

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

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 Docket No. 00-30

**COMMENTS OF THE
UNITED STATES INTERNET
INDUSTRY ASSOCIATION ("USIIA")**

To the Chief, Cable Services Bureau:

SUMMARY OF FILING

The US Internet Industry Association ("USIIA"), the leading national trade association of companies engaged in Internet commerce, content, and connectivity, submits these comments in support of the Petition for Declaratory Ruling and for Enforcement of Merger Conditions¹ made by Texas.Net in its filing to the Commission on August 8, 2001. USIIA further asks that the Commission address and provide relief for two violations of the Commission's Order with respect to the merger of AOL with Time Warner on behalf of Texas.Net and all other ISPs who have made good faith efforts to engage with AOL Time Warner and its customers.

STANDING

USIIA is the nation's oldest and largest trade association of competitive companies engaged in Internet commerce, content and connectivity. Its 400 members constitute a cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

USIIA members, through their annual dues and membership status, entrust the Association to represent their interests before regulatory and legislative bodies at the international, national and local levels. The Association's positions on issues represent a consensus of the opinions of its members, expressed through the USIIA Public Policy Committee, membership in which is open to all members in good standing; and through its Board of Directors, elected from among the membership. As the appointed representative of its members charged with advancing their

¹ [Http://www.texas.net/news/FCCcomplaint.PDF](http://www.texas.net/news/FCCcomplaint.PDF).

economic interests and assisting in achieving and maintaining their legal and competitive parity, USIIA has standing to file these comments.

USIIA has no financial interest in the outcome of the proceedings. The comments presented are based on a consensus of the best interests of the Internet industry and its members, and are not subject to change or withdrawal due to any contracts, agreements, competitive pressures, market valuations or corporate strategies.

STATEMENT OF FACTS AND BACKGROUND

In a Memorandum Opinion and Order released January 22, 2001, the Commission approved the merger of America Online, Inc. and Time Warner, Inc., subject to certain conditions. The Commission's Memorandum notes that while the question of discrimination against unaffiliated ISPs is largely addressed in the FTC Consent Agreement², the Commission expressed concern that AOL Time Warner would have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm

The Commission also recognized that, in the absence of such engagements, AOL Time Warner would act in concert with its affiliated ISPs to deter competition.³

² *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”).

³ *AOL-Time Warner Order*, *supra*, at ¶ 83.

On August 9, 2001, Internet Service Provider Texas.Net filed a complaint with the Cable Bureau of the Federal Communications Commission in order to provide evidence that AOL Time Warner has not entered into good-faith negotiations with Texas.Net as required by the Commission's Order.

COMMENTS OF THE USIIA

The primary requirements for good-faith negotiations are contained in the Agreement and Consent order of the Federal Trade Commission, and a Petition will be filed with that Commission as appropriate and under that Agreement.

However, the Federal Communications Commission has clearly stated that it wishes to consider and monitor the competitive aspects of the merger of AOL and Time Warner from its own perspective, and that it has reservations concerning AOL Time Warner's commitment to good faith efforts to engage with smaller ISPs. The Commission specifically reiterated the requirement for such engagements as part of its own Order

Texas.Net and other ISPs have made substantial efforts under the FCC and FTC Orders to initiate the process of negotiation in a manner that would enable them to participate in the growth of the AOL Time Warner broadband offerings, and within the one-to-two year horizon set by the Commission in the Order as the appropriate timeline for competition.⁴ These negotiations have been spurned, however, as AOL Time Warner completes its negotiations with its selected ISP partners and prepares for rollout of services.

⁴ *AOL-Time Warner Order, supra*, at ¶ 83.

Equally damaging to smaller ISPs and the public interest has been the refusal of AOL Time Warner to accept competitive advertising by ISPs on their cable network, in direct violation of the Order in its conclusions, as enumerated in Paragraph 319. Wisconsin ISP Infinity.Net and regional ISP SBC Telecom have both reported experiences in which their ads were rejected on AOL Time Warner cable networks.

CITATIONS

Relevant to the discussion are two sections of the Order that specifically relate to the petition of Texas.Net and the comments of the USIIA:

- “Therefore, we reiterate here that AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.”⁵
- “AOL Time Warner shall not prohibit ISPs from marketing their services to AOL Time Warner cable customers.”⁶

CONCLUSION

To the extent that AOL Time Warner has refused to engage with Texas.Net in a good-faith, non-discriminatory manner, AOL Time Warner should be immediately subject to a declaratory ruling that will require conformance to the requirements of the Order. In addition, AOL Time

⁵ *AOL-Time Warner Order, supra*, at ¶ 96.

⁶ *AOL-Time Warner Order, supra*, at ¶ 319.

Warner should be required to immediately initiate discussions in good faith with other ISPs interested in interconnection to the AOL Time Warner cable systems.

Further, AOL Time Warner should be subject to an immediate declaratory ruling with regard to its prohibition on marketing to AOL Time Warner cable customers by competitive ISPs, under the provisions of Paragraph 319 or the Order.

Finally, it is requested that the Commission establish and engage in appropriate relief to Texas.Net, Infinity.Net, SBC Telecommunications and other ISPs whose services have been injured and competition suppressed by AOL Time Warner's deliberate refusal to comply with the Commission's order.

If AOL Time Warner is unwilling or unable to meet its obligations under the merger agreement and Order, USIIA submits that the Commission should apply appropriate remedies up to and including the vacation of the merger agreement.

Respectfully submitted,

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