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June 3, 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, Inc. ("Cogent") in response to certain statements made by AT&T Inc. ("AT&T) and DIRECTV in a written *ex parte* presentation dated May 26, 2015 (the "AT&T/DIRECTV May 26 Ex Parte").

Notwithstanding AT&T's and DIRECTV's protestations to the contrary, the record makes clear—and common sense dictates—that AT&T's acquisition of DIRECTV's nationwide video distribution platform will incent the merged entity to shield that investment from competitive threats.[1] Further, there is no doubt as to the source of those competitive threats. As Applicants acknowledged nearly a year ago, "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. And, as predicted by Applicants, that trend has accelerated even in the short time since the transaction was announced, including the introduction of Sling—an OTT substitute launched by DIRECTV's DBS competitor, DISH.

While the explosive growth of innovative OTT services presents consumers with an ever-expanding array of content choices, those choices are only as good as the broadband Internet connection that is used to access them. The quality of that connection, in turn, depends entirely on AT&T's interconnections with the edge providers that provide such content or their intermediaries (*e.g.*, transit providers) that deliver the content AT&T customers select. Put simply, if interconnection ports are congested consumers cannot exercise the choices they have.

[1] *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 (field Jan. 7, 2015), at 14-17; Netflix Reply Comments, MB Docket No. 14-90 (filed Jan. 7, 2015), at 3-10; *see also* Letter from Robert M. Cooper, Boies, Schiller & Flexner LLP for Cogent, to Marlene H. Dortch, FCC, MB Docket No. 14-90 (Apr. 30, 2015).

It is for that reason that the public interest demands a sustainable mechanism to prevent the congestion that causes impairment of consumer broadband Internet access, now and in the future. In response, the Applicants assert that there is not "any basis for requiring AT&T to augment network capacity for free and without any limits." AT&T/DIRECTV May 26 Ex Parte at 4. That argument rests on a false premise.

Cogent is not asking for an interconnection requirement that forces AT&T to upgrade its network. Indeed, there is no reason to do so. AT&T has not claimed that it lacks sufficient network capacity to accept the traffic that its broadband customers currently request.[2] Rather, Cogent is asking for an interconnection requirement that prevents congestion at interconnection points. The only costs associated with eliminating and preventing the recurrence of such congestion are the price of additional ports and the *de minimis* space and power expenses associated with operating those ports. It is well-established that the largest component of that, the port cost, is on the order of $10,000 per 10 Gbps port.

Any network augmentation that *may* be necessary to handle increased traffic across interconnection points is a function of the requests made by AT&T's customers for movies and other information delivered over the Internet. It is an unassailable truth of Internet architecture that transit networks like Cogent do not deliver a single bit of data that is not requested by a last-mile provider's (like AT&T) customers. It follows, therefore, that when and if AT&T's network is incapable of handling the traffic generated when AT&T's customers fully utilize the bandwidth capacity they have been promised, then that is not a problem caused by Cogent. Further, any network augments that AT&T *may* have to make are not unlimited. The augments are capped at the level required to allow AT&T's customers to fully utilize the service they already have been sold. Cogent's position—consistent with historical industry practice—is that each interconnecting network should bear its own costs associated with upgrades to its own network and for additional ports on its side of an interconnection. That is what is required to deliver quality service when a network's customers fully utilize the service they have purchased.

Ultimately, any discussion of interconnection practices must take into account the fact that broadband Internet usage is moving in only one direction—up. While Applicants make passing reference to "traffic growth expectations" (*id.*), their vigorous resistance to a reasonable augmentation requirement calls into question their pledge to ensure unimpeded broadband service that endures.[3] In essence, by refusing to embrace a commitment to eliminate congestion

[2] Likewise, Cogent has more than enough capacity on its network to carry the traffic requested by AT&T subscribers and the customers of other mass-market broadband ISPs.

[3] In addition, Applicants' lengthy discussion of the "trigger" point for augmentation—whether it is at 70% utilization, 85% utilization or somewhere in between—misses the point. *See* AT&T/DIRECTV May 26 Ex Parte at 4. What matters is that consumers not suffer degradation of their broadband service as a direct result of interconnection port congestion. The only way to avoid that result is port augmentation. Debating the precise augmentation "trigger" point at which congestion poses a near-term risk distracts from a fundamental public interest concern that should inform the Commission's review: sophisticated network operators like AT&T and Cogent know congestion when they see it, and it should be incumbent upon them to ensure that it is remedied so as to allow each of them to provide sufficient service to their respective customers.

they are setting the stage to blame someone else when their subscribers are unable to optimally use the service they were sold and for which they pay.[4]

The proposed AT&T/DIRECTV transaction joins AT&T's plans to increase FTTP and U-verse service—which, if carried out, will only increase broadband demand and usage—with enhanced incentives to constrain the operability of those services. This is a concrete public interest threat that can and must be mitigated. The way to do so is through an interconnection framework that recognizes and accounts for the growth of Internet usage. A failure to do that—even if all ports were upgraded tomorrow—would amount to no more than a temporary reprieve of congestion, and a virtual assurance that congestion will reappear in the near future as consumers take advantage of a number of innovative services. That result would be the antithesis of the public interest.

Please direct any questions regarding this correspondence to my attention.

Sincerely,

/s/ Robert M. Cooper

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[4] To that end, it is worth noting that Applicants' selected citations to the 2015 *Open Internet Order* omit various statements in which the Commission recognized the harms associated with congested interconnection facilities, and the abilities and incentives of broadband Internet access service providers like AT&T to create such harms. *See, e.g.*, Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) ¶ 8 ("The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."); ¶ 20 ("[W]hen a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply"); ¶ 195 ("We note that anticompetitive and discriminatory practices [involving the exchange of Internet traffic] can have a deleterious effect on the open Internet."); ¶ 199 ("When links are congested and capacity is not augmented, the networks—and applications, large and small, running over the congested links into and out of those networks—experience degraded quality of service due to reduced throughput, increased packet loss, increased delay, and increased jitter."); ¶ 205 ("When Internet traffic exchange breaks down—regardless of the cause—it risks preventing consumers from reaching the services and applications of their choosing, disrupting the virtuous cycle.").