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January 4, 2001

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

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

Dear Chairman Kennard:

The purpose of this letter, filed on behalf of IM Competitors, is to emphasize the need for the Commission to condition approval of the AOL/Time Warner merger on meaningful and enforceable requirements that facilitate IM interoperability across diverse systems provided by competitive IM providers so that consumers can communicate with each other regardless of the IM system they use.

As the record reflects, AOL dominates the IM business and, in an effort to safeguard that position, has done nothing to date to follow through on its pledge made 18 months ago to fast-track interoperability with competing IM systems. In fact, in spite of all attempts by IM Competitors to establish interoperability with AOL, combined with FCC and Congressional scrutiny, AOL remains unmoved and unwilling to voluntarily take the necessary and simple steps toward interoperability which would benefit consumers of all IM systems.

As the IM Competitors have demonstrated, the Commission has jurisdiction to address the harm to consumers, competition and innovation caused by the AOL/TW merger.[1] Given that the merger threatens to irreversibly tip the IM market to AOL, the only fully effective remedy would be to require AOL to immediately permit customers of competing IM providers to

[1] *See, e.g.*, September 5, 2000 *Ex Parte* Filing by iCast and Tribal Voice, at 22; December 20, 2000 *Ex Parte* Letter from Gerard Waldron to Magalie Salas (describing communications with Commissioner Ness).

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communicate with AOL IM customers in both the narrowband and broadband contexts. For example, IM Competitors could begin interoperating with AOL IM immediately – without any disclosure of technical information or other assistance from AOL – if AOL were simply ordered to cease disabling the innovative interoperability solutions developed by the IM Competitors.

Based on press reports, we understand that the Commission's proposed remedy does not address the lack of IM interoperability today, but rather would ostensibly obligate AOL to achieve interoperability only when it begins to provide "advanced IM services." As we have stated previously, this concept has serious flaws – the primary one being that the anticompetitive effects of the merger clearly extend to existing IM services provided over traditional dial-up "narrowband" connections. Moreover, the term "advanced IM" is inherently ambiguous and lacks a clearly understandable definition. As such, this approach provides no certainty as to when, if ever, AOL would be bound by the Commission's proposed remedy. Assuming arguendo that the Commission is committed to the "advanced IM" concept, however, the simplest fix to this latter problem would be to define the term so that it would include ***any*** IM service that AOL provides over Time Warner's cable systems.[2]

If the Commission is unwilling to address AOL's refusal to allow others to interoperate in this easily measured fashion, then at the very least the Commission should impose a condition that encompasses all four of the following components:

- Is triggered by the offering of an IM service over Time Warner's cable system in connection with the delivery of advanced applications such as, but not limited to, video streaming, video conferencing, IP telephony, document sharing and the transfer of media files;[3]

- Obligates AOL, prior to offering any advanced IM services, to enter into at least five arms-length contracts with unaffiliated significant IM providers that (a) permit full interoperability including but not limited to being able to notify users across services when friends are online and being able to send messages across services, (b) include

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[2] *See* December 20, 2000, *Ex Parte* Letters from Gerard J. Waldron to Magalie Roman Salas (describing *ex parte* conversations with the offices of Commissioner Tristani and Commissioner Ness).

[3] It bears emphasizing that a remedy which is tied to IM-related services that supposedly cannot be delivered effectively in a narrowband environment cannot fully remedy the anticompetitive impact of this merger, even if the "advanced IM" concept is defined as discussed above. As noted, the IM Competitors have established that the merger will have anticompetitive consequences *today* for competition in IM services and applications provided over narrowband dial-up connections. Moreover, consumers regularly demonstrate their will to exploit whatever connectivity they have, and the march of technology will continue to assure that even IM services optimally provided over a broadband connection will be accessible to those willing to use a narrowband connection.

independent "most favored nation" clauses that promote consumer choice, and (c) are subject to Commission approval. Such arms-length contracts must permit interoperability with unaffiliated, third-party IM systems without any condition requiring the use of AOL's proprietary IM technology or branding;

- Requires AOL/Time Warner to report on a quarterly basis via a detailed ex parte filing on both its progress toward interoperability with competitors and any complaints it receives from third-party IM providers concerning interoperability so that the Commission can monitor developments in this area; and

- Terminates only when (a) AOL implements a server-to-server interoperability standard adopted by the Internet Engineering Task Force ("IETF") or (b) AOL has a non-dominant position in the IM business for at least six (6) months as shown by all relevant data measurements, including reports based on minutes of IM usage. AOL should not be able to avoid its interoperability obligations by simply showing that another IM provider, whether significant or not, is offering an advanced IM service. The mere existence of a competitor has done nothing and will do nothing to provide consumers with the benefits of IM interoperability.

Anything less than these modest steps would threaten the openness, diversity, and innovation of the Internet and the development of competition in the provision of IM services – all to the detriment of consumers and their ability to communicate with each other regardless of the IM system they use. The Commission here faces unique circumstances brought about by AOL's intractable position and its pending merger with Time Warner, and it can impose conditions in the unique circumstances of this merger that actually promote growth of the Internet and stave off future regulation of it.

Please direct any questions to the undersigned.

Sincerely,

Gerard J. Waldron

cc: Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth
Kathy Brown

Karen Onyeije
Mark Schneider
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