

# COVINGTON & BURLING

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December 20, 2000

Ms. Magalie Roman Salas  
Secretary  
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  
Notice of Ex Parte Communication***

Dear Ms. Salas:

This letter provides notice that on December 19, 2000, Yusuf Mehdi, Marc Berejka, Bob Visse and the undersigned, on behalf of Microsoft, met with Karen Onyeije, Legal Advisor, Office of Chairman Kennard, Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau, Gerald Faulhaber, Office of Plans & Policy, Dr. Robert Pepper, Office of Plans & Policy, Dave Farber, Office of Engineering & Technology, and Jim Bird, Office of General Counsel; and Erin Egan, on behalf of Microsoft, had a conversation with Darryl Cooper, Cable Services Bureau; to discuss the need to impose a targeted, effective and enforceable IM interoperability condition on a combined AOL/Time Warner.

We specifically discussed the framework for analysis of IM in the context of the AOL/Time Warner merger, including the nature of the name and presence detection database and how the vertical integration of AOL's IM platform with Time Warner's cable infrastructure and content will enable the combined company to continue to dominate IM. We also discussed how the merger of AOL with Time Warner, unless conditioned by this Commission, will strengthen AOL's incentive not to work toward interoperability with other IM providers.

We discussed the merger specific impact of the combination in the context of both narrowband and broadband. We also discussed the concept of "advanced IM" and explained that this concept has serious conceptual flaws but, at a minimum, must include any IM services that AOL offers over the advanced broadband infrastructure of Time Warner's cable systems. We emphasized that any remedy to the problem of AOL leveraging its dominance of IM to broadband facilities must

COVINGTON & BURLING

MS. MAGALIE ROMAN SALAS  
DECEMBER 20, 2000  
PAGE 2

require AOL to work toward interoperability with other competitors in the IM market – i.e., enable customers of third-party IM providers to communicate with AOL’s IM customers.

Finally, we stressed that a remedy that enables AOL to avoid its interoperability obligation by negotiating a single contract with an IM provider is ineffectual. A contract with a single IM provider, even a “significant” one, simply gives AOL the power to select one company that will succeed in this space. This flaw is not cured by a “most favored nation” clause because a contract that meets the needs of one party (*e.g.*, a large provider such as Yahoo! or MSN) may be uneconomic for another party (*e.g.*, Odigo or MessageVine).

Sincerely,

Gerard J. Waldron

cc: Commissioner Gloria Tristani  
Karen Onyeije  
Jay Friedman  
Sherille Ismail  
Royce Dickens  
Darryl Cooper  
Linda Senecal  
Robert Pepper  
Gerald Faulhaber  
Dave Farber  
Jim Bird  
International Transcription Services, Inc.