

**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 )

**ORDER**

**Adopted: October 27, 2000**

**Released: October 27, 2000**

By the Deputy Chief, Cable Services Bureau:

1. On April 7, 2000, the Bureau entered a Protective Order regarding confidential or proprietary documents submitted by America Online, Inc. (AOL) and Time Warner, Inc. (Time Warner).<sup>1</sup> For the reasons set forth below, we are modifying the Protective Order to provide that in-house counsel will not be permitted access to Stamped Confidential Documents<sup>2</sup> that are made available after the date of this Order nor to Confidential Information derived from those documents. We are also requiring that before being allowed further access to Stamped Confidential Documents, persons seeking such access must certify that their firm or company has in place procedures to protect against the improper disclosure of confidential information.

2. In adopting the Protective Order, we stated that the Commission, AOL and Time Warner anticipated that AOL and Time Warner would submit information to the Commission that might contain proprietary or confidential information.<sup>3</sup> We adopted the Protective Order to ensure that any such information was afforded adequate protection.<sup>4</sup> We noted that the Protective Order was identical in all material respects to protective orders adopted in other merger proceedings subject to Commission review.<sup>5</sup>

3. The Protective Order generally permits that Stamped Confidential Documents may be reviewed by outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making.<sup>6</sup> As we have previously recounted, a breach of the Protective Order has occurred in this

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<sup>1</sup> Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, *Order Adopting Protective Order*, 15 FCC Rcd 6117 (2000).

<sup>2</sup> The term "Stamped Confidential Document" is defined in the Protective Order. *Id.* at 6119 ¶ 2.

<sup>3</sup> *Id.* at 6117 ¶ 1.

<sup>4</sup> *Id.* at 6117 ¶ 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 6120 ¶ 3. We generally allow in-house counsel to review confidential information (provided that they are not involved in competitive decision-making) because parties maintain that such access is important to their ability to participate fully in the proceeding and provide meaningful comments. Parties claim that in-house counsel typically have greater expertise than outside counsel and are able to better interpret the documents they review, especially in  
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case.<sup>7</sup> Specifically, we have been informed that information covered by the Protective Order has been inadvertently received and reviewed by in-house counsel who had not executed the required acknowledgments of confidentiality as well as by other personnel who were not entitled to receive that information.<sup>8</sup>

4. Because of the violation of the Protective Order, we have considered whether protections in addition to those provided in our general protective order are prudent or warranted in this proceeding at this time. Because the end of the proceeding is approaching, we believe that we need to resolve this issue quickly. We have discussed our concerns and potential remedies with AOL, Time Warner and the current signatories to the Protective Order. After considering the views of the parties, we conclude that under the unusual circumstances presented in this case, we should adopt the following further protections at this time. We are restricting access to Stamped Confidential Documents that are made available after the date of this Order and to Confidential Information derived from those documents to outside counsel only. We are also requiring that before being allowed further access to Stamped Confidential Documents, persons seeking such access must certify that their firm or company has in place procedures to protect against the improper disclosure of confidential information. We stress the narrow scope of the action we are taking. Because of the point we are at in the proceeding and the fact that AOL and Time Warner have already submitted substantial amounts of information, there are a limited number of documents to which the additional protections will apply.<sup>9</sup>

5. Accordingly, IT IS ORDERED that Paragraph 3 of the Protective Order, *Permissible Disclosure*, is amended to read as follows:

*Permissible Disclosure.* Subject to the requirements of paragraph 5, Stamped Confidential Documents submitted before October 27, 2000, may be reviewed by outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making. Subject to the requirements of paragraph 5, Stamped Confidential Documents submitted on or after October 27, 2000, may be reviewed by outside counsel of record. . . .

6. IT IS FURTHER ORDERED that each person seeking access to any Stamped Confidential Documents after October 26, 2000, shall execute the amended Acknowledgment of Confidentiality before reviewing or having access to such documents, and shall file the amended Acknowledgment of Confidentiality with the Commission and serve it upon each Submitting Party.

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areas involving technical information. Applicants, on the other hand, are generally concerned that the risks of damaging disclosure are increased by allowing in-house counsel access to confidential documents and information. Our protective orders represent our resolution of the parties' competing concerns.

<sup>7</sup> See *In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, CC Docket No. 00-30, *Order*, DA 00-2304 (Oct. 10, 2000).

<sup>8</sup> *Id.* at ¶¶ 2-3. The violation of the Protective Order is still under investigation and this Order does not resolve any of the issues raised thereby, including the appropriate remedy for the violation.

<sup>9</sup> We believe that, under the particular circumstances here--including the late stage of the proceeding, the number and nature of documents still being sought from the applicants, the parties who have previously sought access under the Protective Order, and the limited time to create a more tailored response to the concerns raised by the violation--this limited and temporary departure from our general approach to the treatment of inside counsel will provide reassurance that confidential information will remain protected without seriously compromising the values served by our general approach.

7. This Order is issued pursuant to sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and authority delegated under section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Sherille Ismail  
Deputy Chief  
Cable Services Bureau

## APPENDIX A

## ACKNOWLEDGMENT OF CONFIDENTIALITY

I hereby acknowledge that I have received and read a copy of the amended Protective Order in the above-captioned proceeding and I understand it. I agree that I am bound by this Order and that I shall not disclose or use any Stamped Confidential Documents or any information gained therefrom except as allowed by the Order. By signing this Acknowledgement, I certify that my firm or company has in place procedures to protect against the improper disclosure of Stamped Confidential Documents or any information gained therefrom. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as counsel to a party or other person described in paragraph 3 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the order.

I hereby certify that I am not involved in competitive decision-making as that term is used in paragraph 3 of the Protective Order.

Executed at \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_, 2000.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title