

DATES: Effective March 28, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O), GC Docket No. 02-37, adopted on March 4, 2003, and released March 10, 2003. The full text of the R&O is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. Copies of filings may be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898. Filings may also be viewed on the Commission's Internet Web site using the Electronic Document Filing System (ECFS) at http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi.

Summary of Report and Order

1. In our Notice of Proposed Rulemaking, 67 FR 10658, March 8, 2002 we proposed to amend § 1.17 of our rules, 47 CFR 1.17, which relates to the submission of truthful statements to the Commission. The comments that we received were helpful in clarifying the appropriate scope of the rule, and by this Report and Order we amend the rule accordingly. We also make conforming amendments to 47 CFR 73.1015 and 47 CFR 76.939. The new rule is a clearer, more comprehensive, and more focused articulation of the standards for truthful statements than the old rule. The new rule will also enhance the effectiveness of our enforcement efforts.

2. The new rule broadens the category of persons subject to the rule by applying the requirement to: (1) Any holder of any Commission authorization, whether by application or by blanket authorization or other rule; (2) any person performing without Commission authorization an activity that requires Commission authorization; (3) any person that has received a citation or a letter of inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation; (4) in a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest, and (5) to the extent not already covered above, any cable operator or common carrier. The rule does not apply to attorneys or engineers who file statements in a representational capacity on behalf of

the entities specified. Attorneys and engineers are covered only to the extent that they are themselves the regulated entity.

3. The amended rule applies to investigatory proceedings and adjudicatory proceedings other than declaratory ruling proceedings. It does not apply to rulemakings generally but does apply to expressions of interest in proceedings to amend the FM or Television Table of Allotments and to tariff proceedings. The primary focus of the new rule is to enhance the effectiveness of adjudicatory and investigatory proceedings by providing for an expanded range of sanctions that can be imposed in those contexts. We do not see rulemakings of general applicability and declaratory rulings as raising enforcement issues of the same urgency. Additionally, while we expect parties to be truthful in rulemakings and declaratory ruling proceedings, we are mindful that such proceedings typically involve wide-ranging discussions of general policy rather than specific facts to be weighed in an adjudicatory manner. We do not wish to hinder full and robust public participation in such policymaking proceedings by encouraging collateral wrangling over the truthfulness of the parties' statements. Expressions of interest in proceedings to amend the FM or Television Table of Allotments, and tariff proceedings raise concerns that are distinguishable from those in rulemakings generally and will be subject to the rule.

4. The new rule prohibits written and oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing that the statement is correct and not misleading. With respect to both oral and written statements of fact, we follow our historical definition of misrepresentation and lack of candor, which defined as misconduct incorrect and misleading statements where there was an actual intent to deceive the Commission. We continue to believe that the rule barring such intentional deceptions, whether by affirmative misstatements or by omissions of material facts, should apply, in appropriate contexts, to both oral and written material statements of fact. We believe that in preparing written statements in fact-based adjudications and investigations, regulatees are on heightened notice that they must have a reasonable basis to believe that what they say is correct and not misleading. In these circumstances, we consider it justified to require that parties use due diligence in providing information that

is correct and not misleading to the Commission, including taking appropriate affirmative steps to determine the truthfulness of what is being submitted. A failure to exercise such reasonable diligence would mean that the party did not have a reasonable basis for believing in the truthfulness of the information.

5. Additionally, we wish to clarify that our reference to "materiality" and "Commission jurisdiction" in the rule is intended only to indicate that the representations and omissions we are concerned about are those material¹ to the issues before the Commission and that we do not intend the rule to apply to representations or omissions that are insignificant or extraneous to the issues.

6. We also take three subsidiary actions. First, our amendment of § 1.17 warrants making conforming amendments to 47 CFR 73.1015 and 47 CFR 76.939. Section 73.1015 is the counterpart of § 1.17 applicable specifically to the broadcast service. Section 76.939 applies specifically to cable operators. We see no purpose in having multiple sections contain redundant provisions. Accordingly, we amend §§ 73.1015 and 76.939 to cross reference § 1.17. Second, our revision of the rule makes unnecessary the language contained in the first paragraph of the former rule. The authority of the Commission to obtain information is set forth in various statutory provisions, for example, 47 U.S.C. 218, 308(b), 403, and does not need to be reiterated in the rule. Third, commenter James A. Kay, Jr. (Kay) attaches to his comments a copy of a petition for rulemaking filed March 5, 2002. In his petition, Kay proposes several modifications to the Commission's investigatory and hearing procedures. We have examined Kay's proposals and find them without merit. Several of Kay's proposals would unduly burden the Commission's investigatory and hearing functions. Other matters are already adequately addressed by existing law and policy. We will therefore deny the petition.

Final Regulatory Flexibility Certification

7. The Regulatory Flexibility Act of 1980, as amended (*see* 5 U.S.C. 601 *et*

¹ "Material" has been defined as "important," "more or less necessary," "having influence or effect." *See McDonald v. Murray*, 515 P.2d 151, 152 (Wash. 1973). Additionally, a "material representation" has been defined as one "relating to matter which is so substantial or important as to influence the party to whom it is made." *See In the Matter of Mark E. Wagner*, 744 N.E.2d 418, 421 (Ind. 2001).