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

CS Bureau File No.00-30

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

1. Texas Networking, Inc. ("Texas.net") filed a complaint and petition for declaratory ruling alleging violations by AOL Time Warner, Inc. ("AOLTW") of the *AOL-Time Warner Order*.<sup>1</sup> AOLTW essentially admitted the facts alleged, but claimed that the Commission's mandate that it "must engage with local and regional ISPs in a good faith, non-discriminatory manner"<sup>2</sup> and the other conditions imposed in the *Order* were of no force or effect in requiring that AOLTW *actually* "engage with local and regional ISPs in a good faith, non-discriminatory manner." In effect, AOLTW posited that the Commission misled either itself or the public when it (1) enunciated a good faith non-discriminatory negotiation requirement, (2) said it had imposed negotiation conditions, (3) described in detail what it

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 ¶ 97.

meant by good faith negotiation, and (4) told the public it had imposed good faith negotiation requirements on AOLTW.

2. The Chief, Cable Services Bureau ("the Chief") entered an order essentially agreeing with AOLTW's position, finding that all the Commission had done in the *AOL-Time Warner Order* was to repeat that the FTC Consent Agreement required AOLTW to negotiate in good faith and to add contract conditions which would apply in the event that negotiations led to a contract.<sup>3</sup> Texas.net subsequently filed an Application for Review, alleging that the Chief's finding is entirely inconsistent with the language of the *Order* itself, the circumstances surrounding its issue, and the public statements of the Commission and individual Commissioners at the time.

## II. ARGUMENT

3. In the *AOL-Time Warner Order*, the Commission imposed upon AOLTW a requirement to negotiate in good faith with small and regional ISPs for access to its cable plant. This conclusion is based upon five points, none of which the AOLTW Opposition rebuts.

4. First, the Commission specifically mandated that "AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner,"<sup>4</sup> and noted that it had imposed contract and negotiation conditions on AOLTW.<sup>5</sup> The clear difference between the *contract* conditions in ¶¶ 126 and 316-338 of the *Order* and the *negotiation* conditions in ¶ 97 clearly indicate that the Commission understood the distinction between the two, and meant to impose the latter. The AOLTW Opposition fails to address this fact, noting only that the Commission's statements are somehow

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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.

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

5 "... this *Order* conditions approval of the merger on certain conditions relating to AOL Time Warner's

obviated by an earlier statement that the FTC's Consent Agreement "substantially averted" concerns about the merger, and that the only conditions imposed were contract conditions. This argument fails to address the facts that (1) even given the Consent Agreement, the Commission still had concerns about the merger; (2) as a result, it was imposing both negotiation *and* contract conditions; and (3) AOLTW was ordered to negotiate in good faith with unaffiliated ISPs.

5. Second, the Commission's 294 word definition of "negotiate in good faith"<sup>6</sup> is meaningless unless the Commission meant to impose a good faith negotiation requirement. The AOLTW Opposition fails to rebut this fact, merely noting in passing that the definition is a reference to IM negotiation requirements. The point, however, is that the reference is an explanatory footnote to the directive "AOLTW must engage with local and regional ISPs in a good faith, non-discriminatory manner." The Chief noted that this reference indicated the Commission's intent to "provide some guidance as to Internet access negotiations."<sup>7</sup> The only reason for the reference and for the guidance provided *must* be to explain "good faith" the context of a good faith negotiation requirement, or the reference is meaningless (unless one supposes that the Commission was giving gratuitous advice on the subject of satisfying the FTC's Consent Agreement, which can hardly be the case).

6. Third, the requirement of good faith, non-discriminatory negotiation with local and regional ISPs was singled out in the Commission's contemporaneous public statements – the Public Notice<sup>8</sup> and

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contracts *and negotiations* with unaffiliated ISPs." *AOL-Time Warner Order, supra*, at ¶ 18. (Emphasis added.)

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

7 *CSB Order, supra*, at ¶ 8. This statement is clearly inconsistent with the position that no negotiation conditions were imposed.

8 "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](http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011.doc).

Fact Sheet,<sup>9</sup> as well as Commissioner Ness's statements<sup>10</sup> and Chairman Kennard's explicit public reference to a good faith negotiation condition.<sup>11</sup> It is obvious that the Commission believed, *and told the public*, that it had imposed a good faith negotiation requirement on AOL Time Warner.<sup>12</sup> The Chief's Order is silent upon this subject, and the AOLTW Opposition does not do much better, quibbling with the Fact Sheet and Public Notice, and wholly ignoring the Ness and Kennard public statements. The problem, of course, is in order to disregard the Commission's public statements one must ignore them, since there is no way to explain them away. To do otherwise would require a claim that the Commission either did not understand its own order or was misleading the public. It is clear, however, that the Commission understood its order and correctly told the public what it had done.

7. Fourth, it is clear that the addition of a more explicitly worded requirement of good faith non-discriminatory negotiations than that adopted by the FTC to the Commission's *Order* resulted from ISP efforts to work with the Commission, and is not simply a restatement of the FTC conditions. Again, the Chief's Order ignores this point, as does the AOLTW Opposition. And again, it is clear that they must do so, because there is simply no way around the facts here except to ignore them.

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9 "... 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](http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011_fact.doc).

10 "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." *AOL-Time Warner Order, supra*, Separate Statement of Commissioner Susan Ness, at 149. Also Press Conference, January 11, 2001.

11 "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.) News Conference, January 12, 2001, at about minute 26. Available at [http://www.fcc.gov/aol\\_tw.html](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>.

12 The point is not, as AOL Time Warner assumes, an argument that conditions may be added to the *AOL-Time Warner Order* by public statements. It is, rather, that the public statements clearly reveal the Commission's conclusion that the *Order* in fact contains good faith non-discriminatory negotiation conditions.

8. Fifth, without a requirement that AOLTW engage in good faith non-discriminatory negotiations with unaffiliated ISPs, the contract conditions in ¶¶ 126 and 316-338 of the *AOL-Time Warner Order* make no sense at all, since requiring that conditions apply to contracts with unaffiliated ISPs without at the same time imposing a duty to actually negotiate with them to reach a contract would be meaningless.<sup>13</sup> Once more, the Chief's Order ignores this argument. AOLTW attempts to sidestep it by claiming that it "clearly 'makes sense' for the FCC to rely on another federal agency to enforce its own agreement." In the first place, this does not answer the argument that it makes no sense to impose contract provisions if there is no obligation to negotiate to reach a contract. This makes the contract provisions a dead letter. Second, it should be noted that while AOLTW suggests that the FTC Consent Agreement contains negotiation requirements, and that the Commission can rely on the FTC to enforce them, AOLTW very carefully does not (or perhaps dares not) say that it does. The obvious explanation is that AOLTW's true position is that *no* negotiation conditions apply.

### III. CONCLUSION

6. The Chief incorrectly held that Texas.net's Complaint failed to allege violations of the *AOL-Time Warner Order*, and the Complaint was improperly dismissed. The Commission should reverse the Chief's decision and render a decision in this matter granting to Texas.net the relief requested. In the alternative, the Commission should reverse the Chief and remand this matter to him for factual determinations as to whether AOLTW has violated the negotiation requirements of the *AOL-Time Warner Order*.

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<sup>13</sup> Both the Chief and AOLTW point out that the contract conditions apply only after AOLTW has decided to offer the Internet services of non-affiliated ISPs. This conveniently ignores the facts that (1) AOLTW must do so in order to offer its own Internet services and (2) it has, in fact, decided to do so. In other words, it has long been clear that AOL would do so and it is now clear that it has done so. It should be noted, however, that there is no indication that any negotiations with local and regional unaffiliated ISPs occurred until after Texas.net filed its complaint.

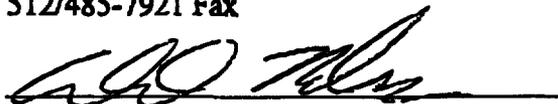
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petition and Complaint has been served on the following via courier service or first class U.S. mail, properly addressed with postage prepaid, on this 28th day of November, 2001.

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