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October 25, 2000

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 – 12th Street, S.W. – The Portals
TW-B204
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: ***CS Docket No. 00-30; In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control.***
Notice of Ex Parte Communication.

Dear Ms. Salas:

Odigo and iCAST, two leading providers of instant messaging features and solutions, provide the following additional information relevant to the appropriateness of imposing instant messaging ("IM") interoperability conditions in the above-captioned proceeding.

In the course of opposing interoperability conditions designed to allow all IM users to communicate, AOL and Time Warner have asserted that despite the strong network effects present in IM and despite AOL's dominant share of the IM market, the market has not yet "tipped" to AOL. This is demonstrated, according to AOL and Time Warner, by the "facts" that no IM provider has yet gone out of business and that firms have entered the IM market in the past year. These claims are meritless.

First and foremost, as we explained in our October 24, 2000 *ex parte*, there is considerable empirical evidence that the market has tipped to AOL. AOL's overwhelming market share, the strong network effects present in IM, AOL's unprecedented anticompetitive behavior, and its demonstrated ability to foist its IM platform even on direct competitors and providers of next-generation IM-enabled devices all prove that the IM market has tipped in AOL's favor.[1] And, absent strong interoperability conditions, the proposed merger, which would marry Time Warner content with AOL's dominant IM system and further raise the costs of competitive entry, would greatly increase the likelihood that the tipping of the market in favor of AOL would be irreversible.

The fact that there has not yet been a mass wave of companies announcing that they are abandoning the IM market in no way undermines this showing. A firm's decision to enter or exit

[1] We want to clarify that the last sentence of the first full paragraph on page 4 of our October 24th filing, which addresses the numerous wireless deals that AOL has entered, should read "*It is our understanding that no other IM competitor has entered into these types of arrangements.*" The ability of AOL alone to obtain these deals further confirms its dominance of the IM market.

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a market reflects *long-term* expectations of profitability. Entry and exit decisions are not dictated by simply current market conditions, but also those conditions that are expected to prevail in the future. Here, it is quite reasonable for firms to remain in the market (or even to enter it) on the expectation that regulators ultimately will recognize this anomalous situation patently anticompetitive effects of this merger on the IM market and will adopt the interoperability requirements needed to allow the IM market to function competitively. For example, as explained in the October 24, 2000 *ex parte*, iCAST recognized that interoperability was a fundamental necessity to the success of its IM service, but it nonetheless decided to begin providing IM service on the expectation that IM interoperability would be achieved in the near future.[2]

It is also important to note that the full impact of the fact that the market has tipped to AOL has yet to be felt. The IM market has grown dramatically in the last few years. In such an explosively growing market, even fringe providers can expand their customer bases. However, when this growth slows down, as it must as active users exceed 100 million, the only carriers that will be able to survive are those that develop a successful niche business or those that are able to offer the bulk of consumers the ability to instant message seamlessly with all of their buddies. Without interoperability, AOL will be the only IM provider in the position to do the latter.

Sincerely,

Margaret Heffernan

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[2] It is possible that niche strategies may be sustainable for a handful of companies even in markets completely dominated by one provider. For example, one or two IM providers may survive without interoperability – because, for example, they do not mind using multiple IM services, have a limited "buddy" list that does not include any AOL users, or use IM only for business applications in which the ability to communicate outside the core group is not needed. But that hardly counsels in favor of inaction or supports a claim that the market has not yet tipped. Because most consumers do not want to have to use multiple IM services or coordinate with their "buddies" which IM service to use, and want to IM with the majority of users, AOL today remains the only viable alternative. Without interoperability, rival IM providers are foreclosed from competing effectively for these consumers. That is the very definition of a "tipped" market.

cc: Ms. Magalie Roman Salas
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