WRITTEN TESTIMONY
OF
ROSS BAGULLY
CEO, TRIBAL VOICE

FEDERAL COMMUNICATIONS COMMISSION
EN BANC HEARING

JULY 27, 2000

Chairman Kennard and Commissioners Ness, Powell, Furthcott-Roth and Tristani. I want to thank you for the opportunity to speak to you today about how this merger could reinforce the walls already being maintained around the Instant Messaging market.

In offering this testimony, I recognize that I have an obligation to speak not just on behalf of myself, but on behalf of many others who are similarly concerned. Such parties include:

- The 28 million members of the hearing impaired community who recognize the great potential that instant messaging has to improve communications in their lives and who have asked this Commission to ensure that that potential is not emasculated by a closed, monopolistic market;

- Applications companies such as Net Nanny who want to provide filtering software for families whose children use instant messaging but whose products don't have a chance to reach consumers because one company has the power to block its introduction

- Content companies like iCast whose efforts at enabling its users to be able to freely send content to their friends through instant messaging have been blocked by one company that controls 90% of the market.

Your Commission has been given a historic task. The law requires you to evaluate the public interest involved with the first significant merger of a Internet media company with a traditional media company. This task is difficult as the merger raises many issues never before addressed by the Commission.

The task is made much more difficult by the fact that both of these companies are dominant forces in a wide variety of markets. So you have to evaluate the implications of these tremendous powers uniting for the sake of dominating markets that are just emerging.

I have great respect for the difficulty of your task.

But I would suggest that history gives you one clear guiding principle that can point the way as you study the issues before you.

That guiding principle is this: ***for communications systems to thrive and maximize their public interest benefits, there must be interoperability and open standards.***

If the courts had allowed AT&T to require that everyone who wanted to communicate with an AT&T customer also be an AT&T customer, would we ~~seen~~ the kind of innovations and price cuts we've seen in the long distance market over the last two decades?

If e-mail required that in order to send an e-mail to another person, you had to subscribe to the same e-mail service, even if such a service were free, would e-mail have become the incredibly powerful and important tool that it has for businesses and individuals?

So the bedrock principle of interoperability and open standards for our communications systems ought not to be violated.

Yet today in the Instant Messaging market we don't have open standards and interoperability.

And the merger you are reviewing is certain to make the problem worse, not better.

We know from history that those who unfairly exploit ~~a~~ their market dominance don't get nicer as they get bigger.

And we know that as Instant Messaging moves from being a chat tool to a more content rich and business oriented product that the combined AOL/TW platform will give AOL/TW plenty of opportunities to bundle its extraordinary media properties with its stranglehold over instant messaging to favor its content and prevent innovations that might threaten its dominance.

AOL/TW understands this. At a recent investor conference Time Warner Chairman Gerry Levin was asked what would be the most valuable asset of a merged AOL/TW. He answered Instant Messaging.

I don't think anything I have said so far is really debatable.

Even AOL/TW doesn't suggest that public policy shouldn't require interoperability and open standards. It simply suggests that now is not a good time to do so for Instant Messaging..

Even AOL/TW doesn't suggest they won't have the power to exploit that position. They simply say to government officials, such as yourselves, that they won't.

These defenses boil down to an argument that says, "Let~~'s~~ us keep our closed system, our monopoly, until we decide we don't want to have it anymore."

In making its argument, AOL/TW relies on two fundamental defenses.

The first is that interoperability would threaten the privacy and security of its members.

This is an important argument and not one to be taken lightly. But AOL/TW's defense does not hold. As detailed in a white paper made public last week written by 17 companies with an interest in Instant Messaging, there is not and need not be any trade-off between interoperability on one hand and privacy and security on the other.

The white paper provides an analysis of AOL/TW's filings to the FCC as well as an AOL submission to the IETF. Among the key points made by the paper are:

- While AOL continually invokes privacy and security concerns, nowhere in its submissions does it demonstrate how interoperability contributes to the problem;
- As the competitors who AOL has blocked used AOL's own protocols, the competitors' systems were at least as private and secure as AOL's service; and
- In fact, competitors to AOL had achieved more private and secure IM systems. However, customers of competing IM providers cannot use these more secure programs if they want to communicate with AOL' s members.

The second defense is that AOL now, and presumably AOL/TW in the future, will work in good faith to achieve interoperability as soon as possible.

Should you trust them to give up their monopoly, which will only be strengthened by the addition of Time Warner, voluntarily?

Here are the undisputed facts.

A year ago, the last time AOL faced government criticism of its closed IM system, AOL sent a letter to the Internet Engineering Task Force (IETF) promising to "fast-track" its efforts to bring about interoperability.

Over the following year, as the IETF did its work, primarily over e-mail, AOL officials contributed nothing to the search for satisfactory protocol.

When the IETF asked for submissions of a set of protocols that would address the issue, AOL, feeling pressure from questions you and the FTC were asking, submitted a document. But the document did not provide any protocols. Nor did it provide a timetable.

Contrast this to the point of view AOL had about the problems of technical challenges when it was seeking government regulation of ISP access to cable facilities. Appearing on a panel with you, Chairman Kennard, AOL CEO said that all the technical challenges could be solved "quickly and easily." Yet here, where other companies have already demonstrated that interoperability can be achieved without creating privacy and security problems and where AOL over a year ago promised to do something quickly, AOL keeps offering PR mantras of protecting consumers instead of offering real work towards real solutions.

And ask yourself, what if the day after the merger were approved, the IETF or a group of highly respected Internet companies, were to announce a protocol that would provide safe, private interoperability and AOL were to again say no. It wasn't "good enough." What recourse would there be?

So should you accept the argument that ~~it~~ AOL should be allowed to continue blocking competitors, effectively eliminating any real chance for competition, until it voluntarily decides to let others communicate with their members?

Business Week, no bastion of pro-regulatory thinking, summarized the situation this way in this week's editorial: "arguments for monopoly profits must always be viewed with a skeptical eye. AOL is a profitable Internet company. A long-term advocate of open systems, AOL turned uncharacteristically quiet on the issue once it announced it was going to buy Time Warner Inc.... Indeed, AOL itself is under attack. Once its instant messaging network hit a critical mass, AOL moved to keep it closed to most competitors. Not a good sign."

A bad sign, yes; but also an important sign, and a sign you must consider as you contemplate this merger.

Let me conclude by quoting another conservative, generally anti-regulatory publication--- The Economist. It wrote that "(t)he antitrust enforcers clearly ought to make approval of the AOL/Time Warner deal contingent on a cast-iron agreement to open up the merged firms's instant-messaging service."

On behalf of all the parties I noted at the beginning, let me simply say, we agree.