June 25, 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
NOTICE OF EX PARTE PRESENTATION;
REDACTED—FOR PUBLIC INSPECTION

Dear Ms. Dortch:

More than a year after AT&T Inc. (“AT&T”) and DIRECTV (collectively “Applicants”) filed their Public Interest Statement in support of their merger, and nearly six months after the formal pleading cycle closed, New America’s Open Technology Institute (“OTI”) has made yet another ex parte filing seeking interconnection conditions that are unrelated to the transaction under review.1 Specifically, in its latest filing, OTI falsely claims that Internet speed data from Measurement Lab (“M-Lab”) show that AT&T has caused congestion at its interconnections with other ISPs and transit providers that can only be remedied by regulating interconnection rates. This submission responds to that filing.

First, the record is clear that, just as the Commission envisioned in the Open Internet Order, the market is producing well-considered, commercial agreements that provide for expanding capacity in a manner that appropriately balances the responsibilities of all industry participants to deliver a high-quality experience for consumers.

In just the past two months, AT&T has reached comprehensive, long-term interconnection agreements with Level 3, Cogent, and [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]. As a result of these agreements alone, AT&T will add at least [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] of capacity at interconnection points, which translates to an increase in capacity of approximately [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] percent. Moreover, while these agreements will bring total peering capacity to more than [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION], they also provide the [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]. To address consumers' needs today and in the future, AT&T remains open to negotiating with any similarly situated provider and reaching similar commercial agreements that properly align the incentives of all parties for the benefit of end users. These agreements—along with others such as Comcast’s agreement


4 See Letter from Maureen R. Jeffreys, Counsel for AT&T Inc., to Marlene H. Dortch, Esq., Secretary, FCC (June 24, 2015).

5 Following the contemplated capacity augmentations, these agreements will represent approximately [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] percent of AT&T’s total peering capacity.

6 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 (May 26, 2015) [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION]

7 Indeed, senior executives at both Level 3 and Cogent hailed their particular agreements as beneficial for their customers. See AT&T/Level 3 Press Release (quoting Level 3 Chief Marketing Officer Anthony Christie); AT&T/Cogent Press Release (quoting Cogent Chief Executive Officer Dave Schaeffer).
with Level 3\textsuperscript{8} and Netflix’s agreements with AT&T\textsuperscript{9} and other broadband access providers\textsuperscript{10}—demonstrate that the market today is delivering privately-negotiated, tailored solutions to address interconnection congestion.

Second, such commercial solutions are exactly what the Commission had in mind when it refrained from direct regulation of interconnection in the Open Internet Order. Faced with “competing narratives” on the interconnection market,\textsuperscript{11} the Commission “conclude[d] that it would be premature to adopt prescriptive rules to address any problems that have arisen or may arise.”\textsuperscript{12} With the “constantly evolving” nature of the market for Internet traffic exchange making 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,”\textsuperscript{13} the Commission decided not to dictate the terms of interconnection.

Recognizing that “Internet exchange agreements have historically been and will continue to be commercially negotiated,” the Commission instead adopted a “case-by case approach” under which it will hear—in a “timely” fashion—complaints that a broadband Internet access provider is not providing interconnection on a just and reasonable basis.\textsuperscript{14} Thus, the Commission has established the mechanism for dealing with any legitimate interconnection issues that might

\textsuperscript{8} 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 Chief Technology Officer Jack Waters).

\textsuperscript{9} See Declaration of Scott Mair, Senior Vice President of Technology Planning and Engineering, AT&T Services, Inc. ¶� 7, 25-30 (Oct. 15, 2014) (describing the contract and its favorable terms for Netflix).


\textsuperscript{11} Protecting and Promoting the Open Internet, GN Dkt No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 ¶ 200 (rel. Mar. 12, 2015).

\textsuperscript{12} Id. ¶ 202.

\textsuperscript{13} Id. ¶ 203.

\textsuperscript{14} Id. ¶ 205 (finding that case-by case review “is an appropriate vehicle for enforcement where disputes are primarily between sophisticated entities over commercial terms”). Regardless of how one interprets the congestion measured by M-Lab, because the congestion preceded the effective date of the Open Internet Order, it in no way is evidence of a violation of that order.
arise. No further conditions in this merger proceeding are either required or appropriate in this
area.

Third, the M-Lab data simply do not support the conclusions reached by OTI. In no way
does the M-Lab study indicate that AT&T has “strategically manipulated interconnection
points,” as OTI claims.\textsuperscript{15} OTI bases its claims about AT&T solely on congestion at AT&T’s
interconnections with GTT. \textbf{[BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION]}

\textbf{[END AT&T HIGHLY CONFIDENTIAL INFORMATION].}\textsuperscript{16}

Even beyond that, OTI grossly misrepresents the M-Lab data. M-Lab itself reports
finding “[p]atterns of degraded performance occurred \textit{across the United States}, impacting
customers of \textit{various access ISPs} when connecting to measurement points hosted within a
number of transit ISPs in Atlanta, Chicago, Los Angeles, New York, Seattle, and Washington,
D.C.”\textsuperscript{17} The congestion allegedly found by M-Lab is therefore not specific to AT&T or its
interconnection practices, but is a function of the rapid increases in data usage and the challenges
\textit{all} carriers face in expanding interconnection to keep pace. More fundamentally, though, OTI
completely ignores the acknowledged limitations of the M-Lab data. M-Lab clearly states that
“while we are able to observe and record these episodes of performance degradation, \textit{nothing in
the data allows us to draw conclusions about who is responsible for the performance
degradation}.”\textsuperscript{18} As M-Lab’s October 2014 report explains:

\textsuperscript{15} Free Press et al. May 28, 2015 Ex Parte at 2; \textit{see} OTI June 24, 2015 Ex Parte at 2-3.

\textsuperscript{16} On this point, AT&T notes that, according to OTI, “AT&T did not display congestion over
interconnections with Cogent and Level 3.” OTI June 24, 2015 Ex Parte at 2. Of course, the
Commission is already familiar with the commercial agreements that AT&T has reached with
those two providers.

\textsuperscript{17} Collin Anderson, \textit{New Opportunities for Test Deployment and Continued Analysis of
Interconnection Performance}, M-Lab Blog (June 24, 2015), http://www.measurementlab.net/
blog (“M-Lab Blog Post”) (emphasis added); \textit{see also} M-Lab, \textit{ISP Interconnection and Its
measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf (“M-Lab Report”)
(presenting results indicating sustained performance degradation across multiple ISPs (AT&T,
Comcast, CenturyLink, Time Warner Cable, and Verizon) and transit providers (Cogent, Level
3, and XO Communications)).

\textsuperscript{18} M-Lab Blog Post (emphasis added).
[I]t is important to note that we cannot determine which actors or actions are “responsible” for observed degradation. We cannot tell whether any particular ISP between the user and a measurement point is “at fault,” what the contractual agreement between ISPs did or did not dictate vis-à-vis interconnection, or whether specific network modification was done to alleviate or magnify a given incident. Similarly, we cannot identify the precise cause of performance problems (e.g. a broken router) in a path between a client on a given Access ISP and a M-Lab measurement point, although we take steps to narrow the range of possible causes. Our data shows that traffic from specific Access ISP customers across interconnections with specific Transit ISPs experienced degraded performance, and that this degradation forms a pattern wherever specific Access ISPs and Transit ISPs exchange traffic. Speculating beyond that is not within the scope of this report.19

Nevertheless, OTI relies on the M-Lab data to draw a conclusion that M-Lab itself explicitly disclaims.20

Finally, OTI fails 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.21 Nor does AT&T own, or is it purchasing, any significant must-have content. As a result, Applicants have shown that the transaction would not increase AT&T’s ability or incentive to degrade any customer’s broadband

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19 M-Lab Report at 7.
20 See also Ariel Rabkin, Overhyped Study Shows No Net Neutrality Violation, Tech Policy Daily (June 24, 2015, 6:00 AM), http://www.techpolicydaily.com/internet/no-net-neutrality-violation/?utm_source=twitter&utm_medium=blogtweets&utm_campaign=cict (attached hereto at Exhibit A). In addition, while OTI touts that the M-Lab data incorporates “2.5 million data points generated by more than 300,000 Internet users,” OTI June 24, 2015 Ex Parte at 1, a closer examination reveals that much of the data cited by OTI relies on very small sample sizes. For example, the graph in Appendix A of OTI’s filing showing hourly median packet retransmit rates for May 2015 in Chicago for AT&T on GTT appears to use data from fewer than half the days in the month, and for no hour in the dataset is the sample size larger than 52. See M-Lab, Internet Observatory, http://www.measurementlab.net/observatory (last visited June 24, 2015) (filtering for packet retransmission rate in Chicago, and using the daily and hourly views).
experience. OTI, however, does not identify any possible merger-specific harm but rather argues that the data show “evidence of a market failure in” the current, pre-transaction “market for interconnection services.”

In short, OTI ignores dispositive marketplace developments, misconstrues facially unhelpful data, and strains unsuccessfully to connect its requested condition to the merger of these assets. Accordingly, OTI’s proposal should be rejected, and the Commission should promptly approve the transaction.

Respectfully submitted,

Maureen R. Jeffreys
Counsel for AT&T Inc.

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22 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).

23 OTI June 24, 2015 Ex Parte. Contrary to OTI’s claim, AT&T has never denied that “AT&T’s broadband product is very much implicated by the proposed transaction.” Id. at 4. Indeed, the additional broadband deployment that the transaction will enable is at the heart of why the transaction serves the public interest. It does not follow, however, that all broadband-related conditions are appropriate, merger-specific remedies.
Exhibit A
Overhyped study shows no net neutrality violation

by: Ariel Rabkin

June 24, 2015 6:00 am

This past Monday, a number of media outlets ran stories purportedly about “net neutrality violations” by major US ISPs, notably AT&T. These stories were all based on a study by lobby group BattlefortheNet. The study itself has not been publicly released, but based on the media coverage, this story has nothing to do with net neutrality and everything to do with the new face of technology lobbying.

The original meaning of the phrase “network neutrality” was that networks should treat all data packets alike regardless of their content; for example, networks should not prioritize one website over another. The Guardian’s headline for the BattlefortheNet study certainly suggests something of this sort: “Major internet providers slowing traffic speeds for thousands across US.” This would be important news if true. But the core of the story is about a completely different topic.

The story is not at all about how AT&T operates its network. Instead, it’s about the conditions under which AT&T connects its network to other networks, known as interconnection. The site being “slowed” by AT&T is a content distribution network named GTT. The reason GTT traffic is slow for...
AT&T customers is not that AT&T is slowing the traffic within the AT&T network. Rather, the problem is that there is only a limited and slow connection between GTT and AT&T, and AT&T expects GTT to pay to enhance it. That is, the performance problem is not that AT&T is slowing the Internet, it's that GTT expects to have a fast connection to AT&T users, without paying for it.

Every content provider would like to have free high-speed connections to their customers. But somebody has to pay. There is no legal or technical reason why content providers should get free connectivity, while the full costs fall on consumers. This is not “neutral.” This is corporate favoritism with a misleading slogan.

In addition to being misleadingly marketed, the “free interconnection for providers” doctrine is bad policy. Content providers have the capacity to invest in more efficient network transmission, via technologies such as improved compression. Assigning them the costs gives them the incentive to do so. In contrast, if the costs are collectivized by consumers, there is no such incentive. It is likely more efficient economically to have providers pay; it is certainly inefficient to have the government meddling with all things network-based. This has now come to pass. The FCC should decline the invitation.

One of the main things that net neutrality skeptics were afraid of is that the slogan of “net neutrality” would rapidly get unmoored from any objective standard and would become an all-purpose excuse for the government to meddle with all things network-based. This has now come to pass. The operative principle in this case has nothing to do with neutrality. It is a much less technical doctrine, one that states “ISPs should not charge you and not charge me, they should charge that man behind the tree.” The Internet will not be improved if residential customers collectively have to pay anytime somebody with good lobbyists says “I deserve free interconnect too, gimme gimme gimme.”

Far from advocating for consumers or for an open internet, BattlefortheNet is implicitly asking the FCC to shift network costs around willy-nilly, based on which companies have the best public image. The FCC should decline the invitation.

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