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September 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION
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VIA HAND DELIVERY

ORIGINAL

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

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

Dear Ms. Salas:

On behalf of America Online, Inc., enclosed please find two copies of written *ex parte* presentation submitted to Deborah Lathen, Chief, Cable Services Bureau, on this date under separate cover. The *ex parte* presentation consists of a letter to Ms. Lathen that addresses issues raised in the above-referenced docket concerning instant messaging services.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Peter D. Ross

Peter D. Ross

Enclosures

cc: Deborah Lathen

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 29, 2000

Ms. Deborah Lathen
Chief, Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
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) Written *Ex Parte* Presentation

Dear Ms. Lathen:

This letter addresses issues raised by certain petitioners regarding Instant Messaging ("IM"). In particular, we respond below to the recent submissions from Microsoft and others (the "IM Competitors") seeking FCC action on IM interoperability in this proceeding.[1] As demonstrated herein, there is no factual, legal, or policy basis for granting the relief sought by these petitioners.

- **Led by AOL's pioneering efforts and by the competitive response of many large and small companies, the Instant Messaging field today is robustly competitive, is free of barriers to entry or innovation, and offers vast consumer choice.** Remarkably, IM is a free service – effectively, a free feature of the Internet itself – offered by dozens of competitors, including such companies as Microsoft and Yahoo!, both of which have millions of active IM users. Because IM users can easily, and do, use multiple products simultaneously, any supposed "network effects" are working for the benefit of all competitors and are stimulating rapid adoption and innovation throughout the sector. In fact, the IM Competitors acknowledge that IM is "one of the fastest growing segments of the Internet." (Section I)

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1 *See* Letter from Erin Egan, Counsel for Microsoft, to Magalie Roman Salas, CS Docket No. 00-30, August 17, 2000 (including attachments); Tribal Voice and iCast, Notice of *Ex Parte* Presentation, CS Docket No. 00-30, September 5, 2000, ("*IM Competitors Sept. 5 Ex Parte*").

- **AOL's IM offerings are not a unique platform for future product extensions.** IM is an application, not an infrastructure or a facility. IM offerings are just one application utilizing innovative presence detection and addressability technologies. The presence detection feature of AOL's IM services is not unique to IM or AOL; rather, presence detection is used by a number of Internet-based applications. Moreover, AOL's IM offerings have little if anything to do with product extensions of the underlying presence detection technology on which IM is based. (Section II)

- **AOL is committed to pursuing industry-wide IM interoperability for the benefit of consumers, not competitors.** This merger does nothing to alter AOL's commitment to that goal. Consumer-oriented interoperability must recognize consumer interests in privacy, security, and ease-of-use and not be forced on one company at the expense of consumers by government action produced by strategic competitive lobbying. In the interim, however, the current lack of IM interoperability in no way diminishes consumer choice in, suppresses consumer demand for, or inhibits competitive innovation in IM services. A government mandate of interoperability, therefore, is both unnecessary and could expose AOL's IM users to spamming and identity theft, facilitate the spread of computer viruses, and compromise the "instant" performance that is critical to IM's appeal. These consequences, whether they result from inadvertent or intentional conduct, would compromise AOL's reputation for providing a safe, enjoyable, and easy-to-use online experience, thereby jeopardizing AOL's relationship with its paying customers. (Section III)

- **The preexisting industry debate regarding IM interoperability predates and has nothing to do with this merger.** There is no nexus between IM and this merger – Time Warner does not provide IM services today and had no pre-merger plans to do so in the future. Moreover, the combination of AOL's IM services and Time Warner's content is a competitive non-event: IM is not expected to be a significant means of distributing content. Other Internet-based options actually designed for online content distribution include file-sharing services, e-mail, and multimedia players capable of receiving streaming audio. In the absence of merger-specific impacts, clear Commission precedent confirms that there is no basis for conditioning approval of the pending transfer applications. (Section IV)

- **FCC intervention in IM interoperability would represent an unprecedented leap into regulation of the Internet and information services generally.** IM is not a telecommunications service. Moreover, FCC intervention here would break with thirty years of "un-regulation" of information services. Finally, neither the Act's public interest standard, Title I, Title VI, FCC precedent, or the cable rules provide any jurisdictional basis to grant the relief sought by the IM Competitors. (Section V)

I. Led by AOL's Pioneering Efforts and By the Competitive Response of Many Large and Small Companies, Instant Messaging Today is Robustly Competitive, is Free of Barriers to Entry or Innovation, and Offers Vast Consumer Choice.

A. What is Instant Messaging?

Instant messaging ("IM") is a term used to describe Internet-based services, such as AOL Instant Messenger ("AIM"), Microsoft's MSN Messenger, Tribal Voice's PowWow, and Yahoo! Messenger, that provide consumers with the ability to exchange short, text messages that appear virtually instantaneously on the recipient's screen. While similar in many respects to e-mail, IM incorporates a number of additional enhanced features that make it possible to, among other things, maintain a list of online correspondents and monitor their online status.

IM was invented by America Online in 1985, nearly a decade before the advent of the World Wide Web, and was first offered as a feature of the AOL online service in 1989. In 1996, AOL introduced the "Buddy List," a feature that allows AOL members to: (1) compile a list of other members with whom they regularly exchange messages; and (2) determine when these "buddies" are online and available to receive an IM. Soon after its introduction, AOL members began to ask for the ability to exchange messages with consumers using other ISPs. In response, AOL developed AIM, a standalone version of its IM service, which it made available at no cost to the Internet community at large in 1997.

AIM was designed to provide an IM application that everyone, not just AOL members, could use. In line with that goal, AOL began licensing the AIM technology to other companies almost as soon as it was released. Today, more than 20 ISPs and other companies—including EarthLink, Lotus, Apple, Juno, and IBM—have royalty-free licenses to distribute AIM. In addition, numerous other companies have developed their own IM offerings that do not use the AIM client.

Because AIM and these other IM services are available for free and can be used simultaneously on a single computer, Internet users today are able to communicate via IM with anyone they choose, at no cost. In fact, 45 percent of AIM users report that they have also used another IM offering. This widespread availability and choice of free IM offerings has contributed substantially to the explosive growth in usage experienced by all IM providers.

B. There is Substantial Competition Among IM Providers.

The last few years have seen a large number of rival IM and similar services emerge (more than 40 by our count).[2] Those services, like AIM and ICQ, AOL's separate IM offering,[3] are

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2 According to *The Presence and Instant Messaging Report*, there are at least 64 companies operating

(Continued...)

generally free and available to any Internet user. And many have been phenomenally successful. Microsoft's MSN Messenger, in particular, has enjoyed unprecedented growth, reaching the 10 million active user milestone in a little more than a year; in comparison, AIM—which has been available for more than three years—had 17.2 million active users in the 60 days prior to August 2, 2000.[4] And Microsoft's growth rate is now uniquely positioned to expand dramatically: The company has announced that it is bundling the MSN Messenger software with Windows Me, the latest consumer version of its operating system. Accordingly, in the not so distant future, nearly every computer user will have MSN Messenger.[5] Other IM providers are experiencing significant success, with rapid growth reported by Yahoo!, Tribal Voice, and Odigo.[6]

C. AOL Has No Hold Over IM Users or Competitors.

In the face of this evidence of increasingly robust competition among IM providers, there is no merit to the concern that AOL holds "market power" over IM users or competitors. For one thing, there is no "market" in IM. IM developed as a feature of Internet service rather than as a standalone offering. And even when offered as a separate Internet-based application, IM usually is provided at no cost to consumers. Whatever the object of concern may be, the proliferation of IM providers plainly demonstrates that there are no barriers to entry to prevent other companies from developing and widely distributing their own IM products.

Absent a "market" in any traditional sense of that word, market share has no real meaning. AOL's "share" of IM users has been overstated in any case. First, because IM is a free service involving a relatively simple registration process, registered user numbers are not a reliable measure

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(...Continued)
in the IM space. Mona Johnson, Technical Marketing Inc. & Pulver.com Inc (August 2000), *at* <http://www.pulver.com/impreport/subscribe.html> ("*The Presence and Instant Messaging Report*")

3 AOL acquired ICQ when it purchased Mirabilis, Ltd. in June 1998. ICQ differs from AIM in certain significant respects. First, ICQ predominantly serves users located outside the United States. Further, ICQ users generally are more experienced Internet users, and tend to have much different privacy and security expectations than AOL members and AIM users. AIM and ICQ are not interoperable.

4 AOL Time Warner Response to Document and Information Request of Aug. 14, 2000, CS Docket no. 00-30 (filed Aug. 28, 2000).

5 To the best of our knowledge, Microsoft has not made MSN Messenger interoperable with other IM services.

6 These parties have not disclosed in this record their own internal active user numbers. AOL's internal data indicates that the number of active users of Yahoo! Messenger (which Yahoo! does not report as a separate statistic apart from total Yahoo! registrations, which have surpassed 155 million) is in fact significantly larger than that of Microsoft's MSN Messenger.

of actual usage. And active user numbers for IM are typically substantially lower than registered user numbers.[7] Second, AIM (and the IM feature of the AOL online service) are not currently interoperable with ICQ – though AOL has taken no steps to prevent interoperability of other IM services with ICQ.[8] There is thus no basis for combining user numbers for these non-interoperable services in calculating supposed "network effects" (and there would be double-counting of users in such a combined figure in any event). Moreover, a substantial portion (some two-thirds or more) of ICQ users are outside of the U.S. Beyond these considerations, many IM providers do not report user statistics, not all of those that do provide them in a meaningful format (such as total active users), and many Internet users register with multiple IM providers. As a result, it is not possible accurately to estimate the total number of IM users against which AOL's user base might be compared. Based on all of these factors, the record provides no support for claims that AOL holds an 80-90 percent share of "the IM market"—or even more importantly, for a finding that whatever position AOL does hold as the early leader in any way negatively impacts consumers or the ability of other IM providers to effectively compete. Indeed, it is not unusual for an innovator with an early advantage see that lead erode as competitive offerings proliferate and new innovations are introduced.

D. Because IM Users Can Easily, and Do, Use Multiple Products Simultaneously, Any "Network Effects" Are Available to Each Competitor and Are Stimulating Rapid Adoption and Innovation Throughout the Sector.

In analyzing whether IM is characterized by "network effects," it is important to understand that consumers are able to download multiple IM software clients which they can use simultaneously, and it appears that many Internet users today have registered with, and in fact use, multiple IM services. Forty-five percent of AIM users report that they have used another IM service. This, along with the fact that IM is generally offered at no cost, indicates that there is nothing

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7 There are two problems with the active user numbers cited by Tribal Voice and iCast in their recent *ex parte* filing. First, rather than providing their own actual usage statistics, they rely on *Network Magazine*, a secondary (and less reliable) source. Second, they substantially overstate – and thus ignore the information AOL has submitted in this proceeding – the number of active users of AOL's IM services. *Compare* AOL Time Warner Response to Document and Information Request of Aug. 14, 2000, CS Docket no. 00-30, at 11 (filed Aug. 28, 2000) *with IM Competitors Sept. 5 Ex Parte* at n.15 (quoting "Instant Messaging, Special Report on Messaging," *Network Magazine* (Aug. 2000).

8 The recent *Wall Street Journal* article suggesting that AOL is testing interoperability between AIM and ICQ is incorrect. *See* Julia Angwin, "Instant Message Services at AOL Quietly Linked," *Wall Street Journal*, Sept. 26, 2000, at B4. The story relates to an eight-month old, limited research and development test – not an alpha or beta test – that was designed to understand some of the technical aspects of IM. The test allowed ICQ users to talk to other ICQ users through an AIM client – it did not enable interoperability between ICQ and AIM. ICQ will not interoperate with AIM ahead of other IM services.

inherent about IM that would prevent other providers from achieving the same degree of success, in terms of user numbers, as AIM currently enjoys.[9] Moreover, because AIM is free and available unbundled from AOL, it affords no conceivable network effects that would benefit the AOL online service.

Given these facts, and the robust IM competition noted above, it is plain that any network effects associated with IM are available to each competitor. In any case, were there strong network effects in IM, one would expect that AOL would have long ago made its two IM services, AIM and ICQ, interoperable with each other – and that other providers would have arranged interoperability across all of their services as well. Neither has happened to date.

II. AOL's IM Offerings Are Just One Application Utilizing Innovative Presence Detection Technologies.

As Section I explains, IM is a service that, like e-mail, web browsing, and ftp, depends on the Internet for the distribution of messages. While IM employs presence detection features, the presence detection capability used in IM is hardly unique to AOL or IM. Rather, presence detection is a feature that is widely available and used in a variety of non-IM applications, none of which are controlled by AOL. Microsoft already can detect the "presence" of any Windows user with an Internet connection. Another prime example of this would be the location-based applications now being offered in connection with wireless services. Put another way, anyone can write an Internet-based application that detects presence, thereby enabling the "intelligent agent" function, which seeks out and delivers specified information to an online user as he or she signs on.

Further, because the value of presence detection is not based simply on the number of subscribers, AIM has no appreciable marketplace advantage in this field. As a recent article in *PC Week* explained, new IM-related services, including "selective message routing and instant alerts" share a common thread: "they do not need a huge user base to make them valuable."[10]

The IM Competitors' strategic interest in interoperability appears to have less to do with consumers' ability to IM someone using a different IM service (which users can do today), and more with using this agency to grant them the right to detect, reach, and market to all AOL IM users instead of building a customer base of their own. While being able to free-ride on AOL's customer

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9 Indeed, AIM itself would enable a user to IM her entire "buddy list" with a link to a rival IM service she found superior, and in an "instant," she and her buddies could decide to switch from AIM to the alternative provider. Thus, the same way that an IM service can grow, so too can its usership readily jump to a competitor's offering.

10 *See* Dennis Fisher, "Small Talk Goes Big Bucks," <http://www.zdnet.com/eweek/stories/general/0,11011,2631584,00.html> (quoting Brian Park of Yahoo!).

list and direct marketing to AIM users via IM undoubtedly would enhance their competitive position, doing so would be difficult to square with anti-spamming laws or with this Commission's commitment not to allow its processes to be used for competitive purposes – and, in any event, hardly constitutes a matter warranting the dawn of Commission regulation of the Internet.

The record reveals no impediment to the ability of others to develop, deploy, and market contemplated services employing presence-detection features. Any such service can be marketed and provided to any Internet user, whether or not they also subscribe to AIM.

III. AOL Remains Committed to Pursuing Industry-Wide IM Interoperability in the Interests of Consumers, not Competitors.

Although no substantial consumer or competition problem exists in the current environment, AOL and the industry have come to believe that there are nevertheless legitimate reasons to pursue inter-service interoperability as additional IM providers continue to enter this space. Indeed, AOL has been consistent in its support of industry-wide efforts to create an open and interoperable standard that would allow individual users to communicate securely across different IM services. To that end, AOL submitted its proposed architectural design for a worldwide, server-to-server based interoperable IM system to the Internet Engineering Task Force ("IETF") in June.

Consumer-oriented interoperability must recognize consumers' interests in privacy, security, and ease-of-use. Interoperability for its own sake must not be forced on the marketplace, or on a single IM provider, at the expense of IM users or competition itself. Microsoft's strategic lobbying efforts in this matter, together with its bundling of MSN Messenger IM software into its monopoly operating system, risk a distortion of competition at the expense of Internet users. Likewise, one key element in building AOL's base of paying customers has been its reputation for providing a safe, enjoyable, and easy-to-use online experience. An interoperability framework that lacked the necessary safeguards would enable competing providers – either inadvertently or through strategic behavior – to compromise that reputation, thereby jeopardizing AOL's relationship with its subscribers.

As efforts to establish interoperability protocols proceed, both at the IETF and within AOL, AOL's primary concern is that the privacy and security of its subscribers be protected. IM has developed into one of the highly popular features of the AOL online service in large part because it is generally free of the problems, such as spam, identity theft, and virus proliferation, that today plague e-mail. As such, AOL firmly believes that interoperability between IM systems will be a benefit to consumers so long as it is achieved in a manner that addresses these concerns effectively and comprehensively.

These risks should not be underestimated. One need only look at the current e-mail system for an example. The failure to address the full range of potential vulnerabilities during that standard-

setting and adoption process has led to what AOL subscribers consider to be their greatest grievance—spam—as well as such ills as viruses like the Love Bug, hacking, and other similar threats to subscriber privacy and security. As explained in the August issue of *The Presence and Instant Messaging Report*, the

> focus on IM sort of hides the complexity involved in presence management. If we compare this to e-mail, then I think at the time everybody wanted interoperability of e-mail, and when it happened it laid the grounds for its widespread use. At the same time people began realizing the drawbacks: no security, spam, and so on. Since then this has been partially addressed by new standards, better e-mail clients and more careful use of e-mail in general, but we still live in a world where the vast majority of e-mails are sent unencrypted between people and there is practically no way to avoid spamming.[11]

AOL's IETF proposal addresses these concerns through a server-to-server approach that is specifically designed to offer consumers the benefits of interoperability that is free of unnecessary risks to privacy and security, scalability, product differentiation, and innovation. In comparison, the approach advocated to date by some IM competitors would entail, at least in the short term, a client-based means of allowing users of a select group of IM services to exchange IMs. This approach, which several participants in this proceeding improperly have attempted to impose unilaterally on AOL, is not true interoperability. As Tribal Voice and iCast have conceded, "[l]ong-term resolution of IM interoperability must be addressed by the private sector Internet Engineering Task Force (IETF)."[12] In that regard, it is important to note that, like AOL, the IETF group working to develop IM interoperability—whose co-chair has noted that "building security and safety into the system from the beginning is crucial"[13]—is only considering server-to-server proposals.

AOL, in addition to its own internal efforts to develop protocols consistent with the architectural approach described in its IETF submission, will continue to participate in the IETF process to develop an open, server-to-server based interoperability standard. However, AOL believes that it is critically important not to release any protocols until it is certain that the security precautions contained therein are sufficient to protect consumers. AOL estimates that it will take until next summer to develop technical protocols, and a period thereafter for peer-to-peer testing, before such protocols are ready to be implemented.

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11 *The Presence and Instant Messaging Report* (August, 2000).

12 *IM Competitors Sept. 5 Ex Parte* at 4.

13 Elizabeth Weise, "Instant Messaging Could Change," *USA Today*, August 8, 2000, *at* <http://www.usatoday.com/life/cyber/tech/review/crh451.htm>.

IV. The Preexisting Industry Debate Regarding IM Interoperability Predates And Has Nothing To Do With This Merger.

As discussed above, AOL is working with industry standards bodies to achieve server-to-server IM interoperability, and competition in the provision of IM services is thriving and will continue to do so while the standards effort proceeds. The debate over interoperability, however, has nothing to do with this merger, and therefore calls to regulate AOL's IM services as a condition of approving the transfer of licenses involved herein are entirely inappropriate.

The Commission prudently and consistently has refused to condition merger approvals in response to allegations of harm that are not merger-related. Moreover, even as to matters of clear Commission relevance, the agency has cautioned that where "[t]he merger is not the cause of [an] alleged competitive threat," the license transfer proceeding "is not the appropriate forum to address [that] issue."[14] Several commissioners echoed this warning at the public hearing regarding this merger,[15] and it is particularly apt with respect to IM issues. As explained below, these issues are not merger-specific, and thus the Commission must decline to intervene as requested by the IM Competitors.

First, Time Warner neither offers IM today nor had any pre-merger plans to do so in the future. Thus, Time Warner plainly is not being eliminated as a significant potential IM competitor.[16]

Second, notwithstanding claims that IM protocols are "a necessary distribution platform for a wide variety of interactive applications, services, and content," the combination of AOL's IM services and Time Warner's content will have no bearing on future competition in the distribution of content over the Internet. As an initial matter, IM, of course, is a service, not a platform or

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14 *AT&T/MediaOne*, CS Docket No. 99-251, FCC 00-202 (rel. June 6, 2000), at ¶ 143 ("*AT&T/MediaOne*"). *See also AT&T/TCI*, 14 FCC Rcd 3160, 3219(1999); *MCI/WorldCom*, 13 FCC Rcd 18025, 18148-49 (1998) (private contractual disputes do not provide a sufficient basis to conclude the merger is not in the public interest).

15 *See En Banc Hearing on America Online, Inc. and Time Warner, Inc., Applications for Transfer of Control Before the Federal Communications Commission*, CS Docket No. 00-30 (July 27, 2000) ("*AOL Time Warner En Banc Hearing*"), Statement of Commissioner Ness ("An issue that ... is not merger-specific, should not affect our decision whether to grant, condition, or deny the merger application."); Commissioner Powell ("We should not use a merger proceeding to impose conditions on one company in an industry, if the putative harm identified is not specific to the merger ....").

16 In any event, the Commission has been concerned about the loss of potential competition only in markets that (1) are transitioning from monopoly to competition and (2) have only a few potentially significant competitors, including the acquired company. Consequently, even if Time Warner had plans to offer IM, there would be no basis for concern by the Commission: here, there are dozens of existing IM providers, including companies such as Microsoft and Yahoo!.

infrastructure. In any event, IM is not likely to be a significant factor, or have any role at all, in content distribution. As explained above, IM is designed to enable the exchange of short, text messages – not multimedia files (music/MP3, video, etc.) whose sizes are measured in megabytes. E-mail attachments, which do not require the recipient to be online at the time of sending, are more appropriate means of distributing digital content. In addition, there are already a number of software applications available on the Internet that are specifically designed to enable file sharing. Moreover, multimedia player software from companies including Microsoft and Real allow consumers to listen and view a customized play list of streaming audio and video selections via the web. There is therefore no basis to conclude that this merger will have any impact on the online distribution of audio or video services.

V. FCC Intervention in IM Interoperability Would Represent an Unprecedented Leap Into Regulation of the Internet and Information Services Generally.

The FCC's longstanding policy of "unregulation of the Internet" has permitted the information services industry to flourish free from government interference. Commission intervention in the IM interoperability debate would represent not only an inexplicable reversal of that policy, but also an unprecedented assertion of jurisdiction over information services.

A. Instant Messaging Is An Information Service.

Both statutory and agency precedent confirm that IM offerings are "enhanced" or "information services." The FCC has defined "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional different, or restructured information; or involve subscriber interaction with stored information.[17]

Congress, in turn, defined the term "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…[18] The Commission has found these classifications to be equivalent and mutually exclusive vis-a-vis telecommunications services. [19] AOL's IM offerings satisfy both definitions.

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17 47 CFR § 64.702(a)(1999).

18 47 U.S.C. §153(20).

19 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998)

(Continued...)

Initially, as part of AOL's flagship online service, IM is but one feature of a bundled offering consisting of Internet access and proprietary content that is indisputably classified as an information service.[20] The Commission has made clear that Internet access provider offerings in total are recognized as information services and should not be classified on a disaggregated basis. The agency explained:

> It would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status... The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities [to] exploit... through applications they install on their own computers.[21]

IM is just such an application.

Moreover, IM services such as AIM—which combines a Buddy List, presence detection, user privacy and security (*e.g.*, AOL Neighborhood Watch and Knock-Knock), messaging, and other features—meets the definition of an enhanced or information service on a standalone basis. ICQ does the same. Presence detection—an integral component of IM which indicates whether a user is online and available to exchange IMs—is accomplished on a store-and-forward basis: when a user signs on to the IM service, the client software relays that information to the IM provider's servers, which store that information and relay it to other users as they request it. This function places IM (and presence detection as well) squarely within the definition of an information service, even without regard to its role as a feature of Internet access, and thus within the category of services the Commission has wisely chosen not to regulate.[22]

(...Continued)
("*Universal Service Report to Congress*").

20 In its *Universal Service Report to Congress*, the Commission stated that, as a matter of law and policy, Internet access services are appropriately classified—and thus left unregulated—as "information services." The provision of Internet access services "involve[s] data transport elements" but "conjoin[s] the data transport with data processing, information provision, and other computer-mediated offerings;" in contrast, a "telecommunications service" consists of the offering (for a fee) of "pure transmission" with no enhanced functionality. *Id* at ¶¶ 80-81, 59.

21 *Universal Service Report to Congress* at ¶ 79.

22 *Amendment of Section 64.702 of the Commission's Rules and* Regulations, 84 FCC 2d 50, 54 (1980) ("*Computer II Reconsideration Order*").

B. The Commission Has Long Declined To Regulate Enhanced or Information Services.

1. The FCC Took Early Action To Foster The Growth of Competitive Services

The Commission's policy against regulating information services dates back to the 1960s. It began with the FCC's *First Computer Inquiry*, wherein the agency declined to subject computer data processing service providers to common carrier regulation.[23] In its subsequent *Computer II* proceeding, the FCC reaffirmed and expanded this decision by creating the broad category of "enhanced services," which it similarly determined were exempted from Title II regulation.[24]

Significantly, this policy was unaffected by the transition in terminology from "enhanced services" to "information services" under the Telecommunications Act of 1996 ("1996 Act"). In interpreting the new term, the agency concluded—and courts have agreed—that "Congress intended the 1996 Act to maintain the *Computer II* framework" rather than "effect[ing] such a major change in the regulatory treatment of [information] services."[25] Consistent with the Congressional directive to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," the Commission confirmed that it would continue its policy of regulatory restraint toward information services.[26]

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23 *First Computer Inquiry*, Tentative Decision, 28 F.C.C. 2d 291 at ¶ 18 (1970).

24 Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (*Final Decision*), 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

25 *Universal Service Report to Congress* at ¶ 45 (". . . in considering the statutory history of the 1996 Act, we note that at the time the statute was enacted, the Computer II framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth . . . our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to [effect a major change in the regulatory treatment of those services]."); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955 (1996). *See also AT&T v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000) (information service providers "are not subject to regulation as telecommunications carriers," and "'information services' – the codified term for what the FCC first called 'enhanced services' – have never been subject to regulation under the Communications Act"); *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000) (information services are not common carrier services, and thus America Online, which is an information service provider, is not subject to common carrier regulation).

26 47 U.S.C. §230(b)(2). *See Universal Service Report to Congress* at ¶ 45.

This commitment has been echoed individually by a number of the current commissioners. For example, Chairman Kennard has stated that "the best decision government ever made with respect to the Internet was the decision the FCC made 15 years ago NOT to impose regulation on it. This was not a dodge; it was a decision NOT to act. It was intentional restraint born of humility. Humility that we can't predict where this market is going."[27] The Chairman also has emphasized that "[w]e don't want to impose legacy regulations on the Internet, which has been able to grow up quite nicely in an unregulated environment,"[28] and that "if policymakers had predicted the growth of the Internet, people would have tried to regulate it. It grew in large measure because it was off people's radar screens."[29]

Similarly, Commissioner Tristani has explained that "the Commission's decisions affecting the Internet—most notably the ESP [enhanced service provider] exemption and the *Computer Inquiry* line of decisions—have to be considered among the agency's greatest contributions to the public interest. As we continue our evaluation of this issue in the near future, I will keep firmly in mind the enormous benefits that have resulted from the philosophy underlying those decisions."[30]

And Commissioner Ness has noted that "the Commission is renewing its determination that the Telecommunications Act should be read to affirm the *unregulated* status of information services, including Internet access service. I firmly believe that this decision is supported by the statute and the legislative history, and that it has stimulated and will continue to promote desirable investment and innovation."[31]

Commissioner Powell likewise has stated, plainly, and accurately, that "we do not regulate the Internet."[32]

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27 *The Road Not Taken: Building a Broadband Future for America*, Remarks of Chairman Kennard before the National Cable Television Association, Chicago, Illinois, June 15, 1999.

28 "Kennard Pledges No Regulation For Internet Telephony," *Warren's Washington Internet Daily*, May 25, 2000, at 2.

29 *Id.*

30 Separate Statement of Commissioner Tristani, *Universal Service Report to Congress.*

31 Separate Statement of Commissioner Ness, *Universal Service Report to Congress.*

32 *AOL Time Warner En Banc Hearing*, Opening Statement of Commissioner Powell.

2. Granting the IM Competitors' Request Would Require an Unprecedented Assertion of FCC Regulatory Authority Over Information Services.

By calling on the FCC to orchestrate the provision of instant messaging, the IM Competitors would require the Commission to reverse this longstanding policy and to engage in an unprecedented assertion of jurisdiction over an information service offering. The FCC has never before sought to extend its regulatory authority in such a manner.

In its *Computer II Reconsideration Order*, the FCC recognized that assertion of its ancillary jurisdiction requires a finding of three factors: (1) that the service is within the subject matter addressed by Section 2(a) of the Act, 47 U.S.C. §152(a); (2) that the "proposed exercise of agency jurisdiction would serve a relevant statutory purpose"; and (3) that "there is an adequate factual predicate shown for the proposed agency action."[33] Applying this test, the Commission there asserted jurisdiction over only those enhanced services offered by common carriers, and even then:

> only insofar as such offerings affect our traditional Title II concerns that there be no unjust or unreasonable discrimination in the offering of Title II services or otherwise negatively affect communications ratepayers.[34]

Thus, even where ancillary jurisdiction may arguably attach to a particular subject matter (because, for example, it contains a communications component), the Commission still must demonstrate a nexus to an express grant of authority under Titles II or III in order to validate the jurisdictional exercise.[35] As shown below, no such nexus exists for IM.

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33 *Computer II Reconsideration Order*, at ¶123, *citing United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968); *U.S. v. Midwest Video Corp*, 406 U.S. 649, 659-60 (1972); *Home Box Office v. FCC*, 567 F. 2d 9, 36, 40-43 (1977), *cert. denied*, 434 U.S. 829 (1977).

34 *Computer II Reconsideration Order* at 93. The Commission continued: "Moreover, assuming the statutory jurisdictional nexus exists, the exercise of such jurisdiction through specific agency action must be predicated on the need to satisfy an overall statutory purpose or objective." *Id.* The Commission reaffirmed in the Computer III proceedings that enhanced services should remain free of state and federal regulation, finding that there continued to be a substantial federal interest in maintaining enhanced services free from public utility-type regulation. *See Amendments of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Order Upon Reconsideration*, 2 FCC Rcd 3035, 3060-61 (1987).

35 For example, although the Commission has recently asserted limited ancillary jurisdiction over even non-carrier provided voice mail and interactive menu offerings, it did so only upon a finding, based on an extensive factual record, that its action was absolutely essential to the performance of its obligation to ensure access to telecommunications by persons with disabilities under Section 255 of the Act. *See* Implementation of Sections 255 and 251(a)(2) of the Communications Act, 1999 FCC LEXIS 4804 (Sept. 29, 1999), ¶¶ 99-

(Continued...)

C. There Is no Jurisdictional Nexus To Support Regulation of IM.

The IM Competitors offer several theories in their effort to establish FCC jurisdiction over instant messaging. As explained below, none is persuasive, and certainly none presents the compelling case necessary for the FCC to overturn its long-standing policies.

- **The Commission's Public Interest Authority Does Not Justify Regulation of IM.**

The FCC lacks jurisdiction to regulate IM based on the agency's public interest authority. As detailed in Sections I and III above, the marketplace for IM services is competitive, and the IM issues raised in this proceeding are not merger-specific. As a result, the FCC need not address IM in order to find this merger is in the public interest. Conversely, it would be antithetical to the public interest to intervene where, as here, regulation is demonstrably inappropriate. Simply put, the Commission has no jurisdiction to impose common carrier-type regulation on information services such as IM, and it does not gain such jurisdiction merely because a merger of an IM provider is before it.

- **Section 230(b)(2) of the 1996 Act Embraces *Un*regulation.**

Section 230 of the Act cannot be used as as a source of authority to regulate IM. By urging the Commission to regulate the terms and conditions of carriage, interconnection and technical standards for AIM, the IM Competitors are in fact calling for something akin to the common carrier regulations found in Title II. As explained above, however, information services such as IM are not subject to common carrier regulation. Moreover, the Commission is not empowered to replicate its Title II regime for non-Title II services under its ancillary jurisdiction.

In any event, Section 230 does not provide the requisite nexus for any assertion of Title I authority over IM. Rather, Section 230 is intended to safeguard competitive services such as IM from regulatory interference:

> 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, *unfettered by Federal or State regulation.*

(...Continued)
103, 107.

The Commission's citations to Section 230 in decisions addressing the regulation of Title II services are not to the contrary. In the cases referenced by the IM Competitors – Access Charge Reform and Reciprocal Compensation – the FCC simply exercised its direct Title II jurisdiction in a manner guided by Section 230's statement of U.S. policy to promote *free competition* in Internet-related markets. It did not attempt to extend Title II regulation to non-common carrier offerings. Section 230 thus confirms that the Commission should let the marketplace resolve IM interoperability issues rather than imposing a government-mandated solution.

- **IM is Not Analogous to the Internet Backbone.**

Nor can precedent for regulating IM service be found in the Commission's *MCI/WorldCom Order*. That Order neither regulated Internet services nor affirmatively found that such jurisdiction existed. Rather, the agency did not reach the issue of jurisdiction because it concluded that the merger would not have anticompetitive effects on any Internet services.[36] Even assuming, however, that the Commission has jurisdiction over the telecommunications service-provided transmission capacity used for the Internet backbone or for other Internet-related services, that would be irrelevant to the IM issues raised by the IM Competitors. Unlike backbone services, IM is not a facility, platform, or transmission service. It is, as demonstrated above, an Internet application and, under the Commission's rules, an information service.

- **IM is Not a Cable Service.**

Likewise, Title VI cable regulations provide no authority to regulate IM,[37] for the simple reason that IM is not a cable service. AOLTV offerings, today and as presently planned, make no use of cable facilities whatsoever; the IM feature of AOLTV relies on narrowband dial-up transport.

The 1996 Act defines a 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.[38]

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36 *See* Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Memorandum Opinion And Order*, 13 FCC Rcd 18025, 18103 (1998).

37 *See IM Competitor Sept. 5 ex parte* at 31-33.

38 47 U.S.C. §522(6)

IM is not video programming.[39] Nor is it an "other programming service," for IM is not (as required) "information" that a cable operator "makes available to all subscribers generally."[40] Moreover, an IM user's act of drafting, sending, and receiving instant messages far exceeds the level of subscriber interaction contemplated by the above definition—even with the 1996 addition of the words "or use" in subpart (B). As the Commission has acknowledged, quoting Congress, these words

> were not intended to affect Federal or State regulation of telecommunications service offered through cable facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.[41]

In any event, the theory espoused here would likewise require finding e-mail, chat, and other Internet-based features of interactive television services such as AOLTV – as well as cable Internet access in general – to be cable services. While Federal courts have ruled variously,[42] the Commission has refused to make any such finding to date—and properly has found merger proceedings to be the wrong forum to consider such issues of industry-wide applicability and interest.

- **The FCC's Cable Navigation Device Rules Do Not Support FCC Regulation of IM.**

Finally, the Commission's navigation device commercial availability rules offer no support for demands that the FCC require interoperability of AIM.[43] The Commission has stated that it "did

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39 "Video programming" is "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* at §522(20).

40 *Id.* at §522(14).

41 *AT&T v. City of Portland*, No. 99-35609, Brief of the Federal Communications Commission as Amicus Curiae (9th Cir. Filed Aug. 16, 1999) at 24 (quoting S. Conf. Rep. No. 230, 104th Cong., 2d Sess. (1996) at 169). The Ninth Circuit noted, "corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view programming." *AT&T v. Portland*, 216 F.3d at 876.

42 *See AT&T v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (holding that Internet access over cable facilities is not a cable service); *Gulf Power Company v. FCC*, 208 F.3d 1263, 1276-77 (11th Cir. 2000) (holding that Internet access over cable facilities is not a cable service). *Cf. MediaOne Group v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000) (holding that Road Runner's Internet service is a cable service).

43 *See IM Competitor Sept. 5 ex parte* at n.49. Once again, even if this statement were true, the only IM services that would be subject to any ensuing regulations would be the small subset of IM services offered over cable facilities.

not mandate that navigation devices be portable or interoperable."[44] Moreover, the agency expressly disclaimed exactly the type of market intervention that the IM Competitors propose. The FCC determined that, because the industry was developing standards which would likely lead to interoperability, it would reconsider whether it was necessary to intervene only if the industry efforts underway did not achieve interoperability on their own.[45] Thus, the correct application of the Commission's reasoning—even assuming the FCC did in fact have jurisdiction—would be that the Commission should *not* take action now; rather, it should first permit the current industry efforts to establish interoperability, including IETF, to run their course.

D. Regulating IM Would Have Profound Implications for FCC Jurisdiction Over—and Intervention in—Information Services Generally and Internet Services in Particular.

Regardless of the purported jurisdictional grounds, FCC entanglement in the offering of IM could have serious adverse consequences for information services and the Internet marketplace. Such action would effectively reverse the agency's long-standing policy of regulatory restraint toward information services and eradicate the well-settled dichotomy between telecommunications and information services on which the industry has relied for decades. As a result, regulating IM would push the FCC down a dangerous, slippery slope by creating a precedent for ad hoc review of all individual Internet-related offerings. In sum, the precedent established by FCC assertion of regulatory jurisdiction over IM would inject uncertainty into the market, undermine the agency's established policy of "unregulation" of the Internet,[46] and disregard the directive of Congress that the Internet develop free of regulation.[47]

As Commissioner Powell wrote in his statement regarding our *en banc* hearing, "[w]hile our authority does extend to much of the infrastructure that affects Internet service, we must react cautiously and perhaps even skeptically to invitations to intervene in matters that involve Internet content, products and services."[48]

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44 In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, *Order on Reconsideration*, 14 FCC Rcd 7596, 7619 (1999).

45 *Id.*

46 See, e.g., Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (1999).

47 *See* 47 U.S.C. § 230(b).

48 *En Banc Hearing on America Online, Inc. and Time Warner, Inc., Applications for Transfer of Control Before the Federal Communications Commission*, CS Docket No. 00-30 (July 27, 2000) ("*AOL Time Warner En Banc Hearing*"), Statement of Commissioner Powell.

VI. Conclusion

The provision of IM services should be governed by the market rather than government mandates. The IM Competitors have failed to demonstrate that this merger will in any way diminish the vibrant competition characterizing the provision of IM services, and they have likewise failed to show that the Commission has the legal authority to grant the unprecedented relief they seek, even if that relief were warranted. Their request for onerous conditions on IM should be denied.

Respectfully submitted,

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