

**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 Chief, Cable Services Bureau

REPLY

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

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September 13, 2001

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EXECUTIVE 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. The *Order* lists 8 requirements imposed by this mandate. The Complaint in this matter demonstrates that AOL Time Warner has violated at least 6 of these requirements. (In other words, it has violated every requirement that it *can* violate while refusing to sign an agreement, since two requirements govern the content of agreements.) That demonstration is not refuted.

The Response and Opposition of AOL Time Warner, Inc. (“AOL Time Warner”) to the Complaint filed in this matter by Texas Networking, Inc. (Texas.net”), does not refute Texas.net’s showing, but essentially raises only two arguments. First, AOL Time Warner maintains that the Commission’s mandate that AOL Time Warner “must engage with local and regional ISPs in a good faith, non-discriminatory manner”¹ 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 Commission’s language is clear, and is not, as AOL Time Warner maintains, 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

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

the requirement that it highlighted it in its Public Notice and Fact Sheet issued the same 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.

Second, AOL Time Warner maintains in its unverified Response, *without any alleging any supporting facts* in response to Texas.net's verified Complaint, that it has negotiated in good faith with unaffiliated ISPs, including Texas.net. It simply ignores the facts alleged by Texas.net and other Commenters that negotiations are not occurring. It cannot or will not describe those negotiations, identify their participants, indicate whether they began before or after the Complaint was filed in this matter, or tell the Commission anything that would indicate that they have actually occurred or are the kind of good faith non-discriminatory negotiations that are required. While claiming that it is willing to negotiate with Texas.net and has offered to do so, AOL Time Warner fails to rebut any of the facts offered by Texas.net to show that this is not the case. It offers as proof of its willingness to negotiate only letters that in fact indicate an *unwillingness* to negotiate, using phrases like "not currently in the position to have further discussions ... at this time," "I'll be back in touch," and "take some time to get back to you," and postpone discussions to some vague time in the future, but which never actually indicate any readiness to negotiate (or, for that matter, whether AOL Time Warner intends to negotiate with Texas.net or with some other unidentified ISP).

In short, AOL Time Warner tells the Commission that (1) the Commission should simply take AOL Time Warner's word that it is negotiating in good faith; and (2) if the Commission believes that AOL Time Warner is not negotiating in good faith, neither Texas.net nor the Commission can do anything about it.

The reality is that 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. While AOL Time Warner maintains that there is nothing the Commission can do about this, it is clear that the Commission imposed a requirement of good faith non-discriminatory negotiations with unaffiliated ISPs, and it is equally clear that this requirement is being ignored and will continue to be ignored unless enforced by the Commission.

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.

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To: The Chief, Cable Services Bureau

REPLY

I. INTRODUCTION

1. In the Response and Opposition of AOL Time Warner, Inc. ("AOL Time Warner") to the complaint filed in this matter by Texas Networking, Inc. (Texas.net"), AOL Time Warner admits the basic facts alleged by Texas.net, but as to the merits of the complaint, ignores the factual allegations and essentially admits only that the Commission issued the *AOL-Time Warner Order*.¹ Its vague allegations fail to meet the requirements of ¶ 126 of the Order, made applicable to this proceeding by the Public Notice of the Complaint.² The Response and Opposition actually raises only two arguments.
2. First, AOL Time Warner maintains that the Commission's mandate in the *AOL-Time Warner*

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).

² "... furnish a detailed report, technical or otherwise, describing the conduct or events that are the subject of the filing." *AOL-Time Warner Order, supra*, at ¶ 126.

Order that AOL Time Warner “must engage with local and regional ISPs in a good faith, non-discriminatory manner”³ and the other conditions imposed in the *AOL-Time Warner Order* are 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 posits that the Commission was merely beating its breast, flapping its arms, and crowing, rather than actually doing anything, when it reiterated the requirement of good faith non-discriminatory negotiation.

3. Second, faced with Texas.net’s recitation of AOL Time Warner’s complete failure to negotiate in good faith, AOL Time Warner simply maintains, without offering any supporting facts, that it has in fact negotiated in good faith with unaffiliated ISPs. In short, it says to the Commission “trust us.”

4. The Commission defined “negotiate in good faith” to impose eight requirements on AOL Time Warner:⁴

- (1) it may not refuse to negotiate with another provider;
- (2) it must appoint a negotiating representative with authority to bargain and conclude an agreement;
- (3) it 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) it may not put forth a single, unilateral proposal that is not subject to negotiation;
- (5) it, in responding to an offer proposed by another provider, must provide considered reasons for rejecting any aspects of the other provider's offer or proposal;
- (6) it may not enter into an agreement that requires the other provider to interoperate exclusively with AOL Time Warner or authorizes AOL Time Warner to deny interoperability to any other provider;
- (7) it must agree to execute a written agreement that sets forth the full agreement between AOL Time Warner and the other provider; and
- (8) the Commission will also examine whether, based on the totality of the circumstances, AOL Time Warner has bargained in good faith.

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

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

5. In its complaint, Texas.net has shown beyond any reasonable doubt that AOL Time Warner has violated at least six of these requirements (the other two are not violated, but only because they *cannot* be violated when their violation would require the execution of an agreement – an impossibility when one party refuses to negotiate):

- (1) *it has refused to negotiate*, in that it refuses to meet, refuses to discuss technical or financial issues, refuses to consider proposals, and refuses to offer any proposals of its own;
- (2) *it has not appointed a negotiating representative with authority to bargain and conclude an agreement*, in that none of the “negotiators” appointed so far has actually had authority to bargain or conclude an agreement – or even to actually begin negotiations;
- (3) *it has not agreed to meet at reasonable times and locations and has acted in a manner that unduly delays the course of negotiations*, in that *for more than a year*, it has steadfastly refused to meet and has constantly delayed negotiations;
- (4) *it has put forth a single, unilateral proposal that is not subject to negotiation*, in that it offered one such proposal, withdrew it, and has since refused to offer any others;
- (5) *it, in responding to an offer proposed by another provider, has not provided considered reasons for rejecting any aspects of the other provider's offer or proposal*, in that it has refused to even consider or discuss any offers or proposals; and
- (6) *based on the totality of the circumstances, AOL Time Warner has totally failed to bargain in good faith, in that it has delayed negotiations*, it will not meet, will not discuss contract terms, and will not discuss technical issues.

6. AOL Time Warner’s Response and Opposition is silent, as it must be, given its actual history, on the specifics of this issue. It *contains not a single verifiable fact* that rebuts this showing by Texas.net, relying instead on unsupported conclusory allegations.

7. This occurs while AOL Time Warner is apparently attempting to expand again through a merger of its cable operations with those of AT&T⁵ - a move that should serve to make the Commission even

5 AOL Bid for AT&T Cable Draws Rivals, Critics, WASHINGTON POST, September 10, 2001, <http://www.washingtonpost.com/wp-dyn/articles/A7044-2001Sep10.html>; AOL Makes Offer for AT&T Broadband, WALL STREET JOURNAL, September 10, 2001 at A3; AOL Time Warner Said to be Pursuing AT&T’s Cable Unit, NEW YORK TIMES, In the Matter of AOL Time Warner, Inc.
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more sensitive than it was during the original merger proceedings when it made two critical findings: “(i) that the merged company would have the incentive to discriminate against unaffiliated ISPs on its cable network and (ii) that it would have ability to do so in a manner that would undermine competition in the relevant market.”⁶

II. BACKGROUND – THE MERGER

5. In its review of the merger, the Commission elaborated upon the FTC merger conditions and the Consent Agreement entered into by AOL and Time Warner before the FTC,⁷ 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 Warner will negotiate in good faith** to reach contract provisions that are consistent with the commercial viability of these entities.⁸ (*Emphasis added. Footnote omitted, but detailed below.*)

September 9, 2001, <http://www.nytimes.com/2001/09/10/business/media/10AOL.html>; AOL bids for AT&T Broadband, CNET September 10, 2001, http://news.cnet.com/news/0-1004-200-7093224.html?tag=cd_mh; AOL Seeks Big Stake In AT&T Cable Unit, NEWSBYTES September 10, 2001, <http://www.newsbytes.com/news/01/169899.html>; AOL Reportedly Bidding for AT&T Broadband Unit, NEWSFACTOR September 10, 2001, <http://www.newsfactor.com/perl/story/13429.html>; AOL’s Clear Path to Cable Table, STANDARD, September 10, 2001, <http://www.thestandard.com/article/0,1902,28930,00.html>; AOL Time Warner eyes AT&T Broadband, USATODAY, 9/10/01, <http://www.usatoday.com/life/cyber/invest/2001/09/10/aol-eyes-att-broadband.htm>; AT&T and AOL Discuss a Cable Merger, WALL STREET JOURNAL, July 26, 2001 at A3.

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

7 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”).

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

6. 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 Notice⁹ and Fact Sheet¹⁰ issued the same day.

7. In footnote 295 to the text cited above, the Commission went to great lengths to elaborate on the definition of "negotiate in good faith" in footnote 497 (a discussion dealing with IM providers, but made applicable by footnote 295 to unaffiliated ISPs).¹¹

III. THE REQUIREMENT OF GOOD FAITH NON-DISCRIMINATORY NEGOTIATIONS

8. AOL Time Warner's position is that nothing in the *AOL-Time Warner Order* imposes any obligation upon AOL Time Warner to engage in good faith non-discriminatory negotiations with

9 "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 .

10 "... 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 .

11 Footnote 497 reads: 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, 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). (*AOL-Time Warner Order*, *supra*, n. 497.)

unaffiliated ISPs.¹² Its contention is that the Commission did not mandate that AOL Time Warner negotiate with ISPs for connection to its cable system, but simply imposed conditions that would have to be offered if and when AOL Time Warner offered such connection.¹³

9. What AOL Time Warner says, in effect, is 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.

A. The Commission's Language Clearly Includes a Requirement of Good Faith Non-Discriminatory Negotiation With Local and Regional ISPs

10. However, the Commission's language must be construed as if it had meaning, and does not easily lend itself to such a construction: "AOL Time Warner **must** engage with local and regional ISPs in a good faith, non-discriminatory manner."¹⁴ The word "must" is generally regarded as mandatory – not precatory or aspirational. It is clearly mandatory in this case.

11. Had the Commission *not* meant to impose a duty of good faith nondiscriminatory negotiation on AOL Time Warner, footnote 295 and its reference to the lengthy footnote 497 make no sense at all.

12 Response and Opposition of AOL Time Warner Inc., at i, 2, 5.

13 *Id.*, at 5. AOL Time Warner cites footnote 365 of the *AOL-Time Warner Order* as support for this proposition. However, the footnote ("not intended to require AOL Time Warner to offer any ISP connection") can more logically be read as a disclaimer, not of an intent to require good faith non-discriminatory negotiations over connection to the cable plant, but of any intent to mandate an agreement for connection, or of any intent to dictate with whom or on what terms AOL Time Warner would have to make agreements. This reading is entirely consistent with, and supported by, the remedy discussed in footnote 497: "If we find that AOL Time Warner has not negotiated in good faith, *we will instruct AOL Time Warner to restart negotiations with the aggrieved ... provider, but will not mandate that the parties reach agreement or enter into a contract with specific terms or conditions.*" (Emphasis added.)

Clearly, the Commission did not want to impose connection without allowing for the exercise of reasonable business judgment in negotiations. The difficulty in this case is that AOL Time Warner is not exercising reasonable business judgment in negotiations – it is simply refusing to negotiate.

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

Why would the Commission bother 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 meaning, as we must, it is clear that such a duty is imposed by the language in question.

12. There is no reason 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.

13. 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, 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.*"¹⁵ 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 that *AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.*"¹⁶ It is followed once again by the mandate "we expect that AOL Time Warner will negotiate in good faith."¹⁷ The requirement of good faith non-discriminatory negotiation is clearly meant to be *in addition to* the FTC's requirement of good faith negotiation.

15 *Id.*

16 *Id.*

17 *Id.*

B. The Surrounding Circumstances Clearly Indicate the Commission’s Intent to Include a Requirement of Good Faith Non-Discriminatory Negotiation With Local and Regional ISPs

14. 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.

15. Perhaps more to the point, without a requirement that AOL Time Warner engage in good faith non-discriminatory negotiations with unaffiliated ISPs, the additional conditions imposed at ¶¶ 126, 316-338 of the *AOL-Time Warner Order* make no sense at all. What could possibly be the point of the Commission requiring (as AOL Time Warner maintains it does) 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 any 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.”¹⁸ This may be a perfect solution from AOL Time Warner’s point of view, but would be very poor public policy.

18 AOL Time Warner Response and Opposition, at 5.
In the Matter of AOL Time Warner, Inc.
Reply of Texas Networking, Inc. (“Texas.net”)

IV. THE NON-EXISTENCE OF GOOD FAITH NEGOTIATIONS

16. 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 Paragraph 1 above, AOL Time Warner's filing fails to meet the requirements of ¶ 126 of the *AOL-Time Warner Order*, made applicable by the Public Notice of the Complaint. As noted in Paragraphs 4 and 5 above, AOL Time Warner has failed to refute Texas.net's showing that it refuses to negotiate.

A. The Allegations

17. Texas.net alleged in its Complaint that AOL Time Warner attempts to *appear* willing to negotiate, but in fact its actions demonstrate that:

- **AOL Time Warner will not actually negotiate, that is, sit down and discuss terms and conditions for access to its 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.**

18. Texas.net extensively detailed this failure to negotiate in its verified Complaint. The same complaints are echoed by other parties in the Comments filed in this proceeding.¹⁹ Other, more damning complaints are made by these parties as well, such as the refusal of AOL Time Warner to

¹⁹ Comments of the United States Internet Industry Association, at 4; Comment of Jerry Scroggin, Bayou Internet. In the Matter of AOL Time Warner, Inc. Reply of Texas Networking, Inc. ("Texas.net")

accept competitive advertising on its cable network.²⁰

B. AOL Time Warner's Empty Response

19. AOL Time Warner is unwilling or unable to deal with the facts alleged above. Its silence is deadening, and speaks worlds about the truth of those facts. *Nowhere* in the unverified AOL Time Warner Response and Opposition are any of Texas.net's allegations actually refuted, nor are any underlying facts offered in support of AOL Time Warner's claim that it is eager to negotiate. Instead, AOL Time Warner merely offers empty platitudes, without factual support:

- "AOLTW submits monthly reports on its discussions with ISPs to the FTC and its Monitor Trustee, former FCC Chief technologist Dale Hatfield."²¹
- "AOLTW has shown good faith in its discussions with Texas.net and many other ISPs"²²
- "Although, to date, agreements have been with national ISPs, AOLTW believes that offering local and regional ISPs is an important part of the services to be made available to consumers. To that end, AOLTW is actively discussing business arrangements with a number of local and regional ISPs and is confident that local and regional ISPs ultimately will be included in the mix of ISPs available over TWC cable systems."²³
- "Time Warner's most recent correspondence invited Texas.net to engage in substantive

20 Comments of the United States Internet Industry Association, at 5. Texas.net and other ISPs have had the same problem with AOL Time Warner.

21 AOL Time Warner Response and Opposition, at i. While Mr. Hatfield has an excellent reputation, it is never explained why undisclosed reports about undescribed discussions with unidentified ISPs, delivered to a contractor of another agency, should reassure the Commission that conditions it imposed (in excess of those imposed by the other agency) are being met.

22 *Id.* No explanation is made of how this "good faith" is manifested. Admittedly, Time Warner began some preliminary discussions with ISPs before the merger order was issued, but these were in fact in reaction to threats of litigation from Texas.net and other ISPs and to mounting pressure (from the Commission, among others) regarding Time Warner's refusals to negotiate. They also, as noted by Texas.net in its Complaint, led nowhere. *See* Paragraph 23 below.

23 *Id.*, at 12. AOL Time Warner apparently agrees with Texas.net that it has delayed negotiations with local and regional ISPs in favor of negotiations with national ISPs. It is noteworthy that in this claim of negotiations, no discussions are identified, and no name or number of ISPs are ever offered. No details are forthcoming that would substantiate that any discussions are actually taking place, whether they actually began before the filing of the Complaint in this matter, whether they are in fact progressing, or how the participants were selected.

discussions”²⁴

- “AOL Time Warner has responded to all Texas.net inquiries and has offered to engage in discussions with Texas.net.”²⁵
- “Mr. Schor sent a letter ... designed to facilitate discussions ... Mr. Schor informed Texas.net that TWC was ready to begin discussions with Texas.net.”²⁶

20. It is especially telling that *none of these allegations are verified, nor are they supported by any facts at all*. The last three of them are, in fact, demonstrably false. First, the April 26 letter contains no invitation to engage in substantive discussions. It contains, rather, a statement that AOL Time Warner is *not ready* to engage in discussions.²⁷ Second, AOL Time Warner simply ignores (without denying) the fact that AOL Time Warner, despite claiming that it would answer technical questions in writing, has never answered Texas.net’s technical questions submitted on 1/3/01.²⁸ Third, while the late July Schor letter contains the phrase “we are now ready to begin discussions with ISPs such as yourself,” the phrase is devoid of meaning.²⁹ Rather than beginning (or even offering to begin)

24 *Id.*, at ii. See footnote 25 and Paragraph 20 below for difficulties with this statement.

25 *Id.*, at 6. See Paragraph 20 below for difficulties with this statement.

26 *Id.*, at 8. Curiously, AOL Time Warner makes use of the Schor letter to claim that it is actually Texas.net which refuses to negotiate and “seeks to use regulatory processes to advance its goal of entering into a contractual relationship with TWC.” AOL Time Warner Response and Opposition, at 10. As the Commission surely understands, Texas.net is convinced that AOL Time Warner has no intention of entering into good faith non-discriminatory negotiations with it. As for the use of regulatory processes to advance contractual relationships, the accusation beggars the imagination. It seems unlikely that anyone in their right mind would think that such a course would be likely to be profitable.

27 AOL Time Warner makes much of the Time Warner April 26, 2001 letter. The letter, of course, does not contain any real offer to negotiate. It does, however, say that “it is not realistic for us to be in active negotiations at this time with every ISP that has expressed interest and with which we have had discussions,” that “[w]e are not currently in the position to have further discussions with TexasNet (*sic*) at this time,” and asks Texas.net to contact Satish Adige at the end of the summer “so that we can renew our discussions.” The letter, in short, continued to put Texas.net on hold with no reasonable expectation that any negotiations would ever begin. Adige, as Texas.net notes in its complaint, was replaced before the end of the summer in another shuffle of negotiators, none of who had any authority to actually negotiate.

28 Texas.net Complaint, at 14.

29 Texas.net does not deny that AOL Time Warner *says* it wants to negotiate. Its complaint is that AOL Time Warner does not, in fact, *actually* negotiate.

negotiations, the letter merely demands information from Texas.net rather than offering information from AOL Time Warner, 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.”* In fact, *nowhere* in the Schor letter does AOL Time Warner say that it is actually ready to begin discussions with Texas.net – it merely indicates a vague intent to begin negotiations with *someone, at some unspecified time in the future.*

21. After being unwilling or unable to refute Texas.net’s allegations, even AOL Time Warner has to admit:

“AOLTW would not be in a position to discuss local and regional ISP carriage until late August or September.”³⁰

22. In short, AOL Time Warner admits that it never intended to negotiate in good faith with local and regional ISPs for at least 7 months after the merger, and more than a year after Texas.net tried to initiate negotiations.³¹

23. Texas.net has shown conclusively that *for the past year and more,* AOL Time Warner has refused to meet, has refused to discuss contract terms, and has refused to discuss technical issues. AOL Time Warner does not even attempt to refute this showing.

C. “Trust Us”

24. What AOL Time Warner does tell the Commission is quite simple: “trust us.” This comes from an entity which the Commission has already determined:

- would have “the ability and incentive to harm consumers in the residential high-speed

30 AOL Time Warner Response and Opposition , at 7.

31 AOL Time Warner attempts to shrug this time period off by pointing out that much of this occurred prior to the merger and is, therefore, apparently, irrelevant. The relevance is that AOL Time Warner did not want to negotiate before the merger and does not want to negotiate now. It has successfully resisted opening negotiations for more than a year, achieving exactly the delay that the Commission’s order tried to prevent.

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;"³²

- would have “both the ability and the incentive to discriminate against unaffiliated ISPs and alternative (non-cable) high-speed platforms within Time Warner cable territories, and to obtain exclusive or preferential carriage for its own Internet access services from other cable providers;”³³
- would be a “company with a unique incentive and ability to thwart competition in the market for residential high-speed Internet access services -- an outcome that would undermine important national policy objectives;”³⁴
- has “already begun to contemplate using [its] potential in a manner that would render unaffiliated ISPs in that market unable to compete effectively;”³⁵
- would have “an incentive to discriminate;”³⁶ and “would also have an incentive to discriminate against unaffiliated ISPs;”³⁷
- “would have the ability to discriminate against unaffiliated ISPs;”³⁸
- “(i) ... would have the incentive to discriminate against unaffiliated ISPs on its cable network and (ii) ... would have ability to do so in a manner that would undermine competition in the relevant market.”³⁹
- and “will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm.”⁴⁰

25. The “trust us” response also comes from a firm about whom the Commission has already concluded “reports regarding the terms of carriage that Time Warner has proposed to certain unaffiliated ISPs raise doubt regarding the company’s commitment to implement the principles underlying the MOU

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

33 *Id.*, at ¶ 56. *See also id.*, at ¶¶ 61, 80.

34 *Id.*, at ¶ 81.

35 *Id.*, at ¶ 82.

36 *Id.*, at ¶ 86.

37 *Id.*

38 *Id.*, at ¶ 87.

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

40 *Id.*, at ¶ 97.

on a voluntary basis and in a manner that would avert the merger's harmful effects."⁴¹

26. Finally, the "trust us" response comes from a firm whose factual representations (see Paragraph 19 above) are misleading.

D. A Truth Test

27. A reasonably prudent person, faced with the phrase "trust us, we didn't do it" from someone accused of misbehavior, might consider a number of things:

- First, do they have an incentive to do what they're accused of?
- Second, have they done something like this before?
- Third, do they have an incentive to mislead me?
- Fourth, have they misled me in the past?
- Fifth, are there any facts from which I can conclude that they did or did not do what they're accused of doing?

28. The answers to these questions are clear in this case:

- First, as the Commission concluded in the original merger proceeding, AOL Time Warner has both the incentive and the means to suppress competition by denying access to its cable plant.
- Second, as the Commission also concluded, Time Warner has already engaged in conduct prejudicial to competition. (*See* Paragraph 25 above.)
- Third, AOL Time Warner has a definite incentive to convince the Commission that it is not refusing to negotiate in good faith, while it delays meaningful negotiations.
- Fourth, the Commission can look at the last three statements set out in Paragraph 19 above and draw its own conclusions about whether it has been misled.
- Fifth, Texas.net's verified Complaint offers facts detailing AOL Time Warner's consistent refusals to negotiate. AOL Time Warner's unverified Response and Opposition offers nothing but "trust us."

29. This is clearly a case in which the Commission should carefully adhere to the adage "trust,

41 *Id.*, at ¶ 96. *See also id.*, at ¶ 95.
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Reply of Texas Networking, Inc. ("Texas.net")

but verify.” AOL Time Warner asks it merely to “trust us,” and offers no verification. The Commission should, at the very least, not simply take AOL Time Warner’s unsupported word, but exercise its powers to determine what, if any, negotiations have occurred.

IV. CONCLUSION

30. AOL Time Warner has failed to refute the case made by Texas.net that it is violating the terms of the *AOL-Time Warner Order*. First, its case that the order does not impose any duty of good faith non-discriminatory negotiations with unaffiliated ISPs fails. It is clear that the order imposes such a duty. Second, despite AOL Time Warner’s protestations, it is clear that it has consistently refused to engage in such negotiations. It can, at best, only say over and over “trust us.”

31. The unreasonable delays from AOL Time Warner’s refusal to negotiate 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 it from meaningful competition from local and/or regional ISPs. It runs the danger of ensuring that competition is eliminated at the start of the race.

32. 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.

33. 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*.

V. 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;
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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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 13th day of September, 2001.

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Chief, Cable Services Bureau
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Washington, D.C. 20554

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Secretary
Federal Communications Commission
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