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.00-30
	)	
Petition for Declaratory Ruling and	)	
Complaint Regarding Violations	)	
Of Merger Conditions and for	)	
Enforcement of Merger Conditions	)	

DOCKET FILE COPY ORIGINAL

NOV 06 2001

Docket #

RECEIVED

NOV 05 2001

FCC MAIL ROOM

To: The Commission

APPLICATION FOR REVIEW OF ACTION
TAKEN PURSUANT TO DELEGATED AUTHORITY

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

November 5, 2001

No. of Copies rec'd 0+4
List ABCDE

Table Of Contents

TABLE OF CONTENTS ..... **II**

SUMMARY ..... **III**

APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED AUTHORITY **1**

I. INTRODUCTION **1**

II. BACKGROUND **2**
- A. The Complaint and Arguments 2
- B. Factors Warranting Consideration by the Commission 4

III. ARGUMENT **5**
- A. The *Order* Contains an Explicit Requirement of Good Faith Non-Discriminatory Negotiation 5
- B. The *Order's* Definition of Good Faith is Meaningless Without a Good Faith Negotiation Requirement 7
- C. The Commission's Public Pronouncements Refer to a Good Faith Negotiation Requirement 8
- D. The Explicit Addition of a Good Faith Non-Discriminatory Negotiation Requirement 11
- E. The Logical Necessity of a Good Faith Negotiation Requirement 11
- F. The Chief Cannot Reverse the Commission's *Order* 12
- G. The Commission is Bound by the *Order* 12

IV. THE NON-EXISTENCE OF GOOD FAITH NEGOTIATIONS **13**

V. CONCLUSION **13**

VI. PRAYER **14**

CERTIFICATE OF SERVICE **16**

SUMMARY

The *AOL-Time Warner Order* requires AOL Time Warner to engage in good faith non-discriminatory negotiations with unaffiliated ISPs for access to its cable plant. This is clear from the language of the Order and from the public statements of the Commission and Commissioners at the time.

The pleadings of AOL Time Warner, Inc. ("AOL Time Warner") to the Complaint filed in this matter by Texas Networking, Inc. (Texas.net"), do not refute Texas.net's showing, but essentially simply maintain that the Commission's mandate that AOL Time Warner "must engage with local and regional ISPs in a good faith, non-discriminatory manner" and the other conditions imposed by the Commission have no force and do not actually require that AOL Time Warner actually "engage with local and regional ISPs in a good faith, non-discriminatory manner."

The Chief. Cable Services Bureau, has issued an Order essentially adopting AOL Time Warner's logic. That Order should be reversed.

The Commission's language is clear, and is not, (as AOL Time Warner and apparently the Chief now maintain), devoid of meaning or practical effect. Normal principles of language construction, together with the circumstances surrounding the *AOL-Time Warner Order* and the Commission's additions to the FTC's merger order, lead one inexorably to the conclusion that the Commission deliberately created an enforceable requirement of good faith non-discriminatory negotiation in addition to the mandates imposed by the FTC. The Commission spent a fair amount of effort (literally hundreds of words) in the *AOL –Time Warner Order* doing so and in defining good faith negotiation. It thought so much of the negotiation requirements that it highlighted it in its Public Notice and Fact Sheet issued the same day. The Chairman remarked on the negotiation conditions the next day. Without a

requirement of good faith non-discriminatory negotiations, the other conditions imposed by the Commission (on the contents of contracts) make no sense at all, since no contracts will ever be made without negotiations.

The Chief, Cable Services Bureau cannot reverse the Commission's *Order* and is bound by it. Similarly, the Commission itself is bound by the *Order*, regardless of the change in makeup of the Commission or the feeling of individual Commissioners, unless it modifies or suspends the *Order*.

Since AOL Time Warner has failed to rebut Texas.net's showing that AOL Time Warner has violated the Order, the Commission should reverse and render judgment. In the alternative, it should reverse the Chief and remand.

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.00-30
	)	
Petition for Declaratory Ruling and	)	
Complaint Regarding Violations	)	
Of Merger Conditions and for	)	
Enforcement of Merger Conditions	)	

To: The Commission

APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED AUTHORITY

I. INTRODUCTION

1. Applicant Texas Networking, Inc. ("Texas.net") filed a complaint and petition for declaratory ruling alleging violations by AOL Time Warner, Inc. ("AOL Time Warner") of the *AOL-Time Warner Order.*[1]

2. AOL Time Warner has essentially admitted the basic facts alleged by Texas.net, but as to the merits of the complaint, denied that the Commission had any authority to act. AOL Time Warner maintained that the Commission's mandate in the *AOL-Time Warner Order* that AOL Time Warner

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).

"must engage with local and regional ISPs in a good faith, non-discriminatory manner"[2] and the other conditions imposed in the *AOL-Time Warner Order* were of no force or effect in requiring that AOL Time Warner *actually* "engage with local and regional ISPs in a good faith, non-discriminatory manner." In short, AOL Time Warner posited that the Commission was merely beating its breast, flapping its arms, and crowing, rather than actually doing anything, when it enunciated the requirement of good faith non-discriminatory negotiation and described in detail what it meant by good faith negotiation, and told the public that it had imposed good faith negotiation requirements on AOL Time Warner.

3. On October 4, 2001, the Chief, Cable Services Bureau ("the Chief"), acting under delegated authority, entered an order essentially agreeing with AOL Time Warner's position, finding that the language used by the Commission "lacks exactitude," but that all the Commission had done in the *AOL-Time Warner Order* was to repeat that the FTC Consent Agreement required AOL Time Warner to negotiate in good faith, and added contract conditions which would apply in the event that negotiations led to a contract.[3]

4. This finding is entirely inconsistent with the *Order* itself, the circumstances surrounding its issue, and the public statements of the Commission and individual Commissioners at the time.

II. BACKGROUND

A. The Complaint and Arguments

5. In its complaint and other pleadings, Texas.net maintained that the Commission had imposed

---

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

3 *In the Matter of Texas Networking, Inc. Petitioner Petition for Declaratory Ruling and Complaint*, CS Docket No. 00-30, Order ("*CSB Order*"), DA 01-2325 (rel. October 5 2001) at ¶¶ 6-8.

on AOL-Time Warner a requirement to negotiate in good faith with small and regional ISPs for access to its cable plant. Texas.net based its position on the following:

(a) the Commission's statement in the *AOL-Time Warner Order* that "AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner;"[4]

(b) the Commission's extensive (294 word) definition in the Order of what it meant by "negotiate in good faith;"[5]

(c) the fact that 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 statements – the Public Notice and Fact Sheet issued the same day;

(d) the addition of a more explicitly worded requirement of good-faith non-discriminatory negotiations than that adopted by the Federal Trade Commission with regional ISPs to the Commission's *Order* resulting from efforts by ISPs to work with the Commission; and

(e) the fact that without a requirement that AOL Time Warner engage in good faith non-discriminatory negotiations with unaffiliated ISPs, the additional conditions imposed at ¶¶ 126 and 316-338 of the *AOL-Time Warner Order* make no sense at all, since requiring that certain conditions apply to contracts with unaffiliated ISPs without at the same time imposing a duty to actually negotiate with unaffiliated ISPs to reach contract would be meaningless.

5. The argument made in (a) above is reinforced by the Commission's express statement in Paragraph 18 of the *Order* that it had imposed contract *and* negotiation conditions. The former are

---

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

found at ¶¶ 126 and 316-338 of the *Order*, while the latter are at ¶ 97, as discussed below.

6. The argument made in (c) above is reinforced by clear contemporaneous public statements made by Commissioners noting the negotiation requirements imposed on AOL Time Warner and discussed below.

7. The Chief disagrees with points (a) and (b) above. He fails to deal with points (c), (d), and (e) at all in his Order.

B. Factors Warranting Consideration by the Commission

8. AOL Time Warner's position, in effect, was that the Commission's words have no real meaning, and that in the Commission's discussion of the good faith negotiation requirement, and in its public statements on the matter, detailed above (the Public Notice and Fact Sheet), the Commission was simply *pretending* to impose a good faith negotiation condition without actually doing so. The Chief appears to agree.

9. The Order of the Chief, Cable Services Bureau is in conflict with case precedent and established Commission policy, as evidenced by the *AOL-Time Warner Order*. The Chief misconstrues the Commission's *Order*. The *Order*, the circumstances surrounding its issuance, and the actions of Commissioners on or about the time of the *Order's* issuance, lead inexorably to the conclusion that the Commission imposed a requirement on AOL Time Warner of good faith non-discriminatory negotiations, *and told the public it was doing so at the time*. The Order of the Chief, Common Carrier Bureau is incorrect. That Order should be reversed and set aside.

---

5 *AOL-Time Warner Order*, *supra*, at ¶ 97, footnote 297, footnote 495.

III. ARGUMENT

A. The *Order* Contains an Explicit Requirement of Good Faith Non-Discriminatory Negotiation

10. The Commission's language must be construed as if it had meaning. The Commission explicitly announced a requirement that "AOL Time Warner **must** engage with local and regional ISPs in a good faith, non-discriminatory manner."[6] The word "must" is generally regarded as mandatory – not precatory or aspirational. It is clearly mandatory in this case.

11. There is no plausible reason whatsoever for the Commission to have phrased its order in the words used unless it actually meant to order AOL Time Warner to engage in good faith non-discriminatory negotiations. A simple "has been told by the FTC to," substituted for "must," would have better served the Commission's purpose, had it simply intended to indicate that the FTC had resolved its concerns about negotiations and was the forum to resolve all merger-related complaints, as AOL Time Warner suggests.

12. Had the Commission been satisfied with the FTC's action on this point, and had it not meant to impose a duty of good faith non-discriminatory negotiation (as the Chief concludes), it would it not have bothered to say, *after* discussing the FTC merger conditions and the Consent Agreement, "[h]owever, *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.*"[7] This expression of concern prefaces, and (after a sentence noting the FTC's good faith negotiation requirements) leads directly to, the imposition of the good faith non-discriminatory negotiation condition: "Therefore, we reiterate here

---

6 *AOL-Time Warner Order*, *supra*, at ¶ 97. (Emphasis added.)

7 *Id.*

that *AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.*"[8] It is followed once again by the mandate "we expect that AOL Time Warner will negotiate in good faith."[9] The requirement of good faith non-discriminatory negotiation is clearly meant to be *in addition to* the FTC's requirement of good faith negotiation.

13. The conclusion by the Chief that this language "represents only the Commission's attempt to describe, in summary fashion, the obligations imposed by the relevant portion of the FTC Consent Agreement"[10] is insupportable. There was no necessity for the Commission to enter into such a description unless it was taking the position that the Consent Agreement resolved the problems associated with the merger – something the Commission was clearly *not* doing, especially after it had enumerated its concerns with the shortcomings of the Consent Agreement.

14. The Commission specifically noted in ¶ 18 of the *Order* that: "this *Order* conditions approval of the merger on certain conditions relating to AOL Time Warner's contracts *and negotiations* with unaffiliated ISPs."[11] The distinction between contracts and negotiations is significant. The conditions imposed by the Commission on AOL Time Warner in ¶ 126 and 316-338 of the *AOL-Time Warner Order* are *contract* conditions. The *negotiation* conditions are contained in ¶ 97 and its associated footnote.

15. The Chief's conclusions that the only conditions imposed by the Commission are those found in ¶126 of the *Order*[12] is insupportable, because these are *contract* conditions. Nothing in them

---

8 *Id.* (Emphasis added.)

9 *Id.*

10 *CSB Order, supra,* at ¶ 7.

11 *AOL-Time Warner Order*, *supra*, at ¶ 18. (Emphasis added.)

12 *CSB Order, supra,* at ¶¶ 2, 7, 8.

concerns negotiation. The Chief's conclusion flies in the face of the Commission's assertion that it had imposed *negotiation* conditions. The *negotiation* conditions noted by the Commission in ¶ 18 are those contained in ¶ 97.

B. The *Order's* Definition of Good Faith is Meaningless Without a Good Faith Negotiation Requirement

16. Had the Commission *not* meant to impose a duty of good faith nondiscriminatory negotiation on AOL Time Warner, footnote 295 of the *Order*, and its reference to the lengthy footnote 497, makes no sense at all. The Commission would not have bothered to spend 294 words (by Microsoft Word's count) explaining the meaning of "negotiate in good faith" if it were not imposing such a duty. If we read the Commission's words to have any meaning at all, as we must, it is clear that such a duty is imposed by the language in question.

17. The conclusion by the Chief that this footnote was intended to "provide some guidance as to Internet access negotiations," but that the negotiation requirements were not actually imposed by the Commission,[13] has a fatal flaw. The idea that the Commission was merely providing "some guidance as to Internet access negotiations" is completely inconsistent with the Chief's conclusion *that no negotiation requirements were imposed.* It would have made no sense at all for the Commission to gratuitously "provide some guidance as to Internet access negotiations" if it was not requiring those negotiations.

18. Similarly, the Chief's notation that the Commission did not intend to mandate that AOL Time Warner offer any ISPs access to its cable network and his reference to the Commission's declining

13 *CSB Order, supra,* at ¶ 8.

to impose "open access" conditions[14] are inapposite. First, the Commission had already noted that the FTC Consent Order required AOL Time Warner to offer and give access, a safeguard to which the Commission *added* its own negotiation and contract conditions. Second, the "open access" requirements referred to by the Commission are those requested by Consumers Union and BellSouth, are far in excess of any conditions regarding contracts or negotiation discussed in the *Order*, and had, in any case, been substantially addressed by the FTC Consent Decree.[15]

C. The Commission's Public Pronouncements Refer to a Good Faith Negotiation Requirement

19. As Texas.net has argued, the fact is that 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 and Fact Sheet issued the same day. This is wholly inconsistent with the idea that no negotiation requirement was imposed, as are the public statements of the Chairman and Commissioner Ness at the time.

20. The Public Notice is clear that a negotiation requirement was imposed:

> "The Commission ... reiterated that AOL Time Warner must engage with local and regional ISPs in a good faith, nondiscriminatory manner."[16]

21. The Fact Sheet is similarly clear that a negotiation condition was added:

> "... the FCC reiterated that AOL Time Warner must engage with local and regional ISPs in a good faith, nondiscriminatory manner."
>
> "Conditions: The FCC imposed the following conditions relating to the provision of residential high- speed Internet access over Time Warner's cable systems:
> Choice of ISPs:

---

14 *Id.*

15 *AOL-Time Warner Order*, *supra*, at ¶ 85.

16 Public Notice FCC 01-11, located at: http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011.doc .

AOL Time Warner must open its cable systems to competitor Internet Service Providers (ISPs), per the Federal Trade Commission's consent agreement."[17]

22. The Public Notice and Fact Sheet are reinforced by the public statements of Commissioners at or about the time that the *AOL-Time Warner Order* was issued.

23. It is abundantly clear from the Commission's news conference the day after the issue of the *AOL-Time Warner Order* that Chairman Kennard believed that the Commission had imposed a negotiation requirement:

> "Q: Does the ... has the FCC ... is there merger, you know, *merger conditions that say to AOL Time Warner "you must negotiate with unaffiliated ISPs"*?
>
> KENNARD: *Oh, yes, that* ... and that ... that, uh ... *condition kicks in immediately. There is a good faith negotiation requirement. That is, AOL Time Warner must negotiate with unaffiliated ISPs in good faith* to ensure that these ... um, uh ... *contractual provisions* that we care about - the direct billing relationship that we care about, for example, and the first screen - are incorporated in any contract that's entered into." (Emphasis added.)[18]

24. In other words, the Commission imposed a *negotiation requirement* designed to ensure that *contractual provisions* mandated by the Commission were incorporated into contracts. The Chairman's distinction between a *negotiation requirement* and *contractual provisions* is instructive, and echoes the Commission's words in ¶ 18 of the *Order* that: "this *Order* conditions approval of the merger on certain conditions relating to AOL Time Warner's *contracts and negotiations* with unaffiliated ISPs."[19] They also serve as a reminder that the conditions imposed by the Commission on AOL Time Warner in ¶ 126 and 316-338 of the *AOL-Time Warner Order* are *contract* conditions, while the *negotiation* conditions

---

17 Fact Sheet, located at: http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011_fact.doc.

18 News Conference, January 12, 2001, at about minute 26. Available at http://www.fcc.gov/aol_tw.html prior to the 10/9/01 update of the Commission's Web page. Still available via the Internet Archive Wayback Machine at: http://www.web.archive.org and still on (although hard to find at) the FCC site at: http://web.archive.org/web/20010607031526/http://www.fcc.gov/realaudio/pc011201.ram.

19 *AOL-Time Warner Order*, *supra*, at ¶ 18. (Emphasis added.)

are contained in ¶ 97 and its associated footnote.

25. The Chief's conclusions that the only conditions imposed by the Commission are those found in ¶126 of the *Order*[20] is insupportable, because these are *contract* conditions. It ignores the Commission's explicit statement in ¶ 18 that it had imposed *negotiation* conditions. The *negotiation* conditions noted by the Commission in ¶ 18 are those in ¶ 97.

26. Commissioner Ness had a similar understanding, as witnessed by her statements issued with and after the order, in which she clearly sees a distinction between the requirement of good faith negotiation and the specific conditions added later in the *Order*:

> "We used our technological expertise to address specific concerns created by the merger combination, including first screen access and quality of service issues. *We also require AOL Time Warner to negotiate in good faith with local and regional ISPs so that a diversity of ISPs might have an opportunity to serve cable subscribers.* These conditions operate in concert with those imposed by the FTC." (Emphasis added.)[21]

> "Bolstered by the narrowly crafted conditions we adopt today, consumers will reap the benefits of new and innovative broadband products and services stemming from the convergence of old and new media. The conditions will help jump-start interoperability between instant messaging services; enable competing ISPs to have broadband access to the Internet; and ensure that AOL Time Warner, in its good faith negotiations, takes into account the needs of small and regional ISPs."[22]

27. In short, two of the three Commissioners voting to impose conditions on the merger stated publicly that the Commission had imposed good faith negotiation requirements on AOL Time Warner. The Commission as a whole made note of the fact that it had imposed negotiation requirements in its

---

20 *CSB Order, supra,* at ¶¶ 2, 7, 8.

21 *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*"), Separate Statement of Commissioner Susan Ness, at 149 (2001). Also Press Conference, January 11, 2001.

22 Press Conference, January 11, 2001. Available at http://www.fcc.gov/aol_tw.html prior to the 10/9/01 update of the Commission's Web page. Still available via the Internet Archive Wayback Machine at: http://www.web.archive.org and still on the FCC site at:

public statements.

28. The Chief ignores these public statements in his Order, perhaps because they constitute an embarassing contradiction of his position. However, these statements must be addressed, because they flatly contradict the Chief's present position. He is in error to now find that the Commission did not impose such conditions.

D. The Explicit Addition of a Good Faith Non-Discriminatory Negotiation Requirement

29. It is significant that a delegation of Texas ISPs (including counsel for Texas.net) had visited the FTC before that Commission's action and asked for a more explicitly worded requirement of good-faith non-discriminatory negotiations with regional ISPs to be added to the FTC's merger conditions. No such addition was made. The ISP community then worked with the FCC, and more explicit wording was added in the Commission's order. Given that background, the Commission's detailed reference to such a requirement can only mean that the Commission intended to impose one itself as something additional to the FTC order.

30. This argument, like the one preceding it, is not addressed in the Chief's Order. Like the preceding argument, it must be addressed, as there is no logical way for the Chief to reach his conclusions without disposing of this argument.

E. The Logical Necessity of a Good Faith Negotiation Requirement

31. Without a requirement that AOL Time Warner engage in good faith non-discriminatory negotiations with unaffiliated ISPs, the additional contract conditions imposed at ¶¶ 126, 316-338 of

---

http://web.archive.org/web/20010620141332/www.fcc.gov/Speeches/Ness/States/2001/stsn101.html.

the *AOL-Time Warner Order* make no sense at all. What could possibly be the point of the Commission requiring that certain conditions apply to contracts with unaffiliated ISPs if the Commission did not at the same time impose a duty to actually negotiate with unaffiliated ISPs to reach contract agreements? All AOL Time Warner would have to do (and seems to have done) is to simply refuse to negotiate with unaffiliated ISPs in order to make the conditions meaningless and frustrate whatever intent the Commission may have had. AOL Time Warner's formulation of the proposition is illustrative: none of the merger order's conditions apply "[b]ecause AOLTW and Texas.net have not yet entered into a contractual agreement."[23] This may be a perfect solution from AOL Time Warner's point of view, but it would be very poor public policy.

32. Like the two arguments preceding it, this argument was not addressed in the Chief's Order, but must be addressed, since it forecloses the Chief's conclusions.

F. The Chief Cannot Reverse the Commission's *Order*

33. It is indisputable that the Commission imposed a good faith negotiation requirement on AOL Time Warner in the *Order*. The Chief's decision that it did not is, pure and simple, a reversal of the Commission's *Order*. The Chief is wholly without statutory authority to reverse the Commission.[24]

G. The Commission is Bound by the *Order*

34. The present Commission is, admittedly, primarily composed of different individuals than those who entered the Order. Nonetheless, regardless of the preferences of individual Commissioners,

---

23 AOL Time Warner Response and Opposition, at 5.

24 The Chief, like anyone else, is bound to comply with Commission orders as long as they remain in effect. 47 U.S.C. § 416(c).

the Commission is bound by its own precedent, especially its own orders,[25] and cannot simply decide that it no longer favors the approach evidenced in the *Order*, selectively ignoring some of its terms. It may modify the *Order* if it can find a procedural way to do so, or it may decide in some future case not to follow the *Order*. It cannot, however, simply decide to ignore the provisions of the *Order*. It must, therefore, reverse the Chief.

IV. THE NON-EXISTENCE OF GOOD FAITH NEGOTIATIONS

35. The actions of AOL Time Warner, detailed in Texas.net's verified complaint, speak louder than its words, especially after AOL Time Warner's unverified Response and Opposition. As noted in Texas.net's earlier pleadings, AOL Time Warner's filings fail to meet the requirements of ¶ 126 of the *AOL-Time Warner Order*, made applicable by the Public Notice of the Complaint. As noted in Texas.net's pleadings, AOL Time Warner has failed to refute Texas.net's showing that it refuses to negotiate.

36. Texas.net's factual allegations, then, must be taken as proved. That being the case, there are no facts in dispute. The Commission should, therefore, reverse the action of the Chief, Cable Services Bureau in this case and enter its own order granting the relief requested by Texas.net.

V. CONCLUSION

37. The Chief, Cable Services Bureau erred in finding that the Commission did not impose a condition of good faith, non-discriminatory negotiation with small and regional ISPs on AOL Time Warner in the *AOL-Time Warner Order*. The Commission should reverse the Chief's decision.

38. Since AOL Time Warner has not rebutted Texas.net's showings, there are no material facts in

---

25 The Commission is also bound to comply with its orders under 47 U.S.C. § 416(c), unless it has suspended or

dispute, and the Commission should render a decision in this matter granting to Texas.net the relief requested.

39. In the alternative, the Commission should reverse the Chief and remand this matter to him for factual determinations as to whether AOL Time Warner has violated the negotiation requirements of the *AOL-Time Warner Order*.

VI. PRAYER

Wherefore, premises considered, Texas.net prays that:

1. The Commission reverse the decision of the Chief, Cable Services Bureau below;
2. The Commission order AOL Time Warner to immediately negotiate in a good faith nondiscriminatory manner with Texas.net;
3. The Commission 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 Commission order the requested negotiations to be conducted on a strict timeline, under the supervision of his staff, and be arbitrated by his staff;
5. The Commission issue a declaratory ruling that the conduct of AOL Time Warner alleged above violates the *AOL-Time Warner Order*; or
6. In the alternative, the Commission reverse the decision of the Chief, Cable Services Bureau below and remand the case back to him for factual determinations as to whether AOL Time Warner has violated the negotiation requirements of the AOL-Time Warner Order, and for reconsideration in accordance with the Commission's instructions; and

---

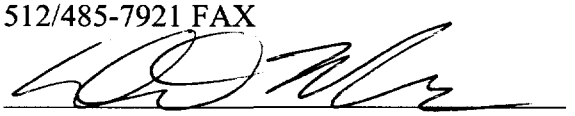
modified its orders under 47 U.S.C. § 416(b).

7. The Commission order such other and further relief to which Texas.net may be justly entitled.

Respectfully submitted,

W. Scott McCollough
Texas State Bar No. 13434100
e-mail: wsmc@aus.scmplaw.com
David Bolduc
Texas State Bar No. 02570500
e-mail: dbolduc@aus.scmplaw.com

STUMPF CRADDOCK MASSEY & PULMAN, P.C.
1801 North Lamar, Suite 104
Austin, Texas 78701
512/485-7920
512/485-7921 FAX

By: 
David Bolduc

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 2nd day of November, 2001.

W. Kenneth Feree
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street. S.W.
Washington, D.C. 20554

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street. S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street. S.W.
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Federal Communications Commission
445 12th Street. S.W.
Room CY-B402
Washington, D.C. 20554

Linda Senecal
Cable Services Bureau
Room 3-A734
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Royce Sherlock
Cable Services Bureau
Room 3-A729
Federal Communications Commission
445 12th Street. S.W.
Washington, D.C. 20554

Steven N. Teplitz
Vice President, Communications Policy
& Regulatory Affairs
AOL Time Warner, Inc.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Wayne D. Johnsen
Oren Rosenthal
Martha E. Heller
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006

David Bolduc