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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control	)))	CS Docket No. 00-30

COMMENTS OF iCAST

I. INTRODUCTION

iCAST is a multi-media rich, online entertainment company that champions self-publishing within a personalized, community-oriented environment. iCAST empowers individuals with the tools to create, customize and share their personal entertainment passions. It offers original, user-generated and syndicated audio and video content, entertainment news, features and interviews, live and archived events, and other innovative kinds of programming.

One of iCast's most important products is the iCaster, a next generation media-player that integrates media searching with instant messaging ("IM"), chat, CD playback and related browser-based content. iCast believes that it has created a new product that will have enormous appeal to a significant customer base. iCast has designed the iCaster to empower its users to be able to send instant messages to all IM users, regardless of which IM service provider they use.

AOL, however, has decided to prevent its users from receiving messages sent via iCaster. On February 28, 2000, iCAST launched its first 2 products – iCAST.com and the iCASTER. On or about March 2, 2000, AOL blocked instant messages coming from iCASTER users. iCAST's President and CEO, Margaret Heffernan, contacted senior executives at AOL, who confirmed that this blocking had been deliberate. They expressed support "in principle" of an open IM platform, but acknowledged that it would take "an extremely long time" for such a platform to emerge. When asked whether, as a gesture of good intent, AOL could allow iCASTER to interoperate with AOL, the answer was a flat "no."

Since then, iCAST has continued to find new ways around AOL's block, which AOL has then shut off. When it was pointed out to AOL that this block hurt AOL's customers as well as iCAST's members, AOL expressed no concern.

AOL's indifference to the inability of its customers to receive messages is

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indicative of its market power. Today, AOL controls over 90% of all IM users. In erecting this wall around its own customers, AOL is seeking to perpetuate its existing dominance of the IM market. The result of that dominance will be less consumer choice, less innovation and less competition.

The FCC has to determine whether AOL's merger with Time Warner is in the public interest. As this filing demonstrates, AOL's blatant exercise of market power to maintain and enhance its dominance in the market for IM services will only be facilitated and encouraged if the Commission grants AOL's applications for transfer of control of the cable television relay ("CARS") licenses of Time Warner without addressing this problem. To prevent this emerging and important market from suffering the adverse effects of AOL's anticompetitive market dominance, the Commission must act to assure that the IM market is open and that all IM users can communicate with each other.

II. ARGUMENT

A. The IM Market Requires Openness and Interoperability to Drive Innovation

1. A critical driver of the growth of the Internet to date has been its openness.

The Internet, a critical cog in the nation's economic engine, has been based on the free flow of ideas, information, and commerce. A vital part of the success of the Internet has been people's ability to communicate with one another across a number of different platforms. Just as in the telephone market where the user of one local or long-distance service is able to talk to another regardless of what local or long-distance service that customer uses, the Internet has benefited enormously from the fact that anyone can e-mail anyone else, regardless of what internet service provider or e-mail service one uses.

E-mail is one of the fastest growing phenomenon in the history of communications. One of the primary reasons for this phenomenal growth is that an open, common standard, SMTP, was adopted by the industry to permit interoperability of the various types of e-mail software. As a result, everyone could communicate with everyone else, no matter who was providing a particular individual's e-mail service.

The Commission has recognized this openness as a key factor driving the incredible growth of the Internet. In the Office of Plans and Policy Paper entitled, *The FCC and the Unregulation of the Internet*,[1] the FCC staff studied the development of the Internet and describes a number of lessons it learned which, the staff believes, should guide government policy makers in their thinking. In reviewing the history of the Internet, the paper concludes that **"[t]he most important technical feature of the Internet is its openness, which allows any user to develop new applications to**

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[1] Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper Series No. 31, July 1999.

communicate with virtually any other user."[2]

The paper then goes on to describe that this openness is no accident; rather, it is the direct result of specific policies that favor open standards and interoperability.[3] As the paper notes:

> [T]his openness is driven by the sharing of that common communications protocol: IP, the Internet protocol, developed by early Internet pioneers. No one owns the Internet protocol, no one licenses its use, and no one restricts access to it. IP is available for all to use, and the explosion of Internet applications, from online commerce and medicine to educational and social tools, demonstrates the wide range of individuals and companies taking advantage of the openness of the Internet.[4]

This openness must be preserved if the Internet is to continue to flourish and its uses continue to expand.

2. IM has many potential new applications; in a way similar to e-mail, it will revolutionize communications.

IM is a new frontier of Internet-empowered communications. IM enables persons to communicate over the Internet in real time. People of all ages are now flocking to this new medium. They use it for business negotiations, real-time reminders, medical emergencies, or any time e-mail is not fast or direct enough. The popularity of IM will only keep spreading as it becomes available on handheld devices, wireless phones and pagers.[5]

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2 *Id.* at 5 (emphasis added).

3 *See id.*

4 *Id.*

5 In fact, AOL and Nokia recently announced plans to develop AOL's IM application for Nokia wireless devices:

> Nokia, the world's largest mobile phone manufacturer, and America Online, Inc., the world's leading interactive services company, today announced plans to develop a version of the AOL Instant Messenger(sm) (AIM) service for a variety of Nokia's wireless handheld devices.
>
> Under this agreement, America Online and Nokia will work together to develop an AOL instant messaging application that will enable live "real time" communication between users of Nokia's wireless devices and AOL's community of approximately 100 million instant-message users, anywhere, anytime. AIM users can communicate with friends, family, and colleagues on the AOL service and on the Internet.
>
> This agreement will offer users of Nokia wireless technology an additional, easy-to-use communications feature, and will help extend

The use of IM inside the iCASTER is specifically designed to provide users with the ability to communicate one-to-one as well as one-to-many simultaneously. It allows members to share entertainment together, such as sharing music and movies that they like. Numerous iCAST partners are keen to develop the application for specific industry verticals – *e.g.*, finance – so that events like earnings calls can be coordinated with private conversations between or among peers.

The growth potential for integrated applications of IM is, therefore, significant. The market demand is strong, the technology is available and there are a number of entrepreneurial companies, such as iCast, investing in new ways to use IM to meet consumers' needs. The only barrier to the explosion of new innovations and uses in the IM market is AOL's insistence that a large part of the market be off limits to other segments of the same market.

3. For IM to generate the growth of which it is capable, there must be interoperability.

It should be obvious that if a single company had been allowed to control e-mailing with a proprietary standard, the Internet would never have experienced the kind of growth it has. When a single company controls the architecture of a market, it will inevitably exercise that control to maximize its own power, rather than to benefit consumer welfare or foster innovation. As Professor Lemley of the University of California at Berkeley and Professor Lessig of Harvard University have pointed out, a company in a dominant position in a market, that is able to control the architecture of the network for the market, "can and will resist change, in order to keep doing what it knows best."[6] The Professors further note that "[a]n architecture that maximizes the opportunity for innovation maximizes innovation. An architecture that creates powerful strategic actors with control over the network and what can connect to it threatens innovation."[7]

In this case, AOL is seeking to control what (and who) can connect to its IM network. As the Professors rightly conclude, such control is not designed to stimulate growth or innovation; rather, it is designed to control market share and enhance market power.

> the AOL community's access to wireless devices. Delivery of the new application in select Nokia products in North America is expected during the second half of 2000.

Press Release, AOL and Nokia Announce Plans to Develop AOL's Popular Instant Messenger Application for Nokia Wireless Devices (available at http://media.web.aol.com).

6 Written Ex Parte of Professor Mark A. Lemley and Professor Lawrence Lessig, *In re Application for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Dkt. No. 99-251, at para. 40 (Nov. 10, 1999).

7 *Id.* at para. 43.

If IM is ever to achieve the kind of growth and innovation of which it is capable, it must be free, as telephone and e-mail communications are free, from a single dominant player that can define the architecture, determine who gets to communicate with whom, and erect walls around consumers.

B. Consumers Benefit When They Have A Choice Of Competing, But Compatible, Systems And Offerings In All Communications Products

1. Even AOL has admitted to what other businesses and the FCC know: that if one company is allowed to dominate the IM market, it will constrain the ability of consumers to have access to a wide variety of IM products and services.

The FCC has a long history of defending openess and interoperability and not allowing individual companies to close off communications markets. The Berkeley Roundtable on the International Economy, in its E-conomy Working Paper 12, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm,*[8] summarizes the FCC's policies on openess by writing: "[p]ermitting a single company to leverage its market power in pursuit of only the technology and service trajectories that serve its own commercial interests reverses three decades of policy moving toward openness. It will stifle the competition through the network structure that has fostered experimentation and user driven innovation."[9]

AOL conceded this point last summer when it started blocking users of other IM systems from communicating with its own members. At that time, AOL committed itself to work with other companies in the industry to create a common standard of interoperability.[10] AOL CEO Steve Case even agreed that "users should be able to exchange messages regardless of which product they use - like they do with e-mail or telephone."[11]

Unfortunately, AOL's actions belie CEO Case's principles. AOL has not actively participated in the industry standard setting process and it continues to block others from communicating with its members. As industry analyst Rob Enderle noted "[c]urrently, AOL's fight to delay the vendor independent standards effort is unprecedented. They

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8 The Berkeley Roundtable on the International Economy, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*, E-conomy Working Paper 12, Aug. 1999.

9 *Id.* at 11.

10 *See* Rajiv Chandrasekaran, *AOL Supports Standard for Internet Messaging*, Wash. Post, July 30, 1999, at E01.

11 *See Hearing on The AOL/Time Warner Merger,* Senate Commerce Committee "America Online's Support for Interoperability," a fact sheet distributed by AOL to staff members of Senate Commerce Committee (Mar. 2, 2000).

have gone as far as to disconnect customers, including their own."[12]

And in recent months, AOL has distanced itself from even a putative commitment to interoperability though standard-setting. Instead, AOL has taken the position that it will allow interoperability only by contract - that is, through individual licensing agreements in which companies pay AOL for the right to deploy software allowing their customers to exchange instant messages with AOL subscribers.

Citing several recent licensing agreements, not long ago Case recently told the *Washington Post* that his objective is a global IM network in which IM software compatible with AOL's would have to be "licensed or approved by us."[13] AOL's inaction in working toward an industry standard, and its actions in blocking communications hurts its own members, hurts economic growth and innovation and prevents consumers from becoming sovereign in the marketplace.

2. Consumers want the freedom to make their own IM choices based on features available from alternative vendors.

The IM market has already developed a number of different choices in terms of functionality. For example, the makers of the iCASTER have chosen to integrate IM with a number of other features – *e.g.*, multimedia playback, worldwide search and correlation with related web content. The iCASTER gives its members the ability to "drag-and-drop" files from their playlists to their online "buddies." In addition, the iCASTER can appear in any number of different "skins" or designs. It can be any number of colors. It can look like a pager or a shamrock or a Pokemon figure. Members can create and share their own "skins" and advertisers can distribute iCASTERs that reflect their unique brand identity. Soon, iCAST members will also be able to personalize the look, texture and shape of their iCASTER. While some of these features may appear trivial, they are fundamental to consumer choice. We no longer live in an age when all telephones are black and wall-mounted. Choices in all consumer products are clearly considered carefully and valued by consumers.

It is telling that none of the innovations available (or soon to be available) through iCASTER were created by AOL. They were all created by other IM providers. Unfortunately, because AOL has opted to erect a wall around its members, consumers must now choose between improved functions or being able to communicate with the vast majority of IM users who still employ AOL. As one consumer advocate described the problem of having one's messages blocked, "[i]t's just a frustrating situation. I can never tell who's going to be available to what program on any given day of the week."[14]

Consumers in other markets, such as the market for telephones, long distance

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12 Rob Enderle, Gigaweb Information Group, The Record, Bergen County, NJ, Oct. 25, 1999.

13 Ariana Eunjung Cha, *Foes of AOL Merger Take to Capitol Hill; Assurances Sought in Low-Profile Effort*, Wash. Post, Mar. 24, 2000 at E03 (quoting AOL Chairman and CEO, Steve Case).

14 Judy Margraves, The Record, Bergen County, N.J., Oct. 25, 1999.

service, and e-mail, don't have to face this Hobson's choice. They are allowed to select the equipment or provider they want on the basis of what or which best serves their needs, knowing that once they have made that choice they will be able to communicate with anyone, and not just with those people who have made the same choice.

3. *Consumers do not want to be forced to accept AOL's product, with the likely result that they will be forced to accept AOL content, just to be able to communicate with their friends who use AOL's IM service.*

Since AOL controls over 90% of the IM market, it is almost a mathematical certainty that most people who want to use IM will want to communicate with someone who is using the AOL system. AOL knows this and the wall that it is building around its members represents nothing less than an effort to leverage its dominant position to perpetuate and enhance its control of the IM market.

Moreover, whatever AOL's dominance of the IM market is today, if the merger with Time Warner goes forward as proposed, AOL will likely become an even more dominant player in the market for internet services and will then be in an even stronger position to tighten its rein over the IM market. For example, if allowed to acquire Time Warner's interest in Road Runner,[15] AOL will undoubtedly bundle its IM service with Time Warner's advanced broadband delivery services to bring even more IM users under its control.[16] If these new users are also fenced off from the outside world by AOL, the

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15 Road Runner is a joint venture among affiliates of Time Warner Inc., MediaOne Group, Inc., Microsoft Corp., Compaq Corp. and Advance/Newhouse. *See Company Profile* (available at http://rrcorp.central.rr.com/company/main_profile.html). Not only does AOL stand to acquire Time Warner's present interest in Road Runner through its pending license transfer applications but, depending on the outcome of AT&T's pending petition to acquire the licenses of MediaOne, *see In re Application for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Dkt. No. 99-251, Time Warner, and then AOL through its proposed merger with Time Warner, could increase its ownership interest in Road Runner.

16 Indeed, AOL and Time Warner bragged about precisely this plan in one of their press releases following announcement of the merger, wherein they explained that:

> America Online will make available on Road Runner popular America Online brands and products, including AOL Instant Messenger, Digital City, AOL Search and AOL Movie Fone.

Press Release, AOL & Time Warner Will Merge To Create World's First Internet - Age Media and Communications Company (available at http://media.web.aol.com).

* * *

The press release also announced:

> For business and consumers, AOL Time Warner will offer a major communications platform that combines America Online's popular instant messaging products with Time Warner's ability to offer local telephony over cable.

Id.

adverse affects of a closed architecture, as described above, will be compounded, to the increased detriment of consumers and of competition.

Further, if its merger with Time Warner goes forward without changes or conditions, AOL will have the ability to extend its enhanced dominance over IM to control content as well. For example, as IM technology starts to be used for news alerts, AOL will be able to assure that the only provider of news over its system will be Time.com or CNN.com.[17] Thus, for instance, if one wants to receive news from Newsweek, one will not also be able to communicate by instant messages with colleagues using an AOL system.[18]

Similarly, AOL could force anyone wanting to communicate with its members to get instant financial updates from Fortune instead of Forbes, and get instant sports updates from Sports Illustrated instead of ESPN. AOL users might not be given the choice of illustrating one's messages with characters from Rugrats, instead of with Warner Brothers cartoons, or sending independent music instead of Warner/EMI music.

In short, in the context of the pending proceeding, giving AOL the power to control the IM market is tantamount to giving AOL monopoly control over the content that one receives over IM. The proposed merger, if approved without conditions, will give AOL an incentive to leverage its existing power over IM to control the instant news and information that consumers will be able to receive.

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[17] Also in the press release announcing the merger, AOL and Time Warner boasted about the advantages that would come from merging:

> Time Warner's vast array of world-class media, entertainment and news brands and its technologically advanced broadband delivery systems with America Online's extensive Internet franchises, technology and infrastructure, including the world's premier consumer online brands, the largest community in cyberspace, and unmatched e-commerce capabilities.

Id.

[18] AOL's plans in this regard are plain. In a recent press release trumpeting its teamed coverage for the Winter Goodwill Games, for example, AOL explained:

> The Winter Goodwill Games will be extensively integrated and promoted across the AOL brands, including AOL, AOL.COM, CompuServe, **ICQ**, Netscape Netcenter, and AOL's Digital City, enabling tens of millions of sports fans to enjoy comprehensive, interactive coverage of the Winter Goodwill Games through the AOL family of interactive brands as well as the Goodwill Games Web site, goodwillgames.com. AOL's more than 21 million members will find a direct link to the Games at AOL Keyword: Goodwill Games.

Press Release, AOL & Time Warner Team Up for Winter Goodwill Games Promotion (available at http://media.web.aol.com) (emphasis added).

C. Government must act, as it has in the past, to facilitate agreement to open standards

1. The FCC has an obligation to consider whether the public interest will be served in evaluating whether a particular merger should be allowed.

The FCC cannot authorize the transfer of control of Time Warner's CARs licenses to AOL unless such a transfer would serve the "the public interest, convenience and necessity."[19] The "public interest" standard of Section 310(d) "is a flexible one that encompasses the 'broad aims of the Communications Act."[20] These broad aims include, inter alia, "promotion of the competition policies of the Sherman and Clayton Acts, and enhancing access to advanced telecommunications and information services in all regions of the Nation."[21] In evaluating whether a proposed transaction would serve the public interest, the Commission may take into account "trends within, and needs of, the telecommunications industry."[22]

The Commission has consistently concluded that its public interest responsibilities under Title III require it to examine the kinds of competitive issues that are raised by the proposed CARS transfer application.[23] The Commission also has stated that it "has a mandate under the Act to encourage technological innovation in communications and to expedite the introduction of new technology subject to other public interest considerations."[24]

When the FCC determines that a proposed transfer of control of a license "would result in anti-competitive effects,[it] may impose appropriate remedial conditions."[25] The Commission has repeatedly imposed remedial conditions on transfers of control of licenses where it has found that such conditions were reasonable and necessary to render

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19 47 U.S.C. § 310(d).

20 *Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd 15,236, at para. 11 (1998).

21 *Id.*

22 *Id.*

23 *See Tele-Communications, Inc. and TeleCable Corp.*, 10 FCC Rcd 2147, para. 7 (Cable Servs. Bur. 1995) (citing Cable Services Bureau decisions).

24 *Carolina Tel. & Tel. Co.*, 10 FCC Rcd 1583, para. 18 (Common Carrier Bur. 1994).

25 *Tele-Communications, Inc. and Telecable Corp.*, *supra* note 15, at para. 7.

the proposed transfers consistent with the public interest.[26] Courts have generally affirmed such exercises of the Commission's authority.[27]

Clearly it is not in the public interest to allow one company to create a closed, proprietary standard for an essential communications facility. As noted above, the FCC has consistently understood that the growth of the Internet depends on open, interoperable communications. While AOL has paid lip service to the principle of openness, AOL's dominance of the IM service market already threatens to retard the potential of that market. If AOL combines with Time-Warner, it will have even greater abilities and incentives to wall off it customers from the choices that competition might deliver.

2. *It is in the public interest that the government act to make AOL honor its commitment to agree to an industry wide standard of interoperability for IM.*

This issue will only be resolved when all IM users are able to communicate with each other regardless of which IM software they elect to use. But compelling such a resolution does not require a new Commission rule. It only requires that the Commission make AOL live up to the commitment that it made more than 8 months ago in promising to work with industry to set an open standard.

It should be clear to the Commission that it is not enough blindly to accept AOL's promises. First, AOL might not honor its verbal commitments in the future anymore than its has up until now.

Second, if left to its own devices, AOL might continue to flip-flop on this issue to serve its own purposes. As earlier discussed, while he once promised to support open standards, more recently CEO Case has been suggesting that AOL wants the market to evolve in a direction in which "everyone who wants to communicate with AOL members would use software 'licensed or approved by us."[28]

Third, the meaning of words when used by AOL can be subject to dispute. For example, at the Senate hearing on this issue on March 1, 2000, Mr. Case tried to defend AOL's position by arguing that AOL has allowed companies to use its protocols to build their own products.[29] He said, "for example, I think it is Lycos IM, not AOL IM for Lycos." In point of fact, Lycos' instant messenger tool is clearly marked "powered by

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26 *See id.* at paras. 12-13; *Cox Cable Communication, Inc. v. Times Mirror Co.*, 10 FCC Rcd 1559, para. 26 (Cable Servs. Bureau 1994).

27 *See Western Union Tel. Co. v. FCC*, 544 F.2d 346, 355 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

28 Ariana Eunjung Cha, *supra* note 13.

29 *Hearing on the AOL/Time Warner Merger*, Senate Commerce Committee (Mar. 2, 2000) (statement of Steve Case, Chairman, America Online).

AOL Instant Messenger."[30]

Further, AOL has on some occasions claimed that we must wait for a new industry standard before we can have interoperability. This is nothing more that a spurious smokescreen. We have interoperability today. The only thing preventing it from being deployed commercially is AOL's insistence that its members be kept behind a wall and prevented from receiving messages from AOL's competitors.

III. CONCLUSION

The IM market is at a crossroads. As industry observer Enderle described it "[t]his is one of those rare moments, like the birth of the Internet, when something can fundamentally change the way people communicate with each other. But there must be a standard for this technology to reach its potential. Otherwise, it's like using two telephones."[31]

The FCC's treatment of this issue at this time will have a pivotal impact on this the direction of the IM market. The FCC has a long history of protecting consumers regarding their choice of communications providers. It would have been unthinkable to allow telephony, the wireless communications industry, or e-mail to develop in an environment where consumers could not communicate freely with one another. Unfortunately, AOL's actions fly in the face of the Commission's legacy of protecting consumer choice.

Clearly, like e-mail, telephony, wireless phones and other communications devices, it is in the public interest to allow consumers to communicate freely with one another. To accomplish this goal and assure that the IM market moves in the right direction, the Commission should simply require that AOL live up to its original commitment, tear down the wall it has built around its members, enable users to exchange messages regardless of which product they use and make "instant messaging work like e-mail or the telephone."[32]

Respectfully submitted,

iCAST Corporation

By: Margaret Heffernan,
President and CEO

April 25, 2000

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30 *Id.*

31 Rob Enderle, Giga Information Group, Time, Aug. 9, 1999.

32 Chandrasekaren, *supra* note 9 (quoting AOL President of Interactive Services, Barry Schuler).