

March 24, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Applications of Comcast Corp., 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

Dear Ms. Dortch:

On March 20, 2015, Dave Schaeffer, Cogent Communications Group, Inc.'s ("Cogent") founder and CEO, Robert Beury, Cogent's Chief Legal Officer, and Robert Cooper of Boies, Schiller & Flexner LLP, outside counsel to Cogent, met with various Commission staff to discuss issues pertinent to Comcast Corporation's ("Comcast") proposed acquisition of Time Warner Cable, Inc. ("TWC"). A list of the Commission staff with whom we met is attached as Exhibit A.

During the meeting, Mr. Schaeffer emphasized the competitive and public interest harms posed by the pending transaction. Consistent with Cogent's and others' submissions in this docket, he explained that Comcast's and TWC's market power (pre- and post-merger) is derivative of the number of broadband consumers each controls.

For example, although neither Comcast nor TWC operate global networks that qualify to exchange Internet traffic with Cogent on a settlement-free basis, both have nonetheless obtained settlement-free peering from Cogent. Prior to doing so, Comcast was a paying transit customer of Cogent's; TWC was not. Cogent reluctantly agreed to exchange traffic with each on a settlement-free basis, because the size of each company's customer base gave them sufficient leverage to compel Cogent to depart from its customary peering criteria.

Were the transaction to be consummated—and control over tens of millions of broadband consumers aggregated in one firm—Mr. Schaeffer explained that this enhanced market power would allow the merged entity to demand access fees from other Internet networks, edge providers or both. The reason is because neither transit providers nor most edge providers can run the risk of losing access to the combined firm's base of customers. This is not just a function of size (*i.e.*, the sheer number of Comcast/TWC broadband customers with limited switching options), but also derivative of the importance of the major coastal markets that the merging

parties aim to bring together. In other words, the merger would increase market power on both quantitative and qualitative dimensions.

Mr. Schaeffer also underscored how changes in the industry in recent years exacerbate the concerns Cogent and others have identified. As has been well documented, after Cogent began carrying Netflix traffic, Cogent's interconnection points with Comcast (and other major ISPs) began to experience increased and sustained congestion. That congestion—which is evident in data from neutral observers, such as M-Lab, as well as Cogent's own data—led to degraded customer service for customers on both sides of the interconnections. Perhaps most concerning, it could have been remedied at a relatively minimal capital cost, one that Cogent even offered to pay. Cogent even was willing to shift the locations at which it interconnects with Comcast, carrying Internet traffic as far as Comcast wished, in order to address Comcast's purported concerns about traffic increases attributable to its customers' use of Netflix. Comcast was not interested.

Instead, Comcast wanted Cogent to pay a fee for Comcast to accept the delivery of traffic that its own customers requested and paid for. It based its demand on the fact that the ratio of traffic delivered from Cogent to Comcast exceeded that which travelled in the opposite direction. Cogent refused to pay an access fee. Ultimately, though, once Netflix agreed to pay Comcast for a direct connection, the problem abated somewhat.

As Mr. Schaeffer explained, what is interesting and particularly disconcerting about this episode is how Comcast's views have evolved over time. A number of years ago, when Cogent was providing transit services to Megaupload, the traffic ratios between Cogent and Comcast were even greater than during the peak of the Netflix episode. At that point, Comcast did not let its customers suffer, did not demand compensation from Cogent, and did not try to wield congestion as a weapon. Instead, it routinely upgraded interconnection facilities consistent with industry practice. The difference between then and now is clear—Netflix, unlike Megaupload, poses a direct threat to Comcast's (and TWC's) legacy video and bundled services.

These changed motives—as expressed through changed behavior—present a grave competitive threat with profound public interest implications. The transaction coincides with consumers' ever-increasing appetite for existing and emerging online services, services that directly compete with those offered by Comcast/TWC. Having already successfully imposed an access toll on one of the most established OTT providers, a merged entity will be able to use that blueprint to target any edge or transit provider it chooses, almost all of whom will have to succumb to its demands.

Cogent has already witnessed and been harmed by the impact of deliberate congestion-creating strategies. Although Cogent is the most cost-effective transit option for bandwidth-intensive edge providers, a number of actual and prospective customers have told Cogent that

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they have to restrict their business with Cogent to the delivery of traffic (or announcement of routes) to only smaller ISPs where they are assured there will be no congestion. For larger ISPs like Comcast and TWC, such customers need to find alternate means to reach their customers, just like Netflix did. This dynamic, if left unchecked, will disrupt what has been a robustly competitive transit market characterized by declining prices, as Cogent and others are forced to turn away business that they have the capacity to serve but for congested interconnection ports. It may also force companies like Cogent to begin charging its customers differentiated rates depending on destination—a development that would lead to increased costs for edge providers and, ultimately, consumers.

Mr. Schaeffer also was asked whether the new *Open Internet Order* addresses the concerns Cogent has raised in this proceeding. He indicated that it does not, while reiterating Cogent's strong support for the Order. First, although Cogent believes the new Order rests on a solid legal foundation, one does not know whether a court will see otherwise, or whether Congress or a future Commission will change course in some way. Second, even if the Order remains as is, it is premature to know how various provisions—especially those relating to interconnection—will be interpreted and enforced as part of the case-by-case adjudication process. For that reason, even a commitment by the merging parties to adhere to the Order regardless of subsequent judicial or legislative action is not sufficient. Third, Cogent fears that a post-merger Comcast/TWC would find or create loopholes that would undermine the efficacy of any professed adherence to the new Order.

In the final analysis, Mr. Schaeffer explained, there is a good case to be made that Comcast and TWC already exercise sufficient market power on their own to raise serious competitive concerns. If they are permitted to merge, however, there is no question that they will exercise substantial market power over edge providers, transit providers and, of course, their consumers (many of whom have no viable alternative). That combination poses a threat to the Internet and the open architecture which has permitted the virtuous cycle of innovation and growth to flourish. Put differently, in this case the sum of the parts is much worse than the whole. A combined Comcast/TWC would have enough captive broadband customers to effectively recreate an old AT&T-style terminating access monopoly over the communications network most wanted and needed by Americans today. Ultimately, for that reason, the proposed merger is antithetical to the public interest.

Please direct any questions regarding this correspondence to my attention.

Sincerely,

s/ Robert M Cooper

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Exhibit A

Jim Bird
Hillary Burchuk
Amanda Burkett
Robert Cannon
Adam Copeland
Elizabeth Cuttner
Bill Dever
Jaimie Douglas
William Freedman
Keith Ingram
Scott Jordan
Paul LaFontaine
Jonathan Levy
Alec MacDonell
Betsy McIntyre
Daniel Meyerson
Bakari Middleton
Will Reed
Matt Warner