June 25, 2015

By 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:

Pursuant to the Second Amended Modified Joint Protective Order1 ("Modified Joint Protective Order"), COMPTEL submits the attached redacted version of its Highly Confidential ex parte letter. COMPTEL has denoted with "{{ }}" symbols information that it has deemed Highly Confidential Information pursuant to the Modified Joint Protective Order. A Highly Confidential version of the letter has been filed with the Commission and will be made available pursuant to the terms of the Modified Joint Protective Order.

Please contact me with any questions.

Respectfully submitted,

Markham C. Erickson
Counsel for COMPTEL

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1 Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Second Amended Modified Joint Protective Order, DA 14-1640 ¶ 14 (Nov. 12, 2014).
June 25, 2015

FILED BY ECFS

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

REDACTED—FOR PUBLIC INSPECTION

Re: Notice of Ex Parte Presentation, 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:

On June 23, 2015, Angie Kronenberg of COMPTEL and COMPTEL’s undersigned counsel met with the following Commission staff: Jamillia Ferris, Claude Aiken, Christopher Sova, Elizabeth Andrion, Brendan Holland, Susan Singer, Randy Clarke, and Eric Ralph. At the meeting, COMPTEL urged the Commission to adopt the interconnection condition proposed by Cogent, DISH, Free Press, and Public Knowledge on May 12, 2015. COMPTEL believes that condition

1 Pursuant to the Second Amended Modified Joint Protective Order, Angie Kronenberg was present only for the parts of the meeting in which publicly available information was discussed. Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Second Amended Modified Joint Protective Order, DA 14-1640 (Nov. 12, 2014).

2 Letter from Robert M. Cooper, Counsel to Cogent Communications, Inc., Jeffrey Blum of DISH Network Corporation, Matt Wood of Free Press, Josh Stager of New America’s Open Technology Institute, and John Bergmayer of Public Knowledge, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90, at 5-6 (May 12, 2015). The condition is reproduced in Attachment A.
is critical for protecting consumers and online video competition from AT&T’s increased incentive and ability to foreclose online video distributors (“OVDs”) post transaction.\(^3\)

AT&T continues to posit a “functioning, complex, and competitive” marketplace for interconnection into its Broadband Internet Access Service (“BIAS”) network.\(^4\) As evidence, AT&T points to the \{\{ \} \} interconnection agreements it recently reached with Cogent and Level 3.\(^5\)

The agreements with Cogent and Level 3 do not demonstrate that the marketplace for interconnection is functioning or competitive. First, there is little doubt that the agreements were reached because of the intense regulatory scrutiny of the merger process. AT&T’s disputes with Cogent and Level 3 span years,\(^6\) beginning around the time that AT&T began implementing a strategy to shift its settlement-free peering partners into paid peering arrangements under the theory that AT&T deserved to be paid due to traffic imbalances.\(^7\) It is not coincidental that both

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\(^3\) See Letter from Angie Kronenberg, Chief Advocate and General Counsel, COMPT EL, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90, at 3 (May 15, 2015) (endorsing the condition).


\(^6\) See, e.g., Letter from John Ryan, Chief Legal Officer, Level 3, to James Cicconi, Senior Executive Vice President, External & Legislative Affairs, AT&T, Inc. (Feb. 24, 2011), available at http://www.level3.com/~/media/Assets/legal/cicconi.pdf (stating that AT&T and Level 3 are involved in discussions “to determine whether [they] can find common ground on a fair and equitable traffic exchange agreement,” and asking AT&T to “refrain from de-activating existing interconnection points currently deployed, and that AT&T consider its position that it will cease augmenting interconnection unless and until Level 3 agrees to AT&T’s commercial terms.”).

conflicts were resolved at the very moment the Commission must determine whether the merger is in the public interest. 8

Second, the terms of the contracts themselves demonstrate the need for an interconnection condition that ensures other Internet stakeholders are not harmed by AT&T’s increased incentive and ability to harm edge providers.

**AT&T Controls the “Market” for Interconnection into Its Network.** AT&T, and AT&T alone, controls the amount of interconnection capacity into its BIAS network. 9 For the last several years, and at least since 2012, AT&T has engaged in a strategy to create artificial scarcity at the point of its interconnection with the larger Internet ecosystem. That strategy allows AT&T to undermine competition from video providers in the short term, and in the longer term to set a precedent of being paid for delivery of content to its network to establish a long-term system to monetize traffic. 10

Prior to its decision to merge with DIRECTV, AT&T had been squeezing the amount of peering capacity available to transit providers, despite significant year-over-year increases in traffic requested by AT&T’s own BIAS subscribers. 11 This created an artificial lack of capacity

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8 Indeed, Cogent previously participated in the merger docket to complain about AT&T’s interconnection practices. One might also assume that the agreements resulted from the recent adoption of the Open Internet Order, which went into effect on June 12. AT&T has sued the Commission, however, to overturn the very part of the Open Internet Order that governs interconnection practices. It is more likely that the merger scrutiny, and not the possibility of defending a complaint under the Open Internet Order, served as a catalyst to reaching an agreement with Level 3 and Cogent.

9 {{

}} AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), {{

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10 Cf. AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), {{

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(Continued...)
available to customers of those transit providers,\(^{12}\) causing significant disruption of BIAS to AT&T’s own consumers.\(^ {13}\) Since it controls the capacity spigot, AT&T was able to offer what transit providers no longer could—large amounts of interconnection capacity, as long as you pay AT&T.

This process has resulted in a seismic shift in the balance of traffic entering AT&T’s network. In 2012, \{\{\}\}. For example, in February 2012, settlement-free peering represented \{\{\}\} of incoming traffic, versus \{\{\}\} Managed Internet Services (“MIS”), which includes paid peering arrangements—a ratio of \{\{\}\} peering to MIS.\(^ {14}\) In May 2015, that ratio appears to have flipped to \{\{\}\}.\(^ {15}\)

This is not the result of a “functioning” market, but of a cornered one.

The Cogent and Level 3 Agreements Do Not Provide the Internet Ecosystem with Meaningful Competitive Options for Edge Providers Sending Traffic to AT&T’s Subscribers. Facing significant regulatory pressure over its proposed merger with DIRECTV, AT&T has begun relieving some of the artificial capacity constraints it placed on its network through recent deals with Cogent and Level 3.\(^ {16}\) Those deals garnered headlines.\(^ {17}\) A careful reading of those

\(^{12}\) See id., \{\{\}\}.


\(^{14}\) AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), \{\{\}\}.

\(^{15}\) See AT&T May 26 Ex Parte at 3 n.9 (\{\{\}\}).

\(^{16}\) See, supra, at 2 n.5.
agreements reveals, however, that they do little to support AT&T’s assertion that they create meaningful competition in the interconnection marketplace.

Specifically, AT&T’s deals with Cogent and Level 3 artificially {{ }}.18 {{ }}.19 Cisco reports that “busy hour” (or “peak”) Internet traffic “increased 37 percent in 2014,” and Cisco expects that traffic to “increase by a factor of 3.9 between 2014 and 2019.”20

The growth of Internet traffic could well exceed AT&T’s and Cisco’s conservative estimates.21 The growth in consumer demand for streaming video has been driving Internet traffic growth for years, as it has increased in popularity with consumers.22 Those increases in traffic are likely to accelerate as consumers increasingly seek access to high-definition and 4K content from

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18 {{ }} (attached to AT&T June 10 Ex Parte).

19 AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), {{ }}.


21 See, e.g., AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), {{ }}.

22 See Cisco White Paper at 2 (“Internet video to TV grew 47 percent in 2014. This traffic will continue to grow at a rapid pace, increasing fourfold by 2019.”).
streaming providers. And recently, an increasing number of entities has begun to offer, or has announced an intention to offer, over-the-top video services—ensuring that consumers will have a ready supply of competitive streaming options.

The agreements also require Cogent and Level 3 to {{ }}. As a result, {{ }}. This significantly limits their ability to take on a client requiring a significant amount of additional capacity or one that needs a significant amount of capacity quickly—such as could occur if AT&T were to fail to renew one of its “on net” interconnection agreements with an OVD.

Finally, AT&T’s new agreements are also for {{ }} and only for two of the significant entities that interconnect with AT&T. So only a relatively small part of the market currently enjoys even this limited protection.

**The Numbers Do Not Add Up.** To put it in perspective, at last report, Cogent and Level 3 had {{ }}. Presumably that

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23 See id. at 8 ("The video impact of the devices on the traffic is more pronounced due to the introduction of ultra-high-definition (UHD), or 4K, video streaming. This technology has such an impact because the bit rate for 4K video at about 18 Mbps is more than double the HD video bit rate and nine times more than standard-definition (SD) video bit rate.").


25 On the date of this filing, the Applicants made available a new peering agreement between AT&T and {{ }}. {{ }} currently has only limited interconnection capacity into AT&T’s network—amounting to {{ }}. And AT&T’s agreement with {{ }} imposes an even more stringent {{ }}, ensuring that {{ }} will not become a significant interconnection partner of AT&T’s in the near future. {{ }} (attached to Letter from Maureen Jeffreys, Counsel for AT&T, and William Wiltshire, Counsel for DIRECTV, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90 (June 24, 2015)).

26 AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), Exhibit 81.h.
Assuming that Cogent's and Level 3's peak traffic will increase at Cisco's conservative estimate of 37%, the needs of AT&T's existing customers would amount to \{\{\}27 \{\} \}. Even if \{\} , it would not allow for any significant new OVD to enter AT&T's network without doing a paid deal directly the AT&T. For example, if a new OVD were to grow to a tenth the size of Netflix, it would need over \{\}28—\{\}. In essence, AT&T's agreements with Cogent and Level 3 do not meaningfully protect the online video distribution ecosystem from the congestion strategy in which AT&T has already engaged. Going forward, however, if the transaction were approved, AT&T would have an even greater ability to harm OVDs because of the merger's predicted growth in AT&T's broadband subscribership. AT&T also has a myriad of other means by which to harm OVDs, including through data caps and usage-based price.\n
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27 The addition of \{\} capacity actually makes the deficit worse: \{\}, as a result of the agreement. However, \{\}.

28 Under AT&T's agreement with Netflix, Netflix is to be allocated \{\} in 2015. AT&T Presentation, MB Docket No. 14-90, at 3 (May 21, 2015) (attached to Letter from Maureen Jeffreys, Counsel for AT&T, and William Wiltshire, Counsel for DIRECTV, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90 (May 26, 2015)).

29 With the inclusion of \{\}, the new competitor \{\} in the hypothetical example.

30 AT&T has asserted that there can be no increased ability to foreclose OVD's because the merger does not involve AT&T's acquisition of any new broadband subscribers. Letter from Maureen Jeffreys, Counsel for AT&T, and William Wiltshire, Counsel for DIRECTV, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90, at 2-3 (Apr. 21, 2015). That narrow view of the potential harms does not comport with AT&T's expansive view of the merger's potential benefits. If AT&T's ability to expand its network and acquire more broadband (Continued...)
OVD foreclosure harms consumers by artificially decreasing the value of the over-the-top video industry. A robust over-the-top video marketplace benefits Multichannel Video Programming Distributors ("MVPDs") that increasingly cannot afford rising video programming costs. Many MVPDs today provide such video programming to their customers at a loss. OVD services increasingly enable those MVPDs to provide a robust broadband product, focusing their resources on additional deployment of broadband infrastructure, while paring or even letting go of their MVPD services.\(^{32}\)

* * *

For the above reasons, in order to find that the merger is in the public interest, the Commission should protect the nascent online video distribution ecosystem—including the consumers who increasingly seek to cord-cut or cord-shave their MVPD subscriptions—by requiring that AT&T provide relevant stakeholders interconnection capacity on bill-and-keep terms, as proposed in Attachment A.\(^{33}\)

31 See, e.g., AT&T, Responses to the Commission’s Information and Data Request, MB Docket No. 14-90 (Oct. 7, 2014), {{

32 Cf. Letter from Angie Kronenberg, Chief Advocate and General Counsel, COMPTEL, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90, at 1 (June 1, 2015).

33 In response to a question, COMPTEL noted that at a minimum, the Commission should require AT&T to provide {{

}}. We noted, however, that the {{

}} was arbitrary. The terms of the contracts themselves demonstrate that the cost of interconnection is cheap—{{

}} (attached to AT&T June 10 Ex Parte). Because it is AT&T’s subscribers, and not its interconnection partners, that dictate {{

}} is being delivered to AT&T, it makes no sense to impose {{

}} on interconnection partners.
Ms. Marlene H. Dortch
June 25, 2015
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Sincerely,

/s/

Markham C. Erickson
Counsel for COMPTEL

cc: Jonathan Sallet
    Jamillia Ferris
    Claude Aiken
    Christopher Sova
    Elizabeth Andrion
    Brendan Holland
    Susan Singer
    Randy Clarke
    Eric Ralph
ATTACHMENT A: PROPOSED INTERCONNECTION CONDITION

1. AT&T shall interconnect on a bill-and-keep basis with other network operators or edge providers for the exchange of Internet traffic between AT&T’s Broadband Internet Access Service (“BIAS”) customers and the other network operator’s customers or the edge provider, provided that the entity requesting interconnection will transmit to or receive from AT&T’s network at least a reasonable minimum amount of traffic and the entity requesting interconnection agrees (i) to interconnect at reasonable locations and (ii) to reasonably localize the exchange of Internet traffic. The terms of interconnection as described in the foregoing sentence shall be just, reasonable and nondiscriminatory.

2. If any interconnection port between AT&T and another entity with whom it interconnects pursuant to paragraph (1) reaches 70% capacity average utilization for more than 3 hours in any 24-hour period on more than 5 separate occasions within any 30-day period, then AT&T must promptly undertake to upgrade the ports and cross-connects to augment capacity and thereby avoid the congestion and resulting packet loss and degradation of service that will occur if the interconnection capacity extends much beyond that point. The interconnecting parties shall each bear all costs associated with upgrades to their own network facilities, including port costs, and the parties shall alternate paying for cross-connects.

3. AT&T shall not seek to enforce any contract that is inconsistent with its duty to interconnect on a bill-and-keep basis under this condition, and upon request, shall modify any agreement with a qualifying network operator or edge provider to provide for interconnection on a bill-and-keep basis.

4. The bolded terms in paragraph (1) shall have the following meanings:

   a. “Reasonable locations” means Internet exchange points or alternative locations agreed to by the interconnecting parties. AT&T may not require a requesting party to interconnect at any location at which the entity requesting interconnection is unable to interconnect on terms and conditions (e.g., costs for renting space, electricity, air conditioning, cross connect, transit) at least as favorable as at the nearest Internet exchange point.

   b. “Reasonably localize” means interconnecting at any reasonable location that allows Internet traffic to be delivered to a port that is geographically closest to the Internet traffic’s end destination.