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December 26, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
Washington, DC 20554

EXPART SUBMISSION
Re: CS Docket No. 00-30
AOL-Time Warner Merger

Dear Ms. Salas:

By letter of December 19, 2000, Christopher J. Wright, General Counsel of the Commission, addressed a letter to America Online, Inc. (AOL) and Time Warner, Inc., requesting the submission of any last-minute information that the parties would like to submit regarding their application for consent to a merger. This letter is written on behalf of a nationwide class of Internet Service Providers (ISPs), who are currently engaged in a nationwide class action lawsuit against AOL, arising from the characteristic of AOL's software that involuntarily directs modem calls away from the user's desired ISP to an AOL access number. We urge the Commission to focus its attention on this specific anticompetitive practice of AOL that prevents, or at least seriously impedes, access to the preferred ISP of many members of the public, and to impose a condition on the merger that would require that the offending AOL software feature be modified. Such a condition would do more to introduce competition in Internet access than the Instant Messaging condition that has been the subject of recent press reports.

The urging of the applicants that approval of the merger be granted by the end of the year is not a reason to ignore the importance, or to defer consideration, of this critical access problem.

We have previously met with the Commission's staff to explain the litigation and the circumstances leading up to it. We have filed written comments with the Commission outlining that meeting. Basically, the installation of either AOL 5.0 or 6.0 software, which is widely distributed to the public free of charge, automatically changes the default ISP dial-up connection in the user's computer to AOL, without the consent or knowledge of the user. This feature can be defeated only with a level of technical sophistication that is beyond the capability of most members of the public. Once the change is

made, it becomes difficult, sometimes hopelessly so for many users, to reach their preferred ISP provider when they choose to do so.

AOL has erroneously stated, in response to inquiry about this problem by Senator Orin Hatch in the Senate Judiciary Committee hearings on the merger, that it does give consumers a choice, by asking them "yes" or "no" whether the consumer wants AOL as their default ISP, as part of the installation of their software. In fact the question that AOL asks has nothing to do with the replacing the default dialer on the consumers computer which determines who is the default ISP. The "yes" or "no" question AOL asks relates only to installation of unrelated AOL software features. Even more telling is that the surreptitious change to the default dialer, which determines the default ISP, is made in the consumer's computer even before any "yes" or "no" question regarding other software choices is displayed.

This misstatement by AOL continues to be their public response to this serious problem

During recent weeks, a great deal of attention has been focused on AOL's Instant Messaging (IM) software, which is incompatible with messaging software of other service providers, and the desirability of the Commission's conditioning approval of the merger on AOL's making its software compatible so as to allow users of different software to exchange instant messages with IM users. The IM issue is important, of course; but it is only a small aspect of the overall AOL problem. The dial-up connection problem affects all AOL customers, not just IM users. Furthermore, with an AOL-Time Warner merger, there is no telling how many Time Warner customers who are enticed to sign up for AOL service through cross-promotions will lose contact with other ISPs because of connection problems, even if Time Warner theoretically provides "open access" to other ISPs over its cables.

We respectfully suggest that the Commission's efforts should be focused on the bigger picture and the problem that affects the most people.

The effect of the dial-up problem cannot be underestimated. The hallmark of competition is consumer choice. It must be equally easy to reach any ISP with whom a customer has chosen to do business. It must be remembered that the AOL software problem, by diverting a call intended for another ISP to AOL, deprives or impairs consumer access to an ISP *with whom the consumer has purposefully chosen to do business*. It is more than a question of whether competing ISPs can find their way into a consumer's home. These are ISPs who have already won over the consumer and then cannot provide service because AOL has diverted the calls.

We have explained in our presentations to the Staff that call diversion is as bad as slamming. The concept is the same. The consumer has chosen to do business with more than one provider -- AOL and at least one other ISP -- but his/her calls are all routed to AOL. It is even worse if the consumer has tried AOL but has decided not to use it. Once AOL software has been installed, the change has been made in the underlying Windows 95 or 98 platform on the computer, regardless of whether or not the consumer ultimately elects to open or to retain a paying AOL account. It is like taking a trial with one interexchange carrier, deciding to change, and not being able to do so because the speed dialer on the telephone has been altered. It is like signing up for one interexchange carrier and discontinuing the service, only to find that your calls are still being carried by that carrier because the programming on your local telephone line has not been changed. See *Halprin, Temple, Goodman & Sugrue v. MCI*, and *Freedom Technologies v. MCI*, 14 FCC Rcd 21092 (1999), where MCI was ordered not to charge casual calling rates to a subscriber who had tried unsuccessfully to terminate MCI's service.

The AOL software problem goes beyond the analogy to interexchange slamming and is akin to having a local call diverted to number other than the one called. What if a consumer called the Yellow Cab Company, but his/her call was diverted to the Blue Cab Company because of an autodialer that had previously been installed? This kind of practice is anticompetitive in the extreme and cannot be tolerated.

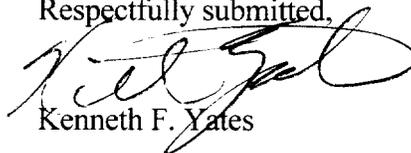
While it may be beneficial to consumers for the Commission to require that AOL's Instant Messaging software be opened up and made compatible with other software, is it not much more important that the ability of consumers to reach their chosen ISP when they so choose not be impaired because AOL software reaches out and automatically alters the basic Windows operating system in the computer? And how much worse may it become with broadband access through an AOL-Time Warner combination?

The ISPs take no position in this letter whether or not the merger should be approved; but if it is approved, they urge the Commission to direct completely free access to whatever ISP a consumer wishes to use, with no impairment by AOL or Time Warner in the software they provide for access to their own offerings, whether voice grade, broadband, or otherwise.

This is a simple issue to understand and a simple remedy to order. The change in AOL's software to avoid automatic change in default dial-up is much simpler to implement than designing compatibility into Instant Messaging. AOL should be required to ask the consumer in clear and unambiguous terms whether the consumer wants AOL to be the "default dial-up connection" and therefore the default ISP. This can easily be done as part of AOL's software installation process.

We urge that the Commission neither ignore nor shy away from addressing the dial-up problem -- a problem that is directly related to its jurisdiction over basic telephone calling and has serious anticompetitive implications if it is not remedied.

Respectfully submitted,



Kenneth F. Yates

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