

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Amendment of Section 19.735-203 )  
And Addition of Section 0.458 )  
of the Commission's Rules Concerning )  
Nonpublic Information )

**ORDER**

**Adopted: October 12, 2000**

**Released: October 18, 2000**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement;  
Commissioner Powell issuing a statement.

1. Recent unauthorized disclosures of nonpublic internal Commission draft orders and documents in market-sensitive proceedings prompt us to adopt this order to amend Section 19.735-203 of our rules, 47 C.F.R. § 19.735-203. Section 19.735-203 currently governs the disclosure and misuse by Commission personnel of nonpublic information that is contained in Commission records or obtained in connection with Commission employment. The purpose of the amendment is to emphasize the responsibilities of Commission employees in this area and to provide guidance to persons who receive nonpublic documents under circumstances where it appears that the release of the documents was either inadvertent or otherwise unauthorized.

2. Currently, Section 19.735-203 prohibits the unauthorized release of nonpublic information, including documents, by Commission officials. Specifically, Section 19.735-203(a) states that “[e]xcept as authorized in writing by the Chairman . . . , or otherwise as authorized by the Commission or its rules, nonpublic information shall not be disclosed, directly or indirectly, to any person outside the commission.” Such nonpublic information clearly includes drafts of Commission orders, memoranda and other documents (such as e-mail) containing internal staff recommendations. *See* 5 C.F.R. § 2635.703 (“nonpublic information is information that . . . has not been made available to the general public” including documents that are “designated as confidential by an agency.”). We take this opportunity to emphasize that, pursuant to Section 19.735-107 of our rules, employees that disclose such documents (or their contents) are subject to significant disciplinary action up to and including removal for cause, in addition to any other penalty prescribed by law. *See* 47 C.F.R. § 19.735-107. Our amendment of Section 19.735-203 cross-references this rule governing the Commission’s disciplinary and remedial authority, which is reprinted in its entirety in Appendix B to this Order for easy reference.

3. Our rules prohibiting the disclosure of nonpublic information serve to protect the integrity of the Commission’s deliberative processes. Disclosure by Commission staff of draft orders, internal confidential memoranda and nonpublic information violates these rules, and we will vigorously investigate and address violations of these rules by Commission personnel.

4. While our existing rules and our guidance in this order make clear our commitment to ensure that Commission personnel do not disclose nonpublic documents, the existing rules do not address the steps that are to be taken by persons regulated by or practicing before the Commission who receive such documents. The revision to Section 19.735-203 adds language requiring such persons who come into possession of written nonpublic information (including written material transmitted in electronic form), the release of which they know or reasonably should know was either inadvertent or otherwise unauthorized, to promptly return such written nonpublic information to the Commission's Office of the Inspector General, without further distribution or use of the material.

5. Persons regulated by or practicing before the FCC may be subject to appropriate sanctions for willful violation of this section. In the case of attorneys practicing before the Commission such sanctions may include disciplinary action under the provisions of § 1.24 of the Commission's rules. (*Cf.*, *D.C. Rules of Professional Conduct*, Rule 1.15 and *Opinion no. 256*, adopted May 16, 1995. *See also: ABA Formal Opinion 92-368*, Nov. 10, 1992; Florida Bar Op. 93-3, Feb. 1, 1994; and Oregon Bar Formal Op. No. 1998-150, approved Apr. 1998). Section 1.24 of our rules is reprinted in its entirety in Appendix B to this Order for easy reference.

6. The revision also adds a cross reference to Section 19.735-203 in a new section 0.458 of the Commission's rules, 47 C.F.R. § 0.458. New Section 0.458 is within the Commission's Part zero rules dealing with public and nonpublic information.

7. The requirements set forth in 5 U.S.C. § 553(b) and (d) pertaining to notice and comment and the effective date in rulemaking proceedings do not apply to this amendment because it concerns matters of agency organization, procedure or practice. *See* 5 U.S.C. 553(b)(A); 553(d).

8. Accordingly, IT IS ORDERED that effective thirty days following the publication of this item in the *Federal Register*, Parts 0 and 19 of the Commission's rules, 47 C.F.R. Part 19, ARE AMENDED as set forth in the Appendix. Authority for such action is found in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A**

Section 19.735-203 of Part 19 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. A new (d), is added after paragraph (c), and shall read as follows:

**§ 19.735-203 Nonpublic Information**

(d) Any person regulated by or practicing before the Commission coming into possession of written nonpublic information (including written material transmitted in electronic form) as described in paragraph (a) under circumstances where it appears that its release was inadvertent or otherwise unauthorized shall promptly return the written information to the Commission's Office of the Inspector General without further distribution or use of the written nonpublic information. Any person regulated by or practicing before the Commission who willfully violates this section by failing to promptly notify the Commission's Office of the Inspector General of the receipt of written nonpublic information (including written material transmitted in electronic form) that he knew or should have known was released inadvertently or in any otherwise unauthorized manner may be subject to appropriate sanctions by the Commission. In the case of attorneys practicing before the Commission, such sanctions may include disciplinary action under the provisions of § 1.24.

2. The following sentence is added after the first sentence of the note following paragraph (d):

Additionally, employees should refer to § 19.735-107 of this part, which provides that employees of the Commission who violate this part may be subject to disciplinary action which may be in addition to any other penalty prescribed by law.

A new Section 0.458 of Part 0 of Chapter 1 of Title 47 of the Code of Federal Regulations is added as follows:

**§ 0.458 Nonpublic Information**

Any person regulated by or practicing before the Commission coming into possession of written nonpublic information (including written material transmitted in electronic form) as described in Section 19.735-203(a) of this chapter under circumstances where it appears that its release was inadvertent or otherwise unauthorized shall be obligated to return the information to the Commission's Office of Inspector General pursuant to that section. See 47 C.F.R. § 19.735-203.

## APPENDIX B

**47 C.F.R. § 19.735-203 Nonpublic information, as amended**

(a) Except as authorized in writing by the Chairman pursuant to paragraph (b) of this section, or otherwise as authorized by the Commission or its rules, nonpublic information shall not be disclosed, directly or indirectly, to any person outside the Commission. Such information includes, but is not limited to, the following:

(1) The content of agenda items (except for compliance with the Government in the Sunshine Act, 5 U.S.C. 552b); or

(2) Actions or decisions made by the Commission at closed meetings or by circulation prior to the public release of such information by the Commission.

(b) An employee engaged in outside teaching, lecturing, or writing shall not use nonpublic information obtained as a result of his Government employment in connection with such teaching, lecturing, or writing except when the Chairman gives written authorization for the use of that nonpublic information on the basis that its use is in the public interest.

(c) This section does not prohibit the disclosure of an official Commission meeting agenda listing titles and summaries of items for discussion at an open Commission meeting. Also, this section does not prohibit the disclosure of information about the scheduling of Commission agenda items.

(d) Any person regulated by or practicing before the Commission coming into possession of written nonpublic information (including written material transmitted in electronic form) as described in paragraph (a) under circumstances where it appears that its release was inadvertent or otherwise unauthorized shall promptly return the written information to the Commission's Office of the Inspector General without further distribution or use of the written nonpublic information. Any person regulated by or practicing before the Commission who willfully violates this section by failing to promptly notify the Commission's Office of the Inspector General of the receipt of written nonpublic information (including written material transmitted in electronic form) that he knew or should have known was released inadvertently or in any otherwise unauthorized manner may be subject to appropriate sanctions by the Commission. In the case of attorneys practicing before the Commission, such sanctions may include disciplinary action under the provisions of § 1.24.

Note: Employees also should refer to the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch, at 5 CFR 2635.703, on the use of nonpublic information. Additionally, employees should refer to § 19.735-107 of this part, which provides that employees of the Commission who violate this part may be subject to disciplinary action which may be in addition to any other penalty prescribed by law.

As is the case with section 2635.703, this part is intended only to cover knowing unauthorized disclosures of nonpublic information.

**47 CFR § 19.735-107 Disciplinary and other remedial action.**

(a) A violation of the regulations in this part by an employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) The Chairman will designate an officer or employee of the Commission who will promptly investigate all incidents or situations in which it appears that employees may have engaged in improper conduct. Such investigation will be initiated in all cases where complaints

are brought to the attention of the Chairman, including: Adverse comment appearing in publications; complaints from members of Congress, private citizens, organizations, other Government employees or agencies; and formal complaints referred to the Chairman by the Designated Agency Ethics Official.

(c) The Inspector General will be promptly notified of all complaints or allegations of employee misconduct. The Inspector General will also be notified of the planned initiation of an investigation under this part. Such notification shall occur prior to the initiation of the investigation required by paragraph (a) of this section. The Inspector General may choose to conduct the investigation in accordance with the rules in this part. Should the Inspector General choose to conduct the investigation, he will promptly notify the Chairman. In such case, the Inspector General will serve as the designated officer and be solely responsible for the investigation. In carrying out this function, the Inspector General may obtain investigative services from other Commission offices, other governmental agencies or non governmental sources and use any other means available to him in accordance with Public Law 100-504 or the Inspector General Act of 1978, as amended, 5 U.S.C. Appendix. The Inspector General will be provided with the results of all investigations in which he chooses not to participate.

(d) The employee concerned shall be provided an opportunity to explain the alleged misconduct. When, after consideration of the employee's explanation, the Chairman decides that remedial action is required, he shall take remedial action. Remedial action may include, but is not limited to:

- (1) Changes in assigned duties;
- (2) Divestiture by the employee of his conflicting interest;
- (3) Action under the Commission's Ethics Program resulting in one of the following

actions:

(i) When investigation reveals that the charges are groundless, the person designated by the Chairman to assist in administration of the program may give a letter of clearance to the employee concerned, and the case will not be recorded in his Official Personnel Folder;

(ii) If, after investigation, the case investigator deems the act to be merely a minor indiscretion, he may resolve the situation by discussing it with the employee. The case will not be recorded in the employee's Official Personnel Folder;

(iii) If the case administrator considers the problem to be of sufficient importance, he may call it to the attention of the Chairman, who in turn may notify the employee of the seriousness of his act and warn him of the consequences of a repetition. The case will not be recorded in the employee's Official Personnel Folder, unless the employee requests it;

(iv) The Chairman may, when in his opinion circumstances warrant, establish a special review board to investigate the facts in a case and to make a full report thereon, including recommended action; or

(v)(A) If the Chairman decides that formal disciplinary action should be taken, he may prepare for Commission consideration a statement of facts and recommend one of the following:

(1) Written reprimand. A formal letter containing a complete statement of the offense and official censure;

(2) Suspension. A temporary non pay status and suspension from duty; or

(3) Removal for cause. Separation for cause in case of a serious offense.

(B) Only after a majority of the Commission approves formal disciplinary action will any record resulting from the administration of this program be placed in the employee's Official Personnel Folder; or

(4) Disqualification for a particular assignment.

(e) Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive orders, and regulations.

**47 CFR § 1.24 Censure, suspension, or disbarment of attorneys.**

(a) The Commission may censure, suspend, or disbar any person who has practiced, is practicing or holding himself out as entitled to practice before it if it finds that such person:

- (1) Does not possess the qualifications required by § 1.23;
- (2) Has failed to conform to standards of ethical conduct required of practitioners at the bar of any court of which he is a member;
- (3) Is lacking in character or professional integrity; and/or
- (4) Displays toward the Commission or any of its hearing officers conduct which, if displayed toward any court of the United States or any of its Territories or the District of Columbia, would be cause for censure, suspension, or disbarment.

(b) Except as provided in paragraph (c) of this section, before any member of the bar of the Commission shall be censured, suspended, or disbarred, charges shall be preferred by the Commission against such practitioner, and he or she shall be afforded an opportunity to be heard thereon.

(c) Upon receipt of official notice from any authority having power to suspend or disbar an attorney in the practice of law within any state, territory, or the District of Columbia which demonstrates that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without any preliminary hearing, enter an order temporarily suspending the attorney from practice before it pending final disposition of a disciplinary proceeding brought pursuant to § 1.24(a)(2), which shall afford such attorney an opportunity to be heard and directing the attorney to show cause within thirty days from the date of said order why identical discipline should not be imposed against such attorney by the Commission.

(d) Allegations of attorney misconduct in Commission proceedings shall be referred under seal to the Office of General Counsel. Pending action by the General Counsel, the decision maker may proceed with the merits of the matter but in its decision may make findings concerning the attorney's conduct only if necessary to resolve questions concerning an applicant and may not reach any conclusions regarding the ethical ramifications of the attorney's conduct. The General Counsel will determine if the allegations are substantial, and, if so, shall immediately notify the attorney and direct him or her to respond to the allegations. No notice will be provided to other parties to the proceeding. The General Counsel will then determine what further measures are necessary to protect the integrity of the Commission's administrative process, including but not limited to one or more of the following:

(1) Recommending to the Commission the institution of a proceeding under paragraph (a) of this section;

(2) Referring the matter to the appropriate State, territorial, or District of Columbia bar;

or

(3) Consulting with the Department of Justice.

**DISSENTING STATEMENT OF COMMISSIONER  
HAROLD W. FURCHTGOTT-ROTH**

**In the Matter of Amendment of Section 19.735-203 of the Commission's Rules Concerning  
Nonpublic Information**

The problem with the disclosure of non-public information – *i.e.*, leaks -- at this Commission is a cultural, not a regulatory, one. We already have on our books a clear proscription against the non-authorized disclosure of, among other things, the content of agenda items or actions taken by the Commission on circulation. *See* 47 C.F.R. section 19.735-203(a). Rather than burdening the communications industry and bar with yet another layer of regulation, the Commission should first enforce the existing rule. After all, leaks spring from the inside, not the outside, of this building.

Admittedly, it may be difficult to discern who is ultimately responsible for a given leak. But that just points up the fact that, in the end, we must rely upon the integrity of those who work at the Commission, and upon the leadership of those who head it, to ensure respectful observance of the non-disclosure rule. Unfortunately, the Commission in this item deflects from itself any responsibility for the many recent high-profile leaks that prompted today's action, instead reacting to those events by adopting new rules to govern the conduct of others. For these reasons, I respectfully dissent.

**SEPARATE STATEMENT OF COMMISSIONER  
MICHAEL K. POWELL**

**In the Matter of Amendment of Section 19.735-203 of the Commission's Rules Concerning  
Nonpublic Information Order**

This *Order* would seem to help curtail the flood of document leaks out of this Commission, but no rule change will have any effect on this endemic problem unless we vigorously enforce our own internal rules and tighten our document handling procedures.

The regular pattern of leaks of pre-decisional written material is intolerable. They damage the deliberative prerogatives of the individual Commissioners and impair the integrity of the entire agency. This brief *Order* is *part* of the solution and I support it. This rule change imposes responsibilities on certain outside parties to help the FCC's Inspector General appropriately retrieve *written* materials that are leaked. And, the new rule subjects such *outside* parties to possible disciplinary action. This step could help prevent a wider dissemination of our pre-decisional documents after they have left the premises, but I have to admit that the change does little to plug the dike in the first place.

We need stronger enforcement of our current rules, including a zero tolerance policy for all leaks. Outside parties—including the press which are correctly excluded from this new rule—who entice our valuable employees to leak non-public information should be on notice as to the peril in which they are placing their “moles.” Likewise, our employees must be well informed and educated about their responsibilities and their fate should they disclose non-public information without proper authorization. This item notifies everyone inside and outside the Commission of the possible consequences. I would also suggest that, to the extent that there is evidence that outside parties are obtaining non-public materials by other means not involving FCC employees directly or knowingly, appropriate law enforcement officials should be called in immediately.

But, it will also take more than disciplinary actions or threat of such actions against persons inside and outside of the Commission. I agree with Commissioner Furchtgott-Roth that it will take a change in the culture that has come now to expect such unauthorized disclosures as the way things are done.

I, therefore, not only support the rule changes in this *Order*, but I have joined the Chairman and my colleagues in requesting the Inspector General and the Managing Director closely and expeditiously examine the Commission's internal management of nonpublic information. I plan to personally and substantially involve myself in this task. We need strong enforcement, disciplinary action and preventative measures to make any headway toward shifting expectations and the culture of the handling of non-public deliberative materials and information.

To paraphrase Donny Osmond, “one bad apple should not spoil the whole bunch.” We have got a great group of employees who are very loyal and dedicated to this agency and I am not placing blame at any level. This is an institutional problem that needs fixing and we need the help of all parties both inside and outside the agency.