ORIGINAL

EX PARTE OR LATE FILED

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP **ORIGINAL**

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7647

WILLIAM L. FISHMAN
DIRECT DIAL (202) 945-6986
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

September 20, 2000

RECEIVED

SEP 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfer of Control (CS Docket 00-30)

Dear Ms. Salas:

Enclosed for filing in the above-captioned proceeding are four copies of a letter from David McCourt, Chief Executive Officer of RCN Corporation, to Chairman Kennard and the Commissioners addressing the issue of instant messaging in the context of the proposed AOL/Time Warner merger. Copies of the letter have been served on the applicants and other commenting parties, as set forth in the attached service list.

Please address any questions to the undersigned.

Very truly yours,

William L. Fishman

Enclosure

No. of Copies rec'd 0+4
List A B C D E

349053.1

RCN

David C. McCourt
Chairman & CEO

105 Carnegie Center
Princeton, NJ 08540
(609) 734-3800

SEPT. 15, 2000

The Honorable William Kennard, Chairman
The Honorable Harold Furchtgott-Roth, Commissioner
The Honorable Susan Ness, Commissioner
The Honorable Michael Powell, Commissioner
The Honorable Gloria Tristani, Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.,
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfer of Control (CS Docket 00-30)

Dear Commissioners:

Recent press accounts have indicated that the staff of the Commission is considering the imposition of certain conditions on the proposed AOL/Time Warner merger in regard to the offering of instant messaging ("IM") services by the merged entity.[1] RCN Corporation ("RCN") has submitted previous filings in this proceeding concerning the need to condition the merger on the continued availability to cable overbuilders like RCN of Time Warner's cable programming. I write today, however, to emphasize the enormous importance of the IM market to the future of eCommerce, the Internet, and the financial viability of RCN and other such new competitive entrants.

Because the Commission staff has been considering the merits of the AOL/Time Warner merger for many months and the review process is in its final stages, I will be brief. In addition to being the premier cable overbuilder and one of the largest CLECs in the country, RCN also provides Internet access service through its subsidiary Erols, and a number of other ISPs. In fact, RCN is the 7th largest ISP in the country and the 2nd largest regional ISP in the Northeast. We are therefore quite familiar with the Internet market and with IM, including AOL's two proprietary IM products, AIM and ICQ.

Although the utility of IM was initially thought to be just an adjunct to email and useful only for casual or social purposes, it has now become clear that it is a powerful tool for business users. Speaking as a practical businessman, and not as a futurist, its "presence detection" capability, combined with the creative use of "intelligent agents," opens enormous possibilities for business users. As wireless access to the Internet grows ever more pervasive, convenient, and inexpensive,

[1] See, for example, the Wall Street Journal, September 13, 2000, at p. A-3.

IM will become very valuable to the business community when its members need to communicate with others, either internally or externally. Stated differently, its importance will mushroom in the very same way and to the same degree that email has grown to be an essential part of most business enterprises within the last few years.

In this light it is crucial that any approval of the AOL/Time Warner merger be conditioned on IM's broad and nondiscriminatory availability to the general public. Today, AOL is by far the predominant provider of IM services. According to its own statistics, AOL has 65.5 million registrations in AIM and 73.1 million in ICQ.[2] AOL's IM marketshare reaches into the 80-90 percent range. This predominance makes it important that, before AOL's IM status is even further buttressed by its merger with media giant Time Warner and the latter's Roadrunner, careful attention be given to the effect of AOL/Time Warner's continued or enhanced IM dominance on the competitive ISP market. This concern extends not only to ISPs themselves, but also to upstream markets. This is especially true because, as the Commission has learned in recent months, AOL has a history of rebuffing the efforts of others to enter the IM market and to interconnect their own IM services with that of AOL.

Like the post-divestiture RBOCs, AOL's commanding operational and economic advantages are such that its private interests are served by declining to interconnect with all other competitors and for a long time that is exactly what it did. When pressured to interconnect with other IM providers, AOL adopted the position that an industry standards group, the IETF,[3] should accept the responsibility for developing an industry-wide protocol. While that position is not unreasonable in the abstract, AOL has done little or nothing to advance the work of that group, and will not do more than window dress the effort unless it is forced to do so. For RCN's internet access business to prosper, our customers must be able to access a variety of IM products, including AOL's, Microsoft's, Yahoos,' and numerous others. Given AOL's history of resistance and stalling on the IM issue, it is clear that the Commission must require the development of full and nondiscriminatory IM rules as a condition of the merger. It is crucial that any such condition be specific, be accompanied by a painful sanction for nonperformance or undue delay, and be verifiable by objective criteria.

This letter is not the place to set forth detailed proposals. But given AOL's overwhelming dominance in the IM field, what comes to mind is section 271 of the Communications Act, in which Congress specified that before an RBOC could be allowed to enter the interstate long distance market, it had to demonstrate to the satisfaction of state and federal regulators that the market for local competition was irreversibly open to competition. A similar approach can be adopted here. Simply put, if the Commission believes the merger is otherwise in the public

[2] Response of AOL and Time Warner dated August 28, 2000, to staff inquiry of August 14, 2000, at 3.15.

[3] Internet Engineering Task Force (a private sector function).

interest, it should specify that it cannot be consummated until the interoperability of IM has been reasonably established to the Commission's satisfaction, based on evidence submitted to the Commission and open for public comment. To grant the merger merely on a promise of future compliance, *i.e.*, on a condition subsequent, I fear, will be to assure years of foot-dragging and delay while AOL/Time Warner attempts to make its IM market dominance unassailable. Such an outcome would not serve the public interest and need not be tolerated.

Very truly yours,

David C. McCourt

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2000, a copy of the foregoing letter from David McCourt to Chairman Kennard and the Commissioners was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW B204
Washington, D.C. 20554

James Bird
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W., 8-C818
Washington, DC 20554

To-Quyen Truong
Associate Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., 3-C488
Washington, DC 20554

Royce Dickens
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., 3-A729
Washington, DC 20554

Matthew Vitale
International Bureau
Federal Communications Commission
445 12th Street, S.W., 6-A821
Washington, DC 20554

Marilyn Simon
International Bureau
Federal Communications Commission
445 12th Street, S.W., 6A-633
Washington, DC 20554

Monica Desai
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., 4-A232
Washington, DC 20554

Laura Gallo
Mass Media Bureau
Federal Communications Commission
445 12th Street, SW, 2-A640
Washington, D.C. 20554

Linda Senecal
Cable Services Bureau
Federal Communications Commission
445 12th Street, SW, 3-A734
Washington, D.C. 20554

Jill M. Frumin*
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Stephen C. Garavito*
General Attorney
AT&T
295 North Maple Avenue
Room 1131M1
Basking Ridge, NJ 07920

Susan M. Eid*
Vice President, Federal Relations
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W., Suite 610
Washington, D.C. 20006

Peter D. Ross*
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Arthur H. Harding*
Fleischman and Walsh, LLP
1400 16th Street, Suite 600
Washington, D.C. 20036

Harold Feld*
Andrew Jay Schwartzman
Cheryl A. Leanza
Media Access Project
950 18th Street, N.W., Suite 220
Washington, D.C. 20006

Erwin G. Krasnow*
Verner Liipfert Bernhard McPherson and
Hand, Chartered
901 - 15th Street, N.W.
Washington, D.C. 20005-2301

Jonathan D. Blake*
Amy L. Levine
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Cynthia Mahowald*
SBC Communications, Inc.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005

James D. Ellis *
Paul K. Mancini
Patrick J. Pascarella
SBC Communications Inc.
175 East Houston Street
San Antonio, TX 78205

John Knox Walkup*
Wyatt, Tarrant & Combs
1500 Nashville City Center
511 Union Street
Nashville, TN 37219

Jonathan E. Canis*
Michael B. Hazzard
Kelly Drye & Warren LLP
1200 Nineteenth Street, N.W., Fifth Floor
Washington, D.C. 20036

Matthew M. Polka*
American Cable Association
One Parkway Center, Suite 212
Pittsburgh, PA 15220

Christopher C. Cinnamon*
Rhondalyn D. Primes
Bienstock & Clark
150 South Wacker Drive, Suite 720
Chicago, Illinois 60606

Richard Cotton*
Diane Zipursky
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10112

Ross Bagully*
Tribal Voice
600 17th Street, Suite 2500 South
Denver, CO 80202

The Honorable Mike DeWine*
Chairman Subcommittee on Antitrust,
Business Rights and Competition
Senate Committee on the Judiciary
161 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Herb Kohl*
Chairman Subcommittee on Antitrust,
Business Rights and Competition
Senate Committee on the Judiciary
815 Hart Senate Office Building
Washington, D.C. 20510

Sharon A. Gantt

349053