

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

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

Adopted: April 6, 2000

Released: April 7, 2000

By the Chief, Cable Services Bureau:

1. On February 11, 2000, America Online, Inc. (“AOL”) and Time Warner Inc. (“Time Warner”) filed joint applications with the Federal Communications Commission (“Commission” or “FCC”) pursuant to Sections 214 and 310 of the Communications Act to transfer control to AOL Time Warner Inc. of various licenses and authorizations controlled by AOL and Time Warner and their affiliates and subsidiaries.¹ AOL and Time Warner filed a supplemental public interest statement on March 21, 2000.² The Commission and AOL and Time Warner anticipate that, in response to Commission inquiries, AOL and Time Warner will submit additional information for consideration that may contain proprietary or confidential information.

2. The Bureau hereby enters the attached protective order to ensure that any confidential or proprietary documents submitted by AOL and Time Warner are afforded adequate protection. We note that the proposed protective order is identical in all material respects to protective orders adopted in other merger proceedings subject to Commission review.³

¹ See Public Interest Statement, filed February 11, 2000 (CS Docket No. 00-30).

² See Supplemental Information, filed March 21, 2000 (CS Docket No. 00-30). On March 6, 2000, FCC General Counsel Christopher Wright had requested that AOL and Time Warner amend their filing by providing additional information necessary to substantiate claims made in their February 11 public interest statement.

³ *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, 13 FCC Rcd 11166 (1998) (“*WorldCom-MCI Protective Order*”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. (Transferor) to AT&T Corp. (Transferee)*, CS Docket No. 99-251, Order Adopting Protective Order, 14 FCC Rcd 12286 (1998) (“*AT&T-MediaOne Protective Order*”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from GTE Corporation (Transferor) to Bell Atlantic Corporation (Transferee)*, CC Docket No. (continued...)

3. We expect that the commenters in this proceeding may seek access to confidential information submitted by AOL and Time Warner, which may include highly sensitive information, such as future business plans, customer names, usage patterns, locations, and traffic volumes.⁴ In the AT&T-MediaOne proceeding, the Cable Services Bureau determined that certain in-house staff should not have access to confidential information, because “there is a greater risk of inadvertent disclosure by such individuals that is not justified given the sensitive nature of the information at issue.”⁵ Because access by certain in-house staff to the documents commenters may seek to review in this proceeding would pose the same potential competitive harm to AOL and Time Warner and the same risk of inadvertent disclosure, the Bureau’s adopted protective order declines to allow certain in-house staff access to the confidential documents AOL and Time Warner provide.

4. AOL shall make available for review the documents subject to this protective order at the offices of AOL’s outside counsel, Wiley Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006. Time Warner shall make available for review the documents subject to this protective order at the offices of Time Warner’s outside counsel, Fleischman and Walsh, L.L.P., 1400 16th Street N.W., Washington, D.C. 20036. Parties reviewing these documents will be provided the following alternatives: 1) parties will be provided adequate opportunity to inspect the documents on site; 2) parties may inspect the documents on site with the ability to request copies, at cost, of all or some of the documents, other than those marked as “Copying Prohibited”; or 3) parties may request a complete set of the documents, other than those marked as “Copying Prohibited,” at cost, allowing two days after the request is made for receipt of the copies. If a complete set of documents will be requested, parties are encouraged to make such requests at the time they submit the Acknowledgment of Confidentiality (see Attachment to Protective Order). This will allow parties the opportunity to begin reviewing the documents at the end of the five-day period referenced in paragraph 5 of the protective order. All copies of documents that are removed from the Wiley Rein & Fielding or Fleischman and Walsh offices will bear an original confidential stamp and must be returned in accordance with the terms of the protective order.

5. Any party seeking access to confidential documents subject to this protective order shall request access pursuant to paragraph 5 of the protective order.

6. This Order is issued pursuant to Sections 4(i), 214(a), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(a) and 310(d); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and authority delegated under Section 0.321 of the Commission’s rules, 47 C.F.R. § 0.321; and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Deborah Lathen
Chief, Cable Services Bureau

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98-184, Order Adopting Protective Order, 13 FCC Rcd 22751 (1998).

⁴ See *AT&T-MediaOne Protective Order*, 14 FCC Rcd at 12287 ¶ 3.

⁵ *Id.* (citing *WorldCom-MCI Protective Order*, 13 FCC Rcd at 11168 ¶ 5).

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PROTECTIVE ORDER

By the Chief, Cable Services Bureau:

1. On February 11, 2000, Time Warner Inc. (“Time Warner”) and America Online, Inc. (“AOL”) filed joint applications with the Federal Communications Commission (the “Commission”) pursuant to Sections 214 and 310(d) of the Communications Act to transfer control of FCC licenses and authorizations held directly or indirectly by Time Warner and AOL to AOL Time Warner Inc. The Commission anticipates that it may seek documents in this proceeding from Time Warner and AOL (individually or collectively, the “Submitting Party”) that contain proprietary or confidential information and, therefore, should be subject to a protective order. Consequently, the Bureau enters this Protective Order to ensure that the documents produced to the Commission in response to its requests and considered by the Submitting Party to be confidential and proprietary are afforded protection. This 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.

2. *Non-Disclosure of Stamped Confidential Documents.* Except with the prior written consent of the Submitting Party, or as hereinafter provided under this Order, neither a Stamped Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. A “Stamped Confidential Document” shall mean any document that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner): “CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN CS Docket No. 00-30 before the Federal Communications Commission” to signify that it contains information that the Submitting Party believes should be subject to protection under FOIA and the Commission’s implementing rules unless the Commission determines, *sua sponte* or by petition, pursuant to Sections 0.459 or 0.461 of its rules, that any such document is not entitled to confidential treatment. For purposes of this Order, the term “document” means all written, recorded, electronically stored, or graphical material, whether produced or created by a party or another person.

3. *Permissible Disclosure.* Subject to the requirements of paragraph 5, 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. 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. Subject to the requirements of paragraph 5 and subject to the obligation to secure the confidentiality of Stamped Confidential Documents in accordance with the terms of this Order, such counsel may disclose Stamped Confidential Documents to any of the following persons, so long as they are not involved in competitive decision-making, as that term is defined above, for any competitor of any Submitting Party: (i) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (ii) Commission officials involved in this proceeding; (iii) outside consultants or experts retained for the purpose of assisting counsel in these proceedings; (iv) employees of such counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with this proceeding; and (v) employees of a third-party performing one or more of these functions under counsel's supervision. Time Warner shall make available for review its Stamped Confidential Documents at the offices of Time Warner outside counsel, Fleischman and Walsh, L.L.P., 1400 16th Street, N.W., Suite 600, Washington, D.C. 20036. AOL shall make available for review its Stamped Confidential Documents at the offices of AOL outside counsel, Wiley Rein & Fielding, 1776 K St. N.W., Washington, D.C. 20006.

4. *Access to Confidential Documents.* Persons described in paragraph 3 shall have the obligation to ensure that access to Stamped Confidential Documents is strictly limited as prescribed in this Order. Such persons shall further have the obligation to ensure: (i) that Stamped Confidential Documents are used only as provided in this Order; and (ii) that Stamped Confidential Documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 7.

5. *Procedures for Obtaining Access to Confidential Documents.* In all cases where access to Stamped Confidential Documents is permitted pursuant to paragraph 3, and before reviewing or having access to any Stamped Confidential Documents, each person seeking such access shall execute the Acknowledgment of Confidentiality and file it with the Commission and serve it upon each Submitting Party so that it is received by each Submitting Party five business days prior to such person's reviewing or having access to any such Stamped Confidential Documents. Each Submitting Party shall have an opportunity to object to the disclosure of Stamped Confidential Documents to any such persons. Any objection must be filed at the Commission and served on counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment of Confidentiality. For example, a Submitting Party might object to a request for review of Stamped Confidential Documents by a person who is involved in competitive decision-making, as that term is used in paragraph 3. Until any such objection is resolved by the Commission and, any court of competent jurisdiction prior to disclosure, and unless that objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Stamped Confidential Documents.

6. *Requests for Additional Disclosure.* If any person requests disclosure of Stamped Confidential Documents outside the terms of this protective order, such requests will be treated in accordance with Sections 0.442 and 0.461 of the Commission's Rules.

7. *Use of Confidential Information.* Persons described in paragraph 3 may, in any documents that they file in this proceeding, reference information found in Stamped Confidential

Documents or derived therefrom (hereinafter, "Confidential Information"), but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential information included pursuant to Protective Order, CS Docket No. 00-30;" and

d. The confidential portion(s) of the pleading shall be filed with the Secretary of the Commission and served on each Submitting Party. Such confidential portions shall be filed under seal, and shall not be placed in the Commission's Public Files. A party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's Public Files. Parties may provide, under seal, courtesy copies to Commission staff of pleadings containing Confidential Information.

8. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing this material: (a) agree not to assert any such waiver; (b) agree not to use information derived from any Stamped Confidential Document to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

9. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of Stamped Confidential Documents or Confidential Information that a party has obtained under terms of this Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court or administrative agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Documents or Confidential Information.

10. *Client Consultation.* Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Confidential Documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not disclose Stamped Confidential Documents or Confidential Information.

11. *Violations of Protective Order.* Persons obtaining access to Stamped Confidential Documents or Confidential Information under this Order shall use the information solely for preparation and the conduct of this proceeding as delimited in paragraphs 4, 7 and 10, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such information for any other purpose, including business, governmental, commercial, or other administrative, regulatory or judicial proceedings. Persons obtaining access to Stamped Confidential Documents or Confidential Information under this Order will be permitted to make use thereof in connection with non-public communications and submissions to the FTC pertaining to that agency's review of the antitrust aspects of the proposed merger of AOL and Time Warner, so long as such material and information is not

disclosed to any persons other than the FTC. 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 the Submitting Party 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 violations of this Order.

12. *Prohibited Copying.* If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made. Applications for relief from this restriction against copying may be made to the Commission, with concurrent service of a copy of such applications upon counsel for the Submitting Party.

13. *Termination of Proceeding.* The provisions of this Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding (which includes any administrative or judicial review), Stamped Confidential Documents and all copies of same shall be returned to the Submitting Party. No material whatsoever derived from Stamped Confidential Documents may be retained by any person having access thereto, except counsel to a party in this proceeding (as described in paragraph 3) may retain, under the continuing strictures of this Order, two copies of each pleading containing Confidential Information prepared on behalf of that party. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the Submitting Party not more than three weeks after conclusion of this proceeding.

14. *Authority.* This Order is issued pursuant to Sections 4(i), 214(a), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(a) and 310(d); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and authority delegated under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321; and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Deborah Lathen
Chief, Cable Services Bureau

APPENDIX A

ACKNOWLEDGMENT OF CONFIDENTIALITY

I hereby acknowledge that I have received and read a copy of the foregoing 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. 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