

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

In the Matter of)
)
Amendment of Section 1.17 of the) GC Docket No. 02-37
Commission's Rules Concerning Truthful)
Statements to the Commission)
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MEMORANDUM OPINION AND ORDER

Adopted: November 23, 2004

Released: November 30, 2004

By the Commission:

1. By this memorandum opinion and order we deny the "Petition for Limited Further Reconsideration," filed April 6, 2004, by James A. Kay, Jr. (Kay). Kay seeks reconsideration of (i) the Commission's action denying a petition for rulemaking filed by Kay and (ii) the Commission's Memorandum Opinion and Order denying Kay's first petition for reconsideration. Amendment of Section 1.17 of the Commission's Rules, 18 FCC Rcd 4016 (2003) (R&O); Amendment of Section 1.17 of the Commission's Rules, 19 FCC Rcd 5790 (2004) (MO&O). Kay challenges one aspect of the denial of his petition for rulemaking.

2. When the Commission amended section 1.17 to revise the standards applicable to regulatees with respect to their obligation to make truthful statements to the Commission, it also denied a petition for rulemaking that Kay attached to his comments. In his petition, Kay proposed several modifications to the Commission's investigatory and hearing procedures. The Commission found Kay's proposals without merit. The Commission stated that:

Several of Kay's proposals would unduly burden the Commission's investigatory and hearing functions.^{fn} Other matters are already adequately addressed by existing law and policy.

[fn] Kay proposes to: (1) prohibit confidential complaints, (2) make compliance with section 308(b) of the Communications Act voluntary and subject to immediate Commission and judicial review, (3) require service of a bill of

particulars before issuance of a hearing designation order, (4) separate regulatory and investigatory functions at the bureau level, and (5) bar bureaus from participating in the consideration of applications for review.

R&O, 18 FCC Rcd 4023 ¶ 19.

3. Kay sought reconsideration of the Commission's action, asserting that the foregoing discussion arbitrarily ignored the merits of his proposals. The Commission denied reconsideration. Amendment of Section 1.17 of the Commission's Rules, 19 FCC Rcd 5790 (2004) (MO&O). The Commission held:

In our view, Kay's proposals clearly threaten to impose an undue burden on the Commission's investigatory and adjudicatory processes. The first two proposals listed above would interfere with necessary access to information in investigations by discouraging informants who seek guarantees of confidentiality from coming forward to the Commission and by discouraging compliance by regulatees with Commission requests for information. The third proposal would add an unnecessary and burdensome extra layer of procedure to the adjudicatory process and impair staff discretion prior to issuing a hearing designation order. **The fourth and fifth proposals would interfere with the efficient allocation of staff resources among the Commission's operating bureaus and offices by impairing the sharing of resources and requiring duplicative efforts.** As Kay suggests, we indeed strike a different balance from the one he proposes. In no case do we find that Kay has advanced sufficiently compelling due process concerns to warrant modifying existing practice. Similarly, Kay has advanced no compelling basis to overturn existing law and practice relevant to his remaining proposals, which involve settlements, burdens of proof, the processing of applications, and discovery. We believe that existing law and practice appropriately balance due process and other public interest considerations

MO&O, 19 FCC Rcd at 5792 ¶ 8 [Emphasis added.]

4. Kay now seeks further reconsideration of the Commission's rejection of the proposal referred to above as the fifth proposal. The proposal, stated in full, is that "Applicants and Licensees shall be afforded an opportunity for truly independent Commission review of adverse decisions by delegated authority." Petition for Rulemaking, filed by James A. Kay, Jr. at 14. In his Petition for Rulemaking, Kay further explained that by this he meant that the Commission staff taking action under delegated authority should be barred from preparing a recommendation to the Commission as to the disposition of an application for review of that action as is currently done. Id. As noted above, the Commission stated its reasons for rejecting this

proposal. Kay, however, now advances an additional argument in favor of this proposal. He contends that the Commission's current practice of allowing the staff that took action under delegated authority to make a recommendation to the Commission as to the disposition of an application for review violates 47 U.S.C. § 155(c)(4), which provides that:

Any person aggrieved by any such order, decision, report or action [under delegated authority] may file an application for review by the Commission . . . and every such application shall be passed upon by the Commission.

Kay asserts that this language implies that the Commission must consider the application for review independently of the staff that took the action under delegated authority. Kay maintains that Commission consideration of an application for review is rendered a "meaningless formality" and an "empty thing" if the staff who took the delegated action makes a recommendation to the Commission.

5. Kay's further argument is without merit. In only one provision of the Communications Act has Congress chosen to prohibit ex parte communications between the staff and the Commission. That provision applies to the staff that "participated in the presentation or preparation for presentation" of the case in adjudications designated for hearing. 47 U.S.C. § 409(c)(1). That provision does not apply by its terms to the situations referred to by Kay, and we do not believe that 47 U.S.C. § 155(c)(4) implies prohibitions that it does not state. We have previously found our current practice to be fair and consistent with the law because the ultimate determination as to the disposition of the application for review remains with the Commission. See Amendment of Section 73.202(b) Table of Allotments FM Broadcast Stations, 4 FCC Rcd 3412 (1989); Petition for Rulemaking to Amend Section 1.115 of the Commission's Rules, 48 RR 2d 55 (1980).

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Limited Further Reconsideration, filed April 6, 2004, by James A. Kay, Jr. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary