenses and authorizations (the "transaction" or "merger").

I. INTRODUCTION

In its September 16 comments in this proceeding, Cogent identified public interest harms presented by the transaction.[1] Specifically, Cogent addressed threats to the delivery of Internet content that competes with the Applicants' proprietary offerings, and explained how the transaction would increase the merged firm's incentives and bargaining power to protect its own content and disfavor existing and emerging online rivals. In order to address these public interest harms—thereby providing the predicate for the Federal Communications Commission (the "Commission") to conclude that the merger comports with the public interest—Cogent proposed specific and enforceable conditions.

In response to Cogent's submission, AT&T and DIRECTV did not embrace the proposed conditions, even though they profess support for the principles of Internet openness that underlie each proposal. Instead, the Applicants used their response to advance a series of arguments that ultimately are unavailing and do not meaningfully address, much less cure, the competitive concerns their merger raises.

As set forth in Cogent's opening comments and below, the transaction poses at least three areas of public interest concern. First, the post-merger entity will have increased incentives, coupled with AT&T's existing broadband market power, to congest Internet traffic that competes

[1] *See In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Comments of Cogent Communications Group, Inc. (Sep. 16, 2014) ("Cogent 14-90 Comments").

with its own or affiliated online offerings. In response, AT&T offers an unconvincing argument, contrary to Commission precedent and common sense, that it would have no reason to operate its broadband network in a manner that favors its enhanced MVPD business at the expense of established and new online alternatives. Second, recent experiences involving AT&T—at a time when its incentive to harm online competitors was less than it would be post-acquisition—demonstrate that it can and will wield congestion as a club to harm its rivals. Here too, the Applicants advance a number of misleading rebuttals that fail to justify AT&T's anticompetitive practices vis-à-vis Cogent and Netflix. Third, the voluntary commitments proffered by AT&T and DIRECTV—unlike the conditions proposed by Cogent—are insufficient to remedy the transaction's public interest risks.

Unless these merger-specific issues are addressed through the imposition of meaningful and targeted conditions, the Commission cannot conclude that the transaction is consistent with the public interest.

II. A COMBINED AT&T/DIRECTV WILL HAVE INCREASED INCENTIVES, JOINED WITH AT&T'S BROADBAND MARKET POWER, TO CONGEST INTERNET TRAFFIC

The proposed merger would combine the nation's second biggest MVPD with the nation's second biggest broadband ISP. The Commission and federal courts repeatedly have explained that such combinations create both the incentives and the ability to degrade Internet traffic from edge providers who compete with the combined firm's traditional MVPD services.[2] As the Commission stated last year, its "assessment of broadband providers' incentives and economic ability to threaten Internet openness was not just supported by the record but also

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2 *See* Cogent 14-90 Comments at 7-9 (collecting citations).

grounded in 'common sense and economic reality.'"[3] The Commission's reasoning not only applies to, but is illustrated by, the proposed merger.

A. The Merger Augments AT&T's Incentives to Disadvantage Online Competitors

AT&T is on the verge of acquiring a massive stake—at a massive cost—in the MVPD business. If the transaction is approved, AT&T will spend upwards of $48.5 billion to acquire DIRECTV's direct broadcast satellite (DBS) business. It defies logic—not to mention Commission precedent[4] and DIRECTV's own past statements[5]—to claim, as the Applicants do, that AT&T will have no reason to leverage its broadband Internet business to protect that multi-billion dollar investment.[6]

As the Commission has explained in an analogous context, ISPs that also function as MVPDs have an incentive to use their Internet distribution business to protect their MVPD business by foreclosing competition from edge providers.[7] That conclusion was apt at the time it

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3 *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, ¶ 43 (May 15, 2014) (quoting *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. Jan. 14, 2014)) ("NPRM").

4 *See, e.g., In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17916 at ¶ 22 (2010) (the "*Open Internet* Order") ("Today, broadband providers have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephony and/or pay-television services.").

5 *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Comments of DIRECTV, at 28-33 (June 21, 2010) (explaining that a combined ISP/MVPD could unfairly favor its own MVPD business and disadvantage its MVPD rivals).

6 *See, e.g., In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer control of Licenses and Authorizations*, MB Docket No. 14-90, Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, at 32 (Oct. 16, 2014) ("AT&T rejects the assertion that it has any incentive to foreclose competition from online video or other edge providers . . . .") ("AT&T/DIRECTV Opp'n"); *id.*, Reply Declaration of Michael L. Katz, ¶¶ 72–73 ("Katz Reply Decl.") (arguing that AT&T lacks incentives to degrade traffic from edge providers that compete with AT&T's MVPD offerings).

7 *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, ¶ 86 (Jan. 18, 2011)

was reached, but it is even more so today, as HBO and CBS have announced plans to join Netflix, Hulu, and others in the provision of online video services that will compete head-to-head with DIRECTV's DBS service.[8] Even AT&T itself has acknowledged in this proceeding that "for an expanding group of consumers, the use of [over-the-top] services has begun to substitute for purchases of MVPD services, a trend that is widely expected to grow in the future."[9]

Today, AT&T operates an MVPD service, U-Verse, in portions of its service territory. The operation of that service already gives AT&T some incentive to degrade the content of on-line providers. There can be no dispute, however, that AT&T will have precisely the incentives the Commission has expressed concern about if AT&T is allowed to merge with DIRECTV and thus acquire a vastly expanded MVPD footprint.

Notwithstanding its current U-Verse MVPD service, it is conceivable that, absent the transaction, AT&T would choose to embrace the trend in consumer preferences and focus its efforts and capital on delivering the best broadband experience it could to its customers. But with the merger, there is a clear risk that AT&T will degrade Internet traffic to deter consumers from abandoning DIRECTV's services for current and new over-the-top video options. This is a

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("*Comcast-NBCU* Order") ("[W]e find that OVDs pose a potential competitive threat to . . . MVPD service, and that [a combined ISP/MVPD] therefore will have an incentive to take actions to hinder that competition.").

8 *See, e.g.*, Jennifer Saba, *Time Warner to Launch HBO as Streaming Broadband Service*, Reuters (Oct. 15, 2014), http://www.reuters.com/article/2014/10/15/us-time-warner-investors-idUSKCN0I41Q020141015; Dave Smith, *CBS Just Announced a Digital Streaming Service*, Business Insider (Oct. 16, 2014), http://www.businessinsider.com/cbs-just-announced-a-digital-streaming-service-following-in-hbos-footsteps-2014-10; *see also* Marcus Wohlson, *As Online Viewing Soars, Internet TV Will Soon be the Only TV*, Wired (Oct. 20, 2014), http://www.wired.com/2014/10/online-viewing-soars-internet-tv-will-tv/ (describing competition between edge providers and traditional MVPDs).

9 *In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Description of Transaction, Public Interest Showing, and Related Demonstrations, AT&T and DIRECTV, at 22 (June 11, 2014) (citation omitted) ("AT&T/DIRECTV Public Interest Statement").

quintessential merger-specific concern, as it is the DIRECTV merger that would give AT&T a substantially enhanced position in—and, thus, a correspondingly enhanced incentive to protect—its newly-expanded MVPD business from online competitive encroachment.

AT&T responds that there should be no such concern because it would never degrade traffic from edge providers. The crux of the argument is that consumers would leave AT&T's broadband Internet service if it were to degrade edge providers, whose "services clearly are complementary to AT&T's broadband services."[10] That argument is flawed in several respects:

- It misses the point. Edge providers' services are complementary to AT&T's standalone broadband service, but they are *competitive* with DIRECTV's MVPD services which AT&T hopes to acquire. This merger-specific change is what gives AT&T the increased incentive to discriminate.
- It lacks empirical support.[11]
- It rests on the faulty assumption that consumers readily could switch to alternative ISPs were they dissatisfied with the quality of their existing service.[12]
- It assumes, incorrectly, that an effective foreclosure strategy would require AT&T to completely foreclose all OVD competition.[13]

But even if AT&T were correct that it would lose some broadband customers by degrading edge providers' traffic, it ignores the benefits that would accrue to AT&T's to-be-

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[10] Katz Reply Decl. ¶ 72.

[11] Tellingly, AT&T does not offer any evidence of consumers actually leaving an ISP in response to a traffic congestion issue. Instead, it says that AT&T "feared" that it would lose customers when Netflix traffic was degraded, and it offers a self-serving study from Comcast stating that consumers "would" switch ISPs if traffic were degraded. *See* Katz Reply Decl. ¶ 74. The Commission should examine relevant data from AT&T to determine the extent to which its "fears" materialized.

[12] *See infra* notes 26-27 (discussing the lack of alternatives and high costs faced by consumers interested in switching from one ISP to another).

[13] Supplemental Declaration of Joseph Farrell, DPhil, Cogent Commc'ns Grp., Inc., MB Docket No. 14-57 (filed Dec. 23, 2014) ¶¶ 38-39 ("Farrell Supp'l Decl.") ("When the Commission has discussed the possibility that a vertically integrated firm might engage in anticompetitive discrimination, it has made clear that its competitive concerns were not limited to complete foreclosure but also addressed partial foreclosure, including strategies to raise rivals' costs.") (citations omitted). While Dr. Farrell submitted his declarations in the Comcast/TWC proceeding, much of his analysis is equally applicable here.

acquired MVPD service from reducing competition from edge providers.[14] Accordingly, a foreclosure strategy designed to diminish the competitive strength of OVDs very well may offer AT&T more benefits (through retention of MVPD subscribers) than costs (through lost broadband subscribers).[15] Fundamentally, the Applicants do not meet their burden of proving that these benefits from reducing competition to the post-merger MVPD service would be outweighed by the putative costs of degrading service to broadband customers, and there is ample reason to doubt that claim.

In the short period of time since the merger was announced, AT&T's incentives to disfavor particular sources of competitive content have become more pronounced. In addition to the Applicants' existing content interests,[16] AT&T notes that it recently entered into a bundling agreement with Amazon Prime and that it has entered into a joint venture with the Chernin Group to launch its own suite of online video services.[17] These deals give AT&T added incentives to degrade certain Internet traffic, namely, that of edge providers who lack favorable

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14 *See, e.g.*, AT&T/DIRECTV Public Interest Statement at 22 (acknowledging that consumers substitute over-the-top services for MVPD services); *Comcast-NBCU* Order ¶¶ 79–86 (Jan. 20, 2011) (explaining that over-the-top videos compete with MVPD services); NPRM ¶ 126 (stating that "broadband providers sometimes offer an affiliated streaming video service over their broadband network in competition with many other third-party broadband and edge providers' services").

15 Farrell Supp'l Decl. ¶¶ 18-20 (observing that economists have identified "numerous cases where a firm with market power in one market may find it attractive to act in an anticompetitive manner towards producers of competing complementary products," and that the Commission considered and rejected similar arguments concerning complementarity in the 2010 *Open Internet* proceeding) (citations omitted). Moreover, as discussed below, AT&T's arguments concerning complementarity are belied by its own actions during its dispute with Netflix.

16 *See* AT&T/DIRECTV Public Interest Statement at 14 (describing DIRECTV's content interests); Joan E. Solsman and Roger Cheng, *DirecTV Secures NFL Sunday Ticket Deal Vital to AT&T Merger*, CNET, http://www.cnet.com/news/directv-secures-nfl-sunday-ticket-deal-imperative-to-at-t-merger/ (Oct. 1, 2014) (explaining that DIRECTV's affiliation with NFL Sunday Ticket was so valuable to AT&T that the merger might have depended on it).

17 AT&T/DIRECTV Opp'n at 36.

arrangements with AT&T.[18] Such anticompetitive behavior would give AT&T and its partners an unfair advantage over rivals, ultimately to the detriment of consumers who were sold and paid for access to all lawful Internet content.[19] That result would contravene the public interest.

B. The Merger Would Permit AT&T to Act on its Enhanced Incentives to Discriminate Against Edge Providers by Using its Gatekeeper Control Over Its Customers' Broadband Internet Access

AT&T already has the market power necessary to act on the heightened incentives for anticompetitive conduct that the merger would confer. In fact, AT&T has leverage over every player in the process by which Internet traffic flows from edge providers, through the Internet's backbone, and into consumers' homes.

First, AT&T has leverage over edge providers, who rely on AT&T's vast distribution network to reach consumers. Edge providers that do not acquiesce to AT&T's demands risk access to approximately 16 million wireline Internet consumers, a cost that may be too high for most established edge providers and prohibitive for many start-ups.[20] If nascent edge providers

18 *Comcast/NBCU* Order ¶ 93 ("[W]e find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections."); *Open Internet* Order ¶ 23 ("[D]elivery networks that are vertically integrated with content providers, including some MVPDs, have incentives to favor their own affiliated content.").

19 These new and enhanced incentives to degrade certain Internet traffic are coupled with and in addition to incentives that AT&T already has by virtue of its standing as the nation's second biggest ISP. For example, even without its newly acquired MVPD or content interests, AT&T already has an incentive to monetize its last-mile bottleneck control by putting edge providers to an untenable choice: pay a toll or forego quality access to AT&T's millions of broadband Internet subscribers. *Open Internet* Order ¶ 24 ("[B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users.").

20 *See, e.g.*, *infra* note 23 (Netflix executive explaining that lost access to ISPs' subscribers is "a really powerful hit to any business"); Computer and Communications Industry Association, Written Testimony, United States Senate Judiciary Committee Hearing, *Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules* (Sept. 17, 2014), *available at* https://www.ccianet.org/wp-content/uploads/2014/09/SJCOpenInternetstatement.pdf, at 2 (last visited Jan. 6, 2015) ("For the Internet marketplace to thrive, investors in start-ups need confidence that their

cannot launch their services with the confidence that they can reach AT&T's subscribers, then entry may be deterred or, at a minimum, investments will be more difficult to obtain.[21] Complicating matters, American broadband Internet access is becoming something of a terminating access oligopoly in which four firms—AT&T, Comcast, Time Warner Cable, and Verizon—increasingly control the gateway through which edge providers access most consumers.[22] Notably, the most intense disputes between edge providers and ISPs involve these four, each of which has the resources and network capacity to avoid congestion issues that degrade end-users' experiences, but each of which also has the clout necessary to create and benefit from congestion.[23]

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products and services will be easily accessible to all online over the Internet."); *In the Matter of Protecting and Promoting the Open Internet*, MB Docket No. 14-28, Comments of Consumers Union, at 9-10 (July 15, 2014) ("With enormous subscriber bases and control over the pipes, the largest incumbents continue to exercise tremendous leverage over smaller competitors and have the power to dictate how consumers can receive content and what prices they must pay. Because of their roles as gatekeepers to millions of customers, the largest ISPs recognize that smaller content providers depend on them for the viability of their business.").

21 May 8, 2014 *Ex Parte* Submission from various venture capitalists to Chairman Wheeler, GN Docket No. 14-28, at 2 ("May 8, 2014 VC Letter") (letter from a group of over fifty investors cautioning that "investors like us will be wary of investing in anything that access providers might consider part of their future product plans for fear they will use the same technical infrastructure to advantage their own services or use network management as an excuse to disadvantage competitive offerings").

22 *See infra* note 28 (stating that these four firms control 68% of the market); Leichtman Research Group, *About 385,000 Add Broadband in the Second Quarter of 2014* (Aug. 15, 2014), *available at* http://www.leichtmanresearch.com/press/081514release.html (last visited Jan. 6, 2015) (showing that these four firms control over 60% of the nation's broadband subscriptions). *See also In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Petition to Deny of Free Press, at 17 (Sept. 16, 2014) ("The future viability of OTT competition is in doubt . . . . AT&T is one of four ISPs (Comcast, AT&T, Verizon and Time Warner Cable, the top four ISPs by number of subscribers) that purposefully let their broadband customers experience poor performance when accessing OTT services in order to extract terminating access fees.").

23 *See, e.g.*, A Measurement Lab Consortium Technical Report, *ISP Interconnection and its Impact on Consumer Internet Performance*, http://www.measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf (October 28, 2014), at 4 ("M-Lab Report") (finding "sustained performance degradation experienced by customers of Access ISPs **AT&T**, Comcast, Centurylink, Time Warner Cable, and Verizon when their traffic passed over interconnections with transit ISPs [**Cogent**, L3

Second, AT&T has leverage over the Internet backbone's transit providers, like Cogent, a contention that AT&T does not seriously dispute. Rather, AT&T simply notes that edge providers "are free to use any of the large number of backbone service providers to reach AT&T's end-user customers."[24] The problem with AT&T's position is that it makes no difference how many paths, or combinations of paths, lead to AT&T's last-mile network, because every one of them ultimately must interconnect with AT&T. Put differently, there is no way to reach AT&T's consumers without going through AT&T.

Third, AT&T has leverage over consumers, many of whom lack meaningful alternatives for broadband Internet service. AT&T says that it would risk losing broadband customers if it degraded Internet traffic,[25] but this effort at exculpation ignores reality. The reality is that AT&T can degrade Internet traffic and get away with it because consumers either lack or must pay prohibitive switching costs for alternatives.[26]

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and XO]" and that "congestion and under-provisioning were causal factors in the observed degradation symptoms.") (emphasis added); Victor Luckerson, *Netflix's Disputes with Verizon, Comcast Under Investigation*, Time, http://time.com/2871498/fcc-investigates-netflix-verizon-comcast/ (June 13, 2014) (describing congestion-related disputes in which Netflix is engaged with Comcast and Verizon); Cogent 14-90 Comments at 12-13 (noting anticompetitive behavior by Verizon, Comcast, and AT&T); *see also* Corie Wright, Director of Global Public Policy, Netflix, Testimony, FCC Open Internet Roundtable: Policy Approaches, Roundtable 2: Scope of the Open Internet Rules, *available at* http://www.fcc.gov/events/open-internet-roundtable-policy-approaches, at 52:06 (Sept. 16, 2014) (last visited Jan. 6, 2015) ("[F]or a few ISPs, we pay an additional access charge on top of [what we pay for transit] . . . . The vast majority of the networks that we connect with don't charge anything. There are a handful of ISPs in the U.S. who control access to a significant number of subscribers [and] denying your ability to access those end users is a really powerful hit to any business.").

24 AT&T/DIRECTV Opp'n at 40.

25 *Id.*, Katz Reply Decl. at ¶ 72.

26 Prepared Remarks of FCC Chairman Tom Wheeler, "The Facts and Future of Broadband Competition" (September 4, 2014), at 3 ("Wheeler September 4, 2014 Remarks"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf (last visited Jan. 6, 2015); *Open Internet* Order at 17924-25 ¶ 34 (explaining that consumers face significant switching costs when changing broadband providers, including "early termination fees; the inconvenience of ordering, installing, and set-up, and associated deposits or fees; the possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the

The Commission need not just take Cogent's word for it. Numerous other voices from a variety of vantage points echo these concerns. Those voices include the nation's most prominent edge providers,[27] content creators,[28] consumer advocates,[29] and leading scholars.[30] Likewise, the Commission's own past statements[31] and those of its Chairman[32] support the conclusion that

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risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website"); *In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Comments of Netflix, Inc. (Sep. 16, 2014) ("Netflix 14-90 Comments"), at 29 ("Based on the results from the Commission's 2010 *Broadband Decisions* survey, only 11.6 percent of respondents switched ISPs in the prior year excluding those who changed ISPs because they moved.") (citations omitted).

27 *See In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28,, Comments of the Computer and Communications Industry Association, at 3-4 (July 15, 2014) ("This severe limitation in choice of provider is what gives [ISPs] the 'economic ability' to 'limit Internet openness.' With so few competitors, [ISPs] have little to fear when they inhibit or manipulate end users' Internet access service.") (quoting NPRM ¶ 44).

28 *See* Chris Keyser, President, Writers Guild of America, West, Inc., Written Testimony, United States Senate Judiciary Committee Hearing, *The AT&T/DirecTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond,* at 3-4 (June 24, 2014), *available at* http://www.judiciary.senate.gov/imo/media/doc/06-24-14KeyserTestimony.pdf (last visited Jan. 6, 2015) ("[T]he ISP market is also concentrated, with four companies controlling 68% of the Internet access market. In addition, almost one in three Americans has only a single option for Internet service fast enough to stream videos.") (citations omitted).

29 *See In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Consumers Union, at 3 (July 15, 2014) ("The market for last-mile Internet access is already controlled by a handful of powerful companies and the largest ISPs are becoming increasingly vertically integrated with programmers.").

30 *See, e.g.*, Susan Crawford, Network Rules, 70 Law & Contemp. Probs. 51, 61 (2007) ("Broadband access providers in the United States face very little competition. . . . [T]he U.S. market for broadband access is essentially a duopoly, with most Americans having a choice of either a cable modem or DSL connection."); Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 Pepp. L. Rev. 427, 431 (2009) ("And because we live in what is effectively a cable-phone duopoly for broadband services, market competition would not necessarily counteract this censorship.").

31 *See* NPRM ¶ 42 (explaining that "most residential customers have only one or two options for wireline broadband Internet access service, increasing the risk of market power" and that "customers may incur significant costs in switching from one provider to another"); *Open Internet* Order ¶ 32 ("The risk of market power is highest in markets with few competitors, and most residential end users today have only one or two choices for wireline broadband Internet access service.").

32 *See* Wheeler September 4, 2014 Remarks at 4 ("Looking across the broadband landscape, we can only conclude that, while competition has driven broadband deployment, it has not yet done so [in] a way that necessarily provides competitive choices for most Americans."); *id.* ("But even [the availability of]

the market for broadband Internet service is insufficiently competitive to guard against the risks posed by this transaction.

III. AT&T'S RECENT DEGRADATION OF EDGE PROVIDER SERVICE IS PREDICTIVE OF ITS POST-MERGER BEHAVIOR WHEN IT WILL HAVE INCREASED INCENTIVES TO PROTECT ITS MVPD BUSINESS AT THE EXPENSE OF ONLINE RIVALS

AT&T's recent conduct at interconnection points offers strong evidence that the combined firm with greater incentives to protect significant MVPD investments will treat competing content at least, if not more, harshly.[33] Accordingly, that conduct is a critical part of the record that the Commission must assess as part of its public interest analysis. Nothing AT&T has asserted in this proceeding suggests any of its interconnection management practices would change should the Commission grant the transfer applications.[34] As discussed below, none AT&T's arguments concerning traffic ratios, its dealings with Cogent, or the purported costs of augmenting capacity at interconnection points justify AT&T's recent conduct or undercut the predictive value of that conduct in assessing the likely effects of this transaction.

A. Purported Traffic "Imbalances"

In the last several years there has been a dramatic increase in consumer demand for streaming video and other bandwidth-intensive content and latency-sensitive applications (*e.g.*,

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two 'competitors' [in some markets] overstates the case. Counting the number of choices the consumer has on the day before their Internet service is installed does not measure their competitive alternatives the day after. Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees.").

33 *See* Netflix 14-90 Comments at 14 (citations omitted) (emphasis in original) ("As Netflix has previously explained in the context of the Comcast-TWC merger proceeding, what a broadband provider like AT&T '*did do* trumps speculation on what [it] *would do* according to economic theories based on various unsupported assumptions.'").

34 Indeed, as explained in Section II *supra*, there is every reason to believe the conduct would intensify.

VOIP calls).[35] AT&T mischaracterizes much of this content as "Cogent traffic" (or "Netflix traffic"),[36] and argues that the increased volume of such traffic warrants a shift by Cogent and/or Netflix in network routing or to "paid arrangement[s]."[37] That argument rests on a false premise.

Services like streaming video are not "Cogent traffic." This traffic does not *originate* with Cogent or any of Cogent's edge provider customers. To the contrary, every bit of data Cogent carries on its network and delivers to AT&T (for ultimate delivery to consumers) is content *requested and paid for* by AT&T subscribers. The suggestion that transit providers like Cogent, or edge providers like Netflix, are somehow dumping unwanted traffic at AT&T's doorstep, thereby causing traffic imbalances which result in congestion and degradation to end-users, is contrary to the facts.

According to AT&T, its refusal to augment capacity at interconnection points with Cogent is based largely on a purported imbalance in traffic ratios (*i.e.*, AT&T claims it is receiving a greater quantity of data than its subscribers are sending to Cogent).[38] Reliance on traffic ratios, however, is nothing more than a post-hoc justification to disguise the

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35 Fact Sheet: Internet Growth and Investment, Federal Communications Commission, Feb. 19, 2014 ("FCC Fact Sheet"), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-325653A1.pdf (last visited Jan. 6, 2015) (citing evidence that the number of hours Americans spend watching video over the Internet has grown 70% since June 2010 (Nielsen), revenues from online video services grew by 175% between 2010-2012, from $1.86 billion to $5.12 billion (SNL Kagan), and real-time streaming of entertainment in primetime grew from 42.7% of downloads in 2010 to 67% by Sep. 2013 (Sandvine Global Internet PhenomenaReport)); Wheeler September 4, 2014 Remarks, at 2 ("[C]onsumer demand is growing; today over 60% of peak-time downloads are streaming audio and video."); NPRM ¶ 32 ("VoIP usage has similarly continued to increase. The number of global over-the-top mobile VoIP subscribers increased by 550 percent in 2012.") (citation omitted).

36 AT&T/DIRECTV Opp'n at 5, 47.

37 *Id.* at 46.

38 *Id.* at 45-47.

anticompetitive reasons for AT&T's behavior.[39] First, the exchange of data over the Internet has *always* been asymmetrical. ISP customers have always downloaded more data than they upload and the broadband networks are built to reflect that fact. For example, AT&T's proprietary U-Verse service historically allowed AT&T subscribers to receive data at higher speeds than the customer can send data. Second, as noted above, all of the traffic purportedly "out of balance" represents content requested and paid for by AT&T subscribers.[40] AT&T customers already pay to receive data faster than they send it, yet AT&T now demands additional payments from transit or edge providers that carry and hand off such data to AT&T for delivery to its customers over its own asymmetric connections.[41]

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[39] Other market participants and observers agree. *See, e.g., In the Matter of Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Comments of Netflix, Inc., at 15 n.25 (July 15, 2014) ("Netflix July 15, 2014 Comments") ("[T]hese ratios are arbitrarily set and enforced and are not reflective of how ISPs sell broadband connections and how consumers use them"); Rob Powell, *Level 3 Calls Out Verizon Directly on Peering Upgrades*, Telecom Ramblings, http://www.telecomramblings.com/2014/07/level-3-calls-verizon-directly-peering-upgrades/ (July 18, 2014) ("[I]n a world of streaming video and asymmetric consumer broadband connections, using balanced traffic ratios as a basis for peering makes no mathematical sense. Nor does blaming traffic on one side of a two-party exchange of data transaction for which both parties already pay."). In fact, during a debate over traffic ratios at a meeting of the North America Network Operators Group ("NANOG"), the audience was polled and the "vote was about 100 to 3 that the metric was not rational." William Norton, *The Folly of Peering Ratios (as a Peering Candidate Discriminator)*, DrPeering International, http://drpeering.net/white-papers/The-Folly-Of-Peering-Ratios.html. *See also* Robert Kenny, *The attack on settlement-free peering and the risk of 'access power' peering* (June 21, 2013), at 9-18, *available at* http://www.ccianet.org/wp-content/uploads/2013/08/Access-Power-Peering.pdf (last visited Jan. 6, 2015) (explaining why the "net direction of traffic flow" reveals little or nothing about "which party incurs more cost as a result of transporting traffic" or "about who gets greater value out of the exchange").

[40] In a half-hearted attempt to bolster its argument concerning ratios, AT&T generally references a set of old business disputes involving Cogent. *See* AT&T/DIRECTV Opp'n at 45 n.154. To the extent these disputes involved other ISPs, those ISPs not surprisingly advocate the same self-serving and misguided positions as AT&T does here. To the extent those disputes involved Cogent's fellow transit providers, they are stale (having taken place in 2005 and 2008) and, most importantly, irrelevant to the public interest concerns raised by this merger.

[41] AT&T recently announced plans to boost certain subscriber upload speeds to match download speeds. Press Release, "AT&T Confirms Plans to Deliver U-verse with AT&T GigaPower in Miami," AT&T Services, Inc., *available at* http://about.att.com/story/att_confirms_plans_to_deliver_u_verse_with_att_gigapower_in_miami.html

B. Cogent's Dealings with AT&T

Consistent with its treatment of traffic ratios, AT&T obfuscates its recent course of dealings with Cogent. As might be expected, the relatively recent period of increased consumer demand for bandwidth-intensive and latency-sensitive content—content that directly threatens AT&T's (and DIRECTV's) proprietary offerings[42]—has coincided with a rapid deterioration in Cogent's relationship with AT&T. In 2012, Cogent began providing transit services for Netflix. Over the next two years, AT&T refused to sufficiently augment capacity at its interconnection points with Cogent and insisted that it would do so only if Cogent agreed to pay for access to AT&T's subscribers[43]—a departure from the firms' historical settlement-free peering relationship. Cogent refused to acquiesce to AT&T's demands.

As a result, AT&T permitted its interconnections with Cogent to congest, resulting in the degradation of service to AT&T's own subscribers.[44] By way of illustration, the attached

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(last visited Jan. 6, 2015) (announcing further expansion of AT&T GigaPower network "featuring symmetrical upload and download broadband speeds up to 1 gigabit per second"). Considering the paucity of applications currently available to take advantage of such increased upload capabilities, this announcement amounts to a largely meaningless gesture, certainly with respect to typical broadband subscribers whose requests to stream movies (*i.e.*, uploads) will continue to require much less bandwidth than the movies they receive in return (*i.e.*, downloads).

42 AT&T/DIRECTV Public Interest Statement at 22 (acknowledging that "for an expanding group of consumers, the use of [over-the-top] services has begun to substitute for purchases of MVPD services, a trend that is widely expected to grow in the future").

43 *See In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer control of Licenses and Authorizations*, MB Docket No. 14-90, Declaration of Scott Mair (Oct. 15, 2014) ¶ 39 ("Mair Decl."). At the same time, AT&T was demanding similar access tolls from Netflix. Netflix 14-90 Comments at 23-25. In early 2013, AT&T finally upgraded capacity at some of its interconnection points with Cogent. While AT&T notes it did so at "substantial expense," *see* AT&T/DIRECTV Opp'n at 47, it provides no information on the relevant expenditures. *See* M-Lab Report at 3 (explaining that the process of interconnecting two networks at an IXP is "rarely expensive or tricky"). In any event, the upgrades were not nearly enough to address the volume of bandwidth-intensive content being requested by AT&T subscribers and, by the summer of 2013, Cogent's links with AT&T were congested again. *See* Figures 1 and 2 attached hereto.

44 It is also worth noting that, during this same time period, Cogent did not experience similar congestion issues with other broadband ISPs—in particular, Charter and Cox—that maintained sufficient

Figures 1 and 2 show the extent to which Cogent's interconnection points with AT&T surpassed 70% utilization (the point at which ISPs have historically upgraded their interconnections with other networks) and 90% utilization (the point at which packet loss at interconnection points intensifies).[45]

In March 2014, in an effort to improve connectivity, Cogent offered to pay AT&T for the capital costs to upgrade its interconnections with Cogent.[46] AT&T did not accept Cogent's

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interconnection capacity with Cogent even though they "experienced percentage increases in traffic from Cogent that were similar to the large consumer ISPs." Declaration of Joseph Farrell, DPhil, Cogent Commc'ns Grp., Inc., MB Docket No. 14-57 (filed Aug. 25, 2014) ¶ 137. *See also* M-Lab Report at 13-14 (explaining that, at the same time there was congestion at Cogent's interconnection points with AT&T, CenturyLink, Comcast, Time Warner Cable, and Verizon at measurement points in Dallas and Los Angeles, "customers of Access ISP Cox did not experience a significant pattern or degree of degraded download throughput when connecting across Cogent sites").

[45] *See* Declaration of Henry (Hank) Kilmer, Vice President, IP Engineering, Cogent Commc'ns Grp. Inc., MB Docket No. 14-57 (filed Aug. 25, 2014) ¶ 16 ("Kilmer Decl."). The downward spike in both charts corresponds to AT&T's decision to temporarily augment the capacity of its interconnections with Cogent. *See* AT&T/DIRECTTV Opp'n at 47. Several points concerning this episode—which only provided a temporary reprieve of congestion—and surrounding discussions between Cogent and AT&T bear noting: {{[redacted]}} In sum, these points illustrate the degree to which AT&T is willing (and able) to use interconnection practices with transit providers—which it tries to downplay as mere business disputes—as a means to inflict harm on edge providers that pose a competitive threat to its business. Moreover, by opting for a tactic that raises its rivals' costs, AT&T has demonstrated its willingness to sacrifice its own customers' interests to achieve its goals.

[46] *See* Press Release, "Cogent Offers to Pay Capital Costs Incurred by Major Telephone and Cable Companies Necessary to Ensure Adequate Capacity," Cogent Commnc'ns Grp. (March 21, 2014), *available at* 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 (last visited Jan. 6, 2015).

offer. Instead, in July 2014, Netflix acquiesced to AT&T's demand that it enter into a direct paid connection agreement. As a result of Netflix's decision to pay a terminating access fee, Cogent is currently experiencing a modest decrease in congestion at its interconnection points with AT&T. More importantly, the AT&T-Netflix agreement highlights the manner in which a combined AT&T/DIRECTV can be expected to use a technical problem of its own making—congestion at interconnection points—as a lever to force edge and/or transit providers to pay for access to the merged firm's broadband subscribers. And most troubling, if AT&T succeeds in acquiring DIRECTV, its incentives to perpetuate this sort of strategy will intensify as DIRECTV-generated MVPD revenues become an important contributor to AT&T's bottom line.

AT&T also emphasizes that it has never blocked "particular types of traffic at Cogent's links" and that its contract with Cogent {{[redacted]}}.[47] However, this is a red herring—Cogent does not claim AT&T is blocking specific types of content—and confuses disparate treatment with disparate impact. It is indisputable that congestion affects bandwidth-intensive content (*e.g.*, streaming video) more than other types of content (*e.g.*, email), and that the content most susceptible to congestion competes directly with AT&T's and DIRECTV's own proprietary content. As a result, AT&T's congestion strategy harms some AT&T subscribers (*e.g.*, Netflix customers) and Cogent customers (*e.g.*, Netflix) more than others. However, because all traffic exchanged between Cogent and AT&T must pass through common interconnection points, the impact of this conduct is necessarily broader than its targets. For example, people trying to telecommute from home with AT&T as their ISP might face difficulties in connecting to their employer's servers, because their employer is a Cogent Internet

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47 AT&T Opp'n at 48 n.169.

access customer.[48] This is but one example of how AT&T's peering squeeze works to hurt more than just Netflix viewers.

C. Costs to Augment Capacity at Interconnection Points

In its comments, Cogent explained how the unreasonableness of AT&T's conduct was underscored by the relatively minimal costs associated with upgrading the interconnection capacity between the two networks. AT&T takes issue with this argument.

According to Hank Kilmer, Cogent's Vice President of IP Engineering, the capital cost of upgrading interconnection capacity is minimal (*i.e.*, $10,000 for each 10 Gbps port, plus a nominal monthly fee for the "cross-connect" that links two networks together).[49] This estimate is consistent with independent assessments provided by the M-Lab consortium, as well as other edge and transit providers.[50] In stark contrast, Scott Mair, AT&T's Senior Vice President of Technology Planning and Engineering, estimates that the cost of establishing *each* new 10 Gbps connection is "about {{[redacted]}} Cogent's estimate" (*i.e.*, approximately {{[redacted]}}.[51]

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48 *See* Susan Crawford, *Jammed: The Cliff and the Slope*, Medium, https://medium.com/backchannel/jammed-e474fc4925e4 (October 30, 2014) (explaining how attempts by residential ISPs like AT&T to charge Netflix for access to their subscribers can also "recklessly affect Internet connectivity" for small- and medium-sized businesses).

49 Kilmer Decl. ¶ 19.

50 *See, e.g.*, M-Lab Report at 3 (explaining that the process of interconnecting two networks at an IXP is "rarely expensive or tricky"); Declaration of Ken Florance, Vice President of Content Delivery, Netflix, Inc., MB Docket No. 14-57 (filed Aug. 25, 2014) ¶ 46 ("Florance Decl.") (explaining that "adding port capacity costs less than $10,000—a cost which is typically amortized over three to five years by [last-mile ISPs]."); Mark Taylor, *Verizon's Accidental Mea Culpa*, Beyond Bandwidth: Level 3 Communications Blog, http://blog.level3.com/global-connectivity/verizons-accidental-mea-culpa/ (July 17, 2014) (estimating that a single 10 Gbps port card costs "just a few thousand dollars").

51 AT&T Opp'n at 48 (citing Mair Decl. ¶ 42). Notably, Cogent is not aware of any estimates provided in the 14-28, 14-90 or 14-57 proceedings that contradict those provided by Cogent, Level 3 and Netflix, or support those provided by AT&T.

According to AT&T, the estimates provided by Cogent do not account for the cost it "requires AT&T to augment its fiber facilities and router capacity."[52] Cogent agrees.[53] However, as Mr. Kilmer explains, such additional costs are "relevant to the capacity of the network, which is a function of the capacity promised to the operator's customers."[54] For example, as the volume of Internet traffic carried by Cogent's network has increased 716% over the past five years—from approximately 2,226,229 TBytes to 18,155,339 TBytes per year—"Cogent has accommodated that increase with capital expenditures averaging $48 million per year."[55]

Given that AT&T promises, and its subscribers pay for, access to all lawful Internet content, AT&T also should be expected to upgrade its network infrastructure to deliver on that promise. Indeed, in recent years AT&T has touted its own significant network upgrade expenditures, including almost $6 billion "for expanding and upgrading the speeds of its U-Verse wireline network."[56] In light of these expenditures, it seems implausible that it would cost AT&T an *additional* {{[redacted]}} each time it establishes a new 10 Gbps connection. If true,

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52 *Id.*

53 Kilmer ¶ 19 (noting that "the cost for adding capacity to exchange traffic. . . . does not reflect any of the capital or operational costs of the operator's networks").

54 *Id.* (adding that "The network capacity is sized based on the data rates promised to customers, whether the data comes from peers or from within the network.").

55 *Id.* ¶ 8. These capital outlays also refute AT&T's suggestion that Cogent is "improperly attempting to obtain backbone services and investments from AT&T for free." AT&T Opp'n at 47.

56 *See, e.g.*, Press Release, AT&T, "AT&T to Invest $14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services" (Nov. 7, 2012), http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode= . *See also* FCC Fact Sheet (citing evidence that broadband capital expenditures rose from $64 billion in 2009 to $68 billion in 2012 (U.S Telecom) and that the telecommunications/cable industry invested $50.5 billion in 2013 (The Progressive Policy Institute)).

however, that is a cost that AT&T should bear to provide the connectivity it has marketed and sold to its customers.

IV. THE COMMISSION SHOULD ADOPT COGENT'S CONDITIONS AND NOT RELY UPON AT&T'S INEFFECTIVE COMMITMENTS

AT&T's voluntary commitments would do nothing to resolve, or even mitigate, the competitive harms attributable to this transaction. However, the Commission can address the public interest concerns relating to the delivery and functionality of Internet content by adopting and enforcing the conditions Cogent proposes.[57]

In particular, AT&T's pledge to abide by the now-vacated *Open Internet* Order for three years following the closing of the merger is an empty gesture that will do nothing to curtail AT&T's ability to throttle unaffiliated OVD content at interconnection points. Indeed, by explicitly excluding interconnection practices from its reach,[58] the *Open Internet* Order effectively grants terminating access networks like AT&T a safe harbor for such conduct.[59] Moreover, AT&T's commitment to continue offering standalone wireline broadband service "at reasonable market-based prices" for three years after the closing of the merger will not adequately protect edge providers or, ultimately, consumers from the anticompetitive incentives the merged firm will gain to discriminate against unaffiliated content, particularly as a combined AT&T/DIRECTV faces increased competition from streaming broadband services offered by

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57 Cogent 14-90 Comments at 18-22.

58 *Open Internet* Order at ¶ 67 n.209 (2010) ("We do not intend our rules to affect existing arrangements for network interconnection, including existing paid peering arrangements.").

59 Nor is there anything in the proposed new *Open Internet* rule that would prevent ISPs from simply treating the proposed rules "as permission to allow Internet performance to deteriorate" at interconnection points. *See* Letter from Joseph C. Cavender, Vice President, Level 3 Commc'ns, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 09-191 (Apr. 24, 2014), at 2; Netflix July 15, 2014 Comments at 11-12 ("Putting in last-mile protections while leaving interconnection exposed to abuse . . . will create a perverse incentive for the ISP to leave interconnection points congested . . . .").

broadcast and cable networks like CBS and HBO.[60] As a result, Cogent's proposed conditions are necessary to address the potential for such otherwise unregulated interconnection abuse. AT&T's responses to those proposed conditions are unavailing.[61]

First, Cogent proposes that the merged entity be subject to the enhanced transparency requirements set forth in Cogent's comments in the *Open Internet* proceeding.[62] Although such requirements are not a substitute for requiring AT&T to alleviate congestion at interconnection points, requiring AT&T to disclose its interconnection management practices will at least allow for the prompt detection of behavior that is discriminatory or inconsistent with the public interest. While AT&T ignores this proposal in its Opposition, it argues in its *Open Internet* comments that requiring additional disclosures concerning the "source, location, timing, speed, packet loss and duration of network congestion"[63] would be "impossible for ISPs to comply with given the broad array of external conditions that might affect broadband speed for an end-user."[64] This argument is a strawman. Cogent is not suggesting that AT&T disclose more than it

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60 *See supra* note 8. *See also* Emily Steel, *Dish Network Unveils Sling TV, a Streaming Service to Rival Cable (and It Has ESPN)*, New York Times, http://www.nytimes.com/2015/01/06/business/media/dish-network-announces-web-based-pay-tv-offering.html (Jan. 5, 2015) (describing plans by Dish Network to provide "live and on-demand television delivered via the Internet connection to television sets, computers and mobile devices").

61 While neither Cogent's proposed conditions nor AT&T's voluntary commitments can alter the increased incentives the post-merger entity will have to discriminate against, and impose costs on, competitive online content providers, the Cogent conditions will at least materially reduce AT&T/DIRECTV's *ability to act on those incentives*.

62 Comments of Cogent Commc'ns Grp., GN Docket No. 14-28 (filed Mar. 21, 2014), at 10-23; Comments of Cogent Commc'ns Grp, GN Docket Nos. 14-28 and 10-127 (filed July 15, 2014), at 23-25; Comments of Cogent Commc'ns Grp, GN Docket Nos. 14-28 and 10-127 (filed September 15, 2014) at 24-31.

63 NPRM at ¶ 83.

64 *In the Matter of Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Comments of AT&T Services, Inc. (July 15, 2014) at 87-88. *See also In the Matter of Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Reply Comments of AT&T Services,

knows. Instead, all that is sought is transparent and prompt disclosure of information known to AT&T about what may be contributing to congestion at its interconnection points with transit or edge providers.[65]

Second, the Commission should require that, if any interconnection point between the combined AT&T/DIRECTV and another network with whom it interconnects reaches 70% capacity, then AT&T/DIRECTV must promptly undertake to upgrade the ports and cross-connects (on terms and conditions equivalent to then-existing agreements with such networks) to augment capacity and thereby avoid the congestion and resulting packet loss that will occur if the interconnection capacity extends much beyond that point.

As even experts representing last-mile ISPs agree, interconnections are susceptible to packet loss when they reach approximately 70% capacity.[66] While AT&T does not dispute that it is standard industry practice for last mile ISPs to upgrade interconnections when utilization reaches that level,[67] it nevertheless suggests that adopting a 70% trigger would effectively

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Inc., GN Docket Nos. 14-28 and 10-127 (September 15, 2014) at 106-110 ("AT&T 14-28 Reply Comments").

65 While the Internet community, along with the Commission and the public, would benefit from a more robust transparency regime across the board, the need for such transparency is particularly acute for a single firm like AT&T that is seeking to merge control over the access of tens of millions of Americans to the Internet with a vast MVPD business. Put differently, the public interest demands clear and contemporaneous visibility into various facets of how the merged firm would operate and manage its broadband Internet business.

66 *In the Matter of Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations,* MB Docket No. 14-57, Opposition to Petitions to Deny and Response to Comments of Comcast Corporation and Time Warner Cable Inc., Declaration of Constantine Dovrolis, Ph.D., Professor at the School of Computer Science of the Georgia Institute of Technology (filed September 23, 2014), Section 3.2 ("Typically, if the utilization of a link during peak-usage time periods is more than 70%, the link can experience congestion episodes in which traffic is delayed or even dropped.").

67 Florance Decl. ¶ 46 (explaining that, historically, "a regular practice" of last-mile ISPs was to augment their interconnections when transit or edge provider ports running into their networks "started to regularly go above 70% capacity utilization."); Kilmer Decl. ¶ 20 ("When a connection [between two

require it to provide "free upgrades" to Cogent, upgrades for which Cogent would not qualify were it in violation of AT&T's peering "policy."[68] As noted above, Cogent has invested an average of $48 million per year over the past five years in network infrastructure upgrades which, among other things, allows more efficient delivery of traffic for its customers, including edge providers that sell streaming video and other bandwidth-intensive content or latency-sensitive applications. Cogent does not need or want free upgrades. However, once it ensures there is adequate capacity on its own network to provide AT&T subscribers with the product that AT&T has already sold them and for which they have already paid (*i.e.*, access to all lawful Internet content), Cogent should not then have to subsidize corresponding upgrades on AT&T's side of the interconnection. In fact, were AT&T to successfully impose such a toll on Cogent, the inevitable (and, perhaps, intended) effect would be to raise the costs of AT&T's OTT rivals.[69]

Third, the Commission should require the combined AT&T/DIRECTV to, for a period of seven years following consummation of the merger, maintain settlement-free peering relationships with any network with whom either of the applicants had such a relationship as of May 18, 2014, the date Applicants announced the proposed transaction. Again, AT&T suggests that this condition represents an attempt by Cogent to obtain non-transaction-related subsidies regardless of changes in traffic balances, the terms of such agreements, or the existence of

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interconnecting networks] reaches about 70% of that connection's capacity, the two networks generally add additional capacity (i.e., additional ports and cross-connects).").

68 AT&T/DIRECTV Opp'n at 48-49 (citing Mair Decl. ¶¶ 44-49).

69 *See* Farrell Supp'l Decl. ¶¶ 40-41 ("It is well accepted by economists that where a firm with market power over an essential input (in this case, broadband Internet access) competes in an upstream or downstream market (such as the provision of video content), it may have an incentive to raise the price of the essential input to its competitors so as to cause them to raise their prices or restrict their output.").

alternative backbone providers.[70] That argument is incorrect. This proposal does not involve any subsidization. Each network, as has been the case historically, should invest in network facilities that are capable of delivering the service that they sell to their own customers. The capacity required to meet that obligation is a function of a network's own customers' demands, not the traffic delivered by peering partners.

Moreover, as Cogent has explained, this condition would ensure that edge providers can continue to choose among competitive backbone networks to provide a cost-efficient and reliable means to reach the merged firm's broadband customers, instead of being compelled to enter into paid direct interconnection agreements to obtain access to them. This is particularly important to serve as a check on the augmented incentives that the merged firm will have to strategically demand onerous interconnection terms from edge providers who are perceived to be a competitive threat.

Here too, Cogent is not alone in recognizing the importance of maintaining open lanes to reach millions of consumers. Various market participants—led by prominent technology firms and the venture firms who invest in nascent edge providers—have made clear that a paradigm where companies who already pay for transit to last-mile ISP networks like AT&T would also now be expected to pay for *access* to the same networks is untenable. For example, in a May 7, 2014 letter to the Commission, more than 100 technology firms—including Facebook, Google, Amazon, Microsoft, Ebay, Tumblr and Reddit—asserted that the ability of large broadband providers like AT&T "to discriminate both technically and financially against Internet

[70] AT&T/DIRECTV Opp'n at 48.

companies and to impose new tolls on them" would represent "a grave threat to the Internet."[71] These concerns have also been echoed by venture capital firms who argue that forcing edge providers to pay for better access to consumers will compromise, if not entirely discourage, investment in such companies.[72]

Fourth, the Commission should prohibit the combined AT&T/DIRECTV from engaging in unreasonable network management practices with respect to interconnection. The purpose of this condition is to prohibit AT&T from doing indirectly (*i.e.*, degrading OVD content at interconnection points just outside its last-mile network), that which it has committed to refrain from doing within the confines of its network by virtue of its pledge to adhere to the 2010 *Open Internet* Order.[73] While AT&T does not directly respond to this condition in its opposition, it has asserted in the *Open Internet* proceeding that concerns relating to the regulation of

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[71] May 7, 2014 *Ex Parte* Submission/Letter from various technology firms to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O'Rielly, GN Docket No. 14-28, at 1.

[72] May 8, 2014 VC Letter at 1 (letter from a group of over fifty investors cautioning that, "If established companies are able to pay for better access speeds or lower latency, the Internet will no longer be a level playing field."); *see also* Brian Fung, *Now dozens of high-profile VCs are protesting the FCC's net neutrality rules, too*, Washington Post, http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/08/now-dozens-of-high-profile-vcs-are-protesting-the-fccs-net-neutrality-rules-too/ (May 8, 2014) (quoting Nick Grossman of Union Square Ventures as stating, "Watching countless music startups fail under the cost of negotiating up-front deals with labels, watching payments and IP telephony startups die at the behest of app stores and carriers, it's clear that this risk is real.").

[73] *See, e.g.*, Netflix July 15, 2014 Comments at 2-3 ("As important as they are, last-mile protections are insufficient if ISPs can move discriminatory conduct to interconnection points with content providers."); Comments of COMPTEL, GN Docket No. 14-28 (filed July 15, 2014), at 2-3 ("[A]n excessively narrow focus on only the last-mile portion of the Internet traffic path will fail to adequately constrain the potential for anticompetitive behavior on the part of ISPs that serve as gatekeepers to the transit providers and content delivery networks ('CDNs') seeking to deliver Internet traffic to ISPs' end users."); Comments of Floor64/Techdirt.com, GN Docket Nos. 14-28 and 10-127 (filed July 15, 2014), at 2 (urging the Commission "to recognize that the current debate over interconnection is not a different issue, but the other side of the same coin. It is how the large broadband access providers have tried to move the debate upstream, to use their market power to get internet companies to double-pay for the same traffic they already sold to their end users, creating the equivalent fast and slow lanes, even if not at the last mile").

interconnection "fail[] to identify any actual problem that needs to be remedied."[74] Indeed, AT&T expressly adopts Comcast's position that "traffic-exchange arrangements have nothing to do with the ability of end users to access particular applications or services, and nothing to do with the priority with which content might be delivered to end users over a broadband Internet access service."[75] That is false. There is substantial evidence in this docket that AT&T, by choosing to allow its interconnection facilities to become congested, has the ability to use "traffic-exchange arrangements" to adversely affect "the ability of end users to access particular applications or services." Moreover, as discussed above, its incentives to engage in such conduct will be magnified should it acquire DIRECTV. It is thus critically important to the public interest that if the transaction is consummated then AT&T cannot use its network management practices to facilitate the congestion of interconnection points with other networks.

V. CONCLUSION

The pending combination of AT&T and DIRECTV has not garnered as much public attention as the Comcast/Time Warner Cable transaction. No doubt cognizant of this disparity, the Applicants appear to hope that their transaction can quietly pass regulatory muster with relative ease. The Commission, though, would be neglecting its statutory obligation and do American consumers a disservice if this merger were to be approved on the theory that "they're not as bad as Comcast." The proposed AT&T/DIRECTV transaction raises its own serious competitive concerns, most prominently with respect to the future of broadband Internet access for millions of American consumers and innovative edge providers. As a result, the transaction

[74] AT&T 14-28 Reply Comments at 91.

[75] *Id.* at 92-93 (citation omitted).

cannot be reconciled with the public interest unless the Commission imposes the conditions Cogent proposes or their functional equivalent.

Dated: January 7, 2015 Respectfully submitted,

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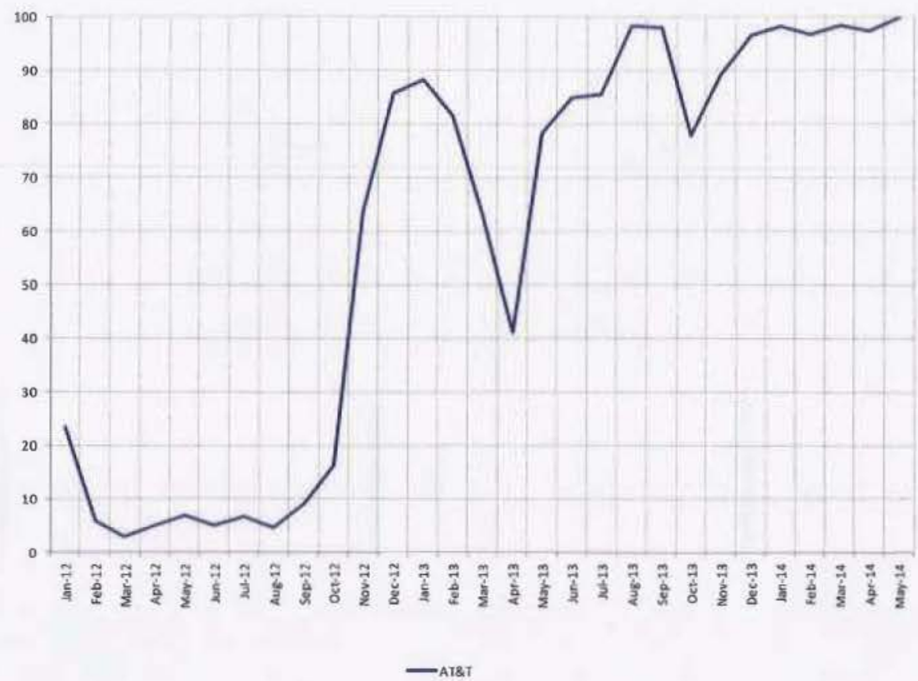
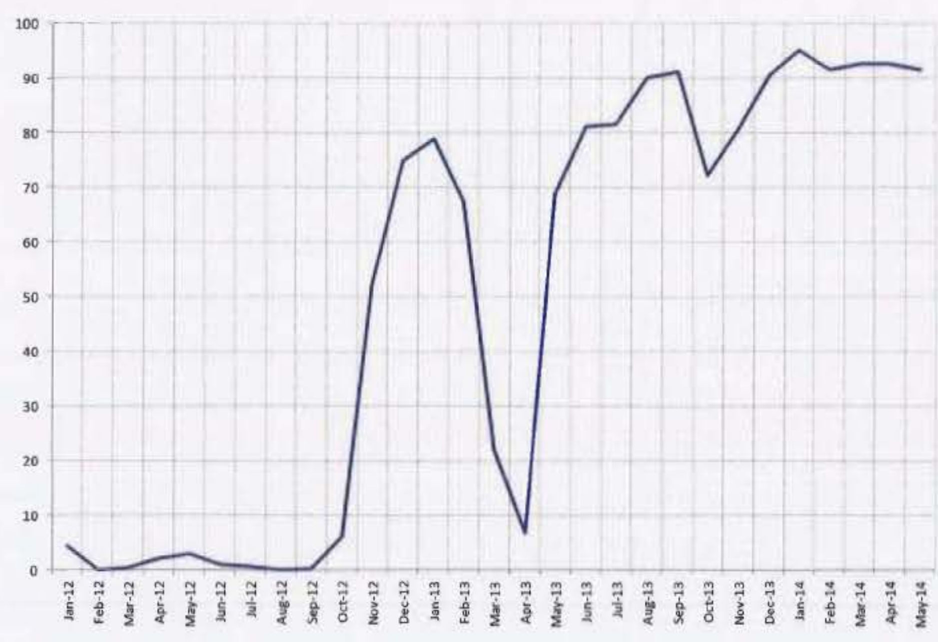
Figure 1. Percentage of the prime time period when Cogent interconnection ports with AT&T are used at more than 70% port capacity



Source: Cogent Data

Figure 2. Percentage of the prime time period when Cogent interconnection ports with AT&T are used at more than 90% port capacity



Source: Cogent Data