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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND

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

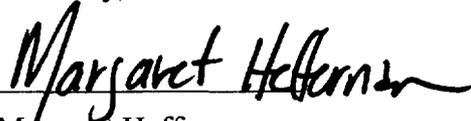
Re: In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control (CS Docket No. 00-30);
Notice of *Ex Parte* Presentation.

Dear Ms. Salas:

Attached please find a copy of my October 6, 2000, testimony before the House Subcommittee on Telecommunications, Trade and Consumer Protection that responds to AOL's claim that it has participated in the IETF process. Contrary to this claim, AOL has not worked toward IM interoperability with IETF. See Testimony, p. 5.

Should you have any questions concerning the attached, please contact the undersigned.

Sincerely,



Margaret Heffernan,
President and CEO
iCast
78 Dragon Court
Woburn MA 01801
(781) 994-4100

Attachment

- cc: Chairman William E. Kennard
- Commissioner Susan Ness
- Commissioner Harold W. Furchtgott-Roth
- Commissioner Michael K. Powell
- Commissioner Gloria Tristani
- Ms. Deborah Lathen
- Mr. Bill Johnson
- Ms. Royce Dickens

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Mr. Darryl Cooper
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Mr. Jim Bird

Testimony of
Margaret Heffernan,
President and CEO
iCAST

Before the
House Subcommittee on Telecommunications, Trade, and Consumer
Protection

Hearing on:
The Future of the Interactive Television Services Marketplace: What
Should Consumers Expect?

October 6, 2000

My name is Margaret Heffernan. I am the President and CEO of iCAST, an Internet entertainment company based in Woburn, Massachusetts. Our company, which employs 200 people, provides an array of multimedia content and tools that enable our users to view, listen to and share that content over the Internet.

What I'd like to do today is, tell you first, of my personal experience with AOL's tactics of keeping a stranglehold over the Instant Messaging ("IM") market; second, how the proposed merger with Time-Warner will make that stranglehold worse, and; third, why government officials should not be fooled by AOL's rhetoric of openness but instead should base the government's decision-making on the facts. Those facts clearly demonstrate AOL's desire to maintain its wall around the IM market for as long as it can. And the facts also demonstrate that it is in the public interest that that wall be removed as soon as possible.

But as a preliminary matter I want to make it clear that my company, and the many others who have joined in this effort, do not seek to regulate the Internet. Rather, we want to ensure that Internet services remain competitive, accessible, and devoid of entry barriers.

As Chairman Tauzin said at the last hearing, the purpose of these hearings is to ensure that consumer choice is protected. It is clear to us, and to many others in the Internet community that unless the Government imposes necessary conditions on the AOL/Time Warner merger, consumer choice will not be protected and IM, a vibrant and critical platform for future exchanges of information, particularly for interactive television, will be rendered non-competitive and non-accessible, with impossibly high entry barriers..

I. iCAST's Hope for IM and Experience with AOL

At iCAST, we know that 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 capabilities of the IM protocol would bring enormous public benefits. 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 personal digital assistant (PDA) devices. And, as AOL highlights in its public statements, IM can play an important role in interactive TV offerings.

Over this past winter, we at iCAST developed a downloadable media player that combines the power of IM with the excitement of experiencing multimedia online. The product, called the iCASTER allows users to play a variety of music and video formats, while simultaneously IM'ing their friends through its fully-integrated instant messaging functionality. Further, the product is designed to allow users to easily share music and video files by simply "dragging and dropping" music and video files from their playlists to names on their IM "buddy list."

For our IM platform, we chose a product created by Tribal Voice as we believed it had features that best suited our product. We wanted our customers to be able to freely communicate with everyone, just as they can with telephones and e-mail. As AOL controls 80-90% of the market we knew that we would need them not to block our users messages. But we were hopeful that AOL would allow us to be interoperable as Tribal Voice had developed a product that utilized an AOL sanctioned IM protocol that it made publicly available on its Web site, thus eliminating privacy and security concerns. Further, AOL's public statements at the time indicated it favored interoperability.

In February of this year, when we launched the ICASTER it was designed to be interoperable with AOL AIM, MSN Messenger and Tribal Voice's PowWow instant messaging products. This meant that our users could communicate with over 60 million IM users. AOL blocked interoperability with our product within two days. I called AOL to try to determine if the blocking was unintentional. I was told that no, the blocking was intentional, and that AOL would continue blocking. I was also told that they thought the iCASTER application was really cool. I ask if they would consider, as a gesture of good faith and in accordance with their public comments about interoperability, whether they would consider not blocking until the industry agreed on an open standard. I was told, in no uncertain terms, the answer was no.

So as a company, we had a problem. It is one thing to face a powerful incumbent with a huge built in advantage. That is the nature of the market and we are ready to take on such a fight.

But it is entirely a different thing to face a market in which the incumbent, and a potential competitor, controls your ability to even communicate with your customers and potential other customers.

As Congressman Tauzin noted at the beginning at the first panel, when's there's only one store in town, you get bad service, bad prices, and bad attitudes. And that is what we have right now with Instant Messaging.

And it's about to get worse.

II. How the Proposed Merger will make the Existing Problem Far Worse, Particularly for Interactive Television

It was clear that we faced a difficult situation. But when we began to think through the future implications of an AOL joined with Time-Warner, it became obvious that the existing problems were about to become even worse.

With its control of well over 80% of the active IM users AOL already 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.

The proposed merger with Time Warner will deepen that dominance in a variety of ways.

In particular, the proposed merger would:

- Allow AOL to leverage its IM dominance into interactive TV services provided by Time Warner. To be sure, AOL has stated that it will not block the Advanced Television Enhancement Forum 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. 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 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;
- 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);

- 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;
- 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; and
- 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

Moreover, it should be understood that approval of the proposed merger without conditions means that interoperability becomes an even more distant goal. After all, increasing the duration and value of AOL's IM market power, as noted above, will increase the incentives for AOL to maintain that market power, and thereby further increase AOL's incentives to resist IM interoperability.

While it is easy to see how the merger creates a number of specific opportunities and incentives for AOL/TW to unfairly exploit its market dominance of IM, these examples are really just representative of the larger point; that if one is allowed to control a critical platform, one can improperly control a number of markets. The television broadcasters, who have a great stake in the future of interactive television, understand that for the future of television to be robust and competitive, AOL/Time-Warner must not be allowed to maintain walls, like they are doing with instant messaging. As the National Association of Broadcasters wrote Chairman William Kennard of the Federal Communications Commission "(t)o counteract the natural incentive of the combined AOL/TW to continue favoring its own content and services over those of the unaffiliated entities, and to protect the interests of consumers in receiving services and content from a variety of competing sources, the Commission must insure that unaffiliated content and service providers are not subject to discriminatory treatment by AOL/TW. To achieve this goal, the Commission should extend the basic principle of open access beyond Internet access so as to include such services as instant messaging, EPG (electronic programming guides) and digital and interactive television."(Letter from National Association of Broadcasters to Chairman William Kennard; October 2, 2000)

III. The Bottom Line: Can the Public Trust AOL to Solve the Problem?

So given how the merger would make matters so much worse, we decided we had to raise our voice and point out the problem.

And we have been gratified that not only have we been joined by numerous companies, but leading editorial writers from around the country, ranging from Business Week to the Economist, from the San Jose Mercury to the Silicon Alley Daily, have joined in the call to open up IM.

Yet the odd thing is that this debate is not really a debate about philosophy. After all, we only want openness; we do not want regulation.

And AOL says it agrees. It says it is for interoperability and open standards. It says it is willing to let others through the wall it has constructed.

If we had any evidence that AOL was sincere in its statements we would not be here. But in business, you look beyond the rhetoric and consider performance. Government should do no less. And Congressman Dingell wisely said at the hearing last week "Trust everyone but cut the cards."

So what has been AOL's performance here?

15 months ago, in July 1999, members of Congress first started expressing concern about AOL blocking competitors. AOL responded by promising it would "fast-track" its efforts to work with the Internet Engineering Task Force. Indeed, Mr. Case came before you and bragged that AOL had committed to providing "leadership" to the IETF process. In response to a question from Congressman Gordon, Case said that he had committed AOL to work "aggressively" toward interoperability.

But what has AOL actually done to "fast-track" its efforts? What kind of leadership has it offered? How "aggressive" has it been in working toward interoperability?

The business of the IETF, not surprisingly, is done over the Internet. The logs of the discussions are a matter of public record. So consider how much AOL has done over the last 15 months by comparing the number of its submissions to the IETF to what the rest of the industry is doing.

	AOL emails	Industry emails
August 1999	0	147
September 1999	0	314
October 1999	0	547
November 1999	0	470
December 1999	0	278
January 2000	0	345
February 2000	0	193
March 2000	0	160
April 2000	0	58
May 2000	0	65
June 2000	8	235

July 2000	0	197
August 2000	0	604
September 2000	0	164

Note that the only month AOL had any submissions was in June, when, in response to press reports that the FTC and FCC were investigating the IM issue, AOL submitted a proposal to the IETF. Mr. Case told you about that proposal in an effort to convince you AOL was living up to its promise to move along the IETF effort. But what he neglected to tell you was that the IETF has already rejected the AOL proposal as a “last-minute submission was a general framework for instant messaging interoperability rather than a full-fledged protocol.” (Network World Fusion 8/3/2000.) Since that time, AOL has again gone silent.

At the last hearing, Congressman Greene suggested that AOL had indicated that there would be interoperability by June of 2001. Unfortunately, while AOL has implied a timetable close to that, it has always provided plenty of wiggle room. Given the pace of development of the Internet one might have thought fast-tracking a solution would take less than 15 months. But now, 15 months after making that “commitment” the same AOL official has publically said that fast-tracking is a bad idea and AOL needs at least another year.

If one can look at AOL’s record and believe that it represents a sincere effort to “fast-track” interoperability, if one can believe that providing less than one-quarter of one percent of the entries to a process constitutes leadership, then one can, perhaps, believe that AOL/Time-Warner will honestly work towards interoperability. But that would be like believing that the East German Regime built the Berlin Wall to protect its citizens.

But we all know the real reason the Wall was built. The Regime wanted to protect itself. And so here, the many excuses AOL gives for blocking interoperability are nothing more than the kind of propoganda that marked the communications of the defender’s of Berlin’s Wall.

Recently, Verizon CEO Ivan Seidenberg noted that the biggest communications market in the world is AOL’s IM network. There is nothing wrong, per se, with a large market. But just as the government would not allow Verizon or AT&T to prevent competitors from being able to interoperate with their customers, so here, the the government has a role in protecting the public interest.

So the choice for the government is clear. It can close its eyes to the facts and the public will get interoperability on AOL’s timetable and on AOL’s terms. And if there is one thing we can be sure of it is that AOL’s timetable will not be on Internet time.

Or the Government can make AOL live up to its own words and set a date certain for interoperability. And then consumers can enjoy the benefits of a vigorous, competitive market.

Thank you.