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Wayne D. Johnsen
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September 4, 2001

BY HAND

Magalie Roman Salas
Office of the Secretary
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: In the Matter of AOL Time Warner Inc. - Response and Opposition to Texas Networking, Inc. (CS Docket No. 00-30)
Client-Matter No. 78836-0006

Dear Ms. Salas:

Enclosed, please find an original and four (4) copies of AOL Time Warner Inc.'s Response and Opposition to Texas Networking, Inc.'s Petition and Complaint in CS Docket No. 00-30. Please feel free to contact me at the above number should you have any questions regarding this filing.

Thank you for your attention to this matter.

Sincerely,

Wayne D. Johnsen

Wayne D. Johnsen

WDJ/or

Enclosure

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

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SEP 4 2001

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
AOL Time Warner Inc.	)	
	)	
Texas Networking, Inc.,	)	**CS Docket No. 00-30**
Petitioner	)	
	)	
Petition for Declaratory Ruling and	)	
Complaint Regarding Violations	)	
Of Merger Conditions and for	)	
Enforcement of Merger Conditions	)	

RESPONSE AND OPPOSITION

AOL TIME WARNER INC.

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September 4, 2001

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SUMMARY

The Complaint of Texas Networking, Inc. ("Texas.net") is based on the claim that AOL Time Warner, Inc. ("AOLTW") has refused to engage in good faith negotiations and has thereby violated a condition imposed by the FCC as part of its order approving the merger of America Online, Inc. and Time Warner Inc. ("TWI"). This claim is without legal or factual merit.

As a legal matter, Texas.net invents an FCC "condition" where one simply does not exist. Neither the Ordering Clauses, which expressly set forth the conditions under which the FCC granted AOLTW authority to acquire control of various FCC authorizations,[1] nor the text of the *Merger Order* in the section captioned "Conditions,"[2] includes any reference to the condition Texas.net claims AOLTW has violated. Rather, the Commission determined that it could rely on the Consent Agreement that AOL and TWI entered into with the Federal Trade Commission ("FTC") to address concerns regarding commercial negotiations between AOLTW and non-affiliated ISPs. In fact, AOLTW submits monthly reports on its discussions with ISPs to the FTC and its Monitor Trustee, former FCC Chief Technologist Dale Hatfield.

Not only is Texas.net's Complaint legally groundless, but it is factually baseless. AOLTW has shown good faith in its discussions with Texas.net and many other ISPs

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[1] *See 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*") Paragraphs 318-324 of the *Merger Order's* Ordering Clauses relate to High-Speed Internet Access Services.

[2] *See Merger Order* Section IV. A. 3. This subsection of the *Merger Order*'s "High-Speed Internet Access Services" section is captioned "Conditions." *Merger Order* at ¶ ¶ 126 - 127.

around the country, and any suggestion to the contrary should be seen for what it is — a misguided attempt to use the regulatory process to somehow gain commercial advantage. Indeed, Time Warner Cable's most recent correspondence invited Texas.net to engage in substantive discussions. Yet, rather than responding to this invitation, Texas.net opted to file a Complaint with the Commission asking, in essence, that AOLTW be "forced" to engage in the very sort of discussions that Texas.net has refused to undertake.

Nor should the Commission be drawn in by Texas.net's implications that AOLTW is not moving toward its goal of providing consumers with a choice of multiple Internet service providers —including local and regional ISPs—over its cable systems. The facts show that AOLTW has made significant progress and is preparing for the initial launch of its multiple ISP ("MISP") initiative later this month. In sum, the Texas.net Complaint is wrong on the law, wrong on the facts, and must be dismissed or denied.

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

In the Matter of	)	
	)	
AOL Time Warner Inc.	)	
	)	
Texas Networking, Inc.,	)	**CS Docket No. 00-30**
Petitioner	)	
	)	
Petition for Declaratory Ruling and	)	
Complaint Regarding Violations	)	
Of Merger Conditions and for	)	
Enforcement of Merger Conditions	)	

RESPONSE AND OPPOSITION

AOL Time Warner Inc. ("AOLTW"), by its attorneys, hereby responds to the above captioned "Petition and Complaint" (the "Complaint") of Texas Networking, Inc. ("Texas.net"). In its Complaint, Texas.net alleges that AOLTW has violated a condition imposed by the Federal Communications Commission ("FCC" or the "Commission") as part of the Order approving the merger of America Online, Inc. ("AOL") and Time Warner Inc. ("TWI") (the "*Merger Order*") regarding the offering of multiple Internet service providers on AOLTW cable systems. Specifically, the Texas.net Complaint rests on two premises: (1) The FCC's Merger Order includes a condition that AOLTW negotiate in good faith with local and regional ISPs; and (2) AOLTW has failed to meet this obligation with respect to Texas.net (as well as other local and regional ISPs). Neither premise is correct and the Texas.net Complaint must be dismissed or denied.

I. Texas.net's Complaint Does not Implicate Any of the Conditions Imposed by the FCC in the *Merger Order*

The legal foundation of the Texas.net Complaint is based solely on its assertion that, as a condition in the *Merger Order,* the Commission imposed an obligation that AOLTW negotiate in good faith with local and regional ISPs regarding the terms and conditions pursuant to which their ISP services would be offered to Time Warner Cable subscribers.[3] A plain reading of the *Merger Order*, however, reveals that the FCC imposed no such condition and that Texas.net's Complaint is groundless.[4]

In the *Merger Order*, the Commission assessed arguments regarding the potential ability of AOLTW to discriminate against unaffiliated ISPs offered on its cable systems.[5] Although the Commission noted that the Memorandum of Understanding ("MOU") AOL and TWI executed shortly after the merger was first announced represented a "commendable statement of principles,"[6] the agency remained concerned that the MOU was, by itself, an insufficient safeguard.[7] Recognizing, however, that the Federal Trade Commission ("FTC") had reached an agreement with the parties in connection with its

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[3] Texas.net Complaint at iii; *see also* Texas.net Complaint at v, 16, 17, 22.

[4] AOLTW notes that, on August 30, 2001, the United States Internet Industry Association ("USIIA") filed comments supporting Texas.net's Complaint. Insofar as USIIA's comments address issues raised in Texas.net's Complaint, USIIA provides no additional justification for Texas.net's arguments which, as discussed herein, are without legal or factual merit. To the extent the USIIA seeks to inject additional issues not raised in the Complaint, those matters are not properly before the Commission and AOLTW will not seek to address them here.

[5] *Merger Order* at ¶ ¶ 85-100.

[6] *Merger Order* at ¶ 94.

[7] *Merger Order* at ¶ 96.

approval of the merger, the FCC determined that the FTC Consent Agreement largely addressed any purported concerns, including its own, about the potential impact that the merger could have upon competition in the provision of high-speed Internet access services. 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 ISPs, to impair the viability of alternative high-speed platforms within AOLTW territories, and to obtain preferential carriage for its own Internet access services from other cable providers.[8]

Because it found that the FTC Consent Agreement already substantially addressed its concerns, the FCC determined that it was unnecessary to impose comprehensive conditions on the merger with respect to AOLTW's provision of high speed Internet access services. Instead, the agency opted to supplement the FTC Consent Agreement by imposing a few limited conditions on the parties. As the FCC explained, its own "narrowly tailored" conditions were intended "... to augment the terms in the FTC Consent Agreement, and to avoid duplication of those terms."[9]

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[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] *Merger Order* at ¶61. The *Merger Order* does, as Texas.net notes, discuss the Commission's concern that a merged AOLTW might lack sufficient incentives to enter contracts with unaffiliated local or regional ISPs. *See Merger Order* at ¶97. It is this discussion that serves as the sole basis for Texas.net's conclusion that an FCC-imposed

Accordingly, the Commission imposed six conditions regarding AOLTW's provision of High-Speed Internet Access over TWC cable systems. 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 system performance on the basis of affiliation; and (6) permit ISPs to disclose their contracts to the FCC on a confidential basis.[10]

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good faith negotiation condition exists. However, contrary to Texas.net's claims, recognizing a potential public interest concern and noting that the FTC Consent Agreement addresses that concern cannot reasonably be interpreted as the FCC imposing its own condition. In fact, the FCC concluded that its six specifically enumerated "requirements, in conjunction with the FTC Consent Agreement, adequately address the potential harms to the public interest raised by the proposed Merger." *Id.* at ¶127. Texas.net also points to the FCC's Public Notice and Fact Sheet, released when the *Merger Order* was adopted, as offering support for its contention that the FCC imposed a good faith negotiation condition. Texas.net Complaint at 8. In fact, both the Public Notice and the Fact Sheet, like the *Merger Order* itself, make clear that the FTC Consent Agreement addresses any FCC concerns regarding the negotiation process with local and regional ISPs. *See* Fact Sheet at 3; *see also* Public Notice at 2. Nor should the Commission 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.

[10] *Merger Order* at ¶ ¶126, 318-323.

The common theme tying together each of these conditions is that they apply only after AOLTW has entered into an agreement with a specific non-affiliated ISP. This was a conscious and deliberate choice, as the Commission expressed no desire to insert itself into the commercial negotiation process. Instead, as made clear by the Commission, 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.*[11]

Because AOLTW and Texas.net have not yet entered into a contractual agreement, none of the *Merger Order's* six conditions come into play. In short, even if there were some merit to Texas.net's allegations that AOLTW has failed to negotiate in good faith (and, as discussed below, there is none), there simply is no such requirement among the specifically enumerated conditions that the FCC imposed on the parties.[12]

Accordingly, because Texas.net does not allege—much less demonstrate—that AOLTW has failed to comply with any of the specific conditions imposed by the FCC in the *Merger Order*, its Complaint should be dismissed or denied by the Commission.

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[11] *Merger Order* at n.365 (emphasis added).

[12] *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 claim that it has a right to review such contracts. *See* Texas.net Complaint at 14-15. 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.

II. AOL Time Warner Has Negotiated In Good Faith and at All Times Acted in a Reasonable Manner in Moving Steadily Toward the Goal of Providing Its Cable Customers With a Choice of Multiple ISPs

A. AOL Time Warner Has Responded to All Texas.net Inquiries and Has Offered to Engage in Discussions With Texas.net

Not only is the Texas.net Complaint legally groundless, but it is factually baseless. The Complaint erroneously seeks to portray TWC's actions with respect to Texas.net as attempts to delay unreasonably negotiations. Not only is much of Texas.net's argument based on events that occurred even prior to the approval of the merger and any possible application of the "condition" supposedly imposed by the Commission, [13] but the facts show that AOLTW has at all times been straightforward with Texas.net regarding the status of its MISP initiative and has met – if not exceeded – the timetable that it presented to Texas.net shortly after the merger was consummated.

Texas.net claims that it first requested negotiations with TWC more than four months before the Commission even issued its *Merger Order*.[14] Of course, AOL and TWI were at that time in the midst of their merger review process at the FCC and FTC, including the very terms under which AOLTW would roll-out its multiple ISP initiative. Despite this, and although TWC believed that it was premature to begin discussing

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[13] Texas.net submits a "Timeline For Open Access Negotiations With Time Warner" that purports to detail all of the communications between Texas.net and TWC. Twenty-two of the thirty-four entries reference communications prior to the adoption of the FCC's *Merger Order*. Because any FCC-imposed duty to negotiate with Texas.net could arise only after the Merger Order was adopted, Texas.net's Timeline is largely irrelevant. The fact that TWC engaged in discussions with Texas.net prior to obtaining regulatory approval demonstrates that TWC is committed, as a business matter, to a multiple ISP environment.

[14] Texas.net Complaint at 11.

definitive agreements for the provision of local and regional ISPs on TWC systems until more work had been done to understand and address a variety of technical, operational and business issues, TWC began preliminary discussions with Texas.net (as well as a number of other local and regional ISPs).[15]

After obtaining the necessary regulatory approvals and completing the merger in January 2001, changes in personnel within TWC were made, including the installation of new senior level executives specifically charged with negotiating deals with ISPs. At that time, AOLTW informed Texas.net (and other ISPs) that AOLTW would not be in a position to discuss local and regional ISP carriage until late August or early September.[16]

After TWC informed Texas.net of this timetable, Texas.net sent a "Notice of Intent to File FCC Complaint" to TWC. Contrary to Texas.net's assertion that "[n]o written response [was] ever received,"[17] TWC responded to Texas.net's Notice by letter dated April 26, 2001.[18] In that response TWC indicated that it was "working hard [through its Columbus, Ohio technical trial] to address the many technical and back-office issues raised by this new MISP environment"[19] and reiterated that it should be in a

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[15] TWC used this initial opportunity to discuss its Multiple ISP Master FAQ with Texas.net and other local and regional providers to better understand the issues involved with the provision of their services prior to any future roll-out. All of these discussions were done under standard non-disclosure agreements to protect the businesses of both TWC and companies like Texas.net. In fact, Texas.net and TWC signed a mutually binding non-disclosure agreement on October 31, 2000.

[16] Texas.net Complaint at 15.

[17] Texas.net Complaint at 16, Attachment A (p.4).

[18] *See* Letter Dated April 26, 2001 from Jeff Zimmerman to Scott McCullogh, attached hereto as Attachment A.

[19] *Id.*

position to explore a business relationship with Texas.net at the end of the summer.[20] No response from Texas.net was ever received. Indeed, Texas.net's April 9 "Notice" was the last communication TWC received from Texas.net prior to its filing of the Complaint.

In addition to pursuing the Columbus trial, and as part of its continuing commitment to provide its cable subscribers with a choice among ISPs, TWC subsequently hired Edward N. Schor, a seasoned executive with extensive experience in the media industry, to supplement existing TWC personnel already working on ISP deals and with the specific mission to focus on dealings with local and regional ISPs. Shortly after his hiring, Mr. Schor sent Texas.net a letter designed to facilitate discussions for establishing a business relationship.[21] Mr. Schor informed Texas.net that he was now the principal contact for regional and local ISPs, noted that many of the technical issues which needed to be addressed had been resolved and that, although additional technical, operational, and business issues still remained, TWC expected to launch its multiple ISP initiative in a limited number of cable divisions in the fall. Finally, Mr. Schor informed Texas.net that TWC was ready to begin discussions with Texas.net.[22]

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[20] *Id.*

[21] *See* Letter dated July 24, 2001 from Edward Schor to Ronald Yokubaitis, Attached to Texas.net's Complaint as Attachment B.

[22] Mr. Schor's letter also included a questionnaire designed to provide basic information about the companies interested in being a part of the MISP initiative. Contrary to Texas.net's assertions, this questionnaire was intended to be nothing more than a mechanism to provide TWC with information to help evaluate the companies which sought to enter into agreements with TWC. It requests basic information touching on matters related to the integrity, consumer acceptability and stability of a business and the people who run it. The questions address matters such as: (i) the legal identity of the company and the names of its principals (thereby allowing TWC to check public records for filings, lawsuits, bankruptcies and business complaints, as well as an ISP's capacity to enter into legally binding contracts); (ii) the size of the company (as an indicia of an ISP's

Yet, after claiming to have spent a year trying to engage TWC in negotiations, Texas.net not only declined to accept this offer, but it also failed to respond to TWC. Although it has now expressed concern about the scope or use of certain of the information sought by Mr. Schor generally to establish the *bona fides* of the ISPs seeking to enter into agreements,[23] Texas.net did not even attempt to call Mr. Schor at the number provided in the letter to raise questions or propose alternative means of initiating discussions. Instead, rather than entering into a dialog with TWC, Texas.net filed the instant Complaint. In doing so, it is clear that Texas.net has distanced itself from any attempt TWC made to initiate discussions regarding a business arrangement.

In sum, there is no need for the Commission to provide the "relief" sought by Texas.net in its Complaint.[24] Although Texas.net chose not to pursue discussions with

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marketing power and success); (iii) technical infrastructure, employee pool and vendor identity (to understand the organizational depth of the ISP, its financial stability and business reputation as reflected by the roster of vendors or suppliers willing to do business with it); and (iv) indicia of resources allocated to customer service and support. Although Texas.net may have earlier provided some of this information in other formats, this questionnaire, which TWC is asking all inquiring ISPs to complete, enables TWC to collect all the relevant information in a uniform format. Even with that, Texas.net was still "free to use any method" to convey the requested information. Moreover, contrary to Texas.net's assertion, the letter from Mr. Schor, in suggesting that any confidential information submitted should be so marked, conformed to the requirements of the October 31, 2000 non-disclosure agreement between the parties, which requires that any materials to be accorded confidential treatment be labeled as such.

[23] *See* Texas.net Complaint at 12.

[24] In its prayer for relief, Texas.net also asks the Commission to order that negotiations "be conducted on a strict timeline, under the supervision of [the Cable Services Bureau], and be arbitrated by [the Cable Services Bureau]." Texas.net Complaint at 21. Even if one assumed that Texas.net's interpretation of the *Merger Order* is correct, and a good faith negotiation obligation is an FCC condition, and the FCC also concluded that AOLTW violated this supposed condition, the requested relief must be rejected. As Texas.net notes, in commenting on the phrase "good faith, non-discriminatory manner," the Commission refers to a discussion relating to negotiations regarding Instant

TWC, Mr. Schor continues to stand ready to begin discussions with Texas.net once this proceeding is resolved. Indeed, while Texas.net seeks to use regulatory processes to advance its goal of entering into a contractual relationship with TWC, Mr. Schor has been speaking with other local and regional ISPs and has begun the negotiation process with a number of companies doing business in areas where TWC will begin to roll-out its multiple ISP offering.

B. AOL Time Warner Has Made Tremendous Strides in its Efforts to Provide its Cable Customers with a Choice of Internet Service Providers.

Of course, AOLTW's ongoing efforts to provide its cable subscribers with a choice among multiple ISPs consists of far more than offering to engage in discussions with Texas.net. Since even before the merger was consummated in January of 2001, AOLTW has been moving steadily and systematically toward that goal.

- February 2000 – AOL and Time Warner enter into a Memorandum of Understanding ("MOU") articulating a framework for entering into agreements designed to establish for consumers a choice of both affiliated and unaffiliated ISPs on AOLTW cable systems.

- July 2000 – TWC launches the first phase of a three phase multiple ISP trial in Columbus, Ohio to work through technical and operational issues for providing multiple ISPs. The first phase was designed to test and refine TWC's approach to providing multiple ISP services over a single cable system network. The second

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Messaging. *Id.* at 8. In that discussion, however, the Commission states "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." *Merger Order* at n. 497. Thus, the sole remedy available under the Texas.net theory would be an order to restart negotiations and there is no basis to impose FCC supervised or arbitrated negotiations. Moreover, as previously discussed, AOLTW already informed Texas.net by letter dated July 24, 2001 that it was prepared to begin such discussions.

phase was designed to test provisioning, billing and customer care over a larger group of subscribers. The third phase involved system-wide rollout of multiple ISPs in the Columbus area.

- November 2000 – Earthlink, the nation's second largest Internet services provider, and TWC reach a definitive agreement for Earthlink's broadband Internet services to be offered over TWC systems. Under the agreement, Earthlink's full package of high-speed Internet access, content, applications and functionality will be made available to homes passed by TWC's broadband-capable cable networks. The agreement marks a groundbreaking advance toward providing consumers with choice among multiple high-speed ISPs over TWC's broadband networks, and represents the cable industry's most far-reaching partnership, to date, with an unaffiliated ISP.[25]

- December 2000 – TWC restructures the Road Runner partnership, providing for an end to Road Runner's exclusivity on TWC, which was to run through the end of 2001. The restructuring clears the way for TWC to offer multiple ISPs on its systems on an accelerated basis.

- April 2001 – Juno Online Services, Inc. and TWC reach an agreement that will allow Juno's high-speed Internet services to be offered over TWC's broadband network. The agreement will make Juno's complete Internet access, content, applications and functionality available to TWC customers.

- May 2001 – High Speed Access Corp. ("HSA") and TWC reach an agreement covering the provision of HSA's high-speed Internet services to AOL Time Warner's cable subscribers.[26]

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[25] The Earthlink Agreement was approved by the FTC as part of its merger review. *See* Consent Agreement at I.Y.

[26] As part of the FTC Consent Agreement, AOLTW agreed that, in addition to Earthlink's already approved service, it would reach agreements with at least two other unaffiliated ISPs within 90 days of offering the AOL ISP service on AOLTW cable systems. On June 25, 2001, AOLTW filed a "Motion for Approval of Non-Affiliated ISPs and Alternate Cable Broadband ISP Service Agreements" with the FTC to approve the deals it has entered into with Juno and HSA. The FTC accepted public comments on the motion until July 31, 2001, and is currently considering the AOLTW motion. On August 29, 2001, AOLTW informed the FTC that it was withdrawing the portions of the motion relating to HSA. HSA informed the FTC that, in light of certain recent changes in its business, it was no longer in a position to perform the contract as a provider of broadband ISP services.

- September 2001 -- TWC expects to launch in mid-September the first commercial offering of multiple ISPs over a cable system in its Columbus, Ohio and Syracuse, New York divisions.

Contrary to Texas.net's implications that AOLTW is acting in bad faith as it works toward a multiple ISP environment, this chronology highlights the significant and demonstrable steps that have been accomplished. And while the job is not yet complete, AOLTW takes great pride in the industry-leading efforts of TWC in working through the many complex technological, operational and business issues that must be resolved in order to provide consumers with a wider array of ISP services.

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, TWC 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.

The facts show that AOLTW consistently has acted in a reasonable manner. It has been straightforward with Texas.net regarding its plans and notified Texas.net that it was in a position to begin discussions in advance of the timetable laid out earlier this year. More broadly, AOLTW set a framework for offering multiple ISPs; engaged in technical trials; negotiated agreements with three unaffiliated ISPs; filed for FTC approval of these national ISP agreements; hired a negotiator dedicated to engaging regional and local ISPs; and has in fact commenced discussions with a number of these ISPs. These facts show that TWC has acted reasonably in moving forward with its multiple ISP initiative.

III. Conclusion

In sum, Texas.net's Complaint is without a basis in law or fact. The Complaint is based solely on a "condition" that simply does not exist and the enforcement authority that it seeks to invoke is thus not available. In any event, the facts show that AOLTW not only is moving steadily forward in achieving its goal of providing its cable subscribers with a choice of multiple ISPs, but that it also had informed Texas.net that it was prepared to begin discussions. Given that undeniable fact, there is no basis for granting the Complaint. Accordingly, AOLTW submits that Texas.net's Complaint should be dismissed or denied.

Respectfully submitted,

AOL TIME WARNER INC.

By: Wayne D. Johnsen

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September 4, 2001

ATTACHMENT A

LETTER DATED APRIL 26, 2001
FROM JEFF ZIMMERMAN TO W. SCOTT MCCOLLOUGH

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Jeffrey M. Zimmerman
Assistant General Counsel

Via Facsimile (920-233-5691) & Federal Express

April 26, 2001

W. Scott McCollough, Esq.
Strumpf Craddock Massey & Pulman
1801 N. Lamar Blvd., Suite 104
Austin, TX 78701

Re: Notice of Intention to File FCC Complaint

Dear Mr. McCollough:

Your letter to Chris Bogart of April 9, 2001, on behalf of Texas Networking, Inc. ("TexasNet") has been forwarded to my attention.

Time Warner Cable's ("TWC's") goal is to provide our subscribers with a broad and varied choice of ISPs, and to do so as quickly and efficiently as possible. Indeed, we are leading the industry in this area and have made great progress on our multiple ISP ("MISP") initiative, though much more still needs to be done.

At the present time, we are still working through many of the details necessary for rollout to begin, including precisely how and in what order the MISP initiative will be launched across our divisions. As part of this, we also have an ongoing trial in Columbus, Ohio where we are working hard to address the many technical and back-office issues raised by this new MISP environment. Again, we are making very good progress there, but we still have much to accomplish.

Despite all of this continued preparatory work, we are interested in reaching agreements with a variety of national, regional, and local ISPs, and have already begun discussions with ISPs in each of these categories. Of course, in light of the factors noted above, 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 some discussions. We will continue, as our roll-out plans and technical capabilities become clearer, to make determinations about when to accelerate negotiations with particular parties. However, we are not currently in the position to have further discussions with TexasNet at this time, before we know more about the final contours and capacity of our MISP project.

We would, however, be pleased to discuss this matter with you further as our MISP project develops. If you are still interested in exploring a business relationship

(Continued)

with TWC, please contact us again at the end of the summer through Satish Adige (satish.adige@twcable.com) so that we can renew our discussions.

Sincerely,

Jeff Zimmerman

JZ/jw

Cc: Deborah Lathem
Dale Hatfield

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 4th day of September, 2001.

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Judy Wilson

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