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September 20, 2000

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445-12<sup>th</sup> Street, S.W.  
12<sup>th</sup> Street Lobby  
Counter TW-A325  
Washington, D.C. 20554

Re: Applications Of America Online, Inc., and Time Warner, Inc.  
for Transfers of Control (CS Docket No. 00-30)  
Ex Parte Meetings

Dear Ms. Salas:

On September 19, 2000, Margaret Heffernan, President and Chief Executive Officer of iCAST, Inc., and the undersigned met with the following persons to discuss Instant Messaging in the context of the AOL-TW merger: Commissioner Susan Ness and her legal advisor, David Goodfriend; Jay Friedman, legal advisor to Commissioner Gloria Tristani; Commissioner Michael Powell and his legal advisor, Kyle Dixon; and Kathryn Brown, Chief of Staff to Chairman Kennard. We discussed the importance of Instant Messaging as a platform for many applications, especially entertainment; the vertical and horizontal effects of the merger on the Instant Messaging market, as outlined in a white paper submitted by iCAST on September 5; and the need for Commission action to require AOL to fulfill its oft-repeated commitment to interoperability. The attached summary was used at the meetings.

If you have any questions, please contact the undersigned.

Sincerely,

  
Gerard J. Waldron

GJW/lis  
Enclosure

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cc: Ms. Kathryn Brown  
Commissioner Susan Ness  
Mr. David Goodfriend  
Commissioner Gloria Tristani  
Mr. Jay Friedman  
Commissioner Michael Powell  
Mr. Kyle Dixon

## **IM INTEROPERABILITY: THE NEED FOR MINIMUM SAFEGUARDS**

*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.<sup>1</sup>*

This statement from the Commission in the context of the MCI/WorldCom merger accurately captures the intent of those parties engaged in the IM business. 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 necessary conditions are imposed.

### **IM Has Tremendous Consumer and Business Value**

IM is 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 the United States alone, *30 million individuals* use IM at least once a month – more than 30% of the U.S. online population.

- One of the most powerful and distinguishing features of the IM protocol is “presence detection.”
  - Allows IM to serve as an “**intelligent agent**,” searching the Internet for news/information specified by users and delivering that information to whatever device (computer, TV, wireless phone, or PDA) the user has activated.
  - Intelligent agents can monitor reservations, provide weather alerts and track financial markets.
- 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 PCS phones and PDA devices, allowing users to remain in contact with family, colleagues and customers.
- 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. Similarly, IM software is being developed for interactive TV that will send the viewer tailored reminders about programs and news developments.

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<sup>1</sup> *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).

### **The Commission Has Jurisdiction To Impose Minimal Safeguards**

The Commission has jurisdiction to ensure, through targeted safeguards that a combined AOL/TW does not raise further barriers to IM competition or leverage its IM power into other markets.

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

- Openness and competition have fueled the Internet's dynamic growth and have delivered a wealth of benefits to consumers.
- As long as AOL continues to block IM interoperability, consumers of various telecommunications services will not reap the benefits of IM 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.
  - (1)PCS: Commission required PCS providers to "achieve compatible interoperability standards" because that was in the public interest.
  - (2)DTV: Commission ultimately concluded that "the DTV Standard will permit interoperability with computers and encourage innovation and competition."
  - (3)Attachments: Commission has acted in the area of attachments to both telephone and cable networks to promote interoperability because it recognized the clear consumer benefit and the public interest benefit by mandating those steps.
- Same policy goals apply here. 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 IM market will see less competition, less innovation, and less consumer choice.*

➤ **The Commission's Ancillary Jurisdiction Authority Also Provides Grounds for Conditions on Interoperability.**

- Ancillary jurisdiction authority, recognized in numerous instances and first upheld in *Southwestern Cable*, gives Commission ability to regulate changing communications in an environment of changing technologies that Congress could never fully address in writing statutory language.
- The development of IM starkly confirms that communications technologies, services and markets are evolving and converging at an unprecedented pace.
- 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.'" Section 230(b)(2) provides the "statutory nexus supporting assertion of ancillary jurisdiction."

➤ **Section 230(b)(2) Gives the Commission Authority, In Certain Special Circumstances, To Protect Openness and Interoperability.**

- 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 and other interactive computer services . . . .”
- *AT&T v. Iowa Utilities Board* clearly establishes that the Commission has authority to take actions to advance this policy goal.
- 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.” *We are not proposing regulation of the Internet, nor is regulation of IM being proposed.*
- Commission has recognized that 230(b)(2) contains authority for it to take narrow and limited action in special circumstances.
  - *Reciprocal Compensation Order*: Commission cited Section 230 and emphasized that “[t]his Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services.”
  - *Access Charge Reform Order*: Commission expressly relied upon Section 230(b)(2) in acting to preserve competition.

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

- 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.”
- 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.

**The Commission Should Condition Its Approval on Targeted Commitments Designed to Encourage Interoperability.**

Federal regulators should impose minimal safeguards to promote interoperability – and thereby foster competition and innovation – in the IM marketplace. These safeguards, at a minimum, should 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 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.