

EX PARTE OR LATE FILED  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

ORIGINAL  
ORIGINAL

3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7647

WILLIAM L. FISHMAN  
DIRECT DIAL (202) 945-6986  
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174

September 20, 2000

RECEIVED

SEP 20 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.  
Office of the Secretary  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W.  
12th Street Lobby, TW-A325  
Washington, D.C. 20554

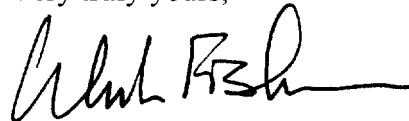
Re: In the Matter of Applications of America Online, Inc. and  
Time Warner, Inc. for Transfer of Control (CS Docket 00-30) /

Dear Ms. Salas:

Enclosed for filing in the above-captioned proceeding are four copies of a letter from David McCourt, Chief Executive Officer of RCN Corporation, to Chairman Kennard and the Commissioners addressing the issue of instant messaging in the context of the proposed AOL/Time Warner merger. Copies of the letter have been served on the applicants and other commenting parties, as set forth in the attached service list.

Please address any questions to the undersigned.

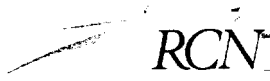
Very truly yours,



William L. Fishman

Enclosure

No. of Copies rec'd 0+4  
List A B C D E



David C. McCourt  
Chairman & CEO

SEPT. 15, 2000

105 Carnegie Center  
Princeton, NJ 08540  
(609) 734-3800

The Honorable William Kennard, Chairman  
The Honorable Harold Furchtgott-Roth, Commissioner  
The Honorable Susan Ness, Commissioner  
The Honorable Michael Powell, Commissioner  
The Honorable Gloria Tristani, Commissioner  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.,  
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and  
Time Warner, Inc. for Transfer of Control (CS Docket 00-30)

Dear Commissioners:

Recent press accounts have indicated that the staff of the Commission is considering the imposition of certain conditions on the proposed AOL/Time Warner merger in regard to the offering of instant messaging ("IM") services by the merged entity.<sup>1</sup> RCN Corporation ("RCN") has submitted previous filings in this proceeding concerning the need to condition the merger on the continued availability to cable overbuilders like RCN of Time Warner's cable programming. I write today, however, to emphasize the enormous importance of the IM market to the future of eCommerce, the Internet, and the financial viability of RCN and other such new competitive entrants.

Because the Commission staff has been considering the merits of the AOL/Time Warner merger for many months and the review process is in its final stages, I will be brief. In addition to being the premier cable overbuilder and one of the largest CLECs in the country, RCN also provides Internet access service through its subsidiary Erols, and a number of other ISPs. In fact, RCN is the 7<sup>th</sup> largest ISP in the country and the 2<sup>nd</sup> largest regional ISP in the Northeast. We are therefore quite familiar with the Internet market and with IM, including AOL's two proprietary IM products, AIM and ICQ.

Although the utility of IM was initially thought to be just an adjunct to email and useful only for casual or social purposes, it has now become clear that it is a powerful tool for business users. Speaking as a practical businessman, and not as a futurist, its "presence detection" capability, combined with the creative use of "intelligent agents," opens enormous possibilities for business users. As wireless access to the Internet grows ever more pervasive, convenient, and inexpensive,

---

<sup>1</sup> See, for example, the Wall Street Journal, September 13, 2000, at p. A-3.

IM will become very valuable to the business community when its members need to communicate with others, either internally or externally. Stated differently, its importance will mushroom in the very same way and to the same degree that email has grown to be an essential part of most business enterprises within the last few years.

In this light it is crucial that any approval of the AOL/Time Warner merger be conditioned on IM's broad and nondiscriminatory availability to the general public. Today, AOL is by far the predominant provider of IM services. According to its own statistics, AOL has 65.5 million registrations in AIM and 73.1 million in ICQ.<sup>2</sup> AOL's IM marketshare reaches into the 80-90 percent range. This predominance makes it important that, before AOL's IM status is even further buttressed by its merger with media giant Time Warner and the latter's Roadrunner, careful attention be given to the effect of AOL/Time Warner's continued or enhanced IM dominance on the competitive ISP market. This concern extends not only to ISPs themselves, but also to upstream markets. This is especially true because, as the Commission has learned in recent months, AOL has a history of rebuffing the efforts of others to enter the IM market and to interconnect their own IM services with that of AOL.

Like the post-divestiture RBOCs, AOL's commanding operational and economic advantages are such that its private interests are served by declining to interconnect with all other competitors and for a long time that is exactly what it did. When pressured to interconnect with other IM providers, AOL adopted the position that an industry standards group, the IETF,<sup>3</sup> should accept the responsibility for developing an industry-wide protocol. While that position is not unreasonable in the abstract, AOL has done little or nothing to advance the work of that group, and will not do more than window dress the effort unless it is forced to do so. For RCN's internet access business to prosper, our customers must be able to access a variety of IM products, including AOL's, Microsoft's, Yahoos,' and numerous others. Given AOL's history of resistance and stalling on the IM issue, it is clear that the Commission must require the development of full and nondiscriminatory IM rules as a condition of the merger. It is crucial that any such condition be specific, be accompanied by a painful sanction for nonperformance or undue delay, and be verifiable by objective criteria.

This letter is not the place to set forth detailed proposals. But given AOL's overwhelming dominance in the IM field, what comes to mind is section 271 of the Communications Act, in which Congress specified that before an RBOC could be allowed to enter the interstate long distance market, it had to demonstrate to the satisfaction of state and federal regulators that the market for local competition was irreversibly open to competition. A similar approach can be adopted here. Simply put, if the Commission believes the merger is otherwise in the public

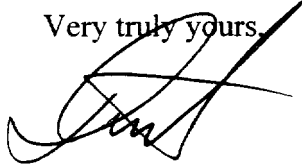
---

<sup>2</sup> Response of AOL and Time Warner dated August 28, 2000, to staff inquiry of August 14, 2000, at 3.15.

<sup>3</sup> Internet Engineering Task Force (a private sector function).

interest, it should specify that it cannot be consummated until the interoperability of IM has been reasonably established to the Commission's satisfaction, based on evidence submitted to the Commission and open for public comment. To grant the merger merely on a promise of future compliance, *i.e.*, on a condition subsequent, I fear, will be to assure years of foot-dragging and delay while AOL/Time Warner attempts to make its IM market dominance unassailable. Such an outcome would not serve the public interest and need not be tolerated.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. McCourt", written over a horizontal line.

David C. McCourt

## CERTIFICATE OF SERVICE

I hereby certify that on the 20<sup>th</sup> day of September, 2000, a copy of the foregoing letter from David McCourt to Chairman Kennard and the Commissioners was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., TW B204  
Washington, D.C. 20554

Monica Desai  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 4-A232  
Washington, DC 20554

James Bird  
Office of General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 8-C818  
Washington, DC 20554

Laura Gallo  
Mass Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, 2-A640  
Washington, D.C. 20554

To-Quyen Truong  
Associate Chief  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 3-C488  
Washington, DC 20554

Linda Senecal  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, 3-A734  
Washington, D.C. 20554

Royce Dickens  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 3-A729  
Washington, DC 20554

Jill M. Frumin\*  
Federal Trade Commission  
Bureau of Competition  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Matthew Vitale  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 6-A821  
Washington, DC 20554

International Transcription Service, Inc.  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Marilyn Simon  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., 6A-633  
Washington, DC 20554

Stephen C. Garavito\*  
General Attorney  
AT&T  
295 North Maple Avenue  
Room 1131M1  
Basking Ridge, NJ 07920

Susan M. Eid\*  
Vice President, Federal Relations  
MediaOne Group, Inc.  
1919 Pennsylvania Avenue, N.W., Suite 610  
Washington, D.C. 20006

Peter D. Ross\*  
Wiley Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Arthur H. Harding\*  
Fleischman and Walsh, LLP  
1400 16<sup>th</sup> Street, Suite 600  
Washington, D.C. 20036

Harold Feld\*  
Andrew Jay Schwartzman  
Cheryl A. Leanza  
Media Access Project  
950 18<sup>th</sup> Street, N.W., Suite 220  
Washington, D.C. 20006

Erwin G. Krasnow\*  
Verner Liipfert Bernhard McPherson and  
Hand, Chartered  
901 - 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-2301

Jonathan D. Blake\*  
Amy L. Levine  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Cynthia Mahowald\*  
SBC Communications, Inc.  
1401 I Street, N.W., Suite 1100  
Washington, D.C. 20005

James D. Ellis \*  
Paul K. Mancini  
Patrick J. Pascarella  
SBC Communications Inc.  
175 East Houston Street  
San Antonio, TX 78205

John Knox Walkup\*  
Wyatt, Tarrant & Combs  
1500 Nashville City Center  
511 Union Street  
Nashville, TN 37219

Jonathan E. Canis\*  
Michael B. Hazzard  
Kelly Drye & Warren LLP  
1200 Nineteenth Street, N.W., Fifth Floor  
Washington, D.C. 20036

Matthew M. Polka\*  
American Cable Association  
One Parkway Center, Suite 212  
Pittsburgh, PA 15220

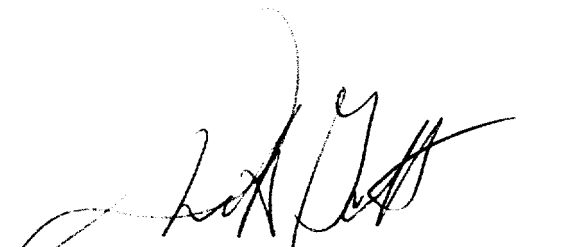
Christopher C. Cinnamon\*  
Rhondalyn D. Primes  
Bienstock & Clark  
150 South Wacker Drive, Suite 720  
Chicago, Illinois 60606

Richard Cotton\*  
Diane Zipursky  
National Broadcasting Company, Inc.  
30 Rockefeller Plaza  
New York, NY 10112

Ross Bagully\*  
Tribal Voice  
600 17<sup>th</sup> Street, Suite 2500 South  
Denver, CO 80202

The Honorable Mike DeWine\*  
Chairman Subcommittee on Antitrust,  
Business Rights and Competition  
Senate Committee on the Judiciary  
161 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Herb Kohl\*  
Chairman Subcommittee on Antitrust,  
Business Rights and Competition  
Senate Committee on the Judiciary  
815 Hart Senate Office Building  
Washington, D.C. 20510



---

Sharon A. Gantt

349053