

IN THE MATTER OF
PROPOSED TRADE REGULATION RULE FOR THE
HEARING AID INDUSTRY

Docket 215-44. Interlocutory Order, June 7, 1979

ORDER DENYING MOTION OF THE NATIONAL HEARING AID
SOCIETY

The National Hearing Aid Society (NHAS) by motion of May 22, 1979 has moved that *ex parte* communications between the Commission, any individual Commissioner, or any advisor of a Commissioner, and the FTC staff members assigned to the Proposed Trade Regulation Rule for the Hearing Aid Industry proceeding, Public Record No. 215-44, or the Director of the Bureau of Consumer Protection be prohibited in the above-described proceeding. NHAS further moves that any *ex parte* communications which have already occurred since the initiation of this proceeding if written be placed on the rulemaking record subject to judicial review, or if oral, with a summary thereof. For the reasons set forth below, the Commission denies the motion.

The basic premise underlying the motion is the claim of inherent unfairness in the Commission's procedures which restrict the ability of interested outside parties to communicate with the Commission, but permit unfettered staff contact. Thus, NHAS argues, while the Commission's recently amended Rule 1.18(c) permits outside communications at some stages of a rulemaking proceeding, it fails to subject staff contacts to similar restrictions. NHAS argues that the failure to recognize staff's role as adversarial results in inherent unfairness, thereby denying the procedural due process rights of all other parties participating in the proceeding.

The Commission, as you know, recently reconsidered this issue in amending Rule 1.18(c) of its Rules of Practice, and found that no change in its current practice is required with regard to staff communications. In so doing, the Commission specifically rejected proposals that staff members who participated in rulemaking proceedings be prohibited from communicating with any individual Commissioner or Commissioners' advisors. *See also* 42 F.R. 6056 (Nov. 28, 1977). It was the Commission's belief that the Administrative Procedure Act's (APA) provisions concerning separation functions and *ex parte* communications do not apply to Magnus-Moss rulemaking. The court in *Hercules, Inc. v. EPA*, No. 77-1 (D.C. Cir., Nov. 3, 1978), noted that the APA has long been construed as "allowing the agencies staff to assist agency administrator

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interpreting the record." Slip. Op. at 65. The court in that case refused to find that staff communications invalidated the rule and concluded that any change in the existing law should come from the agencies or Congress. Slip. Op. at 68-69.

The Commission's prior rule placed a total ban on outside communications in order to preserve the integrity of the rulemaking process and to avoid the appearance of unfair access to decisionmakers. The Commission, in amending the rule, decided that a less restrictive standard could serve the same ends, while allowing Commissioners access to potentially useful information from outside parties by requiring placement of the contents of such communications on the public or rulemaking record. The requirement that communications be made available to the public ensures that a full and complete record is accessible both to persons participating in the proceeding and to a reviewing court. This approach is consistent with that taken by the Administrative Conference of the United States in its recommendation 77-3, 1 C.F.R. 305.77-3, and has received the endorsement of Professor Davis. See, *Davis, Administrative Law Treatise*, 553-54 (2d. 3d. 1978).

The Commission also notes that Rules 1.18(a) and (b) require that information that the Commission considers relevant to the rule be made part of the rulemaking record and that the rulemaking record be publicly available. These provisions ensure that all information that the Commission relies upon in adopting a rule, including any internally generated information, will be made part of the rulemaking record and, more important, that the Commission will not consider any information not reflected in the final rulemaking record.

NHAS specifically alleges that a staff memorandum detailing the relationship between the FTC and the FDA with respect to regulation of hearing aids constitutes a harmful *ex parte* contact. NHAS also notes, however, that this jurisdictional issue was fully briefed both in the final staff report as well as in the lengthy comments submitted by NHAS rebutting the argument. NHAS argues that the inherent credibility afforded the staff memorandum by the Commission puts NHAS at an unfair advantage. This argument is unsupportable. The Commission believes that petitioners prove too much; current procedures have afforded interested parties, including NHAS, more than substantial opportunity to brief the jurisdictional and other issues fully and completely on the rulemaking record.

require all staff communications be recorded would impose substantial burdens on the Commission. The range of communications would be significant, from the trivial to the more important,

and their length and complexity could also vary. To the extent that such communications are oral, the recordkeeping requirements could be substantial in terms of time and cost, and the needs of the Commission for fast and flexible means of communicating with its staff about a complex proceeding with a voluminous record could be seriously disserved. The Commission believes that its procedures adequately provide for contacts between non-FTC personnel and the Commission and its own staff and the Commission without endangering the procedural rights of other parties in the proceeding. The Commission's Rules of Practice ensure that all relevant information that the Commission relies upon in adopting a rule will be made a part of the rulemaking record; the Commission will not consider any comments or information that is not reflected in the final rulemaking record. The petition is hereby denied.

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ORDER DENYING MOTION OF THE HEARING INDUSTRIES
ASSOCIATION

The Hearing Industries Association on May 30, 1979, filed a Motion to Prohibit Ex Parte Communications Between the Commission and the FTC Staff in the above-captioned proceeding. HIA's motion relied upon and incorporated by reference the National Hearing Aid Society's Motion to Prohibit Ex Parte Communications Between the Commission and the FTC Staff filed May 22, 1979. HIA similarly incorporates by reference in support of its motion pp. 534-542 of Volume IV of its "Final Comments" filed on February 19, 1979.

HIA's motion raises no legal or policy arguments different from those set forth in the NHAS motion. The Commission's order denying that motion is attached. For the reasons set forth therein, HIA's motion is hereby denied.