

April 30, 2015

VIA ECFS

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

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

Dear Ms. Dortch:

I am writing, on behalf of Cogent Communications Group, Inc. (“Cogent”), in response to certain statements made by AT&T Inc. (“AT&T”) and DIRECTV in a written *ex parte* presentation dated April 21, 2015 (the “AT&T/DIRECTV April 21 Ex Parte”).

In the AT&T/DIRECTV April 21 Ex Parte, the Applicants continue their efforts to convince the Commission that, at least insofar as broadband is concerned, there need not be any concern about the public interest implications of the proposed transaction. In so doing, the Applicants make a number of statements that cannot withstand scrutiny. Among those are the following:

- The merged entity will “consider[] providing seamless and high-quality access to the full range of OVD services to be a strategic imperative.” (AT&T/DIRECTV April 21 Ex Parte at 1)

While that is a laudable goal, it is contradicted by AT&T’s prior course of dealing with both Cogent and Netflix, Inc. (“Netflix”). *See, e.g.*, Cogent Comments, MB Docket No. 14-90 (filed Sep. 16, 2014), at 12-15; Netflix Comments, MB Docket No. 14-90 (filed Sep. 16, 2014), at 23-25; Cogent Reply Comments, MB Docket No. 14-90 (filed Jan. 7, 2015), at 14-17; Netflix Reply Comments, MB Docket No. 14-90 (filed Jan. 7, 2015), at 3-10. As the events recounted in those filings make clear, the problems that AT&T broadband customers experienced in accessing Netflix content was the product of a deliberate congestion-creating strategy that AT&T employed in an ultimately successful effort to extract payment for the acceptance of Netflix content. It is important to recall that this problem—of AT&T’s own making—was easy and relatively inexpensive to fix at any time AT&T wanted to do so. That it chose not to until it received compensation should be given far more weight in assessing the risks posed by the transaction than promises made in an attempt to secure the consummation of the transaction.

- “AT&T has no significant video programming interests to protect. AT&T is not acquiring significant ‘must have’ video programming interests from DIRECTV.” (AT&T/DIRECTV April 21 Ex Parte at 3)

These statements may be true as far as they go, but they carefully avoid the irrefutable fact that the primary purpose of the proposed transaction is for AT&T to acquire the nation’s second biggest MVPD (and join it with the nation’s second biggest broadband ISP). As such, should the transaction proceed, what AT&T will obtain is a massive video *distribution* business that it will have every incentive to protect from competitive threats. Moreover, as the Applicants themselves acknowledge, “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.” *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 the Transaction, Public Interest Showing, and Related Demonstrations (filed Jun. 11, 2014), at 22. Given that reality, it defies common sense to suggest that a post-merger AT&T will not have a robust incentive to protect its newly acquired video distribution business from existing and emerging OTT substitutes. Whether those substitutes come from MVPD competitors like DISH, from standalone OVDs like Netflix, or from entities like HBO that distribute their content through both traditional MVPD outlets and their own streaming services, is beside the point. What matters is that each of these business models—and others to come—pose an existential threat to incumbent video distribution platforms, the second largest of which AT&T seeks to acquire. Accordingly, the notion that the transaction does not give AT&T *any* incentive to “degrade its customers’ access to OVD content” should be given no credence. *See* AT&T/DIRECTV April 21 Ex Parte at 3.

- “The congestion described by Cogent and Netflix occurred not because of capacity limitations on AT&T’s network, but by business strategies adopted by Cogent and Netflix.” (AT&T/DIRECTV April 21 Ex Parte at 8)

The second clause of the above-quoted sentence—along with the Applicants’ assertions that Cogent and Netflix have “mischaracterize[d]” the circumstances that led to congestion and degradation for AT&T’s own customers (*id.*)—is incorrect and already has been addressed in this docket. *See, e.g.*, Cogent Comments, MB Docket No. 14-90 (filed Sep. 16, 2014), at 12-15; Netflix Comments, MB Docket No. 14-90 (filed Sep. 16, 2014), at 23-25; Cogent Reply Comments, MB Docket No. 14-90 (filed Jan. 7, 2015), at 14-17; Netflix Reply Comments, MB Docket No. 14-90 (filed Jan. 7, 2015), at 3-10. For present purposes, it is the first clause that is of greater interest.

Cogent does not dispute that AT&T’s network had (and has) ample capacity to accept Netflix content that Cogent carried to AT&T in response to requests from AT&T customers who bought and paid for broadband Internet service to access Netflix and other lawful content. That is the essence of the problem. Despite having sufficient capacity—as did Cogent—and despite

Marlene H. Dortch
Federal Communications Commission
April 30, 2015
Page 3 of 3

having sold customers a service that promised the ability to access Netflix or other OVD content of their choosing, AT&T opted to allow its interconnection points with Cogent to become congested. That this occurred only after Cogent began carrying large amounts of Netflix content is noteworthy, as is the fact that the congestion could have been remedied at a modest cost. Why didn't that happen? Only AT&T can answer that question definitively, but it is clear, as AT&T admits, that it had nothing to do with network capacity. Presumably, that is why the problem was rectified promptly once Netflix agreed to pay AT&T a terminating access fee to accept its content.

Moreover, that the Netflix episode occurred at a time when AT&T did not have the millions of additional MVPD customers the proposed transaction would deliver is of particular concern. Once it has those customers, and as OVD options multiply and diversify, AT&T's incentives for engaging in similar behavior will be augmented. Further, those incentives will be paired with its already demonstrated ability to degrade access to online content. After all, it will remain the case that any edge provider or transit provider that wants to reach an AT&T customer must interconnect in some manner with AT&T's network, a connection for which AT&T is the exclusive gatekeeper.

The recent history described in Cogent's and Netflix' submissions in this docket, coupled with the post-merger incentives AT&T will have to degrade or raise the costs of services provided by OTT/OVD rivals, raises a serious question about the public interest implications of the proposed transaction. Fortunately, it is a question the Commission is well-equipped and empowered to answer. To that end, Cogent reiterates that in order for the Commission to find that the proposed transaction is consistent with the public interest, it should impose the conditions set forth in the Cogent Comments. Doing so is the only way to ensure that the dynamic online content options that are increasingly the preference of American consumers are not imperiled by the changed and enhanced incentives the AT&T/DIRECTV transaction portends. As such, the conditions are inherently merger-specific and will further the public interest.

Please direct any questions regarding this correspondence to my attention.

Sincerely,

/s/ Robert M. Cooper