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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
AOL Time Warner Inc.)
)
Texas Networking, Inc.,)
Petitioner)
)
Petition for Declaratory Ruling and)
Complaint Regarding Violations)
Of Merger Conditions and for)
Enforcement of Merger Conditions)

CS Docket No. 00-30

OPPOSITION TO APPLICATION FOR REVIEW

AOL Time Warner Inc. ("AOLTW"), by its attorneys, hereby opposes the "Application for Review of Action Taken Pursuant to Delegated Authority" (the "Application for Review") filed by Texas Networking, Inc. ("Texas.net") in the above-referenced proceeding. In its Application for Review, Texas.net challenges the *Order* of the Chief of the Cable Services Bureau ("CSB" or the "Bureau")¹ dismissing its complaint against AOLTW because Texas.net had "not alleged facts that, if proven, would constitute a violation of the Internet access conditions set forth in the *Memorandum Opinion and Order*" approving the AOLTW merger.² As demonstrated

¹ *Texas Networking, Inc., Petition for Declaratory Ruling and Complaint*, CS Docket 00-30, DA 01-2325, (rel. Oct. 5, 2001) ("*Order*").

² *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*, 16 FCC Rcd 6547, ¶¶ 316-338 (2001) ("*Merger Order*").

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below, the CSB properly dismissed Texas.net's Complaint. Accordingly, Texas.net's Application for Review must be denied.

The CSB Correctly Held That Texas.net's Complaint Does Not Implicate Any Of The Conditions Imposed By The FCC In The Merger Order.

In its Complaint, Texas.net argued that the Commission's *Merger Order* includes a condition that AOLTW negotiate in good faith with local and regional ISPs, and that AOLTW failed to meet this obligation with respect to Texas.net (as well as other local and regional ISPs).³ In flatly rejecting Texas.net's arguments and dismissing its Complaint, the CSB looked carefully at the *Merger Order* and the conditions imposed by the Commission. The Bureau recognized that the "Commission imposed certain narrowly tailored Internet access conditions on AOL Time Warner"⁴ and found the "specific terms of [these] Internet access requirements set forth in Section IV.A.3 ("Conditions") of the [*Merger Order*]."⁵ As is evident from a plain reading of the *Merger Order*, and

³ *Texas.net Petition for Declaratory Relief and Complaint*, "AOL Time Warner, Inc., Texas Networking, Inc., Petition for Declaratory Ruling and Complaint Regarding Violations of Merger Conditions and for Enforcement of Merger Conditions," CS Docket No. 00-30, DA 01-2325, at 10 (filed August 9, 2001) ("Complaint")

⁴ *Order* at ¶ 2.

⁵ *Order* at ¶ 2. Specifically, the FCC's conditions obligate AOLTW to: (1) permit ISP consumers freely to select and initiate service from any unaffiliated ISP which, pursuant to a contract with AOLTW, has made its service available over AOLTW cable facilities (*i.e.*, a participating ISP); (2) allow customers to select a participating ISP by a method that does not discriminate in favor of AOLTW's affiliates on the basis of affiliation; (3) allow participating ISPs to determine the contents of their subscribers' first screen; (4) permit each ISP available via an AOLTW cable system to have a direct billing relationship with those high-speed Internet access subscribers to whom the ISP sells service; (5) include a commitment in all ISP contracts not to discriminate in technical

confirmed by the Bureau's *Order*, the "condition" Texas.net sought to enforce was not included in those provisions. The Texas.net Complaint was appropriately dismissed on this basis alone.

Texas.net's Application for Review cites to isolated passages in the *Merger Order*, the Public Notice and Fact Sheet released at the time the merger was approved, as well as comments made by some Commissioners at the time the *Merger Order* was adopted, to support its argument that the Commission imposed an additional condition not specifically enumerated in either the "Conditions" section of the *Merger Order's* "High-Speed Internet Access Services" discussion or its Ordering Clauses.⁶ These same arguments were considered, and appropriately rejected, by the Bureau.

Specifically, the Bureau's *Order* noted that the Commission considered a number of potential harms that might result from the merger, but concluded that the agreement the Federal Trade Commission ("FTC") had reached with the parties in connection with its approval of the merger largely addressed any purported concerns about the potential impact that the merger could have upon competition in the provision of high-speed Internet services.⁷ Indeed, the Commission made clear in the *Merger Order* that the terms of the FTC Consent Agreement "substantially averted" any concerns that the merger would give AOLTW the ability and incentive to discriminate against unaffiliated

system performance on the basis of affiliation; and (6) permit ISPs to disclose their contracts to the FCC on a confidential basis. *Merger Order* at ¶¶ 126, 318-323.

⁶ *Texas.net Application for Review*, "AOL Time Warner, Inc., Texas Networking, Inc., Petition for Declaratory Ruling and Complaint Regarding Violations of Merger Conditions and for Enforcement of Merger Conditions," CS Docket No. 00-30, DA 01-2325, ¶¶ 5, 8 (filed Nov. 5, 2001) ("Application for Review").

⁷ *Order* at ¶ 6.

ISPs.⁸ The CSB thus concluded that the *Merger Order*'s discussions regarding the potential ability of AOLTW to discriminate against unaffiliated ISPs were "not intended to function as an additional, independent Commission-imposed condition."⁹ Rather, the *Merger Order* imposed "narrowly tailored" conditions intended "to augment the terms in the FTC Consent Agreement, and to avoid duplication of those terms."¹⁰

Indeed, as the CSB noted, the Commission expressly concluded the discussion of the Internet service conditions imposed by the Commission by stating that the six specifically enumerated "requirements, in conjunction with the FTC Consent Agreement, adequately address the potential harms to the public interest raised by the proposed

⁸ See *Merger Order* at ¶57; see also *id.* at ¶85 ("We conclude . . . that [commenters'] concerns that AOL Time Warner would discriminate against unaffiliated ISPs] are substantially addressed by the terms of the FTC Consent Agreement."); *id.* at ¶96 ("[W]e believe that [the] FTC Consent Agreement will substantially mitigate the risk of [discrimination.]); *id.* at ¶ 103 ("We find it unnecessary to address AOL Time Warner's ability to obtain exclusive or preferential carriage rights for AOL, however, because we are satisfied that the FTC Consent Agreement adequately addresses the potential harm with which we are concerned"); *id.* at ¶122 ("[W]e are satisfied that [AOL Time Warner's incentive to withdraw support from the DSL platform in Time Warner cable areas] will be adequately ameliorated by the requirements of the FTC Consent Agreement.").

⁹ *Order* at ¶¶ 6-7; *Merger Order* at ¶¶ 85-100.

¹⁰ *Order* at n.18, citing *Merger Order* at ¶ 61. Critically, each of the six requirements are joined by the common theme that they apply only after AOLTW has decided to offer the Internet services of a specific non-affiliated ISP. This was a conscious and deliberate choice, as the Commission expressed no desire to mandate a commercial negotiation process. Instead, as made clear by the *Merger Order*, the conditions it imposed:

are not intended to require AOL Time Warner to offer any ISP connection to its cable systems, but instead to assure that *if and when the merged firm does agree to offer ISPs such connection, it does so in conformity with the requirements we delineate herein.* *Merger Order* at n.365 (emphasis added).

merger.”¹¹

Texas.net also points to the “extensive (294 word) definition” of good-faith negotiations set forth in the instant messaging portion of the *Merger Order* as proof that the Commission imposed a good-faith negotiation requirement with regard to High-Speed Internet services.¹² The CSB correctly concluded that the cross-reference to that definition “did not specifically impose the IM negotiation requirements in the Internet access context.”¹³ Not only does Texas.net fail to refute this conclusion, but Texas.net offers no rationale as to why the Commission would have attempted to impose a good faith negotiations requirement for Internet access by using a definition that is based solely on negotiations regarding interoperability of instant messaging services.

Unable to find support for its position in the text of the *Merger Order*, Texas.net argues that evidence that the Commission imposed a good faith negotiation condition can be found in the FCC’s Public Notice and Fact Sheet as well as comments made during a press conference or in separate statements. First, Texas.net has offered no support for the argument that conditions can be imposed outside the *Merger Order*.¹⁴ Second, both the Public Notice and the Fact Sheet, like the *Merger Order* itself, make clear that the Commission concluded that, with the addition of the six, explicitly enumerated

¹¹ *Order* at ¶6, citing *Merger Order* at ¶127.

¹² Application for Review at 3, 7.

¹³ *Order* at ¶ 8.

¹⁴ Ironically, Texas.net’s Application for Review cautions that the current Commission is “bound by its own precedent, especially its own orders,” and can not modify or change the conditions of the *Merger Order* absent a proper procedural mechanism. *Application for Review* at ¶¶12-13. It is Texas.net, however, that seeks to write a new condition into the *Merger Order*.

conditions,¹⁵ the FTC Consent Agreement addresses any FCC concerns regarding the potential harms of the merger.

Nor is there any merit – or logic – to Texas.net’s claim that the conditions imposed by the *Merger Order* “make no sense at all” without a Commission-imposed good-faith negotiation requirement.¹⁶ In fact, the *Merger Order* was clear that the Commission’s conditions were designed to “augment the terms in the FTC Consent Agreement.”¹⁷ As the Bureau found, however, for requirements flowing from the FTC Consent Agreement, “[t]he FTC, and not the Commission, enforces that Agreement, and has appointed a Monitor Trustee to hear concerns regarding it.”¹⁸ It clearly “makes sense” for the FCC to rely on another federal agency to enforce its own agreement. In sum, Texas.net has offered no basis for reading into the *Merger Order* a condition that does not exist.

There is, of course, no merit to Texas.net’s allegations that AOLTW failed to

¹⁵ See Public Notice at 2. After reciting language virtually identical to that set forth in Paragraph 97 of the *Merger Order*, the Public Notice states: “The Internet access conditions that the Commission adopted with regard to AOL Time Warner are as follows:” The Public Notice then goes on to list the six conditions set forth in the *Merger Order* and recited by the CSB in its *Order*. Again, it is clear in context that no other conditions were imposed by the Commission. See also Fact Sheet at 3.

¹⁶ Application for Review at 11-12.

¹⁷ *Order* at n.18, citing *Merger Order* at ¶ 61.

¹⁸ *Order* at ¶ 7. Thus, there is no need for the Commission to be concerned that AOLTW will fail to fulfill its obligations under the Consent Agreement. The FTC has been actively monitoring the status of discussions between AOLTW and non-affiliated local and regional ISPs. Pursuant to the Consent Agreement, AOLTW has been submitting monthly reports to the FTC and its Monitor Trustee, former FCC Chief Technologist Dale Hatfield.

negotiate in good faith.¹⁹ However, the Commission need not even address these arguments, because, as the Bureau found, there simply is no such requirement among the specifically enumerated conditions that the FCC imposed on the parties.²⁰ Because Texas.net did not allege—much less demonstrate—that AOLTW failed to comply with any of the specific conditions imposed by the FCC in the *Merger Order*, the Cable Services Bureau properly rejected the Texas.net Complaint.

¹⁹ In fact, TWC is currently offering consumers a choice of ISPs in 18 of its 20 largest markets, and has entered into agreements with a number of national, local and regional ISPs. Seven of these agreements are currently pending before the Federal Trade Commission. TWC continues to negotiate with other ISPs, and expects to announce additional agreements on a going forward basis.

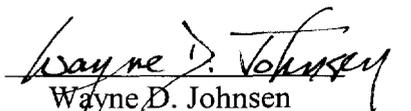
²⁰ See *Merger Order* at ¶¶126, 316-338. Nor do the FCC-imposed conditions include any obligation for AOL Time Warner to divulge its contracts with unaffiliated ISPs to Texas.net, despite Texas.net's request that the Commission impose such a requirement. See Texas.net Application for Review at 14. Rather, as noted above, the *Merger Order* merely requires that AOLTW allow other ISPs to disclose their contracts with the company to the Commission pursuant to the agency's confidentiality procedures. See *Merger Order* at ¶ 323.

Conclusion

The Cable Services Bureau correctly held that Texas.net's Complaint failed to allege a violation of any condition imposed by the *Merger Order* and the Complaint was properly dismissed. Given that there is thus no basis for granting the relief sought, AOLTW urges the Commission to deny Texas.net's Application for Review.

Respectfully submitted,

AOL TIME WARNER INC.

By: 
Wayne D. Johnsen
Oren Rosenthal
Martha E. Heller
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Steven N. Teplitz
Vice President &
Associate General Counsel
AOL Time Warner Inc.
800 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20006
202.530.7883

November 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response and Opposition has been served on the following via first class mail, properly addressed with postage prepaid, on this 20th day of November 2001.

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

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

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

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

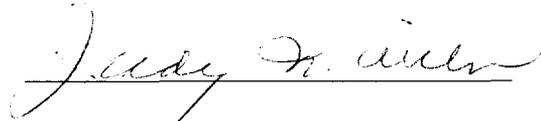
W. Kenneth Ferree*
Chief, Cable Services Bureau
445 12th Street, S.W.
Washington, DC 20554

Royce Sherlock*
Cable Services Bureau
445 12th Street, S.W.
Room 3-A729
Washington, DC 20554

Linda Senecal*
Cable Services Bureau
445 12th Street, S.W.
Room 3-A734
Washington, DC 20554

W. Scott McCollough
David Bolduc
Strumpf Craddock Massey & Pulman
1801 North Lamar Blvd.
Suite 104
Austin, TX 78701

Qualex International*
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554



Judy Wilson

* By Hand