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Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Applications of America Online, Inc.)
And Time Warner, Inc. for Transfers of) CS Docket No. 00-30
Control)

COMMENTS OF TRIBAL VOICE

I. INTRODUCTION

Tribal Voice is a leading provider of co-branded instant messaging ("IM") and interactive communications solutions. Founded in December 1994, the company is headquartered in Denver, Colorado and maintains development organizations in Colorado Springs, Colorado, and Austin, Texas. The Company's PowWow-based software is used by more than eight million worldwide users.

Last fall, AOL blocked users of the PowWow software from sending instant messages to users of AOL's IM software. Even as AOL was blocking others from communicating with its users, it nonetheless stated that it would help the industry develop a common system for IM interoperability.¹ AOL specifically committed to work with the rest of the Internet industry through the Internet Engineering Task Force (IETF) to make interoperability a reality.

However, AOL has made plain that it does not intend to honor its previous commitment. AOL has not actively participated in the IETF process. Instead, AOL has continued to block users of non-AOL owned or licensed software from communicating with AOL software users. Further, the CEO of AOL has now taken the position that instead of developing open standards, AOL wants the market to evolve in a direction in which "everyone who wants to communicate with AOL members would use software 'licensed or approved by us.'"²

AOL is the dominant player in the IM market, with a market share of more than 90%. If the proposed merger is approved, AOL's market power will be increased. AOL already is, and has the potential to become an even greater, bottleneck to the emergence

¹ See Rajiv Chandrasekaran, *AOL Supports Standard for Internet Messaging*, Wash. Post, July 30, 1999, at E01.

² Ariana Eunjung Cha, *Foes of AOL Merger Take to Capitol Hill; Assurances Sought in Low-Profile Effort*, Wash. Post, Mar. 24, 2000 at E03 (quoting AOL Chairman and CEO, Steve Case).

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of a robust, competitive IM market. As this filing demonstrates, IM is becoming an essential communications function. There are no technical obstacles to the interoperability of competing IM software, but interoperability in IM needs to be protected from the control of a single entity, just as e-mail and telephony are protected from such control.

II. ARGUMENT

A. IM is rapidly becoming an essential communications product for both businesses and individuals

1. The IM market, already large, is growing rapidly.

An instant messenger is a software application that tracks the online presence of users who have established each other as online “buddies.” When IM buddies are online simultaneously, messages can be sent between them. These messages are different than e-mail. They appear like a pop-up note on the user’s screen, enabling a much more instantaneous and efficient means of communication than that afforded by ordinary e-mail messages.

IM technology is relatively new, having been commercially available only since 1996. It is, however, one of the fastest growing markets on the Internet. Already there are over 1 billion instant messages sent every day, more than 130 million IM users worldwide and more than 3 million users signing up for IM every month. Its growth rate is faster than the growth rate of e-mail or the browser. Because the IM market has grown so explosively, it has already surpassed the most recent predictions from Jupiter Communications.

The most widely used IM products come from AOL, AOL owns and distributes the AOL Instant Messenger and ICQ applications, which, are used by more than an estimated 120 million users. Tribal Voice has 8 million users of its PowWow-based instant messengers. Microsoft has 5 million users of its MSN Messenger Service. Yahoo, Excite, Multimate, Odigo, and KOZ.com are among other companies that offer IM providers.

2. The lack of interoperability is harmful to the growth of IM.

IM has the potential to offer consumers and businesses the next step in communications. With new commercial applications like on-line meetings and IM over wireless services, IM can be a catalyst to continuing the growth of use of the Internet. Specifically, Tribal Voice envisions IM and online presence detection software available on every Internet-enabled device from AutoPCs, to Game Consoles and Set Top boxes, allowing fast and efficient instant communication through text or voice instant messages.

While the growth of IM to date has been strong, it has not been as strong as it could have been, nor will it be as strong in the future as it could be, if one company did not dominate so much of the market. As one industry analyst observed “(t)he lack of standards is the greatest impediment to allowing this technology to be all that it can. The

ultimate winner (when there is a standard) will be the consumer, who will enjoy an experience more effective and ubiquitous than current pagers and far less costly than cell phones.”³ Another industry analyst similarly wrote that “(l)ooking forward, I believe IM could become the glue that finally makes the Holy Grail of ‘unified messaging’ possible. The main hurdle will be the resolution of interoperability problems.”⁴

History clearly teaches us the need for interoperability to drive growth and innovation. In the early days of the telephone network, growth of the telephone's penetration was impeded by the need to have separate phones when one wished to call someone who was a customer of a different phone company. Once interoperability was required, and customers of all telephone companies could communicate with customers of all other telephone companies, telephone penetration grew much more rapidly.

One reason for the explosive growth of e-mail is that from the inception of commercialized e-mail, a common open standard, POP3/SMTP, was employed to enable everyone to be able to send e-mails to others, even if the recipient was using a different provider of e-mail services.

It should be clear that, as a country, we are better off with the e-mail model where as soon as possible, communications are handled through open, interoperable systems.

B. There are no technical or operational obstacles that would preclude open standards for IM

Existing Internet architecture can accommodate open messaging. Efforts to provide open messaging have already demonstrated the technical feasibility of IM among the users of different IM systems. Tribal Voice's PowWow interoperable client is able to communicate with AOL's AIM system through its previously published public source code, as well as with Microsoft's MSN Messenger Service through its publicly published and sanctioned methods for communicating with other messaging users. Tribal Voice is using protocols that AOL publicly published on its Web site so that IM applications could be made compatible with AOL's AIM system. In addition, all users of PowWow-based AIM interoperability must have a valid AIM account, adding to the security and safety of the overall system.

Open messaging would be done with an agreed upon method of communication that includes how to protect enduser resources. Security methods are a minimum requirement in achieving interoperability and have been achieved in other applications that involve multiple users communicating with each other such as in e-mail, Internet telephony and Internet conferencing. Various IM systems today already afford a high degree of security with encryption, masking of user's specific Internet address, and the ability to monitor all activity.

³ Rob Enderle, *Gigaweb Information Group*, The Record, Bergen County, NJ, Oct. 25, 1999.

⁴ Charley Whaley, *Computing Canada*, Oct. 1, 1999.

Just as with respect to security concerns, privacy issues must be addressed and agreed upon by vendors. Consumers have demanded, and vendors have responded with applications that keep all personal information private. Users will have complete control over what personal, demographic or usage data is gathered.

C. The FCC should act to protect openness and interoperability in the IM market by promoting, as it has in the past, interoperability and open standards

1. *The Administration, Congress and the Commission have all championed an open, competitive Internet as fundamental to national policy.*

The executive and legislative branches, as well as the FCC, have identified the critical link between a competitive Internet marketplace and the delivery of extensive benefits to communications, education and the national economy. These policy makers have recognized the open, competitive infrastructure of the Internet as integral to its extraordinary success and thus a matter of vital concern as new communications opportunities and functions are created.

Government policymakers at all levels agree that "(c)ompetition in the Internet industry...has led to the rapid expansion of the Internet beyond anything that could have been foreseen."⁵ In the Telecommunications Act of 1996, Congress declared that the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet."⁶ As AOL itself noted, the Department of Commerce's Emerging Digital Economy paper called for "creating the optimal conditions for the new digital economy to flourish . . . so that the new converged market[-]place of broadcast, telephony, and the Internet operate based on laws of competition and consumer choice. . . ."⁷

The FCC has implemented this correct and broad mandate by taking numerous concrete steps to assure that consumers have a choice in various services. For example, ensuring that consumers could choose among competing information services was a primary motivation behind the establishment of structural safeguards in the FCC's *Computer II* decision and non-structural safeguards in its *Computer III* order.⁸

⁵ Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series No. 29, at 83, March 1997 (hereinafter "*Digital Tornado*").

⁶ 47 U.S.C. § 230 (b)(2).

⁷ Comments of America Online, Inc., *In re Joint Applications of AT&T Cooperation and Telecommunications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Dkt. No. 98-178, at 19 (Oct. 29, 1998) (quoting U.S. Department of Commerce, *The Emerging Digital Economy*, at 50-51 (rel. April 1998)).

⁸ See generally *In re Amendment of Section 64.702 of the Commission's Rules and Regulations* ("Computer II"), Final Decision, 77 F.C.C. 2d 384 (1980); *In re Amendment of Section 64.702 of*

2. *The FCC has explicitly recognized that the key to continued growth of the Internet is the openness which allows all users to communicate with all other users.*

In 1997, in *Digital Tornado*, the first analysis of the Internet provided by the FCC,⁹ the central importance of open, interoperable communications facilities was clearly recognized. The paper, while stating its author's belief that the growth of the Internet could be extraordinary, also recognized that its growth could be stifled. In a section entitled "Threats to the Continued Spiral," the author asks: "If the Internet truly operates like a feedback loop, why is government intervention necessary?"¹⁰ The author then answers by stating "[t]here are many ways the Internet spiral could be derailed . . . [m]oving toward proprietary standards or closed networks would reduce the degree to which new services could leverage the existing infrastructure."¹¹

This point was again emphasized two years later in the Office of Plans and Policy Paper, *The FCC and the Unregulation of the Internet*.¹² In that paper, the FCC staff studied the development of the Internet and described a number of lessons to guide government policy makers in thinking about appropriate policies for governance of the Internet. In reviewing the history of the Internet, the paper concluded that: "[t]he most important technical feature of the Internet is its openness, which allows any user to develop new applications and to communicate with virtually any other user."¹³

The paper goes on to describe that this openness is no accident. It is the direct result of specific policies that favor open standards and interoperability. As the paper notes:

This openness is driven by the sharing of that common communications protocol: IP, the Internet protocol, developed by the early Internet pioneers. No one owns the Internet protocol, no one licenses its use, and no one restricts access to it. IP is available for all to use, and the explosion of Internet applications, from online commerce and medicine to educational and social tools, demonstrates the wide range of individuals and companies taking advantage of the openness of

the Commission's Rules and Regulations ("Computer III"), CC Dkt. No. 85-229, Phase I, FCC 2d 958 (1086).

⁹ *Digital Tornado*, *supra* note 3.

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² See Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper Series No. 31, July 1999.

¹³ *Id.* at 5.

the Internet.¹⁴

As the paper further notes, beginning with the *Carterphone*¹⁵ decision in 1968, the Commission adopted a position that encouraged the interoperability of equipment and prohibited owners of the network from preventing customers from using equipment that did not harm the network.¹⁶ By virtue of this principle, first adopted for telephone equipment, competitive manufacturers were able “to build and deploy an incredible variety of voice and data equipment for use with the public network, without seeking prior permission from either the Commission, *or more importantly, the monopoly telephone companies.*”¹⁷

The Berkeley Roundtable on the International Economy, in its E-economy Working Paper, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*,¹⁸ summarizes the FCC’s policies on openness by writing: “[p]ermitting a single company to leverage its market power in pursuit of only the technology and service trajectories that serve its own commercial interests reverses three decades of policy moving toward openness. It will stifle the competition through network structure that has fostered experimentation and user driven innovation.”¹⁹

3. *AOL has market power today in the IM market, and uses it to deny businesses and consumers the choice they want to communicate freely with everyone, regardless of which IM product they use. The proposed merger will only increase AOL's market power.*

Today AOL controls 90% of the IM market. This market share is well above any of the allowable levels established under the Department of Justice Merger Guidelines.²⁰ To the extent that AOL continues to gain in market share by developing new functions, we have no complaint. But AOL’s strategy seems to be based not on innovations, but on restricting non-AOL users from communicating with AOL’s large and captive audience.

For example, in the last year, there have been a number of exciting innovations in IM functions. These include voice communications, group browsing, detection of others

¹⁴ *Id.*

¹⁵ *Carterphone v. AT&T*, 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1968).

¹⁶ *See id.* at 14.

¹⁷ *Id.* (emphasis added).

¹⁸ The Berkeley Roundtable on the International Economy, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*, E-economy Working Paper 12, Aug. 1999.

¹⁹ *Id.* at 11.

²⁰ *See generally* U.S. Department of Justice/Federal Trade Commission's Horizontal Merger Guidelines, issued April 2, 1992, as revised April 8, 1997.

who are browsing the same web page, detection of people actively receiving information about your presence, improved security and privacy methods, the addition of real-time alerts from other information sources and many other enhancements too numerous to mention here.

But these innovations were not created by AOL. They were all created by other IM providers. Unfortunately, due to AOL erecting a wall around its members, consumers now must choose between improved functions or being able to communicate with the vast majority of IM users. Consumers in markets for other products or services, such as telephones, long distance service, and e-mail, don't have to face this Hobson's choice. They are allowed to choose the equipment or provider they want on the basis of what best serves their needs, knowing that once they have made that choice they will be able to communicate with anyone, and not just with people who made the same choice.

In short, AOL is already leveraging its dominant position to control the market for IM. If its merger with Time Warner goes forward as proposed, AOL will likely become an even more dominant player in the market for internet services and will then be in an even stronger position to tighten its rein over the IM market. For example, if allowed to acquire Time Warner's interest in Road Runner,²¹ AOL will undoubtedly bundle its IM service with Time Warner's advanced broadband delivery services to bring even more IM users under its control.²² If these new users are also fenced off from the outside world by AOL, the adverse affects of a closed architecture, as described above, will be compounded, to the increased detriment of consumers and of competition.

²¹ Road Runner is a joint venture among affiliates of Time Warner Inc., MediaOne Group, Inc., Microsoft Corp., Compaq Corp. and Advance/Newhouse. *See Company Profile* (available at http://rrcorp.central.rr.com/company/main_profile.html). Not only does AOL stand to acquire Time Warner's present interest in Road Runner through its pending license transfer applications but, depending on the outcome of AT&T's pending petition to acquire the licenses of MediaOne, *see In re Application for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Dkt. No. 99-251, Time Warner, and then AOL through its proposed merger with Time Warner, could increase its ownership interest in Road Runner.

²² Indeed, AOL and Time Warner bragged about precisely this plan in one of their press releases following announcement of the merger, wherein they explain that:

America Online will make available on Road Runner popular America Online brands and products, including AOL Instant Messenger, Digital City, AOL Search and AOL Movie Fone.

Press Release, AOL & Time Warner Will Merge To Create World's First Internet - Age Media and Communications Company (available at <http://media.web.aol.com>).

* * *

The press release also announced:

For business and consumers, AOL Time Warner will offer a major communications platform that combines America Online's popular instant messaging products with Time Warner's ability to offer local telephony over cable.

Id.

Further, if its merger with Time Warner goes forward without changes or conditions, AOL will have the ability to extend its enhanced dominance over IM to control content as well. For example, as IM technology starts to be used for news alerts, AOL will be able to assure that the only provider of news over its system will be Time.com or CNN.com.²³ Thus, for instance, if one wants to receive news from Newsweek, one will not also be able to communicate by instant messages with colleagues using an AOL system.²⁴

4. *Left on its own, AOL will eliminate interoperability and replace it with mono-operability: that is, everyone operating on its system. Allowing one company to define the standard for IM in that way is anti-competitive and anti-innovation.*

Last fall, AOL indicated that it was agreeable to an open, non-proprietary standard for IM. Lately, however, AOL CEO Steve Case has appeared to reverse his position and has indicated that AOL wants all IM with its members to be done through proprietary software that AOL will control. For a company with a dominant market position, this is a rational business strategy. As Charles R. Morris and Charles H. Ferguson describe it in the Harvard Business Review: "[C]ompanies that control proprietary architectural standards have an advantage over other vendors. Since they control the architecture, they are usually better positioned to develop products that maximize their capabilities; by modifying the architecture, they can discipline competing

²³ Also in the press release announcing the merger, AOL and Time Warner boasted about the advantages that would come from merging:

Time Warner's vast array of world-class media, entertainment and news brands and its technologically advanced broadband delivery systems with America Online's extensive Internet franchises, technology and infrastructure, including the world's premier consumer online brands, the largest community in cyberspace, and unmatched e-commerce capabilities.

Id.

²⁴ AOL's plans in this regard are plain. In a recent press release trumpeting its teamed coverage for the Winter Goodwill Games, for example, AOL explained:

The Winter Goodwill Games will be extensively integrated and promoted across the AOL brands, including AOL, AOL.COM, CompuServe, ICQ, Netscape Netcenter, and AOL's Digital City, enabling tens of millions of sports fans to enjoy comprehensive, interactive coverage of the Winter Goodwill Games through the AOL family of interactive brands as well as the Goodwill Games Web site, goodwillgames.com. AOL's more than 21 million members will find a direct link to the Games at AOL Keyword: Goodwill Games.

Press Release, AOL & Time Warner Team Up for Winter Goodwill Games Promotion (available at <http://media.web.aol.com>). (emphasis added).

product vendors."²⁵

As Professors Mark A. Lemley and Lawrence Lessig, citing Morris and Ferguson, have noted, "[A] company in this position can and will resist change, in order to keep doing what it knows best."²⁶ As Lemley and Lessig go on to demonstrate, companies that control the architecture of a dominant network focus their efforts not on innovations but on protecting the existing market. They conclude that "[a]n architecture that maximizes the opportunity for innovation maximizes innovation. An architecture that creates powerful strategic actors with control over the network and what can connect to it threatens innovation."²⁷

That is precisely the case here. AOL is hoping that the government will ignore its broken promise of open standards because it wants to control the direction of the IM market by controlling what can connect to its system. As an IM analyst for Credit Suisse First Boston noted, AOL wants to maintain a closed system because "a closed IM system helps the company maintain a captive audience and build a platform for future audio and video services. Its about loyalty." Lisa Boyer, Credit Suisse First Boston, *Wall St. J.*, Aug. 5, 1999.

Moreover, as Professors Lemley and Lessig point out, this will clearly reduce innovation. Rather than allowing different systems to compete on the basis of what functions best serve the customer, AOL wants the systems to compete on the basis of what system has access to the most customers. This will enable AOL to control innovations in the market so that they do not threaten AOL's existing businesses and, to the extent possible, so that they promote AOL's other businesses.

III. CONCLUSION

This problem will only be resolved when all IM users can communicate with one another regardless of their messaging software. This is a goal that AOL seemed to agree with last summer when it emphasized that users should be able to exchange messages regardless of which product they use--- like they do with e-mail or telephone."²⁸ But it is a goal that AOL, by its actions, is now apparently trying to prevent.

²⁵ Charles R. Morris and Charles H. Ferguson, *How Architecture Wins Technology Wars*, Harvard Business Review, 86,88 (March April 1993).

²⁶ Written Ex Parte of Professor Mark A. Lemley and Professor Lawrence Lessig, *In re Application for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc. to AT&T Corp.*, CS Dkt. No. 99-251, at para. 40 (Nov. 10, 1999).

²⁷ *Id.* at para. 43.

²⁸ See Chandrasekaran, *supra*, note 1 (quoting AOL President of Interactive Services, Barry Schuler).

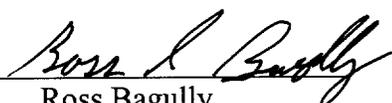
Achieving this goal does not require new FCC regulations or that the FCC become involved in a standard setting process. The Commission need only act to protect the principles of openness and interoperability so that AOL lives up to its commitment of last fall to work with the rest of the industry to create an open standard for IM.

If AOL had honored its commitment, this filing would be unnecessary. It is highly ironic that AOL's petition for approval of the merger is, to a significant extent, premised on asking the government to trust it to honor its commitments to open up other parts of its networks.²⁹ From the evidence of its behavior with IM, however, AOL has a suspect record when it comes to honoring commitments.

Fortunately, the FCC does not have to take AOL at its word. In the SBC/Ameritech proceeding, for example, the FCC incorporated voluntary commitments by SBC to take certain actions to assure that the merger served, rather than diminished, the public interest.³⁰ So here, the Commission should take simple action to make sure that AOL does what it said it would do and agrees to an open standard that provides consumer choice, leads to innovation, and protects competition in the IM market.

Respectfully submitted,

Tribal Voice

By: 
Ross Bagully,
President and CEO

April 25, 2000

²⁹ See *In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfer of Control*, CS Dkt. No. 00-30 (filed Feb. 11, 2000).

³⁰ See *Memorandum Opinion and Order, In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee*, CC Dkt. No. 98-141, 14 FCC Rcd 14, 712 (1999).