Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 2001 **Released: January 26, 2001**

By the Deputy Chief, Cable Services Bureau:

1. In this memorandum opinion and order we consider the facts and circumstances surrounding the violation of the protective order in this proceeding by personnel of The Walt Disney Company and the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered. For the reasons set forth below, we admonish the parties for their breach of the protective order. We find, however, that the interim sanctions already imposed are sufficient to vindicate the integrity of the Commission's processes, and we impose no additional sanctions.

I. BACKGROUND

2. This proceeding involves joint applications by America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") to transfer control of various licenses and authorizations to AOL Time Warner, Inc., an entity formed by the merger of AOL and Time Warner. Consideration of these applications has required AOL and Time Warner to submit to the Commission information of a confidential or proprietary nature. Because the Commission sought public comment on the proposed AOL-Time Warner merger, the Commission provided for access to the confidential information submitted pursuant to the terms of a protective order.[1]

3. In accordance with the original terms of the protective order, AOL and Time Warner were required to make the pertinent documents available to the outside counsel of record and in-house counsel actively engaged in the conduct of this proceeding.[2] To be eligible to inspect documents, in-house counsel could not be involved in the competitive decisionmaking processes of their employers.[3] The protective order permitted such counsel to inspect the confidential documents at the offices of AOL's and Time Warner's outside counsel and to purchase copies, except for those documents designated "copying

[1] *Applications of America Online, Inc. and Time Warner Inc. For Transfers of Control ("AOL-Time Warner")*, 15 FCC Rcd 6117 (CSB 2000); 15 FCC Rcd 6119 (CSB 2000)(collectively "*PO*").

[2] *PO*, 15 FCC Rcd at 6120 ¶ 3.

[3] *Id*. at 6120 ¶ 3.

prohibited."[4]

4. Counsel receiving access to the documents could disclose them to the following third parties who are not involved in the competitive decisionmaking of AOL and Time Warner's competitors: (1) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (2) Commission officials involved in this proceeding; (3) outside consultants or experts retained for the purpose of assisting counsel in these proceedings; (4) employees of such counsel performing certain clerical functions; and (5) employees of a third party performing one or more of these functions under counsel's supervision.[5]

5. The protective order further requires all persons seeking access to confidential documents to execute and file an "Acknowledgment of Confidentiality," pledging compliance with the terms of the protective order.[6] It prohibits persons with access to confidential documents from copying them except as necessary for filing with the Commission under seal.[7] Material derived from confidential documents may not be retained following the termination of this proceeding except for two copies of certain filings.[8]

6. Additionally, the protective order states:

> Should a party that has properly obtained access to Confidential Information under this Order violate any of its terms, that party shall immediately notify the Commission and [AOL or Time Warner, as appropriate] of such violation. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violation of this Order.

II. THE VIOLATION

7. The Walt Disney Company ("Disney") is a commenter in this proceeding and a business competitor of AOL and Time Warner. It is represented in matters related to the AOL-Time Warner Merger by two law firms: Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Verner Liipfert"), in connection with the FCC, and Howrey, Simon, Arnold & White ("Howrey Simon"), in connection with related proceedings before the Federal Trade Commission.

8. On September 27, 2000, Verner Liipfert informed the Commission that an attorney associated with the firm "inadvertently breached" the protective order.[9] Verner Liipfert stated that five days earlier, on Friday, September 22, the attorney provided two in-house counsel in the Government Relations Group in Disney's Washington, D.C. office with "a very brief e-mail description of a number of confidential documents" covered by the protective order. It further stated that the attorney had acted in the mistaken belief that the in-house counsels had executed the required acknowledgements of confidentiality.

9. Verner Liipfert indicated that within an hour the attorney telephoned the recipients of the e-

[4] *Id*. at 6118 ¶ 4, 6120 ¶ 3.

[5] *Id.* at 6120 ¶ 3.

[6] *Id*. at 6120 ¶5.

[7] *Id.* at 6120-21 ¶¶ 4, 7.

[8] *Id*. at 6122 ¶ 13.

[9] Letter from Lawrence R. Sidman to Magalie Roman Salas (Sept. 27, 2000).

mail to advise them that the e-mail related to confidential documents, but, in the interim, the e-mail had been retransmitted "to a number of other Disney personnel." Verner Liipfert reported that the recipients of the e-mail were later instructed to disregard it, and still later to delete the e-mail from their files.

10. In response to this disclosure, the Chief, Cable Services Bureau ordered Disney to provide to the FCC a full and detailed explanation of the matter, including an explanation of the steps it took to remedy the breach, and an explanation of why the breach was not reported until September 27.[10] Disney was directed to provide AOL with a copy or detailed description of the e-mail, the name of the originator, and the names of the recipients. All recipients of the e-mail were directed to execute affidavits acknowledging that they are prohibited from disclosing the confidential information, and Disney was required to furnish the FCC with these affidavits and an affidavit stating that all copies of the e-mail had been deleted from the Disney e-mail system. Disney and its counsel were precluded from further inspection of confidential records until they submitted, and the Commission approved, measures they would adopt to ensure that no future breaches of the protective order would occur. On November 22, 2000, we terminated the interim bar on inspection in view of the fact that the Parties submitted adequate corrective measures.[11]

III. SUBMISSIONS OF THE PARTIES

11. In their Joint Response,[12] Disney and Verner Liipfert ("the Parties") provide further details regarding the unauthorized disclosure. The Parties state that the disclosure was made by an associate who had been with Verner Liipfert for approximately 20 months. They indicate that the associate executed an acknowledgement of confidentiality on September 5 and, thereafter, inspected documents at the offices of Wiley, Rein & Fielding, AOL's outside counsel. The associate took notes on the documents but did not obtain copies. The Parties further indicate that, on the morning of September 22, the associate sent an e-mail regarding the documents to four individuals: a partner at Verner Liipfert, a partner at Howrey Simon, and two of Disney's vice presidents. Both of Disney's vice presidents had previously been involved with the AOL/Time Warner proceeding. The two law firm partners had executed acknowledgements of confidentiality, and were authorized to review confidential information. Disney's vice-presidents, both of Disney's Office of Government Relations in Washington, D.C., had not executed acknowledgements and were not authorized to review confidential information. The Parties assert that Disney had anticipated that the two vice presidents would execute acknowledgements, and that based on the associate's conversations with them, and on his understanding of their responsibilities, the associate mistakenly believed that they had.

12. The e-mail, marked "Privileged & Confidential" and "Attorney-Client Communication," indicates that it was sent at approximately 11:00 a.m., September 22. The subject line reads: "Important AOL Docs at Wiley Rein."[13] The body of the e-mail begins:

> There are hundreds of confidential AOL documents (contracts, marketing materials, internal memos and white papers) at Wiley Rein. I recommend that the Howrey antitrust folks review at least some of these materials, especially the ones briefly described below because they speak to

[10] *AOL-Time Warner*, Order, DA 00-2304 (CSB Oct. 10, 2000).

[11] *AOL-Time Warner*, Order, DA 00-2648 (CSB Nov. 22, 2000).

[12] Joint Response of The Walt Disney Co. and Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Joint response") (Oct. 13, 2000).

[13] We are disclosing in this memorandum opinion and order some portions of the e-mail that do not include confidential information. All other portions of the e-mail remain confidential.

> our claim that AOL/TW intends to discriminate against unaffiliated companies. The con[t]act person at Wiley Rein for review of the documents . . . .
>
> The e-mail thereupon provides brief summaries of 12 items, quoting portions of some of them.

13. According to the Parties, one of the vice presidents, Preston Padden was attending a convention in San Francisco when he received the e-mail at approximately eight a.m. Pacific Time. Padden states in an affidavit that he skimmed the e-mail after breakfast but did not realize that he was restricted from reading it. He claims that, while he was aware of the protective order, he believed that it dealt only with the documents themselves. Padden relates that he composed and transmitted a reply e-mail thanking the associate for his great work.[14] As was his usual practice, he specified that a list of 11 Disney officials, including the staff of the Government Relations Office, should receive courtesy copies of his reply message (including the attached text of the original message). The recipients of the reply message included Disney's President and CEO, its Vice Chairman of the Board of Directors, its Executive Vice President and General Counsel, its Senior Vice President, and the Executive Vice President of ABC (a Disney subsidiary).

14. The Parties state that when Verner Liipfert received Padden's reply, sometime before noon, Eastern Time,[15] they realized that there was a problem and called Padden's Washington office and spoke to his secretary. The Parties further state that the associate then e-mailed Padden and told him that the original e-mail was confidential and should not have been retransmitted. Padden indicates that he then e-mailed the various recipients of his reply message, telling them that the e-mail they received was confidential and should be disregarded.[16]

15. The Parties relate that the Verner Liipfert partner, Lawrence R. Sidman, was mostly out of his office on Friday September 22 and planned to catch a flight out of town that day. Accordingly, the associate did not discuss the situation at length with Sidman. However, when Sidman briefly appeared at the office during the day, the associate reportedly informed him that there was "a problem with the protective order."[17] Sidman purportedly instructed the associate to ascertain the facts and consult with senior communications counsel and litigation counsel, which the associate did.

16. No further action occurred until Monday September 25, when Sidman returned to the office. The Parties indicate that Sidman and the associate then discussed the situation and decided that it was necessary to speak to Padden to fully determine the facts. However, Padden, who returned to Washington on Saturday September 23, had, in the meantime, traveled to Colorado to deal with a family emergency. Sidman and the associate were not able to speak to Padden until Tuesday September 26, when they briefly discussed the need to delete the e-mail from the relevant computer systems and to notify the Commission of the violation. As noted above, Verner Liipfert notified the Commission the next day, September 27, and notified AOL the same day. According to an affidavit by Disney's Chief Information Officer, the e-mail has been deleted from Disney's computer systems. All of the recipients of the e-mails have executed affidavits acknowledging the confidentiality of the e-mail and declaring that they have not disclosed or used any information contained therein.

---

[14] The e-mail reads: "Great job [ ]. Let's follow up!" *See supra* note 1.

[15] The e-mail indicates that it was sent at approximately 11:50 a.m. *See supra* note 1.

[16] Disney provides an affidavit stating that the other vice-president read Padden's second e-mail stating that the information contained in the earlier e-mails was confidential before reading either the e-mail from outside counsel or from Padden, and deleted the e-mails without having reviewed their contents.

[17] Joint Response at 11.

17. The Parties report that they have issued directives regarding compliance with protective orders. The main provisions of Verner Liipfert's policy are as follows:

(a) Reminds personnel of the need to maintain absolute confidentiality.

(b) States that confidentiality must be protected until any doubts are resolved. The responsibility for resolving doubts lies with the "billing" or "responsible" attorney.

(c) Prohibits access to confidential documents without compliance with protective orders.

(d) Provides that confidential material must be maintained in separate, secured files.

(e) Provides that confidential files must contain a list of persons authorized to have access.

(f) Prohibits discussion of confidential material without ensuring that participants are authorized.

(g) Provides that confidential materials may not be transmitted by e-mail, but only by clearly marked hardcopy.

(h) Requires attorneys to maintain a log of access to confidential materials.

(j) States that breaches of confidentiality must be immediately reported to the responsible attorney and the Chair of the Communications Practice Group.

(k) Provides that the Chair of the Communications Group will clarify any questions.

18. The main provisions of Disney's policy are as follows:

(a) Supervisors must ensure that all individuals working on a matter are familiar with the terms of any protective orders.

(b) Employees working on a matter must read and maintain a copy of any protective orders.

(c) Permits access to confidential materials only upon compliance with all confidentiality requirements.

(d) Confidential material must be maintained in separate, secure files.

(e) Prohibits exchange of confidential material with outside consultants or counsel unless their authorization is verified.

(f) All confidential material must be disposed of on termination of the work involving it.

19. The Parties contend that the foregoing establishes that no further action should be taken against them. They urge that the breach of the protective order resulted from an inadvertent error and that immediate corrective action was taken. They further assert that the offending e-mail was disregarded and deleted from the relevant computer systems and that no improper use was made of any confidential material. They do not consider the material contained in the e-mail competitively sensitive. In their view, no harm has been done to AOL and their stringent new policies will prevent a future recurrence of the problem.

20. AOL responds that the conduct of Verner Liipfert and Disney has been deficient. According to AOL, the associate failed to confirm that the Disney Vice Presidents to whom he sent the e-mail were authorized to receive confidential material, and no basis has been shown for the associate's asserted reasonable, good faith belief that they were authorized. AOL questions whether Padden could have been unaware that he was barred from receiving such an e-mail or transmitting it to others. AOL asserts that there was no justification for delaying the reporting of the violation from September 22 to September 27 for "further factfinding and consultation." AOL also criticizes the September 27 notification for not listing the individuals involved in the breach.

21. AOL suggests that the parties had a motive to delay reporting the violation, since they could anticipate that the Commission would respond by curtailing access to confidential material. In this regard, they allege that, on September 22, counsel from Howrey Simon called the Wiley Rein legal assistant mentioned in the e-mail to arrange for the inspection of documents. Some inspection occurred on the morning of September 27, before AOL was informed of the violation. In AOL's view, this sequence of events undermined the enforcement of the protective order.

22. AOL argues that the violation of the protective order could lead to competitive and financial harm and will undermine public confidence in the Commission policies regarding confidentiality. AOL urges the Commission to incorporate further provisions in the protective order and to reexamine its policies regarding confidentiality generally. With respect to Verner Liipfert and Disney, AOL asks that the Commission request further information as to their actions between the time of the violation and its disclosure. Additionally, AOL asks the Commission to determine appropriate sanctions to restore the integrity of the proceeding.

23. The Parties reply that AOL has failed to allege either serious misconduct on the part of their principals or harm to AOL. They assert that AOL has pointed to no reason to doubt the associate's reasonable belief that Padden was authorized to receive confidential information. Similarly, they assert that there is no reason to doubt that Padden in quickly scanning his voluminous e-mail did not realize that he was dealing with material within the scope of the protective order or that his retransmission did not reflect an intent to disseminate confidential material to Disney's executives.

24. The Parties also assert that the five-day delay reflected no nefarious intent, but only the intervention of the weekend and the unavailability of Padden and Sidman at crucial times. In this regard, they submit that the requirement of "immediate" disclosure does not preclude reasonable, nonprejudicial delay for factfinding and consultation. Moreover, they categorically deny that Howrey Simon's inspection of documents on September 27 played any role in the timing of notification.

25. Additionally, the Parties maintain that AOL has demonstrated no harm from the unauthorized disclosure in view of the facts that the offending e-mail has been deleted from Disney's computer system and that no use or further dissemination of the e-mail occurred. They further assert that AOL has provided no specific basis for finding that the brief summaries of documents contained in the e-mail contained any intelligence of a sensitive or detrimental nature. In any event, they assert that the policies instituted at Disney and Verner Liipfert will prevent any future disclosures.

26. In view of the foregoing, Disney and Verner Liipfert urge that there is no basis to impose additional sanctions against them. They find no precedent for the disqualification of a party based on an inadvertent, isolated, and harmless disclosure of confidential information.

IV. DISCUSSION

27. We conclude based on the evidence before us that no additional sanctions, such as forfeiture or other measures, against Disney or Verner Liipfert or against the individuals involved are

warranted. We note that the interim measures we adopted in our October 10 Order have already had the effect of preventing Disney and its counsel from gaining access to confidential materials in this proceeding for a significant period of time. This is a substantial penalty that reinforces our commitment to strict enforcement of protective orders. We also strongly admonish Verner Liipfert, Disney, and their principals that their actions have not reflected the standard of conduct the Commission expects of parties in our proceedings. As we have stated:

> Protection of commercially sensitive materials submitted by parties pursuant to protective orders and confidentiality agreements is a very serious matter requiring vigilance by Commission staff as well as all parties gaining access to such information. Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting that information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission's processes, and have a chilling effect on the willingness of parties to provide us with information needed to fulfill our regulatory duties [Footnote omitted.][18]

The evidence before us leads us to conclude that principals of Verner Liipfert and Disney were not sufficiently diligent in complying with the Protective Order. It does not, however, give us reason to believe either that those concerned deliberately violated the order or that there is a substantial risk of future violations by Disney or Verner Liipfert.

28. We are not persuaded by the evidence before us that the associate exercised sufficient diligence in determining whether the two Disney Vice Presidents to whom he sent the e-mail were authorized to receive confidential information. Although the Parties claim that they anticipated that both Vice Presidents would have access to confidential documents, the evidence they proffer indicates only that one would.[19] Beyond that, the parties offer only the assertion that the associate's belief was based on conversations with the two Disney Vice Presidents.[20]

29. On the other hand, we have no reason to doubt that the associate did in fact believe that Padden was authorized. The e-mail indicates that the associate was addressing the desirability of reviewing documents in the context of this proceeding, and Padden replied in the same vein. There is no suggestion that the associate intended to "leak" information for other, ulterior purposes. The only logical conclusion is that he believed he was addressing a person with authorization.

30. Likewise, the evidence does not show that Padden exercised diligence in determining whether he was authorized to view or disseminate the contents of the e-mail. Padden acknowledges that he was aware that a Protective order had been issued in this proceeding.[21] He was not aware, however, that the Protective Order prohibited disclosure not only of the documents themselves, but also "the contents thereof."[22] Nevertheless, Padden's actions do not suggest that he deliberately disseminated confidential information to unauthorized persons. His sole response to the e-mail was to send a reply to the associate thanking him for his "great job." Padden's response gives no indication that he intended that the information be used other than in the legitimate prosecution of the proceeding. We are troubled,

---

[18] *Craig O. McCaw*, 9 FCC Rcd 5836, 5924 ¶ 163 (1994).

[19] Letter from Lawrence R. Sidman to Arthur H. Harding, Esq. (Aug. 17, 2000); Letter from Lawrence R. Sidman to Peter D. Ross, Esq. (Aug. 17, 2000).

[20] Joint Response at 6.

[21] Affidavit of Preston Padden at 1.

[22] *PO*, 15 FCC Rcd at 6119 ¶ 2.

however, that Padden, without reflection, sent courtesy copies of the e-mail to top Disney executives. Such action might have caused considerable competitive harm. Again, however, we have no reason to doubt his explanation that he sent courtesy copies of his e-mail to Disney management because he customarily copied these individuals. While this action plainly violates the Protective Order, copying these individuals, without any explanation to them, does not suggest an intent to apprise them of information for anticompetitive purposes.

31. We are most troubled by the delay that occurred in reporting to the Commission and to AOL the breach of the Protective Order. We recognize that the term "immediate," at least in some contexts, does not ". . . require instantaneous notice . . . but rather call[s] for notice within a reasonable length of time under all the facts and circumstances of each particular case."[23] Under the circumstances here, we find it difficult to characterize a period of five days as "immediate." Moreover, the delay in reporting has raised troublesome questions about the conduct of Howrey Simon that could have been avoided altogether if reporting had been more prompt.

32. As AOL observes, because the Parties did not report the violation until September 27, they opened themselves to allegations that Howrey Simon's inspection of documents that same day was motivated by an intent to evade the consequences of the violation. We have no direct evidence that Howrey Simon acted in anticipation that the Commission would bar its inspection upon disclosure of the violation, and Howrey Simon's inspection did not explicitly violate the terms of the Protective Order. We believe, however, that the better course would have been for Howrey Simon not to examine the documents until after the violation of the Protective Order had been reported to AOL and the Commission. In the future, we expect that we will explicitly prohibit parties from continuing to inspect confidential documents knowing that a breach of a protective order has occurred at least until they have reported the violation and the other party has had an opportunity to seek relief.

33. Other factors somewhat mitigate the seriousness of the delay. We recognize that the Parties were impaired in responding to the violation by the unavailability of Padden and Sidman at critical times. We agree with the parties that Sidman's participation was needed to evaluate whether the material contained in the e-mail violated the Protective Order, since other senior officials were not authorized to inspect the e-mail. It is also understandable that the parties would want to consult with Padden about the circumstances of his retransmission of the e-mail. Additionally, it appears that the Parties relied on the fact that they had already taken corrective action to preclude any further dissemination to or use by unauthorized persons. Moreover, we do not wish to suggest that a party is better off not reporting at all than reporting imperfectly.

34. In sum, although the evidence before us establishes a significant violation of the protective Order, it does not warrant further action looking toward imposing additional monetary or other sanctions against the Parties here. We find no evidence that the violation was intentional or that it reflects a pattern of noncompliance.[24] The Parties did report the violation within five days and made an effort to mitigate the effects of the improper disclosure. We also find that the policies adopted by the Parties represent a realistic and good faith attempt to avoid future violations. We therefore find that the substantial penalty that the parties have already suffered by being barred from inspecting confidential documents during a critical phase of this proceeding is sufficient to vindicate the integrity of the Commission's processes. We will therefore take no further action with respect to this matter.

35. As to the suggestion that we modify the Protective Order or our policies regarding

[23] *Interstate Fire & Casualty Co. v. Burns*, 484 P.2d 1257, 1260 (Colo. App. 1971).

[24] *See supra* para. 27.

confidentiality generally, we have already restricted the scope of the Protective Order in view of the violation here.[25] That action limited inspection to outside counsel only. In the future, we will consider prohibiting parties and their counsel from obtaining access to confidential documents beginning from the time they discover their violation of the protective order until one or two business days after they have notified the Commission and the submitting party of the violation. The additional time would provide an opportunity both for the submitting party to request that further action be taken before the violating party is again permitted access to confidential material, and for the Commission to act.

36. We wish to emphasize that we expect the Parties to this case and the public generally to comply strictly with this and other Protective Orders because of the crucial role they play in upholding the integrity of the Commission's processes. In this regard, we strongly encourage the use of internal controls such as those proposed by the Parties here. We further emphasize that we reserve the right to apply the full range of sanctions to any person violating this or other Protective Orders in the future.

V. ORDERING CLAUSE

37. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.321, That our inquiry into this matter IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Sherille Ismail
Deputy Chief
Cable Services Bureau

[25] *AOL – Time Warner*, Order, DA 00-2434 (CSB Oct. 27, 2000).