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November 17, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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. 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"), 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 November 16, 2000, representatives of AOL met with members of the Commission's staff to refute claims that there are strong "network effects" associated with instant messaging ("IM") such that "tipping" has occurred or is likely to occur. A list of attendees is attached.

Microsoft, *et al.* have premised their entire campaign for FCC intervention in IM on two claims: (1) AOL has an 80-90% or greater "market share" of active IM users, and (2) strong network effects associated with IM have irreparably "tipped" this "market" in AOL's favor. While virtually every submission by Microsoft, *et al.* to date has repeated these assertions, none has offered any factual basis to substantiate them. Data now available explains why. These claims are plainly—and demonstrably—wrong. A just-released study by Media Metrix reveals that Microsoft's MSN Messenger and Yahoo! Messenger are not merely growing rapidly, but that their active user numbers in a recent three-month period actually grew at a faster rate than those of AOL Instant

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Messenger (“AIM”). This evidence is the exact opposite of what one would expect to see if IM had in fact “tipped” towards AOL—or was even in the process of doing so.

The purpose of yesterday’s meeting was to provide Steven C. Salop and his fellow economists from Charles River Associates with an opportunity to respond, on behalf of AOL, to the claims of Microsoft, *et al.* Mr. Salop began his presentation by describing in general the economic theory of network effects and explaining that identification of the existence of network effects is merely the starting point for analysis—not proof of either anticompetitive effects or market failure. Instead, the relevant question is whether network effects will produce a monopoly (*i.e.*, “tip” to the largest provider). An assessment of whether “tipping” has occurred or will occur requires examination of how weak or strong those effects are, whether other independent or countervailing factors offset those effects, and thus whether the market in fact exhibits: an absence of competition, an inability for newcomers to enter and compete, a dearth of innovation, weak growth, a lock-in of inferior technology, a continuously widening lead for the largest firm, and the like.

Mr. Salop explained that, in general, “tipping” is more likely to occur when consumers (1) are forced—whether by technology, cost, or contractual exclusivity—to make an all-or-nothing choice among services, and (2) face high switching costs if they later wish to use a different service. Mr. Salop explained how IM exhibits none of these characteristics: consumers (AOL subscribers included) can easily download and simultaneously use multiple IM services and, because IM services are offered for free, the cost of switching between services is *de minimis*.

Mr. Salop presented specific data proving conclusively that, whatever network effects exist, there is no “tipping” occurring here—and furthermore that there is no basis on which to conclude that IM will “tip” in the future. First, Mr. Salop distributed a Media Metrix press release summarizing its recent study on IM usage.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

¹ As described in the attached press release, “Media Metrix, a Jupiter Media Metrix Company, is the leader and pioneer in Internet and Digital Media measurement and the industry’s source for the most comprehensive, reliable, and timely audience, e-commerce and technology measurement services. The Company provides the most comprehensive coverage of all Digital Media including more than 25,000 Web sites and online properties. Media Metrix utilizes its patented operating-system metering methodology to track Internet and Digital Media audience usage behavior in real-time—click-by-click, page-by-page, minute-by-minute. Today, Media Metrix has a representative sample of more than 100,000 people under measurement and covers more than 85 percent of Internet usage worldwide.” Media Metrix Press Release, “Yahoo! Messenger and MSN Messenger Service are Fastest Growing Instant-Messaging Applications in the U.S.,” November 16, 2000.

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.² In comparison, the study reports that AIM grew by just under 3.5 million active users in that 12-month period. The Media Metrix study thus indicates that already MSN Messenger and Yahoo! Messenger combined have roughly the same number of active users as AIM. Mr. Salop also provided growth rates for a number of IM services indicating that between July and August of this year, both MSN Messenger and Yahoo! Messenger grew at a faster rate than AIM.³

In light of these facts, it is clear that (1) IM is not “tipping” towards AOL, and (2) there is no basis to conclude it will do so in the future. To the contrary, Microsoft’s MSN Messenger is now uniquely positioned to expand its number of active users dramatically. Microsoft has embedded the MSN Messenger IM software into the latest consumer version of its operating system software, Windows Me.⁴ Accordingly, in the not so distant future nearly every consumer with a computer will have MSN Messenger on their desktop.

On this record, Microsoft, *et al.*’s unsupported claims cannot stand. Because those claims were the underlying predicate for Microsoft, *et al.*’s wholly speculative allegation that AOL will thereby have undue control over next-generation IM-enabled applications (whatever they may be), it is now clear that those concerns are likewise unfounded.

² See *id.*

³ See attached chart entitled “Growth in Unique Visitors to Instant Messaging Services, 2000;” see also Ariana Eunjung Cha, “Yahoo, MSN Challenge AOL in Instant Messaging,” *The Washington Post*, November 16, 2000, at E9; Jim Hu, “AOL’s lead in instant messaging arena dwindles,” CNET News.com, November 16, 2000 <http://dailynews.yahoo.com/h/cn/20001116/tc/aol_s_lead_in_instant_messaging_arena_dwindles_6.html> (copies of both articles are attached).

⁴ See “Microsoft Window Me Product Guide: Send instant messages,” <<http://www.microsoft.com/windowsME/guide/internetexperience/messenger.asp>>.

Ms. Magalie Roman Salas
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Accordingly, even if the FCC were inclined to assert jurisdiction over, and intervene in, this nascent Internet service, there in fact exists no basis for a finding of market failure to support such an action.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Peter D. Ross

Attachments

cc: Deborah Lathen, Bureau Chief, Cable Services Bureau (w/ attachments)
Kyle Dixon, Legal Advisor, Office of Commissioner Powell (w/ attachments)
Susan Eid, Legal Advisor, Office of Commissioner Powell (w/ attachments)
William J. Friedman, Senior Legal Advisor, Office of Commissioner
Tristani (w/ attachments)
Gerald R. Faulhaber, FCC Chief Economist, Office of Plans and Policy (w/ attachments)
David J. Farber, FCC Chief Technologist, Office of Engineering and
Technology (w/ attachments)
Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau (w/ attachments)
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services
Bureau (w/ attachments)
Darryl Cooper, Cable Services Bureau (w/ attachments)
Peter Friedman, Cable Services Bureau (w/ attachments)
James Bird, Assistant General Counsel, Office of the General Counsel (w/ attachments)
Joel Rabinovitz, Office of the General Counsel (w/ attachments)
Michael Kende, Office of Plans and Policy (w/ attachments)
Linda Senecal, Cable Services Bureau
International Transcription Services, Inc.

List of Meeting Attendees

On behalf of the FCC:

Deborah Lathen, Bureau Chief, Cable Services Bureau
Kyle Dixon, Legal Advisor, Office of Commissioner Powell
Susan Eid, Legal Advisor, Office of Commissioner Powell
William J. Friedman, Senior Legal Advisor, Office of Commissioner Tristani
Gerald R. Faulhaber, FCC Chief Economist, Office of Plans and Policy
David J. Farber, FCC Chief Technologist, Office of Engineering and Technology
Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau
Darryl Cooper, Cable Services Bureau
Peter Friedman, Cable Services Bureau
James Bird, Assistant General Counsel, Office of the General Counsel
Joel Rabinovitz, Office of the General Counsel
Michael Kende, Office of Plans and Policy

On behalf of AOL:

George Vradenburg III, Senior Vice President, Global and Strategic Policy, AOL
Steven N. Teplitz, Vice President, Telecommunications Policy, AOL
Steven C. Salop, Charles River Associates, Inc.
John R. Woodbury, Charles River Associates, Inc.
Patrick DeGraba, Charles River Associates, Inc.
Peter D. Ross, Wiley, Rein & Fielding
Andrew K. Long, Wiley, Rein & Fielding

Yahoo! Messenger and MSN Messenger Service are Fastest Growing Instant-Messaging Applications in the U.S.

Combined, AOL's Instant Messenger and ICQ share nearly a third of their users with either Yahoo! Messenger or MSN Messenger Service

Majority of Yahoo! Messenger and MSN Messenger Service users utilize at least one other competing instant-messaging or chat application

NEW YORK--(BUSINESS WIRE)--Nov. 16, 2000-- Media Metrix, Inc., the pioneer and leader in Internet and Digital Media measurement worldwide, today reports that while AOL Instant Messenger remains the dominant instant-messaging application according to overall users in the U.S., Yahoo! Messenger and MSN Messenger Service each have accumulated approximately half the number of users as AOL Instant Messenger and have become the fastest growing instant-messaging applications in terms of overall users over the past year.

Yahoo! Messenger, from its launch in June 1999, grew to 10.6 million users in August 2000, while MSN Messenger Service, from its launch in July 1999, grew to 10.3 million users in August 2000. AOL Instant Messenger, which launched in May 1997, grew from 18.1 million users in August 1999 to 21.5 million users in August 2000.

"Instant-messaging applications are proving to be very popular with consumers," said Doug McFarland, president, Media Metrix. "But their different features and lack of interoperability cause users, especially heavy users, to adopt more than one brand in order to keep in touch with all their friends and colleagues."

Media Metrix Digital Media Report

Unique Users(000) Home/Work Combined in the U.S.
August 1999 and August 2000

Instant Messenger and Chat Applications	Unique Users (000)	
	August 1999	August 2000
AOL Instant Messenger	18,086	21,523
ICQ Chat	10,435	9,118
Yahoo! Messenger(1)(2)	N/A	10,596
MSN Messenger(1)	N/A	10,333

(1) Yahoo! Messenger and MSN Messenger Service data not available in August 1999

(2) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

Media Metrix Digital Media Report

Unique Users (000) of Instant-Messaging and Chat Applications in the
U.S. and Percent That Used at Least One Other Competing
Instant-Messaging or Chat Application(3)

August 2000 at Home

	Unique Users (000)	% That Used at Least One Other Competing Instant-Messaging or Chat Application(3)
Unduplicated Total of AOL Instant Messenger and ICQ Chat Application	23,864	32.2%
AOL Instant Messenger	18,686	32.0%
ICQ Chat	8,626	47.6%
Yahoo! Messenger(4)	9,371	57.7%
MSN Messenger	8,798	54.9%

(3) AOL Instant Messenger and ICQ are both owned by AOL and therefore defined as non-competing applications

(4) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

Media Metrix Digital Media Report
Unique Users (000) of Instant-Messaging and Chat Applications in
the U.S. and Percent that Used at Least One Other Competing
Instant-Messaging or Chat Application(5)

August 2000 at Work

	Unique Users (000)	% That Used at Least One Other Competing Instant-Messaging or Chat Application(5)
Unduplicated Total of AOL Instant Messenger and ICQ Chat Application	6,639	34.0%
AOL Instant Messenger	4,627	25.6%
ICQ Chat	1,429	69.8%
Yahoo! Messenger(6)	1,878	78.5%
MSN Messenger	2,380	83.1%

(5) AOL Instant Messenger and ICQ are both owned by AOL and therefore defined as non-competing applications

(6) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

Media Metrix Definitions:

Unique Users: The estimated number (expressed in thousands) of different individuals who used the application software at least once in the given time period. All Unique Users are unduplicated (only counted once).

About Media Metrix

Media Metrix, a Jupiter Media Metrix Company, is the leader and pioneer in Internet and Digital Media measurement and the industry's source for the most comprehensive, reliable, and timely audience, e-commerce and technology measurement services. The Company provides the most comprehensive coverage of all Digital Media including more than 25,000 Web sites and online properties. Media Metrix utilizes its patented operating-system metering methodology to track Internet and Digital Media audience usage behavior in real-time - click-by-click, page-by-page, minute-by-minute. Today, Media Metrix has a representative sample of more than 100,000 people under measurement and covers

more than 85 percent of Internet usage worldwide. Visit us at www.mediametrix.com for more information.

About Jupiter Media Metrix

Jupiter Media Metrix (NASDAQ:JMXI), formed by the merger of Jupiter Communications and Media Metrix, is a global leader in market intelligence for the new economy. The Company delivers innovative and comprehensive Internet measurement, analysis, intelligence and events to provide businesses with unmatched global resources for understanding and profiting from the Internet. Jupiter Media Metrix brings together world-class, innovative and market-leading products, services, research methodologies and people. Jupiter Media Metrix brands include Media Metrix, AdRelevance, Jupiter Research and Jupiter Events. The Company is headquartered in New York City and operates worldwide, across the Americas, Asia Pacific, Europe (as Jupiter MMXI Europe), and the Middle East. Visit us at www.jmm.com for more information.

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BUSINESS

THURSDAY, NOVEMBER 16, 2000

Yahoo, MSN Challenge AOL in Instant Messaging

By ARIANA EUNJUNG CHA
Washington Post Staff Writer

A new study by Media Metrix Inc. presents a markedly different picture than previous research of the emerging electronic instant-messaging market.

The study, scheduled to be released today, finds that while Dulles-based America Online Inc. continues to dominate the space, Yahoo Inc. and Microsoft Corp. are catching up—fast.

In August 1999, 18 million people used AOL Instant Messenger (AIM) and 10.4 million used the company's ICQ chat service while a negligible number used newly released versions by Yahoo and Microsoft. A year later, AIM had 21.5 million users and ICQ 9.1 million while Yahoo had 10.6 million and Microsoft had 10.3 million in the United States, according to the company's estimates, which were based on its surveys of computer use.

Older analyses pegged AOL's share of the instant-messaging market at roughly 90 percent. The discrepancy can be ex-

plained by the fact that the earlier studies based their estimates on the global number of registered users—who may or may not actually be using the service in a given month. AOL counts 61 million registered AIM users and 80 million ICQ users.

The Media Metrix study found that many U.S. users are juggling more than one instant-messaging service on their machines. About a third of AIM users also employ another service, as do more than half of Yahoo and MSN instant-messaging users.

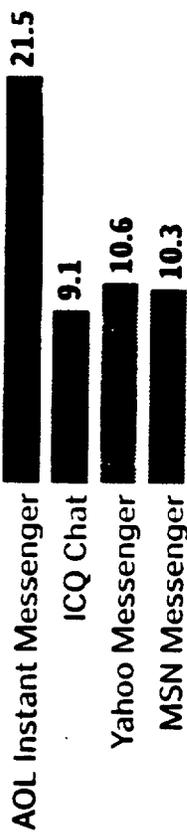
Media Metrix's president, Doug McFarland, said part of that phenomenon can be explained by the lack of interoperability between the systems—an issue federal regulators have raised in reviewing AOL's plans to take over Time Warner Inc. But McFarland says the multiple accounts also reflect the eagerness of many technology buffs to have alternative communications methods on hand.

"You see this among young people who have more than one

Instant Success

AOL's Instant Messenger and ICQ programs still have the upper hand in the instant-messaging market, although new entrants Yahoo and MSN are growing quickly . . .

Users, in millions



. . . but Yahoo and MSN users are likely to have more than one instant-messaging option.

Users who also used at least one competing application

In percent



SOURCE: Media Metrix

THE WASHINGTON POST

cell phone—one [number] that and one that they give to one or they give to a number of people two special people," he said.

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TOP STORY: AOL's lead in instant messaging arena dwindles

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Thursday November 16 12:00 PM EST

AOL's lead in instant messaging arena dwindles

By *Jim Hu*, [CNET News.com](#)

America Online's dominance in instant messaging has long been unquestioned, but it may not be as monopolistic as many of the company's fiercest critics portray it, a new study shows.

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In a survey of instant message usage in the United States to be released Thursday, Internet measurement company Media Metrix (a Jupiter Media Metrix company) reports that in just over a year, Yahoo and Microsoft have each amassed IM memberships totaling roughly half the population of AOL Instant Messenger (AIM). In addition, the two are increasing their audiences more rapidly than any other instant messaging companies.

As of August 2000, Yahoo Messenger had 10.6 million U.S. users, while MSN Messenger Service hit 10.3 million, the study shows. During the same period, AIM reached 21.5 million users, and AOL's ICQ subsidiary had 9.1 million, not counting international usage. ICQ numbers actually showed a decline from the previous year, when the service had more than 10 million active users.

In addition, nearly a third of AIM users also actively used a second IM client, Media Metrix found.

The study could influence an ongoing debate over AOL's obligations to accommodate instant messaging rivals that came late to the game and that now accuse the Internet giant of using its substantial head start to unfairly lock them out of the market.

The stakes are high. Initially underestimated in its popularity, instant messaging is a powerful form of communication that has become part of a larger conflict that will ultimately determine who controls much of the Internet itself. As with email and browsers, companies that own this technology can lead their subscribers to advertising and other revenues while increasing the value of their real estate on the PC desktop.

AOL underscored the importance of this fight last year by blocking other forms of instant messaging from working with its own. But this aggressive tactic increased scrutiny from Congress and federal regulators, who have been lobbied heavily by AOL competitors--led by the now-defunct CMGI-owned companies iCast and Tribal Voice--seeking to turn instant messaging into a key issue in the Time Warner merger.

AOL critics have testified in front of regulators demanding the government force the online giant to

open its instant messaging network to rivals. Instant messaging proponents claim the technology could be as pervasive and influential as the telephone if a common communication standard is established. Competitors have also criticized AOL for backing away from its promises to open its network.

But according to the new study, AOL's decision to block rivals from using its network may not have harmed competitors and may have helped them catch up. Because instant messenger services are unable to communicate with each other, many U.S. Internet users now turn to two or more different instant messengers simultaneously to communicate with people using different services, Media Metrix reported.

"Duplication argues that (AOL) is not a monopolistic element in here," said Doug McFarland, president of Media Metrix. "AOL and ICQ had a very large user base, but in 15 months, both Yahoo and MSN messaging services have grown to between 10 million to 10.5 million users in the U.S. That's a very quick installed base."

For its part, AOL in July reported that AIM had surpassed 61 million registered users, 20 million of whom were active. Meanwhile, ICQ said it topped 70 million registered users with 20 million active users. These are global numbers and are not limited to the United States, as was the Media Metrix study.

An AOL representative declined to comment on the study.

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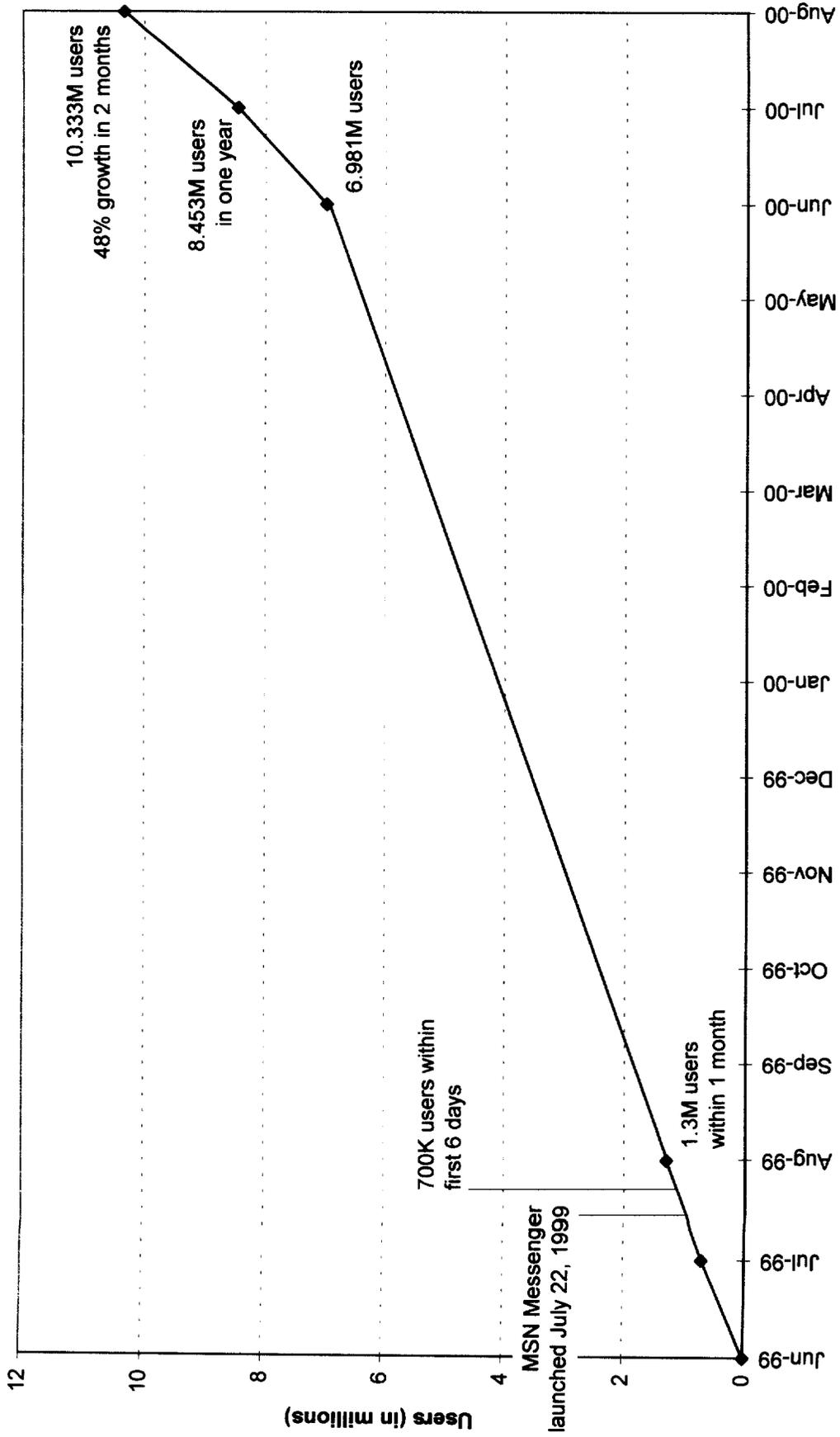
**Growth in Unique Visitors to Instant Messaging Services
2000**

Service	April - August Change in Unique Visitors	July - August Change in Unique Visitors
AOL Instant Message Application *	12.9%	0.5%
AIM	11.8%	1.8%
MSN Messenger	78.3%	22.2%
ICQ	-0.5%	-0.5%
Yahoo! Messenger	n/a	21.8%

* This is the Instant Messenger application within the AOL service.

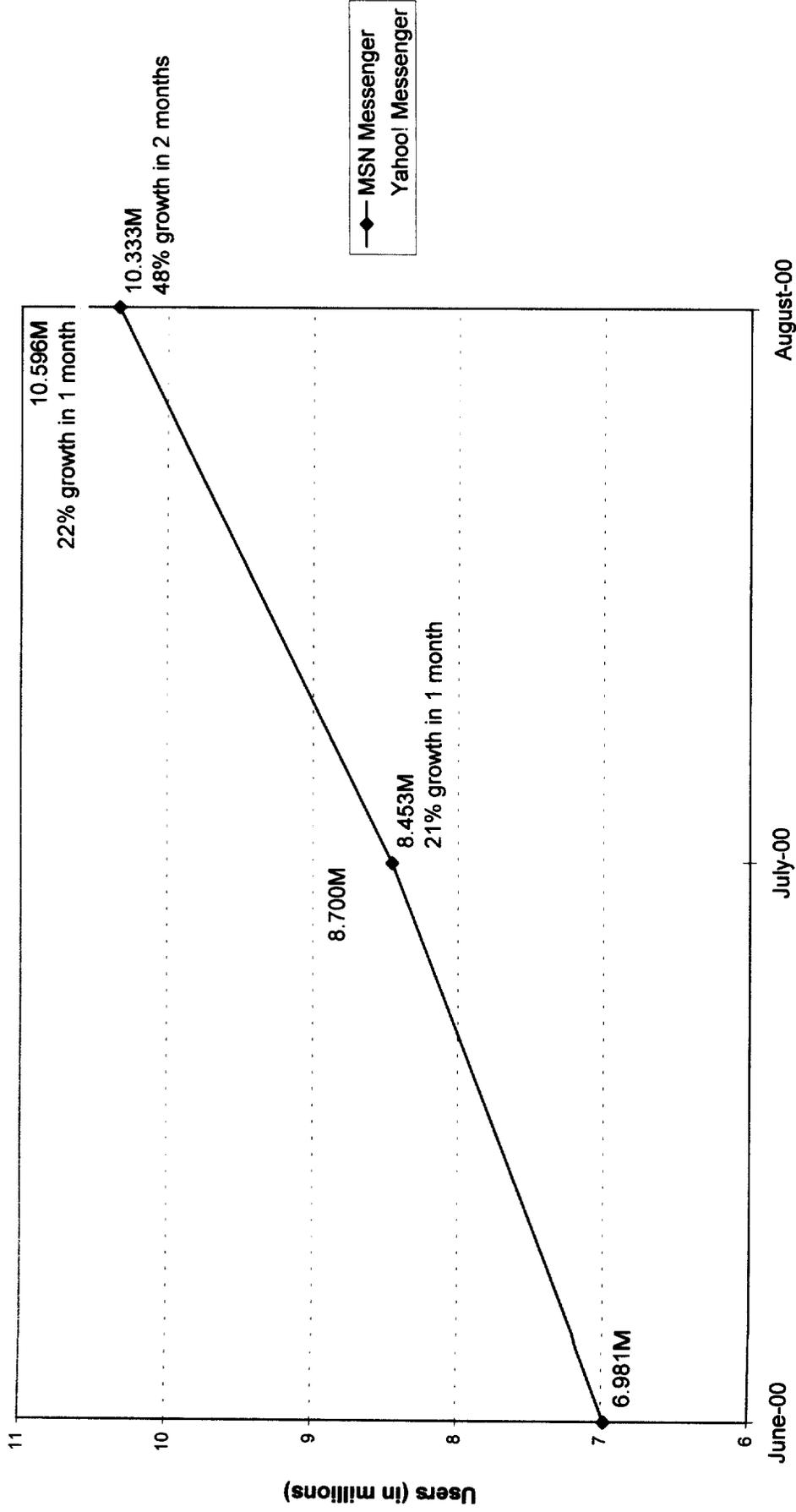
Source: Media Metrix (Home/Work).

MSN Messenger Growth



Source: Microsoft Press Releases; Media Metrix (June, July, August 2000 HomeWork Unique Visitors)

MSN Messenger And Yahoo! Messenger Are Experiencing Tremendous Growth



Source: Media Metrix (June, July, August 2000 Home/Work Unique Visitors)