May 26, 2015

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW
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**
WRITTEN *EX PARTE* PRESENTATION
REDACTED—FOR PUBLIC INSPECTION

Dear Ms. Dortch:

In recent submissions, Cogent, DISH, Cox, and other parties (collectively, "Opponents") repeat prior requests for a variety of conditions on the merger of AT&T Inc. ("AT&T") and DIRECTV (collectively, "Applicants").[1] Opponents' proposed conditions, however, are not specific to the facts of this transaction, which does not involve the acquisition of broadband assets, broadband customers, or significant must-have content. Rather, they are designed only to advance unrelated business interests or specific policy agendas of the commenter, and Opponents continue to use this transaction as a vehicle to present their unrelated requests. Because the record demonstrates that the merger is pro-competitive and will serve the public interest, the Commission should reject Opponents' self-serving demands.

Now complete, the record establishes that the combination of AT&T and DIRECTV will deliver clear, substantial, verifiable, and transaction-specific public interest benefits. In addition, to provide even greater assurance that these benefits will be realized, Applicants announced several voluntary commitments at the outset of the Commission's review. These benefits include expanding and enhancing high-speed broadband service to millions of customer locations,

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[1] Letter from Robert M. Cooper, Counsel for Cogent Communications, Inc., et al., to Marlene H. Dortch, Esq., Secretary, FCC (May 12, 2015) ("Cogent et al. May 12 Ex Parte"); Letter from Jason E. Rademacher, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Esq., Secretary, FCC, at 2 (May 22, 2015) ("Cox Ex Parte"); Letter from Barbara Esbin, Counsel for American Cable Association, to Marlene H. Dortch, Esq., Secretary, FCC (May 1, 2015) ("ACA Ex Parte"); Letter from Henry Goldberg & Devendra T. Kumar, Counsel for TiVo Inc., to Marlene H. Dortch, Esq., Secretary, FCC (Mar. 27, 2015) ("TiVo Ex Parte"); Letter from John Bergmayer, Public Knowledge, et al., to Marlene H. Dortch, Esq., Secretary, FCC at 1-2 (May 20, 2015) ("Public Knowledge et al. Ex Parte").

providing standalone wireline broadband service at reasonable market-based prices, offering DIRECTV satellite service at nationwide package prices, and abiding by 2010 Open Internet protections.[2] Applicants encourage the Commission to accept these commitments, which are appropriately tailored to the facts of this acquisition, and approve the transaction promptly.

I.
THERE IS NO LEGAL OR POLICY BASIS TO IMPOSE CONDITIONS ON THE HIGHLY COMPETITIVE INTERCONNECTION MARKETPLACE

Opponents' most recent interconnection proposal[3] suffers from two fatal flaws.

First, Opponents again fail to demonstrate why the particular facts of this transaction require any condition relating to interconnection. As Applicants have stressed in prior submissions, AT&T is not purchasing any broadband assets from DIRECTV. Nor does AT&T own, or is it purchasing, any significant must-have content.[4] As a result, Applicants have shown that the transaction would not increase AT&T's ability or incentive to degrade any customer's broadband experience.[5] Interjecting the prospect of interconnection conditions is, therefore, inapposite to the transaction under review.

Second, the record evidence reveals an even more fundamental concern—the proposed conditions would subvert a functioning, complex, and competitive interconnection marketplace.[6] Today, private commercial negotiations already balance the interests of all participants, and the Commission has rightly declined to supplant those agreements.[7] Rather than allow this

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[2] Description of the Transaction, Public Interest Showing, and Related Demonstrations at 50-51 (filed June 11, 2014) ("Public Interest Statement"); Joint Opposition of AT&T Inc. and DIRECTV to Petitions To Deny and Condition and Reply to Comments at 6-7 (filed Oct. 16, 2014) ("Joint Opposition").

[3] Cogent et al. May 12 Ex Parte at 5-6.

[4] Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., and William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Esq., Secretary, FCC, at 3 (Apr. 21, 2015) ("Apr. 21 OVD Ex Parte"); Joint Opposition at 32-33.

[5] *See, e.g.*, Apr. 21 OVD Ex Parte; Letter from Maureen R. Jeffreys, Counsel for AT&T, Inc., to Marlene H. Dortch, Esq., Secretary, FCC (May 6, 2015).

[6] The Commission has found repeatedly—as recently as this year—that the Internet transit and peering marketplace is competitive and efficient. *See, e.g.*, *Protecting and Promoting the Open Internet*, GN Dkt No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, ¶¶ 203, 205 (rel. Mar. 12, 2015) ("2015 Open Internet Order"); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18,290, 18,354-66 ¶¶ 116-39 (2005).

[7] 2015 Open Internet Order ¶¶ 30-31, 202 (declining to apply Open Internet rules to interconnection); *see, e.g.*, *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17,905, 17,993 ¶ 47 n.150 (2010) (excluding exchange of traffic between networks from scope of Open Internet rules); *id.* at 17,944 ¶ 67 n.209 ("We do not intend our rules to affect existing arrangements for network interconnection, including existing paid peering arrangements.").

marketplace to continue its evolution, Opponents urge the Commission to nullify existing, freely-negotiated agreements that already balance the responsibilities of broadband access and edge providers to ensure a high-quality experience for consumers. The proposed conditions would distort this balance and put a disproportionate share of, if not the entire, burden solely on AT&T. For this reason, the greatest threat to a well-functioning Internet comes not from AT&T's post-merger asset portfolio, but from the conditions that Opponents seek to place on it.

As the Commission has recognized, "Internet exchange agreements have historically been and will continue to be commercially negotiated."[8] Indeed, in this proceeding, the record demonstrates that backbone carriers, ISPs, content delivery networks, and edge providers have bargained for mutually beneficial arrangements for peering, interconnection, managed Internet services,[9] and other transport. In particular, quality of service is now a fundamental driver of agreements that meet the needs of carriers, edge providers, and consumers. New technological capabilities, along with new demands on backbone and edge networks, require flexibility in providing quality of service, interconnection, and added capacity. As the Commission itself rightly concluded, the "constantly evolving" nature of the market for Internet traffic exchange makes it "difficult to predict what new arrangements will arise to serve consumers' and edge providers' needs going forward, as usage patterns, content offerings, and capacity requirements continue to evolve."[10] Accordingly, these circumstances call for privately-negotiated, tailored solutions—precisely what the market is delivering today, as evidenced by recent agreements, such as AT&T's with Level 3,[11] Comcast's with Level 3,[12] and Netflix's deals with AT&T[13] and with other carriers.[14]

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[8] 2015 Open Internet Order ¶ 203.

[9] **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]**

[END AT&T HIGHLY CONFIDENTIAL INFORMATION]

[10] 2015 Open Internet Order ¶ 203.

[11] *See* Press Release, Level 3 and AT&T Enter into Interconnection Agreement (May 11, 2015), http://investors.level3.com/investor-relations/press-releases/press-release-details/2015/Level-3-and-ATT-Enter-Into-Interconnection-Agreement/default.aspx (AT&T's interconnection agreement with Level 3 "will result in improved efficiency of traffic exchange, and the additional capacity and new interconnection locations between the networks will allow customers to continue to experience high-quality performance and network reliability.").

[12] *See* Press Release, Comcast and Level 3 Announce Long-Term Interconnection Agreement (May 21, 2015), http://investors.level3.com/investor-relations/press-releases/press-release-details/2015/Comcast-and-Level-3-Announce-Long-Term-Interconnection-Agreement/default.aspx#sthash.svdTr51k.dpuf ("We believe the agreement will benefit Level 3's and Comcast's customers for years to come . . . . Our companies share the goal of enabling a growing, secure and resilient interconnection environment.") (quoting Level 3's Chief Technology Officer, Jack Waters).

In contrast, Opponents seek to mandate a one-size-fits-all approach to interconnection that would constrain market participants' ability to address each other's needs and priorities flexibly, in the manner that is most suitable and efficient in each case.[15] The Commission should continue to reject this approach. It would be unprecedented and unjustified to force AT&T to provide free backbone services to other backbone carriers and edge providers,[16] as Cogent et al. seek. Nor is there any basis for requiring AT&T to augment network capacity for free and without any limits. Opponents' proposals would shift the costs of their services onto all AT&T subscribers, many of whom do not use Opponents' services, and would harm consumers.

Likewise, the Commission should reject the invitation to veer from its stated preference for commercial agreements in this area to dictate when bandwidth capacity on peering links should be augmented to accommodate traffic growth. Rather, capacity should be added according to protocols that are defined and negotiated in the interconnection agreement, based upon the engineering practices, traffic growth expectations, cost considerations, and other factors important to those parties. In particular, select Opponents' demand that peering connections be augmented to a higher bandwidth when utilization exceeds 70 percent is inconsistent with industry trends. Historically, 70 percent utilization was often set as the "trigger" point for augments, to account for the cycle times needed to add capacity before the link became congested. However, as provisioning processes have become more streamlined, and software has become more sophisticated, it is now commercially reasonable, if not common, to implement augmentation at 85 percent utilization. At that threshold, carriers still have ample time to augment capacity before congestion and performance degradation appear.[17] Recent commercial

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[13] *See* Declaration of Scott Mair, Senior Vice President of Technology Planning and Engineering, AT&T Services, Inc. ¶ 25 (Oct. 15, 2014) ("Mair Decl."). In addition to these recent agreements, AT&T is currently pursuing other similar arrangements to ensure a high-quality experience for customers. *See* Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., and William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Esq., Secretary, FCC, Attachment at 5-6 (May 26, 2015) **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]**

[END AT&T HIGHLY CONFIDENTIAL INFORMATION]

[14] *See, e.g.*, Drew Fitzgerald, *Netflix, Verizon in Access Deal*, Wall St. J., Apr. 29, 2014, at B2; Press Release, Comcast and Netflix Team Up To Provide Customers with Excellent User Experience (Feb. 23, 2014), http://corporate.comcast.com/news-information/news-feed/comcast-and-netflix.

[15] It also appears that Opponents would apply this condition in perpetuity since they specified no expiration date.

[16] *See* Mair Decl. ¶ 6 (explaining that "[i]nterconnection within in the backbone marketplace has always been provided for compensation—either monetary . . . or . . . in-kind").

[17] In addition, the near-real-time provisioning benefits of software defined networking ("SDN") could improve peering and interconnection in the future. SDN describes networks where the decision logic on how traffic (typically, IP packets) is handled becomes programmatic and dynamic—as opposed to manually handled. Thus, instead of relying solely on fixed configuration in network elements and distributed control protocols, the network can use additional techniques to enable near-real-time provisioning and service configuration to satisfy

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agreements such as the one between AT&T and **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION]** recognize this marketplace reality. As technology continues to evolve, new norms will likely be established at even higher levels of utilization.[18]

In short, there is no legal or policy basis for using this proceeding to supplant the functioning marketplace for Internet peering and interconnection with inflexible, prescriptive regulations that will apply only to AT&T. Contrary to Opponents' claims, this merger will not harm the competitive marketplace that is functioning well today. Instead, it is Opponents' unnecessary proposed conditions that would affirmatively harm consumers and the interconnections that undergird the Internet. For these reasons, Opponents' proposals should be rejected.

II.
AT&T HAS NO INCENTIVE TO IMPLEMENT USAGE-BASED PRICING OR SPONSORED DATA POLICIES IN A WAY THAT WOULD HARM OVD COMPETITION

The record does not support Opponents' request that AT&T be barred from exempting any online video service from any usage-based tracking, metering, or billing in its broadband services.[19] Opponents' proposal is not only unnecessary, but it is also inconsistent with the Commission's position on the subject and harmful to consumers, who would otherwise benefit from such offerings.

In its recent Open Internet Order, the Commission declined to impose the sort of "across-the-board" prohibitions sought here by Opponents. Specifically, the Commission observed that "[u]sage allowances may benefit consumers by offering them more choices over a greater range of service options."[20] Similarly, the Commission recognized that new service offerings involving sponsored data "could benefit consumers and competition."[21] The Commission thus "decline[d] to make blanket findings about these practices."[22] Instead, it decided to "look at and

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both customer needs and efficient network management. This network intelligence resides in a software-based SDN control function, which maintains a global view of the network. The benefits of SDN include (i) greater control over an entire network which greatly simplifies network design and operation, (ii) simpler operating control over network elements with pre-programmed decision logic, and (iii) the ability to control and scale network traffic more efficiently and in near-real time.

[18] SDN could allow even higher utilization triggers in the future—as the capacity could be turned on very quickly.

[19] *See* Cogent et al. May 12 Ex Parte at 6.

[20] 2015 Open Internet Order ¶ 153.

[21] *Id.* ¶ 152.

[22] *Id.* ¶ 153; *see also id.* ¶ 152.

assess such practices . . . based on the facts of each individual case."[23] Opponents offer no reason for the Commission to reverse these very recent conclusions and issue a blanket, abstract prohibition that would apply only to AT&T. Doing so would deprive AT&T customers of service offerings tailored to fit their usage and their budget. It would also distort competition by hindering AT&T's efforts to close the gap and compete with cable's higher-speed broadband products.

Consistent with the Commission's reasoning above, the evidence establishes that AT&T has strong incentives to provide its broadband customers with the richest possible entertainment environment, which includes high-quality access to the full range of OVD services that consumers demand.[24] In addition, the record shows that any AT&T usage-based pricing for wireline broadband includes data allowances that accommodate the great majority of customers:[25]

- 150 GB per month for subscribers to DSL service, with an overage fee of only $10 per each 50 GB of data usage above 150 GB in a month.[26]
- 250 GB per month for U-verse high-speed Internet access data plans up to 75 Mbps, with higher allowances for Gigapower service plans.[27]

Other broadband providers offer similar allowances:

- Comcast is implementing trial usage policies in twelve markets, generally offering 300 GB per month for every service tier, with additional 50 GB increments for $10 each.[28]

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[23] *Id.* ¶ 152; *see also id.* ¶ 153.

[24] *See*, *e.g.*, Apr. 21 OVD Ex Parte at 4-8; Joint Opposition at 34-39; Reply Declaration of Michael L. Katz ¶¶ 72-78 (Oct. 15, 2014) ("Katz Reply Decl."); Public Interest Statement at 22-23.

[25] *See* Response of AT&T Inc. to Information and Discovery Requests Dated September 9, 2014 (filed Oct. 7, 2014) ("AT&T Information Request Response") at Exhibits 58.f.1-58.f.6 (analyzing usage patterns of AT&T wireline broadband customers). Likewise, AT&T currently expects the fixed WLL product to be offered with a usage allowance, **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]** **[END AT&T HIGHLY CONFIDENTIAL INFORMATION]**—high enough to readily satisfy most customers' needs. *Id.* at 199.

[26] AT&T, *High Speed Internet Support: Broadband Usage FAQs*, http://www.att.com/esupport/article.jsp?sid=KB409045&cv=801 (last visited May 25, 2015).

[27] *Id.* Although AT&T currently describes the allowance under the various HSIA plans on its website and incorporates the allowance as part of its standard terms and conditions, **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]** **[END AT&T HIGHLY CONFIDENTIAL INFORMATION]**

- Cox offers 150-350 GB per month, with higher speed tiers receiving larger allowances; additional increments of 50 GB for $10 are available in one market.[29]

- CenturyLink provides 150 GB per month to customers on 1.5 Mbps plans and 250 GB per month on faster plans.[30]

- Charter and Time Warner Cable prohibit the use of excessive bandwidth.[31]

As implemented by AT&T, usage-based pricing encourages more efficient use of the network and ensures that lighter users of broadband services are not forced to subsidize the very heaviest users.[32] By contrast, prohibiting such a balanced approach to pricing, as Opponents suggest, would raise prices for lighter users and undercut the national policy of encouraging broadband adoption.[33]

Finally, AT&T has and will continue to facilitate its broadband customers' access to a wide variety of innovative OVD offerings.[34] The record contains evidence of agreements

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[28] *See* Comcast XFINITY, *What Are the Data Usage Plans Being Trialed?*, http://customer.xfinity.com/help-and-support/internet/data-usage-trials-what-are-the-different-plans-launching (last updated Mar. 16, 2015); *see also* Comcast XFINITY, *What Is the Flexible-Data Option?*, http://customer.xfinity.com/help-and-support/internet/exp-fdo-data-plan/ (last updated Mar. 16, 2015).

[29] Cox, *Data Plan and Usage*, http://www.cox.com/residential/support/internet/article.cox?articleId=%7B2fd6ccb0-b13a-11df-4be3-000000000000%7D (last updated May 19, 2015).

[30] CenturyLink, *Excessive Use Policy FAQ*, http://internethelp.centurylink.com/internethelp/pdf/EUP.pdf (last visited May 25, 2015).

[31] *See* Charter Residential, *Internet Acceptable Use Policy*, https://www.charter.com/browse/content/residential-aup (last visited May 25, 2015); Time Warner Cable, *Internet Acceptable Use Policy*, http://help.twcable.com/twc_misp_aup.html (last visited May 25, 2015).

[32] Katz Reply Decl. ¶ 68 ("Usage-based pricing . . . is a rational and efficient response to congestion and the need to allocate capacity among alternative uses. It can also be an efficient mechanism for recovering common network costs by having the users who derive the greatest benefit from the network make the greatest contribution toward those costs."); *see also* 2015 Open Internet Order ¶ 151 & n.363 (citing comments that usage-based pricing promotes broadband adoption and continued investment in broadband infrastructure). Notably, no opponent has discussed alternative ways of allocating usage to consumers. This is because those alternatives are less desirable. For example, pricing based on the time of day is not only more difficult for consumers to understand, but it would have a disproportionate impact on users at peak times, including consumers who watch OVDs as a substitute for MVPD service.

[33] *See, e.g.*, 47 U.S.C. § 1302; FCC, *Connecting America: The Nat'l Broadband Plan*, 2010 WL 972375, at *15-*16 (2010) (listing "affordable access to robust broadband service" among its long-term goals); 2015 Open Internet Order ¶ 11 ("America needs more broadband, better broadband, and open broadband networks.").

[34] Given the growing importance of OVD content to consumers, a broadband provider with usage-based rates that significantly impinge on the ability of customers to enjoy OVD products

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between AT&T and OVD providers that make it easier for AT&T broadband customers to use OVD services, and AT&T's recently announced deal with Hulu is further evidence of that continued commitment.[35] To that end, AT&T will continue to have a strong incentive to implement any usage-based data policies in a way that accommodates its customers' usage of OVD services.

III. AT&T'S PROPOSED STANDALONE BROADBAND COMMITMENT IS APPROPRIATE FOR A TRANSACTION THAT DOES NOT INVOLVE ANY BROADBAND CONSOLIDATION

As stated previously, AT&T is not acquiring any broadband assets or subscribers from DIRECTV. Accordingly, other than AT&T's pro-competitive commitment to expand broadband service particularly in rural areas after closing, this transaction results in no change to AT&T's broadband footprint or customer base.[36] In the absence of any increased consolidation of broadband ownership, there can be no justification to require AT&T to provide standalone broadband at below-market prices for an extended period, as some Opponents have urged. Instead, AT&T is prepared to honor its voluntary commitment, which will ensure continued

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will not be able to attract new customers or even to retain existing ones. Joint Opposition at 39; Apr. 21 OVD Ex Parte at 5; Declaration of Michael L. Katz ¶¶ 50-60 (June 11, 2014) ("Katz Decl.").

[35] This new AT&T/Hulu agreement is **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]**

[END AT&T HIGHLY CONFIDENTIAL INFORMATION]. *See also* Joint Opposition at 36 (discussing Amazon Prime deal); Letter from Maureen R. Jeffreys, Counsel for AT&T, Inc., to Marlene H. Dortch, Esq., Secretary, FCC, Additional Evidence that Video and Broadband Are Complements at 12-13 (Nov. 12, 2014) ("Video and Broadband Complementarity Paper") (discussing integration of OTT products into MVPD service and bundling MVPD services with OTT services); Declaration of Lori M. Lee, Senior Executive Vice President - Home Solutions, AT&T Inc., ¶ 46 (June 10, 2014) (discussing "Internet + HBO" discount bundle); *id*. at ¶ 48 (discussing AT&T's OTT joint venture with The Chernin Group); AT&T Information Request Response at 133 (same); Public Interest Statement at 77 (discussing post-transaction ability to "obtain more flexible digital rights"); Declaration of John T. Stankey, Group President and Chief Strategy Officer, AT&T Inc., ¶ 63 (June 10, 2014) (discussing efforts to produce original programming). DIRECTV has invested in numerous broadband-enabled video services, including the recently launched Spanish-language OVD service, Yaveo, "TV Apps" that enable subscribers to access online content on their television screens, and music and video streaming on the television for subscribers who have a broadband connection. Video and Broadband Complementarity Paper at 14-17; Press Release, DIRECTV Begins Soft-Launch of Yaveo™, a New Spanish-Language Over-the-Top Streaming Entertainment Experience (Dec. 22, 2014), http://investor.directv.com/press-releases/press-release-details/2014/DIRECTV-Begins-Soft-Launch-of-Yaveo-a-New-Spanish-Language-Over-The-Top-Streaming-Entertainment-Experience/.

[36] Joint Opposition at 32; Apr. 21 OVD Ex Parte at 3.

availability of standalone wireline broadband at reasonable market-based prices, even after improved bundles become available due to the transaction.

Along the exact lines of the condition imposed by the Commission in Comcast/NBCU,[37] AT&T voluntarily committed to offer a standalone broadband service for three years at reasonable market-based prices. AT&T's proposed commitment is therefore a broad one, designed to assure customers that, after the merger, they will continue to enjoy a rich selection of standalone options throughout AT&T's wireline broadband footprint. As an example, AT&T has committed to offer a service with speeds of at least 6 Mbps down (where feasible) at a 12-month price no greater than $34.95 per month.[38] AT&T selected this service speed for its commitment because it would be more widely available than a service of higher speeds.

In contrast, Opponents have recently suggested that the standalone broadband commitment should apply to a speed tier of at least 25 Mbps, at a price no greater than $29.95 for a seven-year term.[39] Opponents also seek to extend such a commitment to AT&T mobile wireless service.[40] Yet, Opponents cannot explain why speed, price, term, and availability requirements beyond AT&T's current commitment are necessary, or what alleged transaction-specific harms they address. As a result, the Commission should instead embrace Applicants' proposed commitment for several reasons:

- AT&T's proposed commitment of a 6 Mbps service where feasible is designed to ensure that a basic and affordable broadband service reaches a large number of customers throughout AT&T's wireline footprint. Opponents' higher-speed proposal would benefit far fewer people, as only about **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]** **[END AT&T HIGHLY CONFIDENTIAL INFORMATION]** percent of AT&T customers subscribe to speed tiers of 25 Mbps or above.[41]

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[37] *Applications of Comcast Corp., General Electric Corporation and NBC Universal, Inc. for Consent To Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4362, App. A, § IV.D (2011) ("Comcast/NBCU Order") (imposing a three-year condition requiring Comcast to offer standalone broadband at reasonable market-based prices, including at a minimum a service of at least 6 Mbps for $49.95).

[38] Joint Opposition at 7 (noting that the price can be increased by no more than any increase in the Consumer Price Index for All Urban Consumers (CPI-U) for Communications every 12 months starting 12 months following deal close); Public Interest Statement at 50 (same).

[39] Cogent et al. May 12 Ex Parte at 2-3.

[40] *Id.* at 2-4.

[41] As of February 2015, AT&T had fewer than **[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]** **[END AT&T HIGHLY CONFIDENTIAL INFORMATION]** customers who subscribe to a wireline broadband service of at least 25 Mbps. *See* Apr. 21 OVD Ex Parte at 2; Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, Esq., Secretary, FCC (May 8, 2015).

- AT&T faces significant broadband competition in all U-verse markets, and the standard of "reasonable, market-based" pricing ensures that pricing will remain competitive. Competition with other providers, notably the cable providers that generally offer higher speeds than AT&T,[42] will further guarantee that consumers receive competitive broadband speeds at affordable prices. Moreover, as Dr. Katz has explained, cost efficiencies from the transaction will place additional downward pressure on standalone prices from both AT&T and cable competitors.[43] Opponents ignore these market realities.

- The three-year length of AT&T's commitment is consistent with Commission precedent, including Comcast/NBCU.[44] Opponents' proposed seven-year duration not only ignores such precedent, but it also fails to recognize the potential harm that such long-term restrictions can cause in a space known for rapid technological and marketplace changes.

- Finally, there is absolutely no basis in the record to extend the commitment to AT&T's mobile wireless service. No party has made any showing that mobile broadband has anything to do with the issues in this proceeding, particularly insofar as they relate to OVD service.

For these reasons, AT&T's voluntary standalone broadband commitment is rooted in the facts of this transaction and Commission precedent. Opponents' proposals are not and should be rejected.

IV.
<u>OTHER PROPOSED CONDITIONS SHOULD BE REJECTED</u>

Opponents continue to propose a laundry list of additional conditions that are unrelated to this transaction, unnecessary to address any transaction-specific harm, or both. Many of these proposals raise industry-wide issues that are the subject of pending Commission proceedings. Precedent is clear that merger reviews are not the proper forum to resolve such matters.[45] The Commission should reject these blatant attempts to leverage this proceeding for private gain.

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42 *See* Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, Esq., Secretary, FCC, at 4, 7 (Apr. 21, 2015) (describing broadband speeds offered by competitors).

43 Katz Decl. ¶¶ 4, 79, 84; Katz Reply Decl. ¶ 55; *see also* Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, Esq., Secretary, FCC (July 17, 2014) (describing economic analysis of Professors Steve Berry and Phil Haile).

44 *See* Comcast/NBCU Order, 26 FCC Rcd. at 4362 (three years); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5808, App. F (2007) (30 months); *see also* Comcast/NBCU Order, 26 FCC Rcd. at 4278-79 ¶¶ 101-103.

45 *See, e.g.*, *Applications of AT&T Inc. and Centennial Communications Corporation for Consent To Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*,

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For example, Cox repeats its complaint that DIRECTV has attached diplexers that effectively "commandeer cable wiring" by interfering with Cox's broadband service, and therefore requests that the Commission require Applicants either to develop new equipment or to run their own wiring to new customer units where Cox already provides broadband service.[46] As Applicants have explained previously, any "interference" between these diplexers and Cox's equipment is the fault of Cox, not DIRECTV, and Cox has refused to cooperate with DIRECTV to avoid disruption of service.[47]

Despite efforts by Congress and the Commission to remove barriers to video competition for multiple-dwelling units ("MDUs"),[48] and despite DIRECTV's diligent attempts to enter the MDU market, Cox and other incumbent cable operators continue to dominate in most areas. Because DIRECTV is the new entrant, Cox's proposed condition essentially would require DIRECTV to replicate inside wiring installed long ago by the incumbent—assuming the MDU owner even would allow such installation.[49] Cox's filing thus is not an attempt to *promote* competition, but rather an attempt to *hinder* competition from a new rival with minimal market share in the MDU space.[50]

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Memorandum Opinion and Order, 24 FCC Rcd. 13,915, 13,969 ¶ 133 (2009) (stating that the Commission will "impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, 6633 ¶ 209 (2001) ("[T]he issues raised by [commenters] are already under consideration in pending Commission proceedings of general applicability. The conditional requirements suggested by [commenters] should be addressed in those proceedings, and not within the confines of the merger analysis.").

46 *See* Cox Ex Parte, Attachment at 2; Letter from Jason E. Rademacher, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Esq., Secretary, FCC, Attachment at 2-3 (Nov. 14, 2014) ("Cox Nov. 14 Ex Parte"); Petition to Condition Consent of Cox Communications, Inc. at 34-35 (filed Sept. 16, 2014); Reply to Joint Opposition of Cox Communications, Inc. at 14 & n.39 (filed Nov. 5, 2014).

47 Joint Opposition at 72 n.265.

48 *See, e.g.*, 47 U.S.C. § 544(i); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20,235, 20,236 ¶ 1 (2007) (prohibiting arrangements that grant cable operators exclusive access to MDUs); *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659 (1997) ("1997 Inside Wiring Order").

49 *See* 1997 Inside Wiring Order, 13 FCC Rcd. at 3678 ¶ 36 (finding that "property owners' resistance to the installation of multiple sets of home run wiring in their buildings may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes of the Communications Act").

50 *Id*. at 3679-80 ¶ 38 ("[D]isagreement over ownership and control of the home run wire substantially tempers competition. The record indicates that, where the property owner or

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Moreover, DIRECTV designed its equipment to share inside wiring based on the assumption that cable operators (including Cox) would use an industry-standard frequency range for their broadband service. DIRECTV shared its diplexer design specifications with Cox *before* beginning installation so that the parties could discuss any technical issues. Only *after* DIRECTV began installing these devices in MDUs did Cox change the frequency range used for its broadband service. It is this change in frequency unilaterally implemented by Cox which created the conflict with DIRECTV's usage of the same wire for video. Although DIRECTV diligently tried to work with Cox to avoid disruption to either service, those efforts met with little cooperation. Ultimately, DIRECTV transferred rights of entry to the MDUs in which Cox provided broadband and focused on other properties where it did not face a similar issue. Adopting Cox's proposed condition simply would add another disincentive to competitive MVPD entry. For these reasons, the Commission should reject Cox's request.

Cox's proposal for limits on the volume discounts or exclusive agreements the combined company may negotiate on programming are similarly self-serving and unjustified.[51] As Applicants have explained, arguments that the content cost savings from the transaction would raise competitors' cost of content or reduce the variety of programming are not supported by facts or economic logic and provide no basis for imposing conditions.[52] In fact, Cox's proposal on volume discounts would prevent the combined company from fully realizing substantial cost savings—savings that will enable stronger competition with cable, improved services, investment in broadband expansion, and innovative video options across all screens, all of which will greatly benefit consumers. There is no justification to prevent the combined company from achieving these pro-competitive consumer benefits in order to protect Cox's business interests or the profits of content companies.

Other Opponents merely rehash proposals that have been addressed fully by Applicants (in the filings cited in the footnotes below) and involve matters that are unrelated to this transaction or the subject of pending Commission proceedings:

- DISH proposes to expropriate DIRECTV's orbital slots for DISH's own benefit.[53]
- Public Knowledge asks for conditions related to the IP transition.[54]

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subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring.").

51 Cox also repeats requests for conditions related to basic service tier requirements, MDUs, and Section 251 and 252 interconnection. Cox Ex Parte, Attachment at 1; Cox Nov. 14 Ex Parte, Attachment at 1-3. Applicants previously have shown there is no basis for these conditions. *See* Joint Opposition at 54-59, 69-72.

52 Joint Opposition at 49-54, 56-59.

53 Cogent et al. May 12 Ex Parte at 6. *See* Joint Opposition at 68-69 (DISH's claims are demonstrably untrue, unrelated to the transaction, and designed solely to benefit DISH.).

- ACA and DISH request programming access and arbitration conditions related to regional sports networks.[55]

- COMPTEL and TiVo propose conditions relating to set-top boxes.[56]

- Opponents also request conditions related to compliance with the Commission's 2015 Open Internet rules.[57]

As noted in prior submissions by AT&T and DIRECTV, Commission precedent requires rejection of these proposals.

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[54] Cogent et al. May 12 Ex Parte at 7. *See* Joint Opposition at 72-73 (IP transition concerns are unrelated to the transaction, and the Commission is addressing them elsewhere.).

[55] Cogent et al. May 12 Ex Parte at 6-7; ACA Ex Parte. *See* Joint Opposition at 54-56 (Neither AT&T nor DIRECTV has substantial content holdings and DIRECTV remains subject to program access conditions with respect to that programming.).

[56] Letter from Angie Kronenberg, Counsel for COMPTEL, to Marlene H. Dortch, Esq., Secretary, FCC, at 3 (May 13, 2015); TiVo Ex Parte at 2. *See* Joint Opposition at 62-65 (Set-top box conditions are both unnecessary and not transaction-specific. They would create complex technical issues for both AT&T and DIRECTV while jeopardizing the protection of other parties' intellectual property and privacy rights.); *see also* Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., and William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Esq., Secretary, FCC (Mar. 13, 2015).

[57] Cogent et al. May 12 Ex Parte at 6; Public Knowledge et al. Ex Parte at 1-2. *See* Joint Opposition at 4-5, 7, 37-39 (AT&T has committed to adhere to the 2010 Open Internet rules, including their prohibition on unreasonable discrimination, for three years after the merger's closing.); *see also* Apr. 21 OVD Ex Parte at 4-8 (The combined company will continue to have strong incentives to support and promote OVD services.).

V.
CONCLUSION

The public interest demands denial of Opponents' various self-serving proposals. Instead, the Commission should approve the transaction promptly based on the record before it and on the strength of Applicants' voluntary commitments.

Respectfully submitted,

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