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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 5, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW – The Portals
TW-B204
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and Time Warner,
Inc. for Transfers of Control (CS Docket No. 00-30)
Notice of *Ex Parte* Presentation

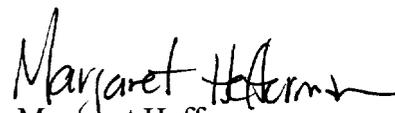
Dear Ms. Salas:

Attached for filing in the above-captioned proceeding is an original and two copies of a white paper prepared on behalf of iCast and Tribal Voice, discussing the impact of the proposed America Online-Time Warner merger on the instant messaging industry. This paper is submitted in response to a request from Commission staff to address the merger specific features that affect the instant messaging industry, the jurisdictional foundation for Commission action, and suggested remedies to address the problem of interoperability in instant messaging.

If you have any questions, please contact the undersigned.

Sincerely,


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IM INTEROPERABILITY: THE NEED FOR MINIMUM SAFEGUARDS

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INTRODUCTION AND SUMMARY

We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers.¹

This statement from the Commission in the context of the MCI/WorldCom merger accurately captures the intent of those parties engaged in the instant messaging (“IM”) business which seek to impose conditions on the proposed merger of America Online, Inc. (“AOL”) and Time Warner, Inc. (“Time Warner”). We are not seeking to regulate the Internet, but rather are concerned that IM, this vibrant and critical platform for future exchanges of information, will be rendered non-competitive and non-accessible, with higher entry barriers, as a result of the AOL/Time Warner merger unless the Commission imposes necessary conditions.

This paper is submitted in response to a request from Commission staff to address the merger specific features that affect the IM industry, the jurisdictional foundation for Commission action, and suggested remedies to address the problem of IM interoperability. IM is an application that has tremendous consumer and business value. One of the most powerful and distinguishing features of the IM protocol is “presence detection” – *i.e.*, the ability to allow users, subject to their control, to let news and entertainment providers, work colleagues, friends or others know when they are “online” and available and which Internet-connected device they are using. Competitive delivery of services utilizing the presence detection and other unique

¹ *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, ¶ 142 (1999).

capabilities of the IM protocol would bring enormous public benefits. As described in Part I, IM can serve as an “intelligent agent,” enabling weather alerts, school scheduling information and time-sensitive news to be delivered to any device; IM can support advanced audio and video-based conferencing and other audio and video related services, including collaborative business document sharing; IM can bring additional capabilities to wireless tools, such as telephones and PDA devices; and, as AOL highlights in its filings, IM can play an important role in interactive TV offerings.

IM has the potential to become a robust platform that could rival e-mail as a critical feature to consumers and business. But that potential will be realized only if IM shares the features of openness and interoperability that characterize both the public telephone network and the Internet. AOL, which controls 80-90 percent of the market, has violated the core principle of interoperability by blocking the ability of other companies to exchange messages with AOL customers. The merger of AOL with Time Warner, unless conditioned by this Commission, will strengthen AOL’s dominant position in the IM market and result in fewer consumer choices and less innovation in this vital area.

Although AOL already enjoys substantial network effects-based advantages over its IM rivals, the proposed merger with Time Warner would make things much worse for competition and consumers. As described in Part III, the proposed merger is a classic strategy to foreclose such competition through vertical integration designed to raise potential rivals’ costs. At the same time, the merger would allow AOL completely to silence one important potential competitor with next-generation technology (Time Warner/Road Runner) and to use AOL’s IM dominance to raise Time Warner’s content and interactive TV rivals’ costs. All of these harms

are specific to this merger, and, given the pivotal role that the IM protocol will (and already does) play, appropriate conditions designed to foster IM interoperability and competition on the merits are necessary to avoid enormous harm to consumers and the public interest.

As described in Part IV, the Commission has clear jurisdiction to impose minimal safeguards to ensure that a combined AOL/TW does not raise further barriers to IM competition or leverage its IM power into other markets.

- *First*, the Commission has authority under its public interest jurisdiction to ensure that the IM market is competitive, accessible and devoid of entry barriers.
- *Second*, the Commission has ancillary jurisdiction authority, recognized in numerous instances and first upheld by the Supreme Court in *Southwestern Cable*, to ensure that evolving IM services, which use communications networks, have the features of interoperability that promote competition, benefit consumer welfare and serve the public interest.
- *Third*, Section 230(b)(2), which requires the Commission to preserve competition for the Internet and other interactive computer services, gives the Commission limited authority to protect openness and interoperability in the IM market.
- *Fourth*, AOL's IM offering through AOLTV will be integral to the subscriber's selection and use of interactive TV services; thus the Commission has jurisdiction under Title VI to ensure that, at the very least, AOL develops open and interoperable standards with respect to IM offered through the AOLTV service.

In light of the anti-competitive effects associated with the combination of AOL's IM platform and Time Warner's content and cable holdings, the Commission should exercise its jurisdiction described above and require a combined AOL/TW to:

- Cease IM blocking immediately. For more than a year, AOL has blocked the exchange of instant messaging by other IM providers, thereby interfering with the critical open nature of the Internet and harming consumers and the emergence of competition.
- Immediately publish its fully functional and complete IM specifications on a public web page, and shall update this site with all relevant changes, in the same

time frame which it makes these specifications available to its own development team. This step will give other IM providers the necessary protocol information to exchange IM.

- Not provide AOLTV in Time Warner franchise areas until IM is fully interoperable. IM is a central feature of AOL's interactive television offering and is the source of much of the real-time exchange of information that is the hallmark of interactive television. It would be discriminatory and contrary to the public interest if AOL could offer an interactive television service in a manner that subscribers could not interact freely with a video programmer (say, if that video programmer did not have an arrangement with AOL).
- Appoint a designated person to receive and address interoperability complaints. This designated person would acknowledge and resolve any complaints that arose concerning interoperability and provide any necessary assistance to the complaining party within a timely and responsive time frame.
- Submit quarterly reports on IETF progress. Long-term resolution of IM interoperability must be addressed by the private sector Internet Engineering Task Force (IETF). Because AOL has not participated in a meaningful way in the IETF process, despite commitments in July 1999 from Barry Schuler that they would "fast track" the IETF standard., AOL should be required to document for the Commission its contributions to the IETF and what progress has been made towards development and adoption of a standard for full IM interoperability.
- Commission staff should report on the level of interoperability in the IM market. These reports, which should be submitted at six-month intervals for the next two years, would be similar to the Commission's review of competition in the video and CMRS marketplace. The Commission could obtain the necessary information with a notice of inquiry.

Conditioning the AOL/TW merger on the above conditions is necessary to encourage open IM standards and interoperability that provide the only hope for competition and innovation in the face of vertical integration by the dominant IM provider.

I. IM IS A CRITICALLY IMPORTANT PLATFORM AND PROTOCOL FOR A WIDE ARRAY OF CONTENT, SERVICES AND APPLICATIONS.

Contrary to common belief, IM is much more than "fast e-mail." It is an application that has both consumer and business value. While yesterday, it seemed to be utilized largely by

teenagers as a private communication mechanism or by family members to keep in touch on daily tasks and decisions, today it has already evolved into a practical, useful, and necessary tool that can ease and facilitate decision making for business groups, improve customer service response, enable consultation in the work place, and provide a tool for basic communication.

One of the most powerful and distinguishing features of the IM protocol is “presence detection.” Upon logging onto an IM system, a user’s computer (or TV, wireless phone, PDA, or other Internet-connected device) automatically alerts other pre-selected users (and any “intelligent agent” software applications that the user employs to find and deliver information) that he or she is online and is available to conduct private communications in real time. If desired, numerous parties can participate in these online communications at the same time, creating real-time personal conversations that are akin to teleconferencing. The IM protocol can also detect the bandwidth limitations of the particular Internet-connected device a consumer is currently using and thereby ensure that messages are delivered to that user in an appropriate format (*i.e.*, text vs. audio or video enhanced).

Although IM technology has been widely available since 1996, it is already one of the fastest growing segments of the Internet. More than 3 million users are signing up for IM every month and its growth rate is faster than the growth rate of e-mail or browsing technology. In fact, it exceeds cellular growth, In the United States, 30 million individuals use IM at least once a month.² This represents more than 30% of the U.S. online population.

As *The Economist* reports, “[t]his new form of communication, once considered only a toy for teenagers, is turning out to be much more. Advertisers see it as a pithy productive

² *Forrester*, Nov. 29, 1999.

medium. Businesses are using it for customer support. And, once connection speeds improve, and voice communication becomes a standard feature, the ‘buddy list’ will become an immensely valuable telephone directory.”³ For these reasons, companies seeking to provide Internet access view IM as an essential feature of attracting and keeping customers. To not have a robust IM offering is to be at a significant disadvantage in the marketplace.

It is important to recognize that IM is much more than just an application or service in its own right. Rather, IM protocols support, and are a necessary distribution platform for, a wide variety of interactive applications, services and content.⁴

Competitive delivery of services utilizing the presence detection and other unique capabilities of the IM protocol would bring enormous public benefits. For example, in the fast-growing “intelligent agent” area, there are increasing numbers of innovative applications that search the Internet for news/information specified by users (*e.g.*, news and weather alerts, school scheduling information, business news) and then deliver that information to whatever device the user has activated and activated and packaged in the form the user has specified.⁵ Intelligent agents can monitor airline, train or bus reservations, and through IM, inform the consumer of the status of a departure and search out alternative departures should the preferred schedule become delayed or be cancelled. Intelligent agents can monitor weather changes and through IM, alert travelers of weather advisories and parents of changes in school schedules. Intelligent agents can

³ *The Economist*, “Trying to Connect to You,” June 24, 2000, p. 69.

⁴ See <http://www.zdnet.com/intweek/stories/news/0,4164,2325816,00.html>.

⁵ See <http://www.nytimes.com/library/tech/00/07/biztech/articles/17lab.html>; http://webopedia.internet.com/TERM/i/intelligent_agent.html; <http://news.cnet.com/news/0-1005-200-1422946.html>; <http://www.agentbuilder.com/AgentTechnology/agentApplications.html>; <http://www.zdnet.com/intweek/stories/news/0,4164,2590220,00.html>.

alert or track financial markets, letting the consumer know about activities of particular companies and securities. And these are just examples of the many ways that the IM platform and intelligent agent software could make the Internet more accessible and useful to tens of millions of consumers.

IM is also a natural platform for audio and video-based conferencing and other audio and video-related services and applications, including services that will allow consumers and businesses to share documents and other files in real time. IM platforms will (and, in some cases, already do) support IP telephony applications that allow IM users to engage in “conference calls” instead of text chat. For example, HearMe has developed an application for AOL’s ICQ platform that allows “buddies” to talk to each other using their PC microphone and keyboard.⁶ And, as broadband technology is more widely deployed, “video” services could also, in a competitive market, be expected to be available over the IM platform.⁷

IM platforms are also being integrated into wireless telephones, PDA devices and other wireless tools. Thus, a user can remain in contact with co-workers and customers. Including IM platforms in wireless phones will also allow users to better utilize the intelligent agent technologies discussed above because IM’s unique presence detection capabilities allow the intelligent agent to “push” information to the phone instead of the computer. That is why industry analysts believe that IM “looks like the ‘killer app’ of wireless data services.”⁸

⁶ Press Release, *HearMe Offers Live Voice Product for ICQ Users* (Jan 20, 2000) (available at 1/20/00 DJNS 07:31:00).

⁷ See <http://www.zdnet.com/zdnn/stories/news/0,4586,2572225,00.html>.

⁸ “Trying to Connect to You,” *The Economist*, June 24, 2000, p. 69.

AOL and others also expect IM to play an important role in interactive TV offerings.⁹ For example, IM protocols can support innovative applications that would permit viewers watching interactive TV to block real time messages from co-workers but permit those from family members.¹⁰ Similarly, IM software is being developed for interactive TV that will send the viewer tailored reminders about particular programs and important news developments.

It is little wonder, then, that Time Warner's Chairman recently characterized IM as one of the most important assets of the combined AOL/TW.¹¹

II. BECAUSE IM IS CHARACTERIZED BY STRONG NETWORK EFFECTS, AND AOL IS THE DOMINANT IM PROVIDER WITH A HISTORY OF ANTICOMPETITIVE CONDUCT, EXACTING PUBLIC INTEREST REVIEW IS ESSENTIAL.

IM is characterized by very strong network effects. As the Commission recognizes, network effects are created when "each individual's demand for a product is positively related to the usage of other individuals."¹² In other words, the more customers that use a particular IM system, the more valuable it is to each user because the number of people with which each customer can interact is expanded. IM's "network effects are mediated through complementary

⁹ See <http://www.zdnet.com/intweek/stories/news/0,4164,2594954,00.html>; <http://www.zdnet.com/anchordesk/stories/story/0,10738,2589806,00.html>; <http://www.zdnet.com/zdnn/stories/news/0,4586,2587639,00.html>.

¹⁰ See <http://www.zdnet.com/intweek/stories/news/0,4164,2325816,00.html>.

¹¹ Digital Media Conference: The Impact of the Internet on the Media Industry (June 25, 2000).

¹² See Memorandum Op. and Order, *AT&T Corp., British Telecommunications plc, et. al, for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, ¶ 54, n.123 (Oct. 29, 1999) (citing M. Katz and C. Shapiro, *Systems Competition and Network Effects*, 8 J. of Econ. Perspectives 93-115).

goods as well.”¹³ The more people that use a particular IM system, the greater the incentives to software programmers to develop applications, services and content that ride on top of that IM system, and the more valuable in turn that IM system becomes to the users.¹⁴ By blocking interoperability, AOL is fragmenting and decreasing the size of this communication network and closing it off to innovation.

There can be no doubt that AOL – with over 80-90% of the IM traffic and a customer base that is over 10 times greater than the base of its nearest rival – is today the dominant IM provider.¹⁵ But AOL did not gain this commanding position by offering a superior product.

¹³ D. Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries* (address to Software Publishers Association March 24, 1998) (available at <http://www.usdoj.gov/atr/public/speeches/1611.htm>).

¹⁴ See also, e.g., D. Balto, *Networks and Exclusivity: Antitrust Analysis to Promote Network Competition*, 7 Geo. Mason L. Rev. 523 (1999); M. Lemley & D. McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998); M. Katz & C. Shapiro, *Systems Competition and Network Effects*, Journal of Economic Perspectives (1994).

¹⁵ Network Magazine estimates the following distribution of users:

Company	System	Active Users
AOL	ICQ	45 Million
AOL	AIM-AOL	50 Million
Microsoft	MSN Messenger	5 Million
Yahoo!	Yahoo! Messenger	5 Million
Tribal Voice	PowWow	8 Million
Odigo	Odigo	1 Million

Instant Messaging, Special Report on Messaging, Network Magazine (Aug. 2000). In its recent filing, AOL compares apples and oranges when citing to the relevant number of IM customers of competing IM providers. See August 28, 2000 letter from AOL and Time Warner in response to August 14, 2000 letter from Commission, at pp. 8-11. AOL confuses persons who have simply registered as a user of a service with users who are actively engaged in utilizing the service. The
(continued . . .)

Although AOL was among the first companies widely to deploy IM, Mirabilis' ICQ system was generally perceived as a superior product. Unable to beat ICQ on the merits, AOL simply purchased it.¹⁶

AOL's conduct presents a textbook example of the harm to consumers and competition that can occur when the dominant provider in a market characterized by strong network effects achieves sufficient size that it no longer has any incentive to interoperate with the networks of other providers. In a competitive IM market with no clearly dominant player, one company's refusal to interoperate with other networks would deprive its customers of the ability to communicate with a substantial portion of the IM community. The remaining IM providers, by making their systems interoperable, could then offer consumers a wider variety of "buddies" as well as a broader array of applications and features. That, of course, could cause the customers to migrate to the interoperable platforms and thus would create a strong competitive constraint against blocking/resistance to interoperability.

AOL itself initially flirted with interoperability, publishing a standard that detailed the steps other IM providers should take if they wanted to make their systems interoperable with AOL IM.¹⁷ Once the market was more mature and AOL had the lion's share of IM customers, however, it apparently determined that blocking would have little effect on its customers but would be devastating to its competitors – in the same way that a Bell Operating Company's

(. . . continued)

real test of market power should be applied to those persons who actually use a particular IM service.

¹⁶ See <http://www.icq.com/press/letter.html>.

¹⁷ See <http://www.zdnet.com/eweek/stories/general/0,11011,2318135,00.html>.

refusal to interconnect with a new competing local telephone network would create a near absolute barrier to entry by preventing customers of the new phone company from talking with most people. Thus, AOL abruptly changed course and began blocking traffic even from IM rivals such as Prodigy that were willing to employ AOL's published standard.¹⁸ In these circumstances, it is particularly important that the Commission take a hard look at this merger to determine whether it would enhance AOL's incentives or abilities to abuse market power in IM or to leverage that power into other markets.¹⁹ As explained below, absent appropriate conditions, the merger would clearly have those anticompetitive effects.

III. ABSENT APPROPRIATE CONDITIONS, THE PROPOSED MERGER OF AOL'S DOMINANT IM PLATFORM AND TIME WARNER'S VAST CONTENT AND CABLE HOLDINGS WOULD HAVE SUBSTANTIAL ANTI-COMPETITIVE EFFECTS.

AOL – with well over 80-90% of the active users of a service characterized by strong network effects – enjoys market power over both consumers and the content and applications providers that require access to the IM platform to bring presence-enabled services and applications to those consumers. AOL recognizes, however, that market power in Internet markets can often be fleeting, because the unprecedented pace of innovation can create

¹⁸ See <http://www.zdnet.com/eweek/stories/general/0,11011,2318135,00.html>; <http://www.zdnet.com/zdnn/stories/news/0,4586,2302694,00.html>.

¹⁹ Both this Commission and the federal antitrust authorities have made it clear that they will apply heightened scrutiny to mergers in industries characterized by network effects. Thus, for example, the Commission found that, but for the divestiture of MCI's Internet backbone business, its merger with WorldCom would have been anticompetitive because of network effects. See *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, ¶¶ 1447-50 (1999).

opportunities for an entrant with a new, superior technology to “leap frog” a dominant incumbent even in the face of network effects.

The proposed merger with Time Warner is a classic strategy to foreclose such competition through vertical integration designed to raise potential rivals’ costs. At the same time, the merger would allow AOL completely to silence one important potential competitor with next-generation technology (Time Warner/Road Runner) and to use AOL’s IM dominance to raise Time Warner’s content and interactive TV rivals’ costs. Given the pivotal role that the IM protocol will (and already does) play in the delivery of Internet content, services and applications, approving this merger without appropriate conditions – designed to foster IM interoperability and competition on the merits – would do enormous harm to consumers and the public interest.

In particular, the proposed merger would:

- give AOL the incentive and ability to make Time Warner’s IM-enabled content (and related applications) exclusive to the AOL IM platform, thereby making AOL IM the only platform over which consumers can access all content and substantially raising IM rivals’ costs by forcing two-level entry (in both IM and IM-enabled content/applications).²⁰
- give AOL the incentive and ability to integrate its closed IM platform into Time Warner’s interactive TV service, thereby effectively foreclosing millions of IM-capable devices to IM rivals;
- eliminate a well-financed potential IM entrant with broadband-enhanced next generation capabilities, and, by adding the one million (and growing) Time Warner/Road Runner subscribers to the AOL IM subscriber base, further reduce the prospect that another IM provider can effectively compete;

²⁰ Alternatively, AOL could require an IM provider to guarantee a certain number of “eyeballs” in return for access to the Time Warner content knowing that no other competitor would be able to fulfill that requirement.

- give AOL the incentive and ability to use Time Warner's cable systems (e.g., routers and servers) to discriminate in favor of AIM and ICQ and IM-related traffic, thereby further raising rivals' costs of competing with AOL;
- give AOL the incentive and ability to use its essential IM distribution platform to discriminate in favor of Time Warner content (as well as "intelligent agents" and other applications that prefer or sponsor Time Warner content), thereby raising content/aggregation/ intelligent agent rivals' costs; and
- by increasing the duration and value of AOL's IM market power, increase incentives for AOL to maintain that market power, thereby further increasing AOL's incentives to resist IM interoperability.

A. Vertical Foreclosure of Upstream and Downstream Markets.

AOL and Time Warner have maintained that the largely "vertical" nature of their merger establishes that there is little competitive concern. But it is well-established that a vertically integrated company can, in some circumstances, use foreclosure anticompetitively to raise rivals' costs and create barriers to entry.²¹ Foreclosure occurs when vertical integration closes off some or all of a market to competitors. Foreclosure can occur upstream (for example, cutting off rivals' access to necessary supplies or inputs) or downstream (for example, cutting off rivals' access to sales outlets or customers). This merger would give AOL the incentive and ability to engage in *both* upstream *and* downstream foreclosure.

1. Specific examples of ways in which the vertical integration contemplated by the merger could harm competition.

Making Time Warner's IM-Enabled Content Exclusive to AOL. Because AOL – and AOL alone – would control Time Warner's content, it would be able to make that content

²¹ See generally J. Baker, *Challenges to the Chicago School Approach: Recent Developments in Economics that Challenge Chicago School Views*, 58 Antitrust L.J. 645 (1989); T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986).

available exclusively on its IM systems. The IM platform and protocol will be an enormously important means of delivering music, video and other content to consumers in formats appropriate to the Internet-connected devices they happen to be using at a particular time. With the merger, AOL can ensure that next-generation broadband IM applications that are deployed on rival systems do not have access to any of Time Warner's 39,000 hours of TV and film, 5,700 feature films, 32,000 television titles, 1 million music copyrights and 32 magazines.²² The point here is not that Time Warner has any content monopoly (although, as discussed below, the merger would allow AOL to leverage its IM market power into upstream content markets) but that closing off such a large slice of unique content to rival IM providers would put those AOL rivals at a severe competitive disadvantage, where, as here, rivals cannot effectively duplicate the strategy. Because AOL controls 80 percent of the subscribers, rival IM providers could not hope to obtain exclusives of similar scope to counteract this advantage, because no content owner would agree to limit distribution of its content to 10-20 percent of the market. Thus, the combination of AOL's dominant IM position with Time Warner's content library would ensure that AOL's IM is the only place where users could get access to all of the content that they desire.²³

Degrading IM Rivals' Access to Time Warner Cable Facilities. The merger also would give AOL the opportunity to degrade access to rival IM providers the old fashioned way – through the manipulation of downstream network facilities. Time Warner Internet customers

²² Time Warner 1999 Fact Book.

²³ Alternatively – and just as anticompetitively – AOL could demand as the price of interoperability with an IM rival that the rival agree to feature or promote Time Warner content, thereby further disadvantaging Time Warner's content rivals.

wanting to access IM offerings by other providers such as AOL must establish a connection with the servers used by IM providers that enable and maintain IM functionalities. Like other Internet traffic, “routers” are used to direct traffic between users and the specified IM server. Routers, however, are capable of detecting both the source of information and the destination of information. That also means that routers can be programmed to block, or give lower priority to, traffic from a particular source or that is destined to a particular location.²⁴

Discriminating in Favor of Time Warner Content. The proposed merger would allow AOL to leverage its IM market power into upstream content and applications markets by favoring Time Warner content and applications over unaffiliated content and applications. As explained above, the instant messaging platform with its enormous and very “sticky” installed base promises to be an increasingly essential platform and distribution vehicle for interactive content of all types. AOL, with its 80 percent share of the IM base is thus the essential IM distribution “partner” for content and applications owners and AOL clearly power over the price of access to its IM platform. “[B]ecause of the dynamic nature of markets and the impact of new technologies, the primary concern in communications arrangements is . . . access” to customers and critical inputs.²⁵

²⁴ Although market forces (*i.e.*, competition from DSL and other Internet providers) generally remove any incentives a cable modem service provider might otherwise have to degrade access to nonaffiliated content and applications – because degrading access to things that subscribers use makes the cable modem service less desirable as compared to competing services – those market forces would plainly be inadequate with respect to IM, because 80-90 percent of IM users are already AOL users. Again, the merger would allow AOL, at very little cost to itself, to use vertical foreclosure to significantly raise its rivals’ costs.

²⁵ R. Pitofsky, *Competition Policy in Communications Industries: New Antitrust Approaches* (address to Glasser LegalWorks Seminar March 10, 1997) (available at <http://www.ftc.gov/speeches/pitofsky/newcomm.htm>).

The merger would give AOL the *incentive* to abuse that power to raise the “price” (more specifically, the price and non-price terms) of access to its IM platform to any application or content that in any way competes with Time Warner Internet offerings and content. Most dramatically, AOL could simply refuse to provide access to its proprietary IM protocols to those entities developing IM applications that compete with Time Warner Internet properties. Alternatively, AOL could simply charge Time Warner rivals supra-competitive rates for such access. Not only would such a strategy generate a handsome revenue stream, it would allow AOL to “preview” the competition.²⁶ “[V]ertical acquisitions can give the combined entity the ability to obtain competitively sensitive information about competitors in either market.”²⁷ This is particularly true here where TW rivals would need to work with AOL to ensure that their products will function on AOL’s IM platform. Thus, AOL would have the ability to “free ride” off of other content and application developers/owners, and, in the wake of this merger, would have the incentive to use this information to advantage its Time Warner properties.

“Internet” radios. For example, whether PC-based or separate home or automobile units, “Internet” radios will use the IM protocol to direct music to the particular radio (based

²⁶ “[V]ertical acquisitions can give the combined entity the ability to obtain competitive sensitive information about competitors in either market.” *Eli Lilly & Co.*, Trade Reg. Rep. (CCH) ¶ 23,873 (1995).

²⁷ C. Varney, *Vertical Merger Enforcement Challenges at the FTC* (address to PLI July 17, 1995) (available at <http://www.ftc.gov/speeches/varney/varta.htm>). See also Memorandum Op. and Order, *Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, File No. NSD-L-96-10, ¶ 122 (Aug. 14, 1997) (“*BA-NYNEX Merger Order*”) (“[A]s an the incumbent LEC, NYNEX has access to significant amounts of information about the rival firms’ customers and services because all market participants will need to terminate the majority of their traffic over NYNEX’s network.”); *Eli Lilly & Co.*, Trade Reg. Rep. (CCH) ¶ 23,873 (1995).

upon the user's designated preferences). IM "filtering" capabilities will be used to allow listener feedback to cause real-time tailoring of the music selections and customer purchase of that music in MP3 (or any other) format. But post-merger, AOL would have a powerful incentive to manipulate deployment of such "intelligent agent" technology on its IM platform – either by blocking or slowing deployment of intelligent agents that would make it easier for consumers to view/package rival content or by insisting that intelligent agents give favored placement to Time Warner content (just as some search engines today present search "results" in a manipulated order that favors partners/affiliates of the search engine).²⁸

Interactive Television. The merger would also poise AOL to leverage its IM monopoly into interactive TV services provided by Time Warner. To be sure, AOL has stated that it will not block the Advanced Television Enhancement Forum ("ATVEF") signals from rival video programmers. At the same time, however, AOL has announced that IM – that is, AOL's closed IM system – will be an integral feature of its interactive TV platform.²⁹ In fact, they are saying that AOL's closed IM will be the exclusive IM service supported by AOLTV. By declining to allow IM interoperability and allowing rival interactive TV providers to use AOL IM only upon payment of substantial license fees (or not licensed at all), AOL would substantially raise rival interactive TV providers' costs. This could enable AOL to use its IM monopoly to help tip the

²⁸ Similarly, having acquired cnnfn.com, AOL would have no interest in giving access to IM-enabled applications that tracks personal finances and financial news unless the developers agreed to direct users to that site.

²⁹ See <http://www.zdnet.com/zdnn/stories/news/0,4586,2589830,00.html>; <http://www.zdnet.com/anchordesk/stories/story/0,10738,2555340,00.html>.

interactive TV business in its favor and also through vertical integration to foreclose the millions of IM-capable TVs of Time Warner subscribers to rival IM providers.

These types of foreclosures are routinely condemned by the courts, the Commission and federal antitrust authorities, which have all recognized that a vertically integrated monopolist can use control of necessary inputs to raise rivals' costs in this fashion and thereby maintain market power.³⁰ Indeed, this was the basis for the government's case against the Bell System – *i.e.*, the claim that the Bell System refused to give rival long distance carriers access to its local distribution facilities. And it was precisely to remove such incentives that the MFJ prohibited the Bell Operating Companies from entering the long distance market. Here, AOL post-merger would have the same type of incentive to discriminate against Time Warner's content rivals in the provision of access to its IM distribution facilities.

Similar concerns also animate the Commission's cable horizontal ownership limits.³¹ The stated purpose of those limits is to prevent any single cable provider from raising the costs of those programmers that compete with its own programming by denying rivals access to its

³⁰ See, e.g., *Ford Motor Co. v. United States*, 370 U.S. 294 (1962); *Dominion Resources, Inc.*, Trade Reg. Rep. (CCH) ¶ 24,668 (1999); *United States v. Enova Corp.*, 63 Fed. Reg. 33,396 (June 18, 1998); *Silicon Graphics*, Trade Reg. Rep. (CCH) ¶ 23,838 (1995); Memorandum Op. and Order, *Global Crossing Ltd. and Frontier Corp.*, CC Docket No. 99-264, ¶ 21 & n.60 (Sep. 21, 1999); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-148, ¶ 12 & n.21 (Dec. 24, 1996); See generally Department of Justice 1984 Non-Horizontal Merger Guidelines § 4.2; Antitrust Law Developments, ch. III.C. (4th ed. 1997); H. Morse, *Vertical Mergers: Recent Learning*, 53 Bus. Law. 1217 (1998).

³¹ See Third Report and Order, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264 (Oct. 20, 1999).

cable distribution facilities. To be sure, the 35% limit established in the cable rules has been challenged as much too low given, *inter alia*, the lack of network effects and the existence of strong competing networks that are winning most of the new customers. But AOL controls 80-90 percent of the IM distribution platform subscribers and enjoys the competition-foreclosing benefit of very strong network effects.³²

2. AOL's claim that it could lawfully accomplish the same foreclosure through contract is both wrong and nonresponsive.

The Commission should reject any claim that these vertical effects are not "merger specific" because AOL could obtain exclusive access to Time Warner content via contract rather than merger. The complete answer to such an argument is that an anticompetitive foreclosure strategy via contract is just as illegal as one accomplished through merger.³³

AOL's incentives to favor Time Warner content over other content are also dramatically stronger in the case of a merger. Even if AOL could use its market power to force Time Warner to only write applications for AOL's IM, AOL would have no particular incentive to foreclose other application providers that compete with Time Warner from access to its IM. Rather, doing so would only advantage Time Warner. AOL would instead be better off by maximizing the number of applications available on its IM platform and thereby increasing the value of its IM to consumers.

³² Indeed, courts have routinely found that arrangements that foreclose more than 50% of an inputs market trigger antitrust scrutiny. *See e.g., United States v. Dairymen, inc.*, 758 F.2d 654 (6th Cir. 1985); *Oltz v. St. Peter's Community Hosp.*, 665 F. Supp. 760 (D. Mont. 1987), *aff'd*, 861 F.2d 1440 (9th Cir. 1988); *Hohler Co. v. Briggs & Stratton Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,047 (E.D. Wis. 1986).

³³ *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

A merger radically changes those incentives. With a merger, AOL now benefits directly from disadvantaging Time Warner's rivals. In addition, AOL has increased incentive to use Time Warner content because it "buys" that content at incremental costs – effectively zero – while it must purchase rival content at the much higher market price. Thus, even though a foreclosure strategy might make its IM service slightly less valuable to consumers, AOL could make up for this by increasing the profits it earns from Time Warner content and by acquiring Time Warner content effectively for "free."³⁴

B. The Increase in Horizontal Concentration.

In addition, the merger is problematic under straightforward horizontal analysis. Post-merger, AOL will be able to impose its IM service on Road Runner. That in turn will increase AOL's IM customer base and at the same time make it less likely that another IM provider can achieve a sufficient customer base to compete effectively in the market.

Through Road Runner, Time Warner was well positioned to offer IM integrated with "broadband" features such as interactive games and voice and video "chat" – the features industry analysts agree are going to make IM an extremely valuable business tool. AOL, on the other hand, is far behind in developing such broadband-based enhancements and has only a handful of broadband subscribers. By enriching the IM experience in this manner, Time Warner

³⁴ To be sure, AOL is "paying" for Time Warner through the merger. However, once the merger occurs, those costs are "sunk" and on a forward-looking basis AOL will pay only the marginal cost of using Time Warner content (which is effectively nothing).

thus had the potential to break AOL's network effects-based grip and "leap frog" AOL's dominant position with next-generation services.³⁵

Under these circumstances, the antitrust laws would prevent unconditioned approval of the proposed merger even if Time Warner were a new entrant with *de minimis* market share rather than, as is in fact the case, a large and rapidly growing next-generation ISP. Well-settled antitrust principles establish that the acquisition by a dominant firm with substantial market power of even a potential entrant is presumptively anticompetitive and, absent unusual countervailing factors (that do not exist here) should be prevented.³⁶ As Professor Areeda stresses, the "case for condemnation is strongest" where, as here, the acquisition is a way for the dominant firm to avoid loss of share to an innovator.³⁷

The Commission has undertaken precisely this analysis in its merger review process. In determining whether the acquisition of a potential entrant is anticompetitive, the Commission reviews whether the acquired entity has the "capabilities and incentives to compete . . . effectively and soon[] in the relevant market."³⁸ Thus, the Commission has found the acquisition by a monopolist of a likely potential competitor with unique capabilities is presumptively

³⁵ See C. Robinson, *Leap-Frog And Other Forms of Innovation* (address before the American Bar Association June 10, 1999) (available at <http://www.usdoj.gov/atr/public/speeches/2482.htm>).

³⁶ See P. Areeda & H. Hovenkamp, III *Antitrust Law* ¶ 701d at 135 (1996).

³⁷ *Id.* at 135-137.

³⁸ *BA-NYNEX Merger Order*, ¶ 62.

anticompetitive.³⁹ The federal antitrust authorities have likewise routinely challenged mergers in involving the acquisition of unique potential entrants by dominant providers.⁴⁰

IV. THE COMMISSION HAS CLEAR JURISDICTION TO CONDITION THE MERGER TO LESSEN THE ANTICOMPETITIVE EFFECTS ASSOCIATED WITH THE COMBINATION OF AOL'S IM PLATFORM AND TIME WARNER'S CONTENT AND CABLE HOLDINGS.

The Commission has jurisdiction to ensure, through targeted safeguards described in Part V, that a combined AOL/TW does not raise further barriers to IM competition or leverage its IM power into other markets. This is not a call for regulation of the Internet. Rather, this request directs the Commission to impose minimal safeguards to encourage the IM interoperability that is the only real chance for competition in the face of AOL's dominance and proposed vertical integration. Conditioning the merger of AOL and Time Warner on these minimal safeguards – which will foster innovation and ensure consumers have a range of choices with respect to IM offerings – is clearly within the Commission's mandate to ensure any transfer of license is in the public interest. In addition, it is consistent with the Commission's ancillary jurisdictional authority. It also is consistent with the express grant of authority in Section 230(b)(2) to preserve competition in the market for Internet services. And with respect to those IM services

³⁹ See *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, ¶¶ 98, 100, 123 (2000); *Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, ¶ 64 (1999); *BA-NYNEX Merger Order*, ¶¶ 65, 72.

⁴⁰ See, e.g., *United States v. Primestar*, Complaint, 1:98CV1193 (D.D.C. May 12, 1998) (Complaint filed to prevent several cable companies from purchasing an orbital satellite slot that could be used to provide nationwide programming via DBS on the grounds that DBS was likely to emerge as the most potent competitor of cable services.).

integrated into interactive programming offered through AOLTV, these safeguards fall within the Commission's authority to regulate cable services under Title VI of the Communications Act.

A. The Public Interest Requires the Commission To Protect Openness and Interoperability In the IM Market.

In order to approve the transfer of control of licenses, AOL and Time Warner must satisfy the Commission that the public interest will be served by the merger.⁴¹ As the Commission recognizes, and the courts have sustained, the public interest standard "is a broad, flexible standard that encompasses the broad aims of the Communications Act."⁴² These broad aims include accelerating "private sector deployment of advanced telecommunications and information technologies and services."⁴³ 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."⁴⁴

Openness and competition have fueled the Internet's dynamic growth and have delivered a wealth of benefits to consumers. As discussed above, IM will provide additional benefits if allowed to thrive in a competitive environment that fosters innovation and offers consumers a choice of providers. Consumers, educators, and businesses will be able to communicate more effectively through the presence detection features offered through IM. And new commercial

⁴¹ 47 U.S.C. § 310(d).

⁴² Memorandum Op. and Order, *In the Matter of the Merger of MCI Communications Corporation and British Telecommunications PLC*, 12 FCC Rcd 15351, 15353 (1997).

⁴³ *Id.*

⁴⁴ *Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee for Consent to Transfer Control of Corporations Holding Point to Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Service*, 13 FCC Rcd 15236, ¶ 12 (1998).

applications, such as IM over wireless services, will provide a catalyst to continuing growth and use of the Internet.

This merger, without conditions, threatens those consumer benefits. The public which uses Instant Messaging (today that's tens of millions of Americans posting hundreds of millions of messages)⁴⁵ will be harmed by this merger, for the reasons set forth above, unless the Commission takes appropriate steps to encourage open standards and interoperability that provide the only hope for competition in the face of vertical integration by AOL, the dominant IM provider. At the start of the last century, when the telephone network was first being deployed, the absence of interoperability led to some Americans having five or six phones on their desk to reach their customers. That interoperability problem was eventually solved, and the telephone network rapidly grew and expanded, but the answer a hundred years ago was found in a monopoly system that this Commission has spent decades dismantling. The interoperability condition proposed here would take us on a different path, one that will promote increases in penetration, productivity, convenience, and efficiency of IM systems.

IM interoperability similarly will spur a new level of growth and innovation that will benefit all users, including AOL's. For example, wireless companies need to develop IM technologies in parallel with their PC-centric counterparts, and at the same time enable their wireless users to communicate with members of these PC-based communities. But, as long as AOL continues to block IM interoperability, consumers of various telecommunications services

⁴⁵ Today, 3 million users are signing up for IM every month and, in the US, 30-million individuals use IM at least once a month. *Forrester*, Nov. 29, 1999.

will not reap the benefits of these types of innovations. AOL's actions harm consumer choice and contravene the public interest.

The Commission has authority under its public interest mandate to require interoperability and it has exercised that authority in a variety of contexts. For example, in the PCS context, the Commission required providers of personal communications systems to "achieve compatible interoperability standards" because that was in the public interest.⁴⁶ The Commission recognized that the "availability of interoperability standards will deliver important benefits to consumers and help achieve our objectives of universality, competitive delivery of PCS, that includes the ability of consumers to switch between PCS systems at low cost, and competitive markets for PCS equipment."⁴⁷ Similarly, when the Commission was considering a standard for digital television, one requirement, promoted by many in the computer industry, was that the standard should be interoperable, and the Commission ultimately concluded that "the DTV Standard will permit interoperability with computers and encourage innovation and competition."⁴⁸ The Commission also has acted in the area of attachments to both telephone and

⁴⁶ Memorandum Op. and Order, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 5022 (1994).

⁴⁷ See, Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, (December 11, 1996) (noting that disclosure of information relating to network standards will promote competition by facilitating interconnectivity and interoperability, alerting competitors and others to changes in standards, and preventing the imposition of unreasonable licensing fees by the BOCs.).

⁴⁸ Fourth Report and Order, *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 FCC Rcd 17771 (1996).

cable networks to promote interoperability because it recognized the clear consumer benefit and the public interest benefit by mandating those steps.⁴⁹

The same policy goals of ensuring competition and innovation are of utmost importance in this proceeding. As described above, AOL dominates the IM market. And AOL has used this dominance to restrict non-AOL users from communicating with AOL's large and captive audience. Without interoperability with AOL, the innovative IM products currently being developed by competitors are of limited use. Customers using IM applications offered by competitors to AOL will have little patience with features and services that cannot communicate with the vast majority of IM users, and will drop the competing providers' IM applications in favor of those applications offered by AOL, which are guaranteed to reach 80-90% of the marketplace. The result: less competition, less innovation, and less consumer choice, and the demise of the emerging competitive IM providers.

AOL's documented resistance to interoperability creates the need for the Commission to condition approval of the merger on minimal safeguards that will promote competition and consumer choice in the IM marketplace. Such safeguards are consistent with the Commission's recent pronouncement in its *MCI-WorldCom Order*:

⁴⁹ For example, in enacting the navigation device provisions, codified at 47 U.S.C. § 549, Congress noted that "competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution services." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995). When the Commission implemented this Congressional mandate, it made clear that subscribers' equipment must work with any multichannel video programming system so that consumers can subscribe to the provider of their choice. Report and Order, *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14786 (1998).

“Our primary intent in reviewing the potential effects of this merger on Internet backbone services is to ensure that the dynamism that has characterized the Internet will not be undermined. We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers.”⁵⁰

That clear statement of the Commission’s intent mirrors our intent here. We want to ensure that one Internet service, Instant Messaging, is (a) competitive, (b) accessible, and (c) devoid of entry barriers. As this Commission has rightfully recognized, most Internet services are characterized by openness and interoperability and as a consequence, those three goals are met without any outside intervention. However, for the reasons outlined above, the IM arena is not competitive, is not accessible, and is characterized by a substantial entry barrier. That situation will only be exacerbated by this merger and is not in the public interest.

B. The Commission’s Ancillary Jurisdiction Authority Also Provides Grounds for Conditions on Interoperability.

Applying the limited safeguards described below to ensure interoperability of IM also would be consistent with the Commission’s ancillary jurisdiction authority, recognized in numerous instances and first upheld by the Supreme Court in *United States v. Southwestern Cable*.⁵¹ In *Southwestern Cable Co.*, which upheld the Commission’s authority to regulate cable services before Congress granted the Commission express authority under Title VI, “it was settled beyond peradventure that the Commission may assert [ancillary] jurisdiction under

⁵⁰ *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, ¶ 142 (1999).

⁵¹ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

section 152(a) of the Act over activities that are not within the reach of Title II.”⁵² That is because, “[i]n designing the Communications Act, Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.”⁵³ Thus, for example, in *Computer II* the Court upheld as “well founded” the Commission’s finding that it has ancillary Title I jurisdiction over enhanced and information services, notwithstanding the absence of express Title II jurisdiction.⁵⁴

Of course, one of the reasons why the Supreme Court and subsequent courts have upheld “reasonably ancillary” jurisdiction is that the Commission is charged with regulating changing communications in an environment of changing technologies that Congress could never fully address in writing statutory language.⁵⁵ The development of IM starkly confirms that communications technologies, services and markets are evolving and converging at an unprecedented pace. If one company was allowed to monopolize the IM platform, the anticompetitive effects would, as explained above, be felt in telephony, interactive TV and other core communications markets as IM becomes the platform and protocol for a host of Title II and Title VI voice and video services and applications, including services that will be very important for those with disabilities.

⁵² *Computer and Communications, etc. v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (“*Computer II*”).

⁵³ *Id.* (citations omitted).

⁵⁴ *Id.*

⁵⁵ *Southwestern Cable*, 392 U.S. at 178 (“Congress could not in 1934 have foreseen the development of” advanced communications systems and services.).

The Commission's recent decision in *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities*,⁵⁶ provides support for a finding of ancillary jurisdiction in this instance. The Commission has jurisdiction here, as it determined it had in *Access by Persons With Disabilities*, because IM services are "at the very least 'incidental' to the 'receipt, forwarding and delivery of communications.'"⁵⁷ There is also here, as in *Access by Persons With Disabilities*, "a statutory nexus supporting assertion of ancillary jurisdiction."⁵⁸ Section 230(b)(2) – which states that it is the policy of the United States to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services . . ." – provides that nexus.⁵⁹

C. Section 230(b)(2) Gives the Commission Narrow and Limited Authority, In Certain Special Circumstances, To Protect Openness and Interoperability In the IM Market.

Section 230(b)(2) both provides an anchor for the Commission's ancillary jurisdiction authority and provides the Commission with express jurisdiction to impose the targeted remedies requested in Part V. Specifically, Section 230(b)(2) states that it is the policy of the United States to "preserve the vibrant and competitive free market that presently exists for the Internet

⁵⁶ 17 Comm. Reg. (P & F) 837 (1999) ("*Access by Persons With Disabilities*").

⁵⁷ *Id.* at ¶ 97 (quoting 47 U.S.C. § 153(33), 153(31)). To be sure, many in the computer industry opposed the assertion of jurisdiction over non-carriers in *Access by Persons With Disabilities* as improvident, but the Commission found that Sections 1-3 of the Act, with the accompanying powers granted in Section 4(i), are broadly drafted and not limited in scope to the activity of carriers.

⁵⁸ 17 Comm. Reg. (P&F) at ¶ 99.

⁵⁹ 47 U.S.C. § 230(b)(2).

and other interactive computer services”⁶⁰ Because this statutory language falls within the Communications Act, *AT&T v. Iowa Utilities Board* clearly establishes that the Commission has authority to take actions to advance this policy goal.⁶¹ However, the Commission’s authority is not unbounded, because Section 230(b)(2) also provides that the competitive free market should be “unfettered by Federal or State regulation.” But just as the Commission declared in the *MCI/WorldCom Order* when it reviewed the Internet backbone market, we are not proposing regulation of the Internet, nor is regulation of Instant Messaging being proposed. Instead we are urging the Commission to take modest steps to require the IM market to be “vibrant and competitive”, consistent with the goal of Congress. Those steps will facilitate the affected companies and private standard-setting bodies to resolve the issue. But without those steps, the IM part of Internet will not be competitive and vibrant.

The Commission has recognized that 230(b)(2) contains authority for it to take narrow and limited action in special circumstances. Specifically, in the *Reciprocal Compensation Order* the Commission cited Section 230 and emphasized that “[t]his Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the

⁶⁰ 47 U.S.C. § 230(b)(2).

⁶¹ 524 U.S. 357, 365-66 & n.5 (1999). Justice Scalia held that “[s]ince Congress expressly directed that the 1996 Act [which included Section 230]. . . be inserted into the Communications Act of 1934, the Commission’s rulemaking authority would seem to extend to implementation of [those] provisions”, adding that “the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of,” an Act with general rulemaking authority meant that Congress intended for the general rulemaking authority to apply.

dynamic market for Internet-related services.”⁶² And in the *Access Charge Reform Order*, the Commission expressly relied upon Section 230(b)(2) in acting to preserve competition.⁶³

To preserve competition in the IM market, the Commission must promote interoperability to ensure that consumers have real choice among competing IM providers. This, in turn, will accelerate IM’s growth by providing a fair market in which competition and innovation thrives.

D. The Commission Has Authority under Title VI to Protect Openness and Interoperability In the IM Market.

The Commission also has jurisdiction to impose the remedies requested in Part V because AOL’s IM offering through AOLTV constitutes a cable service within the meaning of Title VI of the Communications Act. Section 602(6) of the Act defines “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the *selection or use* of such video programming or other programming service.”⁶⁴ The words “or use,” which were added to the definition by the Telecommunications Act of 1996, clearly indicates that Congress intended cable services to include both the subscribers’ “selection” and “use” of video or “other programming services.” Interactive television services, which allow their subscribers to “use,” or interact with, video or other programming services offered on the cable system, clearly fall within this definition.

⁶² See Declaratory Ruling, *Inter-Carrier Compensation for ISP Bound Traffic*, CC 96-98, 14 FCC Rcd 3689, 3693 (April 27, 1999).

⁶³ See, e.g., *Access Charge Reform Order*, 12 FCC Rcd 15982, 16133 (1997) (deciding to retain the ESP exemption to advance the goals of the 1996 Act to ‘preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.’).

⁶⁴ 47 U.S.C. § 522(6).

AOL intends that its AOLTV offering will provide an unprecedented degree of subscriber interaction in the “selection” and “use” of video programming. There are three major features of the AOLTV interactive service: (1) a comprehensive program guide and navigation system; (2) the availability on the television screen of features such as Internet access, e-mail, and instant messaging; and (3) “enhanced TV” allowing video programmers “the opportunity to offer viewers enhanced, complementary interactive content optimized for display on the television screen.”⁶⁵ These features are accessible simultaneously through picture-in-picture viewing – *i.e.*, an AOLTV subscriber can simultaneously watch TV, browse the Internet, and send and receive e-mail or instant messages through different frames on the same screen.

AOL has made clear that instant messaging will be integrated into interactive video programs and is critical to providing subscribers access to the full range of interactive services offered through AOLTV. Barry Schuler, President of AOL’s Interactive Services Group, made an *ex parte* presentation to the Commission in which he displayed slides highlighting the prominent role that instant messaging will play. One slide entitled “Extending the Best of Interactivity to TV” proclaims that AOLTV will offer users access to a “Community of 23 Million AOL Members,” a clear reference to the centrality of instant messaging in AOLTV and the exclusivity of the current AOL Instant Messenger software.⁶⁶ Another slide asserts that “AOLTV Brings Popular AOL Features to TV Experience”, including “AOL Buddy List and Instant Messaging,” confirming that AOL intends for instant messaging to be a vital part of its

⁶⁵ See AOL and Time Warner, Response to Document and Information Request of June 23, 2000, at 1-2 (July 17, 2000). AOLTV has already been launched in a few geographic markets but is not yet available nationwide. *Id.* at 2.

⁶⁶ The slides quoted in this paragraph were attached to AOL’s August 25, 2000 *ex parte* notice.

interactive program offerings. Other slides from the presentation, as well as AOL's written submissions to the Commission, tout AOL's plans to allow video programmers to provide interactive polls, chats with TV stars, and other interactive programming that would require communication between TV viewers and programmers.⁶⁷

The implication is clear: AOL foresees instant messaging not only as a means by which AOLTV members can communicate with other AOL subscribers, but as a means of communicating with video programming providers (and their advertisers) as part of the interactive television experience. The ability to exchange instant messages with video programmers during video programs will be integral to the subscriber's "selection" and "use" of interactive TV services; indeed, it will be part of the very content offered by video programmers. Consequently, to the extent that IM is an integral feature of AOLTV's video programming, the Commission should treat it as a cable service, and ensure that, at the very least, AOL develops open and interoperable standards with respect to IM offered through its AOLTV service.

IV. THE COMMISSION SHOULD CONDITION ITS APPROVAL OF THE PROPOSED MERGER ON A SERIES OF TARGETED COMMITMENTS DESIGNED TO ENCOURAGE INTEROPERABILITY.

IM has the potential to become a robust platform that could rival e-mail as a critical feature to consumers and business. That potential will be realized if IM shares the features of openness and interoperability that characterize both the public telephone network and the Internet. Unfortunately, AOL has violated this core principle of interoperability by blocking the

⁶⁷ See AOL and Time Warner, Response to Document and Information Request of June 23, 2000, at 6-7 (July 17, 2000) (describing plans to enter into agreements allowing video programmers "to provide their own interactive services to AOLTV subscribers").

ability of other companies to exchange messages with AOL customers. As demonstrated above, the merger of AOL with Time Warner, unless conditioned by this Commission, will strengthen AOL's dominant position in the IM market and result in fewer consumer choices and less innovation in this vital area. To address these concerns, the Commission should exercise its jurisdiction described above and require a combined AOL/TW to:

- Cease IM blocking immediately. For more than a year, AOL has blocked the exchange of IM by other IM providers, thereby interfering with the critical open nature of the Internet and harming consumers and the emergence of competition.
- Immediately publish its fully functional and complete IM specifications on a public web page, and shall update this site with all relevant changes, in the same time frame which it makes these specifications available to its own development team. This step will give other IM providers the necessary protocol information to exchange IM.
- Not provide AOLTV in Time Warner franchise areas until IM is fully interoperable. IM is a central feature of AOL's interactive television offering and is the source of much of the real-time exchange of information that is the hallmark of interactive television. It would be discriminatory and contrary to the public interest if AOL could offer an interactive television service in a manner that subscribers could not interact freely with a video programmer (say, if that video programmer did not have an arrangement with AOL).
- Appoint a designated person to receive and address interoperability complaints. This designated person would acknowledge and resolve any complaints that arose concerning interoperability and provide any necessary assistance to the complaining party within a timely and responsive time frame.
- Submit quarterly reports on IETF progress. Long-term resolution of IM interoperability must be addressed by the private sector Internet Engineering Task Force (IETF). Because AOL has not participated in a meaningful way in the IETF process, despite commitments in July 1999 from Barry Schuler that they would "fast track" the IETF standard, AOL should be required to document for the Commission its contributions to the IETF and what progress has been made towards development and adoption of a standard for full IM interoperability.
- Commission staff should report on the level of interoperability in the IM market. These reports, which should be submitted at six-month intervals for the next two years, would be similar to the Commission's review of competition in the video and CMRS marketplace. The Commission could obtain the necessary information with a notice of inquiry.

CONCLUSION

For the reasons stated above, the Commission should approve the proposed merger of AOL and Time Warner with the conditions set forth above.

Respectfully submitted,

Tribal Voice

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