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OFFICE OF THE SECRETARY

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August 3, 2000

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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"), 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 August 2, 2000, representatives of AOL and Time Warner met with members of the Commission's staff, at their request, to answer questions as a follow-up to our July 13, 2000 *ex parte* meeting regarding instant messaging. The discussion focused on AOL's position as summarized in the attached outline and detailed in our prior submissions.

Attending the meeting on behalf of AOL were George Vradenburg, III, Senior Vice President, Global and Strategic Policy; Steven N. Teplitz, Senior Director of Telecommunications Policy; Eric Bosco, Senior Technical Director, Systems and Advanced Technologies; and the undersigned. Representing Time Warner was Arthur H. Harding of Fleischman and Walsh, L.L.P.

The following FCC personnel attended: Deborah Lathen, Chief, Cable Services Bureau ("CSB"); Royce Dickens, Deputy Chief, Policy and Rules Division, CSB; Darryl Cooper, Carl

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Kandutsch, and Nancy Stevenson, CSB staff; David J. Farber, FCC Chief Technologist, Office of Engineering and Technology; Robert Pepper, Chief, Office of Plans and Policy ("OPP"); Gerald R. Faulhaber, FCC Chief Economist, OPP; Michael Kende, OPP; John Berresford, Common Carrier Bureau; and Pieter van Leeuwen, Office of General Counsel.

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  
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau  
Darryl Cooper, Cable Services Bureau  
Carl Kandutsch, Cable Services Bureau  
Nancy Stevenson, Cable Services Bureau  
David J. Farber, FCC Chief Technologist, Office of Engineering and Technology  
Robert Pepper, Chief, Office of Plans and Policy  
Gerald R. Faulhaber, FCC Chief Economist, Office of Plans and Policy  
Michael Kende, Office of Plans and Policy  
John Berresford, Common Carrier Bureau  
Pieter van Leeuwen, Office of General Counsel  
James Bird, FCC Assistant General Counsel  
Linda Senecal, Cable Services Bureau  
International Transcription Services, Inc.

## INSTANT MESSAGING

- AOL first introduced instant messaging (“IM”) in 1989 as a feature of the AOL service. In 1996, AOL introduced the “Buddy List,” a feature that allows AOL members to determine when their friends are online and available to send or receive IMs.
- Soon after the introduction of the Buddy List feature, AOL members began to ask for the ability to add Internet users (who were not AOL members) to their Buddy Lists. In 1997, AOL introduced AOL Instant Messenger (“AIM”), a free software client, making IM available to all Internet users even if they are not AOL members.
- AOL has also extended the benefits of its IM service to the greater Internet community by licensing its AIM technology, on a royalty-free basis, to a number of other companies—including Lotus/IBM, EarthLink, Novell, Lycos, and Apple.
- Today, only a decade after AOL first offered a proprietary IM product solely to AOL members, there are a large number—more than 40 by our count—of different IM and similar products generally available for free to every Internet user. Competition amongst IM providers is robust and growing dramatically.
- AOL’s IM users—and Internet users in general—are able to simultaneously use more than one IM service at the same time. So consumers today can exchange IMs with anyone else on the Internet, regardless of their respective preferred IM service, by downloading and installing a common software client.
- Full interoperability between IM services, which AOL supports and is working to make a reality, can benefit consumers and promote continued innovation—if done correctly.
- Interoperability must be understood as having inherent risks if not done correctly; one need only look at e-mail to see some of the pitfalls—spam, viruses like the Love Bug, hacking, and more.
- Because AOL’s IM services were originally created not as an interconnected, interoperable product, but rather as a wholly internal one, AOL has been able to ensure that its users’ experiences include the privacy, security, and functionality that have made this feature so popular. In comparison, AOL—and every e-mail provider—has far less control over what happens to an e-mail message sent by an AOL member as the message makes its way to its final destination.
- AOL also owns and operates ICQ, a separate IM service that largely caters to non-U.S. users. ICQ is not currently interoperable with the IM feature offered as part of AOL’s subscription service or AIM.
- Proposals to create a “multi-headed client” for select participants would not provide—or advance the cause of—true interoperability, and would in fact introduce a number of privacy, security, performance, and reliability risks.

- This approach would not ensure support for all of AOL’s privacy and user security features (e.g., client-based and the Neighborhood Watch and warning functions), would not resolve the issue of conflicting and overlapping namespaces, would create problems with scalability and accommodating new IM providers, would complicate the process of upgrading and incorporating new innovations into client software, and would make it impossible for IM providers to entirely control and ensure their desired level of quality—and that the IM experience continues to meet the high standards of performance that users have come to expect.
- AOL has proposed a framework for, and is working to develop, server-to-server interoperability that would offer consumers the benefits of true interoperability for all—free of unnecessary limits on privacy and security, scalability, product differentiation, and innovation.
- The Internet Engineering Task Force (“IETF”) is working to develop IM interoperability and is only considering server-to-server proposals to that end.
- With respect to calls for FCC action, this Commission clearly stated in its “Stevens Report” to Congress on universal service that, as a matter of law and policy, Internet access services are appropriately classified—and thus left unregulated—as “information services.”<sup>1</sup>
  - “[I]t 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.”<sup>2</sup>
  - 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.<sup>3</sup>
  - AOL’s IM offerings combine a Buddy List, presence detection, user privacy and security features (e.g., AOL Neighborhood Watch and Knock-Knock), messaging, and other features. Thus, whether offered as a feature of an Internet access service or even if viewed on a standalone basis, IM would be classified as an unregulated “information service.”

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<sup>1</sup> See generally *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

<sup>2</sup> *Id.* at ¶ 79.

<sup>3</sup> *Id.* at ¶¶ 80-81, 59.

- It is a fundamental tenet of FCC policy—and one echoed by every member of this Commission—that regulating “Internet access services as telecommunications services could have significant consequences for the global development of the Internet.”<sup>4</sup>
- In any event, the Commission has long held and just recently affirmed that, even where an alleged competitive or public interest concern is properly within the FCC’s regulatory ambit, the merger review process is not the proper forum to address concerns not specifically caused by the merger at issue.
  - As the Commission stated in its recent *AT&T/MediaOne Order*, “the potential harm alleged by the commenters is not specific to the merger . . . . [T]he merger is not the cause of this alleged competitive threat, and the merger license transfer proceeding is not the appropriate forum to address this issue.”<sup>5</sup>
  - Commenters’ IM interoperability concerns are in no way caused by or specific to this merger.

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<sup>4</sup> *Id.* at ¶ 82.

<sup>5</sup> *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, FCC 00-202, ¶ 143 (2000).