STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN,
DISSENTING

Re: *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee; CS Docket No. 00-30*

We respectfully dissent from the decision to eliminate the requirement that AOL Time Warner achieve interoperability with other providers of instant messaging (IM) services prior to offering new streaming video services through advanced IM. We believe that the petitioner, AOL Time Warner, has failed to meet its high burden of demonstrating by clear and convincing evidence that this requirement no longer serves the public interest due to a material change in circumstance.

In 2001, the Commission found that AOL was the dominant provider of instant messaging services, a platform that the Commission anticipated would become significant for launching and supporting other applications taking advantage of presence detection and real-time communication. At that time, AOL claimed it had 65 percent of the IM market, but that the shares of other competitors, including Microsoft and Yahoo!, were growing. While committing in principle to interoperability, the Commission found that America Online had consistently blocked efforts by others to interoperate. The Order concluded that the combination of America Online's IM dominance, coupled with network effects and resistance to interoperability, and Time Warner's content and high-speed distribution assets, would threaten the public interest in open and interoperable communications systems, the development of the Internet, consumer choice, competition and innovation.

To address potential public interest harms to consumers that could result from the combination of America Online's Internet assets and Time Warner's content and broadband distribution facilities, the Commission required AOL Time Warner, the dominant player in the market, to achieve interoperability with other IM market participants. In this manner, all consumers would benefit from an open Internet without bottleneck controls on the free flow of information.

The condition specifically barred the merged company from offering an advanced IM-based streaming video service until it had achieved or contracted to achieve interoperability. The Commission, however, recognized that this was a nascent market, and therefore, provided that AOL Time Warner could seek relief from this condition by demonstrating that circumstances had changed such that the public interest is no longer be served by an interoperability condition. The Commission not only held that the burden was on AOL to justify elimination of the condition, but that it would have to meet the high burden of doing so through "clear and convincing evidence." The Order settled on a clear and convincing evidence standard to provide an avenue for relief, but with a significant evidentiary hurdle, thereby ensuring a detailed written motion and decision that would be sufficient to overcome the fact findings and predictive judgments in the Order that led to the public interest condition in the first place.

AOL Time Warner, in its petition, argues that circumstances have changed because its market share has dropped from over 60 percent to 58 to 59 percent and remained there for four consecutive months (although the share increased from the third to fourth month). Thus, AOL Time Warner argues that the market has not tipped and it is not dominant in the market. AOL Time Warner further argues that there is competition in the market and high demand elasticity because consumers can use multiple IM services essentially without cost.

Opponents of eliminating this requirement contend that AOL Time Warner has seen only a small erosion of market share and continues to dominate the market. They further contend that, because there has been a significant increase in business IM users for whom the network effects of the public IM network are not important, we need to focus on the consumer IM market for our analysis. They note, however, that AOL Time Warner provides only aggregated data, thus precluding useful conclusions about competitive effects within the consumer IM market. In addition, they worry that AOL Time Warner will use its position as market leader to extract supra-competitive rates from content providers that seek to reach its users. Finally, they argue that this requirement is even more important today because AOL Time Warner has only recently begun to market AOL Broadband for which advanced IM-based high-speed services are relevant.

We conclude that AOL Time Warner has failed to show by clear and convincing evidence the material change in circumstance that establishes that the condition no longer serves the public interest. While AOL Time Warner submits evidence that its market share eroded slightly over more than two years while competitors have increased market share, we cannot conclude that AOL Time Warner has made the requisite showing necessary to eliminate this condition nor that relief from the condition is a fair outcome for consumers.

Although the Commission's 2001 Order requires at a minimum that AOL Time Warner must demonstrate that it has not been dominant for four consecutive months, the majority conducts little economic analysis of the market to determine if AOL Time Warner remains dominant and if the predicted effects of the 2001 Order are not likely to occur. Today, as in 2001, AOL Time Warner is the market leader in IM services. AOL Time Warner continues to have a mass of users that is larger than all other providers combined. It continues to have significant high-speed distribution and content assets which could be incorporated into its IM services. The IM market may be more mature now than in 2001, at least with respect to narrowband, and AOL's market share may have eroded slightly, but the majority has not conducted the requisite analysis of these market changes and their implications for the public interest, convenience, and necessity. As such, any removal of the condition is premature and unwarranted.

The majority dismisses the opponents' argument that AOL Time Warner's market data is improperly aggregated. The majority ignores the opponents' unrebutted analysis, because it is not accompanied by independent, disaggregated data. In doing so, the majority fundamentally misallocates the burden of proof in this proceeding turning the standard on its head and dismissing any critique of AOL's petition that is the least bit incomplete, even if such critique raises substantial questions about the sufficiency of AOL Time Warner's petition. Without such information, there is even more reason to doubt whether AOL Time Warner, or the Commission, has effectively measured or appreciated the relevant market characteristics and their impact on the public interest.

Further, the majority's analysis is often inconsistent, particularly in its discussion of interoperability within the IM market. For example, since AOL's competitors have failed to interoperate, the majority assumes that they must believe that they are competitive in the IM market. In assessing AOL's failure to interoperate, however, the majority assumes that this failure was not the result of a strategic decision. The majority then presents evidence that Microsoft and AOL Time Warner settled litigation between the companies by agreeing to explore ways to establish interoperability between their IM networks, thereby refuting the majority's previous analysis.

Moreover, the Order also does not adequately analyze the public interest implications that might result from the removal of the condition. Perfunctory claims that increased competition is in the public interest are simply not enough, especially when we have no assurance that removal of the condition will actually make the IM market more competitive in the future. Among other things, the Order fails to undertake a prospective market structure analysis or consider how removal of the condition will affect AOL Time Warner's ability to leverage its leading position in the IM market, IM interoperability, continuation of multi-IM services such as Trillian, or continuation of IM service offerings without subscription to another service. All could be potentially affected if AOL Time Warner is freed from this requirement. The Commission has no business voting to eliminate this public interest requirement until it at least addresses these critical questions.

In sum, we are unable to conclude on this record that the petitioner has carried its heavy burden of proof. As a matter of policy, the goal of open, interoperable Internet communications services justified this condition as serving the public interest, and nothing in the petition convincingly shows otherwise.