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November 28, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.—The Portals  
TW-B204  
Washington, D.C. 20554

Re: America Online, Inc. and Time Warner Inc.  
Notice of *Ex Parte* Presentation  
Applications of America Online, Inc. and Time Warner Inc.  
for Transfers of Control, CS Docket No. 00-30

Dear Ms. Salas:

On behalf of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively, the "Applicants"), submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules are an original and one copy of this notice regarding a permitted oral *ex parte* presentation in the above-referenced proceeding. On November 28, 2000, representatives of the Applicants met with Commissioner Michael K. Powell and the following members of Commissioner Powell's staff: Kyle D Dixon, Legal Advisor; Susan Eid, Legal Advisor; and Paul A. Jackson, Special Assistant. Attending this meeting on behalf of AOL were George Vradenburg III, Senior Vice President, Global and Strategic Policy; Steven N. Teplitz, Vice President, Telecommunications Policy; Richard E. Wiley of Wiley, Rein & Fielding; and the undersigned. Attending on behalf of Time Warner was Catherine R. Nolan, Time Warner Vice President, Law and Public Policy.

The topic of this meeting was instant messaging ("IM"). AOL first reaffirmed its commitment to true, server-to-server IM interoperability that protects the privacy and security of

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both AIM users and AOL subscribers. AOL made clear, however, that the issue of IM interoperability both predates and is unaffected by its pending merger with Time Warner.

AOL focused on the ever-evolving attempts by Microsoft, *et al.* to portray IM as a service in need of regulatory intervention. Microsoft, *et al.* premise their arguments in this proceeding on two oft-asserted but never substantiated claims: (1) AOL has an 80-90% “market share” in IM; and (2) “network effects” associated with AOL’s IM offerings have “tipped”—or are on the verge of tipping—this “market” irreparably in AOL’s favor. As a threshold point, AOL explained that the mere existence of network effects in no way suggests that there is a competitive problem warranting governmental interference; rather, the pertinent question is whether those network effects are creating barriers to entry or other related anticompetitive effects.

AOL explained how the relevant factual data available plainly demonstrates that IM is *not* tipping toward AOL. A recent Media Metrix report finds that, from June 1999 to August 2000, the number of unique users of both MSN Messenger and Yahoo! Messenger grew at rates faster than that of AIM. Microsoft, *et al.* have offered no actual data to the contrary; indeed, throughout this proceeding, they have declined to provide their own IM usage data. Further, whereas the IM Competitors previously argued that “[t]he real test of market power should be applied to *those persons who actually use a particular IM service,*”<sup>1</sup> they now quibble with Media Metrix data offering the best available measure of just that.<sup>2</sup>

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<sup>1</sup> Tribal Voice and iCast, Notice of *Ex Parte* Presentation, at 9-10, n.15, CS Docket No. 00-30 (filed September 5, 2000).

<sup>2</sup> Indeed, Microsoft has regularly relied upon Media Metrix data to measure Internet usage in contexts ranging from company press releases to submissions in their antitrust litigation.

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AOL has placed in the record clear evidence that IM has not tipped—and is not in the process of tipping—toward AOL's IM offerings. Absent compelling data that can demonstrate otherwise, there is absolutely no credible basis for a finding of market failure in IM.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Peter D. Ross

#### Attachments

cc: Commissioner Michael K. Powell (w/ attachments)  
Kyle D. Dixon, Legal Advisor, Office of Commissioner Powell (w/ attachments)  
Susan Eid, Legal Advisor, Office of Commissioner Powell (w/ attachments)  
Paul A. Jackson, Special Assistant, Office of Commissioner Powell (w/ attachments)  
James Bird, Assistant General Counsel, Office of the General Counsel (w/ attachments)  
Sherille Ismail, Deputy Bureau Chief, Cable Services Bureau (w/ attachments)  
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services  
Bureau (w/ attachments)  
Linda Senecal, Cable Services Bureau (w/ attachments)  
International Transcription Services, Inc. (w/ attachments)

**Yahoo! Messenger and MSN Messenger Service are Fastest Growing Instant-Messaging Applications in the U.S.**

*Combined, AOL's Instant Messenger and ICQ share nearly a third of their users with either Yahoo! Messenger or MSN Messenger Service*

*Majority of Yahoo! Messenger and MSN Messenger Service users utilize at least one other competing instant-messaging or chat application*

**NEW YORK--(BUSINESS WIRE)--Nov. 16, 2000--** Media Metrix, Inc., the pioneer and leader in Internet and Digital Media measurement worldwide, today reports that while AOL Instant Messenger remains the dominant instant-messaging application according to overall users in the U.S., Yahoo! Messenger and MSN Messenger Service each have accumulated approximately half the number of users as AOL Instant Messenger and have become the fastest growing instant-messaging applications in terms of overall users over the past year.

Yahoo! Messenger, from its launch in June 1999, grew to 10.6 million users in August 2000, while MSN Messenger Service, from its launch in July 1999, grew to 10.3 million users in August 2000. AOL Instant Messenger, which launched in May 1997, grew from 18.1 million users in August 1999 to 21.5 million users in August 2000.

"Instant-messaging applications are proving to be very popular with consumers," said Doug McFarland, president, Media Metrix. "But their different features and lack of interoperability cause users, especially heavy users, to adopt more than one brand in order to keep in touch with all their friends and colleagues."

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**Media Metrix Digital Media Report**  
Unique Users(000) Home/Work Combined in the U.S.  
August 1999 and August 2000  
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Instant Messenger and Chat Applications	Unique Users (000)	
	August 1999	August 2000
AOL Instant Messenger	18,086	21,523
ICQ Chat	10,435	9,118
Yahoo! Messenger(1)(2)	N/A	10,596
MSN Messenger(1)	N/A	10,333

(1) Yahoo! Messenger and MSN Messenger Service data not available in August 1999

(2) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

### Media Metrix Digital Media Report

Unique Users (000) of Instant-Messaging and Chat Applications in the  
U.S. and Percent That Used at Least One Other Competing  
Instant-Messaging or Chat Application(3)

August 2000 at Home

	Unique Users (000)	% That Used at Least One Other Competing Instant-Messaging or Chat Application(3)
Unduplicated Total of AOL Instant Messenger and ICQ Chat Application	23,864	32.2%
AOL Instant Messenger	18,686	32.0%
ICQ Chat	8,626	47.6%
Yahoo! Messenger(4)	9,371	57.7%
MSN Messenger	8,798	54.9%

(3) AOL Instant Messenger and ICQ are both owned by AOL and therefore defined as non-competing applications

(4) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

**Media Metrix Digital Media Report**  
**Unique Users (000) of Instant-Messaging and Chat Applications in**  
**the U.S. and Percent that Used at Least One Other Competing**  
**Instant-Messaging or Chat Application(5)**

August 2000 at Work

	Unique Users (000)	% That Used at Least One Other Competing Instant-Messaging or Chat Application(5)
Unduplicated Total of AOL Instant Messenger and ICQ Chat Application	6,639	34.0%
AOL Instant Messenger	4,627	25.6%
ICQ Chat	1,429	69.8%
Yahoo! Messenger(6)	1,878	78.5%
MSN Messenger	2,380	83.1%

(5) AOL Instant Messenger and ICQ are both owned by AOL and therefore defined as non-competing applications

(6) After upgrades, Yahoo! Pager was renamed Yahoo! Messenger in Summer 1999.

**Media Metrix Definitions:**

Unique Users: The estimated number (expressed in thousands) of different individuals who used the application software at least once in the given time period. All Unique Users are unduplicated (only counted once).

**About Media Metrix**

Media Metrix, a Jupiter Media Metrix Company, is the leader and pioneer in Internet and Digital Media measurement and the industry's source for the most comprehensive, reliable, and timely audience, e-commerce and technology measurement services. The Company provides the most comprehensive coverage of all Digital Media including more than 25,000 Web sites and online properties. Media Metrix utilizes its patented operating-system metering methodology to track Internet and Digital Media audience usage behavior in real-time - click-by-click, page-by-page, minute-by-minute. Today, Media Metrix has a representative sample of more than 100,000 people under measurement and covers

more than 85 percent of Internet usage worldwide. Visit us at [www.mediametrix.com](http://www.mediametrix.com) for more information.

### **About Jupiter Media Metrix**

Jupiter Media Metrix (NASDAQ:JMXI), formed by the merger of Jupiter Communications and Media Metrix, is a global leader in market intelligence for the new economy. The Company delivers innovative and comprehensive Internet measurement, analysis, intelligence and events to provide businesses with unmatched global resources for understanding and profiting from the Internet. Jupiter Media Metrix brings together world-class, innovative and market-leading products, services, research methodologies and people. Jupiter Media Metrix brands include Media Metrix, AdRelevance, Jupiter Research and Jupiter Events. The Company is headquartered in New York City and operates worldwide, across the Americas, Asia Pacific, Europe (as Jupiter MMXI Europe), and the Middle East. Visit us at [www.jmm.com](http://www.jmm.com) for more information.

**Note to Editors on Attribution:** All findings in this release are from Media Metrix, a Jupiter Media Metrix Company. Please attribute all findings within this release to Media Metrix, a Jupiter Media Metrix Company.

**CONTACT:** Media Metrix, New York Mary Helen Trent, 212/329-6001 [mtrent@mmxi.com](mailto:mtrent@mmxi.com) or Shum Preston, 415/486-2002 [spreston@mmxi.com](mailto:spreston@mmxi.com)

## Growth in Unique Visitors to Instant Messaging Services 2000

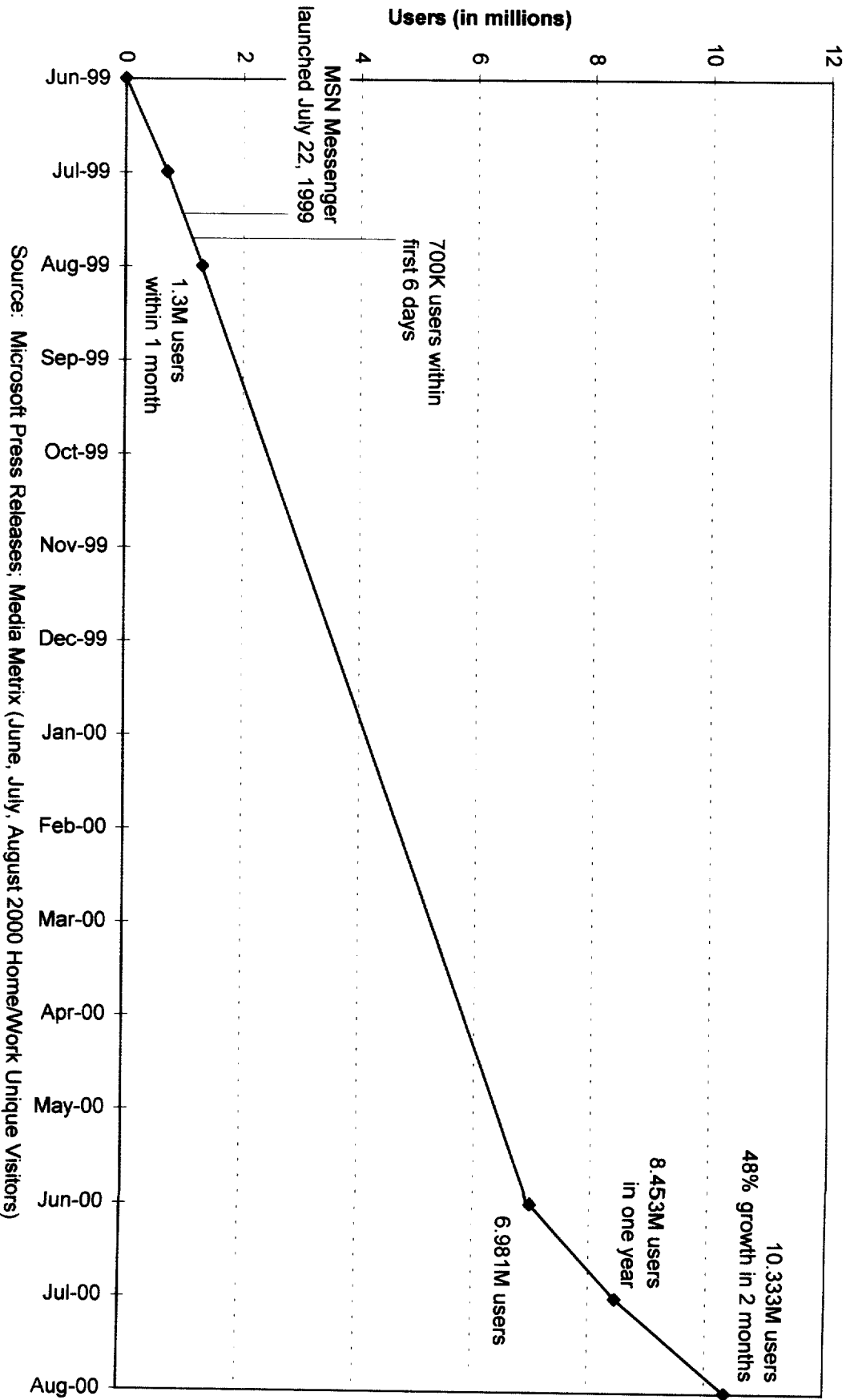
Service	April - August Change in Unique Visitors	July - August Change in Unique Visitors
AOL Instant Message Application *	12.9%	0.5%
AIM	11.8%	1.8%
MSN Messenger	78.3%	22.2%
ICQ	-0.5%	-0.5%
Yahoo! Messenger	n/a	21.8%

\* This is the Instant Messenger application within the AOL service.

Source: Media Metrix (HomeWork).

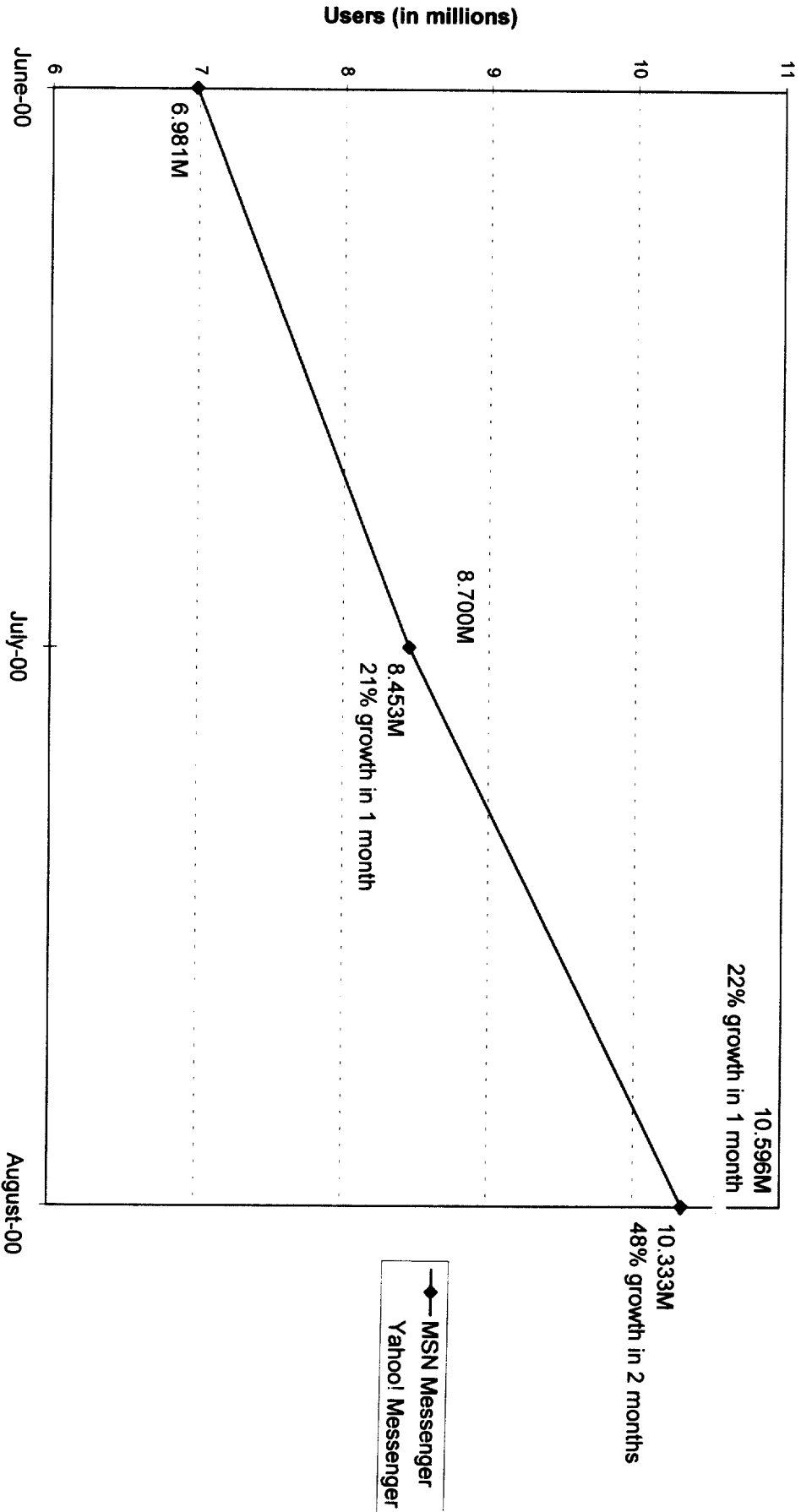


# MSN Messenger Growth



Source: Microsoft Press Releases; Media Metrix (June, July, August 2000 Home/Work Unique Visitors)

# MSN Messenger And Yahoo! Messenger Are Experiencing Tremendous Growth



Source: Media Metrix (June, July, August 2000 HomeWork Unique Visitors)