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FOR PUBLIC INSPECTION

December 12, 2000

EX PARTE OR LATE FILED

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: **Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control (CS Docket No 00-30)**
***EX PARTE* LETTER CONTAINING CONFIDENTIAL INFORMATION FILED UNDER SEAL**

Dear Ms. Salas:

Pursuant to the Amended Protective Order in the above-captioned docket adopted and released December 7, 2000 (DA 00-2774), Microsoft Corporation, by its attorneys, hereby files under seal a Stamped Confidential Document containing confidential information. One copy of this confidential document is being submitted with the version of this cover letter marked "CONFIDENTIAL: NOT FOR PUBLIC INSPECTION." It is being filed under seal with the Secretary's Office and should not be placed in the public record in this proceeding. Copies of the confidential document submitted by Microsoft are also being delivered under seal to Karen Onyeije, Susan Eid, David Goodfriend, William Friedman, Helgi Walker, Deborah Lathen, Sherille Ismail, Royce Dickens, Darryl Cooper, John Berresford, James Bird, Joel Rabinovitz, Pieter Van Leeuwen, Robert Pepper, and Gerald Faulhaber. A redacted version of the pleading, which contains no confidential information and is intended for public inspection, is attached to this letter.

Please do not hesitate to contact me if we may provide you with further information.

Sincerely,

GJWaldron

Gerard J. Waldron

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Attachment

cc: Ms. Linda Senecal
International Transcription Service

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December 12, 2000

Ms. Deborah Lathen
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Lathen:

AOL has employed numerous tactics to divert the Commission's attention from AOL's overwhelming market share of the IM market. AOL's early apples-and-oranges comparisons of registered to active IM users told the Commission nothing about AOL's tremendous market lead. Then AOL came charging in claiming that the Media Metrix report comparing "unique user" numbers vindicated its position. However, AOL neglected to mention that one small fact was missing from the Media Metrix report – AOL's own subscriber numbers! Now the Commission has before it decisive Media Metrix data that is based on intensity of usage.[1] On that basis, there is no dispute – and AOL has not challenged – that it has a dominant share of the IM market.

In its December 9, 2000, filing, AOL basically reasserts the fallacies of its prior position: that the FCC should ignore usage of AOL proprietary and AIM instant messaging programs and only look at "unique users." However, somewhat incredibly, even when citing unique user numbers in its latest filing, AOL once again fails to include its own customers. Seemingly recognizing that it has little chance of prevailing on that basis, AOL ultimately falls back to the position that the merger cannot irreversibly tip the market because, while being dominant today, a handful of competitors have been able recently to gain some market share. But AOL cannot get around the fact that it has unwavering command over the IM market.

[1] *See* December 6, 2000, Letter from Gerard J. Waldron to Magalie Roman Salas, attaching Media Metrix data

Indeed, AOL's recent filings obscure the simple question before the Commission: Should the Commission encourage AOL, given its dominant (and undisputed) share of IM usage, to share its IM protocol with competitors and work with IETF to develop a common IM protocol so that consumers can inter-communicate among IM platforms and true competition for IM and related services can develop? The overwhelming evidence in this docket dictates that the Commission should.

First, AOL does not refute that it has share of IM usage.[2] AOL's attempts to prove otherwise through irrelevant and confusing references to companies' online user name directories and unique user numbers are beside the point. Companies gain no economic benefit from someone who simply registers for or uses an IM service once in a given time period. The more appropriate measurement for any service is the length of time someone spends using a particular program. And, again, according to Media Metrix figures

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Second, temporary growth realized by new entrants, much of which was gained through extraordinary promotions, does not disprove the fact that the merger will irreversibly tip the market to AOL. Of course, any entity that enters a growing market will take away some share from the market leader because, especially on the Internet, millions of consumers will try anything once. But when the IM market matures, absent interoperability among market players, users will ultimately switch to the provider that enables consumers to instant message seamlessly with all of their buddies – here AOL.[3] And, as we have explained in our previous filings, the merger between AOL and Time Warner exacerbates these network effects.

Third, AOL's dominant share will increase over time. Some members of IM Unified, namely iCast and Tribal Voice, have already had to exit the market due in large part to the lack of IM interoperability with AOL users. In addition, AOL has been able to use its dominant position for PC-based IM to become the preferred IM platform for increasingly popular wireless devices (where customers cannot switch IM suppliers). To our knowledge, no other IM provider has had any success putting its IM platform on the millions of wireless phones in America. AOL's wireless deals have a strong feedback effect for PC-based IM services because any PC user that wants to communicate with a wireless IM user can only do so using an AOL IM service.[4] And, as we have explained, the merger would entrench these gains, making effective IM competition impossible.

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[2] *See id.* ( ); December 9, 2000, Letter from Peter D. Ross to Deborah Lathen ( ).

[3] The differential between unique users (which includes those who have tried the service once) and minutes of use (the time spent on a particular program) supports this assertion and indicates that the IM Competitors, despite having features and capabilities deemed by many to be superior, have great difficulty holding on to customers over long periods of time.

[4] Astonishingly, AOL still persists that there are no network effects in IM because the various services are (today) free and because IM users voluntarily sort themselves into small, homogeneous groups thereby making it easy to "switch" (continued...)

REDACTED VERSION–FOR PUBLIC INSPECTION

For the above reasons, we urge the Commission to require AOL to (a) publish its IM protocol, as other IM Competitors have, which will allow consumers to reap the benefits of interoperability within a few days; (b) work in the IETF process toward developing a common protocol that will enable server-to-server interoperability among all IM Competitors; and (c) adopt and implement this common IM protocol. Conditioning the merger on these minimal safeguards – which will foster innovation and ensure consumers have a range of choices with respect to IM offerings – clearly would serve the public interest.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

GJWaldron

Gerard J. Waldron
Erin M. Egan

cc: Magalie Roman Salas, Secretary
Karen Onyeije, Legal Advisor, Office of Chairman Kennard
Susan Eid, Legal Advisor, Office of Commissioner Powell
David Goodfriend, Legal Advisor, Office of Commissioner Ness
William Friedman, Legal Advisor, Office of Commissioner Tristani
Helgi Walker, Legal Advisor, Office of Commissioner Furchtgott-Roth
Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau
Darryl Cooper, Cable Services Bureau
John Berresford, Common Carrier Bureau
James Bird, Assistant General Counsel, Office of the General Counsel
Joel Rabinovitz, Office of the General Counsel
Pieter Van Leeuwen, Office of the General Counsel
Dr. Robert Pepper, Office of Plans and Policy
Dr. Gerald Faulhaber, Office of Plans and Policy

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between services. December 9, 2000, AOL Economist *Ex Parte* at 2-3. This argument ignores the increasing importance of IM applications for wireless devices where, of course, it is impossible for consumers to switch. Further, even where switching is technologically possible today, AOL is not correct that there are little costs to switching between IM services. *See* November 21, 2000, Letter from Frederick Warren-Boulton (describing high costs of switching between IM providers).