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October 18, 2000

VIA HAND DELIVERY

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

Re: CS Docket No. 00-30

Dear Ms. Salas:

On behalf of America Online, Inc. enclosed please find one (1) original and four (4) copies of America Online, Inc.'s Reply To Walt Disney Company's Joint Response to the FCC's October 13, 2000 Order in the above referenced docket.

Please stamp and return the enclosed copy of this filing designated as "duplicate" for that purpose. Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Peter D. Ross

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OCT 18 2000

In the Matter of)
)
Applications of America Online, Inc.)
and Time Warner Inc.)
for Transfers of Control)

CS Docket No. 00-30

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Cable Services Bureau
Office of the General Counsel

REPLY TO WALT DISNEY COMPANY'S JOINT RESPONSE

America Online, Inc. ("AOL"), pursuant to the Cable Services Bureau's October 10, 2000 Order ("Order"), hereby responds to the Joint Response of The Walt Disney Company ("Disney") and Verner Liipfert Bernhard McPherson and Hand ("Verner"), filed October 13, 2000 in the above captioned proceeding. As contemplated in the Order, AOL seeks to provide the Commission with additional information relevant to the FCC's investigation of Disney's violation of the FCC Protective Order, which the agency adopted to ensure that "any confidential or proprietary documents submitted by AOL and Time Warner are afforded adequate protection."¹

¹ Order Adopting Protective Order, ¶ 2. At the request of Commission staff, AOL has submitted various documents—including contracts, business plans, strategic analyses and other business-sensitive information—to facilitate the agency's review of our pending merger with Time Warner. Unlike the confidentiality protections afforded in the Federal Trade Commission merger review under the Hart-Scott-Rodino Act and the Antitrust Civil Process Act, all confidential documents requested by the FCC are subject to review by our competitors. The Protective Order adopted in this proceeding was intended to safeguard business-sensitive information from disclosure to individuals in other companies that have input into competitive decision-making.

Disney's Response confirms that Disney and its counsel together committed a series of unauthorized disclosures of confidential AOL information to top Disney executives, failed to provide the required "immediate" notification to the FCC and AOL upon discovery of the violations, and arranged for and completed a further full review of AOL confidential files in the period following discovery of the violations but before notification to the Commission or AOL. The Bureau's prompt adoption of preliminary remedial measures—requiring the disregarding and deletion of disclosed information, and prohibiting further inspection of AOL confidential documents—only underscores the inadequacy of post hoc remedies and the serious limits of the protection that the Commission's sweeping document production process affords sensitive business information.²

Accordingly, as detailed below, the integrity of this merger review and the FCC's processes generally require that the Commission take action to: get answers to the still unexplained conduct discussed below; bar Disney's further review and use of AOL's confidential documents until the answers are provided; modify the Protective Order to ensure that this type of violation does not reoccur; and take such other actions as the Commission sees fit to deter further violations of, and promote greater regard for, FCC protective orders in present and future proceedings.

² Since the outset of this proceeding, AOL and Time Warner have been concerned that this process, and the merger review in general, invites competitors to participate in the proceeding in order to obtain commercial or competitive advantage; that the Commission staff has declined to weigh the probative value of requested documents containing sensitive business material; that serious competitive harm can result from parties' lax attention to the provisions of the Protective Order; and that, once the Protective Order has been breached and individuals involved in competitive decision-making have been provided with access to confidential business-sensitive information, there is little real remedy for the commercial harm that could ensue.

I. Disney's Series Of Disclosures Of Confidential AOL Business Information To Top Disney Business Executives Is Precisely The Conduct That The FCC's Protective Order Is Designed To Avoid.

In its Response to the Bureau's Order, Disney describes the sequence of events by which it committed a series of unauthorized disclosures of confidential AOL business information to top competitive decision-makers at Disney. The Response cites as the explanation for Disney's multiple violations a mistake by Disney counsel regarding who had access under the FCC Protective Order and a separate misunderstanding of the FCC Protective Order on the part of the head of Disney's Washington office. As reflected below, even this most exculpatory of explanations reflects little regard for the FCC Protective Order and the confidential business information it is intended to safeguard.

Disney's Response explains that, following a review of AOL's confidential documents on September 14, 2000, Disney outside counsel prepared a summary of several documents describing AOL strategic plans, business proposals and contractual relationships. This summary was derivative material subject to the Protective Order, which prohibits the disclosure of Confidential Documents and their contents to any person not explicitly authorized to receive confidential information. On Friday, September 22, 2000, at approximately 11:00 AM, Disney outside counsel sent an e-mail message containing this summary of confidential materials to Preston Padden, former President of the ABC Television Network and now Disney's Executive Vice President of Government Relations,

and Marsha MacBride, Disney Vice President of Government Relations.³ As explained below, this constituted the first set of violations.

Before obtaining access to the confidential documents, Disney's outside counsel had executed an Acknowledgment of Confidentiality, confirming that they had read and understood the Protective Order. Under the Protective Order, only individuals who had executed and filed similar Acknowledgments with the Commission were entitled to access to AOL confidential information. Prior to sending the September 22, 2000 e-mail, however, Disney counsel failed to confirm whether Mr. Padden or Ms. MacBride were authorized to receive confidential information.⁴ Neither Mr. Padden nor Ms. MacBride had ever filed such a document.

Disney states that its outside counsel nonetheless had a "good faith belief" that Mr. Padden and Ms. MacBride were entitled to review the documents.⁵ The letter Disney cites as a basis for this belief, however, makes no mention of Mr. Padden having any intention to seek access to confidential files.⁶ In fact, given his senior management role, Mr. Padden is just the type of in-house executive

³ See Response at 5. Larry Duncan, the Verner attorney who drafted and sent the original e-mail, also directed it to Lawrence R. Sidman, a partner at Verner, and James Olson, a partner at Howrey, Simon, Arnold & White ("Howrey").

⁴ See Response at 5.

⁵ See Response at 5.

⁶ The August 17, 2000 letter that Disney cites as the basis for this mistaken belief does state that Ms. MacBride intended to execute the documents needed to review confidential material. However, when Mr. Duncan sought to obtain access to AOL's confidential documents in mid-September, AOL counsel informed him that only Messrs. Sidman and Olson had submitted the requisite documentation for Disney. He was also directed to the Protective Order to confirm that he would first have to submit his own Acknowledgment of Confidentiality in order to obtain access to the documents.

that would not (certainly not without applicant objection) qualify for access to confidential information because of the “greater risk of inadvertent disclosure by such individuals.”⁷

The second set of violations occurred when Mr. Padden proceeded to forward outside counsel’s summary of confidential documents not only to his entire DC Government Relations Office, but also to a series of executives at the highest level of the Disney decision-making process. The whole purpose of the Protective Order, of course, is to ensure that confidential and proprietary documents produced in Response to the Commission’s requests are afforded protection from disclosure to competitive decision makers.⁸ Although Disney’s notice of violation states only that the confidential e-mail was forwarded to “other Disney personnel,” the Padden e-mail was sent precisely to those one would expect to participate centrally in every significant competitive decision in the company: Robert Iger, President of Disney; Sanford Litvack, Vice Chairman of the Disney Board of Directors; Lou Meisinger, Executive Vice President and General Counsel of Disney; Ken Newman, Senior Vice President of Disney; and Alan Braverman, Senior Vice President and General Counsel of ABC.

Disney explains that Mr. Padden was aware of the Protective Order, but “had no idea or understanding” that the Order would preclude him from reviewing and providing to top Disney

⁷ See Order Adopting Protective Order at 2. *See also Protective Order*, ¶ 3 (Confidential Documents may not be reviewed by in-house counsel who are involved in competitive decision-making. “Counsel is deemed to be involved in competitive decision-making if counsel’s activities, association, and relationship to a client are such as to involve counsel’s advice and participation in any or all of the client’s business decisions made in light of similar or corresponding information about a competitor.”).

⁸ Order Adopting Protective Order at 2.

management a description of the content of “numerous” AOL confidential documents.⁹ Disney describes Mr. Padden as “the most senior attorney in [Disney’s] Washington, D.C. office” and the leader of “Disney’s Washington effort in the AOL/Time Warner Proceeding.”¹⁰ The original e-mail he reviewed was captioned “Important AOL documents at Wiley Rein” – and began by stating that “[t]here are hundreds of confidential AOL documents (contracts, marketing materials, internal memos and white papers) at Wiley Rein.” Nonetheless, explaining that he did not know what was covered or required by the FCC Protective Order, Disney states that Mr. Padden had “no belief that he was reviewing information covered by the Protective Order.”¹¹ So Mr. Padden forwarded the original e-mail to the very individuals that the Protective Order expressly was designed to prevent from having access to AOL confidential information.

II. Disney And Its Counsel Recognized Their Unauthorized Disclosures Within One Hour But Took Five Days To Provide The Commission And AOL With The Required Immediate Notification.

Disney states that it became aware that the Protective Order had been violated when its outside counsel received the e-mail that Mr. Padden had forwarded to other Disney decision-making officials. According to the Response, this occurred at approximately 12 noon on September 22, 2000—one hour after the original e-mail was sent out.¹² Outside counsel then sent an e-mail to Mr. Padden regarding the violation, explaining that the e-mail “related to confidential documents” and

⁹ See Response at 7-8.

¹⁰ See Response at 5.

¹¹ See Response at 8, Attachment 1.

¹² See Response at 9.

“should not have been retransmitted to the copied individuals.”¹³ For all its accompanying narrative, the Response thus makes plain that, at approximately noon on Friday, September 22, 2000, Disney—Mr. Padden and all in-house recipients of the e-mail, including both Disney and ABC general counsels—and both of Disney’s outside law firms had actual knowledge that a violation of the Protective Order had occurred.

Separate and apart from the duty to remedy the improper disclosure, the duty of immediate notification is plainly stated in the Protective Order which Disney counsel had sworn to have read and understood. So it is unclear why any necessary client consultation did not occur in the course of these noontime communications and why “further fact finding and consultation with the client” were needed before providing the requisite notification.¹⁴ In any case, the Protective Order expressly mandated that notification of violations be made “immediately” to both the Commission and the applicant.¹⁵ Nonetheless, neither AOL nor Commission staff were notified of these violations until late Wednesday, September 27, 2000.

According to the Response, no notification was made until the end of Wednesday in part because “[t]he weekend intervened,” and in part because of an inability to consult with Mr. Padden regarding the matter until Tuesday, September 26, 2000.¹⁶ First, Commission obligations important

¹³ Unfortunately, a copy of this e-mail notifying Mr. Padden of the violation of the Protective Order was not included in the Response. In any event, at this point Mr. Padden should have been aware that he, too, had been improperly provided with access to confidential information.

¹⁴ Response at 11.

¹⁵ Under the terms of the Protective Order, parties violating the Protective Order are required to “immediately notify the Commission and the Submitting Party of such violation” and, separately, to “take all necessary steps to remedy the improper disclosure.” Protective Order at 4.

¹⁶ Response at 11.

(Continued...)

enough to warrant immediate notification do not appear to toll on weekends. Second, outside counsel had been able to and had in fact communicated with Mr. Padden on Friday despite Mr. Padden's absence from the office. Further, even if Mr. Padden was unavailable to discuss this FCC violation on Friday (or over the weekend or first thing on Monday), there has been no explanation as to why other Disney personnel—including Disney General Counsel Lou Meisinger (a recipient of the Friday e-mails)—could not have been consulted. Disney's explanation indicates, if nothing else, a fundamental failure to recognize the importance of an FCC Protective Order and the significance of a violation of that Order.

In any case, Disney confirms that no notice was given to either the Commission or AOL until more than five days passed—this despite numerous opportunities to so advise both the Commission staff and AOL counsel. On Monday, September 25, 2000, Ms. MacBride was variously joined by Mr. Sidman and Mr. Olson, among others, in FCC lobbying meetings that included FCC officials Kathryn Brown (Chief of Staff to Chairman Kennard), Robert Pepper (Chief of the Office of Plans and Policy), David Farber (Chief Technologist), Darryl Cooper (Cable Services Bureau) and Nancy Stevenson (Cable Services Bureau).¹⁷ And, as described below, Disney counsel with knowledge of the violation was also in touch with counsel for AOL—for purposes of obtaining further access to the AOL confidential documents.

The letter notification that Disney eventually provided to the FCC and AOL on September 27, 2000 stated that Disney's outside counsel had "inadvertently breached the protective order" in a

(...Continued)

¹⁷ See Letter re Permitted Ex Parte Presentation to from Lawrence R. Sidman, CS Docket No. 00-30, Sept. 26, 2000; Letter re Permitted Ex Parte Presentation from Marsha J. MacBride, CS Docket No. 00-30, Sept. 26, 2000.

transmission to “two *in-house counsels*” and a retransmission “to a number of *other Disney personnel*.” AOL sought, but did not obtain, a full accounting directly from Disney. It was not until receiving the Response to the FCC’s Order that AOL learned the scope—indeed, *the fact*—of Disney’s disclosure of AOL’s business-sensitive information to those overseeing Disney’s business affairs at the highest levels. The “in-house counsel” to which the Disney notification pointedly referred, in fact, meant Mr. Padden, an Executive Vice President of Disney. The “other Disney personnel” to which the earlier notification generically referred, in fact, meant the President, Vice Chairman of the Board, Executive Vice President and General Counsel, and Senior Vice President of Disney; and the Senior Vice President and General Counsel of ABC. Moreover, AOL was for the first time provided with the contents of the September 22, 2000 e-mail (though still not the subsequent Padden e-mail) when it received Disney’s Response to the FCC Order on October 13, 2000.

III. Disney Arranged For And Conducted Another Full Review Of AOL Confidential Documents In The Days Between Discovery Of The Violation And Notification To The Commission And AOL.

The FCC Order responded to Disney’s September 27, 2000 notification letter by, among other things, barring Disney and its counsel “from any further inspection of confidential documents submitted under the Protective Order until they submit to the Commission, and the Commission approves, a description of the measures and procedures to be implemented to ensure that future breaches of the Protective Order do not occur.”¹⁸ This sanction was a wholly predictable result of Disney’s required disclosure of its violations. Here, however, this measure had little, if any,

¹⁸ Order, ¶ 6.

practical effect: Disney's other outside counsel had arranged access to and completed their review of these confidential documents before Disney provided any notice of its violations.

- As noted above, the initial e-mail disclosure occurred at 11:01 AM on September 22, 2000 and Mr. Padden's subsequent retransmission of the e-mail to additional Disney executives occurred at about noon the same day. Disney counsel at the Howrey firm was a recipient of both e-mails. The Response indicates that, at least by the time he received the second e-mail, Mr. Olson recognized that violations had occurred.¹⁹
- Around the same time on September 22, 2000, a Howrey associate attorney—apparently acting on the suggestion in the original Verner e-mail that Howrey review AOL's confidential documents—phoned the Wiley, Rein & Fielding legal assistant identified by Verner,²⁰ and left him a voicemail message to arrange immediate access to the confidential materials on behalf of Disney at the earliest opportunity.
- The Howrey attorneys subsequently made repeated calls (including a call from Mr. Olson himself) on Friday, September 22, 2000 and then on Monday, September 25, 2000, again requesting immediate access to AOL's confidential documents.²¹
- On Monday, September 25, 2000, AOL counsel at Wiley, Rein & Fielding spoke with Mr. Weisman and arranged for Mr. Weisman and Mr. Olson to have access to the confidential materials on Wednesday, September 27, 2000.

¹⁹ Disney's Response states that "Mr. Olson of the Howrey firm played an important, constructive role in recognizing the problem with the e-mail transmission and taking immediate steps to rectify it." Response at 12.

²⁰ The Wiley, Rein & Fielding legal assistant was not the public point of contact regarding access to AOL's confidential materials, but was the point of contact mentioned in Mr. Duncan's e-mail.

²¹ While the timing is unclear as to whether Scott Weisman's initial call was made before the violations had been recognized and thus whether Mr. Weisman was aware of the violations the first time he called, Disney's Response makes clear that the subsequent calls made by Mr. Weisman and Mr. Olson seeking immediate access to the confidential documents would have been made after receipt of the Padden e-mail and at a time when Disney and counsel at both of Disney's firms had realized the violations had occurred.

- On September 27, 2000, at about 9:30 AM, the Disney outside counsel were given access to the confidential materials as scheduled. Mr. Weisman departed at about 2:00 PM.
- At approximately 4:30 PM, AOL counsel received a telephone call from Verner and, upon returning the call a few minutes later, was informed by Mr. Sidman that there had been a violation of the Protective Order and that a letter describing the violation would arrive shortly.²²
- Mr. Olson completed his review of AOL's confidential material at around 5:00 PM.
- At approximately 6:00 PM on September 27, 2000, Mr. Ross received the letter disclosing the violation of the Protective Order.

“It should be noted,” Disney’s Response states, “that following discovery of the inadvertent e-mail transmission, Disney in-house personnel otherwise eligible to have access to documents under the Protective Order . . . voluntarily refrained from seeking such access in the period prior to the issuance of the Bureau’s *Order*.”²³ As explained above, the same cannot be said of Disney’s outside counsel. This sequence of events rendered meaningless any attempts by the Commission to enforce the Protective Order by barring Disney and its outside counsel from further access to the documents.

²² The Response states that “it was alleged in Mr. Vradenburg’s September 29, 2000 letters to the Disney General Counsel and the Commission that Verner Liipfert deliberately delayed disclosing this incident to enable Howrey counsel to examine documents subject to the Protective Order at the AOL’s outside counsel’s office on September 27, 2000.” Response at 12. However, the September 29, 2000 letter “alleged” nothing. It merely set forth the facts—facts that remain undisputed—in stating that Howrey’s review of the documents before the notification of Disney’s unauthorized disclosures eliminated one significant remedy available with respect to these violations of the FCC Protective Order. This would have been so even if the sequence of relevant events were unknown among Disney, Verner and Howrey. Disney’s Response makes clear, however, that Disney and Disney counsel at Howrey had actual knowledge of the Disney violations both at the time that Howrey made repeated requests for access and at the time that Howrey in fact obtained access and conducted its review. What, if any, communications occurred between Disney and its two outside firms in this regard remains a question that has not been answered.

²³ Response at 4.

Yet, the Response offers no explanation for how, at a time when Disney and both its outside counsel had actual knowledge that a series of violations of the Protective Order had occurred, Disney or its counsel would have determined to undertake a new review of AOL's confidential documents while these violations remained undisclosed.

IV. Disney's Breach Highlights The Limits Of The Protective Order As A Means Of Enforcing Confidentiality Provisions

The Commission's ability to provide any adequate remedy for or deterrent to this series of violations remains in doubt. First, Disney outside counsel's e-mail to unauthorized in-house officials summarized confidential information relating to, among other business-sensitive matters, AOL's strategy for competing against broadcast networks and the terms of AOLTV contracts. Second, Mr. Padden forwarded this information on to top Disney executives responsible for competitive business decisions related to these very matters. Finally, during the five-day delay in notifying the FCC and AOL of these violations, Disney's other outside counsel sought and obtained access rights for further review of AOL's confidential materials. While acknowledging these events, Disney asserts that "there has been absolutely no harm to AOL as a consequence of this e-mail."²⁴

To the contrary, the Commission recognizes that "[u]nauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting the information. Such disclosure could also undermine public confidence in the effectiveness and

²⁴ Response at 3.

integrity of the Commission's processes, and have a chilling effect on the willingness of parties to provide [the FCC] with information needed to fulfill [its] regulatory duties."²⁵

The events here demonstrate that there is no adequate remedy for breach of a protective order that results in confidential, business-sensitive information being disclosed to those not entitled to see it, particularly key business officials. Disney relies on the post hoc purging of all electronic files relating to the violation. Unlike computer memory, human memory cannot be so readily deleted. A post-violation attempt to remedy the disclosure of business-sensitive information to a person involved in competitive decision-making cannot simply purge this information from a person's mind. The affidavits Disney now supplies appear to suggest that all unauthorized recipients of the original e-mail and the Padden e-mail (except Ms. MacBride) opened these emails. Whether Disney executives printed, discussed or further forwarded this AOL information among themselves is unclear, but these affidavits do appear to suggest that (except for Mr. Braverman) all of the top Disney management that received the violative Padden e-mail in fact read the AOL confidential information contained in it.

The Commission should not only encourage, but also mandate, the exercise of greater care with respect to confidential and derivative materials. Pursuant to the Bureau's Order, both Disney and Verner have submitted newly adopted internal protocols to be used in handling such materials. The Commission should not wait until a violation has occurred to require diligence and care in the handling of confidential materials. The FCC should incorporate provisions of this sort into the

²⁵ Order, ¶ 4 citing *Applications of Craig O. McCaw, Transferor and American Telephone and Telegraph Company, Transferee*, 9 FCC Rcd 5836, 5923-24 (1994).

Protective Order in this proceeding, effective immediately, as well as in future protective orders it might issue.

More broadly, the Commission should take additional steps to safeguard confidential information—both in the context of this proceeding and generally in its merger review process. As noted above, AOL has remained concerned about the potential for competitive abuse with regard to the document submissions required by Commission information and document requests.²⁶ The events surrounding Disney’s breach of the Protective Order only emphasize the need to reexamine the circumstances and terms under which the Commission should require applicants to submit sensitive business information.

Recognizing the risk of disclosure of confidential information by third parties reviewing such information, the FCC should not allow third parties to access information submitted on a confidential basis until the Commission itself has determined that its probative value outweighs its commercial sensitivity—balancing “the need to protect proprietary information from public disclosure with the benefit of allowing parties to have access to documents that are potentially of

²⁶ While AOL recognizes that the Administrative Procedure Act requires that the Commission make available to the public information that it has used in reaching a decision, AOL believes that much of the information submitted, while responsive to staff requests for information, ultimately is likely to prove irrelevant to the Commission’s analysis of the merger. Subject only to the Protective Order, however, AOL and Time Warner have been required to make even highly commercially sensitive documents available to virtually any entity upon request, even before anyone at the Commission has made a preliminary determination as to whether the documents in fact contain “decisionally significant” information.

decisional significance.”²⁷ This could limit the ability of third parties to use the regulatory process as a way to gain access to competitive business information or other business advantage.²⁸

* * * *

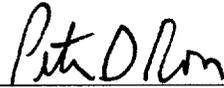
In light of the circumstances surrounding Disney’s breach of the Protective Order, AOL respectfully urges the Commission to request all necessary additional information from Disney and both its counsel to explain fully, inter alia, the relevant events between the time of the e-mail violations and the notification five days later. AOL further urges that the Commission bar Disney’s further review or use of AOL’s confidential information until Disney fully explains the circumstances surrounding all relevant aspects of its violation of the Protective Order. AOL also requests that the Commission modify the Protective Order entered into in this proceeding to, at a minimum, include added procedural safeguards of the sort now adopted by Disney and its counsel in order to adequately protect submitted confidential documents. Finally, AOL leaves to the Commission the determination of such sanctions it deems necessary to restore the integrity of the

²⁷ *Southwestern Bell Telephone Company, Cost Support Filed under Request for Confidential Treatment*, 14 FCC Recd 987 (1999). The Commission has previously noted the importance of balancing the probative value of documents against the prejudicial effects of disclosure. *Id.*; *SBC-Pactel*, at 86.

²⁸ Even with the Protective Order’s safeguards, the Commission has repeatedly expressed concerns about the potential for third parties to use its merger review process for business advantage rather than for resolution of merger-specific issues of public interest. As Chairman Kennard advised Disney during the Commission’s *en banc* hearing on the merger of America Online, Inc. and Time Warner, Inc., “we don’t like to have our [proceedings] here used as leverage in a contractual dispute.”

Protective Order and to deter further violations of protective orders in this and other proceedings
before the Commission.

Respectfully submitted,



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Heather Dixon
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(202) 719-4232
Counsel for America Online, Inc.

CERTIFICATE OF SERVICE

I, Oren Rosenthal, an attorney for the law firm of Wiley, Rein & Fielding, hereby certify that this eighteenth (18th) day of October, 2000, I caused a copy of the foregoing "Reply" to be served upon each of the follow:

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Date: October 18, 2000