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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: America Online, Inc. and Time Warner Inc.
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. ("AOL") and Time Warner Inc. ("Time Warner") (collectively, the "Applicants"), submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules are an original and one copy of this notice regarding a permitted oral *ex parte* presentation in the above-referenced proceeding. On December 4, 2000, representatives of the Applicants met with members of the Commission's staff to discuss the issue of instant messaging ("IM"). A list of attendees is attached.

The parties discussed concerns raised in this proceeding regarding "network effects" associated with IM. AOL reviewed the recent report by Media Metrix indicating that the number of "unique visitors" to Microsoft's MSN Messenger and Yahoo! Messenger are growing at rates faster than that of AOL Instant Messenger ("AIM").[1] AOL then explained why this is clear and unrebutted evidence that IM has not "tipped"—and is not on the verge of tipping—to AOL.

The data reflecting the ascent of Microsoft and Yahoo as the most rapidly growing IM providers are confirmed by additional Media Metrix data, as well. While IM competitors have long suggested that active user numbers are indeed the best metric to consider in analyzing the IM arena, Microsoft, *et al*. now attempt to deny the significance of the Media Metrix "unique visitor" data that undermine the "tipping" claim upon which their call for FCC intervention is predicated. These parties appear to suggest that their "unique visitors" are largely customers who have downloaded and installed their IM software but activate it only in order to shut it down. Additional Media Metrix data clearly contradict this unsupported hypothesis.

In particular, the notion that these IM competitors are growing dramatically in unique visitors—that is, users detected by Media Metrix to have activated the on-screen window for these IM services—but not in actual usage is belied by the fact that Microsoft's IM service has experienced unsurpassed growth in total usage minutes as well. Media Metrix data reveals that Microsoft's MSN Messenger jumped 48% in unique visitors just between June and August of this year.[2] Over this same period, Media Metrix data shows that MSN Messenger's total (home and work) usage minutes grew from 574,000,000 in the month of June to 1,350,000,000 in the month of August—a jump of 135 percent.[3] This compares to growth in total usage minutes of 22 percent for AIM over this same period.[4] (While Media Metrix does not appear to have total usage minutes data for Yahoo! Messenger prior to August, the Yahoo! IM service's total usage minutes in August

[1] According to that study, the number of active users of MSN Messenger grew between August 1999 and August 2000 from virtually zero—the service was launched on July 22, 2000—to over 10 million; likewise, Yahoo! Messenger, which began offering IM in June 1999, grew to over 10.5 million active users in that same time frame. In comparison, the study reports that AIM grew by just under 3.5 million active users in that 12-month period. *See* Media Metrix Press Release, "Yahoo! Messenger and MSN Messenger Service are Fastest Growing Instant-Messaging Applications in the U.S.," November 16, 2000.

[2] *See* Media Metrix Electronic On-Line Report (June 2000); Media Metrix Electronic On-Line Report (August 2000).

[3] *See id*. Note that the Media Metrix methodology does not count the entire time a window is open and active as active usage; if a window is idle for more than 60 seconds, then that service is no longer considered actively used. *See* Media Metrix, "Understanding Measurement of the Internet and Digital Media Landscape," at 13 (*available at* <http://www.mediametrix.com/products/us__methodology_long.pdf>).

[4] *See* Media Metrix Electronic On-Line Report (June 2000); Media Metrix Electronic On-Line Report (August 2000). AIM's total usage minutes measured 4,272,000,000 in August. Media Metrix does not provide data for the dozens of other IM services that are competing in this space.

exceeded those of MSN Messenger—reaching 1,746,000,000.) Thus, there is no basis (certainly none in the record) to reject the Media Metrix data documenting the dramatic rise of Microsoft and Yahoo's IM services.

AOL also pointed out that MSN Messenger is poised to grow even more dramatically as Microsoft migrates more and more consumers to Windows Me, the latest consumer version of its operating system software. As noted in our prior submissions, Microsoft has embedded its MSN Messenger software into Windows Me, which is now the standard operating system included on new PCs. Accordingly, virtually every home computer user will soon have MSN Messenger on their desktop.

This unrefuted record evidence—both the independent data and the fact of Microsoft's bundling—permits no finding of an IM or related business that has "tipped" (or even is in imminent danger of "tipping") to AOL.

Moreover, AOL addressed the potential harms that Microsoft, *et al*. have argued could arise in conceivable extensions of IM and presence detection applications if, despite the clear evidence to the contrary, IM was in fact "tipping" to AOL. AOL refuted the series of speculative assumptions upon which this theory of supposed harm depends: (1) that "advanced IM services"—which today do not even exist—will prove to be a real, viable business; (2) that such services will constitute a distinct product market for which existing or future methods of distributing information (*e.g.*, e-mail, file sharing services) will not prove economic substitutes; (3) that advanced IM providers will be unable to compete effectively in this distinct product market absent access through AOL to its registered IM users; and (4) that, if such a business emerges, other leading e-commerce or communications companies with a substantial online user base could not readily enter and effectively compete in any such "market." None of these assumptions has been shown likely, much less proven, in this record.

Finally, AOL emphasized the far-reaching implications that would result from Commission action on IM in this merger review proceeding. AOL explained how FCC intervention into the IM interoperability issue would risk harm to consumers, competition, and innovation. FCC intervention would have the effect of supplanting ongoing marketplace efforts to achieve true server-to-server interoperability on a basis that safeguards privacy, security, and performance. Beyond that, FCC intervention in the terms of IM-related service offerings would constitute an unprecedented regulation of information services and, indeed, herald the FCC's initiation of regulation of the Internet.

To do so in the absence of any reliable record evidence of market failure in these nascent (if not wholly speculative) Internet services—and, further, in the face of compelling factual evidence disproving any tipping toward AOL in IM services—would be to embrace a strikingly low standard for intrusion in the Internet arena that the Commission has heretofore proclaimed off limits to regulation. And to do so unilaterally as to AOL, at a time when Microsoft has enjoyed unprecedented growth and now has bundled its IM service with its soon-ubiquitous operating system, would be to engage in a wholly unwarranted picking of “winners and losers” in this highly fluid Internet marketplace.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

/s/ Peter D. Ross

Peter D. Ross

cc: Deborah Lathen, Chief, Cable Services Bureau
Robert Pepper, Chief, Office of Plans and Policy
Gerald R. Faulhaber, FCC Chief Economist, Office of Plans and Policy
Sherille Ismail, Deputy Chief, Cable Services Bureau
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau
James Bird, Assistant General Counsel, Office of General Counsel
Darryl Cooper, Cable Services Bureau
Peter Friedman, Cable Services Bureau
Linda Senecal, Cable Services Bureau
John Berresford, Common Carrier Bureau
Joel Rabinovitz, Office of General Counsel
Pieter van Leeuwen, Office of General Counsel
International Transcription Services, Inc.

List of Meeting Attendees

On behalf of the FCC:

Deborah Lathen, Bureau Chief, Cable Services Bureau
Robert Pepper, Chief, Office of Plans and Policy
Gerald R. Faulhaber, FCC Chief Economist, Office of Plans and Policy
Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau
James Bird, Assistant General Counsel, Office of General Counsel
Darryl Cooper, Cable Services Bureau
Peter Friedman, Cable Services Bureau
John Berresford, Common Carrier Bureau
Joel Rabinovitz, Office of General Counsel
Pieter van Leeuwen, Office of General Counsel

On behalf of AOL:

George Vradenburg III, Senior Vice President, Global and Strategic Policy, AOL
Steven N. Teplitz, Vice President, Telecommunications Policy, AOL
Peter D. Ross, Wiley, Rein & Fielding
Andrew K. Long, Wiley, Rein & Fielding

On behalf of Time Warner:

Catherine R. Nolan, Vice President, Law and Public Policy
Arthur H. Harding, Fleischman and Walsh, L.L.P.