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AUG 9 2001

August 8, 2001

00-301

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
Attention: Cable Services Bureau

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By Courier

Re: In the Matter of AOL Time Warner, Inc. – Petition and Complaint of Texas Networking, Inc. ("Texas.Net")

Dear Ms. Salas,

Enclosed please find for filing an original and nine (9) copies of a complaint entitled "In the Matter of AOL Time Warner, Inc. – Petition and Complaint of Texas Networking, Inc. ("Texas.Net"). Please file-stamp and date one copy and return it to me in the enclosed postage-paid return envelope.

Thank you for your attention to this matter.

Sincerely,

David Bolduc with Permission
Carrie Keese

David Bolduc
Attorney at Law

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AOL Time Warner, Inc.	)	
	)	
Texas Networking, Inc.	)	
("Texas.net"), Petitioner	)	CS Bureau File No._____
	)	
Petition for Declaratory Ruling and	)	
Complaint Regarding Violations	)	
Of Merger Conditions and for	)	
Enforcement of Merger Conditions	)	

To: The Chief, Cable Services Bureau

PETITION AND COMPLAINT

TEXAS NETWORKING, INC.
("TEXAS.NET")

W. Scott McCollough
David Bolduc
Stumpf Craddock Massey & Pulman
1801 North Lamar Blvd.
Suite 104
Austin, TX 78701
(512) 485-7820

August 9, 2001

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EXECUTIVE SUMMARY

The Commission approved the merger of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") into AOL Time Warner, Inc. ("AOL Time Warner"), by allowing the transfer of certain licenses and authorizations (in particular, licenses essential to the operation of the cable systems then owned by Time Warner), on January 19, 2001, subject to certain conditions.[1]

The Commission found that the MOU on open access proffered by AOL and Time Warner "by itself affords insufficient protection against the potential harms to the public interest that could result from the proposed merger."[2] Similarly, the Commission found cause for concern that the terms of the Consent Agreement entered into by AOL and Time Warner before the FTC[3] were not sufficient. The Commission therefore imposed additional conditions upon the merger. Chief among those conditions were that AOL Time Warner "must engage with local and regional ISPs in a good faith, non-discriminatory manner"[4] and several other requirements "narrowly tailored to augment [the FTC Consent Agreement] by preventing AOL Time Warner from utilizing certain indirect means to disadvantage unaffiliated ISPs on its cable systems due to their lack of affiliation."[5]

Texas Networking, Inc. ("Texas.net") is a regional ISP unaffiliated with AOL Time Warner, and is headquartered in Austin, Texas. Beginning in August of 2000, during the pendency of the FCC's consideration of the license transfers, and continuing to the present, Texas.net has unsuccessfully

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1 *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*, CS Docket No. 00-30, Memorandum Opinion and Order ("*AOL-Time Warner Order*"), 16 FCC Rcd 6547 (2001).

2 *AOL-Time Warner Order, supra*, at ¶ 96.

3 *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) ("FTC Consent Agreement").

4 *AOL-Time Warner Order, supra*, at ¶ 197.

5 *AOL-Time Warner Order, supra*, at ¶ 126.

attempted to negotiate with AOL Time Warner in order to offer its services over AOL Time Warner's cable system on non-discriminatory terms and conditions.

AOL Time Warner has consistently failed and refused to engage in meaningful, good faith negotiations over substantive terms, and has simply stalled and frittered away the last year without entering into any real negotiations. AOL Time Warner will not meet with Texas.net, will not discuss contract terms, and will not discuss technical issues.

AOL Time Warner has made it clear that it would be fruitless for Texas.net to propose terms for AOL Time Warner's consideration by orally indicating on several occasions that AOL Time Warner is not negotiating and was not yet prepared to discuss substantive terms. It has become apparent that AOL Time Warner does not intend to negotiate in good faith with local and/or regional ISPs such as Texas.net for commercially viable terms and conditions for access to AOL Time Warner's cable plant. The unreasonable delay only serves to lengthen the time that AOL Time Warner's own broadband ISP operations have a monopoly on cable broadband access, and will certainly serve to protect AOL from meaningful competition from local and/or regional ISPs after AOL is given access to AOL Time Warner's plant.

Texas.net is aware that AOL Time Warner has executed an agreement (or an agreement in principle) with at least three national ISPs, and was informed by AOL Time Warner on February 20, 2001 that AOL Time Warner was in active, substantive negotiations with other national ISPs. Texas.net has also been told on at least two occasions that AOL Time Warner plans to implement "third party ISP access" some time around the end of the 3rd quarter of 2001. This causes Texas.net to conclude that AOL Time Warner's plan is to implement access arrangements with its national ISP contracting partners at about that time.

AOL Time Warner informed Texas.net on or about March 12, 2001 that AOL Time Warner still was not prepared to engage in substantive negotiations with local and/or regional ISPs, and would not do so until after its national agreements were approved. This necessarily means that local and regional ISPs will not be allowed access to AOL Time Warner's cable plant on commercially reasonable and viable terms until many months after AOL and its national ISP contracting partners have such access.

AOL Time Warner has failed to negotiate with local and regional ISPs in general, and Texas.net in particular, in a "good faith non-discriminatory manner." First, it has essentially refused to negotiate by engaging in stalling tactics, by failing to propose substantive terms and conditions that are commercially viable, and by indicating that any attempt by Texas.net to propose terms would be fruitless and would be ignored until AOL Time Warner deigns to negotiate. Second, the three AOL Time Warner "negotiators" have never had and do not at present have the authority to bargain and conclude negotiations with local and/or regional ISPs. Third, AOL Time Warner has not agreed to meet at reasonable times, and has purposely acted in a manner that unduly delayed the course of negotiations. Fourth, AOL Time Warner is blatantly discriminating against local and regional ISPs by delaying discussions with them while engaging in active negotiations with national ISPs.

Texas.net therefore asks that the Commission take expedited action to enforce the *AOL-Time Warner Order,* require AOL Time Warner to negotiate with Texas.net, and supervise those negotiations in view of AOL Time Warner's continued refusal to negotiate with local and regional ISPs.

PETITION AND COMPLAINT

I. DESCRIPTION OF THE PARTIES

1. The Commission is well aware of the nature and structure of AOL Time Warner and its major components, AOL and Time Warner, from its recently completed review of the merger. The descriptions below of AOL and Time Warner are essentially taken from their Public Interest Statements filed with the Commission and from the Commission's findings in the *AOL-Time Warner Order*.[1]

2. The actions complained of in this petition are those of AOL Time Warner, acting by and through its affiliate Time Warner Cable. As is apparent from the description below, the cable entities involved are controlled by Time Warner Cable, a subsidiary of Time Warner, a subsidiary of AOL Time Warner. The Commission recognized this structure in the *AOL-Time Warner Order*, and was aware of the kind of coordinated action complained of herein when it expressly bound all AOL Time Warner affiliates in that Order:

> "IT IS FURTHER ORDERED that all references to AOL, Time Warner, and AOL Time Warner in this *Order* shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees, except as otherwise noted."[2]

A. AOL Time Warner

3. Pursuant to an Agreement and Plan of Merger ("Agreement") dated as of January 10, 2000, America Online, Inc. ("AOL") and Time Warner, Inc. ("Time Warner") merged with subsidiaries of a newly formed holding company, AOL Time Warner, Inc. ("AOL Time Warner") in a stock-for-stock

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1 *See generally 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*, CS Docket No. 00-30, Memorandum Opinion and Order ("*AOL-Time Warner Order*"), 16 FCC Rcd 6547 (2001), at ¶¶ 27-46.

2 *AOL-Time Warner Order*, *supra*, at ¶ 335.

transaction. At the time of the merger announcement, this was the largest corporate merger in history, noted by the Commission as being "remarkable not only for its size, but also for the nature of the companies and the assets they control."[3] The merged company accounts for more than $34 billion in annual revenues.[4]

4. As a result of the merger, both AOL and Time Warner became wholly owned subsidiaries of AOL Time Warner. Upon consummation of the merger, the ultimate ownership and control of various entities holding FCC licenses was transferred from Time Warner and AOL to the new AOL Time Warner. AOL Time Warner provides Internet access service and content over the Internet, is the world's largest Internet access provider,[5] and is a major cable system operator. At the time of the merger, through the Time Warner subsidiary, AOL Time Warner was the second largest cable provider in the country, serving 18.9% of the 67 million cable subscribers nationwide.[6] It is apparently attempting to expand through a merger of its cable operations with those of AT&T.[7]

1. AOL

5. AOL is a worldwide provider of interactive services, Web brands, Internet technologies, and electronic commerce services. AOL has four principal operating groups: Interactive Services, Interactive Properties, AOL International, and Enterprise Solutions. AOL's operations can generally be characterized as follows:

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3 *AOL-Time Warner Order*, *supra*, at ¶ 2.

4 *AOL-Time Warner Order*, *supra*, at ¶¶ 27, 36.

5 *AOL-Time Warner Order*, *supra*, at ¶¶ 8, 75.

6 *AOL-Time Warner Order*, *supra*, at ¶¶ 37, 76.

7 *AT&T and AOL Discuss a Cable Merger*, WALL STREET JOURNAL, July 26, 2001 at A3.

- *Interactive Services.* The Interactive Services Group develops and operates branded interactive services. AOL currently serves more than 28 million members worldwide through the Company's flagship AOL service (the world's largest Internet online service, serving more than 26 million members) and CompuServe (another Internet online service serving 2.8 million customers). The Interactive Services Group also includes (i) AOL's Netscape Netcenter, an Internet portal serving 20 million registered users; (ii) the AOL.com Internet portal; and (iii) the Netscape Communicator client software, including the Netscape Navigator browser. The Interactive Services Group also offers AOLTV, an advanced interactive television service, which allows access to AOL features over an interface laid over the television screens of subscribers.

- *Interactive Properties.* The Interactive Properties Group consists of an array of branded properties that operate across multiple services and platforms, including: Digital City, Inc., a local content network and community guide on the Internet; ICQ, a communications portal providing instant communications as well as chat technology; AOL MovieFone, a movie guide and ticketing service provided both through interactive telephony and online; and the company's Internet music brands, Spinner.com, WINamp and SHOUTcast, which provide online music services.

- *International.* The AOL International Group oversees the AOL and CompuServe services and joint ventures outside the United States (including Australia, Austria, Canada, France, Germany, Japan, the Netherlands, Sweden, Switzerland, and the United Kingdom), as well as the Netscape Online service in the United Kingdom. Globally, members are able to access these services in more than 100 countries. AOL owns approximately 80% of America Online Latin America.

- *Enterprise Solutions.* AOL's Enterprise Solutions Group consists primarily of the Netscape Enterprise Group, which provides businesses with a range of software products, technical support, consulting and training services, primarily in the electronic commerce infrastructure and electronic commerce solutions areas.

- *Other Ventures, Including Satellite, TV, and Telephony.* AOL also has entered into a number of ventures with other companies serving a broad range of Internet and related industries. For example, AOL has entered into a strategic alliance with Sun Microsystems, Inc. (Known as the "Sun-Netscape Alliance") to develop and market client software and network application and server software for electronic commerce, extended communities and connectivity. Similarly, AOL made a $1.5 billion investment in General Motors Corporation designed to enhance the ability of Hughes Electronics Corporation to develop and market integrated digital entertainment and Internet services through Hughes' DirecTV direct broadcast satellite service and DirecPC satellite-based broadband Internet delivery system, as well as to market AOL TV interactive television and AOL-Plus services. AOL also has made strategic investments in Internet-related companies such as Oxygen Media, iVillage, The Knot, Liberate Technologies, Multex,

Net2Phone, Preview Travel and Talk.com. Talk.com and Net2Phone offer what the Commission refers to as "telephony services."

2. *Time Warner*

6. Time Warner is a worldwide media and entertainment company. Time Warner's principal business objective is to create and distribute branded information and entertainment throughout the world. Time Warner's business interests fall into the following fundamental areas:

- *Video Programming Networks.* Time Warner holds interests in numerous national, international, and regional programming networks, consisting principally of interests in cable television programming, including TBS, TNT, Turner Classic Movies, Cartoon Network, Turner South, CNN , CNN Headline News, CNN/SI, CNNfn, Home Box Office, and the WB Network, as well as 24-hour news channels in New York City, New York; Tampa Bay, Florida; Orlando, Florida; Rochester, New York; and Austin, Texas.

- *Sports.* Through wholly owned subsidiaries of TBS, Time Warner owns the Atlanta Braves, Atlanta Hawks, and Atlanta Thrashers.

- *Publishing.* These interests consist principally of interests in magazine publishing and direct marketing, including *Time*, *People*, *Sports Illustrated*, *Money*, *Fortune*, Warner Books and Time Life Inc., as well as book-of-the-month clubs and interactive media sites.

- *Music.* These interests consist principally of interests in recorded music and music publishing, including Warner Music Group and its labels Atlantic, Elektra, Maverick Recording Co., Rhino, Sire, Warner Bros. Records and Warner Music International;[8]

- *Filmed Entertainment.* These interests consist principally of interests in filmed entertainment, television production and television broadcasting, including Warner Bros. Pictures, New Line Cinema, Castle Rock, Warner Home Video, Telepictures Distribution, and Warner Bros. Television.

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8 On January 24, 2000, Time Warner and EMI Group plc announced that they had signed definitive agreements to combine their recorded music and music publishing businesses into a global joint venture to be owned equally by Time Warner and EMI Group. The eleven-member Warner EMI Music board of directors, controlled by Time Warner, will consist of six Time Warner designees and five EMI designees. The transaction is subject to certain conditions, including regulatory consents and EMI Group shareholder approval, and was expected to be completed by the end of 2000.

- *Telephony.* Time Warner provides both business and residential telephony services through Time Warner Cable, Time Warner Telecom, Inc., and Time Warner Connect, as well as through joint marketing agreements with AT&T.

- *Internet Services.* Time Warner controls Road Runner (the nation's second largest high-speed ISP, and 13th overall), a joint venture providing high-speed Internet access and content optimized for broadband networks with more than 1.1 million subscribers, of whom more than 719,000 are served by Time Warner Cable systems.

- *Cable systems and MVPD Services.* Time Warner is the second largest cable provider in the country, serving 12.7 million subscribers, 18.9% of nationwide cable subscribers, and 15.4% of MVPD subscribers. These interests consist principally of interests in cable television systems, including Time Warner Cable. Time Warner's cable systems are held through three entities managed by Time Warner Cable: Time Warner Entertainment ("TWE"); Time Warner Entertainment – Advance/Newhouse Partnership (TWE-A/N"); and TWI Cable, Inc. ("TWI Cable). Time Warner owns 74.5% of TWE, approximately 67% of TWE-A/N, and all of TWI Cable.

3. Time Warner Cable

7. Time Warner's cable systems are held through three entities managed by Time Warner Cable: Time Warner Entertainment ("TWE"); Time Warner Entertainment – Advance/Newhouse Partnership (TWE-A/N"); and TWI Cable, Inc. ("TWI Cable). Time Warner owns 74.5% of TWE, approximately 67% of TWE-A/N, and all of TWI Cable.

8. Through Time Warner Cable and Road Runner, Time Warner and therefore AOL Time Warner provide cable service and Internet access service in several cities served by Texas.net.

B. Texas.net

9. Texas Networking, Inc. ("Texas.net") is a regional ISP unaffiliated with AOL Time Warner, and is headquartered in Austin, Texas. Texas.net provides Internet access service in Austin, Bandera, Boerne, Dallas, Dripping Springs, Georgetown, Houston, New Braunfels, San Antonio, and Spring, Texas. AOL Time Warner, through Time Warner Cable, is the incumbent cable television provider in

several of these cities.

II. BACKGROUND – THE MERGER

10. The Commission approved the merger of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") into AOL Time Warner, Inc. ("AOL Time Warner"), by allowing the transfer of certain licenses and authorizations (in particular, licenses essential to the operation of the cable systems then owned by Time Warner) on January 19, 2001. This approval was not given without some concern on the part of the Commission about the possible anticompetitive implications of the merger, and the Commission's approval was made subject to certain conditions.[9]

A. "Under Pressure" - The Merger's Dangers to Competition[10]

11. The Commission noted that the FTC, in its review of the merger, had found that the merger would harm competition in the residential Internet access marketplace and imposed conditions on the merging parties requiring them to afford access to Time Warner's cable plant to unaffiliated ISPs. The Commission had its own concerns as well, and found it necessary to impose its own conditions on the merger.

12. The Commission focused on four major potential harms in its review of the proposed merger. First and foremost among these was that:

> "the proposed merger would give AOL Time Warner the ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs' access to Time Warner cable facilities and by otherwise discriminating against unaffiliated ISPs in the rates, terms and conditions of

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9 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Licenses Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order ("*AOL-Time Warner Order*"), 16 FCC Rcd 6547 (2001).

10 Some section headings include song lyrics or titles. For the reader's convenience, the song title and artist(s) are noted. *Under Pressure*, David Bowie/Queen, 1981.

access."[11]

13. The Commission noted that, "absent mitigating conditions, the proposed merger would undermine competition in the provision of residential high-speed Internet services."[12] It found that the MOU on open access proffered by AOL and Time Warner "by itself affords insufficient protection against the potential harms to the public interest that could result from the proposed merger."[13]

B. "Stand By Me" – Protection of Unaffiliated ISPs[14]

14. Having determined that the merger as proposed, and as approved by the FTC, still offered real dangers to competition, the Commission determined to ameliorate those dangers as a condition of approving the merger.

15. The Commission elaborated upon the FTC merger conditions and the Consent Agreement entered into by AOL and Time Warner before the FTC,[15] saying:

> We are convinced that the foregoing requirements will substantially ensure that unaffiliated ISPs are able to offer their services over AOL Time Warner's cable system on non-discriminatory terms and conditions. **However, we are concerned that AOL Time Warner will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm.** We note that the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith with any unaffiliated ISP seeking access to its cable systems. **Therefore, we reiterate here that AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.** The requirements we discuss below regarding choice of ISPs, first screen, billing, technical performance, and disclosure of contracts are particularly relevant to the ability of smaller ISPs to negotiate carriage arrangements on non-discriminatory terms, and we expect that AOL Time

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11 *AOL-Time Warner Order*, *supra*, at ¶ 18.

12 *AOL-Time Warner Order*, *supra*, at ¶ 57. *See also AOL-Time Warner Order*, *supra*, at ¶ 86-88.

13 *AOL-Time Warner Order*, *supra*, at ¶ 96. The Commission also noted that the MOU was not legally enforceable. *AOL-Time Warner Order*, *supra*, at ¶ 95.

14 Stand By Me, Ben E. King, 1961.

15 *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) ("FTC Consent Agreement").

> Warner will negotiate in good faith to reach contract provisions that are consistent with the commercial viability of these entities.[16] *(Emphasis added. Footnote omitted, but detailed below.)*

16. The requirement of good faith, non-discriminatory negotiation with local and regional ISPs was significant enough in the Commission's eyes to be singled out in the Commission's Public Notice[17] and Fact Sheet[18] issued the same day.

17. Commenting upon the phrase "good faith, non-discriminatory manner," in footnote 295 to the text cited above, the Commission elaborated on the definition of "negotiate in good faith" in footnote 497 of the *AOL-Time Warner Order* (a discussion dealing with IM providers, but made applicable by footnote 295 to unaffiliated ISPs):

> By "negotiate in good faith," we mean that AOL Time Warner: (1) may not refuse to negotiate with another IM provider regarding interoperability; (2) must appoint a negotiating representative with authority to bargain and conclude an agreement on interoperability; (3) must agree to meet at reasonable times and locations and may not act in a manner that would unduly delay the course of negotiations; (4) may not put forth a single, unilateral proposal that is not subject to negotiation; (5) in responding to an offer proposed by another IM provider, must provide considered reasons for rejecting any aspects of the other provider's offer or proposal; (6) may not enter into an agreement that requires the other IM provider to interoperate exclusively with AOL Time Warner or authorizes AOL Time Warner to deny interoperability to any other IM provider; and (7) must agree to execute a written agreement that sets forth the full agreement between AOL Time Warner and the other IM provider. We add the seventh requirement to ensure that there are no misunderstandings as to the obligations of the parties to the agreement. In addition, because good faith determinations must be grounded on particular facts, we will also examine whether, based on the totality of the circumstances, AOL Time Warner has bargained in good faith. If we find that AOL Time Warner has not bargained in good faith, we will instruct AOL Time Warner to restart negotiations with the aggrieved IM provider,

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16 *AOL-Time Warner Order, supra*, at ¶ 97

17 "The Commission ... reiterated that AOL Time Warner must engage with local and regional ISPs in a good faith, nondiscriminatory manner." Public Notice FCC 01-11, located at: http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011.doc .

18 "... the FCC reiterated that AOL Time Warner must engage with local and regional ISPs in a good faith, nondiscriminatory manner." Fact Sheet, located at: http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011_fact.doc .

but will not mandate that the parties reach agreement or enter into a contract on specific terms or conditions. *Cf. Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445 (2000).][19]

18. The Commission went on to add further conditions of its own "narrowly tailored to augment [the FTC Consent Agreement] by preventing AOL Time Warner from utilizing certain indirect means to disadvantage unaffiliated ISPs on its cable systems due to their lack of affiliation."[20] It further added a series of enforcement provisions designed to ensure AOL Time Warner's compliance with the *AOL-Time Warner Order*.[21] These conditions were added because the Commission found it "necessary to impose remedial conditions to mitigate the merger's potential harms and in order to ensure that consumers enjoy the benefits the merger promises to offer."[22]

III. BACKGROUND – "NEGOTIATIONS"

19. Until recently, AOL was "the leading voice in a movement led by narrowband ISPs to compel cable operators to allow competing ISPs to provide high-speed access to the Internet over their cable systems."[23] With the AOL-Time Warner merger accomplished, however, this is no longer the case.[24] AOL's voice is now silent (or, indeed, now speaking out of the other side of its mouth), especially as it pertains to the efforts of unaffiliated ISPs to gain access to cable plant.

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19 *AOL-Time Warner Order*, *supra*, at ¶ 96, footnote 297, footnote 495.

20 *AOL-Time Warner Order*, *supra*, at ¶ 126.

21 *Id.*

22 *AOL-Time Warner Order*, *supra*, at ¶ 314.

23 *AOL-Time Warner Order*, *supra*, at ¶ 13; *see also AOL-Time Warner Order*, *supra*, at ¶ 54; *In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, AOL Comments at 12-17; *In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc, Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, AOL Comments at 30-39.

24 Pun intended.

20. The actions of AOL Time Warner, detailed below, speak louder than its words. Despite its attempts to *appear* willing to negotiate with local and regional ISPs, AOL Time Warner's actions actually demonstrate that:

- **AOL Time Warner will not actually negotiate, that is, sit down and discuss terms and conditions for access to cable plant.**
- **AOL Time Warner unduly delays negotiations.**
- **AOL Time Warner will not discuss the technical matters necessary for access to the cable plant.**
- **AOL Time Warner will not make available any contract terms, including the contract terms it has entered into with large national ISPs.**
- **AOL Time Warner Will Not Negotiate With Local and Regional ISPs Until *After* it Completes Access Arrangements With Large National ISPs.**
- **AOL Time Warner will not offer any terms at all to local and regional ISPs.**

21. Unfortunately, the Commission's reiteration of a requirement of good faith, non-discriminatory negotiations, even coupled with its added conditions and enforcement mechanism, has not been enough to ensure that AOL Time Warner actually engages in good faith non-discriminatory negotiations with unaffiliated local and regional ISPs. In fact, the record indicates clearly that AOL Time Warner is not interested in negotiating in good faith with unaffilated ISPs for access to its cable facilities. More action is needed immediately if the Commission intends to enforce its negotiation requirements.

A. "Can't You Hear Me Knocking?" - Refusal to Negotiate and Undue Delay of Negotiations[25]

22. For almost a year now, AOL Time Warner has refused to negotiate with Texas.Net over

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25 *Can't You Hear Me Knocking*, The Rolling Stones, 1971.

access to its cable plant, and has continuously unduly delayed any start of such negotiations. Beginning in August of 2000, during the pendency of the FCC's consideration of the license transfers, and continuing into 2001, Texas.net has attempted unsuccessfully to negotiate with AOL Time Warner in order to be able to offer its services over AOL Time Warner's cable system on non-discriminatory terms and conditions.[26] Texas.net's attempts to get AOL Time Warner to negotiate in good faith have been fruitless, as the attached "Timeline for Open Access Negotiations With Time Warner" shows.[27] Negotiations have been stalled a number of ways, including the refusal to discuss technical issues, the refusal to offer contract terms, and the repeated substitution of "negotiators," each of which entails new delays.

23. What limited "negotiations" Texas.net has been able to have with AOL Time Warner have, at best, been more negotiations over negotiating than negotiations over any concrete terms and conditions. In reality, they evidence AOL Time Warner's continued refusal to actually negotiate while trying to *appear* willing to negotiate.

24. A month (and four unanswered letters) went by before Time Warner Cable responded to Texas.net's original 8/25/00 request for negotiations. Delay after delay has occurred, and more time has been spent in discussing non-disclosure agreements than in any negotiations over concrete terms and conditions. A conference call finally scheduled for 11/29/00 to discuss technical interfaces was cancelled by AOL Time Warner on 11/27/00, and has never occurred. Almost four months passed before Texas.net was allowed to have its first (and only) conference call on 12/20/00 with Time Warner Cable to discuss access issues. Questions about technical issues and contract terms have gone

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26 Texas.net's negotiations with AOL Time Warner have generally been through Time Warner Cable personnel. The two, for the purposes of the "negotiations" discussed above, appear to be identical.

27 A copy is attached hereto as "Attachment A."

unanswered.

25. On 1/29/01, after being asked repeatedly for the status of new contract terms, Time Warner Cable advised Texas.net that its negotiating personnel had changed, which delayed matters again. Negotiating personnel have changed again since that date.

B. "The Letter" - More Delay, Still No Negotiations[28]

26. On 7/30/01, Texas.net was advised by a letter from Edward Schor (attached hereto as "Attachment B") that negotiating personnel had changed yet again, and that Time Warner Cable was "now ready to begin discussions." There were, however, two catches: first, that after a year of attempting to negotiate with AOL Time Warner, Texas.net *now* needs to fill out a 4-page "questionnaire" before matters can proceed; and second, that matters will proceed (that is, AOL Time Warner "will be back in touch") at ... well, some point in the future. That is, it may "take time to get back to you."

27. The questionnaire is an excellent example of AOL Time Warner's lack of interest in good faith negotiation over terms and conditions of access to its cable plant. Not only does it request information which AOL Time Warner could (had it actually been interested in the substance, rather than the appearance of negotiating) have obtained during the last year, and which it admits "duplicates what you may have previously submitted to my colleagues," *the overwhelming majority of the information requested consists of confidential and proprietary information which is more geared to giving AOL Time Warner information about its local and regional competitors than it is to assisting with negotiations over access to the cable plant.*

28. The requested information is apparently *not* subject to the confidentiality agreements on

which AOL Time Warner has spent so much time, and includes:

- *The jurisdictions in which Texas.net is authorized to do business.*
- *The names of Texas.net's principals and principal stockholders.*
- *Texas.net's network vendor for toll-free dial-up connectivity and the boundaries of that service.*
- *The geographic locations served by Texas.net.*
- *The number of Texas.net DSL modems and the vendor.*
- *The number and addresses of Texas.net's POPs.*
- *The hours during which Texas.net's tech support is available.*
- *The number of Texas.net dial-up lines.*
- *Whether Texas.net resells dial-up or DSL services from another ISP.*
- *Texas.net's pricing and average monthly number of customers for dial-up and DSL service.*
- *Texas.net's total number of employees.*
- *Texas.net's delinquent customer experience.*
- *Texas.net's current number of customers, average number of monthly customers, and churn rate.*
- *How much Texas.net plans to spend on marketing and promotion in the next 12 months.*

29. The questionnaire is not, in short, evidence of good-faith negotiation. It is, in fact, the opposite – further evidence of intent to stall any actual negotiations for as long as possible by repeatedly delaying the point at which negotiations can actually begin. This technique should be familiar to the Commission, and the Commission should act swiftly to curb its use.

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28 *The Letter*, The Box Tops, 1967; The Arbors, 1969; Joe Cocker/Leon Russell, 1971.

C. "I Hear You Knocking But You Can't Come In" - Refusal to Discuss Technical Matters[29]

30. Attempts by Texas.net to deal with technical issues have been similarly frustrated. A conference call finally scheduled for 11/29/00 to discuss technical interfaces was cancelled by AOL Time Warner on 11/27/00, and has never occurred. Time Warner Cable says that it will refuse to answer these unless submitted in writing. On 12/20/00, Time Warner Cable's negotiator informed Texas.net that Time Warner would respond only to technical questions related to their "MISP Master FAQ" which were submitted in writing.

31. However, submission of technical questions in writing is apparently not enough. Texas.net submitted a series of written technical questions to Time Warner Cable on January 3, 2001, and AOL Time Warner has to date not responded to those questions. Without those responses, little or no progress can be made in resolving technical issues.

D. "You Can't Hurry Love" - Refusal to Divulge National Contract Terms[30]

32. Texas.net is aware that AOL Time Warner has executed agreements (or agreements in principle) with at least three national ISPs (Earthlink, Juno, and High Speed Access), and was informed by AOL Time Warner on February 20, 2001 that AOL Time Warner was in active, substantive negotiations with other national ISPs. However, Texas.net has been unable, despite repeated written and oral requests for copies of agreements with large national ISPs, to get AOL Time Warner to divulge those contract terms.

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29 From *I Hear You Knocking*, Smiley Lewis, 1955.

30 *You Can't Hurry Love*, The Supremes, 1966.

E. "Hello, Hello, Hello, Is There Anybody In There?" - Refusal to Offer Terms[31]

33. AOL Time Warner has consistently failed and refused to engage in meaningful, good-faith negotiations over substantive terms with Texas.net. AOL Time Warner has made it clear that it would be fruitless for Texas.net to propose terms for AOL Time Warner's consideration, by orally indicating on several occasions before and after the FCC's approval of the merger that AOL Time Warner was not yet prepared to discuss substantive terms. Time Warner Cable has yet, despite repeated requests, to forward to Texas.net either proposed contract terms or a copy of its agreements with Earthlink (or any other national ISP).

34. After initially offering a proposed term sheet, AOL Time Warner has refused to offer any contract terms at all to Texas.net or other local and regional ISPs. Requests in January of 2001 for contract terms merely led to Texas.net being informed that negotiators had changed, and to further delays.

35. While Time Warner Cable finally (after repeated requests) represented to Texas.net on 2/20/01 that proposed contract terms would be available in March 2001, it announced on 3/12/01 that such terms, in the form of a proposed term sheet, would not be available until August, 2001. No such term sheet has been forthcoming.Texas.net has little faith, based on its record so far, that AOL Time Warner will indeed have any such terms to offer on that date.

36. The latest communication from AOL Time Warner (Attachment B) gives no ground for such faith. It demands information from Texas.net rather than offering information from AOL Time Warner, and deals with further progress in terms of "I'll be back in touch," and notes that it may "take some time to get back to you." How *much* time is still a mystery.

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31 From *Brain Damage*, Pink Floyd, 1973.

F. "The Waiting Is The Hardest Part" - Local And Regional ISPs On Hold[32]

37. Texas.net has also been told on at least two occasions by AOL Time Warner that it plans to implement "third party ISP access" some time around the end of the 3rd quarter of 2001, but that there was no guarantee that this would occur in any city in Texas. This causes Texas.net to conclude that AOL Time Warner's plan is to implement access arrangements in some locations with several national ISPs at about that time.

38. AOL Time Warner informed Texas.net on or about March 12, 2001 that AOL Time Warner would not be prepared to engage in substantive negotiations with local and/or regional ISPs until after its national contracts were approved. This necessarily means that local and regional ISPs will not be allowed access to AOL Time Warner's cable plant on commercially reasonable and viable terms until many months after AOL and several national ISPs have such access. This delay violates the duty to negotiate in good faith imposed on AOL Time Warner by the Commission and is unreasonably discriminatory. It also deprives consumers of "the benefits the merger promises to offer."

F. "Wait A Minute, Mister Postman" - Notice to AOL Time Warner[33]

39. On April 9, 2001, Texas.net sent to Time Warner Cable a "Notice of Intention to File FCC Complaint," pursuant to the enforcement section of the *AOL-Time Warner Order*.[34] A copy of that notice is attached hereto as "Attachment C." However, no meaningful good faith negotiations have occurred, and AOL Time Warner has never provided a written response to the notice.

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32 From *The Waiting*, Tom Petty and the Heartbreakers, 1981.

33 From *Please Mr. Postman*, The Marvelettes, 1961.

34 *AOL-Time Warner Order*, *supra*, at ¶ 126

IV. DISCUSSION

A. "I Don't Want To Talk About It Now" – Non-Negotiation and Delay[35]

40. In the *AOL-Time Warner Order*, the Commission noted that it feared that without some action by the Commission:

> "the proposed merger would give AOL Time Warner the ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs' access to Time Warner cable facilities and by otherwise discriminating against unaffiliated ISPs in the rates, terms and conditions of access."[36]

and

> ... AOL Time Warner's ownership rights would also empower the merged company to deal with unaffiliated ISPs requesting carriage by offering them "take it or leave it" agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably.[37]

41. The behavior of AOL Time Warner, detailed above, goes beyond the Commission's fears. It has not only failed to negotiate in good faith, it no longer even bothers to offer "take it or leave it" terms (admittedly, it did offer such terms initially, confirming the Commission's fears). It has refused to negotiate and has unduly delayed negotiations. It refuses to offer or discuss contract terms. Its negotiators change frequently and seem to have no authority to do anything more than ask for (not give) information. It refuses to discuss technical issues. It now apparently refuses to offer any terms at all, or to engage in any meaningful negotiations with Texas.net (and, presumably, other local and regional ISPs).

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35 *I Don't Want To Talk About It Now*, Emmylou Harris, 2000.

36 *AOL-Time Warner Order*, *supra*, at ¶ 18.

37 *AOL-Time Warner Order*, *supra*, at ¶ 87.

B. "Time Is On My Side" – Costs Of Delay[38]

42. At the time of the merger, the Commission noted that:

> "We are guided both by the desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later need for more onerous intervention to either regulate where competition has disappeared or to attempt to reintroduce competition once it has been eliminated."[39]

43. The Commission further noted that:

> "The record suggests that if AOL Time Warner were permitted to discriminate against unaffiliated ISPs in the terms and conditions of access to its cable network, many such ISPs would be unable to compete effectively, permitting the merged entity and its affiliated ISPs to attain a market-dominant position for residential high-speed Internet access within one to two years."[40]

44. Arguably, half of that "one to two years" has already passed, and AOL Time Warner is well on its way to a market-dominant position. The danger of the disappearance or elimination of competition is real, and time is of the essence in this case. Every day that passes during which AOL Time Warner continues to refuse to negotiate in good faith with unaffiliated ISPs over access to its cable plant increases both AOL Time Warner's share of the broadband market and the danger that real competition will be eliminated. The Commission should, therefore, act immediately to ensure that AOL Time Warner obeys its directives enunciated in the *AOL-Time Warner Order*.

C. "Short People Got No Reason To Live" – Local and Regional ISPs[41]

45. To the extent that AOL Time Warner has shown any inclination to negotiate with unaffiliated entities, this inclination has been restricted to large national ISPs. It does not extend to the smaller local

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38 *Time Is On My Side*, Irma Thomas, 1964; The Rolling Stones, 1964.

39 *AOL-Time Warner Order*, *supra*, at ¶ 15.

40 *AOL-Time Warner Order*, *supra*, at ¶ 83.

and regional ISPs that the Commission tried to protect in the Time Warner Order.[42] AOL Time Warner admits, in fact, that it will *not* negotiate with local and regional ISPs until *after* it has made deals with large national ISPs. It has clearly made no effort to do otherwise, and has steadfastly resisted efforts by Texas.net to negotiate.

46. In its discussion of public interest concerns in the *AOL-Time Warner Order*, the Commission noted the Communications Act's encouragement of "the widest possible diversity of information sources and services to the public"[43] as well the Supreme Court's finding that decentralization of information production serves values that are central to the First Amendment and its conclusion that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[44]

47. These interests are important. They are, in fact, critical indeed, and they are not served when, as in this case, it is the centralization of information production that is served by restricting business opportunities only to large national enterprises and not to local and regional entities. The Commission should act to ensure that AOL Time Warner negotiates, as the Commission has already ordered it to, with local and regional ISPs as well as with large national ISPs.

V. CONCLUSION

48. AOL Time Warner has failed to negotiate with local and regional ISPs in general, and Texas.net in particular, in a "good faith non-discriminatory manner" – or in any real manner at all. First, it has

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41 From *Short People*, Randy Newman, 1977.

42 See *AOL-Time Warner Order*, *supra*, at ¶ 97.

43 47 U.S.C. § 521(4).

44 *AOL-Time Warner Order*, *supra*, at ¶ 23, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

essentially refused to negotiate by failing to propose substantive terms and conditions that are commercially viable (or any terms at all, for that matter), and by indicating that any attempt by Texas.net to propose terms would be fruitless and ignored until AOL Time Warner was ready to negotiate. Second, the three AOL Time Warner "negotiators" have never had, and do not at present have, the authority to bargain and conclude negotiations with local and/or regional ISPs, have never offered any terms, and have never been able to bargain over terms. Third, AOL Time Warner has not agreed to meet at reasonable times, has repeatedly changed "negotiators" in a way that effectively forced a re-start of "negotiations," and has purposely acted in a manner that unduly delayed the course of negotiations. Fourth, AOL Time Warner is blatantly discriminating against local and regional ISPs by delaying discussions with them while engaging in active negotiations with national ISPs.

49. It has become abundantly clear that AOL Time Warner does not intend to negotiate in good faith with local and/or regional ISPs for commercially viable terms and conditions for access to AOL Time Warner's cable plant, and that it has simply stalled and frittered away valuable time. The unreasonable delays only serve to lengthen the time that AOL Time Warner's own broadband ISP operations have a monopoly on cable broadband access, and will certainly serve to protect AOL from meaningful competition from local and/or regional ISPs after AOL is given access to AOL Time Warner's plant. It runs the danger of ensuring that competition is eliminated at the start of the race.

50. To remedy this situation, and ensure AOL Time Warner's compliance with the AOL Time Warner Order, the Commission should order AOL Time Warner to immediately engage in good faith non-discriminatory negotiations with Texas.net. It should further ensure that those negotiations are supervised and arbitrated by Commission staff, since AOL Time Warner either will not or cannot enter into such negotiations unaided.

51. The Commission should grant relief in this case in an expedited manner, certainly taking no more than the sixty (60) days provided in the *AOL-Time Warner Order*.[45] There is, or should be, little or no dispute over the facts in this matter. Any delay only serves to lengthen the time that AOL Time Warner's own broadband ISP operations have a monopoly on cable broadband access, and will certainly serve to protect AOL from meaningful competition from local and/or regional ISPs after AOL is given access to AOL Time Warner's plant.

52. The Commission should also issue a declaratory ruling that the conduct of AOL Time Warner alleged above constitutes a violation of the *AOL-Time Warner Order*.

VI. PRAYER

Wherefore, premises considered, Texas.net prays that:

1. The Chief, Cable Services Bureau resolve this complaint under the procedure laid out in the AOL Time Warner Order;
2. The Chief, Cable Services Bureau act within sixty (60) days to sustain the complaint and order AOL Time Warner to immediately negotiate in a good faith nondiscriminatory manner with Texas.net;
3. The Chief, Cable Services Bureau order AOL Time Warner to furnish to Texas.net copies of all contracts with affiliated and unaffiliated ISPs for access to the AOL Time Warner cable plant;
4. The Chief, Cable Services Bureau order the requested negotiations to be conducted on a strict timeline, under the supervision of his staff, and be arbitrated by his staff;

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45 *AOL-Time Warner Order*, *supra*, at ¶ 126.

5. The Chief, Cable Services Bureau, issue a declaratory ruling that the conduct of AOL Time Warner alleged above violates the *AOL-Time Warner Order*.

6. The Commission and Chief, Cable Services Bureau order such other and further relief to which Texas.net may be justly entitled.

Respectfully submitted,

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By: _____
W. Scott McCollough

Attorneys for Texas Networking, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition and Complaint has been served on the following by electronic mail and/or by first class U.S. mail, properly addressed with postage prepaid, on this 9th day of August, 2001.

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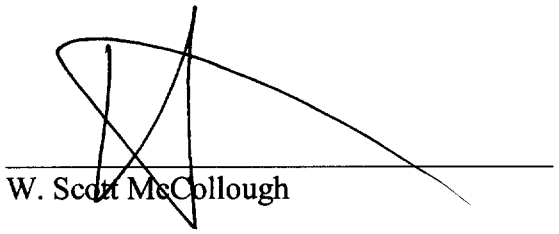

W. Scott McCollough

VERIFICATION

STATE OF TEXAS

COUNTY OF TRAVIS

I, Ronald B. Yokubaitis, do on oath depose and state that the facts contained in the foregoing document are true and correct to the best of my knowledge and belief.

SIGNATURE OF PERSON VERIFYING DOCUMENT

Name: Ronald B. Yokubaitis

Title: Chairman, Texas Networking, Inc.

SIGNED AND SWORN TO BEFORE ME THIS 1st DAY OF AUGUST, 2001.

NOTARY PUBLIC

CARMEN GARCES
NOTARY PUBLIC STATE OF TEXAS
COMMISSION EXPIRES:
MARCH 12, 2005