

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Texas Networking, Inc.
Petitioner
Petition for Declaratory Ruling and Complaint
CS Docket No. 00-30

ORDER

Adopted: October 4, 2001

Released: October 5, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we address a complaint and petition for declaratory ruling filed by Texas Networking, Inc. ("Texas.Net"). 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 merger conditions included requirements regarding access by unaffiliated Internet Service Providers ("ISPs") to the merged company's high speed Internet platform, and procedures by which a complaint may be filed regarding AOL Time Warner Inc.'s ("AOL Time Warner") compliance with these requirements. On August 9, 2001, Texas.Net, an ISP, filed a complaint and petition for declaratory ruling ("Texas.Net Complaint") regarding AOL Time Warner's compliance with the Internet access requirements. The United States Internet Industry Association ("USIIA") filed a comment in support of the Texas.Net complaint. For the reasons discussed below, we dismiss Texas.Net's Complaint.

II. BACKGROUND

2. In the Memorandum Opinion and Order, the Commission imposed certain narrowly tailored Internet access conditions on AOL Time Warner to supplement conditions imposed by the

1 In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc. Transferees, to AOL Time Warner, Inc., Transferee, 16 FCC Rcd 6547 (2001) ("Memorandum Opinion and Order").

2 See Memorandum Opinion and Order ¶¶ 126-127, 16 FCC Rcd at 6600-03.

3 In addition, comments were filed by Jerry Scroggin, Owner/Manager Bayou Internet, Monroe, LA, and Alex Free.

Federal Trade Commission (“FTC”) resulting from its review of the merger.⁴ The Commission stated that its conditions augmented those of the FTC “by preventing AOL Time Warner from utilizing certain indirect means to disadvantage unaffiliated ISPs on its cable systems due to their lack of affiliation.”⁵ The specific terms of the Commission’s Internet access requirements are set forth in Section IV.A.3 (“Conditions”) of the *Memorandum Opinion and Order*.⁶ These conditions require that: 1) AOL Time Warner allow customer choice of unaffiliated ISPs which, pursuant to a contract with AOL Time Warner, have made service available over AOL Time Warner’s cable facilities (“Participating ISPs”); 2) AOL Time Warner allow each Participating ISP to determine the contents of its subscribers’ first screen; 3) AOL Time Warner allow each ISP a direct billing arrangement with those high-speed Internet access subscribers to whom the ISP sells service; 4) contracts between AOL Time Warner and unaffiliated ISPs for access to Time Warner’s cable systems shall contain a clause warranting that, to the extent AOL Time Warner provides technical functions, it shall provide them in a manner that does not discriminate in favor of AOL Time Warner’s affiliated ISPs on the basis of affiliation; and 5) AOL Time Warner not enter into any contract with any ISP for connection with AOL Time Warner’s cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission’s confidentiality procedures.⁷

III. DISCUSSION

3. Texas.Net asserts the Commission required as a condition of the merger that AOL Time Warner “engage with local and regional ISPs in a good faith, non-discriminatory manner.”⁸ Texas.Net states that AOL Time Warner has failed to negotiate with it or other regional and/or local ISPs in good faith and enumerates various facts in support of this contention.⁹ Texas.Net asks that the Cable Services Bureau: 1) order AOL Time Warner to immediately negotiate in a good faith and nondiscriminatory manner with Texas.Net; 2) order AOL Time Warner to furnish Texas.Net copies of all contracts with affiliated and unaffiliated ISPs for access to the AOL Time Warner cable plant; 3) order that the requested negotiations be conducted on a strict timeline under the supervision of Cable Services Bureau staff and be

⁴ *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”).

⁵ *Memorandum Opinion and Order* ¶ 126, 16 FCC Rcd at 6600-02.

⁶ *Id.*

⁷ *Id.* The *Memorandum Opinion and Order* also included enforcement procedures for these provisions.

⁸ Texas.Net Complaint at 7 (citing *Memorandum Opinion and Order* ¶ 97, 16 FCC Rcd at 6591).

⁹ Texas.Net Complaint at 9-19. See also USIIA comments at 4-6; Alex Free comments; Jerry Scroggin comments. Specifically, Texas.Net alleges that while AOL Time Warner attempts to appear willing to negotiate with local and regional ISPs, it has continually delayed negotiations and, as a result, has not yet actually held negotiations with Texas.Net (Texas.Net Complaint at 9-14). Texas.Net also asserts that AOL Time Warner refuses to answer technical interfacing questions while asking Texas.Net to submit proprietary and confidential information (*Id.* at 12-14). Texas.Net further alleges that AOL Time Warner has refused to divulge contract terms offered to national ISPs and is reaching agreements with national ISPs while discriminating against local and/or regional ISPs by denying them the opportunity to negotiate (*Id.* at 14-19; see also USIIA Comments at 4).

arbitrated by said staff; 4) issue a declaratory ruling that the conduct of AOL Time Warner violates the *Memorandum Opinion and Order*; and 5) issue such other relief as necessary.¹⁰

4. AOL Time Warner responds that Texas.Net's complaint is legally groundless and must be dismissed or denied because it fails to implicate any conditions imposed by the Commission in the *Memorandum Opinion and Order*.¹¹ AOL Time Warner asserts that while the Commission discussed concerns regarding incentives to enter into contracts with unaffiliated local and regional ISPs for high speed Internet access over Time Warner Cable ("TWC") systems, the Commission found that its six specifically enumerated Internet access conditions, in conjunction with the FTC Consent Agreement, adequately addressed those concerns.¹² Furthermore, according to AOL Time Warner, the Commission's Internet access conditions are meant to apply only *after* AOL Time Warner has entered into an agreement with a non-affiliated ISP, and do not include a good faith negotiation requirement.¹³ Finally, AOL Time Warner asserts that the complaint is factually baseless, denying that it has acted in the manner alleged by Texas.Net.¹⁴

5. In its reply, Texas.Net asserts that if there is no good-faith negotiation requirement, then the Commission's "additional" Internet access conditions, as well as references to "good faith negotiations," make no sense.¹⁵ Texas.Net also asserts that AOL Time Warner has failed to rebut Texas.Net's contention that AOL Time Warner has refused to engage in ISP access negotiations with Texas.Net.¹⁶

6. In the *Memorandum Opinion and Order*, as noted by Texas.Net, the Commission recognized the potential for discrimination by AOL Time Warner against unaffiliated ISPs on its cable systems, including unaffiliated local and regional ISPs.¹⁷ However, the Commission found that the FTC Consent Agreement substantially addressed the potential harms. The Commission enumerated specific conditions (see section II, above) "narrowly tailored to augment the decree," and found that "these requirements, in conjunction with the FTC Consent Agreement, adequately address the potential harms to the public interest raised by the proposed merger."¹⁸

7. We note that, in the *Memorandum Opinion and Order*, the Commission also stated that "the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith with any unaffiliated

¹⁰ Texas.Net Complaint at 21-22.

¹¹ AOL Time Warner Response and Opposition ("AOL Time Warner Opposition") at 2-5.

¹² AOL Time Warner Opposition at 3-4, n. 9.

¹³ *Id.* at 3-5.

¹⁴ *Id.* at 6-9. AOL Time Warner states that it has in fact responded to all of Texas.Net's inquiries, has offered to engage in discussions with Texas.Net, and has taken significant steps towards providing its cable customers with a choice of ISPs. *Id.* at 10-12.

¹⁵ Texas.Net Reply at 6-9.

¹⁶ *Id.* at 3, 10-15.

¹⁷ Texas.Net Complaint at 7-8 (citing *Memorandum Opinion and Order* ¶ 97, 16 FCC Rcd at 6591).

¹⁸ *Memorandum Opinion and Order* ¶¶ 126-127, 16 FCC Rcd at 6600-03. *See also Memorandum Opinion and Order* ¶ 61, 16 FCC Rcd at 6570 ("[w]e have narrowly tailored these terms to augment the terms in the FTC Consent Agreement, and to avoid duplication of those terms.").

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.”¹⁹ Texas.Net asserts that this language was intended by the Commission to create a separate good-faith negotiation requirement beyond that imposed by the FTC in the Consent Agreement. We do not agree. We acknowledge that the above quoted language lacks exactitude regarding precisely what obligations AOL Time Warner bears with respect to unaffiliated regional and local ISPs. However, the quoted text represents only the Commission’s attempt to describe, in summary fashion, the obligations imposed by the relevant portion of the FTC Consent Agreement. It was not intended to function as an additional, independent Commission-imposed condition.²⁰ The FTC Consent Agreement itself must be looked to when determining its specific content. The FTC, and not the Commission, enforces that Agreement, and has appointed a Monitor Trustee to hear concerns regarding it.

8. To further support its claim, Texas.Net points to a footnote in the instant messaging (“IM”) portion of the *Memorandum Opinion and Order* that is referenced in the Internet access portion, which contains language regarding good faith negotiation.²¹ While the Commission intended that the reference to the IM portion of the *Memorandum Opinion and Order* provide some guidance as to Internet access negotiations, it did not specifically impose the IM negotiation requirements in the Internet access context. We note that the *Memorandum Opinion and Order* states that the Internet access conditions “are not intended to require AOL Time Warner to offer any ISP connection to its cable systems, but instead to ensure 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.”²²

9. In sum, we find that Texas.Net has not alleged facts that, if proven, would constitute a violation of the Internet access conditions set forth in the *Memorandum Opinion and Order*. In addition, we note that, in its comments, USIIA alleges that AOL Time Warner has violated the *Memorandum Opinion and Order* by refusing to carry the advertisements of unaffiliated ISPs.²³ Because Texas.Net did not raise this issue in its complaint it falls outside the scope of this proceeding, and therefore we do not address USIIA’s claim.

¹⁹ *Id.* ¶ 97, 16 FCC Rcd at 6591 (emphasis added).

²⁰ In ¶ 97 of the *Memorandum Opinion and Order*, the Commission notes that while the FTC Consent Agreement substantially ensures that unaffiliated ISPs are able to offer their services, the Commission remained concerned that “AOL Time Warner will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm.” However, the Commission resolved its concerns, stating that “[t]he 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.” *Id.*

²¹ Texas.Net Complaint at 8-9, citing notes 295 and 497 of the *Memorandum Opinion and Order*; Texas.Net Reply at 5-7.

²² *Memorandum Opinion and Order* 16 FCC Rcd at 6603 n. 365. See also 16 FCC Rcd at 6602 n. 363 (“we decline to mandate ‘open access’ to AOL Time Warner’s cable systems”).

²³ USIIA Comments at 5.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 309, that the Petition and Complaint of Texas Networking, Inc. is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Cable Services Bureau