

Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Peter D. Ross
(202) 719-4232
pross@wrf.com

Fax: (202) 719-7049
www.wrf.com

December 12, 2000

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 *ex parte* presentation in the above-referenced proceeding. On December 11, 2000, representatives of AOL met with members of the Commission’s staff to review certain issues raised in this proceeding.

Participating on behalf of AOL were George Vradenburg III, Senior Vice President, Global and Strategic Policy; Steven N. Teplitz, Vice President, Telecommunications Policy; and Richard E. Wiley and Peter D. Ross of Wiley, Rein & Fielding. Representing Time Warner was Catherine R. Nolan, Vice President, Law & Public Policy.

The following FCC personnel participated: Kathy Brown, FCC Chief of Staff; Karen Onyeije, Legal Advisor to Chairman Kennard; Michelle Ellison, FCC Deputy General Counsel; James Bird, FCC Senior Counsel; Joel Rabinowitz, Office of General Counsel; Deborah Lathen, Chief, Cable Services Bureau (“CSB”); Royce Dickens, Deputy Chief, Policy and Rules Division, CSB; Darryl Cooper, CSB; Robert Pepper, Chief, Office of Plans and Policy (“OPP”); Gerald R. Faulhaber, FCC Chief Economist, OPP; and David Farber, FCC Chief Technologist.

AOL reviewed its *ex parte* submission of December 11, 2000, which demonstrated that—by any measure—instant messaging (“IM”) has not “tipped” (and is not on the verge of tipping) to AOL and, thus, that no FCC intervention is necessary or warranted in this nascent Internet arena. With its competitors growing more rapidly, AOL’s “share” in IM has—by any measure—fallen significantly. Thus, this record not only fails to substantiate a claim that IM (or any relevant “market” or essential input) has “tipped” to AOL, it in fact permits no such finding. AOL also emphasized the significance of Microsoft bundling its already fast-growing IM service into its operating system, which soon will result in virtually every home computer user having MSN Messenger on their desktop.

To the extent the concern has been that AOL is poised to leverage its position into an “unassailable dominance” of future “advanced IM” services that might depend on the combination of inputs that underlie IM today (including online user name directories and presence detection), available data confirms that this theory is not only highly speculative but plain wrong. Further, the Internet arena is populated by a wide array of companies who already today have substantial online user name directories that could be readily combined with widely available presence detection technology and any IM provider’s messaging capability. In addition, there already exist other distribution technologies—functionally substitutable for IM distribution—for the services that are posited as “advanced IM services” (namely video streaming). Thus, the set of inputs underlying the IM application is just one of several methods by which competitors can distribute advanced video streaming or other services competitive with potential “advanced IM” services.

Accordingly, any notion that AOL holds (or, through this merger, could secure) a dominant position in future IM extensions because of its alleged dominance in the “essential inputs” for such potential offerings is simply unsupported by the record evidence.¹ To the contrary, it is Microsoft—having now bundled its already fast-growing IM service with its new operating system—that is poised for unchecked growth in any future IM marketplace.

¹ Despite attempts by IM competitors to demonstrate some sort of nexus between the IM issues raised in this proceeding and the merger of AOL and Time Warner, there is absolutely nothing in the record that shows, or could show, that AOL’s ownership of Time Warner’s video content or broadband platform “inputs” for possible “advanced IM” services could somehow foreclose other IM providers from readily obtaining comparable inputs from competing providers. Time Warner has only a small share of video or other content in the offline world, and a miniscule share of Internet content available for any posited advanced IM service. Likewise, Time Warner’s cable systems are well within FCC ownership limits, and, of course, the FCC has found cable to face significant and growing competition from alternative broadband providers.

Ms. Magalie Roman Salas
December 12, 2000
Page 3

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 herald the FCC's initiation of regulation of the Internet. To do so unilaterally at a time when Microsoft has enjoyed unprecedented growth and now has bundled its IM service with its soon-ubiquitous operating system, moreover, 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/ Wayne D. Johnsen

Wayne D. Johnsen

cc: Kathy Brown
Karen Onyeije
Deborah Lathen
Royce Dickens
Darryl Cooper
Michele Ellison
James Bird
Robert Pepper
Gerald R. Faulhaber
Joel Rabinowitz
David Farber
Sherille Ismail
Linda Senecal
International Transcription Services, Inc.