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VERNER · LIIPFERT
BERNHARD · MCPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

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FEDERAL COMMUNICATIONS COMMISSION
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WRITER'S DIRECT DIAL
(202)371-6206

October 20, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: CS Docket No. 00-30

Dear Ms. Salas:

Attached please find one (1) original and four (4) copies of the Response to Reply of America Online, Inc. submitted by The Walt Disney Company and Verner, Liipfert, Bernhard, McPherson & Hand, Chartered in the above referenced docket. Please be advised that Attachment 1 to this Response is being filed under seal and, therefore, is being submitted under separate cover.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosure

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

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS Docket No. 00-30
and Time Warner, Inc.	)	
for Transfers of Control	)	

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

RESPONSE TO
REPLY OF AMERICA ONLINE, INC.

The Walt Disney Company ("Disney"), by and through its undersigned counsel, and the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Verner Liipfert") (Disney and Verner Liipfert hereinafter, collectively, the "Respondents"), pursuant to the Cable Services Bureau's ("Bureau") October 10th Order in this proceeding,[1] hereby respond to the Reply submitted by America Online, Inc. ("AOL") on October 18, 2000 ("*Reply*"),[2] relative to the *Joint Response* filed by the Respondents on October 13, 2000.

I. INTRODUCTION AND SUMMARY

In its *Reply*, AOL seeks to expand and protract this proceeding well beyond the scope of issues and timeframe for action enunciated in the Bureau's October 10th *Order*. There is no justification for doing so. This matter can and should be resolved expeditiously to permit the Bureau and all parties to return their attention to the central focus of this proceeding: the merits of AOL's proposed merger with Time Warner.

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1 *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, DA 00-2304, released October 10, 2000, 2 ¶ 5 (*Order* in CS Docket No. 00-30) [hereinafter "*Order*"].

2 *Reply to Walt Disney Company's Joint Response*, filed by America Online, Inc., on October 18, 2000, in CS Docket No. 00-30 [hereinafter "*Reply*"].

AOL does not contest Respondents' account of the facts. Rather, by taking isolated facts out of context, downplaying Disney's and Verner Liipfert's swift and effective remedial actions, and insinuating the presence of a nefarious intent that did not and does not exist, AOL draws inferences that are wholly unsubstantiated and conclusions that are simply wrong. All of the facts and circumstances relevant and necessary to the Bureau's consideration and resolution of the pending issues have been fully and completely disclosed. Those facts are as follows:

- No AOL confidential documents were themselves ever disclosed to anyone in Disney or otherwise;

- The descriptions of the AOL documents that appeared in the September 22nd e-mail were so bereft of detail as to have no value for any competitive business decision-making purpose and, indeed, were not materially different than the descriptions provided by AOL in its Reply;

- The entire e-mail was only one and one-half pages long;

- The initial disclosure of the descriptions in the e-mail was inadvertent and precipitated by the good faith, albeit mistaken, belief on the part of the originator of the e-mail message that the recipients were authorized to receive the information;

- The retransmission of the message occurred without any conscious and deliberative consideration of the contents of the message by the retransmitter, but rather reflected his normal business practice;

- Immediately upon discovery of a potential violation of the Protective Order, both Verner Liipfert and Disney took immediate remedial steps to rectify the error – Verner Liipfert by e-mail notification of Mr. Padden, and Mr. Padden by e-mail instruction to the indirect recipients of the original e-mail to disregard it;

- The remedial measures taken by the Respondents were completely effective, as evidenced by the sworn affidavits of each of the secondary recipients of the e-mail message (i) attesting to the fact that he or she has deleted the message and has not disclosed or otherwise used its contents; and (ii) acknowledging that he or she is prohibited from doing so;

- The five-day period that elapsed between the event of disclosure and the subsequent notification to the Commission and AOL resulted from (i) the intervening weekend; (ii) the time needed for counsel to analyze whether a violation of the Protective Order had, in fact, occurred; and (iii) the need to consult with Mr. Padden to ascertain the facts surrounding the retransmission to assure the accuracy of the notification to the

Commission; and (iv) the need to consider issues involving attorney-client privilege.[3] Under the extenuating circumstances described fully in the Joint Response, the notification should reasonably be construed to have been immediate;

- Neither Verner Liipfert nor Disney colluded or otherwise coordinated with the lawyers from Howrey Simon Arnold & White ("Howrey"), who were duly authorized to examine the documents pursuant to the Protective Order, to delay notifying the Commission about the breach in order to facilitate review of the AOL documents by the Howrey attorneys; and

- Both Disney and Verner Liipfert have instituted policies and procedures for handling confidential materials that will ensure that breaches of the Protective Order will not occur in the future. Significantly, AOL has acknowledged the effectiveness of Respondents' policies and procedures, urging the Commission to "incorporate provisions of this sort into the Protective Order in this proceeding . . . ."[4]

AOL also uses its *Reply* to attack the adequacy of the Protective Order and, generally, the Commission's procedures for handling confidential information in merger reviews. To the extent that AOL harbors concerns relative to the underlying regulatory framework for protective orders in general, it may file a Petition for Rule Making, or otherwise seek to initiate a separate proceeding to address them.[5] However, such issues are not now before the Bureau, and the instant proceeding is neither a suitable nor an appropriate context for considering them.

As stated in the *Joint Response*, and reaffirmed herein, neither Verner Liipfert nor Disney seeks to minimize in any way the importance of the Commission's protective orders and the

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3 *See Joint Response* at 1 n. 1.

4 *Reply* at 14-15.

5 In addition to any issues that AOL might seek to have considered in such a proceeding, it also would be important to reexamine the Commission's standards governing the sorts of documents that a submitting party may designate as "confidential." The descriptions of AOL documents that appear in the September 22, 2000 e-mail illustrate the fact that AOL has employed the "confidential" designation to shield materials and/or information from the public view that in many cases are otherwise in the public domain, that have little or no competitive business significance, but which are highly probative regarding the anticompetitive practices central to the Commission's review. *See* Confidential Attachment 1 to *Joint Response*. There is a compelling argument that the public interest favors openness rather than secrecy regarding much of this information. *See FCC v. Schreiber*, 381 U.S. 279, 291-292 and 294 (1965).

policies that underlie them. We both are cognizant of, and sensitive to, the care that must be exercised in handling confidential materials.

Nonetheless, the facts set forth in the *Joint Response*, and summarized above, demonstrate that the breach of the Protective Order was an isolated occurrence borne of an innocent mistake. The e-mail was inherently innocuous and incapable of inflicting competitive harm on AOL. Within an hour of discovering the problem, Verner Liipfert and Disney both took effective corrective action to ensure that the e-mail would be disregarded. In fact, AOL has suffered no harm as a consequence of the breach. Its attempts to identify any harm are nothing but unfounded speculation contradicted by sworn affidavits. The Commission has previously determined in the *AT&T/McCaw* case[6] that, in similar but clearly more troublesome circumstances, no sanction was warranted. The Commission's reasoning in the *AT&T/McCaw* decision should impel the Bureau to lift quickly the interim bar on further examination of the materials subject to the Protective Order, and impose no further sanctions.

II. DISCUSSION

Stripped of its attack upon the Commission's policies and practices for the review and use of confidential business records in FCC proceedings, the residue of AOL's *Reply* raises three main points. Specifically, AOL: (1) challenges Mr. Duncan's and Mr. Padden's good faith in acting as they did; (2) questions the "immediacy" of Respondents' notification to the Commission of the violation of the Protective Order; and (3) attempts to establish a harm resulting from the e-mail transmission. In addition, AOL persists in its spurious and entirely

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[6] *See In re Applications of Craig O. McCaw and American Telephone and Telegraph Co. for Consent to the Transfer of Control of McCaw Cellular Communications Inc.*, File No. ENF-93-44, *Memorandum Opinion and* Order, 9 FCC Rcd. 5836 (1994) (McCaw Order), *aff'd*, SBC v. FCC, 56 F.3d 1484 (D.C. Cir. 1995), *modified on reconsideration on other grounds, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd. 11786 (1995).

unfounded implication that Respondents conspired with the Howrey firm to delay notification of the breach to AOL and the Commission to facilitate the Howrey attorneys' ability to review AOL's documents. AOL's arguments with respect to each of these issues are inconsistent with the facts and specious.

A. The Record Clearly Establishes that Mr. Duncan and Mr. Padden Acted in Good Faith and Without Any Intention to Disclose Confidential Information.

In the *Joint Response*, Verner Liipfert and Disney described, in painstaking detail, the sequence of events from Mr. Duncan's review of the AOL documents, through his preparation and transmission of the e-mail in question, to Mr. Padden's retransmission of the message, and the subsequent steps Respondents took, upon discovering the potentially improper disclosure, to remedy the problem.[7] In addition to recounting the events, the narrative also noted important contextual facts that are essential to a clear and accurate understanding of the mental state and motivations of these individuals at the time of their actions.

Notwithstanding these undisputed facts, AOL attempts to cast doubt on the good faith of Mr. Duncan and Mr. Padden. Respondents respectfully submit that the facts speak for themselves and demonstrate conclusively that each of these persons acted in the reasonable and good faith belief that his transmission of the information was entirely proper and, more importantly, that neither acted, intentionally or otherwise, in disregard for the Protective Order that was in place.[8]

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[7] *Joint Response* at 3-10.

[8] *Reply* at 3.

1. The Facts and Circumstances Evidence that Mr. Duncan Transmitted the Information in the E-mail and in the Reasonable Belief that the Intended Recipients, Including Mr. Padden, Were Entitled to Receive It Under the Terms of the Protective Order.

AOL first observes that Mr. Duncan did not independently confirm Mr. Padden's authorization to receive the material prior to sending the e-mail.[9] This observation ignores the fact that, at the time he prepared and transmitted the message, Mr. Duncan already believed that Mr. Padden was an eligible recipient, based collectively on his earlier understanding that Disney in-house counsel were to have signed the requisite acknowledgements,[10] his knowledge of Mr. Padden's responsibilities, his prior experiences working with Mr. Padden, and his discussions concerning the matter.[11] Under these circumstances, Mr. Duncan understandably, though mistakenly, believed that Mr. Padden and Ms. MacBride were authorized to receive confidential information, and, therefore, had no reason to confirm their eligibility.

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9 *Id.* at 4.

10 *See Joint Response* at 4 n.7 (citing Letter from Lawrence R. Sidman, Esquire, Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, counsel for the Walt Disney Company, to Peter D. Ross, Esquire, Wiley, Rein & Fielding, counsel to America Online, Inc., dated August 17, 2000). AOL attempts to make much of the fact that the August 17th letter did not explicitly mention Mr. Padden by name. *Reply* at 4. However, this disregards the fact that the letter did identify Marsha MacBride, Mr. Padden's chief lieutenant in Disney's Washington office. Mr. Duncan's interactions with Ms. MacBride in connection with Docket No. 00-30 very frequently involved Mr. Padden, as well. Accordingly, it was natural for Mr. Duncan to conclude, in light of his experience on the matter, that if Ms. MacBride had access to the documents that Mr. Padden would also. *See Joint Response* at 5-6.

11 In a passage ignored by AOL, the *Joint Response* specifically identified the bases for Mr. Duncan's belief:

> . . . Mr. Padden is Disney's Senior Vice President for Government Relations and the most senior attorney in its Washington, D.C. office . . . leads Disney's Washington effort in the AOL/Time Warner proceeding, and previously had personally reviewed significant FCC pleadings drafted by Mr. Duncan. Mr. Duncan's belief also was based upon conversations with Ms. MacBride and Mr. Sidman regarding who was actually going to review the documents subject to the Protective Order – i.e., whether it be outside counsel or Disney in-house attorneys. Thus, Mr. Duncan's understanding was entirely consistent with Verner Liipfert's August 17, 2000 letter to the FCC and to counsel to AOL and Time Warner, indicating the intention for Disney attorney(s) to have access to confidential documents.

Joint Response at 5-6.

AOL also appears to suggest that Mr. Duncan should have been on notice of Mr. Padden's ineligibility to review the documents because of Mr. Padden's "senior management role."[12] Yet, in advancing this assertion, even AOL itself acknowledges that it is uncertain as to whether Mr. Padden's executive position would have so disqualified him.[13] Notably, AOL stops short of contending that Mr. Padden would unquestionably and categorically have been excluded from access to its documents, asserting only that such access would not come without AOL's objection. In the final analysis, however, it is irrelevant whether Mr. Padden would, in fact, have been granted such access or not. The salient question is whether Mr. Duncan reasonably believed that Mr. Padden was eligible and, based on the actual facts already set forth,[14] not AOL's cynical speculation, it is patently evident that he did. Thus, in light of his understanding of the facts at the time, Mr. Duncan's transmission of the e-mail message to Mr. Padden (and Ms. MacBride) was innocent, in good faith and certainly demonstrated no disregard for the Bureau's Protective Order.

2. *Mr. Padden's Normal Business Practice to Retransmit the E-Mail Likewise Evidences No Intention to Use Confidential Information Contrary to the Protective Order. Indeed, His Affirmative Conduct Following Discovery Dispels Such a Conclusion.*

AOL similarly questions the assertion that, at the time he received and retransmitted the initial e-mail message from Mr. Duncan, Mr. Padden "had no idea or understanding" that the message or its contents might be subject to the Protective Order.[15] However, once again, the facts set forth in the *Joint Response* explain in detail why this was so, and why it was entirely

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12 *Reply* at 4.

13 *Id.* at 4-5.

14 *See, e.g.*, note 9, *supra*.

15 *Reply* at 5.

reasonable.[16] Nevertheless, to reiterate the point, neither the circumstances surrounding his review of the e-mail, nor the contents of the message itself, were such as to alert Mr. Padden that the information should not have been sent to him.

First, as Mr. Padden recounted in his affidavit which accompanied the *Joint Response*, his receipt and review of the e-mail took place in circumstances that are all too familiar to any frequent business traveler – a quick review of voluminous e-mail messages in his hotel room while on business. As Mr. Padden stated in his affidavit, his primary focus at the time was on getting through all of the accumulated e-mail traffic. As a consequence, when he came to the e-mail in question, he scanned the item and jotted off a perfunctory one line reply, "Great job Larry, Let's follow up."[17] He routed it on to his customary distribution list without further thought, in the process, as serial e-mail messages work, picking up the text of Mr. Duncan's earlier e-mail. Such conduct is hardly unusual or unreasonable under the circumstances. More importantly, however, it clearly evidences that Mr. Padden had no intention to disseminate competitively-sensitive confidential AOL information when he forwarded the message to his colleagues.

AOL contends, however, that the contents of the message should have alerted him that the information was subject to the Protective Order. For example, AOL observes that the subject line for the message in question read "Important AOL Documents at Wiley Rein."[18] Yet, contrary to AOL's assertion, this reference only makes Mr. Padden's understanding more reasonable. Notably, the subject line of Mr. Padden's e-mail refers only to "important" documents, not "confidential" documents. Thus, Mr. Padden would have had no reason to

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16 *See Joint Response* at 7-9.

17 Mr. Padden's e-mail reply is appended hereto as Attachment 1 and filed under seal.

18 *Reply* at 6.

suspect that he had received potentially confidential material until after he had actually opened the message. Even then, however, assuming that Mr. Padden understood that the underlying documents were confidential, the descriptions of the documents contained in the e-mail were so lacking in detail that there was simply no reason to believe that the e-mail might be business sensitive and subject to the Protective Order. Thus, especially in light of Mr. Padden's quick and cursory review of the message, no inference can reasonably be drawn that Mr. Padden knowingly, or even negligently, disregarded the Protective Order when he forwarded the message to other Disney personnel.

B. The Five-Day Period That Preceded Respondents' Notification to the Commission and AOL of the Error was Reasonable Under the Circumstances and Satisfied the Requirement That Notice be "Immediate."

AOL's *Reply* renews its charge that the five days that intervened between the discovery of the potential violation and the subsequent notification thereof to the Commission failed to satisfy the Protective Order's requirement that such notice be "immediate."[19] In particular, AOL contends that it is "unclear" why Verner Liipfert did not consult with Mr. Padden concerning the disclosure on Friday afternoon, September 22nd; indeed, AOL questions why any such consultation or fact finding was even needed prior to notification of the Commission.[20] AOL also questions why Verner Liipfert could not have consulted with Disney's General Counsel in Mr. Padden's absence,[21] finally charging that Respondents' conduct reflects "a fundamental

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19 *Id.* at 6-7. The Protective Order states that if a party properly obtaining access to confidential information violates any of the terms of the Protective Order, "that party shall immediately notify the Commission and the Submitting Party of such violation." *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, Protective Order* in CS Docket No. 00-30, DA 00-780, released April 7, 2000 ¶ 11.

20 *Reply* at 7.

21 *Id.* at 8.

failure" to recognize the importance of an FCC Protective Order.[22] For the reasons that follow, AOL's argument cannot be accepted. Both the facts and law demonstrate that Disney's and Verner Liipfert's actions were appropriate under the circumstances and complied with the letter and spirit of the Protective Order.

As the *Joint Response* explained, the fact-finding inquiries were necessary in order to determine the scope of, and circumstances surrounding, the disclosure in question for the very purpose of ensuring that the notification to the Commission was accurate. Also as the *Joint Response* indicated, the necessary consultations were not undertaken on Friday because both Mr. Padden, and the undersigned (Mr. Duncan's supervisor on this matter) were unavailable.[23] In fact, as discussed in the *Joint Response*, both Mr. Duncan and Mr. Olson attempted to contact Mr. Padden by telephone at his office. When Mr. Duncan called Mr. Padden's Washington office and learned he was in California, Mr. Padden's secretary tried to patch him through but Mr. Padden could not be reached. Failing to speak directly with Mr. Padden, Mr. Duncan e-mailed his remedial message to Mr. Padden. Moreover, it was specifically necessary to consult with Mr. Padden – rather than Disney's General Counsel – because Mr. Padden was the only individual with knowledge of the facts surrounding his retransmission of Mr. Duncan's initial message. Thus, far from demonstrating a failure to appreciate the importance of the Bureau's Protective Order, the care taken by Respondents to ascertain the facts necessary to make an accurate report to the Commission actually evidence the gravity and seriousness with which

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22 *Id.* AOL also questions Respondents' justification of two of the five days as the intervening weekend. *Id.* at 7-8 ("Commission obligations important enough to warrant immediate notification do not appear to toll on weekends."). However, AOL does not explain how Respondents might have effectuated notification of the Commission when it was closed.

23 Mr. Padden was attending commitments at the NAB Radio Show, *Joint Response* at 8, and the undersigned was also out of the office in business meetings, returning for only a few minutes before departing to catch a flight out of town for the weekend. *Id.* at 11.

Respondents discharged their obligations.[24] Finally, as discussed in detail below,[25] in light of the scant information in the e-mail, there was a threshold question as to whether the e-mail contained confidential information at all, and, if not, whether the e-mail transmission even triggered the disclosure requirement under the Protective Order.[26] Since Mr. Sidman was the only Verner Liipfert attorney, other than Mr. Duncan, authorized to review the e-mail to make this judgment and was unavailable on Friday to do so, an earlier disclosure was also impossible for that reason.

In addition, wholly apart from the factual considerations, AOL's critique of Respondents' conduct rests on an interpretation of "immediate" unsupported by most authorities. While not devoid of meaning, the requirement of "immediate" notification does not mandate notification within twenty-four hours or any other concrete time-frame.[27] Consistent with precedent and common sense, "immediate" notification customarily requires that notification occur within a reasonable time after the triggering event, in light of all of the attendant circumstances of the case. Consequently, the question of whether or not a disclosure was "immediate" must be answered on a case-by-case basis.

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24 AOL also disingenuously suggests that Respondents had "numerous opportunities" to notify the Commission of the violation of the Protective Order, citing meetings Disney technical experts held with members of the FCC staff on Monday, September 25. These meetings had been scheduled several days before the e-mail transmission occurred and involved presentations by Disney representatives based in California concerning technical issues. The meetings were completely unrelated to the mistaken e-mail transmission on September 22 and, for the reasons discussed in the text above and in the *Joint Response*, it would have been totally inappropriate to have raised this issue in those meetings without a full knowledge of the facts, and without first consulting with Mr. Padden.

25 *See* pp. 14-16, *infra*.

26 As discussed below, the question of whether the e-mail contained "confidential information" within the meaning of the Protective Order is not free of doubt. Nonetheless, Verner Liipfert made the disclosure, consonant with its respect for the intent of the Protective Order and Commission processes.

27 In drafting the Protective Order, the Commission could have required disclosure within a specific time-frame (*e.g.*, 72 hours, 5 days, 1 week). It declined to do so. In fact, while the "immediate" disclosure requirement is a part of the Commission's Model Protective Order, *see Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order* in GC Docket No. 96-55 (1998), the Commission has not attached a concrete time-frame to the word.

In other areas of law, the appropriateness of case-by-case interpretations regarding requirements of "immediate disclosure" or "immediate notification" is well-established. For example, in the insurance law context, contract provisions requiring "immediate" notice of triggering events have been consistently construed to require notice "within a reasonable time under the circumstances of the case."[28] Notices delayed from one day to three years have been held to be reasonable under particular circumstances.[29] Courts have traditionally considered illness and other extenuating circumstances when assessing compliance with an "immediate" notice provision.[30] Even in the absence of any unusual circumstances, courts have found that notification provided to an insurer more than two weeks after an accident was reasonable.[31]

This case is analogous to the insurance cases. Business interests are at stake. Requirements of "immediate" disclosure are in place so that an uninformed party may acquire information to protect itself from harm. This is readily apparent in the insurance context, where courts assessing reasonableness consider the amount of prejudice, if any, the delay in notification caused the insurer.[32] Here, the delay in disclosure did no harm to AOL because, as discussed

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28 13 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 190:31 and n. 75 (citing numerous state and federal court decisions). Insurance contracts requiring "prompt" notice or notice "as soon as practicable" have been similarly construed.

29 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4734.

30 *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 58 S. E. 969 (S.C. 1907) (holding that where plaintiff was insured against accidents to its employees and the policy provided for immediate notice of accident to insurer, delayed notice was reasonable where the superintendent was sick and most of the office force were quarantined).

31 *See, e.g., International Underwriters Insurance Company of America v. Sherwood*, 228 F. Supp. 465 (N.D. Tex. 1964) (holding that notice mailed twelve days after an accident and received sixteen days after an accident was reasonable due to "all circumstances including mail delivery and the distance involved" (the automobile accident occurred in Texas and the insured resided in Idaho)).

32 13 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 190:43. Other factors impacting the reasonableness determination may include the extent of the insured's sophistication, the awareness of the insured that a triggering occurrence has taken place, and the diligence with which the insured ascertains whether a policy applies. *Id.* § 190:39.

above, the e-mail itself was innocuous from a competitive perspective and, significantly, because Verner Liipfert and Disney took effective corrective measures within an hour of discovering the problem and took further action thereafter, as described in the *Joint Response*, to ensure no harm to AOL ensued. In light of all of the extenuating circumstances of the case, notice of the breach was provided to the Commission and AOL within a reasonable time, in accordance with the terms and intent of the Protective Order.

C. AOL's Reckless Insinuation that Respondents Conspired with the Howrey Firm To Delay the Filing of the Notification With the FCC Is Totally False.

Closely related to its argument that Respondents' notification was not "immediate" is AOL's suggestion that Verner Liipfert and/or Disney deliberately colluded with the Howrey firm to delay notifying the Commission of the breach of the Protective Order in order to facilitate the Howrey attorneys' ability to review the AOL documents. Nothing could be further from the truth. The facts set forth in the *Joint Response* indicate all of the circumstances that precipitated the filing of the notification on September 27, 2000 and make clear that there was absolutely no action whatsoever taken by Disney or Verner Liipfert to facilitate a further review of documents by the Howrey firm. The considerations related to the timing of the disclosure to the Commission and AOL involved exclusively the fact-finding and consultations needed to ascertain whether the e-mail was in fact covered by the Protective Order and what actually transpired. At all times, Verner Liipfert's disclosure and Howrey's document examination were on separate and independent tracks.

Moreover, the Howrey attorneys in question required no such machinations in order to review the confidential AOL documents. Those attorneys at Howrey that had executed the required acknowledgement of confidentiality were independently fully entitled to review the

documents. They were not implicated in the error that led to the disclosure and, accordingly, no colorable basis of law existed upon which AOL could properly seek to exclude them.[33]

Finally, surely if AOL's insinuated conspiracy had been the intention of the parties, they certainly could have found a more clever way of effectuating it than voluntarily coming forward to disclose publicly and notify the Commission, AOL, and Time Warner of the inadvertent breach.

D. AOL Has Suffered No Actual Harm Whatsoever From the Inadvertent E-Mail Transmission Because the Scant Information Contained Therein Hardly Qualifies As "Business-Sensitive."

Perhaps the most significant characteristic of AOL's *Reply* is its inability to identify any palpable injury that AOL has experienced incident to the inadvertent disclosure. As indicated in the *Joint Response*, immediately upon discovery of the problem, Verner Liipfert and Mr. Padden immediately took steps to correct the error. The affidavits appended to the *Joint Response* attest to the fact that these remedial measures were effective. Respondents reiterate that a complete and total elimination of the e-mail from Disney's computer systems has occurred.[34] In addition, Disney has submitted sworn affidavits from the e-mail recipients acknowledging under penalty of perjury that the cursory descriptions have neither been used for any purpose nor will they be disclosed to anyone else in the future. Furthermore, procedural

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[33] Counsel from Howrey had previously reviewed Time Warner documents. To argue that Howrey should have refrained from its permitted review of AOL documents anticipating that AOL would seize upon this inadvertent e-mail to bar all Disney counsel from review of these documents is unreasonable. Review of the documents in question was and remains time sensitive because of the FCC's and FTC's active consideration of the AOL/Time Warner merger. The public interest is served by the Commission's receiving Disney's views on the merger. Counsel has a corresponding duty to ensure that its advocacy is fully informed by availing itself of all permitted means of doing so.

[34] *See Joint Response* at Attachment 4, Affidavit of Michael Tasooji, Senior Vice President and Chief Information Officer of the Walt Disney Company.

safeguards have been adopted by Verner Liipfert and Disney to prevent such mistakes in the future.[35]

In spite of these thorough corrective actions, however, AOL complains that "there is no adequate remedy for a 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."[36] In short, AOL complains not of any concrete harm it has suffered as a consequence of the errant disclosure, but rather it grieves over an inchoate and unrealized harm that it speculates might occur in the future. In light of the competitively harmless nature of the e-mail itself and thoroughness and effectiveness of Respondents' remedial measures, discussed above, AOL's concern about harm from the disclosure is implausible.

Respondents reject AOL's assertion that the e-mail actually contained "business sensitive information." While it is true the documents themselves were designated by AOL as "confidential," thereby subjecting them to the protection of the Bureau's Protective Order, as the Bureau stated, that order "does not constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act ("FOIA") or otherwise."[37] An examination by the Bureau of the brief, conclusory descriptions contained in the one and one-half page e-mail concerning a mere twelve documents will reveal that, in fact, the information in the e-mail cannot reasonably be construed to represent the kind or quality of "business-sensitive" information the Protective Order was intended to cover.

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35 *See Joint Response* at Attachments 5 and 6.

36 *Reply* at 13.

37 *Protective Order* at 1 ¶ 1.

In its Reply, AOL describes at least two of the documents mentioned in the e-mail, saying that the e-mail "summarized confidential information relating to, among other sensitive business matters, AOL's strategy for competing against broadcast networks and the terms of AOLTV contracts."[38] AOL's own description of these two documents, which it evidently deems not to be confidential, is scarcely different in tone, scope, analysis, or content from the bare bone descriptions contained in the e-mail to which it objects.[39] As the Bureau will see, these descriptions contained in the e-mail were lacking in detail and void of analysis.

Importantly, these descriptions did not provide any definitive insight on AOL's business plans or reveal truly "business sensitive" material. Quite the opposite, these descriptions embody, and were drafted solely with the intention of showing AOL's anticompetitive practices against unaffiliated companies.

Some of the information recounted in the e-mail replicates information and analysis in the public domain and widely observed by industry analysts. Other aspects of the descriptions were even less revealing, simply noting that AOL speculated about certain issues without providing any conclusion or sense as to what action, if any, AOL might take. Given the true nature of this information, AOL's stated concern about protecting "business-sensitive" material is fallacious. Thus, even assuming, *arguendo*, that the Disney senior executives that received the forwarded message from Mr. Padden actually read it and paid any attention to it, AOL would suffer no harm because none of the information contained in the e-mail can reasonably be viewed as providing Disney with any kind of competitive advantage in the market.

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38 *Reply* at 12. AOL's decision to publicly release a description of these confidential documents may constitute a waiver of confidentiality for this material, and make it appropriate to disclose at least some of this material to the public.

39 AOL's treatment of its "confidential" documents in its Reply raises a genuine question of whether the e-mail truly constituted a violation of the Protective Order. It certainly provides strong support for Verner Liipfert needing the time to assess whether or not the e-mail triggered a disclosure obligation.

E. The Circumstances Surrounding the Disclosure and Notification, When Considered in Light of Commission Precedent, Demonstrate That the Interim Sanctions Should Be Lifted and That No Further Sanctions are Warranted.

1. The Interim Sanctions Should Be Lifted.

In the *Order*, the Bureau expressed concern about an "apparent laxity in procedures" used by Respondents that it believed had precipitated the inadvertent disclosure in this case. In response, the Bureau imposed the interim remedial measure of a ban on Respondents' further examination of any of the confidential documents submitted under the Protective Order until such time as Respondents' submitted, and the Commission approved, "measures and procedures to be implemented to ensure that future breaches of the Protective Order do not occur."[40]

As part of their *Joint Response*, each of the Respondents submitted a statement of the policies and procedures now in place to govern the handling of protected confidential information.[41] Significantly, after reviewing these protocols, AOL indicated in its *Reply* that it is sufficiently persuaded of their effectiveness that it has recommended them as models, urging the Commission to "incorporate provisions of this sort into the Protective Order in this proceeding, effective immediately, as well as in future protective orders it might issue."[42] In light of this important acknowledgement and consistent with its October 10, 2000 *Order*, the Bureau should immediately lift the interim ban on Respondents' further review of the confidential documents. To do otherwise, under the circumstances presented here, would unduly restrict Disney's ability to be an effective participant in this proceeding, a result which would be contrary to the public interest in a full and fair consideration of the anticompetitive effects of the proposed AOL/Time Warner merger.

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[40] *Order* at 2 ¶ 6.

[41] *See Joint Response* at Attachments 5 and 6.

2. *No Further Sanctions are Warranted.*

In its *Reply*, AOL leaves to the Bureau "the determination of such sanctions it deems necessary" to prevent a reoccurrence of the breach of Protective Order in this case. Based on Commission precedent, and the facts of this case, however, no additional sanctions are warranted.

Despite the apparent paucity of reported decisions by the Commission involving breaches of its protective orders, in at least one instance, the Commission has considered disclosure of information subject to a bureau-level protective order in a merger-review context – the combination of AT&T and McCaw Cellular Communications.[43] In that decision, the Commission focused on two factors when contemplating sanctions: A) whether the disclosure led to significant competitive harm, and B) whether the disclosure was part of a larger pattern.

In *AT&T/McCaw*, the Common Carrier Bureau imposed a protective order similar to the one at issue here,[44] governing certain documents in McCaw Cellular's application to transfer to AT&T indirect control of radio licenses and other authorizations as part of a proposed merger.[45] Late in the Bureau's consideration of the application, BellSouth issued a public press release that summarized information contained in the applicants' protected Hart-Scott-Rodino (HSR) filings.[46] The Commission concluded that the press release violated the Bureau's protective

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42 *Reply* at 13-14.

43 *See In re Applications of Craig O. McCaw and American Telephone and Telegraph Co. for Consent to the Transfer of Control of McCaw Cellular Communications Inc.*, File No. ENF-93-44, *Memorandum Opinion and* Order, 9 FCC Rcd. 5836 (1994) (McCaw Order), *aff'd*, SBC v. FCC, 56 F.3d 1484 (D.C. Cir. 1995), *modified on reconsideration on other grounds, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd. 11786 (1995).

44 *See In re* American Telephone and Telegraph Co. and Craig O. McCaw Applications for Consent to Transfer of Control of Radio Licenses, File No. ENF-93-44, *Protective Order*, 9 FCC Rcd. 2613.

45 *McCaw Order*, 9 FCC Rcd. at 5839 ¶ 1.

46 *Id.*at 5922 ¶ 159.

order.[47] It "admonish[ed] [the opponent] for its actions," and instructed it "to take all reasonable and necessary steps to ensure that any information designated as confidential that it has obtained, or might subsequently acquire in [the] proceeding, is accorded the full treatment and protection contemplated by the Bureau's Protective order."[48]

In the *McCaw* case, the Commission concluded that no sanction was warranted other than a reprimand because the disclosure was "vague and limited [such that] any actual or potential impact on applicants appear[ed] to be at most *de minimis,*"[49] and because the incident was "isolated and not part of a recurring problem that would cause [the Commission] greater concern."[50] Significantly, the Commission specifically ruled that it would be inappropriate to disqualify the opponent from further participation in the proceeding, finding that such a sanction would serve no public interest in light of the late stage in the proceeding, the active role the opponent had played, and the opponent's likely status as a competitor of AT&T/McCaw.[51] It is also noteworthy that the Commission's admonition, discussed above, instructed the opponent to "take all reasonable and necessary steps to ensure that any information designated as confidential that it has obtained, *or might subsequently acquire in [the] proceeding.*"[52] Thus, the opponent continued to have access to the materials.

As was the case in *McCaw,* no further sanction is warranted here. Like the press release in *AT&T/McCaw*, the information disclosed in the e-mail message consisted only of brief descriptive passages lacking any significant or material detail. The disclosure here was

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47 *Id.* at 5924 ¶¶ 162 & 164.

48 *Id.* at 5924 ¶¶ 162-164.

49 *McCaw Order*, 9 FCC Rcd. at 5924 ¶ 163.

50 *See id.*

51 *Id.* at 5923-24 & n.352 ¶ 163.

52 *Id.* at 5924 ¶ 164 (emphasis added).

inadvertent, isolated, and effectively contained by the parties' remedial actions. Also as previously discussed, the Respondents have each implemented safeguards to ensure that this kind of disclosure does not happen again. Consequently, this is not part of a recurring problem that should give the Bureau greater concern.

Indeed, in many ways, the disclosure in *AT&T/McCaw* was far more serious than the disclosure here. As discussed above, the information in the e-mail at issue here is not nearly as sensitive as the HSR filings at issue in *McCaw*. Moreover, in the *AT&T/McCaw* case, the opponent in *McCaw* released summaries of the entire filing[53] in a press release to the general public. The summaries here were neither so extensive[54] nor as broadly disseminated. In addition, in the instant case, Respondents took immediate steps to remedy the disclosure upon its discovery. By contrast, there is no evidence that any remedial steps were taken in *McCaw*.

It is also noteworthy that the Commission concluded in *McCaw* that no sanctions other than a reprimand were warranted, even though nothing in the decision suggests that BellSouth's disclosure was unintentional. In the instant case Disney and Verner Liipfert took immediate remedial action and already have been sanctioned by the Bureau's interim measure. Therefore no admonishment or additional sanctions should be imposed.

Decisions of other agencies indicate that sanctions other than reprimand are not

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53 *McCaw Order*, 9 FCC Rcd. at 5922-233 ¶¶ 159, 162.

54 *Compare* Protest of ST Systems Corp., GSBCA No. 11207-P, 91-3 B.C.A. (CCH) P24,201 (Gen. Servs. Admin. B.C.A. rel. July 16, 1991), available at 1991 GSBCA LEXIS 303 ¶¶ *25, 37-39 (noting that counsel inadvertently released to client protected memorandum in entire, non-redacted form, but still concluding that admonishment was sufficient sanction).

warranted where, as here, the disclosure is accidental.[55] In *Protest of ST Systems Corp.*, for example, admonishment was the only sanction that the General Services Administration Board of Contract Appeals found necessary.[56] In that case, ST Systems' attorney had released to ST Systems a memorandum subject to a protective order in a NASA request for proposal (RFP).[57] In light of the fact that the disclosure was inadvertent, and that the attorney promptly brought the disclosure to the Board's attention, the only action the Board took was to admonish the attorney.[58]

The disclosure in this case was also inadvertent, and there is no indication of bad faith among the parties involved.[59] The parties who received the materials in this case were thought to be duly authorized to review such information, and to have already executed confidentiality agreements, as contemplated from the outset of the AOL/Time Warner proceeding.[60] Because the disclosure involved here was also inadvertent, and for all of the other reasons enumerated above, no additional sanctions are necessary.

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55 *See, e.g.*, Protest of ST Systems Corp., GSBCA No. 11207-P, 91-3 B.C.A. (CCH) P24,201 (Gen. Servs. Admin. B.C.A. rel. July 16, 1991), *available at* 1991 GSBCA LEXIS 303 ¶¶ *25, 37-39 (concluding that admonishment and not disqualification from proceeding was appropriate where counsel inadvertently released protected memorandum to client). *Cf. In re* Appalachian Council Inc., B-256179, 994-1 Comp. Gen. Proc. Dec. P319 (May 20, 1994), *available at* 1994 U.S. Comp. Gen. LEXIS 471, at *2, *32-33 (concluding that release of protected document by Department of Labor to competing bidder rather than to competing bidder's counsel did not warrant termination of contract awarded pursuant to RFP, where release was caused by misunderstanding of agency personnel regarding protected status of materials and no harm resulted).

56 Protest of ST Systems Corp., GSBCA No. 11207-P, 91-3 B.C.A. (CCH) P24,201 (Gen. Servs. Admin. B.C.A. rel. July 16, 1991), *available at* 1991 GSBCA LEXIS 303 ¶¶ *25, 37-39.

57 *Id.*

58 *Id.*

59 Joint response at 4

60 *See* Joint Response at 1, 4-7.

III. CONCLUSION

As we have from the outset of this proceeding, Respondents acknowledge with regret the errors that resulted in the inadvertent transmission of the e-mail in question. Both Disney and Verner Liipfert take with utmost seriousness their obligation to handle with due care confidential materials shielded by an FCC protective order and, upon discovery of the instant lapse, immediately acted to mitigate – indeed to prevent – any harm or prejudice to AOL that might otherwise result from the breach.

However, by relying on isolated facts taken out of context, and veiled, unsubstantiated insinuations of culpable intent, AOL seeks to exaggerate the gravity and significance of Respondents' violation and to expand the scope of this proceeding to a degree that is neither necessary nor warranted. The Bureau should not be misled by AOL's diversionary tactics.

The issues before the Bureau are narrow and clear. The relevant facts and applicable law are equally clear. The facts demonstrate that the disclosures in question: (1) were inadvertent and resulted from innocent mistakes; (2) were narrow both in the scope of the information disclosed and in the breadth of dissemination; (3) were immediately and effectively corrected by the remedial measures employed by Disney and Verner Liipfert and resulted in absolutely no harm to AOL; and (4) were reported to the Commission and to AOL at the earliest time permitted by the circumstances. In addition, Verner Liipfert and Disney have implemented effective procedures and policies to ensure no further trespass against the Protective Order takes place.

Under these factual circumstances, the applicable law supports (1) quickly lifting the Bureau's interim remedy forbidding Respondents from further review of the AOL documents,

and (2) imposing no further sanctions or admonishments on Verner Liipfert or Disney.

Respectfully submitted,

THE WALT DISNEY COMPANY

By: Lawrence R. Sidman

Lawrence R. Sidman
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
901 – 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Its Attorney

**VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED**

By: Lawrence R. Sidman

Lawrence R. Sidman
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
901 – 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Date: October 20, 2000

ATTACHMENT 1

VERNER · LIIPFERT
BERNHARD · MCPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

WRITER'S DIRECT DIAL
(202)371-6206

October 20, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Confidential Information
Pursuant to Protective Order DA 00-780
In CS Docket No. 00-30

Dear Ms. Salas:

Attached please find one (1) original and four (4) copies of Attachment 1 to the Response to Reply of America Online, Inc. of The Walt Disney Company and Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, which is being filed under seal and, therefore, is herein submitted under separate cover.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosure

CERTIFICATE OF SERVICE

I, Stephanie Suerth, a secretary for the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that this twentieth (20) day of October, 2000, I caused a copy of the foregoing "Response To Reply Of America Online, Inc." to be served by hand delivery upon each of the following:

Christopher Wright
General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Deborah Lathan
Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

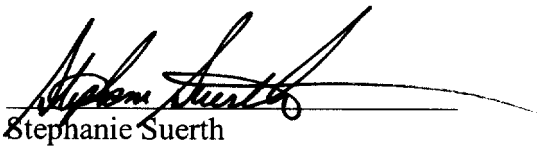
James Bird
Office of General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Royce Dickens
Cable Services Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

George Vradenburg III
Senior Vice President for Global and Strategic Policy
America Online, Inc.
22000 AOL Way
Dulles, Virginia 20166-9323

Peter D. Ross, Esquire
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Arthur H. Harding, Esquire
Fleischman and Walsh, LLP
1400 16th Street, NW
Washington, DC 20036



Stephanie Suerth