Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Telephone: 202/434-7300
Fax: 202/434-7400
www.Mintz.com

EX PARTE OR LATE FILED

Donna N. Lampert
Internet Address
dnlamper@mintz.com

Direct Dial Number
202/434-7385

March 9, 1998

EX PARTE

RECEIVED
MAR - 9 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND
Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-45 -- Universal Service - Report to Congress

Dear Ms. Salas:

On March 9, 1998, Jill Lesser (Deputy Director - Legal and Public Affairs), Steven Teplitz (Senior Counsel - Law and Public Policy) of America Online, Inc. and I met with Thomas Power (Legal Advisor - Office of Chairman Kennard) to discuss to the above-referenced docket.

At the meeting, we discussed issues raised in the written submissions. We also discussed the attached documents which were distributed at this meeting.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of the written documents distributed are attached for inclusion in the public record in the above-captioned proceedings. Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

cc: Thomas C. Power (w/encl.)

DCDOCS: 124673.1 (2_7501!.doc)

No. of Copies rec'd 0+2
List ABCDE

ELECTRONIC MAIL AND THE TELECOMMUNICATIONS ACT OF 1996

Recently, questions have been raised regarding the definitions set forth in the Telecommunications Act of 1996 ("1996 Act") and the status of certain services and service providers pursuant to those definitions. For example, there have been suggestions that Electronic Mail ("e-mail") falls within the definition of "telecommunications" and that, therefore, Internet Service Providers should be reclassified as "telecommunications carriers."

The fact is, however, that the definitions under the 1996 Act cannot be viewed in isolation.[1/] Indeed, viewed in a vacuum, all services, including electronic mail and other "information services," could be deemed to fit within the definitions of "telecommunications" and "telecommunications services," effectively reading "information services" out of the 1996 Act. When analyzed in the overall context of the 1996 Act, however, it becomes apparent that E-mail services are "information services" under the 1996 Act and that Internet Service providers, as the entities that offer such services are "information service providers," consistent with long standing regulatory and legal precedent.

This analysis is wholly consistent with Congressional understanding of and intent underlying the 1996 Act. Rather than intend the definition of "information service" to be effectively read out of the Act, Congress intended for the definitions under the 1996 Act to be "based on the definition [sic] used in the Modification of Final Judgment." ("MFJ").[2/] Under the MFJ, "information services" encompassed both services which involved no control by the carrier over the content and services in which the carrier would control both the transmission of information and the content. Electronic mail falls squarely within this definition.

Moreover, just because e-mail and other information services ride upon the carriage layer of communications networks (i.e., the information is sent via

---

1/ Section 153(43) states: "TELECOMMUNICATIONS – The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

Section 153(46) states: "TELECOMMUNICATIONS SERVICE– The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

Section 153(20) states: "INFORMATION SERVICE. – The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

2/ (H.R Rep. No. 204, Part I, 104th Cong., 1st Sess. 125 (1995))

telecommunications) does not transform them into "telecommunications services."[3/] Indeed, there are many services that rely upon the telecommunications carriage layer, such as airlines reservations or telephone-based audio information services, all of which are clearly "information services" within the definitions in the 1996 Act. In fact, a fundamental difference between telecommunications carriers and information service providers is precisely that the latter perform intermediary, value added services for end users.

Critically, electronic mail services track specifically the 1996 Act's definition of "information services." As a multidimensional dynamic service, e mail is much more than the simple transmission of textual messages from one party to another. Indeed, basic textual E-mail messages are only a percentage of all electronic mail traffic. Moreover, just because a particular user makes the decision not to use some or all of the available functionality of the Electronic Mail service does not transform the service into a "telecommunications service."

Consistent with the definition of information services set forth in the 1996 Act, e-mail is a service or application that provides the end user with multiple capabilities such as:

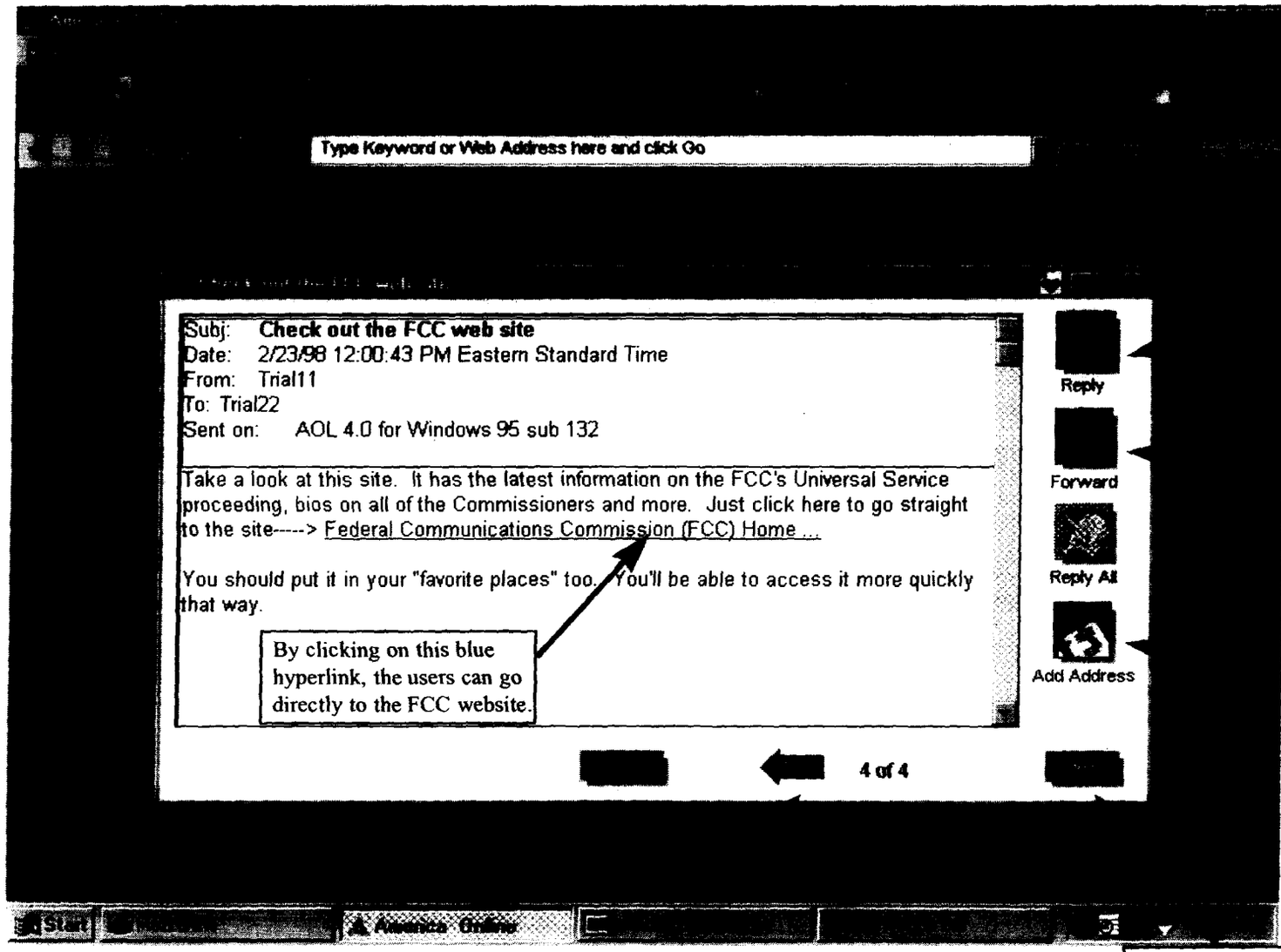
- **Generating** a message in text, graphics, video and audio formats;
- **Acquiring** the messages, files, photos, hyperlinks, websites, etc. transmitted by others;
- **Storing, forwarding, replying to and re-sending** the messages, including by creating a personal file storage system for favorite websites, addresses, etc.;
- **Transforming** the text of messages or attached files ;
- **Processing** information, including through replies, addition of other information;
- **Retrieving and utilizing** information; and
- **Accessing and interacting** with other individuals and groups, etc.

As depicted more fully in the attached Exhibits, the E mail service is more than just a message.

DCDOCS: 124128.1 (2ns001!.doc)

3/ See "Layering for Equity and Efficiency: A Principled Approach to Universal Service Policy," Professor Jeffrey K. MacKie-Mason

E-Mail Functionality: More than just a message



By clicking on this blue hyperlink, the users can go directly to the FCC website.

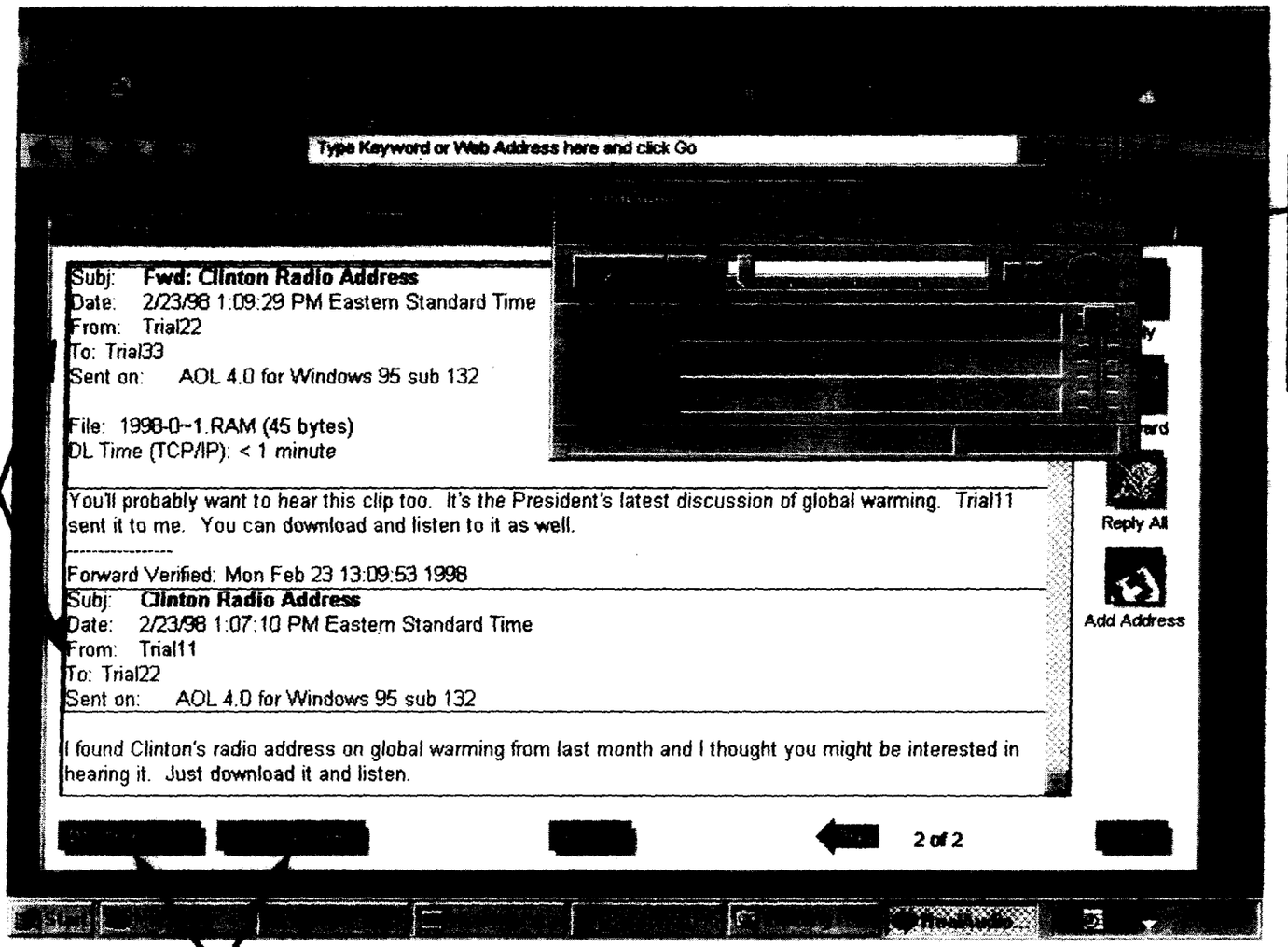
The reply button allows a user to automatically address an email back to the sender.

The forward button allows the user to send this email to one or more other users.

Users can also automatically add the sender's address to their address book.

Help text can be accessed directly from the email form.

E-Mail Functionality: More than just a message



A radio address was attached to this email. After downloading, the user can hear this speech through his or her AOL connection.

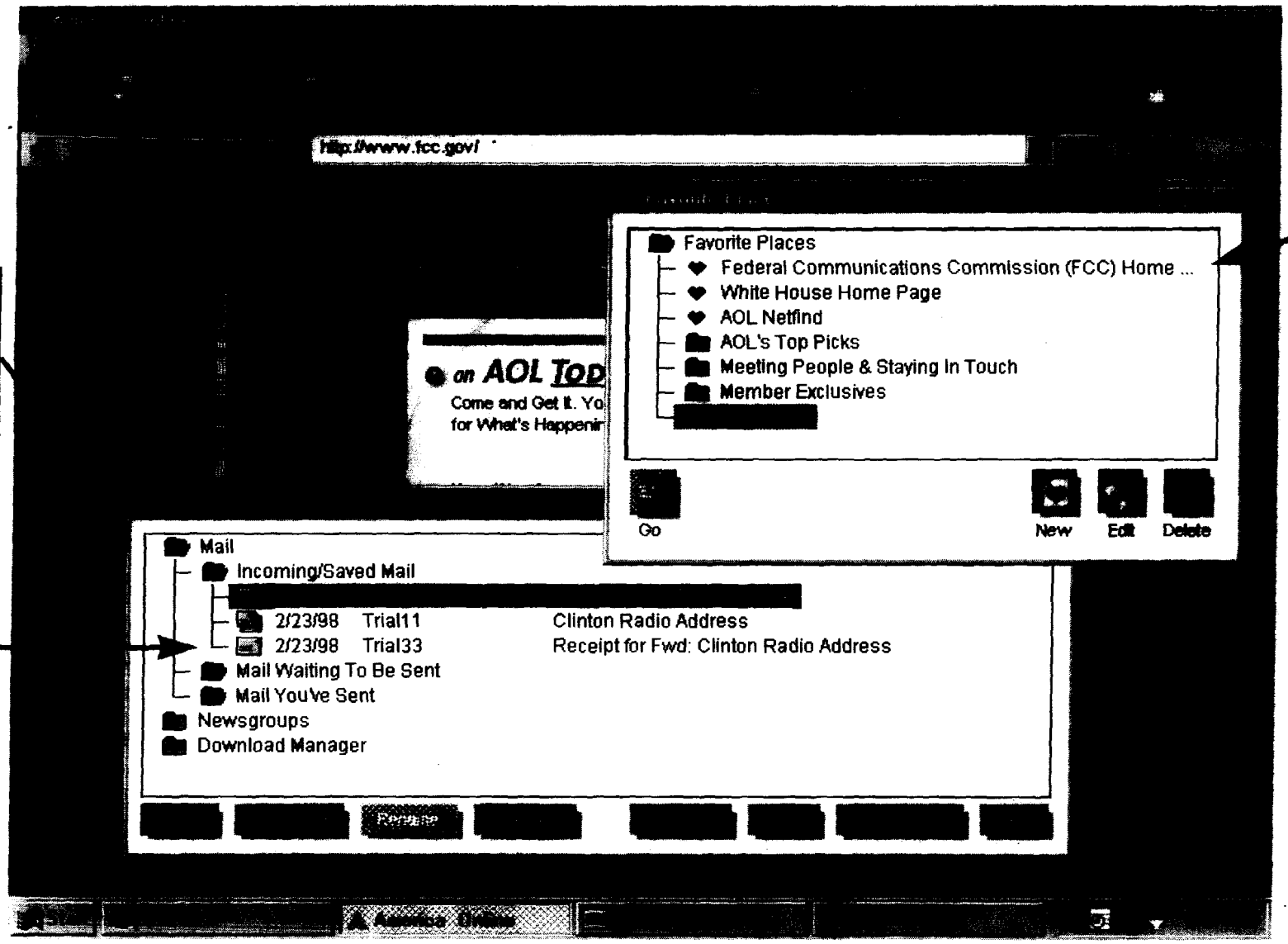
This message was forwarded from Trial22 to Trial33 by clicking a button on the email form.

The user can download an attachment, in this case a radio broadcast.

E-Mail Functionality: More than just a message

The Personal Filing Cabinet can automatically store sent or received email.

Trial22 received a receipt indicating the Trial33 read the email titled "Clinton Radio Address."



Users can store links to websites sent in email as a "Favorite Place."