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HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 1423

TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE FOR THE ESTABLISHMENT OF A PUBLIC COUNSEL CORPORATION TO INSURE FULL PARTICIPATION BY AND ON BEHALF OF UNREPRESENTED CITIZENS IN ADMINISTRATIVE RULE-MAKING PROCEEDINGS

Part 2

MARCH 30, 1971

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CONTENTS

Witnesses and Exhibits

	Page
Banzhaf, John F. III, professor of administrative law, George Washington University, Washington, D.C.	363
Exhibit A: Student clinical team projects	365
Meyers, Peter H., chairman, Students Opposing Unfair Practices (SOUP), accompanied by Ivan White, Jack Zidel, and Fred Franklin	383
Exhibit B: Exhibits relating to SOUP petition	389
Sribnick, Howard, chairman, Student Taskforce Against Telecommunication Information Concealment (STATIC), accompanied by Robert Ross, Stephen Spivack, David Swersky, and Arthur Wineburg	474
Exhibit C: Exhibits relating to STATIC petition	378
Hannaway, Larry, chairman, Future Lawyers Investigating Transportation Employment (FLITE), accompanied by Gene Mechanic, and Mark Weinstein	510
Exhibit D: Exhibits relating to FLITE petition	517
Slippen, Richard, chairman, Fight To Advertise the Truth About Saturates (FATS), accompanied by Barry Baime, Howard Feinstein, Susan Lautz, and Howard Zimmerman	538
Exhibit E: Exhibits relating to FATS petition	543
Koch, Arthur, chairman, Law Students' Education for Buyers' Education in Labeling (LABEL), accompanied by Louis Kaufman, Gary Laden, Joan Levy, and Ellis Saull	587
Exhibit F: Exhibits relating to LABEL petition	593
Permer, David, chairman, Students Hot on Conserving Kilowatts (SHOCK), accompanied by Susan Hentel, Melvin Lefkowitz, and Mark Steinberg	658
Exhibit G: Exhibits relating to SHOCK petition	663
Nemkov, Peter, chairman, Termination of Unfair Broadcasting Excesses (TUBE), accompanied by Jon Bowers	683
Exhibit H: Exhibits relating to TUBE petition	688

PUBLIC INVOLVEMENT IN THE ADMINISTRATIVE PROCESSES

TUESDAY, MARCH 30, 1971

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICES AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy.

Also present: James F. Flug, chief counsel; Thomas M. Susman, assistant counsel.

Senator KENNEDY. The subcommittee will come to order.

We are here today to ask a very direct question: Do we really have a government of the people, by the people, and for the people?

Is our government of the people if vital decisionmaking goes on in secret, deep within the recesses of a vast bureaucracy, carried on by officials who are only responsive to the pleadings of special commercial interests?

Is our government by the people if the public has neither opportunities nor resources to participate in the decisionmaking processes that affect every aspect of our lives from the price of gasoline to the taste of water?

Is our government for the people when the results of federal decisionmaking is to give us cans of dog food with a full listing of ingredients on the labels and cans of baby food with mystery ingredients, or to give oil companies fantastic windfalls at the expense of homeowners' heating bills, or to allow gas companies to promote gas use on TV specials at the same time that they are being given special advantages because of an alleged shortage of gas?

The ranks of those who are ready to answer these questions in the negative are full of famous names:

Ralph Nader claims that "most Americans are shut out of the Federal administrative and regulatory system."

Mason Williams wrote that "Government makes better deals with business than it does with people."

Paul Tillich writes: "There is a tendency in the average citizen, even if he has a high standing in his profession, to consider the decisions relating to the life of the society to which he belongs as a matter of fate on which he has no influence."

Nicholas Johnson puts it bluntly: "The government is not working."

John Gardner observes that "most parts of the system have grown so rigid that they cannot respond to impending disaster. They are so ill designed for contemporary purposes that they waste taxpayers' money, mangle good programs, and frustrate every good man who enters the system."

And President Nixon, most recent critic of the structure of American Government, says that "most Americans today are simply fed up with government at all levels."

It does not take a theologian, a writer, a government official, a famous public interest advocate, or even the President of the United States, to observe that governmental structure are not responsive to the people's interests. Nor does it take a seer to know the alternatives of what we can do about it. Those within the system can work to change it. That is what Congress and the President are up to, with consumer protection agencies, public advocate agencies, and government reorganizations. Those outside the system can work to bring pressures for change from without. Ralph Nader is doing this, as are the growing ranks of public interests organizations across the country. Or we can lose faith in the system completely and either ignore it or try to tear it down weathermen-style.

The participants in today's hearing have chosen the second course. They have decided to become personally involved with the processes of government. The groups of law students who are with us today know first hand that while the average citizen depends on, and often looks to, the government to protect him and to promote his welfare, often the agencies charged with those functions are looking the other way.

These students saw deceptive advertising on television, and wondered why the Federal Communications Commission was saying nothing. They knew that a number of additives in food products—including substances possibly harmful to some persons—were not listed on the labels, but thought that the Food and Drug Administration was supposed to be enforcing a tough Federal truth-in-labeling law. They heard advertisements promoting all-electric living at the same time the city was experiencing brownouts, and they believed that the Public Service Commission should do something about it.

In short, these students believed that government agencies weren't doing enough. They didn't just talk about the problems, however; they set out to do something about them. In the best tradition of the public interest lawyer, they undertook extensive studies and research. They prepared sophisticated and complex legal documents, and then they went to the Government agencies petitioning for action. Opposing them were some formidable corporate foes: the broadcasting industry, Coca-Cola, Campbells, Firestone, Potomac Electric Power Co., and the airlines. Yet these young advocates succeeded more often than they failed.

The successes have been noteworthy, and they may make a difference in our lives. The failures so far, however, have mainly been procedural. In large part, they have been failures of the agencies: failure to reply, failure to respond, failure to act. We will hear more of these successes and failures during this morning.

The law students we have with us today, no less than those students who take to the streets to demonstrate, are trying to bring about

change through confrontation. They are confronting the administrative process as well as Government agencies. They are challenging that process to accommodate itself to public participation and they are challenging the agencies to consider the views of the public—views usually unheard in administrative proceedings.

As Federal activities expand and as State regulatory functions and programs grow, it will be more and more important to encourage public involvement in governmental decisionmaking on all levels. The activities of the law students appearing here today can serve as examples of what can be done, of what must be done, to bring about a greater responsiveness of the Government to the people.

We on this subcommittee are particularly interested in their experiences because we will again be considering this year a bill to strengthen and expand public representation before Federal agencies through the establishment of a Public Counsel Corporation. The bill was introduced last year as S. 3434 and the hearings we held on it showed broad support for the concept of Government support and financing of an institution to promote representation of the underrepresented public through the Federal decisionmaking machinery. As a result of suggestions we received we have revised and improved the bill and I will reintroduce it on the floor of the Senate today. Copies of last year's version and the hearings held on it are available now for those interested.

Prof. John Banzhaf, who supervised the working of these students as part of his course in administrative law, is here to give us a general introduction to the work of these students. This subcommittee was fortunate to have Professor Banzhaf testify before us almost 2 years ago, and it is indeed a pleasure to have him back. We want to welcome you and tell you how much we appreciate your appearance here before the subcommittee today.

STATEMENT OF JOHN F. BANZHAF, III, PROFESSOR OF ADMINISTRATIVE LAW, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

Mr. BANZHAF. Thank you very much, Senator Kennedy. I am very happy to be here this morning to testify with some of my students on the general topic of citizen intervention and public representation before Federal agencies.

In a few moments it will be a privilege and an honor for me to introduce to you seven student legal action groups or organizations which have been engaged in significant administrative actions. However, before I introduce them perhaps I can best explain a little bit by way of background how we came to have these seven groups which are only a sample out of approximately 24, and range on the one hand from SOUP to on the other hand not NUTS but TUBE. All of these groups were formed as a part of a class which I teach in Unfair Trade Practices at the George Washington University National Law Center.

As you probably recall, part of the problem with law school and law school teaching is that the students obtain no practical experience. They go out into the world, unlike doctors, ready to practice their profession, many of them not knowing what a legal document

looks like. One of the primary purposes of this program and this exercise was to give the students practical experience, to force them to research problems and plan legal strategy like attorneys.

Even more important, my purpose in establishing this exercise was to introduce them to an entirely new concept of law. Ninety percent of what we teach and what they learn at law schools concerns what a colleague of mine called badman law: learning simply to deal with the individual problems of individual citizens, drafting a will, reducing taxes, suing somebody because a dog bit a postman and so on. But these students are learning for the first time a different, new, and unique use of the law called legal activism. It is a use of law not to benefit a particular client, but rather to do something significant about a major social problem. In doing these exercises they learn about legal activism first hand and they learn the basic techniques: techniques which are applicable far beyond this very narrow confine of unfair trade practices; techniques equally applicable to the problems of civil rights, poverty and environmental action, and so on.

In addition to all of this, they gain practical experience and, even more importantly, confidence. They know that approached properly agencies will respond, and I think that later in their careers they will not hesitate to bring additional public-interest actions before administrative agencies. I believe their actions so far have generally been successful, and as you say, where they have not I think the problem lies mostly with the administrative agencies. I hope their legal documents and their work speak for themselves.

I hope the testimony here this morning will be helpful in a number of ways. I think first it will reemphasize the vast potential for citizen action and public participation in the agency process. The Federal agencies are often criticized, and I think most of the criticism is valid. We frequently criticize them for listening too much to industry and not enough to the public, and yet in many cases I think that part of the blame can be laid at the doorstep of the public because we have not gone to the agencies, we have not presented our positions, we have not participated in their rulemaking procedures. In short, we have not really made our voices heard as much and as loudly as we could have.

Second, I hope their testimony here this morning will present some of the problems and frustrations that small groups, not working for big industry, meet when they work and try to operate before our major Federal agencies.

Third, I think their testimony today will very clearly indicate the need for additional support, the kind of support that your bill would provide. I am thinking here of funds for the work they do. I am thinking here of establishing continuing programs. I am thinking here of out-of-pocket expenses, filing fees, and so many of the problems that they meet in trying to do battle with the major agencies and the major regulatees.

Finally, I hope that this hearing and the record of this hearing of what we have been able to do at the George Washington University National Law Center might serve as a model for other law schools; that in effect the record of this hearing might serve as a handbook for other law schools to be equally involved. For we have clearly demonstrated that any major law school—or even any law school

professor—interested in giving its students this kind of clinical experience can do so within the confines of its existing courses at little added expense; and that given the opportunity, and a minimum of guidance, law students will do a more than competent job. And, Senator, if 50 more law schools would become involved even to the very limited extent that our law school has so far, I think you would see nothing short of a revolution at the major Federal regulatory agencies—a new American revolution.

I have asked that the students, rather than going into great detail on their projects, prepare only short statements by way of introducing you very briefly to what they have done and the problems they have met, in the hopes that you, by and through your questions, will touch on those areas which are of particular interest to you. With your kind permission, we will submit for your record all of their various documents for those who wish to examine them, particularly for other student groups and law schools who would like to see what kind of work can be done by law students.

I should emphasize only two things. You mentioned that I supervise the groups. This is true only in part. To a large extent the groups guide their own efforts making their own decisions, doing their own research, and taking primary responsibility for their work. My role is primarily one of guidance.

Second, I should emphasize that all of this work is done in addition to their normal very rigorous classroom schedule of 10 to 15 hours of classroom work every week, and in addition to the preparation outside of class and all of their normal social obligations.

For the record and to further explain this work to other law schools which might wish to attempt a similar problem, I would like to insert at this point a copy of a report I prepared describing this work in somewhat greater detail. It is entitled: "An Experiment in Legal Education: Student Clinical Team Projects."

(The material referred to follows:)

An Experiment in Legal Education: Student Clinical Team Projects[1]

(By John F. Banzhaf III, Associate Professor of Law, National Law Center, George Washington University)

As part of an otherwise conventional course in Unfair Trade Practices, students were asked, in addition to their normal classwork, to undertake projects in small groups involving some current social problems in the general area of unfair trade practices. The students formed clinical project teams and participated in a variety of proceedings, primarily before regulatory bodies.

This report briefly describes the conduct of the course and the projects the students undertook, including some samples of the students' work and reactions. The experiment appears to demonstrate that a major clinical law program, of significant educational value and great interest to the students, can be conducted even within the confines of many "conventional" law school courses without major curriculum changes or additional expenses. Moreover, it indicates the value and feasibility of the clinical team project approach to law teaching.

INTRODUCTION

Clinical education in general

Clinical education, which may broadly be defined as "learning by doing," has long been an integral and essential part of higher education for many of the

[1] Copyright 1971 John F. Banzhaf III. Dedicated to the students, the faculty, and the Dean of the George Washington University National Law Center without whose support this would not have been possible. (Reprinted by permission.)

professions including medicine, education, accounting, and the physical and social sciences. No medical school in the country would think of confining the education of doctors to an examination and detailed dissection of dead bodies. Nor would they graduate a physician solely on the basis of his ability to absorb information and to answer hypothetical questions on examinations. Moreover, although several years of full-time supervised clinical work are required after graduation and before practice, and despite the ability of modern technology to simulate medical problems, medical schools nevertheless consider actual practice upon live patients with real problems as a necessary part of medical education.

Yet, as no less an authority than Chief Justice Warren E. Burger recently remarked, the case law method, based largely upon the study and analysis of appellate cases, is in many ways analogous to the study of medicine by performing autopsies on dead bodies to discover how the victims died. Clearly both are very useful techniques and effective teaching devices, yet neither can hope to produce a well-rounded professional capable of dealing with real problems of actual people. Moreover, although law, unlike medicine, does not require a period of supervised legal practice subsequent to graduation, its graduates—unlike those of the medical school—usually have little or no practical training in the handling of real problems.

The case-law Socratic-dialogue of teaching law is, and for the foreseeable future will remain, the mainstay of legal education. It has many advantages which cannot be denied, particularly for first year students. Yet even its strongest proponents admit that it has its weaknesses and limitations: the inability to provide practical experience, the restricted viewpoint from which each problem is approached, the overemphasis on abstract legal theory and under emphasis on presentation and proof of facts. Its detractors, probably including the majority of second and third year students, claim that it is boring, of decreasing utility and effectiveness, not challenging, and "not relevant" to the law as they see it. Clearly something is needed to supplement the case-law method of teaching.

Other clinical law programs

Among the earliest attempts to supplement the case-law method with some learning-by-doing was a variety of make-believe techniques including practice problems based upon real or hypothetical examples, writing and practice appellate arguments in moot court, and preparation for various phases of trial work through trial practice court. Although these are all of undeniable value in effective legal education, both students and faculty sensed that the element of unreality detracted in part from the value of the experience, and many felt that student interest and enthusiasm, and therefore student input and learning, would be greater if students had the satisfaction of working on real problems. Moreover, the problems presented in these exercises have generally been prescreened and simplified—a necessity if large numbers of first year students are to tackle them—but a disadvantage for the advanced student seeking real challenge and responsibility.

A second approach has been to allow law students to participate in an advisory or support capacity in projects including real legal problems. In some cases students research issues and prepare memoranda for attorneys and/or law professors working on actual cases. In others students work, generally on a volunteer basis, for public interest organizations involved in legal matters. In still another variation, students work as clerks in an office of a public prosecutor or other government official. Valuable as these program are, they are also not without their limitations. For one thing, students often feel that they do not have a sufficient responsibility, and that their roles are minor and relatively unimportant ones. This frequently results either in a reluctance to join the programs, or in less than enthusiastic participation. In addition, a student who is "low man on a large team" feels little responsibility for the final work product and may be somewhat less thorough, knowing that his work will be checked by others. His creativity and originality may also be diminished if he believes that his chances to materially affect the final product are small.

One of the most valuable types of clinical law programs are of the legal-aid variety in which a student actually works closely with, and may even represent, an actual client with respect to a real legal problem. However, there are severe limitations built into any such program, which do not detract from its importance but rather restrict its scope. Because the law student is work-

ing with an actual "client," close supervision and control by a member of the Bar is an absolute necessity to protect the "client" and safeguard the integrity of the legal system. This requirement, under ordinary circumstances, severely limits the number of students who can effectively receive the benefit of this educational experience without directing large amounts of faculty resources from other areas. Moreover, the close supervision and control still limit the student's individual responsibility, much to the displeasure of a number of them. As one of them once put it, "How much can you learn by writing yourself if the professor guides your hand."

A number of other limitations of the legal-aid type of clinical program must also be borne in mind. In the first place, although it provides a good training in the individual attorney-client type of law which represents the bulk of legal practice, it does not serve as an effective teaching vehicle for the practice of so-called public-interest law in which there is so much interest. Public interest law may roughly be defined as that in which the principle purpose is not to represent or benefit an identified client, but rather to advocate and advance a position of a sizable non-private but otherwise unrepresented interest group. Public interest law differs significantly from the more traditional practice in a number of important ways. Since there is now a tremendous interest in this area, a growing body of knowledge, some recognized practitioners, and the possibility for gainful employment and advancement, it seems only appropriate and fair that students who wish to study it be given the opportunity if possible. Another limitation of the legal-aid type programs is that they have traditionally been divorced from classwork so that there is no interplay and mutual enhancement by closely combining theory and practice. Finally, although this depends somewhat on the program, the legal-aid type approach may not teach the student to work as part of a small legal team, sharing equally in the responsibilities and decision making in the resolution of common legal problems.

A new approach

It is possible to formulate a clinical law program which would fill the gaps left by the legal-aid approach and be strongest where it is weakest—thus serving to compliment rather than compete with successful existing programs. As with legal aid, students would work with real problems, but unlike this earlier approach, there would be no readily identifiable individual clients. Instead, students would seek to espose some responsible segment of public interest (*e.g.*, environmentalists, consumers, etc.) of which they would be members. Rather than working on a one-to-one basis, students would form small groups so that they could work with problems of some significance and legal complexity. The several members of each group would then be in a position to divide much of the work and, far more important, to serve as a check and balance upon each other and as a source of fresh approaches. An added benefit would be that they would learn to work as a legal team—allocating work, reviewing and criticizing each other's contributions, planning strategy, making hard decisions—in much the same fashion as a team at a law firm might handle an appellate brief.

For several reasons the instructor may be able to turn over additional responsibility to the students by providing more supervision in the form of guidance and counseling, and less in the form of strict control. First and foremost, there are no individual clients where interests must be carefully safeguarded. Secondly, a duty to insure the high quality of the legal work to protect the tribunal would be lessened because of the more informal nature of agency rules governing non-adversary proceedings, and because most regulatory bodies have long since developed a variety of very flexible techniques for dealing with the tens of thousands of citizen complaints and petitions which they regularly receive. In other words, any administrative pleading which does not exhibit substantive merit and proper form will not get to first base, unlike a judicial proceeding in which the courts must rule at least to some extent on the merits of every complaint. Thirdly, the need to exercise close supervision and control to protect third parties from irresponsible attack would be lessened to the extent that the student petitions were aimed not at individual respondents but rather at seeking a broadly based agency ruling. Finally, unlike many legal-aid situations in which the student is called upon to make a variety of individual decisions, students in a group would decide major questions by majority vote and group pressure would serve to some extent as a counterweight

to individual impulses. Any decrease in the need for tight personal supervision and control would have an added benefit to the law school of allowing a far greater number to receive the advantages of this type of practical training, without greatly increased expense or the need to utilize members of the faculty who do not feel at home with this technique of legal education.

Clinical law projects of this type might be organized as a separate law school course similar to legal writing, law review, moot court or supervised research projects, but this would ordinarily require a substantial modification in the curriculum and in the allocation of faculty resources. Moreover, members of the faculty might be reluctant to consider such a substantial change until the proposal had been tested under more restricted conditions. Alternatively, these projects might be conducted as part of an existing course whose subject matter lends itself to a social-problem clinical approach (*e.g.*, Unfair Trade Practices, Administrative Law, Consumer Law, Environmental Law, etc.) in much the same way that research papers and practice problems have been used to enrich and enliven many other courses. Like research papers and practice problems, clinical projects would lead the student into a deeper understanding of the substantive material and into a better balance and coordination between abstract theory and the real problems of practice. Some of the projects might also serve as the basis for class discussion, thus bringing fresh, practical, and "more relevant" materials into the course. The students' performance in a clinical project might serve as one basis for measuring his ability in this area, since it corresponds much more closely than a three-hour final with what an attorney actually does in practice. It might in fact serve as a better measure of his mastery of the subject matter and as a more accurate predictor of eventual success. Since under this program students would do the projects in addition to the normal classwork, this approach would not require substantial curriculum changes nor additional faculty manpower, and could be done initially on a limited trial basis.

Possible advantages

For the reasons previously indicated, if student clinical-team projects could be successfully used in addition to classroom discussion in a substantive law course, one might reasonably expect to achieve the following advantages:

1. Because they are selecting their own project and are responsible in large part for its success, students will tend to be more enthusiastic and put more time and energy into their work.

2. This in turn will create an increased interest in their substantive classwork—which will be more "relevant" to them—and will lead to greater learning, understanding, and retention.

3. By working on actual projects students will gain practical experience of the kind needed by every attorney, have a chance to integrate classroom learning with practical problem-solving, and be able to test and evaluate the theories of the classroom against the realities of legal practice.

4. Through this experience students will learn, among others, such skills as legal research (particularly with current materials), fact investigation, interviewing, negotiating, legislative research and liaison, draftsmanship, administrative practices, formulating legal strategy, and more which might not otherwise be acquired in the normal law school curriculum.

5. Students working together on a project will learn the valuable techniques of working as a legal team with fellow "attorneys", and develop self-confidence in their abilities as lawyers.

6. By participating in clinical actions whose primary purpose is to advance some social goal, students will learn first hand that law can do more than merely serve to resolve specific disputes between particular individuals and/or institutions; *i.e.*, the type of law, or use of the law, which constitutes the great bulk of their law school education.

7. Students will gain experience in using techniques in which the law serves primarily as an instrument for changing social policy; techniques which are frequently quite different from those taught in law school in which the attorney is seeking to advance only the interests of a particular client. Thus, students interested in a position in the growing field of so-called "public-interest law" will gain first-hand experience which will enable them to enter the field or to decide that it is not for them.

8. Because less faculty supervisory time is necessary than for the legal-aid type of clinical law, far larger numbers of students can have the advantages

of the clinical law experience without additional burdens on law school and faculty resources.

9. The combining of practical problems with a conventional substantive law course might stimulate faculty members to include more current materials and discussions of actual problems as a focus for theoretical concepts. In addition, it may give the faculty member a wider, more varied, and more current experience with the subject matter.

10. Discussion of problems encountered by the project groups will bring the instructor closer to the students by breaking down some of the barriers to communication encountered in the classroom and by providing a basis and incentive for meaningful discussion. In short, it will combine and give the student some of the advantages of the classroom teaching approach, the seminar, and the individual consultation.

At the heart of such a program lay a basic question: *Could ordinary law students, in addition to their regular classwork, plan and conduct clinical team projects of substance and merit without the rigorous control and supervision traditionally associated with the legal-aid approach?* This two year experiment indicates that the answer is in the affirmative, and that the expected advantages were substantially realized. The next section briefly describes how the program began and how the first class was conducted.

THE FIRST YEAR OF THE COURSE

Initial considerations

The catalog description of the course in Unfair Trade Practices briefly outlines the substantive content and states that a final examination will be given. It is silent, as are most such descriptions, as to how the material will be presented and what assignments will be required of the students. These decisions have normally been reserved to the professional judgment of the individual professor and, as might be expected, vary widely. For example, in one class in Administrative Law students were asked to plan a legal attack on a current problem and several became so interested and concerned that they subsequently filed (and were successful with) the action they had planned. In another course originally described in the catalog only by its substantive content, students man a complaint center, prepare television broadcasts, and lecture to high school students. Other recently announced law school courses at other schools include a monitoring of advertisements for indications of deceptions. Thus, teaching methods are normally limited only by the articulated requirements of the school and certifying association, by the creativity and good judgment of the instructor, and by his need to obtain the cooperation of the students.

On the first day of the instructor's first class in Unfair Trade Practices, students were asked to submit an unsigned statement explaining why they had selected this course and what they hoped to learn by taking it. Despite the emphasis in the materials on the remedies open to a business which has been harmed by an unfair trade practice, the great majority of students said that they had selected the course because they were concerned about the effect of unfair trade practices on the consumer, and hoped to learn what could be done to help him. As they saw it "Unfair Trade Practices" (which does have a somewhat flexible legal meaning) included any "practice in trade" (including any business) which was "unfair" including not only false advertising and consumer fraud but also racial discrimination, the production and promotion of dangerous products, etc. In conversations with the instructor, the students indicated their willingness to take on projects related to their area of concern.

Each student was then asked, in addition to his normal reading assignment, to find and report within two weeks on an unfair trade practice of particular interest to him, and to explain what legal actions could be taken to alleviate it. Students were urged to use their own sense of fairness as an initial guide, and to research applicable precedents to determine if their practice was an unfair trade practice under existing law. The students' reports indicated an interest in a wide range of consumer problems including deceptive advertising, mislabeling, housing discrimination, deceptive packaging, etc. Although they were not required to do so, the students, in a number of cases, followed through on their individual projects by filing with a number of regulatory agencies the complaints they had recommended in their report. It was therefore with this background, including particularly the students' interest, enthusiasm, and demonstrated ability to work, that the clinical team projects were finally launched.

Selection of projects

Based upon the students' initial reports and additional suggestions, the ideas of other interested attorneys, and upon the instructor's own experience, an extensive list of possible projects was prepared. Proposed projects were restricted by the following requirements:

1. *Public Interest.*—The primary thrust of the project must not be to represent or assist an identified client or particular small group of people (*e.g.*, dwellers in an apartment building, (holders of tickets to a particular event, etc.) but rather to benefit a sizable but otherwise unrepresented group of people sharing some common characteristic or concern (*e.g.*, consumers, television viewers, those concerned with the environment, etc.).

2. *Law-Related.*—The thrust of the project must be to achieve the goals being sought primarily through a law-related action (*e.g.*, decision of a regulatory body, passage of regulation, etc.) rather than by some other technique such as public education, negotiation, organizational techniques, etc.

3. *Legal Document Oriented.*—The activities of the project must be oriented towards the production of one or more legal documents in a final form (*e.g.*, petition for rulemaking) which would fairly reflect the work of the group and form a reasonable basis upon which a grade could be based. Although the project may naturally involve a variety of activities (*e.g.*, interviewing, conducting a survey, etc.), this work would be a preliminary step in the preparation of a legal document. The legal document must be more than a mere report of work performed, and it must be reasonably anticipated that the bulk of the work would ultimately be reflected in the legal document.

4. *Time Limitation.*—Although ultimate action on the legal document, and achievement of the substantive goal sought, may not be anticipated for some time, the project must be one in which the group can acquire a sufficient background, make strategic and tactical decisions, and prepare a finished legal document(including time for prelimiary drafts) before the end of the term.

5. *Unquestioned Legality.*—The project may not involve any activity which is not unquestionably legal. Thus, a group could not assist in a rent strike (unless and within limits clearly provided by existing law), create a test situation by violating an existing law, rule, or regulation, or make an abuse or nuisance of any legal process.

In addition to the requirements stated above, several other criteria was used in evaluating proposed projects. Whenever possible projects would be favored over others to the extent that they met the following criteria:

1. *Data Base.*—As the primary purpose of these projects was to have the students utilize their legal skills of research, analysis, drafting, etc., preference was given to projects where technical information, to the extent that it was necessary for the project, was readily available in a form and from a source from which the students could readily assimilate it.

2. *Outside Guidance.*—Wherever possible projects were chosen where there were individuals and/or organizations to which the students could readily turn for information, guidance, and assistance. These might include public-spirited experts in a technical field, research organizations, public-interest lawyers with background in the area, staffs of regulatory bodies, Congressional staff members, etc.

3. *Non-Judicial Emphasis.*—Although not an absolute restriction, students were strongly urged for a variety of reasons to avoid a judicial action. Similarly, they were strongly counseled as to the benefits from their point of view of proceedings before administrative bodies.

4. *Non-Adversary.*—For a variety of reasons, students were urged to avoid proceedings involving one or a small number of identified adversaries, and to concentrate on broadly-based proposals for relief. Usually all of those potentially affected by the project action would be treated equally (*e.g.*, all airlines, all television stations, etc.).

5. *Unexpected Difficulties.*—Although clinical projects cannot be pre-screened and simplified to the same extent as research problems, moot court arguments, etc., projects where unforeseeable technical, legal, or other difficulties might readily occur were avoided.

6. *Conflict With Other Groups.*—Projects which might involve a conflict with other organizations working towards similar goals were avoided.

7. *New Skills.*—All other things being equal, projects were preferred which would offer students an opportunity to acquire legal skills to which they might otherwise not be exposed.

Once a list of possible projects meeting the above requirements and criteria was prepared, students were allowed to select the project of their choice. In addition, they were allowed to pick the members of the project group with whom they were to work. Naturally, both of these choices had to be limited by the requirement of selecting approximately five students to work on each project eventually selected.

Conduct of the clinical program

Once the projects and the members of the project teams had been selected, the instructor met with each group to make substantive and procedural suggestions, indicate possible sources of legal and technical information aimed at getting them started in the right direction. Students were encouraged to ask questions, pose alternatives, and question assumptions. They were told that one of the purposes of the exercise was to give them a large measure of responsibility for the project, and that its success and their grade depended on their ability to handle the responsiblity. They were counseled to set up regular meetings on at least a once-a-week basis, and to develop and follow a strict timetable leaving ample room for review, revision, and retyping. The students were told that the instructor would be available as often as they may need him, to give them guidance in meeting the problems they were sure to encounter.

Thereafter the instructor met with the students largely according to their request as the need for consultation arose. Some meetings were brief—usually to clarify a point or to exchange and evaluate some new piece of information—while others relating to major problems were longer and more detailed. Frequently the meetings were between the instructor and a project leader; often between the instuctor and an individual student, and less frequently with the entire project team. In addition, the instructor met twice on a formal basis with all of the project leaders to allow them to compare notes and to remind them of deadlines which had to be met.

Wherever possible, the instructor attempted to limit his supervision to serving as a source of ideas in the form of leads, suggestions, and strategies, and to provide a sympathetic ear for the discussion of problems. Every effort was made to help the student and the team see the alternatives available at each stage and to weigh the expected advantages and disadvantages for himself. Initially, a number of students were nonplused by this low-pressure form of supervision but all were able to manage the responsibility, and many later were glad in retrospect that they had been forced out of the nest to fly on their own. Actual control by ordering a course of conduct was rare, but a strongly worded recommendation from one who will eventually mark the project can usually accomplish the same result without seeming to dilute the student's responsibility.

Integration with classwork

In the classroom the case material which the students read was discussed in the usual fashion, and no more than the last 15 minutes of each class period was devoted to some aspect of the clinical team projects. Initially these 15-minute periods were used for the presentation of materials related to some skill the students would need in doing their project: *e.g.*, fact investigation, legal drafting, cooperative research, relations with legislators, etc. Subsequently each group was asked to take a 15 minute classroom period to explain their project and to highlight their major problems, which were then used as the basis for a class discussion. In this way students were able to participate vicariously in all of the projects, and to learn to play a part in the process by which attorneys tackle problems, to gain confidence from the successes of others, and were to be consoled by the setback other groups experienced. For the instructor, these sessions also served as an additional control and opportunity to evaluate the group's progress and performance. The projects were also frequently used to illustrate some substantive point brought up by the discussion of case materials.

Team characteristics

The student clinical teams formed as a result of this experiment were alike only in that they were all composed of full-time law students who undertook these projects in addition to their normal classwork, outside employment, and other family and social commitments. Otherwise, each had different objectives, faced different problems, required different combinations of skills, and achieved

different goals. Although all projects involved legal research and writing, each project also involved several additional skills such as fact investigation, interviewing, working with government officials and/or legislative staff members, administrative procedures, etc. In addition, students learned how to operate as a team, dividing the work, scheduling frequent meetings, communicating through memos, and checking each other's work product.

All project groups formed a close working liaison with one or more outsiders with background and interest in the field who served as a very valuable source of additional guidance. Each group elected a student chairman who was responsible for scheduling meetings, assigning work, and demanding adherence to the deadlines. Rather than attempting to further generalize concerning these basically different projects, the following section very briefly describes each of the first year team projects.

STUDENT CLINICAL TEAM PROJECTS: 1969

SOUP (Students Opposing Unfair Practices)

A major weakness of the Federal Trade Commission has always been its refusal to do more in cases of deceptive advertising than to order the advertiser to cease the deceptive practice. SOUP had its genesis in a classroom discussion of the F.T.C.'s role in which it was noted that this procedure did nothing to undo the effects of the deceptive ad, nor to deter future deceptive practices. SOUP's initial purpose was to convince the F.T.C. that it also had the power to order an advertiser found guilty of deception to feature in its future ads a notice as to its past deception. Such an "affirmative disclosure" would tend to discourage future transgressions, and undo at least a portion of the harm caused by the initial advertisements.

To accomplish this SOUP sought as a test case to intervene into a consent decree proceeding brought against the Campbell Soup Co. Because the Commission had not established procedures covering this type of proceeding, SOUP had to move for the right to proceed *in forma pauperis*, to obtain disclosure from the F.T.C. files, to have an evidentiary hearing, and to have an affirmative disclosure provision added to the Campbell consent decree. The F.T.C. granted them *de facto* intervention, permitted them to proceed *in forma pauperis*, to obtain substantial disclosure, and to have an oral argument before the Commission. Finally, the Commission recognized for the first time that it had the power to order an affirmative disclosure provision, but declined to order it in this particular case.

CRASH (Citizens to Restrict Airline Smoking Hazards)

CRASH was formed because, at that time, all airlines permitted the unrestricted smoking of cigarettes during flight. Their purpose was to take action to protect what they believed to be the rights of non-smoking passengers to breathe air unpolluted by tobacco smoke. Their medical research indicated that cigarette smoke was very dangerous to an estimated 40 million Americans with a variety of pre-existing medical conditions, and was a significant health hazard to all non-smoking passengers. On this basis they filed a petition for rulemaking with the Federal Aviation Administration seeking a rule which would require all commercial airlines to provide non-smoking sections. Anticipating the argument that the F.A.A. had no jurisdiction over this problem, CRASH argued on the basis of statutory construction and prior administrative interpretation that the agency's jurisdiction included passenger health during the flight.

In response to CRASH's petition the F.A.A. issued an advance notice of a proposed rule which would require separate non-smoking sections, admitting for the first time that it had jurisdiction over this problem. Shortly thereafter a number of airlines announced that they would voluntarily supply such sections. (The petition prepared by CRASH was actually filed in the name of ASH, an existing anti-smoking organization.)

BLAST (Black Legal Action for Soul in Television)

In September 1969, a coalition of Black organizations in the District of Columbia filed a petition with the F.C.C. opposing the renewal of the broadcast license of one of the city's major television stations. They charged that the station had failed to serve the public interest in that its programming was not responsive to the needs and interests of the Black people in Washington

who make up over 70% of the population of the city, and that it had discriminated against Blacks in its hiring and promotion. BLAST, working under the direction of staff members of the National Law Center's Urban Law Institute, served as the legal research arm of the petitioners.

In the course of the proceedings BLAST prepared a response to the 1000+ page answer of the station, and investigated a number of important and heretofore overlooked questions concerning the practices of broadcasters; *e.g.*, is the primary obligation of a broadcaster to the city he serves or to all viewers within a reasonable receiving range? As a result of these efforts there have been substantial changes in the conduct of the respondent station and a greater sensitivity to the needs of Blacks among other stations in the District. In addition, it substantially contributed to the climate in which Blacks are pressing their demands through established legal channels as a means of attacking the unfair trade practices of broadcasters. The petition has now been denied by the F.C.C. in a lengthy opinion and over a strong dissent. An appeal is very likely.

CONSENT

In a proceeding terminated by a consent decree, the Government discontinued the prosecution in return for a commitment by the defendant not to engage in the conduct charged. In such cases the evidence against the defendants is not revealed, and thus is not available to private litigants whose suits for money damages are often the only effective deterrance to unfair conduct in the future. CONSENT investigated some of the problems raised by consent decrees and found that although they play a major part in the Government's enforcement policies, there was a paucity of legal guidelines relating to their use. Working in cooperation with a number of sympathetic Members of Congress, they prepared a report supporting the need for additional disclosure of evidence to private litigants in such cases, and drafted a bill which would provide the needed disclosure. The bill was introduced but has not been acted upon.

SNOOP (Students Naturally Opposed to Outrageous Prying)

SNOOP's major concern was possible unfair invasions of privacy by companies which collect and maintain information about individuals for credit purposes. Their investigations revealed, among other things: (1) a shocking instance in which the credit and business of two women had been ruined by a credit report charging them with Lesbianism based soley on circumstantial hearsay evidence; (2) an equally shocking instance in which an in-depth investigation of the life of a congressional staff member was ordered when he began working on a bill unfavorable to a large industry; (3) that employees of at least one credit investigating organization were being equipped with identity cards resembling those used by Government agencies; (4) that credit investigators were encouraged to use a variety of deceptive tactics to gather information, etc.

SNOOP's major problem was to determine what was the most appropriate and effective action to take with regard to this problem. They learned that although the District of Columbia had a statute which licensed and regulated private detective agencies, credit investigating organizations had not registered. SNOOP therefore filed a complaint seeking to require the licensing and regulation of the city's largest credit investigating organization.

TUBE (Terminating Unfair Broadcasting Excesses)

Despite the efforts of the Federal Trade Commission, television continues to feature many clearly deceptive advertisements. One reason is an agreement in which the F.C.C. left the matter largely in the hands of the F.T.C. After some preliminary research, TUBE concluded that the F.T.C. could not reasonably be expected to handle this problem without the active cooperation and enforcement assistance of the F.C.C.

TUBE therefore filed a petition for rulemaking with the F.C.C. which would place some responsibility on television broadcasters for deceptive ads, and establish a series of guidelines which they could follow and rely upon. Their petition included an appendix of sample deceptive ads then being featured with emphasis on those primarily deceptive because of the unique properties of the television medium: *e.g.*, faked demonstrations, qualifications and warning notices unreadable, etc. and those aimed at children. Their proposal has received some Congressional support and members of the staffs of the F.C.C. and F.T.C. are meeting in preparation for a report on the proposal. The F.T.C. has issued several complaints against the advertisers cited, and the F.C.C. has

scheduled hearings on the problems of children's television, including deceptive ads (prompted though in large part by another petition).

CLASS (CLass Action Study and Survey)

CLASS was interested in the possibilities of using class actions as a remedy for a variety of unfair trade practices including deceptive advertising. However, existing Federal law was not conducive to this type of legal action. CLASS therefore worked behind the scenes with Members of Congress like Congressman Eckhardt and others, researching some of the major legal problems of legislation in this area. Unfortunately, as it was putting the finishing touches on a major report on one aspect of the class action problem, CLASS was advised that publicity on that aspect could only hurt the bill's chances. Placing the success of the bill over their own desire for a bit of the limelight, they therefore chose not to release their report.

CANDY (Cigarette Advertising Normally Directed towards Youth)

Despite its title, CANDY's overall concern was with the problems of consumers, as contrasted with competitors, who try to take action against unfair trade practices involving trademarks. They chose as a test vehicle the practice of candy cigarette manufacturers to package their product in packs closely resembling those of trademarked tobacco cigarettes, without a license but with the obvious connivance of the tobacco industry. Many feel that this practice tends to condition young children to purchase cigarettes as they grew older.

CANDY investigated a large number of approaches to this problem and finally concluded that virtually the only remedy open to them would be a petition to the F.T.C. asking it in turn to petition the U.S. Patent Office to remove the offending trademarks from the principal register. CANDY therefore prepared such a petition including evidence on the psychological impact of the practice on youngsters.

STORE (Student To Observe Retail Establishments)

The genesis of STORE was the observation by two of its members that prices on certain food items appeared to rise in their neighborhood food stores after the first of the month. STORE undertook a survey of a number of representative food stores in the District of Columbia and learned that there were substantial increases in prices on certain staple foods at the beginning of the month but largely in stores with a large number of shoppers on welfare. They concluded that the price rise was caused by the merchant's realization that welfare checks were mailed or received on the first of the month.

Based upon its survey study, STORE, filed a complaint with the Federal Trade Commission, alleging that this was an unfair and deceptive trade practice. In addition they persuaded a Member of Congress to introduce a bill to stagger the mailing of welfare checks in the District of Columbia, a remedy that would also tend to decrease the theft of such checks from mailboxes which always occurs around the first of the month.

PUMP (Protesting Unfair Marketing Practices)

PUMP's area of interest was the gasoline industry, and they set out to determine whether the producers and/or distributors were engaged in any deceptive trade practices, and if so how effective the F.T.C. had been in regulating them. They eventually zeroed in on two practices which they felt were particularly unfair to consumers: "dual distribution" (in which the same gasoline is sold by the "off-brand" dealer, and by the brand station at a higher price) and "exchange agreements" (under which the delivery truck for brand X may likewise refill the tanks at stations featuring brands Y and Z).

PUMP took a number of legal actions. They participated in a rulemaking proceeding and urged the F.T.C. to require disclosure of octane ratings on gasoline pumps and in gasoline commercials. They also petitioned the F.T.C. to reopen an older set of hearings on gasoline distribution and investigate it this time from the point of view of the consumer. PUMP also prepared a number of complaints against a number of specific deceptive gasoline advertisements. The F.T.C. recently issued a rule requiring the disclosure of octane ratings on gasoline pumps.

CAP (Collection Agency Project)

CAP began its project with a study to determine whether unfair trade practices were being used by collection agencies operating within the District

of Columbia. Working with a number of legal-aid organizations, they uncovered and documented with affidavits many instances of racial epithets, outrageous and clearly deceptive threats, harassing phone calls, and other practices apparently being used routinely to collect debts. The problem they then faced was to devise an appropriate and effective legal remedy.

Working in cooperation with officials of the District of Columbia government, CAP drafted a legislative package which would set up a licensing and regulatory scheme for collection agencies. It included a list of specific guidelines and a complaint and fact-finding mechanism. Both the Corporation Counsel's Office and a representative of the collection agencies have expressed tentative approval of the licensing proposal. The District of Columbia government is now holding hearings on a comprehensive consumer package including regulation of collection agency practices.

Others

One group was unsuccessful and did not complete their project, largely because of problems of liaison with another outside organization active in the area. Two students undertook special projects on behalf of a previously existing student environmental organization, and several, particularly those whose projects did not succeed, wrote reports in the nature of research papers.

Final grades

Students were told at the beginning of the course that approximately 50% of their final grade would be based upon their mark for the projects, and 50% of their final grade would be based on a final examination covering the substantive material of the course. It was hoped that this would insure reasonable class preparation and attendance, and also provide a valuable basis of comparison between the two grading approaches. Students were also told that their project grade would most likely be based on the work product of the entire group, and that they had the responsibility for seeing to it that the work was shared equally (or at least of reporting any problems to the instructor). Near the end of the term, the students found that, largely because of their own strong interests, they were spending far more time on the projects than they had anticipated. In response to the instructor's initial refusal to modify the grading system (based on his belief that a final examination was required), the students filed a unanimous petition with the Dean asking that a final grade based solely upon the projects be permitted and that the exam be made optional. The Dean, with the concurrence of the instructor, agreed.

To assist in the grading, each project group was asked to submit to the instructor the following materials:

1. All of the legal documents in final form prepared by the team.
2. All working papers including research notes, memos, records of meetings and assignments, initial drafts, etc.
3. Any other miscellaneous documents related to the group, *e.g.*, correspondence.
4. An informal report indicating what the group did, what particular problems and strategic decisions it faced, why in each case they made the decision they did, and the outside individuals and organizations to whom they turned for additional guidance.

In most cases the material was submitted in a box. In addition, the instructor met with each group captain to discuss and assess the team's performance.

The primary criteria for a grade was the quality of the final legal document, with due allowance for the legal and technical difficulties the project presented. To the extent, however, that the document did not accurately reflect all of the work which had gone into it, the instructor attempted to ascertain this element from the report, the interview, and an examination of the working papers (for example, one team spent a large amount of time in a difficult legal problem simply considering and eventually eliminating a large number of proposed alternative approaches). In almost every case the members of the group requested equal grades because all had contributed equally. These wishes were generally followed except where it was clear that one individual had done more or less than the norm.

INTERIM: SPRING TERM 1970

By the end of the Fall 1969 term each group had completed its initial work and had received a final grade. For a number of groups little needed to be done until their petition was acted upon. Quite a number of students, though, indi-

cated a strong interest in continuing the work, either following up their initial work or working in a related area. Almost all of these, however, stated that they would be unable to undertake the work unless they could in some way obtain academic credit for it. Since there was no program under which this could feasibly be done, most groups suspended activities (one notable exception was SOUP which prepared and presented oral argument before the full bench of the Federal Trade Commission).

SECOND CLASS: FALL TERM 1970

The use of student clinical team projects was continued during the same instructor's second class in Unfair Trade Practices during the Fall 1970 term. To the extent that the conduct of the second course was similar to the first, the details will not be repeated. However, one of the factors which complicated the conduct of the second course was a sizable unexpected increase in registration.

During the Fall 1969 term registration for the instructor's course was approximately 60, and it met as one section three times a week. During the summer of 1970 the instructor was advised that approximately 150 students had preregistered to take his course in the Fall of 1970, and he was given the choice of dropping about 60 students or teaching two separate sections. The instructor rather reluctantly chose the second alternative, and tentatively arranged with the Dean's office that the class would be divided into two sections; a small one combining clinical team projects with classwork, and a larger one based exclusively on the Socratic Dialogue system.

To assist in dividing the class into two sections, the instructor on the first day asked each student to fill out a form indicating his preference as to section, why he preferred that section, and his time availabilities. This revealed that over two-thirds of the students wanted to engage in a clinical project, and that it would be impossible to put them all into one section without requiring a large number to drop the course. Moreover, most of those preferring not to do a project nevertheless indicated a great interest in them, a willingness to learn about them, and even to participate on a part-time no-mark basis. This was not surprising since an informal description of the course indicated that students in the course would be expected to do projects, and students not wishing to do projects could elect to take the same course under another instructor. The instructor therefore arranged for a large section composed of both project students and non-project students, and a smaller seminar-like section composed solely of project students. In retrospect it could be argued that the instructor's concern over not dropping any students outweighed his cautious judgment since this arrangement left him with approximately 70 students engaged in projects and a 10-hour teaching load. As can be imagined, this placed a large burden on his time above and beyond that normally expended in course preparation. It seems clear that for any future course some means of limiting the size of the class to a workable number (probably no more than 60) will have to be worked out with the Dean's office.

In an effort to get the clinical projects off to a quick start, students were not asked to actually report on an unfair trade practice but rather to discuss any proposed projects with the instructor. Although it was rare for a student to be able to suggest in detail a workable project on his own initiative, students' suggestions were frequently refined and slightly redirected by a process of discussion and preliminary research similar in some ways to a law review "note-kill." Based upon student suggestions, the ideas of others including faculty members, and the instructor's own ideas, a large list of possible projects was assembled and distributed to the students. The experience gained in the first year made it somewhat easier to select appropriate projects and to avoid some with possible pitfalls.

The earlier experience had indicated that the most effective size of a clinical project team was five students. A larger number would probably have difficulty arranging meetings and coordinating the work; a smaller number would have difficulty handling significant projects and would not have an effective internal system of checks and balances. A uniform number of students would also make it easier to evaluate one project against another. Therefore, with the students as before selecting their own projects and team mates, 14 project teams were formed, 12 with 5 members each, and, because of unusual circumstances, one team of 6 and one team of 2.

The projects again covered a wide range of topics and involved different mixes of legal and law related skills. Rather than attempting to generalize further, a brief description of each project follows.

STUDENT CLINICAL TEAM PROJECTS: 1970

NOSE (Neighbors Opposing Smelly Emissions)

NOSE's projects involved a large rendering plant in Washington, D.C. which frequently emits a very noxious and disagreeable odor, making it one of the District's major air polluters. Investigation revealed that sporatic legal action had been ineffective in controlling it, and that no complaints had been filed recently because the city had adopted as a prerequisite for action a positive reading on the so-called scentometer. The scentometer is a device through which a health inspector inhales the fumes to test for a violation. The students conducted an on-the-spot investigation, interviews with a number of experts in the area, an examination of the literature on air quality monitoring and the scentometer in particular, and consulted with community leaders. They then prepared and filed with the District of Columbia government a petition asking for a change in the regulations requiring the use of the scentometer, and a return to the nose which they argued was the most reliable standard. Shortly thereafter the City Counsel held hearings at which the air pollution director stated, under severe questioning, that his department was now actively considering a change in the regulations which would make citizen complaints the basis for issuing citations regardless of the results of the scentometer test. Shortly thereafter his department noted the first violations in many months. NOSE also worked closely with a number of clean-air organizations in the District of Columbia, particularly in doing research on a yet-to-be-filed air pollution action against the rendering plant.

INFANTS (INterested Future Attorneys Negotiating for Tot Safety)

Although the law now requires the installation of seat belts and shoulder harnesses in all automobiles, these provide little protection for young children. Of the devices manufactured to protect children while driving, Ford Motor Company's Tot-Guard seemed to be about the only one of real value. Unfortunately, the students determined that it was not readily available from Ford dealers and their project was to correct this. They first documented their charges by examining the literature relating to child safety restraints and by taking surveys of the availability of the Tot-Guards at Ford dealers in the Washington area and elsewhere. They were able to show that none had them available, that customers had suffered very long delays in obtaining them, or were positively discouraged by dealers who told them that it was useless to order them. Based upon this information, INFANTS prepared a complaint to the Federal Trade Commission which would have charged that Ford was guilty of an unfair and deceptive trade practice in the nature of bait advertising. However, before filing the complaint, INFANTS wrote a detailed letter to the Ford Motor Company detailing their findings with supporting affidavits and asking them to take immediate steps to make the Tot-Guards available in the public interest, to protect their good public image, and to avoid a proceeding at the F.T.C. They also released their letter to the press. The Ford Motor Company responded warmly, thanking them for calling the matter to their attention, and promising to take steps immediately to make the Tot-Guard readily available. No complaint has been filed. INFANTS has won the support of many concerned parents, and organizations such as Physicians for Auto Safety.

HANDBOOK

The HANDBOOK organization was concerned with the problem faced by an individual, particularly a law student, who needs a ready, detailed, yet easy-to-follow guide to the Federal Trade Commission. After determining that no book meeting these criteria was available, they decided to write one, drawing on their own experience and on the experience of the other student clinical groups which had faced the problem of learning how the F.T.C. works. Their work included examinations of existing works, interviews with members of the staff of the Commission, a study of documents filed at the Commission by various groups, and talks with other interested individuals. The result of their work was a draft of a handbook guide to the F.T.C. including its structure and organization, the different kinds of proceedings, particular problems such as

intervention, scope of discovery, etc. Plans are now underway to produce the handbook for publication and several leading publishers have expressed an interest.

Interestingly enough, this group's initial project was entirely different. Originally they had become concerned that ads indicating bargain sales at Safeway did not also apply to Safeway Jr. stores, although apparently a large number of people who believed that they did were confused or misled. They were therefore actively investigating what action might be taken concerning that problem when Safeway announced that they were themselves changing the names of their Safeway Jr. stores. Faced with this very sudden and completely unexpected "victory", the students switched to the handbook project.

SMASH (Students Mobilizing on Auto Safety Hazards)

SMASH was very impressed by data accumulated by the Institute for Highway Safety which showed that bumpers on today's cars were virtually useless in preventing damage to automobiles in low-speed crashes. Although bumpers presently exist which can protect a car from damage at collisions up to 30 mph (relative speed), accidents at 5 mph cause hundreds of dollars of damage to most modern cars, and estimates are that accidents at 30 mph or less annually cost over one billion dollars. SMASH's project was to take this information and fashion it in the form of a proposal for a new standard to be submitted to the National Highway Safety Bureau. This project was somewhat complicated by the technical expertise they had to acquire, although the Institute worked closely with them and all of the necessary information was available. An additional complication was that the Bureau has jurisdiction only over safety, so that the proposed rule had to be justified from a safety standpoint. Moreover, because of the language of the statute, the rule had to specify performance rather than mechanics, a difficult drafting problem. After the project had been announced but before the proposal could be filed, the Secretary of Transportation filed a proposal for a bumper standard. The students examined the proposal, found it to be in their judgment sadly inadequate, and filed a much stronger proposal with supporting material and arguments. Both proposals are now pending and have attracted a great deal of interest.

SPIRO (Students Protesting Illegal Realestate Operators)

This project grew out of a much larger public-interest controversy concerning a real estate development which had been charged by many responsible people for fraud, influencing of public officials, adverse environmental effects, etc. It also was one project which offered students the opportunity to work with and under the supervision of a well-known Washington, D.C. public-interest lawyer. The particular facet of this problem on which the lawyer was working concerned the sale of apparently unregistered stock to purchasers of land in this development. His goals were two-fold: to persuade the S.E.C. to investigate the matter, and to prepare an action based on alleged violation of the securities laws on behalf of some land buyers seeking a refund. The problem was complicated by the desire of the land buyers to receive a refund of the money paid not only for the stock but also for the land which they claim they bought as part of one transaction. This problem, needless to say, involved some difficult legal issues relating to securities law and the scope of the transaction. The students worked with the public-interest attorney, researching legal problems, preparing memos, and drafted a letter to the S.E.C. and a proposed complain.

STATIC (Student Taskforce Against Telecommunication Information Concealment)

One of the most significant changes in a Federal agency has occurred within the last several years at the F.C.C. In large part this has been the result of the intervention of a variety of public-interest organizations in Commission proceedings and occasional appeals from Commission decisions. STATIC felt that additional participation by citizen organizations, or at least the potential threat of such intervention, would have a beneficial impact on broadcasting. STATIC believed, however, that few citizens or organizations were aware of the obligations broadcasters had to the public, nor of how a citizen group could go about enforcing these obligations. STATIC therefore filed a petition for rulemaking with the F.C.C. asking that stations be required at regular intervals to present to the viewer or listener information as to the station's obligations to the public (*e.g.*, fairness doctrine, personal attack rule, etc.) and to

advise the members of the public as to the actions they may take to see that a broadcaster lives up to these obligations.

LABEL (Law students Association for Buyers Education in Labeling)

LABEL grew out of a student's concern that some ingredients, which he believed to be potentially dangerous, were not listed on a bottle of cola. Investigation revealed that the reason was the establishment of so-called standards of identity for a variety of products, and a rule by the F.D.A. that products for which there is a standard of identity do not have to list some or all of their ingredients. LABEL investigated the statute, the legislative history, F.D.A. regulations, the ingredients of a number of products, etc. and concluded that the F.D.A. should require the disclosure of all ingredients regardless of a standard of identity. Working closely with another public-interest attorney knowledgeable in this field, they prepared a petition to the F.D.A. including supporting materials urging a change. They also worked closely with a large food chain which assisted them, and was persuaded by their arguments to voluntarily agree to label many of their own products.

Committee To Save the Peace Symbol—CANDY

In the first phase of this project, students became alarmed by several applications for registration of the well-known peace symbol as a commercial trademark. This in turn led to class discussions of trademark principles under which one may sometimes obtain protection for a mark even though it may have an established meaning. The students felt that it would be inappropriate that there are no established means by which one, without a competing economic interest, can oppose the registration. They nevertheless filed to intervene and sought to persuade the Commissioner of Patents to exercise his powers in this area. Girded for a long legal battle including the filing of formal documents opposing the registration, the Committee to Save the Peace Symbol was delighted to find that the Patent Office was persuaded by their arguments and agreed not to register the peace symbol or colorable imitations as a trademark. The students, then at mid-term, thus sought a new project in a related area.

They selected a petition prepared last year by a group called CANDY which opposed the use of a tobacco cigarette trademark on candy cigarettes, and sought cancellation of an existing cigarette trademark. Unfortunately, the latter petition had been prepared hurriedly since the former CANDY group spent a large part of their time simply eliminating a large number of alternative approaches. CANDY therefore reexamined and rewrote the original petition, including the addition of a new statutory basis.

SHOCK (Students Hot On Conserving Kilowatts)

SHOCK was concerned with the problem that electrical power companies continued to promote the consumption of additional power at a time when we are unable to meet even present demands, and when blackouts and brownouts are not uncommon. SHOCK examined the law and recent proposals in this area and then studied PEPCO, the local power company for the Washington, D.C. area. Based upon these studies, they prepared and filed an extensive petition complete with supporting information with the agency responsible for regulating the utility seeking: (1) a ban on advertising for increased consumption until such time as the company can demonstrate its ability to supply present needs including peak demand; (2) a modification of the existing rate scale which serves to promote additional consumption; (3) a requirement that a fixed small percentage of the company's revenues be used for research and development to increase system reliability and reduce adverse environmental impact. Although no formal action has yet been taken on the petition, several members of Congress have expressed an interest in their proposals, some of which had previously been adopted or at least proposed by other utilities or regulatory agencies.

ASH Project

The students who formed this project expressed an interest in working with an existing public-interest, legal-action organization rather than starting their own new project. From several proposed organizations they selected ASH. Their project consisted therefore of research and the drafting of documents in areas of interest to the organization which included: (1) a petition to the F.C.C. relating to anti-smoking messages which was partially successful; (2) a submission in the F.T.C. rulemaking proceeding involving disclosure of tar and

nicotine in cigarette ads; (3) the question of whether cigarettes can be classed as a drug so that the F.T.C. could seek a preliminary injunction when necessary to protect the public interest; (4) other areas relating to television.

SAME (Students Against Misleading Enterprises)

SAME's concern was with advertisements for products which are either identical or substantially the same as other products with which they compete, but which nevertheless advertise so as to create the impression that their product has unique or superior properties. Several proposals to attack this problem were considered including complaints against particular deceptive ads, a proposal requiring advertisers to disclose certain properties of their products, and others. The students consulted with a number of individuals and organizations active in the field including Consumers Union. They eventually concluded that the most prudent step would be to open the door slightly on this problem at this time, and reserve more sweeping proposals for a later day. They therefore prepared and filed with the F.T.C. a petition for a rule which would require manufacturers of products which are chemically identical (*e.g.*, aspirin, bleach) to advise the public of this fact in their ads, and to refrain from making any claims or comparisons which might lead the public to the contrary. The petition is now benig considered.

PRINT (Public Release of Information and Transcripts)

PRINT was concerned with the policy of at least one regulatory agency forbidding the copying of their transcripts without a very large payment to cover stenographic costs. Their first approach was to write letters opposing this rule based on a theory that this was tantamount to a copyright in public works which is prohibited by law. This was unsuccessful, so they took what appears to be a more reasonable position by petitioning for a rule which would permit public-interest organizations access to these materials at a nominal fee. This second proposal is still pending.

FLITE (Future Lawyers Investigating Transportation Employment)

Of all of the Federal regulatory agencies, probably only the F.C.C. has made even an attempt to insure that those subject to its regulatory powers comply with the statutory and presidential mandates relating to non-discriminatory hiring. This in turn was probably caused primarily by the intervention of public-interest organizations into its license renewal proceedings, and a petition for rulemaking on this matter which was successfully filed by a religious organization. FLITE's purpose was to see if the same techniques could be successfully applied to another regulatory agency, the C.A.B. FLITE familiarized itself with the operations and procedures of the C.A.B., and with that factual data was available with respect to possible discriminatory practices in the air transport industry. It consulted with individuals, the E.E.O.C., associations of pilots and stewardesses, and others. Then, in a combined effort to persuade the C.A.B. to act quickly on this matter, FLITE filed a petition for rulemaking urging a rule which would require an examination of an airline's performance with respect to hiring and promotion of minorities as a condition of approval of mergers, route changes, etc., and a petition to intervene in an existing proceeding to press the same point. Their petition for rulemaking has been accepted by the Board for consideration, and they have just filed a petition in support of their application for intervention. At least one Senator has written in support of their position. Needless to say, if FLITE is even partially successful, it could have a large impact on the area of minority rights.

FATS (Fight to Advertise the Truth about Saturates)

The FATS project was prompted by a massive study conducted under the auspices of the Inter-Society Commission for Heart Disease Resources which recently concluded that the ingestion of certain forms of fats is a major contributing cause of heart diseases and deaths and, even more important, that changes in diet can significantly reduce the risk of this number-one killer. The Commission recommended that foods be labeled to show the quantities of the various types of fats contained. FATS, utilizing this report, and the advice, suggestions, and studies of many other prominent medical researchers and organizations, filed a petition with the F.D.A. asking them to promulgate a rule which would require the disclosure of the fat content of a number of products, and a specification as to the type of fat (unsaturated, poly-unsaturated, mono-unsaturated). Another problem which FATS uncovered in the course of their investigation

was that, although the public as a result of advertisements associated "pure vegetable oil" with unsaturated fats (which present little cholesterol problem), coconut oil, which is a vegetable oil, was very high in saturated fats (which do present a cholesterol problem). Moreover, coconut oil is increasingly being used in a variety of dairy substitute products although the label lists only "vegetable oil." Thus, a second part of the FATS petition asked the F.D.A. to require manufacturers to specify the type of vegetable oil used. It was recently reported that the F.D.A. is about to issue both rules which FATS requested.

CONCLUSION

As previously stated, at the heart of the program lay a basic question: could ordinary law students, in addition to their regular classwork, plan and conduct clinical team projects of substance and merit without the rigorous control and close supervision traditionally associated with the legal-aid approach? The answer appears to be clearly yes. In evaluating the quality of the legal work the reader may also wish to consider as one factor the results that have actually been achieved. SOUP's petition, which led to a ruling that the F.T.C. had the power to order corrective notices in the advertisements of respondents found guilty of deceptive advertising, has been hailed as one of the most important decisions in the F.T.C.'s history. Several Commissioners, in their opinions and other writings, have praised the work and accomplishments of the students. Subsequently, the Commission again recognized their skill by agreeing, for the first time in their history, to admit a public interest group (SOUP) as an intervenor in an adversary proceeding. Staff members at the F.T.C. have indicated privately to the instructor that the PUMP petition in support of a proposed ruling requiring the posting of octane ratings was one of the best they had seen. In any case, the F.T.C. subsequently enacted the rule. TUBE's petition, which asked for F.C.C. action against the problem of deceptive ads, is now receiving serious study and has precipitated conferences between the F.T.C. and F.C.C. staffs. Meanwhile, a number of the ads cited as deceptive in their petition have been the target of the F.T.C. complaints. In direct response to CRASH's petition, the F.A.A. issued an advance notice of a proposed rule which would require non-smoking sections on all airlines. In so doing they accepted CRASH's argument that despite some statutory uncertainty the F.A.A. had jurisdiction over this matter. Incidentally, the F.A.A. rejected a related petition filed on behalf of Ralph Nader by his attorney asking for a ban on cigarette smoking based in part on an alleged safety hazard caused by on-board smoking. These four petitions were selected for inclusion in this report largely because they had been reprinted in small type in the Congressional Record. At least in the instructor's judgment, there were others which have been as good.

All of this is not to say that all of the projects were completely successful, or that most of them could not have been better done, or that the instructor's structuring of the course was the best possible. It must be remembered that even in the best tried-and-proven programs the quality of the student work varies and some may not do well at all. Moreover, one of the purposes of an initial small experimental program is to learn the weaknesses so that they can be strengthened in subsequent programs drawing upon the earlier experiences. Although the instructor believes that the two experimental programs were clearly successful and that the proposed advantages earlier stated were substantially realized, there are clearly areas where improvements could be made. One of the major weaknesses of the program was the inability of the students to carry on with a project under law school auspices once the course had ended. The program would be greatly strengthened if means could be provided so that the projects could continue and/or expand into related areas with new students joining and learning in part by working with more experienced students. This actually happened with only one project. It is also clear that 14 projects on top of a 10 hour-a-week teaching load is far too much for one instructor to handle well without a great deal of additional work and sacrifice on his part. Substantial improvement could be made in that area either by limiting the number of students in the course, or by shifting more faculty resources into this area. It is also not clear whether the clinical team program would be better as a separate course rather than as part of a substantive course like Unfair Trade Practices, and the idea of a separate program should be considered. It should be emphasized, however, that all of the above

would probably require substantial curriculum changes and faculty approval, and thus were not options available to the instructor. His choice was between teaching a second course in Unfair Trade Practices along the same lines as one taught by a more experienced instructor, or of utilizing a new teaching method on a limited experimental basis to determine its feasibility either in such a limited role or as a program which might grow as experience dictates.

Other law schools may wish to consider similar programs based on their own needs. Additionally, individual faculty members may wish to incorporate these techniques into their own courses on an individual experimental basis. Law teaching, like law itself, cannot serve its great purpose by remaining static—it must continue to grow and improve by a process of innovation, experimentation, and reevaluation. To paraphrase Mr. Justice Cardozo's description of the judicial process: The techniques of legal teaching have never been treated as final truths, but rather as working hypotheses, continually retested in those great laboratories of legal teaching, the classroom. Each new class is an experiment.

Moreover, as Chief Justice Warren E. Burger stated recently to the American Bar Association:

"*THE MODERN LAW SCHOOL IS NOT FULFILLING ITS BASIC DUTY TO PROVIDE SOCIETY WITH PEOPLE-ORIENTED COUNSELORS AND ADVOCATES TO MEET THE EXPANDING NEEDS OF OUR CHANGING WORLD* . . . I hasten to add that not all Law Schools have failed to see the need for what might be called 'clinical' or 'practical' exposure of law students to the realities they will face in practice. Those schools which treated Langdell's method as a platform on which to build realized that the appellate case study method is really an 'autopsy' process with the record as the lifeless body and the appellate opinion as a post-mortem report. A goodly number—but far too few—have shaken off the dead hand of the past and have begun to work toward what we now call 'clinical' methods of teaching, but *even the best of these efforts must be broadened.* An increasing number of law professors have become involved in activities outside the Law School and in turn have related their practical experience in their teaching. A growing number have taken part in government and community work and as volunteer counsel for the poor in civil and criminal cases . . . We find a growing number of Law Schools involving their third year students in civil legal aid or public defender programs or as 'interns' to various government offices. *These are among the most encouraging developments in the past 30 years or more, but they represent hardly more than a slice of the available loaf of practical work which could be exploited in legal education.* . . . The recent development of teaching law through 'clinics' is one of the first new steps taken in legal education since Langdell's 'case method.' . . . *This is one of the encouraging signs that there is much ferment; it must be encouraged; and at this state it would be a mistake to try to channel all of the many and varied innovative Law School programs into any kind of mold.*" (Capital letters in the original, other emphasis added.)

Mr. BANZHAF. I think one of the problems with law schools is that clinical law programs such as this are sandwiched in between everything else and not given the rightful place that they should have. Given more time, given more resources, given a continuing program with proper guidance, I think even the vast successes which we have seen so far could be greatly surpassed.

It is now my privilege and honor to introduce to you the first group which will testify before you. The group is called SOUP, deriving its name from one of the principal combatants in the initial forray they had at the Federal Trade Commission, and it stands for students opposing unfair practices. Speaking on behalf of the group will be Peter Harwood Meyers, and sitting with him will be Ivan White, Jack Zidel, and Fred Franklin. I think that their group is particularly significant because of the very important successes they have had—nothing short of revolutionizing the Federal Trade Commission—and because they demonstrate quite clearly the impact

that even one small students group can have on a major Federal regulatory agency.

Mr. Meyers?

STATEMENT OF PETER HARWOOD MEYERS, CHAIRMAN, STUDENTS OPPOSING UNFAIR PRACTICES (SOUP); ACCOMPANIED BY IVAN WHITE, JACK ZIDEL, AND FRED FRANKLIN

Mr. MEYERS. Senator Kennedy, 2 years ago the FTC had only one remedy for companies alleged to have engaged in deceptive advertising—a so-called consent decree which said in effect go and sin no more. Today the FTC has tentatively ordered six companies to publish notice in forthcoming ads advising the public of their past deceptions, and has in addition proposed such new remedies as restitution. Less than 1 year ago the FTC, the agency supposedly closest to the consumer, had never had a consumer group participate in one of its adversary proceedings. Today the commission has agreed to admit consumer groups in appropriate proceedings and one such proceeding is now in progress which is questioning the basic underlying assumption of all advertising. SOUP is proud to have been responsible in large part for these changes, and is honored to be here today to indicate how even a small, underfinanced, and inexperienced group may nevertheless be able to have a significant and beneficial impact on a major regulatory agency.

In 1969 the Federal Trade Commission charged the Campbell Soup Co. with deceptive advertising for placing clear glass marbles in their bowls of soup used for display ads. The effect of the marbles was to force all of the solid ingredients to the top of the soup and thus give the false impression that the soup was bursting with solid ingredients. The Commission proposed a standard cease-and-desist order, which would have required Campbell Soup to do nothing more than "go and sin no more."

Since Campbell had discontinued its ad before the order would become effective (which is all too frequently the case), the order would have no effect at all, and would neither deter Campbell or any other manufacturer from engaging in deceptive ads nor serve to undo the effects of the deceptive ad. SOUP examined the FTC statute and legislative history and applicable case law and determined that it could do far more than issue this totally ineffective order. SOUP therefore decided to enter this proceeding and use it as a test vehicle to convince the FTC of its vast unused powers.

Unfortunately, there were many obstacles. The FTC would not allow us to examine any of its files to learn what we needed to know to prepare an effective petition; even the simple question of whether the alleged ads ever appeared on television was too "secret" to be revealed to a mere member of the general public. The FTC also required that all documents be submitted not in triplicate or quintuplet but in twentyuplet—20 copies. Since SOUP anticipated filing hundreds of pages, this was a financial burden we simply could not meet. Finally, and most importantly, the FTC had no procedures to permit consumers to intervene in its consent order proceedings and accordingly denied our intervention.

To make a long and drawnout story short, SOUP was able to win a number of significant victories. The Commission responded to our petition and permitted us to examine much of its files and to proceed in forma pauperis; submitting only one copy of each document rather than 20. The Commission permitted SOUP to orally argue its motion for intervention. Finally, and most significantly, although the Commission declined to order an affirmative disclosure in the Campbell Soup case, it did heed our petition and agreed that it had the power to order respondents to run corrective notices in their future ads. The Commission said that it would order them in the future in appropriate cases.

True to their word, the Commission has proposed the affirmative disclosure remedy in six other cases on its own initiative. In the Hi-C case against Coca-Cola for false nutritional claims for artificial fruit juices, the proposed order would prohibit nutritional claims for a year unless Coke disclosed that the Commission had challenged the Hi-C claims as false and deceptive. In a case against Standard Oil for false antipollution additive claims, the proposed order would prohibit gasoline advertising for a year unless Standard Oil disclosed the Commission's findings as to the ineffectiveness of its F–310 additive in future ads. Similar disclosures are included in proposed orders against Du Pont for false demonstrations of the antileak properties of Zerex antifreeze and the failure to disclose that damage may result from its use; against the Chemway Corp. for false germ-fighting properties and the danger of the use of mercury coating on its Dr. West toothbrushes; against Ocean Spray Cranberry, Inc., for false nutritional claims for its cranberry juice cocktails, and against the ITT Continental Baking Co. for false nutritional claims for Wonder Bread and other products. In each of these cases involving important questions of public health, nutrition, or environmental impact, the public for the first time will hear in future ads the other side of these deceptive claims and the advertiser will have to bear some burden for deceiving the public.

Following the decision in Campbell Soup, our group searched for a case in which the affirmative disclosure remedy would be clearly appropriate. The Commission had charged the Firestone Tire & Rubber Co. with having falsely advertised the prices, and—more importantly—the safety and stopping capacity of certain of its tires. Because Firestone had refused to agree to a consent decree, the issue had been set down for formal adjudication. SOUP moved to intervene to present evidence and argument in favor of the affirmative disclosure clause. After two initial rebuffs, the Commission for the first time in its history agreed to let a consumer group formally intervene into its adjudicatory proceedings.

The *Firestone* case will in all probability be the case in which it is finally decided whether or not the Commission can order affirmative disclosure, restitution, or any other novel forms of relief. Consequently, it has attracted a great deal of attention and the Association of National Advertisers has been also granted permission to intervene. Strangely enough, ANA is attempting to convince the Commission that advertising has no long-term effect, a position seemingly at odds with the underlying basis of advertising. SOUP, which at this point in the proceedings has retained a public-interest at-

torney to assist it, is presenting evidence instead that advertising does in fact have a long-term and lasting effect which, if deceptive, needs to be counteracted by some means to protect the public.

The most important remaining question for the FTC is the extent to which the public can actively participate in proceedings of the Federal Trade Commission. Frankly, we can't see how the Commission can protect the public unless it can hear from them. Although the Commission granted SOUP formal intervention in the *Firestone* case, this was experimental and it remains to be seen whether other groups in other cases will likewise be permitted to intervene. In a sense, the burden has now shifted to many of the consumer organizations who claim that the FTC is not effective and not protecting the public interest; the door is apparently open for them to walk in and attempt to persuade the FTC to act. However, the great bulk of the Commission's work is still done in consent decree proceedings in which the companies and the Commission meet and agree in secret on the terms of orders. So far the Commission has refused to grant consumers intervention in these proceedings, and SOUP is now in the U.S. court of appeals seeking to persuade the court to do so.

Gentlemen, if you are somewhat surprised that just a few inexperienced law students, working in their spare time and with no financial resources, were able to do so much at the Federal Trade Commission, please be assured—we were all just as surprised. It was a fantastic learning experience for all of us, and one from which we only hope other law students can also benefit. This experience also illustrates, we believe, the vast untapped potential of the regulatory agencies. If more organizations were able to meaningfully participate and effectively in the Federal regulatory process, the agencies might actually begin to protect and serve the public interest.

Thank you.

Senator KENNEDY. Thank you very much, Mr. Meyers.

Let me ask you how you got into these particular areas of concern relating to that particular agency? How did you decide which issues you would try and pursue? Were these the most notorious examples which readily appeared to you, or how did you make that decision?

Mr. MEYERS. As I said before, Senator, we have been involved in two proceedings, one against Campbell Soup Co. and one against Firestone. The Campbell Soup case was selected because of its ordinary nature and, of course, it was not an exceptional case as concerns public health or safety. It was a standard deceptive advertising case, and we were attempting to point out that the standard cease-and-desist order which the Federal Trade Commission issues should be much stronger. When we were denied intervention in the Campbell case, the Commission indicated one of the considerations which it considered in determining the importance of the case was whether it involved the public health or safety. This was the primary consideration we used in determining to intervene in the second case, the Firestone proceeding. In that case the Commission had charged Firestone with deceptively advertising the safety and stopping ability of its tires. We believed the Firestone case would be essentially appropriate because it did involve the public health and safety.

Senator KENNEDY. Would you say that the FTC only grudgingly let you participate in the procedures of the case, but not the substance of it? Or how would you characterize their cooperation and response to your efforts?

Mr. MEYERS. There was no doubt that the Federal Trade Commission in the Campbell Soup consent-order procedure allowed us to participate as fully as their present rules would allow. We were arguing to the Commission that the present consent-order rules which merely permitted written comments or views to be submitted to the Commission were inadequate to resolve the question we were raising. That is, the only significant thing the Federal Trade Commission did not give us, which we had requested, was an evidentiary hearing so that, in addition to making our views known to the Commission in written form, we could actually introduce evidence.

Senator KENNEDY. Well, did you reach any conclusion at the end of your investigation whether those rules should be changed by the Federal Trade Commission?

Mr. MEYERS. We are convinced that the Federal Trade Commission rules governing consent orders will have to be changed to allow two specific things, Senator. First, to allow formal intervention by consumer groups in consent orders, as they are authorized to do in their adjudicatory proceedings; and second, specifically to authorize the holding of evidentiary hearings when substantial questions of law or fact are raised.

The Federal Trade Commission has indicated that both of these problems have been referred to its advisory committee. We do not know the status of them at the present time.

I could point out to you, Senator, that the Campbell Soup appeal is requesting the U.S. Court of Appeals for the District of Columbia to require the Federal Trade Commission to do this without any rule changes.

Senator KENNEDY. In your review of the relevant statute, do you see anything that prohibits the Federal Trade Commission from establishing this sort of rule. Is this just a question of administrative procedure on their part, or does it take additional legislative action to facilitate relief you have just outlined?

Mr. MEYERS. We are convinced that the Federal Trade Commission statute, as originally passed by the Congress in 1914, and as amended in 1938, does encompass our relief, and additionally, innovative relief which the Federal Trade Commission has never attempted to use. I think one of the problems at the Federal Trade Commission is timidity. It is a problem they face and have faced throughout the years; that is, unless it is clear and it has been established in a number of cases, they are afraid to go ahead and attempt to think out and use new and more effective types of relief. I think, as my prepared statement indicated, Senator, the Federal Trade Commission is now beginning to experiment and beginning to take the attitude that if they think that something is necessary and desirable, they will attempt it. If the courts tell them then that they do not have the power, they will come to the Congress to ask for it.

Senator KENNEDY. Do you see a change in the attitude of the agency generally over what it was a year and a half or 2 years ago, in

terms of the kind of cooperation they are giving to interested consumer groups?

Mr. MEYERS. I think very definitely, Senator Kennedy, and I think this is a product of the pressure put on the Commission not only by SOUP but by the atmosphere created by a number of organizations which have investigated the Federal Trade Commission and made these reports public, as well as pressure put on by the Hill, yourself included, Senator.

Senator KENNEDY. Let me ask you, while you and your group was involved in this effort, did you run across other groups that were petitioning the Commission itself in behalf of consumer interests, or were you the only group that was working with the agency itself?

Mr. MEYERS. To our great surprise, we were the only one.

Senator KENNEDY. Well, who is protecting the public on a continuing basis before the Federal Trade Commission? I would be interested in getting the reactions of the others this morning on who is looking out for the public interest, especially in rule-making procedures, before the agencies they dealt with. Is there anyone that you know of?

Mr. MEYERS. Not that I know of.

Senator KENNEDY. Do you see the value of having a Public Counsel Corporation that would be empowered by the Congress to involve itself in constructive and positive ways to insure that the public interest is represented in agency decisionmaking? We are not just talking about the poor; we are talking about the middle income and even the rich, who are being deceptively treated by the actions or inactions of various agencies. Do you think that such an advocate would be of some value?

Mr. MEYERS. I would go beyond "of some value" and I would say that it is absolutely necessary, Senator, if the rulemaking proceedings will come out with the rules that give the greatest protection to the public.

Mr. BANZHAF. Senator, perhaps I can give a concrete example here from a group which is not with us this morning. Last spring we learned that the Federal Trade Commission was considering, apparently on its own initiative, a proposed rule which required labeling on all apparel and garments to tell what kind of care was required, and this was to have been a label that would have been permanently attached to the garment and would tell how it should be washed; for example, if it should be washed in warm water, or cold water, or spindried, or otherwise. It sounded like the greatest thing for the housewife since the automatic washing machine, and the Federal Trade Commission was anxiously looking for support for this rule, and for organization to participate in hearings on this rule. Virtually the only ones who turned out to appear for these hearings were people from the industry who were coming there by the dozens, with dozens and dozens of reasons why the rule was no good, and why it should not be accepted. My group took it upon themselves to speak for the public side of it. They took a public survey to find out how many people would like such care labeling and found it overwhelming. They found numerous instances where a housewife would purchase clothing and then not know later on how to care for it, and

hopefully they were able to provide some kind of public input. But, here is a rule which would have had a major impact and where one would think that literally hundreds of groups, particularly those concerned with the housewife's problem, and the consumer's problems in general, would come forward to be heard and to present evidence, testimony, and give the FTC some kind of backing. Unfortunately, by and large they did not come through, and so far as we know CARE (Clothing Articles Require Explanation) is one of the few groups participating, and in far too many rulemaking proceedings no consumer group comes forward at all.

Senator KENNEDY. Do you think it is asking too much of these various advertisers for them publicly to proclaim their past guilt, that that is the best means of proceeding to halt deceptive advertising in the future?

Mr. MEYERS. From our point of view, aside from it being too much, we think it is possibly too little. We see it as a first step in attempting to begin to equalize and to begin to say to the advertisers if, in fact, you have deceptively advertised, if you have permitted a deceptive practice, an illegal practice upon an American public, the least you should be forced to do is to attempt to correct the false impression you have made. We see this as a minimal first step. At the Federal Trade Commission, based on the timidity of the past orders, it is almost a major revolution.

Senator KENNEDY. What is your theory behind it? Is it to punish past transgressors, or is it to alert people in the future to the potentiality of deceptive advertising? What is really the purpose for doing that?

Mr. MEYERS. Mr. White will answer that.

Mr. WHITE. Senator, we do not feel that the remedy would be punitive at all. We feel that the corrective ad would have two functions, the first of which would be to inform the public that a deception has been perpetrated upon them, and the second of which would be to deprive the deceptive advertiser of the illegal fruits that he might have gained from his customers and his competitors.

Senator KENNEDY. What would be the other ideas and remedies that you would suggest besides this statement about being deceptive in the past?

Mr. MEYERS. In the Firestone proceeding we also have proposed the restitution remedy. It is the remedy by which, if sales were induced fraudulently, a consumer should be able to return the product and receive his money back. The Federal Trade Commission is beginning to experiment with restitution as a proper remedy. The Federal Trade Commission is also more in the monopoly area, beginning to experiment with divestiture.

Senator, if I could point out, one of the real problems in this area is that because the Federal Trade Commission has been traditionally timid, there has been almost no thought concerning what type of creative remedies could be devised. I think now the Federal Trade Commission has given that process some thought.

Senator KENNEDY. I would like, for the benefit of the record, and have made of the Commission that we could follow up and to find out what is happening to your recommendations and how these recommendations and suggested changes in procedures are treated

by the Commission, and their attitude toward them. I would hope that perhaps you let us know so we could make them a part of the record and follow up on this .

Mr. MEYERS. Yes. Thank you, Senator.

Senator KENNEDY. Thank you very much. I hope that perhaps you will remain here and perhaps we will have some time later on to get back to some general questions.

Mr. MEYERS. Senator, the Firestone proceeding, which is the second proceeding into which SOUP has intervened, is presently going on, and we will be forced at the end of our testimony to return to that hearing.

Senator KENNEDY. OK. Very good.

Mr. MEYERS. Thank you, Senator.

Mr. BANZHAF. Just one of the other problems, I suppose, of being a legal activist.

Senator KENNEDY. Thank you.

(Material relating to SOUP follows:)

A. EXHIBITS RELATING TO TESTIMONY OF SOUP (STUDENTS OPPOSING UNFAIR PRACTICES)

1. S.O.U.P. Brief Requesting the Commission to Withdraw its Proposed Consent Order
2. Opinion of the Commission in the Matter of Campbell Soup Co.
3. Articles from Advertising Age Describing Impact of F.T.C. Decision in Campbell Soup Case
4. "Soup Clauses" in Proposed F.T.C. Orders
5. Petition for Review of F.T.C. Decision in Campbell Soup Case
6. Memorandum in Support of Motion for Leave to Proceed on Appeal in Forma Pauperis
7. Amended Motion of S.O.U.P. for Leave to Intervene in the Matter of the Firestone Tire and Rubber Co.
8. Request of S.O.U.P. for Leave to File an Interlocutory Appeal from the Denial of its Amended Motion to Intervene
9. F.T.C. News Release: F.T.C. Grants Limited Intervention to Public Interest Group
10. F.T.C. Decision Granting Intervention to S.O.U.P.
11. Article on Impact of S.O.U.P.'s Intervention
12. Letter from F.T.C. Office of General Counsel to Senator Edward M. Kennedy
13. Letter from F.T.C. Commissioner Jones to Senator Edward M. Kennedy
14. Correspondence from F.T.C. to Comptroller General relating to agency authority to pay expenses incurred by indigent parties

1. SOUP Brief Requesting the Commission to Withdraw Its Proposed Consent Order

United States of America before the Federal Trade Commission
(to the Secretary of the Commission)

(File No. 692 3061)

BRIEF FOR SOUP, INC. REQUESTING THE COMMISSION TO WITHDRAW ITS PROPOSED CONSENT ORDER, MARCH 20, 1970

In the matter of Campbells Soup Company, a corporation, and Batten, Barton, Durstine & Osborn, Inc., a corporation.

Representatives for SOUP, Inc. Cynthia Edgar, 4124 Edmunds Street NW., Washington, D.C.; Aaron Handleman, 12307 Braxfield Court, Apt. 8, Rockville, Maryland 20852; Peter Harwood Meyers, 3832 Calvert Street NW., Washington, D.C. 20007; John J. Simkanich, 2000 N Street NW., Washington, D.C.; Ivan Vance White, Jr., 3611 S. 7th Street, Arlington, Virginia 22204.

TABLE OF CONTENTS

Part 1. Background.
I. Statement of Facts.
II. Since this Consent Order as Presently Written does not Adequately Protect the Public Interest, it Should be Withdrawn.
Part 2. The Order as Written is Inadequate To Protect the Public Interest.
I. The Public is not Adequately Informed by This Order.
II. Proposed Respondents are not Adequately Deterred by This Order.
III. Other Businesses are Not Adequately Deterred by This Order.
Part 3. An Order Which Requires an Affirmative Disclosure of Past Deceptions in the Respondents' Current Advertisements Will Adequately Protect the Public Interest.
I. General Description of Affirmative Disclosure.
II. An Order Requiring Affirmative Disclosure of Past Deceptions Will Adequately Inform the Public.
III. An Order Requiring Affirmative Disclosure of Past Deceptions Will Adequately Deter Respondents from Future Deceptions.
IV. An Order Requiring Affirmative Disclosure of Past Deceptions Will Adequately Deter Other Businesses from Deceptively Advertising.
Part 4. Language Contained in and Conditions Upon the Use of the Affirmative Disclosure Clause.
I. Alternative Phrasing of the Clause.
II. Conditions Upon the Use of the Affirmative Disclosure Clause.
Part 5. The Commission Has the Authority Under § 5 of the Federal Trade Commission Act To Require Affirmative Disclosure of Past Deceptions in Proposed Respondents' Present Advertisements.
I. Congress Intentionally Gave the Commission Wide Discretion in its Choice of an Appropriate Order.
II. The Commission has the Authority to Execute Any Order which has a "Reasonable Relation" to the Unlawful Practices Found to Exist.
III. An Order Requiring Affirmative Disclosure of Past Deceptions has a "Reasonable Relation" to Campbells' Alleged Deceptions.
IV. The Commission has Traditionally Required Various Types of Affirmative Action by Respondents.
V. To Effectuate the Ultimate Goal of the FTC Act, Protection of the Public from Deceptive Advertisements, the Commission May Require the Affirmative Disclosure We Suggest.
Part 6. The Commission Has the Obligation To Include Our Clause in Order To Prevent the Public's Continuing Reliance on the Deceptive Ad.
I. Advertising's Avowed Purpose is to Persuade the Public to Buy the Product.
II. Advertising is able to Move People to Action Because it Reaches a Level Deeper than Rational Understanding.
III. Advertisers Seek to Create a Loyal and Automatic Corps of Customers Displaying "Brand Recognition."
IV. Campbells' Soup Company has Impressed its Message Deep into the Minds of the Public.
V. The Order is Insufficient Competition for Advertising Conditioning Strategy.
VI. Affirmative Disclosure is Required to Overcome the Conditioning Effects of Advertising.

PART 1. BACKGROUND

I. Statement of facts

Campbells Soup Company ("Campbells") is the nation's leading marketeer of liquid soup to the consuming public. Campbells extensive advertising utilizes virtually all media; its advertising agency is Batten, Barton, Durstine & Osborn, Inc. ("BBD&O"). Over a number of years Campbells and BBD&O have promoted Campbells' soups through an advertising program which utilizes a picture of a bowl of soup in a ready-to-eat situation. Apparently prepared in accordance with the dilution directions on the can, the soup appears to be chock-full of solid ingredients. In reality, however, a can of Campbells soup prepared in accordance with the instructions on the can does not look like the bowl of soup in the Campbells advertising. It is not brimming over with solid ingredients. The difference in appearance results from the practice of Campbells and BBD&O of "mocking up" the bowl of soup pictured in the advertising by placing clear marbles in the bottom of the bowl. Thus, the solid ingredients are forced to the surface, conveying the false impression that the soup contains much more solids than it actually does.

After learning about this practice the Federal Trade Commission (the "Commission") issued a proposed complaint charging the advertising as being false, misleading and deceptive because it did not disclose the use of marbles. On September 19, 1964, the Commission then provisionally accepted a consent order with Campbells and BBD&O and directed that it be placed on the public record for thirty days, until October 20, 1969, to permit interested members of the public to file comments or views concerning the adequacy of the order. Within that thirty day period, Students Opposing Unfair Practice, Inc. ("SOUP")

filed five motions with the Commission concerning the adequacy of the order. The motions include:

(1) Motion for disclosure, filed October 6, 1969—granted in part February 24, 1970.

(2) Motion requesting extension of time for the submission of comments or views concerning the adequacy of the order, filed October 15, 1969—granted and in effect.

(3) Preliminary motion to intervene, filed October 20, 1969—granted only to the extent that we received a hearing on said question on February 5, 1970.

(4) Preliminary petition requesting the Commission to withdraw its provisional acceptance of said consent order, filed October 20, 1969—still pending and superceded by this petition.

(5) Motion to file only the copy of documents with the Commission, filed October 20, 1969—granted.

On November 18, 1969, the Commission issued its Order Extending Effective Date of Consent Order and Providing for Submission of Briefs and Oral Argument, setting for December 18, 1969 (later changed to February 5, 1970) an oral argument on the two primary issues raised in SOUP's previously submitted Motion To Intervene, namely: whether we have standing to intervene, and whether a hearing is necessary to resolve questions of fact, law and Commission policy.

On December 5, 1969, SOUP filed a Brief in Support of Intervention and Hearing. The oral argument took place February 5, 1970.

On February 24, 1970, the Commission decided that SOUP: (1) be allowed to examine the Commission's investigational file as requested by Motion for Disclosure of October 6, 1969 and (2) be allowed to submit further written comments concerning the adequacy of the proposed consent order to be filed by March 20, 1970. This brief is submitted in accordance with that direction.

SOUP is a corporation duly incorporated in the District of Columbia. Its main address is 301 Bacon Hall, 2000 H Street, N. W., Washington, D. C. It is presently composed of law students from George Washington University Law School who are dedicated to the protection of consumer interests, and advocacy of their interest before the federal administrative agencies. The members of SOUP who have been involved in the writing of this brief are: Cynthia Edgar, Aaron Handleman, Peter Harwood Meyers, John J. Simkanich and Ivan White. Each member of SOUP is a consumer; each member resides in or around Washington, D. C. Incorporated as a non-profit organization, SOUP is totally independent and all decisions concerning policy, strategy, and goals are the sole product of a majority vote of its members. Being an independent organization, no decisions SOUP makes are dictated by any other organization or individual.

II. Since this consent order as presently written does not adequately protect the public interest, it should be withdrawn

The Commission's authority to withdraw its provisional acceptance of the consent order is embodied in FTC Rules § 2.33 which provides in part:

"[T]he Commission may withdraw its acceptance of the agreement if, within thirty (30) days after such acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is *inappropriate, improper,* or *inadequate.*" (emphasis added)

Since the effective date of the consent order as postponed indefinitely, this brief is filed in timely fashion. Below we set forth reasons why we believe that the present order is improper and inadequate to protect the public interest. We pray that the arguments herein will convince the Commission that its resolution of this case with the proposed consent order is inadequate and that the order should be withdrawn pursuant to FTC Rules § 2.33. In its place, we propose a substitute consent order which will adequately protect the public interest.

PART 2. THE ORDER AS WRITTEN IS INADEQUATE TO PROTECT THE PUBLIC INTEREST

I. The public is not adequately informed by this order

In order to protect the public interest from "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce," § 5(a)(6)

of the Act, the Commission is required by § 5(b) to issue a complaint, hold a hearing, and issue an order to the respondent to "cease and desist" from using such methods of competition or such acts or practices if found to be engaging in them. Since § 12 of the Act specifically defines false advertising which induces or is likely to induce the purchase of foods, drugs or cosmetics as an unfair or deceptive act or practice, it appears that Congress intended the Commission to assume a greater responsibility in preventing acts or practices of this type—the type of deception involved here.

Assuming for the moment that the respondent will comply with the order, the Commission in addition must inform the public of the particular advertisement that the order is designed to stop and why the advertisement is considered false. Such information is necessary for two reasons: First, the public is not able to ascertain on their own whether a particular advertisement correctly informs them as to the true nature of a product. Given the persuasive influence of mass advertising, discussed *infra.* at Part 6, the consumer must be made aware of the misconceptions he has as to a particular product so as to reverse advertising's impact on future purchases. Such a requirement was recognized by the Court of Appeals for the Tenth Circuit in *Kennan v. FTC* when the Court said that the public "[i]s entitled to know the facts . . . and make his own choice with respect to purchasing. . . ." 265 F.2d 246 at 248 (1959). And by the Court of Appeals for the Second Circuit in *FTC v. Sterling Drug* when the Court said:

"The central purpose of the [Wheeler-Lea Act] is in effect to abolish the rule of *caveat emptor* which traditionally defined the rights and responsibilities in the world of commerce. That rule can no longer be relied upon as a means of rewarding fraud and deception [citation omitted], and has been replaced by a rule which gives to the consumer the right to rely upon representations of facts as truth." [citation omitted] 317 F.2d 669 at 674 (1963).

Second, given the limited investigative staff that the Commission has, the Commission must inform the public of specific advertisements found to be deceptive so that the public can inform the Commission of continued violations of the order and similar deceptions by other advertisers. FTC Rules § 2.2 specifically permits any individual, partnership, corporation, association, or organization to request the Commission to institute investigations in any matter over which the Commission has jurisdiction. Such feedback is necessary if the Commission intends its orders to effectively deter future violations, discussed *infra.*, by insuring that the Commission will have notice of them.

How then has the Commission attempted to fulfill this responsibility to inform the public about particular false advertisements? The Commission periodically issues press releases briefly describing the nature of the false advertisement and the content of the order. It then relies on the Washington press corps and the wire services to inform the public in newspaper articles.

Such an approach is unrealistic in terms of fulfilling the informative obligation for two reasons. First, there is no guarantee that the release will be extensively printed. Relying on the editors of the relatively few[1] newspapers who receive the releases to consider them newsworthy enough to print and then relying on the wire services to pick up such information and pass it along to a sufficient number of other newspapers who will also print it is a rather imprecise manner of informing the public. Second, even if extensively printed, there is no guarantee that such information will be adequate or will reach those members of the public actually deceived by the false advertisement. The newspapers who receive and print the press releases, summarize their contents. This creates the possibility that the articles will not state enough specific information about the particular deception or in what media the advertisement may be found. Even if quite detailed, such information may never reach the deceived consumer. As discussed in Part 6, *infra.*, they probably didn't perceive the false advertisement in a newspaper. (81 percent of Campbells' advertising is in magazines and television commercials.) It is improper then to expect such a medium to convey the correct information and adequately place the public on their guard.

II. Proposed respondents are not adequately deterred by this order

The immediate effect that a "cease and desist" order is designed to have is stopping the respondent from further engaging in false advertising. To

[1] 928 according to the Commission's Information Office.

accomplish this effect, the Commission is authorized in § 5(1) to seek civil penalties of up to $5,000. per day for continued violation of an order.

Assuming that the maximum fine would be a sufficient amount to deter the use of such advertising in the future, the threat of such a fine is no longer effective in assuring that the practice will be stopped. FTC Rules § 3.61 normally requires the respondent to file a compliance report with the Commission within 60 days after service of the order. However, review of compliance reports is continuing to fall behind because of insufficient manpower and outdated methods. Eleven attorneys in the Bureau of Deceptive Practices' Compliance Division are assigned to reviewing the reports submitted and investigating complaints from the public alleging violations.[2] No systematic check is undertaken after the report is approved. Such a hit-or-miss program can hardly be expected to be effective.

In addition, even if the respondent is found to have been violating an outstanding order, few penalties are sought for non-compliance.[3] The most glaring example of the Commission's unwillingness to impose the civil penalties available for continued violation of an order is provided by the Geritol case—*J. B. Williams Co. v. FTC*, 381 F.2d 884 (C.A. 6 1967). In March 1969, almost 10 years after the initial investigation, the Commission still refused to seek civil enforcement after finding that certain commercials continued to violate the order. Knowing that if found to be violating an order, the respondent will be permitted to file a new compliance report is hardly going to encourage initial compliance.

III. Other businesses are not adequately deterred by this order

In order for the public to be adequately protected, the effect of the Commission's order must be not only to stop the proposed respondent from falsely advertising, but also to deter other businesses presently engaged in similar practices or considering such practices for future use. The Commission has neither the funds nor the manpower to detect and investigate all false advertising practices posing a threat to the public at a given time. Not only is detection limited almost exclusively to monitoring commercial advertising on national television, but there is a serious question whether the personnel available are being properly deployed.[4] In the absence of increased revenue or reordered priorities, the Commission must rely on the threat of the sanctions made available by the issuance of the order plus vigorous enforcement of such sanctions in order to dissuade most businesses from considering such practices.

The present order fails to provide such a deterrent for two reasons. First, it does not provide any retroactive sanctions for initially engaging in false advertising. Any business presently engaged in deceptive advertising or considering it for future use knows that even if the Commission discovers such a practice, no sanction has been imposed in the past for engaging in the practice to begin with—no matter how flagrant and intentional the practice. We are aware of no case in which the Commission has sought a temporary injunction or the criminal penalties available under §§ 13, 14 of the Act. The Commission can only seek civil penalties under § 5(1) for continued violations of an outstanding final order. Thus, the present order would give any business engaging in such advertising the "first bite for free."

Second, as previously discussed in II, the Commission rarely seeks penalties for noncompliance. Little deterrent effect then can be expected when the Commission is as reluctant as it has been in the past to enforce the laws available for violations of its orders.

PART 3. AN ORDER WHICH REQUIRES AN AFFIRMATIVE DISCLOSURE OF PAST DECEPTIONS IN THE RESPONDENTS' CURRENT ADVERTISEMENTS WILL ADEQUATELY PROTECT THE PUBLIC INTEREST

I. General description of affirmative disclosure

The affirmative disclosure provision requested would be a statement within the Commission's order requiring the respondent who has falsely advertised to

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[2] *The Report of the ABA Commission to Study the Federal Trade Commission* (Sept. 15, 1969), p. 44.

[3] Total Civil Penalties for the period July 1964 to July 1968 of $416,530 were imposed in only 16 cases; Cox, Fellmeth and Schulz, *"The Nader Report" on the Federal Trade Commission*, Appendix 9, p. 224.

[4] *The Report of the ABA Commission to Study the Federal Trade Commission* (Sept. 15, 1969), pp. 40–45.

affirmatively state that it has used a specific method of advertising in the past which the Commission charges as or has been found to be misleading. As discussed in Part 4 *infra.*, the specific phrasing and the types of advertisements in which the disclosure must be included depend upon the seriousness of the deception and whether the order results from a consent order proceeding or a formal adjudication. The provision would also stipulate that the disclosure must be included in current advertisements for a period of time equal to the time in which the deceptive advertisements were publicized and be conspicuously displayed.

Such an order will fully protect the public interest by informing the public about past deceptions, deterring Campbells from future deceptions and deterring other businesses from engaging in similar deceptions in their advertisements.

II. An order requiring affirmative disclosure of past deceptions will adequately inform the public

As was shown in Part 2, I, *supra.*, the Commission's present order includes no provision to directly inform the public of the deception that has been perpetrated upon them by the respondents' past advertisements. The Commission seeks to fulfill its informative responsibility to the public by issuing press releases describing the Commission's action against the respondents. Such an agreement is ineffective because there is no guarantee that the information within the release will be extensively printed and, if extensively printed, that such information will be adequate or will reach the members of the public affected by the respondents' practices. Therefore, the Commission can no longer rely on such a tenuous device to insure that the public is correctly informed as to the true nature of the specific product purchased.

Our proposal for an affirmative disclosure provision within the Commission's order would effectively fulfill this obligation by informing the public that their impression of the amount of garnish in Campbells' soups resulted from the use of "doctored" advertisements and that in reality it does not contain this amount. Such information would enable the public to consider what their actual purchase of Campbells' soups is based upon—past deceptive advertisements or satisfaction with the soup itself. This "direct information" provided by the "sinning" company in its own future advertisements is the only reasonable means of counteracting the probable effect that past deceptive advertising has had on their purchases, both then and in the future. See Part 6, *infra.*

III. An order requiring affirmative disclosure of past deceptions will adequately deter respondents from future deceptions

The present threat of civil penalties for future violations of an outstanding order has been shown in Part 2, II, *supra.*, to be ineffective in deterring such violations. The respondent knows that there is little risk of being found by the Commission to have violated an outstanding order because of the lack of periodic compliance checks by the Commission and the small amount of the public aware of the order. In addition, even if found to have violated the order, the possibility exists that the respondent will be given an additional opportunity to comply without any penalties being assessed or extensive publicity released.

On the other hand, the issuance of an order containing an affirmative disclosure requirement would exert immediate pressure on Campbells not to reengage in such activities. Not only would more members of the public be aware of the first deception—hence more able to report future violations—but any additional publicity requirement as to other deceptions would risk a drop in future sales. The public might lose faith in Campbells' advertising if continually made aware of repeated deceptions. And for a company like Campbells who relies so heavily on mass advertising to sell its products, the risk of continuous announcements of false advertising in these advertisements would create strong pressure to eliminate such practices.

IV. An order requiring affirmative disclosure of past deceptions will adequately deter other businesses from deceptively advertising

As was shown in Part 2, III, *supra.*, the present order has no effect on any other business. Should other business also be found deceptively advertising by the Commission, they likewise would not be penalized for the initial deception.

Knowing that the order will not contain any retroactive sanctions, they probably will not be very careful in determining the line between deception and non-deception. Given the fact that the Commission does not have the manpower or funds to stop all deceptive advertising on a case-by-case approach, it is imperative that the mere threat of being caught engaging in such practices serves as an effective deterrent not to do so.

Affirmative disclosure provides such a threat. No longer would a business receive the traditional warning by the Commission not to engage in false advertising again. Engaging in such a practice risks being discovered by the Commission and required by it to affirmatively disclose this practice to the public in future advertisements. The resulting publicity rather than the wrist-slapping by the Commission acts as the deterrent not to engage in the initial deception. A company, when in doubt about a proposed method of advertising, could request the Commission under FTC Rules § 1.1 for an advisory opinion as to whether such advertising technique is considered deceptive.

PART 4. LANGUAGE CONTAINED IN AND CONDITIONS UPON THE USE OF THE AFFIRMATIVE DISCLOSURE CLAUSE

I. Alternative phrasing of the clause

Of all the possible phrasings of the affirmative disclosure clause to be included in a consent order with proposed respondents, we will bring only two alternatives to the Commission's attention. The order could require Campbells to state as follows:

[Alternative Number I]

"The Federal Trade Commission has alleged that Campbells Soup Co. has engaged in deceptive advertising in which the pictured bowls of soup appeared to contain more solid ingredients than a bowl actually contains if prepared according to the dilution directions on the can."

[Alternative Number II]

"Campbells Soup Co. has been charged with deceptive advertising in violation of the Federal Trade Commission Act. Pictured bowls of soup appeared to contain more solid ingredients than a bowl actually contains if prepared according to the dilution directions on the can."

We, of course, recognize that a consent order containing a clause similar to the above might be unacceptable to Campbells; for such a case, we also suggest to the Commission two possible phrasings for the clause when included in a cease and desist order following a formal adjudication. Such phrasing would serve at least two different functions: (1) reflect the difference between an adjudicative order, with a finding of guilt, and a consent order, without such finding and (2) preserve the exigency of consent order procedures by retaining the present inducement to negotiate. The order could require Campbells to state as follows:

[Alternative Number I]

"The Federal Trade Commission has found that Campbells Soup Co. has engaged in deceptive advertising in which the pictured bowls of soup appeared to contain more solid ingredients than a bowl actually contains if prepared according to the dilution directions on the can."

[Alternative II]

"Campbells Soup Co. has been found guilty of deceptive advertising in violation of the Federal Trade Commission Act. Pictured bowls of soup appeared to contain more solid ingredients than a bowl actually contains if prepared according to the dilution directions on the can."

II. Conditions upon the use of the affirmative disclosure clause

A. Conspicuously displaying the affirmative statement

The Commission should direct in its new consent order that in advertisements in the print media (magazines, newspapers, etc.) the above statements be displayed "clearly and conspicuously and in large enough print that the normal consumer will be able to read and understand it."

Similarly, as applied to television advertisements, the Commission should direct that the affirmative statement be "clear and conspicuous and of sufficient duration that the average consumer will have time to read the entire message."

B. Calculating the time period for which advertisements containing affirmative requirement should run

The affirmative clause advertisement should run for a similar amount of time in months that the deceptive advertisements were run; or the Commission may direct the advertising agency to disclose to the Commission the number of times the advertisement appeared on television and/or in magazines and the affirmative disclosure advertisement will be shown or published for like number of times.

C. Determining the advertisements in which affirmative statement should be placed

Depending upon the Commission's belief as to the seriousness of Campbells' deceptive advertising, we are submitting three possible methods (in a descending order) by which the respondent could be required to disclose the Commission's allegation or finding:

(1) in all future advertisements for the entire product line, regardless of how the advertisement is presented.

For Campbells, this would apply to all its soup advertisements, regardless of whether the particular soup was ever deceptively advertised.

(2) in all future advertisements for the particular product, regardless of how presented.

For Campbells, this would apply only to those soup advertisements which had been deceptively advertised, but irrespective of whether garnish is shown or not in the advertisement.

(3) in all future advertisements for the particular product presented in similar form.

For Campbells, this would apply to those soup advertisements deceptively advertised, but only those which show garnish in the advertisement.

PART 5. THE COMMISSION HAS THE AUTHORITY UNDER § 5 OF THE FEDERAL TRADE COMMISSION ACT TO REQUIRE AFFIRMATIVE DISCLOSURE OF PAST DECEPTIONS IN PROPOSED RESPONDENTS' PRESENT ADVERTISEMENTS

I. Congress intentionally gave the Commission wide discretion in its choice of an appropriate order

In § 5(a)(6) of the Act, 15 U.S.C. § 45(a)(6), Congress empowered the Commission to prevent violations of the Act. That section, in relevant part, states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." The primary method for accomplishing this goal is through the issuance of cease and desist orders, § 5(b) of the Act, 15 U.S.C. § 45(b), and agreements containing orders to cease and desist, FTC Rules §§ 2.31–2.34.[1]

Congress intentionally did not define either the types of practices which violate § 5 or the specific clauses an order could contain. While we are concerned in this case only with the permissible clauses to be included in the order, there seem to be at least two reasons why Congress did not define either the scope of the order or the scope of § 5 violations. The first reason is that Congress was creating the Federal Trade Commission to be an expert body in deceptive practices, and therefore the Commission would be in a better position than Congress to determine what acts were illegal and what actions would appropriately stop violations. The second reason that Congress avoided defining more explicitly in the Act, was to leave the Commission enough latitude to adapt to changing times. Any attempt to categorize would have a sifling influence on the Commission. Congress may have clearly realized that the effectiveness of the Commission was directly related to the Commission's ability to respond to the circumstances of the marketplace. As the methods and techniques of fraud and deception changed, the Commission must have the power to redirect its energies *without* the time-consuming process of additional express Congressional direction. The effect that this should have on the Commission was eloquently stated by Commissioner Mary Gardiner Jones:

[1] Other enforcement methods authorized by the Act include the use, where appropriate, of injunctions and criminal and civil sanctions. *See* FTC Act §§ 13–14, 15 U.S.C. §§ 13–14.

"Agencies should be encouraged constantly to re-examine and re-interpret their overall enabling statutes and their overall functions in the light of new conditions and demands emerging in their areas of responsibility. . . . The administrative agency has a genuine potential for creative action. [We should] devise means to insure that it exercises this potential to the fullest extent possible." Jones, "The Role of Administrative Agencies as Instruments of Social Reform," 19 *Admin. L. Rev.* 279, 300–01 (1967).

The legislative history of the Act, therefore, indicates Congress' clear intent to provide the Commission with the freedom to be relevant to the times. *See e.g.*, S. Rep. No. 597, 63d Cong. 2d Sess. 13 (1914).

The courts have consistently emphasized that the Commission has wide discretion in its choice of an order. The following language from *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 611–613 (1946) has been extensively cited:

"The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices [disclosed]. . . . The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and . . . [the test is what order] would in the judgment of the Commission be adequate."

Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374 at 392 (1965):

"It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found . . . and that Congress has placed the primary responsibility for fashioning orders upon the Commission."

Accord: FTC v. Cement Institute, 333 U.S. 683, 726 (1948); *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

It is, of course, true that the Commission may not exceed the authority delegated to it in the Act. This principle is firmly established in the common law, and was explicitly stated in the Administrative Procedure Act.[2] But since the Commission's authority was purposefully made flexible and open-ended in the choice of an appropriate order, it is not likely to be presumed that any specific order exceeded or abused that authority. The courts have continually permitted the Commission to effectively use its expertise in framing orders to effectuate the purposes of the Act.

In the following discussion of the scope of the Commission's authority in framing orders, we will use the consent order and the cease and desist order interchangeably. It seems clear that the Commission may include any clause in a constant order which it is authorized to include in a *cease and desist order*.[3]

II. The Commission has the authority to execute any order which has a "reasonable relation" to the unlawful practices found to exist

The traditional test for determining the permissible scope of administrative orders is that the court need only find a "reasonable relation" between the violation proved or alleged and the terms of the resultant order. The "reasonable relation" test was originally applied to FTC orders in *Jacob Siegal Co. v. FTC*, 327 U.S. 608 (1946). The Supreme Court articulated the test as follows, 327 U.S. at 612–13:

"The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has *no reasonable relation to the unlawful practices found to exist*." (emphasis added)

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[2] § 9 of the APA, 5 U.S.C. § 558 states: "In the exercise of any power or authority—(a) In General.—No sanction shall be imposed or substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

[3] The Commission has treated both types of orders similarly. First, the major substantive provisions of the consent order correlate with the major substantive provisions of the cease and desist order. If the order with proposed respondents in this case was arrived at through adjudication, the order would have probably been virtually identical. Second, the consent order has "the same force and effect" as adjudicated orders. FTC Rules § 2.33, 16 C.F.R. § 2.33. The scope of the consent order is therefore at least potentially equal to the permissible scope of the adjudicative order.

Finally, the Commission has stated, by way of delineating the scope of orders, only that they must be "appropriate." FTC Rules § 3.51(b)(2) states that the initial decision shall contain "an appropriate rule or order" in adjudications. FTC Rules § 2.33 states that every consent agreement shall contain "an appropriate order" and that "the Commission may withdraw its acceptance of the agreement if . . . the order contained in the agreement is inappropriate, improper, or inadequate."

The Supreme Court emphasized in *Jacob Siegal, supra,* that "the test" centered on what order "would *in the judgment of the Commission* be adequate," 327 U.S. at 613 (emphasis added).

The Supreme Court has continually upheld the "reasonable relation" test as the appropriate test to determine the permissible scope of FTC orders. *FTC v. Cement Institute,* 333 U.S. 683, 726 (1946); *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374 (1965).

III. An order requiring affirmative disclosure of past deceptions has a "reasonable relation" to Campbells' alleged deceptions.

It is important to distinguish two functions of Campbells' allegedly deceptive advertisements. One function is to motivate the *immediate* purchase of soup. The other function is to convey and inculcate in the viewer the impression that the soup contains a great amount of solid ingredients and is therefore an extremely nourishing and nutritious product. While these two functions are closely interrelated and the ultimate effect of both is to motivate purchasing, there is an important difference between the two. To counteract the first function (immediate purchase), the sole action the Commission need take is to effectively stop the deception. We do not dispute that the consent order as presently written adequately serves this purpose, if properly effectuated.

However, we do dispute that the consent order as presently written adequately counteracts the second function—the impression that Campbells' soup contains the amount of garnish portrayed in the deceptive advertisements. Through continued exposure to the allegedly deceptive advertisements, many consumers have been "brain-washed" with a mental picture of the amount of solid ingredients in a can of Campbells' soup. Stopping the use of these advertisements does nothing, in and of itself, to dispell this mental conception, which continues to motivate purchases even after the specific deceptive advertisements have been removed from the marketplace. The only practical and effective way for the Commission to inform the great majority of consumers who have this erroneous (perhaps subliminal) impression of the merits of Campbells' soup is for the Commission to require Campbells to themselves inform the consumer that their impressions resulted from "doctored" advertisements. This then is the "reasonable relation" between the continuing wrong to the consumer and the deceptive advertisements.

As a practical limitation on the scope of the remedy requested, an order requiring affirmative disclosure of past deceptions would only be appropriate, needed, and within the Commission's authority when the allegedly deceptive advertisements are used for both functions discussed above. Many advertisements seek only to motivate immediate purchase. For example, the "once only" advertisements to purchase a specific record album which is not available in record stores, serves only the first function. For these "limited purchase" advertisements, no affirmative disclosure of past deceptions is feasible or necessary to protect the public interest. The product is no longer being sold and the deception no longer "exists." But Campbells' advertisements are still today deceiving the public.

IV. The Commission has traditionally required various types of affirmative action by respondents

It is too late in the day to suggest that the Commission is limited to prohibiting the specific deceptive practice found to exist or that the Commission is limited to a merely negative order.[4]

The Commission has continually used orders requiring various types of affirmative action, and these orders have been held valid by the courts. As the Supreme Court stated in *Colgate-Palmolive,* 380 U. S. at 394: "The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . Having been caught violating the Act, respondents 'must expect some fencing in'."

It is important to note that the consent order the Commission has executed with the proposed respondents in this case already contains a number of affirmative obligations, and is not limited to merely prohibitions. Such obliga-

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[4] *See* Auerbach, "The Federal Trade Commission: Internal Organization and Procedure," 48 *Minn. L. Rev.* 383, 511–13 (1964).

tions include: (1) the filing of one or more compliance reports.[5] Agreement at paragraph 8. (2) the distribution of a copy of the order to each of their operating divisions. Order at 5. and (3) notification to the Commission of any proposed change in the corporation which may affect compliance obligations. Order at 5.

The Commission has required other types of affirmative action to remedy § 5 violations. Recently, the Commission ordered compulsory licensing of a patent upon a reasonable royalty basis as a remedy for § 5 violations; and the Court of Appeal for the Sixth Circuit upheld the order. *Charles Pfizer & Co. v. FTC*, 401 F. 2d 574 (CA 6 1968), *cert. denied*, 37 U.S.L.W. 3354.[6]

The Commission is also beginning to use restitution as an appropriate remedy. *See Curtis Publishing Co.*, trade Reg. Rep. ¶ 18, 798 (FTC June 12, 1969).[7]

To this date, however, the Commission has not utilized the type of affirmative action we have specifically requested. Historically, the Commission has (perhaps subconsciously) been separating § 5 violations into two categories, and proceeding against each type in a different manner. The first type of § 5 violations concerns deceptive statements about the inherent nature of the product (its limitations or potential dangers), and here the Commission has often required affirmative disclosures of the limitation or potential harm. Examples of these types of affirmative disclosure orders include: (1) warning statements in advertisements for drug products which are potentially harmful or toxic,[8] (2) warning statements in all cigarette advertisements that smoking may cause death from cancer or other diseases,[9] (3) statements in certain preparations for the treatment of baldness that the preparations are only effective for a very limited number of cases,[10] and (4) statements in Geritol advertisements that Geritol will be effective in a very limited number of cases.[11] All these orders have been upheld by the courts. The principle derived from them is: when the product advertised has potential dangers or is of only limited use, the advertisement must affirmatively disclose this fact.

The other type of § 5 violation concerns the nature of the advertisement itself, as distinct from the nature of the product. Traditionally, if the advertisement itself is deceptive, all the Commission has required is an end to that and similar deceptions. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); The *Papercraft Corp.*, D. 8489 (Dec. 24, 1963). In *Papercraft*, the Commission ordered a gift wrapping manufacturer to cease and desist from:

"(1) Packaging rolls of gift wrapping paper in oversized boxes or other containers so as to create the appearance or impression that the width or other dimensions or quality of the gift wrapping paper contained in the box or container is appreciably greater than is the fact. . . ."

A mere stopping or "correcting" of the allegedly deceptive advertisement is not enough to dispel the deception engendered by Campbells' advertisements: The deception is a *continuing* one. Therefore, the same principle should be applied in this case as in the cases in which affirmative disclosure of product dangers or limitations was required. In those cases the courts continually reaffirmed the need for affirmative disclosure to prevent deception. In *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F. 2d 18, 23 (CA 5 1960), the Court said: "cease and desist orders compelling affirmative disclosure are enforced by the courts when they are necessary to prevent deception."

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[5] One writer has pointed out that compliance reports clearly have affirmative consequences: "The Commission accompanies every cease-and-desist order with a requirement that the respondent file with the Commission a written report setting forth in detail the manner and form in which it has complied with the order. Obviously, the Commission expects the compliance report to recite what the respondent did affirmatively to bring himself into compliance." Auerbach, "The Federal Trade Commission: Internal Organization and Procedure," 48 *Minn. L. Rev.* 383, 512–13 (1964).

[6] *See* Rushefsky, "FTC § 5 Powers and the *Pfizer-Cyanamid* Imbroglio: Where Do We Go From Here," or "You Ain't Seen Nothing Yet," 18 *Cath. L. Rev.* 335 (1969).

[7] That restitution is a remedy which the Commission is empowered to prescribe is suggested by at least two writers. Wade & Ramenshire, "Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency," 37 *Geo. Wash. L. Rev.* 1031, 1058 (July 1969).

[8] *Consolidated Royal Chemical Corp. v. FTC*, 191 F. 2d 896 (CA 7 1951); *Aronberg v. FTC*, 132 F. 2d 165 (CA 7 1942).

[9] 30 Fed. Reg. 9484 (July 25, 1965), vacated by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1332–39.

[10] *Ward Laboratories, Inc. v. FTC*, 276 F. 2d 952 (CA 2 1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F. 2d 18 (CA 5 1960); *Wybrant System Products Corp. v. FTC*, 266 F. 2d 571 (CA 2 1959).

[11] *J. B. Williams Co. v. FTC*, 381 F. 2d 884 (1967).

In *Ward Laboratories, Inc. v. FTC.* 276 F. 2d 952 (CA 2 1960) the Court said:

"Thus, it is obvious here why some affirmative statement is necessary to dispel an otherwise misleading statement. . . . The power of the FTC to require affirmative disclosures where necessary to prevent deception has long been recognized."

Since Campbells' deceptions will continue until counteracted by affirmative disclosure, the Commission has the authority to require affirmative disclosure. It is "necessary to prevent deception." The objective of informing the consumer of the true nature of drugs, cigarettes, hair products, and Geritol is equally applicable in the case at bar. We believe the Commission has the authority to require respondents to inform the public about the true nature of Campbells' soups.[12]

V. To effectuate the ultimate goal of the FTC Act, protection of the public from deceptive advertisements, the Commission may require the affirmative disclosure we suggest

Besides the authority discussed in IV, *supra*, to require affirmative disclosure of past deception, there is the authority based upon the ultimate purposes of the Act. Traditional analysis of the scope of Commission orders isolates two relevant interests, the respondent and the Commission itself. From respondent's point of view, a strong order will be an effective deterrent but may place him at an unfair competitive disadvantage. A weak order will act as no deterrent. From the Commission's point of view, a weak order encourages continued illegality by the respondent. A strong order encourages compliance with the law.

But the primary purpose of the Act (and especially the Wheeler-Lea Amendment) is *not* to protect the respondent from unfair treatment or to insure the efficient functioning of the Commission, but to protect the consumer from deception.[13] The consumer seeks protection from deceptive advertisements, and this includes both deceptions by respondents and deceptions by non-respondents. From the consumers' point of view, a weak order encourages respondents and every other business to break the law; a strong order encourages compliance by everyone. If a company knows that if caught violating § 5 a weak sanction will be imposed, it will not be very careful about approaching the line between deception and non-deception. If, on the other hand, a company expects that if caught it will have to tell about this deception in the future, it will naturally be a great deal less willing to take a chance. From the consumers' point of view, advertising practices are to some extent the product of the degree of apprehension at being "caught" by the Commission. Since the Commission does not have the manpower or funds to stop all deceptions within its jurisdictions on a case by case method, the Commission must be able to use the threat of being "caught" as a deterent in-and-of-itself.

It seems quite natural to assume that the available arsenal of the Commission's powers effects business behavior. We request the Commission to add another "weapon" to this arsenal for use in appropriate situations. We are not requesting that Campbells be punished or made an example of. We request that the clause be included to deter Campbells in the future, inform the public, and to deter others.

The power of the Commission is purely regulatory and not punitive, *United Corp. v. FTC*, 110 F. 2d 473 (CA 4 1940), and the purpose of the Commission is protection of the public not punishment of the wrongdoer, *Gimble Bros. v. FTC*, 116 F. 2d 578 (CA 2 1941). The remedy must be such as not to punish for past transgressions, but as a means of preventing illegal practices in the future. *Nitesk Industries, Inc. v. FTC*, 278 F. 2d 337 (CA 7), *cert. denied*, 364 U.S. 883 (1960).

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[12] One writer has argued that since the court in modifying the Commission's order may require the sanction we suggest, the Commission may also require it: "Furthermore, on judicial review, the courts may exercise their inherent equity power to issue a mandatory injunction when they 'enter a decree . . . modifying . . . the order of the Commission.' If so, there is little reason why the Commission may not issue an affirmative order at the outset, if the exigencies of the particular case so require." Auerbach, "The Federal Trade Commission: Internal Organization and Procedure," 48 *Minn. L. Rev.* 383, 511–12 (1964).

[13] *See e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 375, 384 (1965).

Requiring proposed respondents to affirmatively disclose past deceptions is the only way the Commission can adequately protect the public from the continuing deception, is the only effective way of regulating advertising, and is the only effective way of preventing illegal practices in the future. The Commission therefore has the authority to require it.

PART 6. THE COMMISSION HAS THE OBLIGATION TO INCLUDE OUR CLAUSE IN ORDER TO PREVENT THE PUBLIC'S CONTINUING RELIANCE ON THE DECEPTIVE AD

I. Advertising's avowed purpose is to persuade the public to buy the product

Two officials of the Federal Trade Commission Bureau of Deceptive Practices have stated unequivocally that "the avowed purpose of advertising . . . is not informative, but persuasive, playing up on the emotions and desires of the consumer." [1]

Advertising has become so important that in 1966, the nation's advertisers spent $16.8 billion to influence the consumers' purchasing decision.[2] The full impact of this figure is realized in the knowledge that the total expenditures of the nation's 25 largest cities exceeded the investment in advertising by only $2.9 billion.[3]

In 1968, Campbells Soup Company ranked 28th in total advertising expenditures, investing $34,330,126 in television, radio, magazine, and newspaper communications to the public.[4]

II. Advertising is able to move people to action because it reaches a level deeper than rational understanding

The Association of National Advertisers has stated the goal of advertising to be delivery of a sales message which stimulates the buyer to act on that message. The Association envisions this goal to comprise two stages: conveying information on the advantage or benefit which makes the product outstanding; and creating a state of mind conducive to purchase.[5]

Clarence Eldridge, former executive vice-president of marketing for Campbell's, asserts that the emphasis on these two stages is not equally apportioned: "It has become a hard fact of advertising life that . . . the effectiveness of the advertising depends more upon the way the message is presented than upon any factual product superiority of the advertised product." [6] Other companies, joining what John Galbraith terms management of the consumer's mind,[7] have explored the human psyche to discover human needs and wants to which advertising appeals quite effectively. Consumers are now sufficiently affluent that no single purchase requires great thought. Purchasers who consider everyday products too trivial for the time required for price or quality comparisons willingly permit their subconscious to make the decisions.[8]

In short, advertising no longer relies on "copy" to convince the public; rationality has in some instances been totally displaced as a means of persuasion. Pierre Martineau, director of research for *The Chicago Tribune* and a recognized authority on psychological advertising, describes advertising's non-rational appeal:

"Advertisement as we know it today uses layout and illustration, both photography and art; it uses color and music, even choreography and drama. . . . Any given ad may have any number of appeals which are not openly presented. . . . Besides economic self-interest, advertising leans heavily on such psychological processes as suggestion, association, repetition, identification, fantasy, etc. . . . The creative people are trying to achieve various effects which are just as vital to the success of the ad.[9]

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[1] Charlton & Lawcett, "The FTC and False Advertising," 17 Kansas L. Review 599 (1969), p. 617.
[2] *Statistical Abstract of the U.S.* (1968) at 782.
[3] *Ibid.*
[4] "Advertising Age", Vol. 4, no. 34, Aug. 25, 1969, at 41.
[5] Association of National Advertisers, *Defining Advertising Goals*, at 53.
[6] Clarence Eldridge, "Advertising: Its Marketing Role", *Marketing Insights*, April 3, 1967.
[7] John Galbraith, *New Industrial State*, 1967, at 200.
[8] Galbraith, *American Capitalism*, 1952, at 100.
[9] Pierre Martineau, *Motivation in Advertising*, 1957, at 13.

III. Advertisers seek to create a loyal and automatic corps of customers displaying "brand recognition"

The specific strategy of advertisers consists of creating "customer loyalty."[10] This strategy requires that the consumer be educated, by comprehensive and repetitive communications, to create a compelling image of the product to which he automatically responds.[11] The Supreme Court recognized this as early as 1942. In *Miskawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942), the court said that the object of much modern advertising is "to impregnate the atmosphere of the market with the drawing power of a congenial symbol."

In *Smith v. Chanel, Inc.*, 402 F. 2d 562 (CA 9 1968), the Ninth Circuit explicitly recognized the difference between advertisements which "communicate information as to quality or price" and advertisements which seek to create a "conditioned reflex." *Id.* at 567. The Court then said that "to the extent that conditional reflex advertising succeeds," the product "is endowed with sales appeal independent of the quality or price of the product to which it is attached; economically irrational elements are introduced into consumer choices," and the product "is insulated from the normal pressures of price and quality competition. In consequence the competitive system fails to perform its function of allocating available resources efficiently." 402 F. 2d at 567.[12]

A. The advertisement must first ensure that the consumer "learns" the message

In view of the many advertisements which the consumer is daily exposed, the advertiser must be sure that his message is learned. To this end, most ad agencies retain a corps of psychologists to advise them how to teach the public.

1. The basic goal of advertising is stimulation and solution.—Clark Seavitt, a psychologist, Director of the Perception Laboratory at the Leo Burnett Company, maintains that the basic goal of advertising is arousal and solution of uncertainty.[13] In support of this, he cites data which indicates that stimulation (defined as change, disparity, or discontinuity of input) is biologically necessary to human beings, and something which humans actively seek. Seavitt gives the example of adults' attention to novel, unexpected, or incongruous live drawings rather than "run of the mill" pictures.

Seavitt's thesis is supported by Elizabeth Duff's studies which reveals that learning is enhanced by "arousal" and hindered without it.[14] She found that familiar items arouse little stimulation, indicating that the item had already been learned (hence its familiarity). Thus, another psychologist explains, non-users of a familiar stomach remedy will respond less to a novel television commercial than will user of the brand.[15]

Advertising, then, attempts to create uncertainty by presenting a claim for a new product (or one not used by the consumer) which is inconsistent with the consumer's experience with the old product. Studies establish that when perception thus clashes with cognition, the "perceiver" (i.e. the public) most often responds by compromising; that is, by moving his belief more towards the claim of the advertisement.[16] Thus, even if the advertiser's claim is not completely believable, it is at least partially accepted by the public.

Paul Gerhold and William McGuire found simiar results in an independent study with stronger implications for advertising.[17] Previous data had suggested that the more extravagant a claim, the more it induced a change in attitude; Gerhold and McGuire wished to test this hypothesis in terms of advertising claims. They discovered that if a claim falls within the individual's zone of acceptance (outside limits of claims which he will *accept*, even if not

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[10] Galbraith, *New Industrial State*, at 205.

[11] *Ibid.*, at 206.

[12] The court also pointed out that "irrational consumer allegiances" may produce an effective barrier to the entry of new competition, which, in turn, may produce excess profits, monopolistic output restrictions, and excessive costs in sales promotion. 402 F.2d at 567 (citing authorities).

[13] Clark Seavitt, "The Communication Response," in Bogart, ed., *Psychology in Media Strategy*, 1966, at 27.

[14] Elizabeth Duff, *Activation Behavior*, 1962.

[15] Herbert Krugman, "Processes Underlying Exposure to Advertising," *American Psychologist*, 23(4), at 250.

[16] William Ittieson, "Perception, Cognition, and Action," in Bogart, *op. cit.*, at 31.

[17] Paul Gerhold & William McGuire, "Basic Research and Advertising Practice," in Bogart, *op. cit.* at 68–89.

his current belief) the individual will shift his belief more towards that claim, and distort the claim so that it is more consistent with his belief. Thus, said Gerhold, within the zones of acceptability, *persuasiveness of a claim increases with extravagance.*

2. Resistance to Learning is broken to ensure that message is retained.—Human beings have created barriers against uncertainty by forming beliefs. Advertisers have learned from psychology that the consumer is more likely to retain the message (or attitude change, as described above) if these defenses—or beliefs—can be broken down.

Two studies especially emphasized this point to advertisers. In one study, a film developed for the W.C.T.U. presented 20 reasons why the ladies should drink. Before the film, a questionnaire on 10 of the points was distributed to the ladies. Tests after the film indicated that the viewers retained more of the film in areas where they had not been alerted than in those areas covered by the questionnaire which alerted the ladies and raised their defenses.[18] The second study involved an anti-fraternity lecture given in a fraternity house (though some viewers were not fraternity brothers). The message was better learned (i.e. was more persuasive) when a film unrelated to the message was simultaneously shown, than when a film of the speaker was shown.[19] The distraction of the unrelated film had lowered the resistance to the message and allowed it to be learned

Advertisements similarly break down consumer resistance by distraction. This means that "copy"—the claim of the ad—will be better learned if the picture evokes unrelated thoughts in the viewer. The more unstructured the ad, the deeper the learning.

This approach was substantiated to advertisers by Herbert Krugman's study of the consumer's "direct experience" when looking at ads.[20] One of his main interests was the viewers "thoughts", these thoughts were examined for the number of connections linking some aspect of the ad to personal life. One Timex ad was used displaying a watch; a second ad depicted an Opel car being landed by ship; and the third ad for Pan Am, showed a fishing village in Southern Europe. Krugman found that the Pan Am ad—the most unstructured (in terms of conveying the message) elicited the most thoughts per respondent; Timex—the most structured ad—elicited the least thoughts. Pam Am also elicited the widest variety of thoughts (unrelated to the product or service represented), while Timex elicited a high percentage of thoughts on watches. Yet more of the thoughts elicited by Pan Am (20%) expressed desire for the product than those thoughts elicited by the other two ads (Opel—3%; Timex—1%). The structure of the stimulus thus controlled the structure of the response. Though the highly controlled response (the Timex ad) was most informative, it was least persuasive. Advertisers thus learned that distraction lowered defenses, and learning was better (deeper) achieved by indirection (i.e. emotional responses).

In a later study, Krugman asserted that ads worked in two different ways: by low-involvement, or high-involvement.[21] Distraction by pictures is an example of low-involvement; the viewer does not need to involve himself in the advertisement to receive the message (especially characteristic of television). Low-involvement characterizes most ads because the "message" to be learned is meaningless material, and thus does not stimulate involvement.[22] In low-involvement advertising, the message is learned indirectly—often unconsciously. Repetition of the message—and thus constant relearning (until the message is learned and arousal expires)—moves some of the information from the short term memory system into the long-term memory system. This movement, according to Krugman, permits significant alterations in the *structure* of the perception of the brand or product; e.g. there may, in the unconscious (long-term memory), be a shift in emphasis on the attributes of the product. This process is characterized as "latent learning." The effects of latent learning are noticable only at a crisis situation, in this case, the purchase situation. This point acts as a catalyst, reassembling and evoking all the potentials for shifts in salience which have accumulated up to that point.

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[18] Raymond Bauer in Bogart, *op. cit.*, at 49.
[19] Nat Maccoby, as described by Krugman, "The Impact of T.V. Advertising," *Public Opinion Quarterly*, 1965, 29, 352.
[20] Krugman, "Processes Underlying Exposure to Advertising," *supra.*
[21] Krugman, "The Impact of T.V. Advertising", *supra* at 365.
[22] *Ibid.*, at 350.

The product is then seen in "a different light", though this is only the announcement of an already, unconscious, changed attitude.

High-involvement ads don't always have the powerful unconscious as an ally. They may, however, appeal to other elements of the psyche. Specifically, high involvement is characterized by "bridging experiences"; i.e. connections made by the viewer between his own life and the stimulus.[23] To the extent that this method plays on the needs and desires of human mind, it may create a powerful desire for the product on the basis of a persuasive "bridge"; it may further lead to a low-involvement response (distraction) and thus to the unconscious. High-involvement ads generally seek to first create an attitude change (e.g. by image identification) which then motivate the purchase.

3. Retained information is ensured by familiarity with the ad.—Advertisers have long assumed that brand recognition (and product recognition) will increase as familiarity with the ad increases. This view has motivated the repetition which we all bemoan.

This view was proved sound, however, by a test performed by Dale Berg to ascertain the effect of constant exposure to an ad on perception of the ad.[24] For a few hours each week (to enable the "sleeper effect" to work), Berg exposed several women to various advertisements (emphasing one ad which he wished to be learned) for one minute duration, misleading the women as to the purpose of the test (he said he wanted their reaction to the ads). He then made perception tests, and compared them with tests made before the exposure. The results indicated that the threshold (barrier) to perception had significantly decreased, and that recognition of similar ads was substantially quickened. Since the classic definition of "attitude" is the tendency to respond to stimuli in a particular matter, Berg termed his results as a measure of attitude change.

This, familiarity with an advertisement leads to increased awareness of similar advertisements. The question remains whether the increased awareness goes to the product, or merely the brand (being propogated by similar ads). Walter Weiss, professor of psychology, has concluded that increased speed of recognition means that a quick glance will suffice to produce recognition and recall of the gross elements of an ad, but only the outstanding features of the ad—i.e. brand name—would be noticed.[25] Therefore, *though Brand awareness increases with familiarity, average product awareness decreases.*

4. Retention of Information does not depend on the reliability of the source.—Though immediate attitude changes are likely to be incurred only by highly trusted sources, mistrust does not hinder long term, or "latent" learning. Bauer discovered that an audience to three speakers on civil defense showed immediate attitude change only in response to the most trusted source, but this change was short-lived; information from the "competent" but mistrusted source was more likely to be retained.[26] Weinberger attributes this to the fact that after an interval, the subject is less likely to spontaneously associate the source with the consent; i.e. the content was remembered ("sleeper effect"), though the source was not.[27]

Since the consumer tends to rely on cues to the product which the advertiser points out,[28] this means that mistrust *of the advertiser, even if known, will be forgotten over time,* (e.g. four weeks), *while his misrepresentation as to product cues will be ingrained in long-term memory.* As exaggerations were demonstrated to have great persuasive impact, this does not bode well for consumer equality with the advertiser.

B. The advertisement seeks secondly to create brand loyalty

Words alone will not convince the consumers to do anything; generally, words are used to justify what the consumer emotionally desires to do.[29] Just as the learning process appeals to unconscious forces, the advertiser seeks to impress the brand *image* upon the mind of the consumer. This

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[23] *Ibid.*

[24] Dale Berg, "An Emquiry Into the Effect of Exposure to Advertisements on Subsequent Perception of Similar Advertisements," *Journal of Applied Psychology,* 1967, at 503–08.

[25] Weiss, "Repetition in Advertising," in Bogart, *op. cit.*, at 63.

[26] Bauer, *op. cit.*, at 38.

[27] Weinberger, "Does the Sleeper Effect Apply to Ads," *Journal of Marketing,* Volume 25, No. 6, Oct., 1961, at 65.

[28] Bauer, *op. cit.*, at 40.

[29] Martineau, *op. cit.*, at 98.

requires that imagery in ads be rich and associative, providing bridges for the consumer to identify himself with the projected image.[30]

1. Brand loyalty must be built on emotional and psychological factors.—Generally, products do not greatly differ from brand to brand, so that it is difficult to make a decision on rational grounds. The time required to investigate rational criteria—e.g. price or quality—generally discourages true thought about everyday items, which are "not worth the trouble." Studies on gasoline, for instance, show that consumers do not know how to differentiate between gasolines except in the words of advertisements.[31] Consumers can not define, however, the terms they are using (e.g. "high-octane"); the real ground for preference seems to be colors of the gas station, good experience with servicemen, etc. Yet even such unglamorous products as flour produce high customer loyalty—73.2% of flour customers show undivided loyalty to primarily one brand.[32]

Advertisers take their cue from these studies, and gear their campaigns accordingly. Businessmen study in detail the traits of the consumer with whom they must deal, with increasing emphasis upon psychological and sociological traits. Thus, says Mayer, "all advertising of course edges its way below the conscious level in driving home its point, because consumers at the moment of purchase do not stop to analyze why they regard Brand A as safer for them, more reputable, or more dependable."[33] The Consumer is urged to purchase the product because of the image that the product conveys, not because of its intrinsic value.[34]

2. Brand awareness is created by recall and associations.—Studies have shown that the purpose of the advertiser is to make the consumer learn and retain the association between the two elements of an advertisement—the product and the brand name.[35] This paired-associate learning involves two stages: response (or free-recall) learning and associative learning. Thus, the learner is first taught the individual items themselves (product-awareness as discussed *supra*); he then acquires free association between the pairs so that given one of the items (e.g. product), he can freely recall (by association) the other—i.e. brand.

This learning system may be put in perspective by the Watts and McGuire study showing a "light-bulb" effect regarding recall of message topic (i.e. once it's "switched on", it stays on), and a "doorbell" effect regarding recall of side and arguments, (must keep your finger on the bell to keep it ringing).[36] This means that what is "recalled" by the consumer in Kanungo's model is *not the attributes* of the product, but simply the *existence* of the product—i.e. the subject.

3. Associations are elicited by meaningful and pleasant images.—Gerhold and McGuire assert that even more important than the distraction quality of pictures (discussed above as useful in learning) is the pleasantness of the symbols depicted.[37] Thus, food advertisements are represented as luscious and "mouth-watering" (though not too complicated); or a picture of mother and child represents the happy home. These images are then recalled in the buying situation (true to Kanungo's model) when confronted with the product on the shelf.[38]

Another important aspect of image is the extent to which the brand is associated with the meaning of the product that it represents.[39] Newman, a Harvard Business School professor, cites coffee as an example—coffee is associated with warmth, sociality, and hospitality, and a meaningful image will utilize this association. A more relevent example is soup—which Vance Packard asserts to connote warmth, protection, and the womb.[40] A soup company which conveys the image of affection, protection, and mother-

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[30] *Association of National Advertisers, op. cit.*, at 50.
[31] Martineau, *op. cit.*, at 37.
[32] Social Research, Inc., for Chicago Tribune, *A Study of Motivations Relating to Soaps and Chemical Detergents*, at 4.
[33] Mayer, *Madison Avenue: USA*, 1958, at 88.
[34] Galbraith, *op. cit.*, at 601.
[35] Rabindra Kanungo, "Brand Awareness: Differential Roles of Fittingness and Meaningfulness of Brand Names", *Journal of Applied Psychology*, 1969, vol. 53, No. 2, at 140–146.
[36] Watts and McGuire, 1964, in Gerhold and McGuire, *op. cit.*, at 86.
[37] *Ibid.*, at 85.
[38] Martineau, *op. cit.*, at 14.
[39] Newman, *Motivation Research and Marketing Management*, 1957, at 60.
[40] Vance Packard, *The Hidden Persuaders*, 1957, at 58.

hood would present a compelling and meaningful image not likely to be forgotten.

Burleigh Gardner, head of Gardner Advertising Agency and Sidney Levy of Social Research, Inc. jointly emphasized this point to advertisers:

"These sets of ideas, feelings and attitudes that consumers have about brands are crucial to them in picking and sticking to tones which seem most appropriate. How else can they decide whether to smoke Camels or Lucky Strikes; to use Nescafe or Borden's Instant Coffee; to drive a Ford or Chevrolet or a Plymouth?[41]

4. Associations are elicited by depiction of situations into which the viewer can project himself.—Advertisers want the viewer to identify himself with the image of brand "character"; this gives added incentive to choose one brand over another because of close associations which the consumer feels to the product. Human begins are undoubtedly egocentric animals; thus the most effective way to pair a product with its image is to make the image crucial to the consumer's very being.

An obvious example of this is found in cigarette advertising. Tests have shown that when blindfolded, smokers are unable to identify their preferred brand.[42] Yet most smokers maintain intense loyalty to one particular brand. Cigarette advertisers have capitalized on this by playing on the consumer's self-image. Marlboro's are for rugged and masculine outdoor men; Salem's should be smoked by the youthful; Viceroy's are for the middle-aged with a youthful bent.

Social Research, Inc., has found that demonstration of the product is also important for projection; demonstrators are usually made by "typical" housewives or husbands.[43] Demonstrations are performed in recognizable settings; for example, food products are served on a kitchen table with everyday china.

5. Associations are elicited most successfully in "unstructures" advertisements.—Kregman's study on thought provocations of various styles of advertisements, *supra*, indicate that the more unstructured the ad (in relation to the product discussed), the more connections the viewer makes with the setting and the individual's own life and desires. The most unstructured ads were also found to elicit by far the most thoughts expressing desire for the products. This data suggests that consumer associations of a product with an image are far more persuasive than rational appeals to product superiority. It is emotional identification which motivates choice.

6. Associations are extended to other products in the brand line—The success of image appeal is emphasized by Joseph Fry's findings that customers prefer not just one product, but all similar products in a brand line. Brand name, in other words, acts as a medium through which consumers generalize loyalties from one category of products to another.[44] A consumer who has associated "bread" with Pepperidge Farm will therefore also prefer Pepperidge Farm cookies. Thus brand image has important repercussions for the *whole* brand line, not just the specific product with which the consumer has identified himself.

7. Advertisements impress their message and image by constant repetition.—Martineau has asserted that repetition by itself leads to forcing the brand name into the mind of the consumer.[45] His view was substantiated by Berg's study on the effect of repeated exposure to advertising (*supra*). Krugman also has discussed the effect of repetition, (i.e. continuous relearning, in moving some of the information into the long-term memory system (i.e. the unconscious)).

The important question remains as to *what* is being repeated; is it the product qualities, the brand name, or the image? For many companies, the focus seems to be on the brand name and image; Campbells, for instance, presents a different product (i.e. a different kind of soup) in each ad. The significance of this focus is highlighted by Weiss' theory that repetition (increased familiarity) increases brand awareness, but not product awareness. This means that once the consumer has been substantially exposed to

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[41] Newman, *op. cit.*, at 61.
[42] Martineau, *op. cit.*, at 50.
[43] Social Research, *op. cit.*, at 57–58.
[44] Joseph Fry, "Family Branding and Consumer Brand Choice," *Journal of Marketing Research*, 1967, vol. 4 (3), 237–247.
[45] Martineau, *op. cit.*, at 9.

advertising, his evaluation of product superiority becomes less and less important. Unless product qualities are re-emphasized for the consumer, he will tend less and less to give them their due weight in his decision processes. His choice will become more unconscious and more automatic.

C. The mass media is admirably suited to exploitation of the consumer's mind

National magazines and national television are especially suitable for advertisor's creation of loyal and automatic customers. They are perfect instruments for a dual attack on human learning processes: through distraction and lowered resistance; and through bridging experiences with the consumer.

1. Low involvement learning is effected by unstructured pictures and commercial television.—Martineau, in his advice to advertisers, asserts that while "copy" is an assault on the beliefs of the consumer and thus meets considerable hostility, *pictures* do not have such built-in resistance.[46] "Copy", Krugman reported, is similar to learning nonsense, and thus does not stimulate great interest or motivation. Pictures, on the other hand, are more relaxing, especially when pleasurable to sight.

Krugman demonstrated the interest stimulated by picture ads in magazines by measuring pupil dilation of subjects viewing the pictures. He found that as long as the picture remained novel (for most people, the first three times of viewing), the stimulation was great; and that stimulation was greater for unstructured pictures than for pointed ads.[47] Many advertisers realize the value of "non-obvious" pictures; an especially successful example has been the advertising of Hathaway shirts, which often has no copy at all. People, then, enjoy looking at pictures, and enjoy most the pictures which depict more than the product advanced. To this extent, they are being distracted from the message, and let down their resistance to the assault.

Commercial television, Krugman asserts, is also a distracting or low-involvement teacher. This is especially dangerous because most people regard television as a reliable source of information.[48] Furthermore, many psychologists maintain that television drugs its viewers into a state of passivity, so that everything is accepted unquestioningly (at least temporarily).[49] Krugman apply underlines the implications of television for advertisers:

"I have tried to say that the public lets down its guard to the repetitive commercial use of the television and that it easily changes its ways of perceiving products and brands without up to then changing verbalized attitudes. This adds up, I think, to an understandable success story for advertising's use of the television media. Furthermore, this success seems to be based on a lefthanded kind of public trust that sees no great importance in the matter." [50]

Both magazines and television, then, present invaluable opportunities for low-involvement learning. As discussed earlier, this type of learning is especially prone to move into the unconscious, resulting in automatic customer loyalty with little knowledge of the specifics.

2. High-involvement learning is effected by scenes with which the viewer consciously identifies.—At some point, of course, the advertiser must deliver the message that it is his product that is being pushed. The consumer may also wish to make his decision before the catalystic purchase point. This requires that the consumer be consciously (though not necessarily rationally) persuaded to buy the brand in question.

High-involvement or conscious learning is more likely to be retained by the learner if the learner is motivated or aroused by some aspect of the product (see C.1. *supra*). He is most able to be aroused if the ad depicts a situation with which the viewer can identify. Often, this is an image of what the consumer idealized (i.e. what his *needs* dictate) but close enough to reality so that the situation does not appear absurd. The discrepancy between the picture and the viewer's life is the uncertainty aroused; the solution to this discrepancy is to buy the product. Thus, a housewife may become

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[46] *Ibid.*, at 6.
[47] Krugman, "Processes Underlying Exposure to Advertising," *op. cit.*, at 250.
[48] Marshall McLuhan, *The Medium is the Message*, New York, 1967.
[49] Paul Lazerfield and Robert Merton, "Mass Communication, Popular Taste, and Organized Social Action," *Mass Communication*, ed. Wilbur Schaamon, 1960.
[50] Krugman, "The Impact of T.V. Advertising," *supra.*, at 354.

the ideal and loved wife by serving her husband a delicious meal; a husband may become "more of a man" by smoking Marlboro cigarettes.

In short, the consumer will buy the brands displaying images with which he identifies. Colored pictures, and especially television, provide the perfect means for conveying the desired situation. Associative recall is immeasurably advanced.

D. Advertising has successfully created automatic consumers

Advertising has been admirably successful in attaining its goal of loyal and automatic purchasers. The full horror of this success was revealed by Ruthrauff and Ryan, a New York ad agency which employed a prominent hypnotist to penetrate mental blockages to the subconscious to discover why consumers do or do not buy certain products. One subject under hypnosis was questioned as to why he preferred and always purchased a certain make of car. This man—under hypnosis—repeated *word for word* an ad which he had read *more than twenty years earlier* which he had particularly liked!![51]

1. Advertising has created impulse buying.—DuPont Company ascertained fifteen years ago that most purchases are made on impulse.[52] They pointed out that less than one out of five purchasers carry a complete shopping list but still manage to fill up their carts. The new philosophy, quipped DuPont, is "I WANT IT." Thus, *seven out of ten* purchases are impulsive.

Krugman gave a scientific explanation to this finding in his thesis that the purchase situation is a catalyst allowing unconscious beliefs and attitudes to motivate the purchase, although the attitude change may not yet be consciously verbalized. Furthermore, the accumulated attitudes and beliefs about a brand are etxended to other products in the brand line, so that an impulse to buy Del Monte's pineapples may give rise to a similar impulse to buy Del Monte's waxed beans. The "impulse" is simply a message from the unconscious, prepared by the advertising's "latent learning" strategy and stimulated by the actual sight of the product.

2. Advertising has created hypnotic buying.—Impulsive purchases may simply be part of the entranced state which characterizes shoppers, in a self-service retail store, James Vicary, a motivational analyst, wished to ascertain why there had been an increase in impulsive buying in supermarkets. Using hidden cameras to photograph eyeblinks as the woman shopped, he discovered that eyeblinks fell to a very subnormal fourteen blinks per minute (normal is 32 blinks per minute) which he described as a hypnotic trance, the first stage of hynosis.[53] Many of these women passed neighbors and friends without greeting them; and no one noticed the camera, though many passed within eighteen inches of it. Vicary found that at the check-out camera, the eyeblink rate began rising until it reached the normal, and shooting up to 45 blinks per minute at the ring of the cash register and the clerk's request for money.

Women may actually enjoy being "hypnotized" and thus open the way to the subconscious voices; the variety of choices for a multitude of products would certainly exhaust the rational processes.

IV. Campbells Soup Company has impressed its message deep into the minds of the public

Campbells Soup Company, investing $44,000,000 in advertising in both 1967 and 1968, increased in its 1968 sales by $50,587,000 and its earnings by $8,296,000.[54] Since Campbell's denied that it had been engaging in deceptive practices on March 25, 1969 it seems evident that at least some if not all of its deceptive ads appeared during 1968—the year of substantial gain. At any rate, Campbell's clearly realized the value of communicating with the public. The means by which it communicated were the very tactics by which deep and unconscious memory is effected.

A. Food advertising is especially conducive to associative appeal

Most housewives find their task to be difficult. Social Research, Inc., reported that in a Thematic Apperception Tests, most women, when shown a picture of a woman in her kitchen watching a young boy tracking mud

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[51] Packard, *op. cit.*, at 34.
[52] *Ibid.*, at 90.
[53] *Ibid.*, at 91–92.
[54] "Advertising Age," Volume 4, No. 34, Aug. 25, 1969, at 74.

across the floor, were definitely provoked (some were hysterical), comparing the woman with themselves, and the housewife's sad plight.[55]

Women assert that their job comprises four main spheres of activity: Being a wife; raising the children; feeding the family; and general housekeeping. When asked to complete the sentence, "My family most appreciates me when . . .", 90% of the answers had to do with cooking.[56] Cooking gives the woman self-importance; it permits her role to be recognized; and provides her with the love and affection which she needs.

It is obvious that appeals to a woman's self-image of protector and mother will stimulate tremendous identification and association. All food products to that extent have a great advantage in reaching the woman.

B. Campbell's Soup ad exploit the housewife's emotional needs

Campbell's, ranking 28th in advertising expenditures for 1968, (33rd in terms of a percentage of sales) allocated $8,017,953 to magazines, nearly $20,000,000 to television, and $2,234,273 to newspapers.[57] Its magazine patronage—23.4% of its total expenditures, centered on such magazines as *Ladies Home Journal, Good Housekeeping, Look, Life, Saturday Evening Post,* and *Parents.* These magazines, which ranked from 4th to 24th in circulation, *each* reached from 2 million to 8 million families.[58] Three of these magazines are exclusively devoted to women; the other three are read primarily by women.

Spot (25% of expenditures) and network (32.8%) television commercials were allocated in 1968 over 22 prime time evening programs, 15 daytime and 16 children's shows. In addition, Campbell's co-sponsored "Lassie," the "Beverly Hillbillies," and the "Doris Day" shows,[59] all "family" programs; and sponsored such specials as "Macy's Thanksgiving Day Parade" and "Miss Teenage America Pageant." 60% of its ads were presented to children or women exclusively (who alone would watch daytime T.V. shows.)

Thus, Campbells appeals first to women (through magazines and daytime shows); next women and their families (family magazines and family shows); and finally to the children. The wisdom of Campbell's allocation should be appreciated in view of the fact that favorable disposition towards the featured programs of the media predisposes the viewer to its ads.[60]

1. Campbell's soup ads ensure that the brand is associated with the product.—Campbells has utilized to the fullest extent associative-learning techniques. The connotations of soup—protection, affection, and the womb—have already been discussed. Soup ads are thus inherently emotive. This image is further enhanced by bowls of soup on the kitchen table, and a hungry family—the husband and the children—smiling happily. This scene appeals directly—and effectively—to the woman's needs. It allows her to identify herself as the successful mother and wife performing her most appreciated role—feeding her family. It arouses uncertainty (as to her performance), and solves this uncertainty by recommending Campbells' soup as the solution. Arousal-solution thus enhances the learning of the message. Finally, it appeals to woman's primary motivation—the desire to feel important and appreciated. The smiling faces of the Campbells' family will motivate the woman to find this self-importance for herself.

Thus, the woman completely learns the Campbell's message: soup means self-fulfillment; and self-fulfillment is derived from serving Campbell's soup (because Campbell's "image" is the happy family).

2. Campbells Soup ads ensure that the message (the product) is impressed in the memory.—Women, according to Fransesco Nicosia, (a behavioral scientist) are especially prone to learning from pictures rather than from copy.[61] Campbell's exploits this proclivity by using distracting pictures, and by symbolizing the message within the picture rather than writing it. Thus, resistance to the message is broken, and the information enters the woman's memory. As described *supra.* by Krugman, eventually the information enters the subconscious, where it becomes a motivating force in crisis (purchase) situations.

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[55] Social Research, *op. cit.*, at 10.
[56] *Ibid.*, at 23.
[57] *Advertising Age*, 40 (26), at 42.
[58] *Ibid.*, 40 (42), at 67.
[59] *Ibid.*, 40 (34), at 76.
[60] Krugman, "Processes Underlying Exposure to Advertising," *op. cit.*, at 249.
[61] Francesco Nicosia, *Consumer Decision Processes in the Behavioral Sciences*, 1966, at 165.

Besides the fact that Campbells scenes are highly filled with identification, they are also fairly unstructured. That is, very rarely is the bowl of soup so emphasized as to overpower the rest of the scene. Often, the family—e.g. the children or the husband—are as important to the ad as the bowl of soup. The family scene is pleasant, and permits the woman to contemplate the better side of family life. While she is meditating, Campbell's central message—the superiority of its products—is learned without resistance and without consciousness. The woman learns that Campbell's soups are superior to other soups because of the numerous vegetables (or beans or dumplings) which it contains. By serving soup with such rich garnish, the woman is truly performing well: not only is she feeding her family, she is feeding them soup (with all of its rich connotations); not only is she feeding the soup, she is feeding them the richest and most nutritious brand.

Thus, women are consciously persuaded to choose Campbell's Soups to attain the image of the appreciated efficient important provider; and they are subconsciously persuaded that Campbell's is a superior brand, though this knowledge may not be realized until after the purchase is made. Campbells Soup Ads have accomplished a prodigious feat in mass persuasion, as verified by increasing sales and earnings.

V. The order is insufficient competition for advertising conditioning strategy

Successful advertising implants brand loyalty in the minds of the customers; as this brand loyalty becomes embedded in the subconscious, normal decision processes accede to automatic choice. When the message has been thoroughly learned, the justification for the message—product superiority—becomes decreasingly important to the consumer. Indeed, his awareness of the product has been essentially displaced by awareness—and devotion—to the brand on an unconscious (mesmerized) and emotional (associative) level.

Mesmerization of the public is substantially aided by the two direct concerns of FTC orders: deceptive claims; and communication on a huge scale. Psychologists have found that the more exaggerated the claim (within the limits of acceptability), the more the public will be persuaded to accept that claim. Campbell's exploited the benefits of exaggeration in its deceptive practice, depicting its soups with an exaggerated amount of garnish. That this deception did in fact persuade its viewers is attested by its increased sales and earnings in the time period involved. The deception is not corrected by the fact that Campbells has now discontinued its practice because the public has learned the ads too well to notice that hundreds of vegetables no longer float in the soup bowls.

Campbells Soup Company concentrates on the media best suited for mass indoctrination: magazines with especially high readership; and television (although the FTC made no finding that Campbell's used deceptive techniques in its television commercials, even a casual viewing of the ads obviate the fact that *some* deception was used). It is difficult to estimate the number of persons exposed to the advertising, but a *minimum* of 30,000,000 people is evident. Even assuming that all of the newspapers and magazines who are notified of FTC orders convey this information to the public (an assumption which is far from warranted), millions of loyal Campbells customers would remain ignorant of the order. For those persons who do know of the order, their comprehension is hardly greater; for reading an announcement in a newspaper (that Campbell's signed a consent order for settlement purposes only) involves a learning substantially different—and *shallower*—from associative and unconscious learning.

The Order, then, is completely inadequate to reach the deceived; but more important, to reach the levels of the mind in which the deception is immersed.

VI. Affirmative disclosure is required to overcome the condition effects of advertising

The Federal Trade Commission is charged with protection of the public interest. The public interest requires more than mere cessation of a deceptive practice; it requires that the harm perpetrated by the deceptive practice be undone. This constitutes the informative function of the Commission.

The Commission can not properly perform its informative function unless it notifies the persons exposed to the deceptive practice. Assuming that the 18,946 notifications of an order received by various communications agencies are conveyed to its subscribers, this does not inform the persons harmed. It is

highly unlikely that *Life, Look, Ladies Home Journal,* or *Good Housekeeping* has ever publicized Commission orders. It is certain that television has never done so. The "public" in question is neither informed nor protected by publication in the *Wall Street Journal* or *Consumer Report's.*

It is essential that the Commission convey its finding to the persons exposed to Campbell's advertisements. This is particularly necessary in view of the penetration of brand awareness in the memory of the public The public must be first *aroused* to stimulate its cognitive processes; some notice must be conspicuous in the ad to attract public attention. This is the only way to assure that the information is conveyed to the unconscious in which Campbell's deception is embedded. It is also the only assurance that consumer identification with Campbell's *image* be restrained (to the extent of the deception).

Thus, affirmative disclosure in every advertisement which Campbell's submits—in magazines and on television—will reach the same persons who have been deceived. Further, it will attract the notice of those persons—and allow them to convey the information to the deep recesses of the mind (this, of course, requires that the disclosure be repeated for the same length of time that the deception appeared). This alone will assure that the public be able to exercise a rational decision on the qualities of Campbells soups.

Wherefore, we respectfully request that the Commission withdraw its provisional acceptance of the proposed consent order and attempt to negotiate a consent agreement containing a clause requiring an affirmative disclosure in addition to the provisions included in the present agreement.

Respectfully submitted,

CYNTHIA EDGAR.
AARON HANDLEMAN.
PETER HARWOOD MEYERS.
JOHN J. SIMKANICH.
IVAN VANCE WHITE, JR.

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2. Opinion of the Commission in the Matter of Campbell Soup Co.

Before Federal Trade Commission

Commissioners: Caspar W. Weinberger, Chairman, Paul Rand Dixon, Philip Elman, Everette MacIntyre, Mary Gardiner Jones.

In the matter of Campbell Soup Company, a corporation, and Batten, Barton, Durstine & Osborn, Inc., a corporation.

OPINION OF THE COMMISSION

By Weinberger, Commissioner:

This matter involves a number of advertisements by the Campbell Soup Company which the Commission has challenged as being false, misleading, and deceptive in violation of Section 5 of the Federal Trade Commission Act. The advertisements in question included pictures of a bowl of soup, apparently prepared in accordance with the directions on the can, in a ready-to-eat situation. Solid ingredients appear at the top of the bowl. The Commission charged that this picture did not accurately represent the appearance of a bowl of soup prepared according to the instructions on the can because Campbell had "mocked up" the bowl of soup pictured in the advertisements by placing glass marbles in the bottom of the bowl. It was further charged that these marbles at the bottom of the bowl were designed to force the solid ingredients to the top, thus making visible in the picture that which would not have been visible in a bowl of soup prepared in the home.

When this practice came to the Commission's attention in 1969, it proposed to issue an order prohibiting Campbell from using any such picture or any deceptive test or demonstration in advertising its products and, further, from misrepresenting the ingredients of any of its products in any manner. Respondents consented to the entry of this order. On September 19, 1969, the Commission provisionally accepted the order and, in accordance with FTC Rules § 2.34(b), directed that it be placed on the public record for thirty days, until October 20, 1969, to permit interested members of the public to file comments concerning it.

On October 20, 1969, SOUP, Inc., filed a petition requesting the Commission to withdraw its provisional acceptance of the consent order and made a motion

to intervene in the proceedings. SOUP also asked an opportunity to present oral argument to the Commission, urging that the consent order as provisionally accepted was inadequate to protect the public interest.

On February 24, 1970, after a hearing had been held on February 5, 1970, on SOUP's motion to intervene, the Commission allowed SOUP until March 20, 1970, to submit further written comments on the adequacy of the proposed consent order. "Intervention" in the proceedings was granted to this extent. The Commission delayed consideration of the consent order until after SOUP's comments were filed. This was done on March 20, 1970.

By petition of that date, SOUP presents us with the following issues for decision. (1) We are asked to withdraw our provisional acceptance of the consent order for the reasons given in SOUP's brief of March 20, 1970, which supersedes the petition of October 20, 1969, on this point. (2) We are asked to reconsider our decision of February 24, 1970, and to grant SOUP a hearing on the issues raised in its March 20, 1970, brief. (3) We are asked to reconsider our decision of February 24, 1970, and to grant SOUP intervention in these proceedings. (4) SOUP requests the Commission to provide it with a free copy of the complete transcript of the February 5, 1970, oral argument.

II

§ 2.34 of the Commission's Rules of Practice provides for the submission of comments by interested persons on consent orders which have been provisionally accepted by the Commission. SOUP has submitted extended comments which have been seriously considered by the Commission.

While the Commission's rules do not explicitly provide for "intervention" in its consent order proceedings—an omission which we have referred to our Advisory Council on Rules of Practice and Procedure—we feel that the participation permitted SOUP in this case provided it an adequate opportunity to bring its views to the Commission's attention. Had the arguments made in SOUP's brief raised substantial issues of the law or the facts involved in this case, further presentations, perhaps in the form of a hearing, might have been appropriate. Cf. *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (D.C. Cir., 1966). But the short of the matter is that there is no disagreement between petitioner and the Commission as to either the facts of this case or the Commission's power to deal with them.

In SOUP's brief of March 20, 1970, there is no suggestion that the Commission has misconceived what Campbell actually did in this case. Our complaint was in agreement with petitioner that Campbell put glass marbles in the bottom of its bowls of soup before photographing them, and that this practice was a deceptive one in violation of Section 5 of the Federal Trade Commission Act.

Nor is there any disagreement between the Commission and petitioner as to the scope of the order which the Commission has the power to issue in this case. Particularly, petitioner argues at length that the Commission has the power to require respondent to make affirmative disclosure in future advertisements of the deceptive practices discovered by the Commission in order to alert the public to these practices. We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably of that deception. *All-State Industries of North Carolina, Inc.* v. *F.T.C.*, —— F.2d —— (4 Cir., No. 13,568, decided March 19, 1970); *Portwood* v. *F.T.C.* —— F.2d —— (10 Cir., No. 9983, decided November 14, 1969). Nor is there any doubt as to the Commission's right and power to alert the public as to the acts and practices which it has challenged as deceptive, as well as to all orders entered with respect to these acts and practices. *F.T.C. v. Cinderella Career Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968). All that is required is that there be a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 613 (1946).

Because there is no dispute as to the facts of this particular case or as to the Commission's powers to remedy them in the way which petitioner suggests, it does not appear to us that any purpose would be served by permitting SOUP to make additional submissions, whether in written or in oral form. It remains only for the Commission to decide, in light of the arguments made by SOUP and other relevant considerations, whether the final acceptance of the provisionally accepted consent order is in the public interest.

III

The petitioner recognizes, as it must, that the Commission has wide discretion in determining the scope of its orders. Indeed, the thrust of much of petitioner's brief is to the effect that the Commission should use its discretion to include additional provisions in its order in this case. The Supreme Court has summarized the state of the law in the following passage, cited in petitioner's brief:

"It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found . . . and that Congress has placed the primary responsibility for fashioning orders upon the Commission." *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 390 (1965).

The issue before us, then, is simply what provisions we should include in this order so as to protect the public.

SOUP contends that the order provisionally accepted by the Commission is inadequate to protect the public. It argues that in order effectively to protect the public from the deception involved in Campbell's advertisements the order must require Campbell's future soup advertisements to disclose that their prior advertisements of this product had been challenged by the Commission as being deceptive. It is proposed that this disclosure be required to be included in advertisements for the same period of time that the challenged advertisements appeared, and in the same media.

Petitioner raises three principal questions concerning the provisionally accepted order: whether members of the public will be adequately informed of respondent's alleged deception and thus be able to protect themselves from future recurrences; whether it contains sufficient assurances that the alleged violations will not be repeated in the future; and whether the order adequately insures that the effects of the deception alleged here have been adequately dissipated.

These questions are, of course, among those which the Commission must consider in determining whether final acceptance of the proposed order is in the public interest. There are also other questions which we should consider—among them the extent and type of the deception, whether it involves a danger to health or safety of consumers, and, what is particularly important where a proposed order has been agreed to by respondent, whether the matter merits further expenditure of the Commission's limited resources when compared with other matters within our jurisdiction. All these questions, it should be noted, concern the general policy of the Commission in administering the statutes referred to it by the Congress; they are in no way peculiar to this case or to this order.

Considering all of these factors, and giving particular attention to the arguments made in petitioner's brief, the Commission is of the opinion that final acceptance of the proposed consent order is in the public interest. Our reasons follow.

This order is substantially identical in its terms to orders issued in other "mock-up" cases, orders which have been upheld by the courts. See *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). It would prohibit respondent from advertising any of its food products by presenting pictures or demonstrations which do not accurately represent the products and, further, from misrepresenting the ingredients of any of its products in any manner. A violation of this order will be punished by the imposition of substantial fines pursuant to Section 5(1) of the Federal Trade Commission Act. We think that the order completely describes the practices alleged to exist and will deter respondent from repeating them. The order also covers some practices not actually used by this respondent but which are reasonably related to these practices. We further think that the Commission's press release describing its disposition of this case, while perhaps not as widely disseminated as Campbell's advertisements including the affirmative disclosure proposed by petitioner would be, will give the public adequate notice of the respondent's conduct here. With regard to petitioner's final point about dissipating the effects of the alleged deception, we think that stopping the said deception itself should be our principal objective; further, we are doubtful that to require, perhaps only in 1972 or 1973 or even later, after trial and appeal, a public apology for placing marbles in soup advertisements in 1968, would have the effect petitioner seeks.

These considerations, while important, are not, however, what principally persuade us that final acceptance of the proposed order is in the public inter-

est. It is because we think that the Commission has other important matters to deal with that we do not believe further resources should be devoted to this case. A sensible assessment of our priorities convinces us that the added amount of relief which might theoretically be obtained after years of protracted litigation is not worth the expenditure of resources which could be put to better use elsewhere.

While the alleged deception here is not one which creates dangers to the health and safety of consumers, as do many matters which come before the Commission, and while it does not even involve an affirmative misstatement of fact, it is, of course, a deception—unnecessary and deceitful—designed, as the complaint alleged, to create a false impression of the amount of solid ingredients in Campbell's soup. However, we do have an order, obtained without an interminable trial and series of appeals, which is fully adequate to protect the public; we shall not hesitate to enforce this order if this tawdry practice is revived.

There should now be an end to this matter.

IV

We make, then, the following disposition of the issues presented to us in SOUP's petition. The motions to grant a hearing on the issues raised in SOUP's March 20, 1970 brief, and to allow further intervention in these proceedings, and the motions to reconsider, are denied. The motion to withdraw our provisional acceptance of the proposed consent order is also denied, and the proposed consent order is finally accepted. Our November 12, 1969, order, according petitioner's limited request to proceed *in forma pauperis*, is still in effect, and we hold that petitioner's request for a copy of the transcript of the February 5, 1970, oral argument should be granted.

An order accompanies this opinion.

Commissioners Elman and Jones have filed separate statements.

May 25, 1970.

United States of America Before Federal Trade Commission

Docket No. C–1741

Commissioners: Caspar W. Weinberger, Chairman, Paul Rand Dixon, Philip Elman, Everette MacIntyre, Mary Gardiner Jones.

In the matter of Campbell Soup Company, a corporation, and Batten, Barton, Durstine & Osborn, Inc., a corporation.

ORDER

The Commission having considered the petition of SOUP, Inc., filed March 20, 1970, in which SOUP, Inc., moves for withdrawal of provisional acceptance of the consent agreement in this matter, for a hearing on the adequacy of the provisionally accepted consent agreement, for permission to intervene in this matter, and to be furnished at Commission expense with a copy of the transcript of oral argument heard February 5, 1970:

It is ordered that the motion of SOUP, Inc., to withdraw provisional acceptance of the proposed consent order be, and it hereby is, denied.

It is further ordered that the attached consent agreement be, and it hereby is, finally accepted, and the Order to Cease and Desist contained there in issue.

It is further ordered that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered that the motions of SOUP, Inc. for a hearing, for further intervention in this matter, and for reconsideration of our February 24, 1970, decision be, and they hereby are, denied.

It is further ordered that the motion of SOUP, Inc., for a copy at Commission expense of the transcript of oral argument in this matter heard February 5, 1970, be, and it hereby is, granted.

The opinion of the Commission accompanies this order.

By the Commission.

Commissioners Elman and Jones filed separate statements.

[SEAL] Joseph W. Shea,
Secretary.

Issued: May 25, 1970.

United States of America Before Federal Trade Commission

Commissioners: Caspar W. Weinberger, Chairman, Paul Rand Dixon, Philip Elman, Everette MacIntyre, Mary Gardiner Jones.

In the matter of Campbell Soup Company, a corporation, and Batten, Barton, Durstine & Osborne, Inc., a corporation.

SEPARATE STATEMENT OF COMMISSIONER ELMAN

On October 20, 1969, SOUP filed a petition for intervention which raised serious and substantial questions—questions of law, fact, policy, and discretion—as to the adequacy of the proposed consent order to remedy the deceptions alleged in the complaint. The order, it was contended, was too narrow in that it was limited to a negative prohibition of future advertisements involving misrepresentations similar to those challenged by the Commission. SOUP urged, with considerable force, that the order should go further and require respondents' future advertising to contain affirmative disclosures designed to overcome and dissipate any residual deceptions of the public resulting from past misrepresentations.

It seemed clear to me in October 1969, as it does now, that the public interest would be best served by prompt adjudication of these issues in an adversary proceeding in which SOUP could participate as a public intervenor. In my view, the proper course for the Commission was, and is, to issue a formal complaint under Part 3 of the Rules of Practice, referring the case for trial before a hearing examiner. Consent decrees and orders undoubtedly serve a useful purpose, saving the time and expense of litigation where no real controversy exists. That cannot be said here, where basic issues relating to the adequacy of the remedy have not been fully canvassed on an evidentiary record and remain unresolved.

There is no doubt of the Commission's general authority, comparable to that of a court of equity, to insist upon affirmative disclosures or other actions necessary to remedy unlawful acts and practices found by it. The questions for the Commission to consider in each case is whether, in light of the nature, gravity, duration, and effects of the illegal conduct, adequate protection of the public requires such additional provisions in the order.

In determining whether, and to what extent, there is a need in this case for the type of affirmative relief urged by SOUP, the crucial facts—which the Commission does not now have—are those bearing on the residual effects of respondents' alleged misrepresentations. Consumers' buying habits can be influenced by many factors, including the impressions left by past advertising claims long discontinued. Although a deceptive advertising campaign may have run its course, its adverse effects on the public, and on honest competitors, may continue unabated, thus creating the need for a remedy beyond a simple order to cease and desist.

SOUP's claim that there is such a need here seems to me to call for a factual inquiry—which the Commission has not made—into the effects of respondents' advertisements. As I see it, the need for an affirmative remedy to dissipate the effects of the alleged deceptions cannot be dismissed on the basis of conjecture or unverified assumptions. It may well be that, after evidence is taken and findings made on a record, the Commission would still conclude that a merely negative prohibitory order is all that the public interest requires. But I am not prepared to make that judgment now, in the absence of facts showing the extent, if any, of the residual harm to the public which would remain after discontinuance of the challenged advertisements.

As all agree, the questions raised by SOUP have a broad significance in the general area of the Commission's consumer protection responsibilities which is not confined to this case. Issues of such large importance to the public should not be "settled" on the basis of respondents' acceptance of a consent order whose adequacy has been seriously challenged by responsible representatives of the public interest.

Regrettably, the disposition of this case has been unduly delayed by the peripheral and pointless controversy over SOUP's standing to intervene—which seems to me too clear for argument. The kind of "intervention" which SOUP has been permitted thus far is indicated by the quotation marks which

the Commission puts around the word. The fact is, as the Commission recognizes, that our present Rules make no provision for intervention in proceedings disposed of by consent orders. SOUP's petition to intervene has, at least, served a useful purpose in bringing this deficiency to our attention. In any event, it surely is not a valid reason for denying the petition that it cannot easily be fitted into our present procedures.

If the allegations of the complaint are true, we are confronted here with an egregious violation of law by one of America's largest companies. The charge is that, several years after the Supreme Court had specifically outlawed the practice, respondents used a deceptive "mock-up" in advertising their product, a household staple. In dealing with such a case, it is important that the Commission's response be swift and sure. I fear that, in both these respects, the disposition of this matter will be found wanting.

May 25, 1970.

United States of America Before Federal Trade Commission

Commissioners: Caspar W. Weinberger, Chairman, Paul Rand Dixon, Philip Elman, Everette MacIntyre, Mary Gardiner Jones.

In the matter of Campbell Soup Company, a corporation, and Batten, Barton, Durstine & Osborne, Inc., a corporation.

SEPARATE STATEMENT OF COMMISSIONER JONES

John Gardner, speaking of the problems raised by dissenters, said recently that "The solution lies in giving them outlets *within the system*, that is, in providing them constructive paths of action."

Granting members of the public affected by and concerned with Federal Trade Commission actions the *right* of intervention in Federal Trade Commission proceedings would provide one legitimate and traditional channel for members of the public to make proposals, present data or express their viewpoints and ideas to the Commission about Commission actions.

The instant petition for intervention by SOUP raises important issues going to the effectiveness of Commission action. These issues affect the basic viability of the Commission and its potential for effective action. It presents a graphic illustration of the responsibility and high quality of the substantive contribution which members of the public are in a position to make to the work of federal agencies.

The issues posed by the SOUP petition do not involve questions respecting the scope of Commission's remedial powers. They go directly to a key issue respecting the order proposed to be entered here, namely, its adequacy to protect the public. Petitioners argued that the Commission's proposed order was inadequate. They went further and made a concrete proposal respecting a remedial provision which they urged would go a long way to rectify the order's inadequacy.

I cannot agree with the majority's interpretation of petitioners' proposal as calling for "a public apology" from the respondent. It is designed for much more serious purposes: to seek to dissipate the effects of the alleged deception involved here. This concept of relief is a transitional one and integral to all antitrust decrees. It surely deserves more thoughtful consideration than labeling it a call for public apology.

Nor can I agree that the adequacy of relief should only be of concern to the Commission when the deception involves the health or safety of members of the public. Congress did not make such a distinction in formulating our statutory mandate and we should not undertake to do so at this late date.

I believe the constructiveness of the proposal and its direct relevance to the susbtantive performance by the Commission of its statutory duty compels the Commission to hold a hearing on the issue of the order's adequacy, and to grant petitioner the right to intervene and in that hearing to present their arguments and offer evidence. Therefore, I dissent from the Commission's decision which disregards the substantive proposals of the petition and determines instead to enter the order as originally proposed.

May 25, 1970.

3. Articles from Advertising Age Describing Impact of F.T.C. Decision in Campbell Soup Case

[From Advertising Age, May 10, 1971]

"CORRECTIVE" AD SCENE GETS CLARIFIED IN CURRENT LITIGATION

(By Stanley E. Cohen)

Washington, May 6—Who will have the distinction of being the first advertiser hit by a Federal Trade Commission order requiring "corrective" ads in general media?

There have already been more than half a dozen nominees, and the screening process is under way. Many people in the ad business still seem to think this is some kind of far out madness; but it is going to happen to someone in the next year or two.

At the moment, the commission is—in effect—"getting its ducks in a row." "Corrective ads" are one of several new remedies FTC has developed to make deceptive advertising prohibitively risky. But it is a "doomsday weapon," so the commission is still determining the circumstances where it will be warranted.

The FTC's innovation is new only in the sense that it involves advertising in general media. Prescription drug advertisers have been subject to this kind of penalty for several years. Some of the prescription drug "corrections" have been by mail; others have been in ads in medical journals.

What is justified for prescription drugs is not necessarily appropriate for other products, however. It is more serious, for example, to give doctors bad advice than to overstate the effectiveness of a gasoline additive.

FTC's formula for "corrective" ads visualizes that the advertiser devote 25% of his budget for a 12-month period to time and space, publicly disclosing that previous ads have been found deceptive by FTC. Walter Bregman, exec vp of Norman, Craig & Kummel, who testified for the Assn. of National Advertisers at FTC's recent hearing on Firestone ads, said many advertisers would decide it is better not to advertise at all than to submit to such an arrangement. Even considerably less than 25% might be fatal, he said, because the ad is completely destroyed once the negative message becomes part of the over-all impression.

He had some sobering observations for FTC. The first advertiser hit with a "corrective" ad order is going to be severely hurt, because the remedy is "unique" and will necessarily attract attention. In effect, he was warning the commission that this is not a remedy to be used capriciously. Once several advertisers have been required to run corrective ads, however, Mr. Bregman anticipates a "fatigue" factor—they won't be noticed any more. Here was another lesson for FTC: Save your "doomsday" weapon for truly flagrant situations.

So far there has been no reason to believe FTC intends to make "corrective" ads the routine result in all kinds of ad cases.

The first to go through the screening process was Campbell Soup Co., which was accused of rigging photos by dropping marbles in the soup. In a landmark decision, FTC said it could require "corrective" ads if it wished. But this case did not warrant such a remedy.

Three of the five "nominations" that followed involved cases where FTC charges that nutritional value had been misrepresented—Coca-Cola's Hi-C, Ocean Spray's cranberry juice cocktail and ITT-Continental's Wonder bread. One involved pollution issues—Standard of California's ads for Chevron with F-310.

One "nutrition" case, Swift's baby food, pointedly omitted a proposal for "corrective ads." Robert Pitofsky, FTC's chief of consumer protection, who is on the "inside" on these matters, explained that FTC was not pushing Swift, because Swift is one of the less important members of the baby food industry. While it wants Swift's ads to be non-deceptive, Mr. Pitofsky said, FTC does not want to discourage Swift from driving for a bigger share of the baby food market.

Last week FTC disclosed it has had some second thoughts about requiring "corrective" ads from Chemway Corp. in a case involving therapeutic claims for Dr. West's "germ killer" toothbrushes. The original complaint contended the toothbrush was potentially harmful because it was treated with a mercury

compound, and in any event would not provide the health benefits the ads suggested.

The settlement tentatively accepted by FTC stops Chemway from treating toothbrushes with potentially harmful chemicals, and requires it to have good evidence to support future claims for safety and effectiveness. The company would be obliged to take back remaining inventories of the "germ killer" brush, but there is no requirement to notify consumers about FTC's findings.

There's some suspicion FTC deliberately inserted the proposed "corrective ad" clause in the Dr. West case as a negotiating device. The product was already off the market, so the case for a corrective ad was less apparent, particularly since the normal life of a toothbrush is estimated to be no more than three months. Consumerists, however, may still choose to challenge the settlement. Some of the therapeutic claims for the product were extreme, and consumerists could contend Chemway is getting off too easily.

FTC watchers tell me the case that is bound to shed the most light on this subject is Firestone. During the past three weeks the "whys" and "why nots" have been exhaustively examined at a full-scale hearing involving a confrontation between consumerists and advertisers. A bizarre juxtaposition existed. Advertisers were arguing that it isn't possible to measure the impact of particular ads. Consumerists were contending: "The impact is there. The deceptive advertiser must not retain tainted gains he made at the expense of honest competitors and gullible consumers."

Regardless of the outcome, the Firestone case has helped clarify the "corrective" ad issue. Firestone, for example, stressed the futility of attributing more than minimal residual impact to ads which have not run since 1966-'68. In the Firestone case, consumerists now agree to allow a choice. The case involves price and safety claims. The "corrective ad" remedy will be asked only for those themes FTC finds to have been used deceptively in the past. That means the advertiser could avoid "corrective ads" entirely by switching to new themes.

[From Advertising Age, March 1, 1971.]

'CORRECTIVE' AD CASES RAISE HOST OF COMPLICATED LEGAL, POLITICAL ISSUES

(By Stanley E. Cohen)

WASHINGTON, February 25—No government action in 50 years hits the ad business as hard as Federal Trade Commission's recent proposal to require "corrective" ads.

In numerous recent cases, the commission seeks to require the advertiser to devote 25% of future ads for 12 months to confessions that previous ads were deceptive. It's a startling "undiscovered" power in a law that has been interpreted and reinterpereted for half a century; and each new case brings fresh cries of anguish.

Consumerists, particularly SOUP, the young law students from George Washington University law school who invented the "corrective ad" concept, believe the government finally has a penalty which makes deceptive advertising prohibitively costly. Ad people see it another way. They think FTC is toying with a "doomsday" weapon which could wipe out their businesses.

The industry is particularly jittery because the new policy applies to old ads as well as new ones. Current FTC complaints reflect rigid concepts of "truth"—and previously unsuspected forms of retribution. These are being applied to ads which were planned when admen felt free to utilize a great deal of poetic license, and when the penalty for deception amounted only to an order which said, in effect, "Go and sin no more."

Between 50 and 100 major campaigns, many of them by the most respectable food companies, are known to be on FTC's active list of investigations. Current cases seeking corrective ads already involve Chevron gas, Hi-C, Dr. West's toothbrushes and Ocean Spray cranberries. In today's climate, FTC's staff

feels obliged to apologize when it recommends an order which omits "corrective" ads or some equally disagreeable remedy.

Some ad people, on the verge of panic, look pleadingly to Congress. But FTC's stock is at an alltime high, largely because of widespread admiration of its willingness to get tough with advertising. Key FTC policy makers say the best contribution they can make toward raising the morality of advertising is "to sue the hell out of them." President Nixon appears to be impressed, too. As a reward, he has just given FTC the key role in his new consumer program.

In the absence of congressional or White House intervention, there are months and years of uncertainty ahead. So far, FTC has merely issued proposed orders, which must be debated by lawyers, reexamined by the commission, and ultimately by the courts. If corrective ads are indeed a "doomsday" weapon, there is an imperative need to examine when—if ever—a weapon of this kind is warranted.

Is it "cricket," for example, to apply new, tougher standards and forms of punishment retroactively to campaigns which were developed under older, and more tolerant, standards of public morality? The Constitution prohibits *ex post factor* legislation. If Congress can't pass laws applying new ground rules to actions which have already taken place, should FTC have greater discretion?

There are already a few clues which suggest that FTC recognizes that a "doomsday" weapon should not be used for "brush fire" wars. In the Campbell Soup case, where the SOUP made its initial move, FTC refused to require "corrective" ads. The rigging of a photo by dropping marbles into the soup might be a deception. But it did not warrant this form of correction, FTC said.

A few days ago, FTC simultaneously announced complaints against ads for Ocean Spray cranberry juice and Swift baby food. Both cases involve hotly controversial nutritional claim issues. FTC wants corrective ads by Ocean Spray, but not by Swift. Robert Pitofsky, chief of FTC bureau of consumer protection, explained that Swift is No. 4 in the baby food field. The commission did not want to impose a penalty which might make it more difficult for Swift to become an important competitor in that product category.

There are other clues to when FTC considers "doomsday" weapons warranted. Ad people have argued that the advertiser who is forced to use corrective ads would hurt his business. FTC's executive director, Basil Mezines, isn't impressed. Ordinary cease and desist orders let offenders keep their ill-gotten gains, he argues. Corrective ads help restore market shares to competitors who were victims of deception by an aggressive advertiser.

Some pending cases involve charges that anti-pollution merits of a product were misrepresented. One involves safety. Several involve nutrition, including two which complain that consumers were told this was the economical way to get necessary food values, when, in fact, other foods, which cost less, are more nourishing.

Some important information may emerge from the hearing which gets under way March 9 in a case involving charges that Firestone made deceptive pricing and safety claims for tires. The SOUP students are intervening, and a prominent Washington anti-trust lawyer, Victor Kramer, has volunteered to handle their case for them. Assn. of National Advertisers, represented by Gilbert Weil, will also participate; so the lines appear to be drawn for a significant round.

How significant remains to be seen. If Firestone wins—if the ads are considered true—the "corrective" ad issue won't be argued. If it is argued, however, lawyers for the first time will debate such questions as these: Was there sufficient residual impact from this campaign—now several years old—to justify corrective ads? Was the deception so flagrant as to justify the "doomsday" penalty, regardless of residual impact?

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[From Advertising Age, October 5, 1970]

FTC May Invoke "Soup Clauses"; Hi-C Ads Not False, Coke Says

STANDARD OF CALIFORNIA, COCA-COLA WOULD HAVE TO MAKE PUBLIC CONFESSIONS

(By Stanley E. Cohen)

Washington, Sept. 30—The prospective penalty for false advertising escalated dramatically today as the Federal Trade Commission disclosed that it hopes to put so-called "soup clauses" in cease and desist orders against Coca-Cola Co. and Standard Oil of California.

Apart from the unique penalties FTC is proposing, the cases could lead to landmark decisions defining permissible nutritional and anti-pollution claims. But the insertion of "soup clause" penalties marks them as the testing ground for a new concept which says advertisers who are found to be guilty of deceptive advertising can be required to make appropriate public confession.

FTC says Coke and its agency, Marschalk Co., New York, misrepresented the nutritional value of Hi-C fruit drink, and Standard and its agency, Batten, Barton, Durstine & Osborn, New York, falsified the anti-pollution potential of the F–310 additive in Chevron gasoline.

The Coca-Cola Co. distributed a statement which pictures the case as a menace to all food companies which have been promoting the fact that their products are fortified with extra vitamins and minerals. Standard of California claimed FTC "ignores overwhelming scientific proof" that F–310 is effective.

FTC'S "SOUP CLAUSES" GIVE STIFF PENALTIES

While there has been no statement indicating the specific reasons why FTC decided to seek the unusual "soup clause" penalty in these cases, *the FTC vote is a spectacular victory for a group of George Washington University law students who contend FTC lets advertisers off too easily.* And it appears that "soup clauses" are likely to become standard in many future FTC ad cases.

Early this year the law students, operating under the "corporate name" SOUP, tried unsuccessfully to persuade FTC to require Campbell Soup Co. to run ads advising the public that pictures of vegetable soup were enhanced with glass marbles which made the soup more photogenic by forcing vegetables to the surface.

Though FTC decided to settle the Campbell Soup case with a consent order which simply prohibits rigged mockups in the future, Caspar Weinberger, who

was FTC chairman at that time, wrote an opinion which said the "soup clause" could be required "in appropriate cases."

The students became interested in the problem during a course in trade practice law taught by John Banzhaf III, a "public interest" crusader best known as the individual who persuaded the Federal Communications Commission to require broadcasters to offset cigaret ads with anti-cigaret information.

They took the position that FTC falls short of its responsibility when it lets an advertiser off with an order which says, in effect, "go and sin no more." They contend that sinners should not be permitted to profit from their sins, and that—in fairness to consumers, as well as other business men who have been hurt competitively—FTC should fashion penalties which deprive the sinner of the fruits of his transgression.

Encouraged by Mr. Weinberger's comments in the soup case, FTC staff members decided to test the commission's willingness to impose "soup clause" remedies. The vote to use "soup clauses" in two major cases this week indicates the commission is satisfied that it has fashioned a "workable" formula for the public "confession."

An early proposal worked up by FTC's staff visualized an order requiring "corrective" ads in the same media that carried the original "deceptions." FTC's formula, applied to proposed orders against both Coke and Standard, set no quotas.

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4. "S.O.U.P. Clauses" in Proposed F.T.C. Orders

Provision No. 3 Contained in the Proposed Order in *The Coca-Cola Company*, File No. 702 3191 (1970):

It is further ordered that respondent The Coca-Cola Company do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which claims, directly or indirectly, any nutrient value whatsoever for any fruit drink product or any other product in commerce other than natural fruits or natural fruit juices for a period of one year from the date this order is served upon it unless it is clearly and conspicuously disclosed in such advertisement that the Federal Trade Commission has alleged that the company's previous use of the term "Hi-C" to designate high vitamin content was false and deceptive, in that the product "Hi-C" was not in fact high in Vitamin C. Said disclosure must consist of not less than twenty-five percent (25%) of the total space used for each advertisement in printed form and not less than twenty-five percent (25%) of the total time devoted to each advertisement disseminated on radio or television.

Provision No. 4 Contained in the Proposed Order in *Standard Oil Company*, File No. 702 3222 (1970):

It is further ordered that respondent Standard Oil Company of California do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement for Chevron gasoline, or any other gasoline, for a period of one year from the effective date of this order, unless it is clearly and conspicuously disclosed in such advertisement that the Federal Trade Commission has found that the company's previous advertisements for Chevron gasolines with the additive F–310 contained false, misleading and deceptive statements, representations and demonstrations and said products in fact that did not reduce air pollution. Said disclosure must consist of not less than twenty-five percent (25%) of the total space used for each advertisement in printed form

and not less than twenty-five percent (25%) of the total time devoted to each advertisement disseminated on radio or television.

Provision No. II Contained in the Proposed Order in *Chemway Corporation*, File No. 702 3498 (1970):

It is further ordered that respondent Chemway Corporation do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement for Dr. West's "Germ Fighter" toothbrush or any other toothbrush manufactured or distributed by respondent, for a period of one year from the date of the order, unless it is clearly and conspicuously disclosed in such advertisement that the Federal Trade Commission has alleged that the company's previous advertising for Dr. West's "Germ Fighter" toothbrush, a product of Chemway Corporation, falsely asserted that because the brush killed germs, the product was effective in the mitigation or prevention of infectious diseases of the oral cavity. Said disclosure must consist of not less than twenty-five percent (25%) of the total space for each advertisement in printed form and not less than twenty-five percent (25%) of the total time devoted to each advertisement disseminated on radio or television; provided, however, that the aforementioned space and time requirement will not prohibit the use of such other appropriate relief, by way of affirmative disclosure, that will reach the same class of consumers to whom respondent's deceptive advertising was disseminated.

5. Petition for Review of F.T.C. Decision in Campbell Soup Case

(Reply Brief for Petitioner)

United States Court of Appeals for the District of Columbia Circuit

No. 24,476

S.O.U.P., Inc., a Corporation, petitioner

v.

The Federal Trade Commission, respondent

Petition for review of an opinion and order of the Federal Trade Commission

John F. Banzhaf, III,
Attorney for Petitioner,
2000 H Street NW.,
Washington, D.C. 20006
(202) 659-4310.

On the Brief:*

Peter Harwood Meyers.
Ivan Vance White, Jr.

TABLE OF CONTENTS

I. This Court Possesses Jurisdiction to Review an FTC Cease-and-Desist Order at Behest of an Intervenor.
II. SOUP Has a Right to Intervene in the Underlying FTC Proceeding.
A. Intervention in FTC proceedings is mandatory if the "good cause" requirement has been satisfied.
B. Even if intervention into FTC proceedings is discretionary, judicial review is permitted for any abuse of that discretion.

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*Students at The George Washington Law School.

III. SOUP is Not Contending that the Commission Abused its Discretion by Accepting a Consent Order Without Including a Provision Disclosing Past Deceptions but that its Discretion could not be Properly Exercised until it knew the Effects of the Challenged Advertisements.

A. The Commission must exercise informed discretion in choosing the appropriate remedy for violations of its statutes.

B. The Commission's choice of other cases in which to apply affirmative disclosure does not eliminate the requirement that the Commission resolve factual questions presented by SOUP concerning the residual effects of Campbell's advertisments.

C. The Commission cannot deny SOUP an evidentiary hearing on the residual effects of the challenged advertisements because the consent order procedure or the finality of the order in this case might thereby be jeopardized.

IV. SOUP has Standing to Intervene in and Appeal from this Consent Order Proceeding.

Conclusion.

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Section 825g(a).
Section 825l(b).
Federal Trade Commission Act, 38 Stat. 717 (1914), as amended 52 Stat. 111 (1938), 15 U.S.C. § 41 *et seq.*:
Section 5.
Section 5(b).
Section 5(c).
Federal Trade Commission Decisions Cited:
In re Campbell Soup Co., Docket No. C-1741, Opinion and Order (May 25, 1970).
In re The Firestone Tire & Rubber Co., Docket No. 8818, Opinion and Order Granting Limited Intervention (October 23, 1970).
Legislative Material Cited:
51 Cong. Rec. 13315–16 (Aug. 5, 1914).
51 Cong. Rec. 11318 (Aug. 5, 1914).
51 Cong. Rec. 14714–17 (Sept. 4, 1914).
51 Cong. Rec. 14918–24 (Sept. 10, 1914).
51 Cong. Rec. 14764–72 (Sept. 5, 1914).
51 Cong. Rec. 14784–802 (Sept. 8, 1914).
51 Cong. Rec. 14918–43 (Sept. 10, 1914).
H.R. Rep. No. 1980, 79th Con., 2d Sess. (1946).
Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946).
S. Rep. No. 752, 79th Cong., 1st Sess. (1945).
Other Material:
3 Davis, *Administrative Law Treatise* (1958).
Jaffe, *Judicial Control of Administrative Action* (1965).

United States Court of Appeals for the District of Columbia Circuit

No. 24,476

S.O.U.P. Inc., a Corporation, petitioner

v.

The Federal Trade Commission, respondent

Petition for review of an opinion and order of the Federal Trade Commission

Reply Brief for Petitioner

I. THIS COURT POSSESSES JURISDICTION TO REVIEW AN FTC CEASE-AND-DESIST ORDER AT THE BEHEST OF AN INTERVENOR

The Commission argues in its Brief at 10–15 that SOUP may not appeal the acceptance of this cease-and-desist order because the Federal Trade Commission Act limits appeals to respondents "required by an order of the Commission to cease and desist."[1] The Commission further argues that since the FTC Act expressly provides for review of cease-and-desist orders at the behest of respondents, review of FTC cease-and-desist orders at the behest of intervenors may not be had under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703.[2]

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[1] Section 5(c) of the FTC Act, 15 U.S.C. § 45(c) provides in pertinent part: Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such orders in the court of appeals of the United States. . . .

[2] SOUP does not understand the Commission's argument on jurisdiction at 10–15 of its Brief to raise the issue of whether this Court, and not the district court, is the appropriate forum in which SOUP should seek relief. Section 5(c) of the FTC Act, quoted *supra* n. 1, provides that the proper forum for a respondent appealing a cease-and-desist order is the court of appeals. Section 10(b) of the APA, 5 U.S.C. § 703(b), provides for review "in any court of competent jurisdiction." This Court is competent and most appropriate for review of an FTC order at the behest of an intervenor because there cannot be different levels of courts to review the same type of order for different categories of persons seeking review. *Cf.* United States v. ICC, 337 U.S. 426, 443 (1949); Environmental Defense Fund, Inc. v. Harden, —— U.S.App.D.C. ——, ——, 428 F.2d 1093, 1098–99 (1970).

SOUP expresses no opinion on which court would have been appropriate if SOUP had only appealed the denial of its further intervention, and not also the final acceptance of this cease-and-desist order by the Commission.

SOUP does not dispute that the FTC Act proscribes judicial review only for respondents, and that SOUP is an intervenor, not a respondent. SOUP, in short, may not use the FTC Act to ground its right to review. Professor Davis has noted that the FTC's review provision is the narrowest of all the statutes of the leading federal agencies. 3 Davis, Administrative Law Treatise § 22.03 at 214 (1958).

There can be no question at this late date, however, that Congress intended the Administrative Procedure Act to assure comprehensive review of a "broad spectrum of administrative actions," including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). *See also Rusk* v. *Cort*, 369 U.S. 367, 379–80 (1962).

The issue, then, is whether the review provision contained in the FTC Act precludes review by a non-respondent under the APA.[3]

The Supreme Court recently held that "we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." *City of Chicago* v. *United States*, 396 U.S. 162, 164 (1969), *quoting from Abbott Laboratories, supra*, 387 U.S. at 140.

This Court has extended this principle even further in *Scanwell Laboratories, Inc.* v. *Shaffer*, 137 U.S.App.D.C. 371, 384, 424 F.2d 859, 872 (1970):

"[I]n spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case."

Accord: *Ballerina Pen Co.* v. *Kunzig*, —— U.S.App.D.C. ——, ——, 433 F.2d 1204, 1216 n. 18 (1970).

The standard usually applied to determine whether a party may invoke review under the APA is that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories, supra*, 387 U.S. at 141.[4]

SOUP submits that the fact that the FTC Act provides for review by respondents only, is not "clear and convincing evidence" that Congress intended to preclude review by intervenors under the APA.[5]

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[3] To be entitled to review, SOUP must also demonstrate standing to appeal as "adversely affected or aggrieved" within the meaning of section 10(a) of the APA, 5 U.S.C. § 702(a). SOUP demonstrates this in section —— of this Brief, dealing with the standing question.

This Court has treated the preclusion issue as an element of standing to appeal. Blackhawk Heating & Plumbing Co. v. Driver, —— U.S.App.D.C. ——, ——, 433 F.2d 1137, 1140 (1970); Ballerina Pen Co. v. Kunzig, —— U.S.App.D.C. ——, 433 F.2d 1204 (1970), but we have treated it as a separate jurisdictional question in conformity with the structure of the Commission's Brief.

[4] *Accord*: Tooachnippah v. Hickel, 397 U.S. 598, 606 (1970); Barlow v. Collins, 397 U.S. 159, 167 (1970); Curran v. Laird, 136 U.S.App.D.C. 280, 420 F.2d 122, 125 (1969); Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 377–78, 424 F.2d 859, 865–66 (1970); *Environmental Defense Fund., Inc.* v. Hardin, —— U.S.App.D.C. ——, ——, 428 F.2d 1093, 1098 (1970).

[5] The "clear and convincing evidence" standard is contained in the legislative history of the APA. H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946) states:

"To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review. (Quoted by the Supreme Court in *Abbott Laboratories, supra*, at 140, n. 2.) See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)."

See also the following exchange on the floor of the Senate:

"Mr. Austin: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide review?

"Mr. McCarran: That is correct.

"Mr. Austin: And is it not also true that, because of the situation in which we are in at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran: That is true; the Senator is entirely correct in his statement." Sen. Doc. No. 248, 79th Cong., 2d Sess. 311 (1946).

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967), the Supreme Court stated:

"The mere fact that some acts are made reviewable should *not* suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent. (Quoting Jaffe, Judicial Control of Administrative Action, at 357 (1965))" [emphasis added].

In *Abbott Laboratories, supra*, the government argued that because the statute there involved included a specific review provision for certain enumerated kinds of administrative action, other types not enumerated were necessarily meant to be excluded from review. The Court rejected this argument, and held (387 U.S. at 144) that:

"*The special-review procedures* provided in § 701(f) [of the Federal Food, Drug, and Cosmetic Act], applying to regulations embodying technical factual determinations, *were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action.*" [emphasis added].[6]

In two very recent cases, this Court has held that when a statute explicitly grants judicial review to one category of participants in an agency proceeding, this is not sufficient in and of itself to show "clear and convincing evidence" that Congress intended to deny review to another category of participants. *Peoples* v. *Dept. of Agriculture*, —— U.S.App.D.C. ——, 427 F.2d 561 (1970); *National Welfare Rights Organization* v. *Finch*, —— U.S.App.D.C. ——, 429 F.2d 725 (1970).

In *Peoples, supra*, 427 F.2d at 565, this Court stated:

"There is no fair implication that granting this special judicial review to food distributors was intended to curtail or negative the judicial review otherwise presumed to be available for the protection of the poor."

In *National Welfare Rights, supra*, 429 F.2d at 736, this Court stated:

"The fact that the statute in question explicitly gave judicial review to the states and said nothing about welfare recipients is not 'clear and convincing evidence' that Congress intended to deny review to the primary beneficiaries under the statute."

The *National Welfare Rights* decision went appreciably further than SOUP is asking this Court to go. In that case, there was no statutory provision for intervention, as well as no specific statutory provision for review. In this case, the FTC Act does contain a provision for intervention, and SOUP applies the APA solely to derive its right to appeal.

Since the FTC Act does not preclude appeal by an intervenor merely because it authorizes appeals by a respondent, this Court, therefore, has jurisdiction in this case pursuant to Section 10(a) of the APA.[7]

This conclusion is fortified with one additional line of authority. Three circuits, including this one, have held that respondents can review other FTC actions besides cease-and-desist orders, even though the FTC Act only provides for review by respondents of cease-and-desist orders. *Rettinger* v. *FTC*, 392 F.2d 454, 457 (2d Cir. 1968); *Robertson* v. *FTC*, 415 F.2d 49, 55 (4th Cir. 1969); *B.F. Goodrich Co.* v. *FTC*, 93 U.S.App. D.C. 50, 208 F.2d 829, 932 (1953).[8]

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[6] *See also Stark* v. *Wickard*, 321 U.S. 288 (1944); United States v. ICC, 337 U.S. 426 (1949).

[7] SOUP submits that the legislative history cited in the Commission's Brief at 21–22 does not provide "clear and convincing evidence" that Congress intended to deny intervenors review. The defeated amendments sought to give the complaining party the right to review, and they were defeated to prevent the Commission from becoming a civil court designed to vindicate private interests. 51 Cong. Rec. 13315–16 (daily ed. Aug. 5, 1944). Intervention in Commission proceedings is designed to vindicate public, not private interests. Furthermore, the amendments would have provided review when the Commission had declined to exercise jurisdiction, not, as with intervenors, where jurisdiction has been asserted by the Commission. These distinctions make it impossible to know whether Congress intended intervenors to be denied review.

[8] *Rettinger* concerned a reopening of a consent order proceeding, and *Robertson* concerned compliance proceedings. In both cases the appeal was dismissed because the courts held the appropriate forum was the district court. Both cases recognized, however, that the FTC action was reviewable under the APA even though not challenging the issuance of a cease-and-desist order.

II. SOUP HAS A RIGHT TO INTERVENE IN THE UNDERLYING FTC PROCEEDING

A. Intervention in FTC proceedings is mandatory if the "good cause" requirement has been satisfied

The Commission argues at 16–24 of its Brief that SOUP may not appeal the denial of further intervention to SOUP. The Commission contends that Section 5(b) of the FTC Act accords only permissive intervention[9] and that the denial of such intervention is not judicially reviewable.

At the outset, SOUP submits that even if the Commission were correct on this point, only that portion of SOUP's appeal seeking review of the denial of further intervention to it[10] would thereby be made nonreviewable. It would in no way affect the issue of whether SOUP has raised factual questions which must be resolved by the Commission before exercising its discretion to accept or reject this order. Regardless of whether SOUP can participate in any further hearing, SOUP has argued on appeal that such further hearing is necessary.

SOUP submits that Section 5(b) affords prospective intervenors who satisfy the "good cause" requirement of that section the right to intervene. Section 5(b) provides in pertinent part:

"Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

SOUP disputes the Commission's contention at 16–17 of its Brief that the words "may be allowed" in Section 5(b) of the FTC Act connote discretion in regard to intervention into FTC proceedings.[11] This Court has held that the intervention provisions in the Communications Act of 1934 and the Federal Power Act which also contain the word "may" require mandatory intervention before the FCC and the FPC. *Elm City Broadcasting Corp.* v. *United States*, 98 U.S.App.D.C. 314, 320, 235 F.2d 811, 817 (1956); *Office of Communication of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 340, 359 F.2d 994, 1006 (1966); *National Coal Association* v. *FPC*, 89 U.S. App. D.C. 135, 139, 191 F.2d 462, 466–67 (1951); *Virginia Petroleum Jobbers Association* v. *FPC*, 104 U.S. App. D.C. 106, 110–11, 259 F.2d 921, 925–26 (1958); *Juarez Gas Co.* v. *FPC*, 126 U.S. App. D.C. 167, 169–70, 375 F.2d 595, 597 (1967).

The pertinent portion of Section 309(b) of the Communications Act, 47 U.S.C. § 309(b), provided:

"The parties in interest, if any, who are not notified by the Commission of its action . . . *may* acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their intervention." . . . (emphasis added)

The pertinent provision of the Federal Power Act, 16 U.S.C. § 825g(a), provided:

"In any proceeding before it, the Commission . . . *may* admit as a party any interested State, State Commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest." (emphasis added)

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[9] Section 5 applies on its face only to adjudicative proceedings and this case was a nonadjudicative consent order proceeding. The Commission, however, does not dispute that Section 5 is the applicable standard for intervention in consent order proceedings (Brief at 16 n. 11). This position is in accord with previous decisions by the Commission. *See* Opinion and Order, *In re Campbell Soup Co.*, Docket No. C–1741 (May 25, 1970 at 3); Opinion and Order Granting Limited Intervention, *In re The Firestone Tire & Rubber Co.*, Docket No. 8818 (Oct. 23, 1970 at 3).

[10] See SOUP's Brief at 39–43, 53–63.

[11] The Commission concedes, as it must, at 11–13 of its Brief that respondents have a right to intervene, even though the review provision in the FTC Act also uses the word "may." *See* FTC Act, Section 5(c), 15 USC § 45; Wholesale Grocers Association v. FTC, 277 Fed. 657, 661 (5th Cir. 1922) cited in the Commission's Brief at 12.

In *National Coal Association, supra,* this Court stated: "We think it clear that any person who would be "aggrieved" by the Commission's order, such as a competitor, is also a person who has a right to intervene." 89 U.S. App. D.C. at 139, 191 F.2d at 467.

SOUP submits that the only logical construction that can be given Section 5(b) is that a right to intervene is created upon a showing of "good cause." It would be illogical for the Commission to argue that a person who had established "good cause" could be denied intervention. A somewhat similar provision in the Communications Act, 47 USC § 309(b), *supra,* was held by this Court to limit the agency's discretion to a determination whether the necessary requirement had been demonstrated. *Elm City Broadcasting Corp* v. *United States, supra.* In setting aside the Commission's order for refusing to grant intervention, the Court stated that the only legislative purpose for requiring the potential intevenor to show the basis for his interest "is to enable the Commission to determine whether the petitioners' allegations show them to be 'parties in interest.' When that is done the Commission has *exhausted its discretion;* it may not deny intervention to a party in interest merely because it thinks his participation would not aid its decisional process" [emphasis added]. 98 U.S. App. D.C. at 319, 235 F.2d at 816.

SOUP submits that the same principle is applicable to intervention in FTC proceedings. Once the Commission has decided whether or not the would-be intervenor has met the "good cause" requirement of Section 5(b), its discretion is spent and it must permit intervention if the requirement is satisfied as a matter of right. The FPC cases cited above directly conflict with the Commission's position at 18–19 of its Brief that an identical intervention provision before the SEC has been held to allow discretionary intervention.[12] Finally, the attempted distinction at 17 of the Commission's Brief between the FTC and licensing agencies like the FCC as to whether intervention is discretionary or mandatory is inappropriate. SOUP, no less than an FCC intervenor, is attempting to define relevant factors that should be considered by the Commission before making its decision. The fact that complaint counsel, the FTC's public interest "prosecutor," did not regard the proposed consent order in this case as inadequate because of the residual effect of the challenged advertisements, shows the assistance public interest intervenors like SOUP can make to the work of the Commission by ensuring that proper consideration is given to all pertinent factors.

Since "good cause" is the only requirement established by Congress for intervention into FTC proceedings, there are no additional criteria that the Commission may consider in its decision whether or not to permit intervention. All relevant criteria are subsumed under the term "good cause." SOUP does not dispute the fact that the showing of "good cause" will, in each case, be determined upon the specific circumstances of the case. For example, a greater showing may be required when there are already a number of intervenors in an FTC proceeding. Similarly, a greater showing may be required if the intervenor desires to play a central or complex role in the proceeding. Furthermore, SOUP does not dispute that the Commission has some degree of latitude in determining whether an intervenor has established "good cause." But if the Commission believes that a party has done so, it would be an abuse of discretion for the Commission to deny intervention when that determination is the only discretion the Commission has in deciding whether intervention is appropriate. It follows that the only reasonable construction that can be assigned to Section 5(b) is that intervention is mandatory if the prospective intervenor has satisfied the requisite "good cause" requirement.

SOUP does not dispute the Commission's position at 20 of its Brief that courts have generally required intervention as a matter of right if Congress has provided for appellate review by those persons "adversely affected" or "aggrieved" by the agency's action. SOUP does dispute, however, the Commission's position at 20–22 of its Brief that judicial review to persons "adversely affected or aggrieved" by Commission orders has been precluded by the lack of such a

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[12] Apparently this Court does not agree with the Second Circuit as to the interpretation to be given to such a provision. Nor does the fact that courts have held intervention discretionary before the NLRB help the Commission in its position that intervention in FTC proceedings is discretionary. The distinguishing factor is that the NLRB provision contained in the Commission's Brief at 18 does not contain any requirement similar to "good cause," which, once met, eliminates any further discretion by the Commission as to whether intervention should be allowed.

provision in the FTC Act and by a reading of the legislative history of the Act that that was the legislative intent.

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, does provide for judicial review by persons adversely affected or aggrieved by agency action.[13] SOUP admits that the right to judicial review is the same whether the provision granting such review is contained in the agency's enabling statute or in the APA. Since SOUP, as demonstrated *infra* at 21–24 is adversely affected or aggrieved under the APA, its right to obtain judicial review further reinforces SOUP's right to intervene in this case.

The legislative history of the FTC Act does not support the Commission's position that Congress intentionally refused judicial review of Commission orders to third parties. While the Commission at 21–22 of its Brief correctly notes that the Senate twice defeated a proposal to amend Section 5 to allow the complaining party to obtain judicial review of a Commission decision to dismiss a complaint, the ground for such rejection was to prevent the Commission from becoming a civil court designed to vindicate private interests. 51 Cong. Rec. 13315–16 (daily ed. Aug. 5, 1914). Because SOUP is an organization attempting to protect public consumer interests rather than its own private interests and because the defeated amendments went only to judicial review by complaining parties of decisions not to exert jurisdiction over a case rather than to obtain review once jurisdiction has been asserted, SOUP submits that the amendments are unenlightening to show legislative intent to permit intervention only by the Commission's absolute discretion. More fundamental, however, is the fact that the Senate did include an amendment in Section 5 in its version of the bill that was designed, in the words of its sponsor, to provide the complaining party with judicial review as a matter of right in order to modify a Commission order. 51 Cong. Rec. 13,318 (daily ed., Aug. 5, 1914). However, the conference committee report substituted the present provision on intervention and presented it to both houses without explanation. 51 Cong. Rec. 17,714–17, 14,918–24 (daily ed. Sept. 4, 10, 1914). Neither house discussed the intervention provision during debate on the final bill. 51 Cong. Rec. 14,764–72, 14,784–802, 14,918–43 (daily ed. Sept. 5, 8, 10, 1914). Thus SOUP submits that the legislative history of Section 5 does not disclose whether the intervention provision was intended by Congress to be mandatory in its application or merely discretionary.

B. Even if intervention into FTC proceedings is discretionary, judicial review is permitted for an abuse of that discretion

Even agency action committed by law to agency discretion is judicially reviewable when that discretion has been abused. *Overseas Media Corp.* v. *McNamara*, 128 U.S. App. D.C. 48, 56, 385 F.2d 308, 316 (1967); *Zacharias* v. *McGrath*, 105 F. Supp. 421, 427 (D.D.C. 1952). This position is supported by the congressional debate over Section 10 of the APA which provides in pertinent part:

"*Except so far as* (1) statutes preclude judicial review or (2) *agency action is by law committed to agency discretion*—

"(a) Right of Review—*Any person suffering legal wrong* because of any agency action, *or adversely affected or aggrieved* by such action within the meaning of any relevant statute, *shall be entitled to judicial review* thereof." [emphasis added].

The seeming conflict between these two provisions was clarified by Senator McCarran, Chairman of the Senate Judiciary Committee that favorably reported the bill, on the Senate floor on March 12, 1946. Senator Donnell, having recited the above portion of Section 10, asked:

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person

[13] That section provides: "Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant stature, shall be entitled to judicial review thereof."

who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?"

In response, Senator McCarran replied:

"Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review."

But in regard to whether action committed to an agency's discretion was intended to be reviewable, Senator Donnell continued:

"But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

To which Senator McCarran answered: "It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning." Sen. Doc. 248, 79th Cong. 2d Sess. 310–11 (1946). Such a position is consistent with a latter provision of Section 10 which provides:

"(e) So far as necessary to decision and where presented *the reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It *shall* . . . (B) *hold unlawful and set aside agency action,* findings, and conclusions *found to be* (1) arbitrary, capricious, *an abuse of discretion,* or otherwise not in accordance with law" . . . [emphasis added].

Moreover, this Court has stated that "the mere fact that a statute is drafted in permissive rather than mandatory terms" does no make it unreviewable. *Environmental Defense Fund, Inc.* v. *Hardin,* —— U.S.App.D.C. ——, ——, 428 F.2d 1093, 1098 (1970). *See also, Barlow* v. *Collins,* 397 U.S. 159, 165–66 (1970).

III. SOUP IS NOT CONTENDING THAT THE COMMISSION ABUSED ITS DISCRETION BY ACCEPTING A CONSENT ORDER WITHOUT INCLUDING A PROVISION DISCLOSING PAST DECEPTIONS BUT THAT ITS DISCRETION COULD NOT BE PROPERLY EXERCISED UNTIL IT KNEW THE EFFECTS OF THE CHALLENGED ADVERTISEMENTS

A. The Commission must exercise informed discretion in choosing the appropriate remedy for violations of its statutes

SOUP does not dispute the principle that the Commission has wide discretion in shaping the remedy deemed adequate to counteract the unlawful practices found to exist. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946), cited in the Commission's Brief at 25. SOUP does contend in its Brief at 33, however, that the Commission may not properly exercise that discretion until it has accurately informed itself of the residual effects of the challenged advertisements.

Jacob Siegel, supra, does not compel a different result. Indeed, the Court's opinion subsequent to the passage cited by the Commission reinforces SOUP's position. In reversing the Commission's order because the Commission had failed to consider whether or not some remedy less drastic than excising a valuable trade name would be adequate, the Court felt that it had been ". . . left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, [citations omitted]. Its application involves the exercise of an *informed, expert judgment.* 327 U.S. at 613–14." [emphasis added].

This Court has recently begun to more closely scrutinize agency action on the basis of the discretion that the agency has exercised. In a decision unavailable at the time of filing of SOUP's Brief, *Greater Boston Television Corp.* v. *FCC,* —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (No. 17,785, decided Nov. 13, 1970) (Slip opinion at 16–17), the Court undertook an exhaustive review of the principles applicable in reviewing administrative decisions:

"Expert discretion is secured, not crippled, by the requirements for substantial evidence, findings and reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion.' [citation omitted]. A Court does not depart from its proper function when it undertakes a study of the record, . . . for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agncy has exercised a *reasoned discretion,* with reasons that do not deviate from or ignore the ascertainable legislative intent. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." [citation omitted]. [emphasis added].

* * * * * * *

"[A reviewing court's function is to] assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency . . . identify the significance of the crucial facts,[14] a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

* * * * * * *

"Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making."

B. The Commission's choice of other cases in which to apply affirmative disclosure does not eliminate the requirement that the Commission resolve the factual questions presented by SOUP concerning the residual effects of Campbell's advertisements

The Commission's conclusion in its Brief at 28–31 that it did not abuse its discretion in considering this case inappropriate for using the affirmative disclosure remedy proposed by SOUP shows the Commission's apparent misunderstanding of the nature and grounds of relief sought in this appeal. SOUP is not challenging the Commission's discretion in choosing the appropriate case in which to test affirmative disclosure relief. SOUP is arguing that the Commission cannot make this determination until *after* an evidentiary hearing has been held.

It must be pointed out that the Commission's argument on appeal is significantly different from the Commission's opinion below. The Commission's opinion below held that no hearing was necessary because the Commission did not have to resolve factual questions concerning the adequacy of the order. *See* Opinion and Order of the Commission, *In re Campbell Soup Co.*, Docket No. C–1741 (May 25, 1970) at 3. On appeal, however, the Commission at 26–27 of its Brief argues that a hearing was unnecessary because the factual issues were not substantial in the context of this case. SOUP refutes the logic of the Commission's opinion at 21–22, 27–32 of its Brief.

Crucial to the Commission's argument at 28–29 of its Brief that it need not know the effects of the challenged advertisements is the principle that an agency "has discretion not to exercise jurisdiction to the limits of its powers in every case before it." The Commission finds authority for this principle in a single Supreme Court case. *NLRB* v. *Denver Building Council*, 341 U.S. 675, 684 (1951). SOUP submits, however, that this case does not stand for that principle. The relevant passage form that case reads as follows:

"Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

The question in *Denver Building Council* was whether the Board may in some instances decline to exercise its jurisdiction. Here, however, the question is whether an agency which has asserted jurisdiction may accept inadequate relief. Furthermore, *Denver Building Council* approves of a refusal to exercise jurisdiction only when such refusal would effectuate the policies of the agency statute. SOUP is not aware of and the Commission has cited no authority for the proposition that an agency may accept less than adequate relief. Indeed, SOUP submits that it is unlikely that a court would so hold for the FTC in light of the Commission's consent order rules and the recent Supreme Court case of *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962), both of which are discussed in SOUP's Brief at 28–29.

C. The Commission cannot deny SOUP an evidentiary hearing on the residual effects of the challenged advertisements because the consent order procedure or the finality of the order in this case might thereby be jeopardized

The Commission advances the position in its Brief at 37–39 that it should not receive all pertinent information concerning the challenged advertisements be-

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[14] *Cf.* Environmental Defense Fund, Inc. v. Ruckelshaus, —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (No. 23,813, decided Jan. 7, 1971) (slip opinion at 21–24.) 439 F. 2d 584 (1971).

cause it would jeopardize the consent order negotiated in this case between Campbell, BBD&O and the Commission, and require the Commission to institute a full adjudication. The fallacy of this argument is that the only manner in which the consent order here will be jeopardized is if the Commission finds after an evidentiary hearing that affirmative disclosure is required to protect the public interest. Furthermore, the Commission's position at 39 of its Brief that an evidentiary hearing would force the Commission to "unnecessarily" conduct a full adjudication is disappointing. The Commission would only hold an adjudication if *it* felt the case required it.

SOUP further maintains that the slight effect that the Commission argues at 39–40 of its Brief that this appeal may have on the finality of this order is outweighed by the overriding interest in insuring the Commission will receive adequate and meaningful relief in this case.

IV. SOUP HAS STANDING TO INTERVENE IN AND APPEAL FROM THIS CONSENT ORDER PROCEEDING

The Commission argues in its Brief at 33–35 that SOUP does not have standing either to intervene in, or appeal from, this consent order proceeding. The Commission relys on a single ground to show that SOUP lacks standing—it does not possess the requisite "personal stake." Brief at 35. In support of this position, the Commission cites only the following footnote from Mr. Justice Brennan's Concurrence in *Barlow* v. *Collins*, 397 U.S. 159, 172 n. 5 (1970):

"The more 'distinctive or discriminating' the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plainitff may meet the 'constitutional test [for personal stake] . . . I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm to themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public."

For the purposes of this Brief, SOUP will treat standing to intervene and appeal synonomously. This is appropriate because this Court has indicated that these concepts are roughly parallel and many of the same considerations apply equally to each. *See, e.g., Office of Communications of the United Church of Christ* v. *FCC*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); *American Communications Association* v. *United States*, 298 F.2d 648 (2d Cir. 1962). As the Commission states in its Brief at 34, standing to appeal requires a greater showing than standing to intervene. SOUP will argue it possesses the standing for both, based upon the criteria established for standing to appeal.

Before proceeding with its standing argument, SOUP respectfully submits that this Court need not reach the merits of whether SOUP has standing to intervene for two reasons. First, the argument is moot: In the underlying proceeding the Commission accorded SOUP at least limited intervention, thereby acknowledging that SOUP had standing. The Commission recognizes this in its Brief at 7, 33. *See also* Order of May 25, 1970 at 2, reprinted as Appendix A of our Brief. Second, even if the argument is not moot, it is improper to raise on appeal because the Commission did not hold that SOUP lacked standing to intervene. The Commission's Brief explicitly recognizes this at 33: "In denying further intervention to petitioner in the *Campbell Soup* case, the Commission did not hold that S.O.U.P. lacked standing to intervene." It is clearly inappropriate for the Commission to raise on appeal a ground not relied upon by the Commission below. The standing question was squarely put in issue in the underlying proceeding, and experience shows that an agency knows how to write an order denying intervention for lack of standing when it so intends.

If this Court rejects the above arguments, and proceeds to the merits of the standing issue, it is clear that SOUP has standing to intervene and appeal. Standing to intervene is determined by the intervention provision of the FTC Act, 15 U.S.C. § 45(b), which provides in pertinent part:

"Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

Standing to appeal is determined by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, which provides:

"A person suffering legal wring because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The Supreme Court recently established a two-part test for standing to appeal under the APA, (1) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the [relevant statute]." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152–53 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).[15]

The Commission does not dispute that SOUP satisfies the second part of this test (protected interest), but only disputes that SOUP satisfies the first (injury in fact), and therefore concludes that SOUP does not possess the requisite personal stake. Brief at 35. It is clear that SOUP satisfies the "protected interest" part of the test, because consumers are one of the main beneficiaries of the FTC Act.[16]

The requirement of "injury in fact" is also easily met here, because consumers have suffered a specific and substantial economic injury. Consumers have relied, and continue to rely, on deceptive representations as to the nutritional qualities of Campbell Soups, and continue to purchase a product "which they did not wish or intend to buy, and which they might or might not buy if correctly informed "as to its nutritional qualities. *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933). The FTC Act gives consumers "the right to rely upon representations of facts [in advertisements] as the truth." *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). The consumer is entitled to know the facts . . . and make his own choice with respect to purchasing. . . ." *Kerran* v. *FTC*, 265 F.2d 246 (10th Cir. 1959). *See also*, *Rothschild* v. *FTC*, 200 F.2d 39, 42 (7th Cir. 1952). The FTC Act gives consumers a right to honest and fair advertising, and a right to have the residual effects of deceptive advertising corrected.

SOUP does not dispute that the members of SOUP suffered no discriminatory injury in this regard. They suffered the same injury as many other consumers. SOUP's motion to intervene in the underlying proceeding indicated that SOUP sought to represent its members interests, and the consumer interest generally. Motion to Intervene at 1 *et seq.*, submitted Oct. 20, 1969. *See also*, Brief for SOUP, Inc. In Support of Intervention and Hearing at 1–20.

After the *Campbell Soup* case was decided, the Commission held in the *Firestone* proceeding that responsible representatives of the consuming public have standing to intervene in deceptive practice cases to represent the consumer interest, and that SOUP was such a "responsible representative of the consumer interest." Opinion and Order Granting Limited Intervention at 1, *In re The Firestone Tire & Rubber Co.*, Docket No. 8818 (Oct. 23, 1970), reprinted as Appendix C of SOUP's Brief.

This Court and the Second Circuit pioneered this concept of "responsible spokesman" for general consumer interests in terms of standing to intervene and appeal. *Office of Communications of the United Church of Christ* v. *FCC*, 123 U.S.App.D.C. 328, 335, 359 F.2d 994, 1001, 1004–05 (1966); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 616 (2d Cir. 1965). In the recent campaign cases of *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the entire court cited *Church of Christ* and *Scenic Hudson* with approval. *See*

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[15] *See also*, National Welfare Rights Organization v. Finch, —— U.S.App.D.C. ——, ——, 429 F.2d 725, 733–35 (1970); Scanwell Laboratories, Inc. v. Shaffer, 137 U.S. App.D.C. 371, 378, 381, 424 F.2d 859, 866, 869 (1970); Blackhawk Heating & Plumbing Co. v. Driver, —— U.S.App.D.C. ——, ——, 433 F.2d 1137, 1140 (1970); Ballerina Pen Co. v. Kunzig, —— U.S.App.D.C. ——, —— 433 F.2d 1204, 1207 (1970).

[16] *See* SOUP Brief at 5 n. and 4 and 6. *See also*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384 (1965); FTC v. Sterling Drug, Inc., 317 F.2d 669 (CA2 1963).

This Court has stated that "[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit." Environmental Defense Fund, Inc. v. Hardin, —— U.S.App.D.C. ——, ——, 428 F.2d 1093, 1097 (1970) and cases cited at 1097 n. 14.

opinion of the court, 397 U.S. at 154; Brennan's Concurrence, 397 U.S. at 172 n. 5.[17]

Surely the consumer interest may be properly represented here by a corporation "with a organizational interest in the problem." *Environmental Defense Fund, Inc.* v. *Hardin*, —— U.S.App.D.C. ——, ——, 428 F.2d 1093, 1097 (1970), and cases cited at 1097 n. 17.

In determining whether SOUP has standing, it is also important to consider that SOUP (i.e. consumers) are the only parties likely to intervene and appeal. This Court has continually held that this "weighs heavily toward the grant of standing." *Curran* v. *Laird*, —— U.S. App. D.C. ——, ——, 420 F.2d 122, 140 (1969) (Wright, Bazelon, and Robinson, J.J., concurring in part and dissenting in part); *Office of Communication of the United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 335, 359 F.2d 994, 1001 and 1004–05 (1966); *National Association of Security Dealers, Inc.* v. *SEC*, —— U.S.App.D.C. ——, ——, 420 F.2d 83, 99, *cert. granted*, 90 S. Ct. 1114 (1970).

The Commission itself has recognized that consumer-intervention can be valuable to it in its search for more effective remedies.[18] Consumer appeals can serve this same function.

SOUP submits it possesses the requisite standing to intervene in, and appeal from, this consent order proceeding as a responsible representative of the consumer interest.[19]

CONCLUSION

For the foregoing reasons, SOUP submits that the Commission's Order of May 25, 1970 finally accepting the consent order should be set aside and the proceeding remanded to the Commission for the taking of evidence on the factual questions raised by SOUP in either a limited evidentiary hearing or a formal adjudication in which SOUP should be permitted to participate as a full party.

Respectfully submitted,

JOHN F. BANZHAF III,
Attorney for Petitioner,
2000 H Street NW.,
Washington, D.C. 20006,
(202) 659–4310.

On the Brief:*

PETER HARWOOD MEYERS.
IVAN VANCE WHITE, Jr.

Dated: February 2, 1971.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief for Petitioner were personally served upon the Federal Trade Commission, 6th and Pennsylvania Avenue, Washington, D.C. 20580, through its attorney, James P. Timony, this 2d day of February, 1971.

JOHN F. BANZHAF III,
Attorney for Petitioner.

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[17] In terms of standing to appeal, it is relevant that the stature involved in this case (APA) contains similar language to the statutes in *Scenic Hudson* (FPA) and *Church of Christ* (FCA). Section 10(a) of the APA gives review to persons "adversely affected or aggrieved"; Section 402(b) of the Communications Act of 1934 gives review to persons "aggrieved or whose interests are adversely affected," 47 U.S.C. § 402(b); and § 313(b) of the Federal Power Act gives review to "aggrieved" persons, 16 U.S.C. § 825 1(b).

There is no reason to give the term "aggrieved" a different meaning in the APA than it has in the Communications Act and Federal Power Act. Powelton Civic Home Owners' Association v. HUD, 284 F. Supp. 809, 827 E.D. Pa. (1968); Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650, 661 (S.D.N.Y. 1967).

[18] SOUP's Brief at 3.

[19] *Id.* at 3 n. 2, 7 n. 8.

*Students at the George Washington Law School.

6. Memorandum in Support of Motion for Leave to Proceed on Appeal in Forma Pauperis

In the United States Court of Appeals for the District of Columbia Circuit

No. 24,476

S.O.U.P., Inc., a Corporation, petitioner

v.

The Federal Trade Commission, respondent

Memorandum in support of motion for leave to proceed on appeal in forma pauperis

John F. Banzhaf III,
Attorney for Petitioner,
2000 H Street NW.,
Washington, D.C. 20006.

TABLE OF CONTENTS

Background of this proceeding in this court.
The nature of SOUP, Inc.
Background of this proceeding before the Federal Trade Commission.
Argument on issue No. I: Whether a corporation can appeal *in forma pauperis* under 28 U.S.C. § 1915.
A. The term "person" in an Act of Congress includes corporations, according to 1 U.S.C. § 1, unless the context affirmatively indicates that a more restrictive meaning was intended.
B. This Court and the United States Supreme Court have consistently construed § 1915 liberally so as to effectuate the Congressional intent of providing equal access for indigents to the federal courts.
C. Construing § 1915(a) to exclude indigent corporations would be an arbitrary discrimination violating the Due Process Clause of the Fifth Amendment.
D. Corporations are, as a general rule, considered "persons" at common law, and within the meaning of constitutional and statutory provisions.
E. Corporations are, as a general rule, considered "residents," "inhabitants," "citizens," and other terms more restrictive than "person."
F. Corporations today have the powers, rights, duties, and liabilities of individuals.
G. This Court should not follow the three cases which held that corporations cannot proceed *in forma pauperis.*
H. There are strong "public policy" considerations for affording the indigent "public interest" intervenor in an administrative proceeding the right to proceed on appeal *in forma pauperis.*
I. The decision on SOUP's motion in this case could be appropriately limited according to the nature of SOUP, the nature of the underlying administrative proceeding, and the nature of the issues SOUP seeks to raise in this appeal.
Argument on issue No. 11: The criteria which should govern *in forma pauperis* treatment of corporations.
A. This Court should apply the same criteria for corporations as it does for individuals.
B. There are a number of additional criteria this Court might apply.
Conclusion.
Attachment A—final opinion and order of May 25, 1970 accepting the negotiated consent order, with separate statements of Commissioners Jones and Elman.

United States Court of Appeals for the District of Columbia Circuit

No. 24,476

S.O.U.P., Inc., a Corporation, petitioner

v.

The Federal Trade Commission, respondent

Memorandum in support of motion to proceed on appeal in forma pauperis

Students Opposing Unfair Practices, Inc., Petitioner (hereinafter "SOUP"), through its attorney submits the following memorandum in support of its motion for leave to proceed on appeal *in forma pauperis.*

SOUP has filed in this Court a Petition to Set Aside and Otherwise Review [the Federal Trade Commission] Order, issued May 25, 1970, in which the Commission accepted the consent settlement it had negotiated with the Campbell Soup Company and its advertising agency, Batten, Barton, Durstine and Osborne.[1]

SOUP has also filed with this Court a Motion for Leave to Proceed on Appeal *In Forma Pauperis*, accompanied by an Affidavit in Support of Motion for Leave to Proceed on Appeal *In Forma Pauperis* by Mr. Aaron Handleman, President of SOUP.[2]

By order of this Court (per Acting Chief Judge Leventhal) dated July 24, 1970, the motion to proceed *in forma pauperis* was accepted for the purpose of filing but the Federal Trade Commission was requested to submit a responsive memorandum before this Court would determine whether the motion would be granted for other purposes.[3]

The Commission's response stated: "Respondent which accorded petitioner certain rights to proceed in forma pauperis in the underlying administrative proceeding is not opposed to the Court granting leave to petitioner to proceed in forma pauperis in this matter. . . ." Response at 1–2, submitted Aug. 3, 1970.

After receiving that response, this Court, in an order entered September 11, 1970 (per Judges Fahy and Wilkey), held SOUP's motion in abeyance until receiving a memorandum from SOUP. That order stated in full:

"On consideration of petitioner's motion for leave to proceed on appeal in forma pauperis and of the response filed with respect thereto, it is

"Ordered by the Court that petitioner's aforesaid motion be held in abeyance pending its filing a memorandum in support of its position to proceed in forma pauperis as a corporation. Special attention should be directed to what criteria can be used to determine which corporation or corporations should be permitted to proceed in forma pauperis."

After very briefly setting out the nature of SOUP, and the relevant background of this proceeding before the FTC, this memorandum will address two primary issues, in the following order: (1) whether an indigent corporation *qua* corporation can proceed on appeal *in forma pauperis;* and (2) what criteria should this Court use to determine that an indigent corporation can so proceed.

These questions appear to be of first impression for this Court; research has uncovered no case in this Circuit on these issues.[4]

The resolution of these issues goes to the heart of the question of judicial review of administrative action. This case presents a clear-cut example of the so-called "public interest" litigant intervening in and appealing from an agency decision which is alleged to inadequately protect the public interest, *i.e.*, an order which allegedly fails to meet the Congressional requirement to vigorously protect the consumers' interests. Neither SOUP nor its members will receive a money judgment if successful in this court; if unsuccessful, SOUP may be burdened with court costs. *In forma pauperis* treatment of such "public interest" intervenors would be one step towards facilitating their access to court, and thereby one additional safeguard that the judiciary can fulfill its function of insuring that the administrative agencies are following their statutory commands.

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[1] *In re Campbell Soup,* Docket No. C–1714, 3 CCH Trade Reg. Rptr. par. 19,261. The order, by vote of three to two, rejected *inter alia* SOUP's arguments that (1) a limited evidentiary hearing was necessary to resolve the factual question raised concerning the adequacy of the order to protect the public interest, and (2) a full adjudication was required by statute. Commissioners Elman and Jones dissented, issuing separate statements. See Appendix A, where the opinion and separate statements are set out in full.

[2] The affidavit stated, *inter alia,* that SOUP is a nonprofit corporation incorporated in the District of Columbia; that SOUP has no monies, no established sources of income, and owns no real or personal property; and that SOUP has a nonfrivolous claim to present on appeal.

[3] The only additional relief SOUP desires in this proceeding is to be absolved from the costs of this appeal, such costs specifically excluding counsel fees and a copy of the transcript below. SOUP is not requesting this court to appoint an attorney for it, and SOUP has already been provided by the FTC with a free copy of the transcript of the oral argument at the FTC on the issue of intervention. SOUP, of course, does desire the ordinary privileges accompanying *in forma pauperis* treatment, including the submission of a typewritten instead of printed brief.

[4] There have only been three decided cases on the issue of whether a corporation can proceed on appeal *in forma pauperis,* and they are discussed in detail *infra.*

THE NATURE OF SOUP

Students Opposing Unfair Practices, Inc. is a private, nonprofit corporation incorporated in the District of Columbia. Its membership is composed of law students at the George Washington University Law School; each member is, of course, a consumer, and each member lives in or around Washington, D.C.

The primary purpose of SOUP is to assist the Federal Trade Commission in more vigorously protecting the consumers' rights to fair and honest advertising. Neither SOUP nor its members seek to receive financial gain through its participation in this case. The Commission and a number of consumer groups have recognibed SOUP as a responsible representative of and spokesman for the consumers' interests.[5]

It is necessary to go into the nature of the underlying proceeding in some detail because the nature of the proceeding may have important bearing on the criteria to be applied to *in forma pauperis* treatment of corporations. SOUP suggests to this Court that there may be an important difference between a business corporation appealing a decision which involves financial considerations, and a nonprofit corporation with no financial stake in a proceeding, interested solely in whether an administrative order will adequately protect the consumers' interests.

BACKGROUND OF THIS PROCEEDING BEFORE THE FEDERAL TRADE COMMISSION

The Commission had negotiated and provisionally accepted a consent order with the Campbell Soup Company and its advertising agency, Batten, Barton, Durstine, and Osborn (hereinafter collectively referred to as "Campbell"). The proposed complaint alleged, in essence, that Campbell had deceptively advertised the nutritional quality in its soups; the proposed order, in essence, merely prohibited similar deception in future avdertisements, and contained no provision to inform consumers who were still being motivated to purchase Campbell soups through the allegedly deceptive ads that said ads did not honestly represent the nutritional quality of the soups. In addition, the consent agreement explicitly stated that Campbell did not admit any violation of the FTC Act.

According to established Commission procedures,[6] the negotiated consent order (including the proposed complaint, proposed agreement, and proposed order) is placed upon the public record for thirty days, in which time any "interested person" can submit comments on the order's adequacy in protecting the public interest. After the thirty-day period is ended, the Commission reviews the proposed order together with any comments submitted, and may either accept the order (by simultaneously issuing both complaint and order), or it may withdraw its acceptance and "take such other action as it may consider appropriate." [7]

No party before SOUP had ever seriously petitioned the Commission within the thirty-day period to withdraw its acceptance of a consent order, and the Commission has never, on this basis, withdrawn its consent.

Within the thirty-day period when the agreement was on the public record, SOUP requested the Commission to withdraw its acceptance because the order was inadequate to protect the public interest.[8] SOUP argued specifically that for the order to adequately protect the public interest it had to contain an affirmative disclosure provision designed to counteract the residual effects of Campbell's allegedly deceptive ads, *i.e.*, even after being taken off the media, the ads were still motivating purchasing. The Commission had never made

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[5] Consumers Union, in a brief submitted on Dec. 5, 1969, and Consumer Federation of America, in a letter submitted to former Chairman Dixon on Dec. 4, 1969, indicated that they considered SOUP a responsible spokesman for the consumers' interests. The FTC recently stated: "The Commission applauds the efforts and enthusiasm of groups such as SOUP to fight for the public interest by means of participation in the work of federal agencies serving the same public interest. We are also very cognizant of the potentially great contribution to the work of such agencies, including our own." In re The Firestone Tire & Rubber Co., Docket No. 8818, order issued Oct. 23, 1970 granting SOUP intervention, at page 4.

[6] FTC Rules of Practice For Nonadjudicative Procedures §§ 2.31–2.35, 16 C.F.R. §§ 2.31–2.35.

[7] *Id.* § 2.34(b).

[8] "Petition Requesting the Federal Trade Commission to Withdraw Its Provisional Acceptance of Consent Order," submitted Oct. 20, 1969.

an inquiry into these effects of advertising, and had never considered provisions to counteract them.

SOUP argued, alternatively, for a limited evidenciary hearing and for a full adjudication. The argument for a limited evidenciary hearing was premised on the principle that the Commission could not decide whether the order it had negotiated was adequate to protect the public interest until the Commission knew the residual effects of Campbell's ads. Only after such a hearing could the Commission, in its sound discretion, determine whether an additional clause was necessary to protect the public interest.

Alternatively, SOUP argued that the Commission must withdraw its acceptance and begin a full adjudication, in which one of the issues would be the residual effects of Campbell's ads.

In addition to these arguments, SOUP made a motion to intervene in the consent order proceeding and to participate in the limited evidenciary hearing or adjudication to take place,[9] SOUP made a motion to proceed *in forma pauperis*,[10] SOUP made a motion for an extension of the thirty-day period for the submission of comments,[11] and SOUP made a motion for discovery.[12]

In a series of public orders and private letters to the President of SOUP, the Commission made the following disposition of SOUP's requests:

(1) Granted SOUP intervention;

(2) Granted SOUP an extension of the thirty-day period;

(3) Granted SOUP the right to submit an additional brief on the necessity of including the additional affirmative disclosure clause;

(4) Granted SOUP discovery;

(5) Granted SOUP oral arguments on the issue of whether SOUP could intervene;

(6) Granted SOUP *in forma pauperis* to submit only one copy of documents (instead of the 20-copy requirement);

(7) Extended the *in forma pauperis* treatment to include a free copy of the oral argument transcript;

(8) Denied SOUP's requests for either a limited evidenciary hearing or a full adjudication.

Commissioner Jones dissented from the final order of May 25, 1970, which accepted the consent agreement, and issued a separate statement arguing that a limited evidenciary hearing in which SOUP could introduce evidence on the residual effects of Campbell's ads was required. Commissioner Elman also dissented and issued a separate statement arguing that a full adjudication in which SOUP could participate and introduce evidence was required.

I. SOUP, INC., AS A CORPORATION, IS A "PERSON" WITHIN THE MEANING OF 28 U.S.C. § 1915(A)

In forma pauperis treatment of litigants in the federal courts is regulated by statute (28 U.S.C. § 1915) and by Court rule (F.R. App. Pro. 24).[13] 28 U.S.C. § 1915(a) provides in part:

"Any Court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a *person* who makes affidavit that he is unable to pay such costs or give security therefor." (emphasis added)

Rule 24(b) of the Federal Rules of Appellate Procedure provides in part:

"A *party* to a proceeding before an administrative agency * * * who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed together with the affidavit

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[9] "Motion to Intervene," submitted Oct. 20, 1969.

[10] "Memorandum" submitted Oct. 20, 1969, requesting leave to proceed *in forma pauperis*.

[11] "Motion Requesting the Federal Trade Commission to Extend the Time Allotted For the Submission of Comments or Views Concerning the Appropriateness of the Order Contained in the Consent Agreement," submitted Oct. 15, 1969.

[12] "Motion for Disclosure," submitted Oct. 7, 1969.

[13] There are no special rules of the D. C. circuit relevant to consideration of corporations proceedings *in forma pauperis*. Only two rules discuss *in forma pauperis*, rules 6 and 17. Rule 6(d) permits pleading by letter a pro se litigant proceeding *in forma pauperis*. Rule (b) and 17(c)(2) prescribes procedures for *in forma pauperis* on appeal from District Court criminal proceedings.

prescribed by the first paragraph of subdivision (a) of this rule." (emphasis added)

This memorandum will treat the issue of whether an indigent corporation is entitled to proceed *in forma pauperis* as substantially identical with the more narrowly phrased issue of whether corporations are "persons" within the meaning of 28 U.S.C. § 1915(a) quoted *supra*. There are two primary reasons why this approach is appropriate. First, this approach was used in all three cases, discussed in detail *infra*, which have dealt with the issue of whether corporations can proceed *in forma pauperis*. Secondly, the requirement of F.R. App. Pro. 24(b) that the litigant be a "party" is not an additional limitation (nor could it be) on the requirement of being a "person" within the meaning of § 1915(a) because, indisputably, corporations are encompassed by the term "party." In addition, SOUP was a party to the underlying administrative proceeding. The argument that SOUP is a "person" within the meaning of 28 U.S.C. § 1915(a) will be divided into the following parts:

A. The term "person" is an Act of Congress includes corporations, according to 1 U.S.C. § 1, unless the context affirmatively indicates that a more restrictive meaning was intended.

B. This Court and the United States Supreme Court has consistently construed § 1915 liberally so as to effectuate the Congressional intent of providing equal access for indigents to the federal courts.

C. Construing § 1915(a) to exclude indigent corporations would be an arbitrary discrimination violating the Due Process Clause of the Fifth Amendment.

D. Corporations, are, as a general rule, considered "persons" at common law, and within the meaning of constitutional and statutory provisions.

E. Corporations are, as a general rule, considered "residents," "inhabitants," "citizens," and other terms more restrictive than "persons."

F. Corporations today have the powers, rights, duties, and liabilities of individuals.

G. This Court should not follow the three cases which held that corporations cannot proceed *in forma pauperis*.

H. There are strong "public policy" considerations for affording the indigent "public interest" intervenor in an administrative proceeding the right to proceed on appeal *in forma pauperis*.

I. The decision on SOUP's motion in this case could be appropriately limited according to the nature of the underlying administrative proceeding, and the nature of the issues SOUP seeks to raise in this appeal.

A. The term "Person" in an act of Congress includes corporations, according to 1 U.S.C. § 1, unless the context affirmatively indicates that a more restrictive meaning was intended

In construing the term "person" in an act of Congress, 1 U.S.C. § 1 requires that it include corporations as well as individuals unless the context affirmatively indicates that Congress intended to exclude corporations. Entitled "Rules of Construction," 1 U.S.C. § 1 states in pertinent part:

"In determining the meaning of any act of Congress, unless the context indicates otherwise * * * the words 'person' and 'whoever' includes corporations * * * as well as individuals. . . ."

In the absence of any explicit indication in the context or language of § 1915(a) that Congress intended to exclude corporations from *in forma pauperis* treatment, this Court cannot impute to Congress an intent to discriminate between indigent individuals and indigent corporations.

1 U.S.C. § 1 creates, in effect, a presumption that a corporation is a "person" in a federal statute, which presumption can only be rebutted, according to 1 U.S.C. § 1, by some positive showing that the statute contains a more restrictive meaning. This principle that 1 U.S.C. § 1 is not neutral, but creates a presumption toward including corporations is clearly supported by the history of that section. Prior to 1948, the statute merely stated: "[T]he word 'person' may extend and be applied to partnerships and corporations * * *." This language, especially "may extend," indicates that Congress had given the judiciary freedom to include or not include corporations within the term "person" as it saw fit. By act of June 25, 1948 (c. 645, § 6, 62 Stat. 859) the present wording was substituted. Now this court must include corporations "unless the context indicates otherwise." From permissive or neutral language, Congress has substituted a presumption in favor of inclusion. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 461 (9th Cir. 1966).

There is nothing in the context of § 1915 which indicates that Congress intended the term "person" to be restricted to individuals. Congress was concerned that parties would be denied access to the judiciary unless they could receive *in forma pauperis* treatment. The indigent corporation is effectively denied the right to appeal just as is the indigent individual. SOUP will not be able to prosecute this appeal unless allowed to proceed *in forma pauperis*. SOUP, as a corporation, is in the same circumstance as an indigent individual, and deserves the same treatment under § 1915 to effectuate the same purposes of that statute.[14]

B. This court and the United States Supreme Court have consistently construed § 1915 liberally so as to effectuate the Congressional intent of providing equal access for indigents to the Federal courts

Earlier this year, this Court reviewed the important recent cases dealing with § 1915, and concluded:

"The picture is far from complete, but recent cases dealing with [costs and transcripts on appeal], coupled with the expansive readings being given to *in forma pauperis* statutes, all suggest that the trend seems to be toward more, not less, affirmative action. *Lee* v. *Habib*, —— U.S.App.D.C. ——, 424 F.2d 891, 900–01 (1970)."

The "expansive readings" of § 1915 mentioned by *Lee* v. *Habib*, *supra*, includes a liberal test of poverty. In the early case of *Adkins* v. *E. I. Dupont de Nemours & Co.*, 335 U.S. 331, 339 (1948), the Supreme Court stated that the applicant need not be destitute. Two very recent cases by this Court have reinforced *Adkins*, extending *in forma pauperis* treatment to parties receiving $70 and $90 take home pay per week. *Harris* v. *Harris*, —— U.S.App.D.C. ——, 424 F.2d 806 (1970); *McKelton* v. *Bruno*, —— U.S.App.D.C. ——, 428 F.2d 718 (1970)

Another example of the liberal construction being accorded § 1915 is the "good faith" criterion which has been construed as limited to a nonfrivolous or nonmalicious basis for appeal. *Ellis* v. *United States*, 356 U.S. 674 (1958); *Coppedge* v. *United States*, 369 U.S. 438, 454 (1962); *Tate* v. *United States*, 123 U.S.App.D.C. 261, 359 F.2d 245, 250 (1966).

Another example of this Court's liberal construction of § 1915 is its decision that the criteria developed under § 1915 is applicable to the District of Columbia Court of General Sessions, even though it appeared that the D.C. Court of General Sessions was not a "court of the United States" within the meaning of § 1915. *Tate* v. *United States*, 123 U.S.App.D.C. 261, 359 F.2d 245 (1966).

Certainly the great advances in the right to counsel under § 1915 and under the Constitution need no elaboration here.

All these developments partake in the same philosophy, expressed by the Supreme Court in *Coppedge* v. *United States*, 369 U.S. 438, 446–47 (1962):

"[W]e have been impelled by considerations beyond the corners of 28 U.S.C. § 1915, considerations that it is our duty to assure to the greatest degree possible, within the statutory framework * * *, equal treatment for every litigant before the bar."[15]

Certainly permitting indigent corporations which satisfy the necessary criteria to proceed *in forma pauperis* would be in accordance with this philosophy and the trend of decisions construing § 1915.

C. Construing § 1915(a) to exclude indigent corporations would be an arbitrary discrimination violating the due process clause of the fifth amendment

Unconstitution discrimination criteria have been much more fully developed under the Equal Protection clause of the Fourteenth Amendment than under the Due Process clause of the Fifth Amendment. Even though the Fourteenth Amendment applies on its face only to state action, it is established that a

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[14] *See, e.g.*, 18 Am. Jur. 2d Corporations § 24: "Corporations are to be deemed and considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." *See also* Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdictions: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1447 (1964): "[A Corporation's] legal treatment should depend upon the purposes of the statutory or constitutional provision being applied." *See also* Henn. Corporations § 80 at 111 (1961); United States v. Northern Express Storage & Transportation Co., 164 U.S. 686, 688–89 (1897).

[15] *See also*, Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 12 n. 51 (1963); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966).

violation by the Federal Government of Equal Protection violates the Due Process clause of the Fifth Amendment. In effect, the Equal Protection clause has been incorporated as a federal right through the Fifth Amendment. This Court very recently stated this principle as follows: "[T]he concept of equal protection [is] embodied in the Due Process clause of the Fifth Amendment." *Watson* v. *United States*, U.S.App.D.C. (en banc), No. 21,186, decided July 15, 1970, Slip at 29.

Similarly, this Court stated in *Lee* v. *Habib*, —— U.S.App.D.C. ——, 424 F.2d 891, 898 n.21 (1970):

"This court has held that the equal protection guarantee applies to the federal government through the Fifth Amendment. Bolton v. Harris, 130 U. S. App. D. C. 1, 4 n. 3, 395 F.2d 642, 645 n. 3 (1968); Hamilton National Bank v. District of Columbia, 85 U. S. App. D. C. 109, 115, 176 F.2d 624, 630, *cert. denied*, 338 U. S. 891, 70 S. Ct. 241, 94 L. Ed. 547 (1949)."[16]

Construing the term "person" in § 1915 to exclude corporations would be an arbitrary discrimination violating the Equal Protection clause of the Fourteenth Amendment, and thereby violating the Due Process clause of the Fifth. Both clauses protect corporations.[17]

Equal protection means the "right to equal treatment," *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946), and a corporation is entitled to equal treatment with natural persons absent a reasonable difference between the two for the purpose of the relevant statute. Legislation which "arbitrarily favors the individual as against the corporation" violates the equal protection clause. *Frost* v. *Corporation Commission*, 278 U.S. 515, 522 (1929). In the words of *Ligget Co.* v. *Lee*, 288 U.S. 517, 536 (1933):

"Unequal treatment and arbitrary discrimination as between *corporations and natural persons*, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified * * *." (emphasis added)

The standard to be applied to discover whether an arbitrary discrimination has occurred is that the statutory classifications "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 37 (1928).[18]

Using this test, there is no substantial difference between an indigent corporation and an indigent individual as regards *in forma pauperis* treatment. A number of recent cases applying the equal protection clause to *in forma pauperis* statutes support this. For an excellent and extensive discussion of the expanding scope of equal protection for indigent civil litigants, see *Lee* v. *Habib*, —— U.S.App.D.C. ——, 424 F.2d 891, 898–902 (1970).

The recent case of *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966) deserves special attention. That case involved the constitutionality of a New Jersey statute which recouped the cost of the trial transcript furnished indigents on appeal out of prison allowances to the incarcerated prisoner, but did not seek similar recoupment from parolees or convicted defendants not imprisoned. The Supreme Court held, 384 U.S. at 309, that the statute violated the Equal Protection clause:

"To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions * * * is to make an invidious discrimina-

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[16] *See Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954): "[I]t would be unthinkable that the same constitution would impose a lesser duty on the Federal Government." *See also Hyser* v. *Reed*, 115 U. S. App. D. C. 254, 318 F.2d 225, 255, *cert. denied*, 375 U. S. 957 (1963) (Judges Bazelon and Edgerton concurring in part and dissenting in part); *Harris* v. *Harris*, —— U.S.App.D.C. ——, 424 F.2d 806, 811 n. 8 (1970); *The Supreme Court, 1961 Term*, 76 Harv. L. Rev. 54, 172 (1962); Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 Cornell L.Q. 1, 22 (1957); Damisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 12 n.51 (1963).

[17] A Corporation is a "person" within the meaning of the Fifth Amendment and cannot be deprived of property without due process of law. Sinking Fund Cases, 99 U.S. 700 (1879); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). In like manner, a corporation is entitled to equal protection of the laws. *See, e.g., Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 574 (1949):

"It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886, *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U.S. 394, 396 [1886]). (Separate opinion of Justice Jackson)."

[18] The language of this test is repeated in Power Co. v. Saunders, 274 U. S. 490, 493 (1927); Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920). *See also*, Baxstrom v. Herold, 383 U. S. 107, 111 (1966); Bolton v. Harris, 130 U.S. App. D. C. 1, 395 F.2d 642 (1968).

tion * * *. There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision."

The Supreme Court, after specifically rejecting the arguments that the distinction was valid because of the objectives of administrative convenience and of deterring frivolous appeals, 384 U.S. at 309–10, stated what is equally applicable to whether corporations can proceed *in forma pauperis:*

"This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U.S. 12 [1956]; Douglas v. California, 372 U.S. 353 [1963]; Lane v. Brown, 372 U.S. 477 [1963]; Draper v. Washington, 372 U.S. 487 [1963]. 384 U.S. at 310–11."

It is submitted that excluding corporations from *in forma pauperis* treatment would be an arbitrary discrimination in violation of the Due Process clause of the Fifth Amendment. Such a construction of § 1915 would impede a corporation's "open and equal" access to Federal court, and would be based upon no objective of § 1915.

D. Corporations are, as a general rule, considered "persons" at common law, and within the meaning of constitutional and statutory provisions

By 1826, the Supreme Court could state that "corporations are, in law, for civil purposes, deemed persons is unquestionable." *United States* v. *Amedy*, 11 wheat. (24 U.S.) 392, 412 (1826).[19] In addition, in the absence of an express statutory provision of construction such as 1 U.S.C. § 1, the term "person" in a statute is generally held to include corporations.[20]

In the specific class of statutes relating to business transactions, the term "person" includes corporations routinely.[21] For example, in *Ramsey* v. *Tacoma Land Co.*, 196 U.S. 360 (1905), a corporation was held entitled to the benefit of a statute providing for the purchase of tracts of land from the government which named as beneficiaries "citizens of the United States" or "persons who have declared their intentions to become such citizens."

As with statutory provisions, "under current constitutional law a corporation is a 'person.'" Hornstein, 1 Corporation Law and Procedure 369 (1959). Within the meaning of the constitutional provisions, a corporation is considered a "person" entitled to equal protection of the laws (14th Amendment),[22] due process of law (5th Amendment and 14th Amendment),[23] and to be secure from unreasonable searches and seizures (4th Amendment).[24]

Even though a corporation has been held not to be a "person" within the constitutional provisions protecting against self-incrimination,[25] within the privileges and immunities clause,[26] and within the "liberty" guarantee of the Fourteenth Amendment,[27] these cases can easily be reconciled with the majority of cases holding corporations to be "persons" within the numerous constitutional provisions. Whether a corporation is deemed a "person" depends upon the purposes of the constitutional provision being applied, and using this approach, these cases have been reconciled by two articles.[28]

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[19] "The term 'person' prima facie, at common law and apart from any statutory enactment limiting its meaning, includes both natural and artificial persons, and therefore as a general rule includes corporations." 18 Am. Jur. 2d Corporations § 20, *citing* Klein v. Tax Supers, 282 U.S. 19 (1930); McKinley v. Wheeler, 130 U.S. 630 (1889); Louisville, C. & C. R. Co. v. Letson, 2 How. (43 U.S.) 497 (1884).

[20] 18 Am. Jur. 2d Corporations § 24. *See, e.g.,* United States v. Union Supply Co., 215 U.S. 50 (1909); Beaston v. The Farmers' Bank of Delaware, 12 Pet. (37 U.S.) 102 (1838).

[21] Green, *Corporations as Persons, Citizens and Possessors of Liberty,* 94 U. Pa. L. Rev. 202, 203 (1946), *citing,* United States v. Amedy, 11 wheat. (24 U.S.) 392, 412 (1826); Beaston v. Farmers' Bank of Delaware, 12 Pet. (37 U. S.) 102, 134–35 (1838); Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 588–89 (1839).

[22] Louis K. Liggett Co. v. Lee, 288 U. S. 517 (1933); Frost v. Corporation Commission, 278 U. S. 515 (1929); Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1928).

[23] Sinking-Fund Cases, 99 U. S. 700, 718–19 (1878); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77 (1938); Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923); Mississippi R. R. Com. v. Mobile & O. R. Co., 244 U.S. 388 (1917); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[24] Hale v. Henkel, 201 U.S. 43, 75–76 (1906).

[25] Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186, 208–09 (1946).

[26] Asbury Hospital v. Cass County, 326 U.S. 207 (1945).

[27] Hague v. CIO, 307 U.S. 496 (1939).

[28] Henn, Corporations § 80 at 111 (1961); Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited,* 77 Harv. L. Rev. 1426, 1447–48 (1964).

Using this approach, corporations are always considered constitutional "persons" when they have the same relations to the constitutional provisions as does an individual. In this way, those cases holding a corporation a constitutional "person" are applicable authority for the proposition that corporations are persons within the meaning of 28 U.S.C. § 1915(a) because indigent corporations maintain a common status with indigent individuals, and the *in forma pauperis* statute relates to both equally.

E. Corporations are, as a general rule, considered "Residents," "Inhabitants," "Citizens," and other terms more restrictive than "Person"

In addition to being considered a "person" within the meaning of constitutional and statutory provisions, corporations have been held to be other more restrictive terms than "person." A state corporation is a "citizen" of the United States within the meaning of treaties protecting the interests of citizens of the United States, and of acts of Congress giving citizens of the United States, the right to sue in the Court of Claims,[29] a "citizen" entitled to purchase mineral deposits in public lands,[30] a "citizen" to perfect defective titles to public land,[31] and a "citizen" for diversity jurisdiction in the federal courts.[32] In addition, a corporation is an "inhabitant" of the district where it has its principal office,[33] a "resident" of the state by which it was incorporated,[34] a "resident" of the county in which it has its principal office,[35] and one of "the people" whose right to be secure against unreasonable searches and seizures is guaranteed by the Fourth Amendment.[36]

F. Corporations today have the powers, rights, duties and liabilities of individuals

Early in the history of this Republic, corporations were treated with suspicion and their powers and authority were carefully circumscribed. Today, however, a corporation has the powers and duties of an individual.[37] The statute under which SOUP was incorporated, the District of Columbia Nonprofit Corporation Act, Title 29 §§ 1000 *et seq.* of the D.C. Code (1967), follows generally the modern liberal acts. Section 1005 of the Nonprofit Corporation Act sets out the powers of the nonprofit corporation, and it is apparent that such a corporation has the powers of an individual. Section 1005 reads in part:

"Each corporation shall have power—

"(a) to have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation;

"(b) to sue and be sued, complain and defend, in its corporate name;

"(c) to have a corporate seal which may be altered at pleasure and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced;

"(d) to purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use, and otherwise deal in and with, real or personal property, or any interest therein, wherever situated;

"(e) to sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets;

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[29] United States v. Northwestern Express Storage & Transportation Co., 164 U. S. 686 (1897), and Cases cited therein.

[30] McKinley v. Wheeler, 130 U. S. 630 (1889).

[31] Ramsey v. Tacoma Land Co., 196 U.S. 360 (1905).

[32] Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 287 (1888): "[I]t is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the federal courts." In 1958, Congress amended the jurisdictional statute to expressly include this principle by adding section 1332(c), including corporations.

[33] Case of the Sewing Machine Cos., 18 Wall. (85 U. S.) 553, 575 (1873); Galveston, Harrisburg & San Antonio Ry. v. Gonzales, 151 U. S. 496, 504 (1894); Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561 (1942).

[34] Macon Grocery Co. v. Atlantic Coast Line R.R., 215 U.S. 501, 509 (1910) and cases cited therein; Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 647 (1916); Seaboard Rice Milling Co. v. Chicago, Rock Island & Pac. Ry., 270 U. S. 363 (1926).

[35] Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 647 (1916).

[36] Hale v. Henkel, 201 U. S. 43, 76 (1906).

[37] See the discussion of the trend away from limitations on corporate power and activity in Liggett Co. v. Lee, 288 U. S. 517, 548–52 (1933) (Brandeis, J., Dissenting). *See also*, Latty, *Why are Business Corporation Laws Largely Enabling?* 50 Cornell L. Q. 599 (1965); Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 Law & Contemp. Prob. 177 (1958).

"(f) to lend money to and otherwise assist its employees other than its officers and directors;

"(g) to purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, whether for profit or not for profit, associations, partnerships, or individuals, or direct or indirect obligations of the United States, or of any other government, State, territory, governmental district, or municipality or of any instrumentality thereof;

"(h) to make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income;

"(i) to conduct its affairs, carry on its operations, hold property, and have offices and exercise the powers granted by this chapter in any part of the world * * *."

Similary, a corporation may, as a general rule, be criminally liable for common law crimes and those statutory crimes employing the term "person." *See* Am. Jur. 2d Corporations §§ 1434–36, at 827–29, and cases cited therein. The same is true for the tort liability of corporations:

"At the present time it is universally recognized that ordinary private corporations may commit almost every kind of a tort and be held liable therefor, and that this liability may be enforced in the same manner as if the wrong complained of had been committed by an individual." [38]

Finally, the obligation of protecting the interests of a state corporation is acknowledged on the part of the United States. *United States* v. *Northwestern Express Stage & Transportation Co.*, 164 U. S. 686, 689 (1897).

Since the modern corporation possesses the powers, rights, duties, and liabilities of individuals, it is appropriate to treat corporations as individuals for the purposes of § 1915(a), and accord to corporations *in forma pauperis* treatment.

G. This court should not follow the three cases which held that corporations cannot proceed in forma pauperis

Research has uncovered three cases which have decided the question of whether a corporation can proceed *in forma pauperis*, and all three concluded that a corporation could not so proceed. *Atlantic S.S. Corporations* v. *Kelley*, 79 F.2d 339 (5th Cir. 1935); *Quittner* v. *Motion Picture Producers & Distributors of America, Inc.*, 70 F.2d 331 (2d Cir. 1934); *Honolulu Lumber Co., Ltd.* v. *American Factors, Ltd.* 265 F. Supp. 578 (D. Hawaii 1966).

It is necessary to discuss these cases in some detail to indicate the reasons why their authority must reasonably be rejected by this Court.

The earliest case, *Quittner*, involved a suit brought by an individual and a corporation for treble damages for a Clayton Act violation. Plaintiffs appealed from a judgment dismissing their complaint at the end of their case, and sought to proceed on appeal *in forma pauperis* because the district court record was "voluminous and prohibitive for appellants to print." 70 F.2d at 331. Since *Quittner* was decided in 1934, § 1915(a) required the applicant for *in forma pauperis* treatment to be a "citizen." [39] In a two-sentence holding which cited no authority for the position, the court granted the motion of the individual to proceed *in forma pauperis*, but denied *in forma pauperis* to the corporation:

"The corporation may not succeed in this motion, for it is not a citizen. The individual has shown reason and justification for his petition, and the motion will be granted as to him. 70 F.2d at 332."

The reasons why this decision is not applicable to the present case are apparent. First, it was decided under the older, more restrictive "citizen" language in § 1915(a). Furthermore, it was not important to either the court or the appellants whether the corporation could proceed on appeal *in forma pauperis*, because the individual was allowed to so proceed, and appellants thereby receive free copies of the transcript and exhibits. Finally, it must be pointed out

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[38] 19 Am. Jur. 2d Corporations § 1427, at 821. *See, e.g.*, National Bank v. Graham, 100 U. S. 699 (1879); Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317 (1883).

[39] The term "person" in § 1915(a) was substituted for the term "citizen" by the Act of Sept. 21, 1959, Pub. L. 86–320, 73 Stat. 590.

that the court's decision on this point consisted of a two sentence conclusionary ruling which gave no basis and cited no authority.

The second case, *Kelly*, was decided in 1935, one year after *Quittner*. In *Kelly*, there was a judgment for plaintiff in the district court, and defendant corporation sought to appeal *in forma pauperis*. The trial court granted the motion, but the Fifth Circuit reversed and dismissed the appeal. The one-page opinion gives two reasons why a corporation cannot proceed *in forma pauperis*. First, the opinion argues that a corporation cannot be a "citizen" within the meaning of § 1915(a) because corporations are not "citizens" within the constitutional provisions establishing diversity jurisdiction:

"It is settled that a corporation may invoke the jurisdiction of a federal court on the grond of diversity of citizenship. It is sometimes said in opinions of the courts that a corporation is a citizen of the state under the laws of which it is incorporated, but the fundamental reason for maintaining jurisdiction is that the suit is considered to be by or against the stockholders of the corporation, who are the real parites in interest. In practically every case in which this point has been considered, from the early case of Bank of the U. S. v. Deveaux, 5 Cranch 61, 3 L. Ed. 38, the Supreme Court has said that a corporation is not a citizen within the meaning of the Constitution." 79 F.2d at 340.

The authority this case is undermined, as is *Quittner*, by the liberalization of the language of § 1915(a) from "citizen" to "person," and, more importantly, by the patently erroneous statement of judicial principles concerning diversity of citizenship jurisdiction.

It is true that the Supreme Court in *Bank of the United States* v. *Deveaux*, 5 Cranch (9 U. S.) 61 (1809) stated that a corporation was not a citizen for jurisdictional purposes, jurisdiction being dependent on the citizenship of the natural persons who composed the corporation. However, the *Deveaux* case had interpreted the citizenship clause "inconsistent with popular understanding and previous holdings of the court,"[40] and was overruled in 1844 by *Louisville C. & C. R. R.* v. *Letson*, 2 How. (43 U.S.) 497 (1844). Letson held without a dissent that a Corporation was a citizen within the meaning of the jurisdictional clause of the Constitution and Judiciary Act *independent* of the citizenship of the members of the corporation. The *Letson* holding "has been repeatedly cited as sound law, and it has ever since been the doctrine of the courts."[41]

In 1888, the Supreme Court stated: "[I]t is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the federal courts." *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287 (1888). In 1898, the Supreme Court clearly indicated that *Deveaux* had been overruled by *Letson:*

"The jurisdiction of the Circuit Courts over suits between a citizen of one State and a corporation of another State was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the State by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. Bank of United States v. Deveaux. * * *.

"But the earlier cases were afterwards overruled; and it has become the settled law of this court that, for the purpose of suing and being sued in the courts of the United States, a corporation created by and doing business in a State is, although an artificial person, to be considered as a citizen of the State, as much as a natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation. Louisville C. & C. R. R. v. Letson * * *."

Barrow Steamship Co. v. *Kane*, 170 U. S. 100, 106 (1898).

Congress indicated its approval of this approach by codifying it into the Judicial Code in 1958. In that year, subsection (c) was added to 28 U.S.C. § 1332, which subsection stated in full:

"For purposes of this section and section 1441 of this title, a corporation shall

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[40] Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. Pa. L. Rev. 202, 215 (1946). Some of the early suits in which it was taken for granted that corporations were citizens are Head v. Providence Ins. Co., 2 Cranch 127 (1807), and cases cited at 94 U. Pa. L. Rev. at 211 n.38.

[41] Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. Pa. L. Rev. 202, 217 (1946).

be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

In light of this history of judicial construction of the citizenship jurisdictional clause, it is amazing for a court to cite *Deaveaux* in 1935 as authority for the proposition that corporaitons are not considered citizens.

The second reason set out in the *Kelly* case to support its holding that a corporation could not proceed *in forma pauperis* was that corporations must be presumed to have the necessary funds:

"In adopting the law allowing the prosecution of suits in forma pauperis Congress clearly intended to extend the benefit to natural persons who are citizens in the full meaning of the term and because of poverty would otherwise be denied access to federal courts. There would be no logical reason for extending the same privilege to corporations. Corporations, if litigants, may be presumed to have sufficient assets to pay costs or, if not, the stockholders would have sufficient interest to furnish security." 79 F.2d at 340.

While this presumption may be true of the business (as distinct from the nonprofit) corporation, it is not relevant. Only indigent corporations could, in any event, seek *in forma pauperis* treatment, and the fact that most corporations possess adequate funds to litigate should not bar litigation by those few corporations who are indigent. More importantly, piercing the corporate veil to look at the financial status of its members should be a criterion in determining which corporations should be allowed to proceed *in forma pauperis*, and not in the question of whether any corporation may so proceed.

The *Kelly* case should therefore be rejected by this Court because it was based on a more restrictive *in forma pauperis* statute ("citizen"), it reflected an aggregious misreading of Supreme Court precedent, and the only rationale given for entirely excluding corporations is more appropriately used to determine which corporations may proceed *in forma pauperis*. As in *Quittner*, the *Kelly* case reasoning leads only to the, arguable correct, conclusion that the specific business corporation making application could not proceed *in forma pauperis*, but not to the conclusion that *no* corporation could *ever* so proceed.

The final case, *Honolulu Lumber*, involved a private antitrust action by a corporation against its competitors. The District Court, after dismissing the case with prejudice, held that plaintiff corporation could not appeal *in forma pauperis*. No appeal was taken from this decision. The District Court judge gave a number of reasons for denying *in forma pauperis* to the corporation, and all are inappropriate authority for this present case. The District Court first argued that Congress never intended to include corporations within § 1915 and that a corporation is not a citizen within the meaning of the Constitution:

"An examination of the statutory language and legislative history of 28 U.S.C. § 1915 indicates that Congress never intended to include corporations as a 'person' within the meaning of this statute. Congress first enacted in forma pauperis legislation by the Act of July 20, 1892. That statute used the word 'citizen' instead of 'person', and since Chief Justice Marshall so ruled in Bank of the United States v. Deveaux, 5 Cranch 61, 3 L. Ed. 38 (1809), it has been settled that a corporation is not a citizen as that word is used in the Constitution. Atlantic S. S. Corporation v. Kelley, 5 Cir., 1935, 79 F.2d 339; Quittner v. Motion Picture Producers and Distributors of America, Inc., 2 Cir., 1934, 70 F.2d 331. Thus, at its inception the Act was never intended to confer in forma pauperis privileges to corporations.

"In 1959, the statute was amended by substituting 'person' for 'citizen', for the very specific and limited purpose of permitting resident aliens to sue in forma pauperis * * *. It thus appears that Congress never intended by this single word change in 1959 to extend this privilege to a whole new class of artificial persons." 265 F. Supp. at 580.

In so far as this reasoning resurrects the *Deveaux* authority it is simply wrong; insofar as it uses the "intention of Congress" test it misconstrues the effect of 1 U.S.C. § 1 and the fact that Congress never intended to exclude corporations.

The legislative history of the 1959 amendment does indicate, as the quote states, that Congress changed the term "citizen" in § 1915 to the term "person" only to include indigent aliens. It nowhere appears that Congress considered the issue of the indigent corporation. However, one of the principal reasons given for extending *in forma pauperis* treatment to aliens was that any distinction between aliens and citizens might be unconstitutional. *See*, Sen. Rep.

No. 947, Sept. 8, 1959, 2 U.S. Code Cong. & Admin. News 2663–65 (1959); 105 Cong. Rec. 18909–10 (86th Cong., 1st Sess. 1959); 105 Cong. Rec. 13714 (86th Cong., 1st Sess. 1959). Any distinction between indigent individuals and indigent corporations may likewise be unconstitutional. Part I(C) of this memorandum, *supra*, suggests that such a distinction would violate the Due Process Clause of the Fifth Amendment. Furthermore, the fact that Congress never considered the question of whether corporations would be included in the more expansive term "person" in § 1915, requires this Court to look to 1 U.S.C. § 1, quoted *supra*, for the presumed intent of Congress, and hold that a corporation is a person within the meaning of § 1915(a).

Perhaps more important in terms of the weight which should be given to the *Honolulu Lumber* opinion, the court candidly admits that its holding that no corporation can proceed *in forma pauperis* is irrelevant because there were at least three reasons why the particular corporation making applications could not qualify under any circumstances:[42] (1) It was a closely-held corporation whose members would benefit exclusively from any judgment; (2) the individual plaintiffs did not make a timely application to proceed *in forma pauperis;* and (3) there was a strong implication of either bad faith or fraud in making application to proceed *in forma pauperis.* The court first states that a closely-held corporation whose members will benefit directly and exclusively from any recovery awarded should not be allowed to hide behind the corporate veil:

"[E]xcept for a $200 investment by one person, the entire stock in this corporation is held by its president, Preston Low, and two other individuals also named Low, living in the same general community in California. There is no showing that this small group, who would benefit directly and exclusively from any recovery awarded * * * is financially unable to pay the expenses of this suit. * * *

"[I]n the case of this closely-held corporation, there is no reason why the true beneficiaries should be allowed to stand behind a corporate veil and thereby be excused from paying the legal costs of a suit which the corporation they controlled decided to institute." 265 F. Supp at 581.

SOUP submits that this is a reasonable and desirable criteria for determining which corporations should be allowed to proceed *in forma pauperis*, and may be adopted by this Court. However, there is fundamental distinction between a close corporation whose members would benefit directly and exclusively from the large damages alleged, and a nonprofit "public interest" corporation whose members have no discriminating financial stake in the outcome of the controversy, but seek only to insure that a federal agency adequately protects the consumers' interests in a proceeding.

The court also held that plaintiff had lost its privilege to proceed *in forma pauperis:*

"Plaintiff was free * * * to come into court and request the appointment of local counsel in a forma pauperis petition, and due diligence would dictate that this application thus should have been made during the normal course of the litigation. Since the corporation has failed to take advantage of the statutory benefits it now claims under 28 U.S.C. § 1915(d), despite ample opportunity to do so over a period of more than two years, the plaintiff in this case has not made timely use of the privileges it claims is conferred on it by the statute." 265 F. Supp. at 581.

Without discussing the question of whether *in forma pauperis* is a constitutional right as opposed to a privilege conferred by Congress,[43] and without discussing the merit of this waiver theory, it is clear that waiver s not relevant to the present proceeding. SOUP proceeded *in forma pauperis* in the underlying administrative action and made timely application in this Court.

The final reason given by the District Court in *Honolulu Lumber* for denying *in forma pauperis* treatment to the plaintiff corporation was the court's suggestion of bad faith or fraud in the corporation's allegation of poverty:

'Further, this court has not overlooked the allegations of corporate poverty made by plaintiff's attorney Tibbits and its Pacific-hopping President Low on

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[42] "Even if the statute were construed as authorizing corporations to sue in forma pauperis, this court would nevertheless, for the reasons indicated hereafter, in its discretion, deny plaintiff's petition in this case." 265 F. Supp. at 580–81.

[43] SOUP respectfully submits that *in forma pauperis* treatment is a constitutional right, and exists independent of any congressional statute providing for it.

October 12, 1966, as contrasted with the prior statements of the same California attorney filed on September 6, 1966, that plaintiff was ready for trial, that mainland counsel would try the case with assistance of local counsel, that its President Low would be in Honolulu, and that at least six other witnesses would be subpeonaed. At that prior time no complaint of corporate poverty or inability to meet the very obvious and considerable expenses of trial was even suggested." 265 F. Supp. at 581.

This is also perhaps a reasonable criteria for this Court to use in determining which corporations can proceed *in forma pauperis*, but again, it is not applicable to the present case. In sum, the *Honolulu Lumber* case is more concerned with the criteria to be applied to corporations making application to proceed *in forma pauperis* that with the first question of whether any corporation could so proceed. Insofar as the court argues that a corporation cannot be a "person" within § 1915(a), its reasoning is based upon a misinterpretation of 1 U.S.C. § 1 and of the precedents construing the "citizenship" jurisdictional provisions. *Honolulu Lumber* is valuable for the criteria it suggests for determining which corporations can proceed *in forma pauperis*, but for little else. The same may be said for *Quittner* and *Kelly*.

H. There are strong "Public Policy" considerations for affording the indigent "Public Interest" intervenor in an administrative proceeding the right to proceed on appeal in forma pauperis

This appeal is not a private controversy wherein SOUP seeks monetary relief for itself only, but is an attempt by a "public interest" consumer-representative with no financial stake in the outcome of the controversy to provide this Court the opportunity to review the Commission's decision so as to determine whether it was made in accordance with required procedures and adequately protected the public interest. The Commission recognized the desirability of encouraging consumer imputs into this proceeding by allowing SOUP to proceed *in forma pauperis* below. Likewise, the desirability of insuring that the Commission acted properly below would be facilitated and made possible by affording SOUP *in forma pauperis* treatment on appeal. The rationale of this Court's pioneering holding in *United Church of Christ*,[44] that citizens must have the right to intervene in and appeal from license renewal applications at the FCC "in order to safeguard the public interest in broadcasting," [45] is equally applicable to *in forma pauperis* treatment of consumers appealing an FTC order. In fact as distinguished a jurist as Judge Clark, has specifically recognized the need for consumer imputs before a court could determine whether FTC action is legitimate.[46]

To date no consumer has ever appealed an FTC decision. From the early years of this century when the Trade Commission was founded, courts have reviewed Commission orders only in the posture of whether the Commission had gone *too far* in its relief, and never that it had *not gone far enough* to protect the public interest. Since practically all deceptive advertising cases before the Commission involve little or no monetary loss to each individual consumer, there is no motivation for any consumer to attempt to intervene in or appeal from Commission decisions if the threat of paying court costs hangs over their heads. Not allowing SOUP to proceed *in forma pauperis* in this proceeding, will effectively shut off consumer-initiated review of FTC proceedings. Without proceeding *in forma pauperis*, a consumer group risks paying significant court costs but receives no financial return if successful. It is in this context that § 1915 should be appropriately used to assist consumer groups.

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[44] Office of Communications of the United Church of Christ v. FCC, 123 U. S. App. D. C. 328, 359 F.2d 994 (1966).

[45] *Id.*, 123 U. S. App. D. C. at 339, 359 F.2d at 1005.

[46] In Rosenblum v. FTC, 214 F.2d 338 (2d Cir. 1954), the court granted the joint motion of the petitioner and the Commission to vacate a decree entered by the court enforcing a Commission order, and to enter in lieu thereof a decree dismissing the entire proceeding. Judge Clark, dissenting from the per curiam dismissal, stated:

"At any rate surely the issues thus opened up are too important in both their immediate and their potential implications to be settled by a purely pro forma ruling by us at the behest of regulator and regulatee acting in concert and without representation of other possible interests.

* * * * * * *

"It seems to me that procedurally the least we must require before entering upon such a course [is] * * * an opportunity for the presentation of objections (with resulting right to petition for review) by anyone, consumer or competitor, who has been induced to rely upon the previously stated law * * *." 214 F.2d at 339–40.

I. The decision on SOUP's motion in this case could be appropriately limited according to the nature of SOUP, the nature of the underlying administrative proceeding, and the nature of the issues SOUP proposes to raise on appeal

It must be pointed out that this Court's holding that a corporation is a "person" within the meaning of § 1915(a) is not license for every corporation making application to automatically be given *in forma pauperis* treatment. This Court can establish criteria to determine which corporations can so proceed. Immediately below, this memorandum sets out a number of criteria this court may use, focusing on the nature of the corporation, the nature of the proceeding appealed from, and the nature of the issues presented on appeal.

II. THE CRITERIA WHICH SHOULD GOVERN IN FORMA PAUPERIS TREATMENT FOR CORPORATIONS

The order directing SOUP to submit this memorandum stated that: "Special attention should be directed to what criteria can be used to determine which corporation or corporations should be pemitted to proceed in forma pauperis." It is SOUP's position, and these two points are developed immediately below, that (a) this Court should use, and use exclusively, the established criteria applied to indigent individuals, and (b) if this Court would add additional requirements, they should relate to the nature of the corporation, the proceeding appealed from, and the issues presented on appeal.

A. This court should apply the same criteria for individuals and corporations

Section 1915 contains two criteria for *in forma pauperis* treatment, i.e., poverty and good faith. The Supreme Court and this Court have consistently avoided imposing additional requirements through judicial construction of the statute, and it would be inappropriate for this Court to do so in this case. In addition, since the FTC determined that SOUP was entitled to *in forma pauperis* treatment below, and has not opposed its application here, it could be argued that this Court cannot refuse to accord SOUP *in forma pauperis* treatment on appeal. *McKelton* v. *Bruno*, —— U. S. App. D. C. —— 428 F.2d 718 (1970).

In *McKelton*, this Court construed F. R. App. P. 24 to require the appellate court to permit a party to proceed on appeal *in forma pauperis* if the party had been allowed to proceed *in forma pauperis* by the District Court, unless it was certified that the appeal was not taken in good faith (i.e. frivolous or malicious):

"[A]bsent an affirmative showing of disentitlement, the [appellate court] *cannot refuse* to allow an appeal *in forma pauperis* once permission has been granted by the trial court if nonfrivolous issues are present." 428 F.2d at 718 (emphasis added)

While the Federal Rules of Appellate Procedure are only binding on the United States courts, *McKelton* required the District of Columbia Court of Appeals to follow this principle. There is no reason why this Court should not apply this principle to review of FTC proceedings in this case. Here the Commission, by unanimous vote of its five commissioners, held SOUP entitled to *in forma pauperis* treatment below. While the Commission at present has no statutory standard for *in forma pauperis*, its decision was based on SOUP's poverty and valuable contribution to the proceeding. The Commission, through a memorandum to this Court, did not oppose granting SOUP *in forma pauperis* on appeal. By the logic of *McKelton*, this Court "cannot refuse" SOUP leave to proceed *in forma pauperis* on appeal. Certainly the decision of the five commissioners that SOUP may proceed *in forma pauperis* at the FTC is equivalent to a single Judge's decision that a party may proceed *in forma pauperis* in the District Court.

SOUP easily meets both criteria in § 1915. The first criteria is that the appeal be taken in "good faith." 28 U.S.C. § 1915(a). The Supreme Court, in a series of cases, has equated the "good faith" requirement of § 1915(a) with the requirement in § 1915(d) that the appeal be neither "frivolous or malicious." In *Ellis* v. *United States*, 356 U.S. 674, 674 (1958), the court stated: "In the absence of some evident improper motive, the applicants good faith is established by the presentation of any issue that is not plainly frivolous." In *Coppedge* v. *United States*, 369 U. S. 438, 454 (1962), the court stated that nonfrivolous grounds of appeal are these "sufficiently reasonable to withstand a claim

that their frivolity is so manifest that they merit no further argument or consideration . . ." *See also, Tate* v. *United States*, 123 U. S. App. D. C. 261, 359 F.2d 245, 250 (1966).

The criteria of good faith is obviously as applicable to a corporation as it is to an individual; it is also obvious that the issues contained in the affidavit of Mr. Handleman, President of SOUP, supporting SOUP's motion to proceed in this Court *in forma pauperis*, are nonfrivolous. Indeed, these issues comprise two fundamental questions concerning the Commission—the procedures it must follow and the role of consumers in consent orders.

The second and final criteria contained in § 1915 is poverty, and § 1915 contains no express standards to determine the relevant poverty level. The Supreme Court ruled in 1948 that the litigant need not "be absolutely destitute to enjoy the benefit of the statute." *Adkins* v. *E. I. Dupont de Nemours & Co.*, 335 U. S. 331, 339 (1948). In two cases earlier this year, this Court permitted a party receiving $70 take home pay per week with two dependents and pressing debts and a party receiving $90 take home pay per week with four dependents and pressing debts to proceed *in forma pauperis*. *Harris* v. *Harris*, —— U.S.App.D.C. ——, 424 F.2d 806 (1970); *McKelton* v. *Bruno*, —— U.S.App.D.C. ——, 428 F.2d 718 (1970).

SOUP is certainly indigent for the purposes of appealing *in forma pauperis*, for while it has no debts or dependents, it is unable to pay or give security for the costs of this appeal. According to the uncontradicted affidavit of Mr. Handleman, SOUP "presently has no monies whatsoever in its treasury, has no established sources of income and owns no real or personal property which it could offer as security."

SOUP submits that it would be clearly improper for this Court to "pierce the corporate veil" of SOUP and look at the financial conditions of its members.

It might be appropriate for this Court to pierce the corporate veil in three very limited circumstances, none of which are present in this case. The first circumstance is when the corporation is a closely-held business corporation where a small group of stockholders "would benefit directly and exclusively from any recovery awarded." *Honolulu Lumber Co., Ltd.* v. *American Factors, Ltd.*, 265 F. Supp. 578, 581 (D. Hawaii 1966). SOUP is clearly not a closely-held business corporation, but is a nonprofit corporation. In addition, the relief sought in this appeal is not a money award to the members of SOUP, but more effective remedies by the Federal Trade Commission, which would benefit all consumers (both rich and poor).

The second limited circumstance where this Court might appropriately pierce the corporate veil is where the litigant is asking the Court to subsidize an essentially private controversy between two parties, where there is no overriding public interest in assuring appeal. This case, however, presents a corporation trying to require an administrative agency to more adequately protect the "public right" to honest advertising, and there is an overriding public interest in this Court's reviewing the Commission's action to determine whether it followed procedures required by law and adequately protected the public interest.

The third and final circumstance where this Court might appropriately pierce the corporate veil is where failure to do so would result in fraud or injustice or defend crime. *Francis D. Day Co.* v. *Shapiro*, 105 U.S.App.D.C. 392, 396, 267 F.2d 669, 673 (1959). Treating SOUP as a separate entity for the purpose of *in forma pauperis* treatment in this appeal would not result in fraud, or in injustice, or defend crime.

Because none of these three limited circumstances are present in this case, SOUP should be treated as a legal entity for the purpose of *in forma pauperis* treatment.

While SOUP believes that it would be improper for this Court to look to the financial status of its members, it must be pointed out that the six members of SOUP are all full-time law students, with limited funds. As this Court pointed out in *McKelton* v. *Bruno*, —— U.S.App.D.C. ——, 424 F.2d 806 (1970), the nature of the litigation is important in determining whether an individual can bear the costs of the suit:

"Finally, in assessing a litigant's ability to bear the costs of a lawsuit, the courts must pay some attention to the nature of the particular litigation * * *. [A Person] for whom a victory would not bring a large monetary judgment, might well decide not to defend or appeal if he were forced to pay all court costs." 428 F.2d at 720.

The members of SOUP could not realistically prosecute this appeal if forced to pay all court costs, because the case offers no possibility of monetary recovery if SOUP is successful.

Finally, we may specifically anticipate one fear this Court may have: permitting SOUP to proceed *in forma pauperis* may open up a "floodgate" of similar requests from other corporations. It must only be pointed out that very few corporations could make affidavit declaring that "it presently has no monies whatsoever in its treasury, has no established sources of income and owns no real or personal property which it could offer as security," as SOUP has done. If, however, this Court deems it advisable to limit its holding in this case, there are a number of special circumstances presented by this proceeding, discussed immediately below, which this Court could appropriately utilize.

B. This case presents a number of special circumstances which could appropriately be used to limit the holding on SOUP's motion

In addition to the statutory requirements of an appeal in "good faith" and of indigency, this Court may desire to set out other criteria separating corporations who may and corporations who may not proceed *in forma pauperis* SOUP respectfully submits the following four criteria as useful for this purpose:

(1) The corporation seeking leave to proceed *in forma pauperis* is a non-profit corporation: as distinct from a business corporation, and especially from a closely-held corporation.

(2) The corporation must be a legitimate representative of a segment of the public interest (herein of the consumers' interests), as distinct from an advocate for a merely private or commercial interest.

(3) The issues sought to be raised on appeal are, in essence, that the underlying administrative action did not adequately protect the public interest as required by statute.

(4) The corporation and its members possess no discriminatory financial interest in the appeal, but possess the same interest as other consumers.

In addition to the four criteria set out above, there are other criteria which might be useful but should not be mandatory. These include:

(5) The corporation was allowed to proceed *in forma pauperis* by the agency in the underlying administrative proceeding, and the agency has not opposed its application to proceed *in forma pauperis* on appeal.

(6) The corporation is within the only class likely to appeal the agency order (herein the class is consumers).[47]

CONCLUSION

Wherefore, SOUP submits it should be allowed to proceed on appeal *in forma pauperis* and be absolved from court costs, because a corporation may proceed *in forma pauperis* under 28 U.S.C. § 1915, and because SOUP satisfies the appropriate criteria to so proceed as a corporation.

Respectfully Submitted,

JOHN F. BANZHAF III,
Attorney for Petitioner,
2000 H Street NW.,
Washington, D.C. 20006.

Dated: November 13, 1970.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Motion For Leave to Proceed on Appeal In Forma Pauperis was sent by first class mail, postage prepaid, to the respondent, Federal Trade Commission, through its attorney James P. Timony, Federal Trade Commission, 6th and Pennsylvania Avenue, N. W., Washington, D. C. 20580, this 13th day of November, 1970.

JOHN F. BANZHAF, III,
Attorney for Petitioner,
2000 H Street NW.,
Washington, D.C. 20006.

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[47] *Cf.* Office of Communications of the United Church of Christ v. FCC, 123 U. S. App. D.C. 328, 338, 359 F.2d 994, 1004 (1966): "In a renewal proceeding, furthermore, public spokesmen, such as Appellants here, may be the only objectors." This point appears to be applicable to *in forma pauperis* as well as standing.

7. Amended Motion of S.O.U.P. for Leave to Intervene in the Matter of the Firestone Tire and Rubber Co.

United States of America Before the Federal Trade Commission

Docket No. 8818

In the Matter of the Firestone Tire & Rubber Company, a corporation.

AMENDED MOTION OF SOUP, INC. TO INTERVENE, FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND FOR DISCLOSURE

Students Opposing Unfair Practices, Inc., a corporation (hereinafter "SOUP, Inc."), respectfully moves the Hearing Examiner to intervene in this proceeding and to participate as a full party, with all the rights of parties. In addition, SOUP, Inc. respectfully requests that it be granted leave to proceed *in forma pauperis*, that it be given disclosure of certain specified documents in the Commission's files, and that it be afforded a reasonable opportunity to reply to the points raised in any answers opposing this motion.

The major substantive difference between this motion and the original motion of SOUP, Inc. to intervene is that this motion sets out in concrete and specific detail the reasons why SOUP, Inc. has good cause to intervene in this proceeding.[1]

The remainder of this motion is divided into five parts, as follows: (1) This amended motion to intervene is properly before the Hearing Examiner; (2) SOUP, Inc. has good cause within the meaning of Section 5(b) of the FTC Act to intervene in this proceeding; (3) SOUP, Inc. should be granted leave to proceed *in forma pauperis;* (4) SOUP, Inc. has a right to disclosure and reproduction of certain documents and materials in the Commission's files; and (5) SOUP, Inc. should be granted a reasonable opportunity to reply to the points raised in any answer opposing this motion.

I. THIS AMENDED MOTION TO INTERVENE IS PROPERLY BEFORE THE HEARING EXAMINER

Section 3.15(a) of the Commission's Rules of Practice for Adjudicative Proceedings provides that the Hearing Examiner, in his sound discretion, may receive amended pleadings. That section, in pertinent part, states:

"If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing examiner may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of parties, allow appropriate amendments to pleadings. . . ."

This creates a two-part test for the acceptability of amended pleadings: (A) whether this motion is an "appropriate" amendment, and (B) whether the intervention of SOUP, Inc. will facilitate determination of this controversy on the merits. If both of these parts are satisfied, the Hearing Examiner should grant SOUP, Inc. intervention taking a third point into consideration: (C) whether this motion will prejudice the rights of the parties or the public interest.

A. *This Motion is an "Appropriate" Amendment.* This motion is substantially similar to the original motion of SOUP, Inc. to intervene. The major substantive difference between the two motions is that this one sets out in concrete and specific detail the reasons why SOUP, Inc. has good cause to intervene. The original motion was "denied in all respects" by the Hearing Examiner on the sole ground that it "failed to show good cause" in support thereof. The order denying our original motion did not set out the "reasons or basis" why SOUP, Inc. had not shown good cause, as seemingly required by Section 8(c)(A) of the Administrative Procedure Act (5 U.S.C. § 557(c)(A)). Since this motion addresses and cures the single technical defect of our previous motion, we cannot

[1] The original motion of SOUP, Inc. to intervene, filed July 29, 1970, was "denied in all respects" on the sole ground that it "failed to show good cause" in support thereof. Order of August 21, 1970.

Complaint counsel had argued in his answer that our showing of good cause was "generalized and unsupported." Similarly, Respondent had argued in its answer that our good cause showing was "imprecise and speculative." The order denying the original motion of SOUP, Inc. to intervene did not set out any basis or reasons why "good cause" had not been shown.

conceive of a more "appropriate" amended pleading. In Part II, immediately below, this motion sets out the specific reasons why the proposed order is inadequate to protect the public interest, the specific additional clauses the final order must contain to adequately protect the public interest, and the precise evidence SOUP, Inc. will introduce to justify inclusion of these additional clauses. At this point, we reasonably believe that there will be no overlapping of our evidence with the evidence submitted by complaint counsel, in the event that Respondent contests the allegations of the complaint.

B. *The Intervention of SOUP, Inc. will Facilitate Determination of this Controversy on the Merits.* SOUP, Inc. recognizes that its intervention will "complicate" these proceedings. If Respondent contests the complaint, and a hearing takes place, the participation of SOUP, Inc. *will* prolong the hearing. Similarly, if Respondent elects not to contest the complaint, the substantial factual issues SOUP, Inc. raises in this motion require a limited hearing. Therefore, if the term "facilitates" in Section 3.15(a) is synonymous with "shortens", SOUP, Inc. cannot intervene. However, a determination *on the merits* is not facilitated if an order is entered which is inadequate to protect the public interest simply to shorten and simplify the proceeding. The Hearing Examiner has a duty to consider evidence and proposed clauses which relate directly to the adequacy of this order to protect the health and safety of the public (see below). In addition, a number of factors indicate that our participation will not unduly burden this proceeding: We have specified the exact evidence we desire to introduce; we have specified the exact additional clauses in the final order which this evidence requires; the Hearing Examiner may regulate our participation at the pre-hearing conference; and, finally, repetitious evidence may be curtailed by the Hearing Examiner during the hearing. When these factors, together with the substantial questions of fact, law, policy, and discretion we raise are balanced against the added complexity our intervention will create, surely our participation will facilitate the determination of this controversy *on the merits.*

C. *This Motion Does Not Prejudice the Rights of the Parties or the Public Interest.* The original motion of SOUP, Inc. to intervene did not prejudice the rights of the parties or of the public interest. This amendment is substantially identical with our previous motion, the main difference is that this motion goes into greater detail. This motion, therefore, could not prejudice the parties or the public interest. If anything, this motion is less prejudicial because all parties know exactly what the scope of our participation will be, whereas our previous motion was somewhat generalized. Furthermore, how can the public interest be prejudiced by our intervention when our participation is to insure that the resultant order adequately protects that same public interest?

It might be argued that the "lateness" of this motion is prejudicial. This is clearly erroneous: This motion was filed within a reasonable time after the denial of our original motion, and all parties have a reasonable time prior to the hearing in which to reply. Respondent has not even filed his answers to the complaint as yet.[2]

II. SOUP, INC. HAS "GOOD CAUSE" WITHIN THE MEANING OF SECTION 5 (b) OF THE FTC ACT TO INTERVENE IN THIS PROCEEDING

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides in pertinent part:

"Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

Section 3.14 of the Commission's Rules of Practice of Adjudicative Proceedings, 16 CFR § 3.14, sets forth the procedure by which a prospective intervenor can make his showing of good cause:

"Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefore."

As "good cause" to intervene in this proceeding, SOUP, Inc. sets forth the following:

A. This is an aggravated case directly involving the public health and safety.

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[2] Complaint counsel, in his answers to our original motion, even suggested that our motion was "premature". Answer filed August 13, 1970, at page 2.

A substantial number of consumers who purchased Respondent's tires under the erroneous and mistaken belief that Respondent's tires are safer than they in fact are, still retain this belief while these tires remain on their vehicles. These deceived purchasers are a serious danger to the health and safety of other drivers, passengers, pedestrians, and themselves. If this proposition is true, that as a factual matter many deceived consumers of Firestone tires do rely on the deceptive statements in the advertisements after purchasing Firestone tires, then one of the direct residual effects of Respondent's deceptions has been, and will continue to be until said deceptions are counteracted, collision-caused property damage, personal injury, and loss of life. SOUP, Inc. desires to introduce evidence, as set forth below, showing these residual effects of Respondent's deception.

Any additional time and complexity caused by SOUP, Inc.'s intervention in this proceeding is outweighed by the duty of the Federal Trade Commission to insure that the health and safety of drivers, passengers and pedestrians are adequately protected by the cease-and-desist order in this case. The proposed final order contains no provisions to counteract the above residual effects of Respondent's deceptive advertisements. Suggested below are a number of clauses which, when included in the final cease-and-desist order, would adequately protect the public interest.

B. SOUP, Inc. is a responsible representative of the consumers' interests. It is a non-profit organization, incorporated in the District of Columbia, whose main purpose is to assist the Federal Trade Commission in vigorously and creatively stopping and counteracting misleading and deceptive acts or practices. SOUP, Inc. is composed of law students dedicated to advancing the public interest, and no member of SOUP, Inc. has any private or commercial interest in this proceeding. In addition, our past involvement insures that we will responsibly and adequately represent the consumers' interests.

In a previous proceeding, Commissioner Jones graciously said that our participation presented "a graphic illustration of the responsibility and high quality of the substantive contribution which members of the public are in a position to make to the work of federal agencies." In the Matter of *Campbell Soup Company*, Dkt. No. C-1714, final order of May 25, 1970 (Separate statement).[3]

In addition, both Consumers Union and Consumers Federation of America have recognized SOUP, Inc. as a responsible consumer representative. See, *Campbell Soup, supra*, Brief submitted by Consumers Union on December 5, 1969; Consumer Federation of America's letter to former Chairman Dixon on December 4, 1969.

Respondent, in its answer to our original motion to intervene at page 5, stated:

"SOUP's purported representation of consumers is unnecessary unless it is established that Complaint Counsel and the Commission are unable or unwilling to discharge their acknowledged responsibility to consumers."

Complaint counsel seems to be suggesting a similar point when he states in his answer at page 3:

"Good cause is not established by suggestions that . . . complaint counsel may not . . . adequately discharge his duty to protect the public interest."[4]

First of all, we have not said, and do not believe, that complaint counsel has failed to discharge his duty. The order which is proposed is similar to many orders used recently by the Commission in deceptive practices cases. However,

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[3] Commissioner Jones has also stated that the right of citizens to directly intervene in Commission proceedings "is essential in order to ensure the responsiveness of the Commission to the problems of consumers as consumers see them and to make available to the Commission the viewpoints and ideas of consumers as to the types of remedies which should be directed and other like matters. Moreover, I am also convinced that consumers have a legal right to intervene in Commission proceedings and that in time, if the Commission does not act voluntarily, it will be directed by the Court to grant intervention to consumers in proper cases." Paper delivered by Commissioner Jones before the Biennial World Conference of the International Organization of Consumer Affairs in Baden/Vienna, Austria, released by the Commission on June 29, 1970, at pages 19–20.

[4] Complaint counsel also suggests that SOUP, Inc. should funnel any ideas we may have through complaint counsel's office. This is a reasonable alternative, but it is not the system created by Congress for citizen participation in adjudications. Congress provided that the proper procedure was for the person to himself intervene. FTC Act § 5(b), 15 U.S.C. § 45(b). This does not mean that complaint counsel and SOUP, Inc. must conflict with each other. SOUP, Inc. earnestly desires to work with and assist in any way possible complaint counsel in this proceeding. Both complaint counsel and SOUP, Inc. are endeavoring to advance the public interest, and should work together, not at cross-purposes.

as Chairman Weinberger recently stated, this is a period of radical reappraisal of Commission oders and the scope of Commission statutory authority.[5] An order which was considered adequate to protect the public interest yesterday will not necessarily be considered adequate tomorrow. SOUP, Inc. carefully distinguishes between the proposed order, which *is* inadequate to protect the public interest, and complaint counsel, who we do not dispute is sincerely and conscientiously endeavoring to adequately protect the public interest.

Moreover, judicial decisions clearly do not stand for the principle stated by Respondent at page 5 that "SOUP's purported representation of consumers is unnecessary unless it is established that complaint counsel and the Commission are unable or unwilling to discharge their acknowledged responsibility to consumers." The proper test is whether consumers are within the zone of interests sought to be protected by the statute in question (the FTC Act); if we are we have a right to participate in decisions concerning our interests. *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (U.S.App.D.C. 1966); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965).[6]

It must be remembered that all members of SOUP, Inc. are consumers, and therefore, affected by deceptive advertising. In addition, each member of SOUP, Inc. risks personal and property damage due to drivers who believe the tires on their cars (made by Respondent) are safer than they in fact are. Finally, one member of SOUP, Inc., Ivan Vance White, had seen the deceptive advertisements by Firestone and was motivated into purchasing Firestone tires (which are presently on his car) because of the safety features advertised.[7]

C. SOUP, Inc. will introduce evidence on the following points, which evidence will not be introduced by complaint counsel,[8] and the Hearing Examiner would therefore not otherwise receive it:

(1) A significant number of deceived purchasers of Firestone tires who are still using these tires on their motor vehicles, are still erroneously informed as to the safety of their tires.

(2) This erroneous belief enhances the possibility of collisions and other accidents, resulting in property damage, personal injury, and loss of life.

(3) This residual effect of Respondent's deceptions will remain until the purchasers of Firestone tires are informed that the tires are not as safe as they suppose.

(4) Many purchasers of Firestone tires would not have purchased those tires if they were honestly informed as to their safety.

(5) Tests by government agencies, including the National Highway Safety Bureau, and tests by other reputable organizations have shown that Firestone tires have failed minimum safety requirements.

D. The final cease-and-desist order in this proceeding will not adequately protect the public interest unless it requires Respondent to:

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[5] Chairman Weinberger, in a letter to Senator Edward Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure, dated July 22, 1970, and released by the Commission on August 13, 1970, made the following comments on this recent radical reappraisal of Commission orders and the scope of the Commission's statutory authority:

"We have been examining closely the contours of our laws to see how they should be interpreted in ways most applicable to modern market practices." Letter, at 7.

"We have encouraged the staff to make recommendations to us which will probe the frontiers of our statutes, so that in today's market of ever more complicated products and ever more complicated ways of promoting and distributing these products the Commission may continue to fulfill what Learned Hand called its duty 'to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.'" Letter, at 1–2.

"Among the most important of the resources, given to us by the Congress, which must be efficiently employed, are our statutes.

"In the past six months while I have been at the Commission, we have encouraged the staff, and we have tried ourselves at the Commission level, to make the most use of the statutes which describe our powers. Typical of this attitude is a Commission directive to the staff stating that 'the Commission is receptive to novel and imaginative provisions in orders seeking to remedy alleged unlawful practices' and urging the staff 'to include such provisions in orders for future submissions to the Commission recommending issuance of complaints.'" Letter, at 5–6.

[6] See, also, *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir. 1970); *Crowther* v. *Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970) and cases cited therein.

[7] See attached affidavit by Mr. White, marked Exhibit "A", which is incorporated by reference and made a part hereof.

[8] If SOUP, Inc. has wrongly assumed that complaint counsel will not introduce evidence on these points, complaint counsel may so indicate at the pre-hearing conference, and the Hearing Examiner can rule out SOUP, Inc.'s identical evidence.

(1) Inform, in its current advertisements, those consumers who were deceived by past advertisements, that Firestone has been found guilty of violating the FTC Act by deceptively advertising the safety of Respondent's tires.

(2) Inform personally, by certified mail or otherwise, all purchasers of Firestone tires during the time period such deceptive advertisements were run and for an equal time period thereafter, that Firestone has been found guilty of violating the FTC Act by deceptively advertising the safety of Respondent's tires. (See brief for SOUP, Inc. requesting the Commission to withdraw its proposed consent order dated March 20, 1970, in the matter of *Campbell Soup Co.*, Docket No. C-1741 at 19, for an example of possible phrasing.

(3) Make immediate restitution to those purchasers so notified who will sign an affidavit stating that they would not have purchased Respondent's tires if they had not been deceived concerning the safety of such tires, by returning such tires to the original selling dealer, when convenient, or to any authorized Firestone dealer when inconvenient. (See *McDonald's Corp.*, File No. 692 3074, and *The Coca-Cola Co.*, File No. 702 3014, where the proposed orders contain similar requirements.)

(4) Require numbers (1), (2), and (3), *supra*, for any future deceptive advertisements.

E. We emphatically are not going outside the allegations of the complaint. The substantial and material questions of fact, law, policy, and discretion we raise are based upon, and only upon, the allegations of deception contained in the complaint. Given those allegations, and the residual effects of Respondent's deception, additional facts are necessary in order to see whether additional corrective clauses are necessary in the cease-and-desist order.

F. SOUP, Inc. has set out above the precise reasons why this proposed order is inadequate to protect the public interest, the precise clauses which must be added to adequately protect the public interest, and the precise nature of the evidence we desire to introduce (the pre-hearing conference will specify this in greater detail). Considering the aggravated nature of this case, involving the health and safety of the public, this is sufficient to establish good cause.[9]

III. SOUP, INC. SHOULD BE GRANTED LEAVE TO PROCEED IN FORMA PAUPERIS

SOUP, Inc. respectfully requests that it be allowed to proceed in *forma pauperis* in this proceeding, since SOUP, Inc. has no funds at present. The important immediate effect this would have would be to allow us to file only one copy of future papers, the Commission itself making the additional copies. SOUP, Inc. was allowed to proceed in *forma pauperis* by the Commissioners in *Campbell Soup, supra.*

IV. SOUP, INC. HAS A RIGHT TO DISCLOSURE AND REPRODUCTION OF CERTAIN DOCUMENTS AND MATERIALS IN THE COMMISSION'S FILES

SOUP, Inc. respectfully requests to examine the following documents in the Commission's files, pursuant to §§ 4.8–4.11 of the Commission's Rules, and § 3 of the APA, 5 U.S.C. § 552:

A. All Firestone ads (television, radio, newspaper, magazine, etc.) which represent, directly or by implication, that the tires are safe or free from defects.

B. All tests, findings, or other similar factual data or material relevant to the safety of Firestone tires by the National Highway Safety Bureau and any other public or private testing organization.

C. All other material compiled in the preliminary stages of this proceeding relevant to the safety of Firestone tires.

See, *Campbell Soup Co., supra*, letter to Mr. Aaron Handleman of February 24, 1970, granting partial disclosure. See, also, *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (U.S. App. D.C. 1970); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F.2d 578 (U.S. App. D.C. 1970).

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[9] See Campbell Soup Co., *supra*, Brief for SOUP, Inc. in Support of Intervention and Hearing at 1–20. That brief and all other papers in the Campbell Soup Co. file are incorporated by reference and made a part hereof.

V. SOUP, INC. SHOULD BE GRANTED A REASONABLE OPPORTUNITY TO REPLY TO THE POINTS RAISED IN ANY ANSWER OPPOSING THIS MOTION

Because of the substantial danger to public health and safety involved in this proceeding, it is submitted that SOUP, Inc. should be given a reasonable opportunity to reply to any answer opposing this motion. Such a reply is within the discretion of the Hearing Examiner as provided in § 3.22(c) of the Commission's Rules of Practice for Adjudicative Proceedings. Permitting such a reply here will better enable the Hearing Examiner to determine whether SOUP, Inc. should be permitted to intervene in this proceeding and will avoid any further delay.

Respectfully submitted,

PETER HARWOOD MEYERS,
Member-Representative for SOUP, Inc.
IVAN VANCE WHITE, JR.,
Member-Representative for SOUP, Inc.

Dated: September 1, 1970.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing amended motion of SOUP, Inc. to intervene, for leave to proceed in *forma pauperis* and for disclosure was sent by mail, first class, postage prepaid, to the Firestone Tire and Rubber Company, through its attorney, Thomas A. Gottschalk, 2900 Prudential Plaza, Chicago, Illinois 60601, this 1st day of September, 1970.

PETER HARWOOD MEYERS,
Member-Representative for SOUP, Inc.

United States of America Before the Federal Trade Commission

Docket No. 8818

In the matter of the Firestone Tire & Rubber Company, a corporation.

AFFIDAVIT IN SUPPORT OF MOTION OF S.O.U.P., INC. TO INTERVENE, FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND FOR DISCLOSURE

District of Columbia—SS:

I, Ivan Vance White, Jr., having been duly sworn on oath, depose and say:

"1. I am a member of S.O.U.P., Inc.

"2. On January 3, 1970 as shown by the attached agreement which is incorporated by reference and made a part hereof, I purchased four Firestone Wide-Oval, Super-Belted tires from the Firestone Dealer located in the Shirlington Business Center 4005 South 31st Street, Arlington, Virginia.

"3. Such purchase was in large part motivated by previous advertisements by the Firestone Tire & Rubber Company that such tires would stop my automobile twenty-five percent quicker than other comparable tires.

"4. After repeated brake applications with such tires on my automobile, I finally became aware that I was stopping slower than I had expected as a result of having purchased such tires."

IVAN VANCE WHITE, Jr.

Subscribed and sworn to me this 1st day of September, 1970.

ELAINE J. STEIN,
Notary Public.

My Commission expires June 14, 1974.

S-4333 Rev. 4-69

RETAIL INSTALLMENT CONTRACT SECURITY AGREEMENT

FIRESTONE STORES

CUSTOMER NO.

NAME [illegible] DATE [illegible]

NAME OF ACCOUNTHOLDER

ADDRESS [illegible] PHONE [illegible]

CREDIT APPROVAL SOLD BY [illegible]

MAKE VEHICLE	YEAR	LICENSE NO.	MILEAGE	TIME PROMISED
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

QUAN.	SIZE OR STOCK NO.	DESCRIPTION	OFFICE USE	UNIT EXC. TAX	PRICE	AMOUNT
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
1	[illegible]	"	[illegible]	TAX [illegible]		
4		VALVES			[illegible]	
		VA SALES TAX			5.46	
		WHEEL BALANCE				
		TIRE VALVES				
SERIAL NUMBERS					SALES TAX	
		DESCRIPTION OF TRADE-IN: @ $			CASH PRICE	[illegible]

A.	CASH PRICE	[illegible]
B.	TRADE-IN	( )
C.	CASH DOWN PAYMENT	( )
D.	TOTAL DOWN PAYMENT	( )
E.	UNPAID BALANCE OF CASH PRICE	[illegible]
F.	UNPAID PRIOR AGREEMENT	[illegible]
G.	SUB-TOTAL	[illegible]
H.	FINANCE CHARGE REFUND	( )
I.	SUB-TOTAL	[illegible]
J.	LIFE INSURANCE REFUND	( )
K.	AMOUNT FINANCED	[illegible]
L.	FINANCE CHARGE	[illegible]
M.	LIFE INSURANCE	[illegible]
N.	TOTAL OF PAYMENTS	[illegible]

Total of payments (N) to be paid in [illegible] monthly installments of $[illegible] starting [illegible] until paid in full.

ANNUAL PERCENTAGE RATE [illegible]%

ACCOUNTING USE

This Sale (A less B) $[illegible]

Finance Chg. (L less H) $[illegible]

Insurance Chg. (M less J) $[illegible]

POSTING TOTAL $[illegible]

DEFERRED PAYMENT PRICE $[illegible]

POSTING TOTAL PLUS "B" ABOVE

The undersigned Buyer agrees to pay to The Firestone Tire & Rubber Company or its order the amount shown in Item N in the table above, including any prior time payment agreements which may be incorporated herein by reference, payable as shown in said table.

Until payment in full has been made, Buyer agrees that: Seller shall retain title to the merchandise described herein; Buyer will not sell, remove or encumber and shall be responsible for all loss of and damage to said merchandise. In the event Buyer defaults in the payment of any instalment, Seller may elect to declare the entire balance due and payable. Seller at its option may take back the merchandise or affirm the sale and hold Buyer liable for the unpaid balance, including any attorney or collection charges permitted by law. Except for standard warranties, the foregoing constitutes the entire agreement between the parties.

INSURANCE AGREEMENT: The purchase of credit life insurance coverage on the life of the accountholder is voluntary and is not required for credit. This coverage is available at a cost of $[illegible] for the term of credit and a certificate will be immediately furnished.

I do [ ] do not [X] desire the above insurance coverage on the accountholder. Date [illegible] Signed X

NOTICE TO THE BUYER: 1. Do not sign this contract before you read it or if it contains any blank spaces. 2. You are entitled to a completely filled in (exact) copy of this contract when you sign it. 3. Under the law, you have the following rights, among others, (a) To pay off in advance the full amount due and to obtain a refund of the finance charge and a refund of the credit life insurance charge based on the "rule of 78's"; refund schedule is available; (b) under certain conditions, to redeem the property if repossessed for a default; to require a resale of the property repossessed.

BUYER HEREBY ACKNOWLEDGES RECEIPT OF THE MERCHANDISE AND SERVICES SET FORTH HEREIN TOGETHER WITH A COPY OF THIS RETAIL INSTALLMENT CONTRACT.

Buyer X

Seller: The FIRESTONE TIRE & RUBBER COMPANY

BY [illegible] Authorized Agent

35-64	ORIGINAL INVOICE	MDSE. CHECKED BY	CASH	DEFERRED TERMS	OPEN CHARGE	DEALER CHARGE

8. Request of S.O.U.P. for Leave to File an Interlocutory Appeal from the Denial of its Amended Motion to Intervene

United States of America Before the Federal Trade Commission

Docket No. 8818

In the matter of the Firestone Tire & Rubber Company, a corporation.

REQUEST OF SOUP, INC. FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL FROM THE DENIAL OF ITS AMENDED MOTION TO INTERVENE

Students Opposing Unfair Practices, Inc., a corporation, (hereinafter called "SOUP") respectfully move the Commission for leave to file an interlocutory appeal from the Hearing Examiner's order denying its amended motion to intervene in this proceeding.

The Hearing Examiner, by order issued September 18, 1970, denied SOUP's amended motion on the single ground that it had "failed to show good cause" in support thereof, "good cause" being the standard enunciated in Section 5(b) of the Federal Trade Commission Act for intervention.[1]

Accordingly, Commission review of this decision would be limited to the issue of whether the statements and allegations contained in SOUP's amended motion constituted "good cause" within the meaning of the FTC Act.

A decision on this issue at this time would be of great benefit to the public, because it would determine in large part the role of consumers in Commission adjudication, i.e., whether consumers must remain spectators or whether they can actively engage in and attempt to influence these proceedings according to *their* views of the public interest.

In addition, the Commission could appropriately use this opportunity to clarify its decision in the *Campbell Soup* case,[2] the doctrines enunciated in that proceeding having been clearly violated through the Hearing Examiner's order, as is shown below.

BACKGROUND OF THIS PROCEEDING

The complaint in this proceeding, issued June 29, 1970, alleges, in essence, that respondent has deceptively advertised the price and safety of its tires. The proposed cease-and-desist order contained in the complaint, is limited to prohibiting a recurrence of these practices.[3]

On July 29, 1970, SOUP submitted a motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure. Respondent requested and was granted an extension of time to answer. Respondent's answer opposed the motion to intervene, arguing that SOUP's showing of good cause was "imprecise and speculative." Similarly, complaint counsel argued that SOUP's showing of good cause was "generalized and unsupported." By order issued August 21, 1970, the Hearing Examiner denied SOUP's motion stating only that good cause had not been shown. SOUP did not seek an interlocutory appeal from that order.

SOUP filed on September 1, 1970 an amended motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure. It is from the denial of this motion that this request for an interlocutory appeal arises.[4]

To cure the deficit in SOUP's original motion, SOUP set out in its amended

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[1] Section 5(b), 15 U.S.C. § 45(b) provides in pertinent part: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." See also Section 3.14 of the Commission's Rules of Practice for Adjudicative Proceedings.

[2] In the Matter of Campbell Soup Company, Docket No. C-1714, presently on appeal *sub nom* S.O.U.P., Inc., v. FTC, No. 24476, U.S. Court of Appeals for the District of Columbia Circuit.

[3] Respondent's answer to the complaint, filed September 3, 1970, denied the major allegations contained therein. The prehearing conference has been rescheduled for October 20, 1970; no new date has as yet been set for the hearing.

[4] On September 2, 1970, Peter Harwood Meyers and Cynthia Edgar, both members of SOUP, filed an original motion to intervene as individually aggrieved consumers. This motion made the identical showing of good cause as SOUP's amended motion, and it requested *inter alia* that it be denied if the Hearing Examiner granted SOUP's amended motion. On the same day that SOUP's amended motion was denied, and in virtually identical language, the Hearing Examiner denied the motion to intervene of Peter Harwood Meyers and Cynthia Edgar. That decision is not being appealed.

motion the concrete and specific reasons establishing its good cause to intervene in this proceeding. Those reasons may be summarized as follows:

(1) Consumers are within the zone of interests sought to be protected by the FTC Act;

(2) The Commission and a number of consumer organizations have recognized SOUP as a responsible representative of the consumers' interests;

(3) The members of SOUP have a very real personal stake in the outcome of this proceeding;

(4) This is an aggravated case, directly involving the health and safety of the public;

(5) The proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's allegedly deceptive advertisements;

(6) SOUP set out the restitution and affirmative disclosure clauses which must be added to the proposed order to have that order adequately protect the public interest; and

(7) SOUP requested that it be permitted to introduce factual and expert evidence on the residual effects of respondent's advertisements in order that the Hearing Examiner and the Commission could determine whether affirmative disclosure was necessary to protect the public interest.[5]

The above seven (7) points are, of course, set out in detail in the amended motion. See especially pages 5–10. Respondent again requested and was again granted an extension of time to answer.

In their answers,[6] Complaint Counsel and respondent again opposed SOUP's intervention, arguing that our showing of good cause, in Complaint Counsel's words, "still must be regarded as speculative and unsupported." Complaint Counsel's answer to amended motion at p. 3.

By order of September 18, 1970, the Hearing Examiner denied SOUP's amended motion, stating only as the basis therefore:

"It appears that movant has again failed to show good cause to support the motion, and

"It is hereby ordered that the motion is in all respects denied."

SOUP is seeking an interlocutory appeal from this order denying SOUP's amended motion to intervene.

The Hearing Examiner's Order Clearly Misinterpreted the "Good Cause" Standard of Section 5(b)

Strictly considered, it is impossible to determine the reasons why the Hearing Examiner concluded that SOUP had not established good cause, because he did not set them out in his order, as required by Section 8(c)(A) of the Administrative Procedure Act, 5 U.S.C. § 557(c)(A). However, whatever private reasons the Hearing Examiner may have had, he has clearly misinterpreted the good cause standard of Section 5(b). As indicated above, SOUP set out in its amended motion the precise reasons why the proposed order was inadequate to protect the public interest, the precise clauses which must be added to adequately protect the public interest, and the scope of the evidence SOUP desires to introduce relevant to the proposed additional clauses. If this, together with the fact that SOUP is a responsible consumer representative and that this proceeding directly involves the public health and safety, does not constitute good cause, it is submitted that no intervenor will ever be able to meet this requirement. What additional information can a prospective intervenor supply to establish good cause?

By including in the Federal Trade Commission Act a provision for intervention, Congress must have intended that *someone* be allowed to intervene and participate in Commission adjudications. If SOUP does not meet the Congressional requirement in this case, could any "public interest" consumer or consumer representative ever meet it? If, as Complaint Counsel states, our showng "must still be regarded as speculative and unsupported," it would be desirable for the Commission to review the Hearing Examiner's order so as to set down concrete

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[5] Complaint Counsel, in his answer to SOUP's amended motion, characterized this evidence as having "dubious relevance." Answer at p. 3.

[6] Respondent's answer to SOUP's amended motion, filed September 14, 1970, was titled: Respondent's Memorandum in Opposition to Renewed Motion for Intervention by SOUP, Inc."

rules for the future guidance of prospective consumer intervenors and Hearing Examiners as to the minimum pleading requirements for intervention.

Section 3.23 of the Commission's Rules of Practice for Adjudicative Proceedings provides that leave to file an interlocutory appeal will only be granted in limited circumstances:

"Permission will not be granted except upon a showing that the ruling complained of [1] involves substantial rights and [2] will materially affect the final decision, and [3] that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."

The Hearing Examiner's order, which clearly misinterpreted the good cause standard of Section 5(b), is appropriate for Commission review because all three (3) elements set out in Rule 3.23 *supra* are satisfied. The order clearly involves substantial rights—what right is more basic and fundamental to a prospective intervenor than the right to intervene? Likewise, our intervention will materially affect the final decision. It is SOUP's opinion, and this point cannot be emphasized too strongly, that if SOUP is excluded and the Hearing Examiner refuses to consider evidence on the residual effects of respondent's advertisements, then the final cease-ond-desist order, if one is entered in this proceeding, will be invalid. The Supreme Court has consistently held that this Commission has an obligation to consider proposed alternative remedies. See, *e.g.*, the leading case of *Jacob Siegal Co.* v. *FTC*, 327 U.S. 608 (1946). If SOUP is excluded, and this proceeding continues as if SOUP's motion to intervene had never been made, any resulting cease-an-desist order will be vacated by the federal courts for abuse of discretion, and the proceeding remanded for the taking of additional evidence and rulings on the necessity of including affirmative disclosure and restitution clauses. This seems to be the clear teaching of *Jacob Siegal, supra.*

Finally, a determination of the correctness of the Hearing Examiner's order is essential to serve the interests of justice. This is true in at least two senses. First, SOUP has been denied its right to intervene, which right is the basis of every other right SOUP possesses. Furthermore, only SOUP's intervention can insure that the cease-and-desist order will adequately protect the public interest in this proceeding.

The Order Denying Intervention Clearly Violates the Principles Set Out by the Commission in the Campbell Soup Case

In *Campbell Soup, supra,* the Commission denied SOUP intervention in a consent order proceeding against the Campbell Coup Company and its advertising agency. Chairman Weinberger, speaking for three members of the Commission, set forth principles applicable to intervention by consumer groups in FTC proceedings. The test for good cause was set out as follows: Whether a consumer organization proposes an addition term to be added to an order in an aggravated proceeding directly involving the health and safety of the public, such term being relevant and material and involving substantial factual issues going to the adequacy of the order to protect the public interest. SOUP's amended motion satisfies this test in this proceeding.

CONCLUSION

For the reasons set out above, SOUP respectfully requests that the Commission review the Hearing Examiner's order denying SOUP's amended motion to intervene in order to determine whether that motion has satisfied the "good cause" requirement of Section 5(c) of the Federal Trade Commission Act.

Respectfully Submitted,

PETER HARWOOD MEYERS,
Member-Representative for SOUP, Inc.

Dated: September 25, 1970.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request of SOUP, Inc. for leave to File an Interlocutory Appeal from the Denial of its Amended Motion to Intervene was sent by first class mail, postage prepaid, to the Firestone Tire & Rubber Company, through its attorney, Hammond E. Chaffetz, 2900 Prudential Plaza, Chicago, Illinois 60601, this 25th day of September, 1970.

PETER HARWOOD MEYERS.

9. F.T.C. News Release: F.T.C. Grants Limited Intervention to Public Interest Group

[From Federal Trade Commission News, Washington, D.C. 20580]

For Release After 3 P.M., Monday, October 26, 1970

FTC GRANTS LIMITED INTERVENTION TO PUBLIC INTEREST GROUP

The Federal Trade Commission has allowed an organization representing consumer interests—Students Opposing Unfair Practices, Inc. (SOUP)—to intervene to a limited extent in its proceeding in which The Firestone Tire & Rubber Co., is charged with misrepresenting the price and safety of its tires.

Specifically, the Commission directed the hearing examiner to permit SOUP to intervene for the limited purposes of:

Presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest.

Presenting with respect to this issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable.

Exercising, with respect to this issue, such discovery rights as the examiner shall deem reasonable and necessary.

"In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation," the Commission said. "Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

"It now remains to explain why, in this particular case, the Commission has determined that SOUP has made a sufficient showing of 'good cause' to justify allowance of intervention, consistent with the views expressed in this opinion. SOUP has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public safety danger, a category of cases in which such relief may be especially appropriate. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. We do not believe that in this particular case the grant of intervention will unduly lengthen or complicate the case, or that it will prejudice the rights of the respondent."

Copies of the Commission's opinion and a separate statement by Commissioner MacIntyre are attached.

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10. F.T.C. Decision Granting Intervention to S.O.U.P.

United States of America Before the Federal Trade Commission

Docket No. 8818

Commissioners: Miles W. Kirkpatrick, Chairman, Paul Rand Dixon, Everette MacIntyre, Mary Gardiner Jones, David S. Dennison, Jr.

In the matter of the Firestone Tire & Rubber Company, a corporation.

OPINION AND ORDER GRANTING LIMITED INTERVENTION

This matter concerns a question of vital importance to the effective functioning of the Commission's adjudicatory process: the scope of the privilege of intervention and participation in Commission adjudications by responsible representatives of the consumer interest. In passing upon the motion now before us, the Commission is afforded an opportunity to clarify its previous position on this question in *In re Campbell Soup Co.*, Docket 1741, May 25, 1970.

The complaint in this proceeding, issued June 29, 1970, charges respondent with false and deceptive advertising with respect to the price and safety of its tires. On July 29, 1970, Students Opposing Unfair Practices, Inc. (hereinafter SOUP) filed a motion to intervene, for leave to proceed in forma pauperis, and for disclosure. The motion was opposed by both respondent and complaint counsel. By order issued August 21, 1970, the Hearing Examiner denied the motion

on the ground that no good cause for intervention had been established. Thereafter, on September 1, 1970, SOUP filed an amended motion to intervene, for leave to proceed in forma pauperis, and for disclosure, this time explaining in some detail the reasons for its belief that good cause exists for intervention in this case. The reasons were as follows: consumers are within the zone of interests sought to be protected by the FTC Act; SOUP is recognized as a responsible representative of the consumer's interests; members of SOUP have a personal stake in the outcome of the proceeding; this is an aggravated case, directly involving the health and safety of the public; the proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's deceptions; and SOUP desires to introduce factual and expert evidence on the residual effects of respondent's advertisements to prove the need for an affirmative disclosure provision in the final order. Respondent and complaint counsel again opposed the motion.

By order of September 18, 1970, the Hearing Examiner denied SOUP's amended motion on the ground that SOUP "has again failed to show good cause to support the motion." On September 25, 1970, SOUP filed with the Commission a request for leave to file an interlocutory appeal from the denial of its amended motion to intervene. The Commission has determined that SOUP's request should be granted, and that it should be allowed to intervene in this proceeding, with all of the rights of a party, for the limited purpose of presenting evidence and argument on the issue of the proper remedy and scope of the final order in this case.

Section 5(b) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by Counsel or in person." Section 3.14 of the Commission's Rules of Practice provides that "The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper." These provisions clearly reflect the fact that intervention in Commission adjudications is a matter of privilege, and that its grant or denial is a discretionary matter, to be decided on the basis of the particular facts and circumstances involved in each case in which intervention is sought.

In re Campbell Soup Co., Docket 1741, May 25, 1970, suggests the type of considerations that properly influence the grant or denial of a motion for intervention in a particular matter. Although that case concerned a motion for intervention in consent order proceedings, which are not proceedings governed by Section 5(b) of the Act or Section 3.14 of the Rules, the principles announced therein are generally applicable to the question of intervention in adjudication. The thrust of our opinion in *Campbell Soup* is that before the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case.

But we wish to emphasize that satisfaction of the above standard, or of any other test or formula, will not automatically result in a right of intervention. As stated previously, the exercise of discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not nonexistent, precedential value. But as further guidance for future applicants, we would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed.

The Commission applauds the efforts and enthusiasm of groups such as SOUP to fight for the public interest by means of participation in the work of

federal agencies serving the same public interest. We are also very cognizant of the potentially great contribution to the work of such agencies, including our own. Cf. *Office of Communications of the United Church of Christ v. FCC*, 359 F 2d 994 (D.C. Cir. 1966). But there are important countervailing considerations which must be weighed in the balance: the need to maintain an orderly and efficient adjudicative procedure and the need to control resource allocation on the basis of a system of established priorities. The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delays by means of the proliferation of parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case.

In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

It now remains to explain why, in this particular case, the Commission has determined that SOUP has made a sufficient showing of "good cause" to justify allowance of intervention, consistent with the views expressed in this opinion. SOUP has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public safety danger, a category of cases in which such relief may be especially appropriate. See *Campbell Soup*, supra, at 21,423. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. We do not believe that in this particular case the grant of intervention will unduly lengthen or complicate the case, or that it will prejudice the rights of the respondent.

Having considered all of the views and arguments contained in all of the briefs submitted by SOUP, by respondent, and by complaint counsel in connection with this matter,

It is ordered that SOUP's request for leave to file an interlocutory appeal from the hearing examiner's order denying its motion to participate as a party in these proceedings be, and it hereby is, granted.

It is further ordered that the examiner be, and hereby is, directed to permit SOUP to intervene for the limited purposes of:

(1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

(2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

(3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

By the Commission. Commissioner MacIntyre filed a separate statement.

JOSEPH W. SHEA, *Secretary*.

Issued:

Attached is Commissioner MacIntyre's separate statement.

United States of America Before the Federal Trade Commission

Docket No. 8818

In the matter of the Firestone Tire & Rubber Company, a corporation.

REGARDING REQUEST OF SOUP, INC. FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL FROM AN ORDER OF THE HEARING EXAMINER DENYING ITS AMENDED MOTION TO INTERVENE

Statement by Commissioner MacIntyre:

A few law students have formed a corporation styled Students Opposing Unfair Practices, Inc. (hereinafter referred to as "SOUP").

SOUP, on September 1, 1970, filed with the hearing examiner in this matter a motion to intervene in this proceeding. The hearing examiner by order dated September 18, 1970, denied SOUP's amended motion on the ground that it had "failed to show good cause" as required by Section 5(b) of the Federal Trade Commission Act. That provision of law provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene" in a proceeding by counsel or in person. Thereafter, on September 25, 1970, SOUP filed with the Commission its request for leave to file an interlocutory appeal from the hearing examiner's denial of its amended motion to intervene. Answers were filed by counsel for respondents and counsel in support of the complaint in opposition to that request. Thus was put in issue the validity of the hearing examiner's order denying the motion of SOUP to intervene as a full party with all the rights of parties in this proceeding.

I fully agree with the stated view of the majority that where substantial issues of law or fact appear to be involved in the request of persons wishing to present them to the Commission in a proceeding those persons should be heard and allowed to present the information they say they have about the issues. Likewise, I agree with the majority that in considering a request from persons to present information to the Commission we should weigh the additional factors involving the expenditure of the Commission's limited resources and the prospects for a longer and more complicated proceeding. With these problems in focus I have proposed to the Commission that it grant SOUP, Inc. the privilege of a hearing to the extent that the hearing examiner be instructed to permit SOUP to participate in this proceeding for the limited purpose of presenting the evidence specified in its amended motion to intervene, filed September 1, 1970, at the conclusion of the complaint counsel's case-in-chief and that he be further instructed to reconsider SOUP's requests for disclosure and for leave to file *in forma pauperis*. Moreover, it has been my position that the Commission should not only thus hear SOUP, Inc. but should provide an opportunity for SOUP, Inc. to present briefs and argument to both the hearing examiner and the Commission if necessary to fully inform the Commission regarding any information it has bearing on the issues here and its views about such information and the issues. The majority of the Commission has not seen fit to adopt the proposal I made. Instead, the Commission ordered and directed the hearing examiner "to permit SOUP to intervene for the limited purposes" of presenting certain evidence and in filing certain briefs and argument and in exercising certain discovery rights which would be available to a party litigating the issues in question. I did not concur in the decision of the Commission to issue that order because I am convinced that the Commission will not be able because of that action to adjudicate and conclude this matter within a reasonable period of time. It does not require imagination or speculation to determine why that is so, neither does it require imagination nor speculation for us to know that when justice is delayed it may by that fact be denied.

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11. Article on Impact of S.O.U.P.'s Intervention

[From Advertising Age, Dec. 14, 1970]

THE EDITORIAL VIEWPOINT—A VITAL MOVE ON THOSE "CORRECTIVE ADS"

It is indeed fortunate that the Assn. of National Advertisers has requested permission to participate in the current Federal Trade Commission hearing on advertising for Firestone tires. As a result of the efforts of SOUP, a group of George Washington University law students, there will be an effort to confront the commission with proposals for a cease and desist order requiring "corrective ads." While the commission has proposed this remedy in a number of recent cases, Firestone may be the first to reach a decision stage, and it is important that the commission understand all the considerations, many of them far reaching indeed, that are implied by a regulatory innovation of this magnitude.

There are a great many things to be said about this remedy. One is the unique history of the idea. For more than half a century, it was universally assumed that the penalty for false advertising is a cease and desist order to prohibit

future deceptions. When SOUP first raised this issue in the Campbell Soup case, it argued that the "go and sin no more" remedy represents no real deterrent against the careless or venal advertiser. While SOUP did not have its way in the Campbell Soup Case, FTC subsequently decided that, in fact, the law contains within itself far greater deterrent possibilities than have been generally recognized.

"Corrective ads" are supposed to dispel the false impression created by the ads which FTC found to be deceptive. It is not merely a matter of enlightening the consumer, for his own benefit. The deceptive advertiser presumably increased his market share to some extent through his use of deceptive materials. The corrective ad supposedly helps restore the competitive relationship to where it was before one of the competitors overstepped the bounds.

Whatever its appeal to those who believe advertising has not been adequately policed, the proposal for corrective ads is a matter of immense concern to the advertising business. Suddenly the advertiser faces a penalty which could represent, in effect, a death sentence, since many advertisers would be reluctant to spend money to publicize their own sins. Yet this penalty is being decreed under a law which has been interpreted differently for more than half a century, and it has been devised solely on recent reinterpretation of that law by a panel of administrative officials.

The commission, including its new chairman, Miles Kirkpatrick, is apparently committed to the use of this penalty "in appropriate circumstances," and the commission has proposed in some recent complaints that the advertiser devote at least 25% of his space and time for a 12-month period to notices confessing past deceptions. It is therefore important that qualified spokesmen for advertising, such as ANA, appear before the commission, so that the perils and pitfalls can be fully and properly explored.

ANA can contribute a great deal by pointing out the immense impact of such a penalty, and by insisting that the commission clarify both its authority and its intent. The use of such a remedy except in the most extreme circumstances would certainly represent unwarranted overkill. If there are to be corrective ads at all—and this appears to be an issue that ought to be considered by Congress—it should only be after there is a better understanding of the situations which warrant them.

There is one aspect of the ANA petition which must certainly startle the commission, and it certainly startles us. In an effort to minimize the case for "corrective ads" ANA promises to prove to the commission that "SOUP's essential premise, that there is a substantially persisting, residual communication of respondent's challenged advertising claims, is a false one."

We hope that ANA fails to prove this. One of the important rationales for the use of advertising has always been that it does have a residual effect, and that this effect is indeed substantial. A considerable amount of accumulated research has confirmed that this is in fact the case.

If the ANA succeeds in proving that advertising does not provide a "substantially persisting" communication of the advertiser's claims, the disenchantment of advertisers will undoubtedly inflict more pain on the advertising business than might be inflicted by the "corrective orders" proposed by the FTC.

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12. Letter from F.T.C. Office of General Counsel to Senator Edward M. Kennedy

FEDERAL TRADE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., April 19, 1971.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Chairman Kirkpatrick has asked me to respond to your kind letter of March 30, 1971, regarding the participation in Federal Trade Commission hearings by concerned citizen groups.

As you noted, Students Opposing Unfair Practices (S.O.U.P.) has been granted participation in proceedings before the Commission. In allowing inter-

vention for a limited purpose in the complaint now being litigated against The Firestone Tire & Rubber Company, the Commission noted:

"In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation."

The Commission is now in that period of probation, and no conclusions can yet be reached on its success. I am enclosing, however, for your information, copies of the opinions by the Commission both in the matter of *Campbell Soup* and the request for intervention by S.O.U.P. in *The Firestone Tire & Rubber Co.* case. (Reprinted *supra.*)

I hope these materials will be helpful to you. Considering the litigative posture of these cases, any further comments, we believe, would inappropriate at this time.

With kind personal regards,

Sincerely,

ROBERT E. FREER, Jr.,
For JOSEPH MARTIN, Jr.,
General Counsel and Congressional Liaison Officer.

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13. Letter from F.T.C. Commissioner Jones to Senator Edward M. Kennedy

FEDERAL TRADE COMMISSION,
Washington, D.C., April 27, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR KENNEDY: I am in receipt of a copy of your letter to Chairman Kirkpatrick of April 5, 1971, enclosing the testimony of the representatives of SOUP.

It was good of you to send the Commission copies of this testimony. I am strongly of the view that the more we can provide affirmative structures for communication between citizens and government agencies, the better protection we have against government agencies becoming so bureaucratic that they lose all touch with the public, in whose service they are attempting to act.

I do not know whether you have been brought up to date on the several actions which the Commission has taken in the past months to create such communications structures. You are probably familiar with the joint law enforcement task forces which have been set up, on the initiative of the Federal Trade Commission, between representatives of the Commission and Food and Drug, together with consumer protection officials on the state and local levels. Six such task force committees have been created. One of their major purposes is to pool the various citizens' complaints which each of us get, with a view to making sure that they are assigned to the proper agency which is capable of dealing with them. An important spillover from this exchange is the data bank which we are creating on the basis of these complaints. This data bank enables both the Commission and the local consumer protection agencies to get a more complete picture of the practices which are being complained about most by citizens in their territories, the companies' products or industries which are generating the complaints, and the parts of the community from which the complaints are emanating. Obviously, these printouts cannot tell us the entire story about the problems of greatest concern to citizens, since many citizens do not complain. Nevertheless, it is an important first step to more precise information about the areas in greatest need of government action.

In addition to these governmental enforcement agency committees, the Commission has also established citizens advisory boards associated with three of its field offices. These boards are composed entirely of representatives from the private sector who are concerned with consumer matters. The members of these boards include representatives of business, labor, religious organiza-

tions, minority organizations, consumer groups and indeed, seek to include as many community organizations as are relevant to the consumer protection jurisdiction of the Federal Trade Commission. The functions of these boards have been left rather open-ended. However, they provide an important channel for citizens to interact directly on consumer programs, to suggest areas for investigation, and indeed, to carry out projects of their own where appropriate.

You are, of course, aware of the other avenues for members of the public to communicate their views to the Commission. For example, the Commission makes every effort in its public hearings to insure that all segments of the private sector, both business and consumer, are aware of the hearings and of the particular subject matter giving rise to the hearings. Recently, the Commission has experimented with holding some of its trade regulation rule hearings regionally, to give members of the public who cannot come to Washington an opportunity to participate directly. These regional hearings have been exceedingly valuable both from the point of view of the public who appeared as witnesses and from the point of view of the Commission. Our Cleveland regional office has recently completed hearings which were initiated by the regional office and directed exclusively at the low-income segments of the population living in and around Cleveland. Our New York regional office is planning similar hearings to learn first-hand about some of the problems of particular concern to the Commission and to the public. I am enclosing a staff report describing the Cleveland hearings which may be of interest to you. (Omitted.)

If you have any further questions, I would be delighted to respond to them and to provide you with any other material in which you may have an interest.

With best wishes,

Very sincerely yours,

MARY GARDINER JONES,
Commissioner.

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14. Correspondence from F.T.C. to Comptroller General Relating to Agency Authority to Pay Expenses Incurred by Indigent Parties

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., March 17, 1971.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. STAATS: Pursuant to 31 U.S.C. § 74, the Commission hereby applies for a decision of the Comptroller General concerning the Commission's authority to pay expenses incurred by indigent parties to Commission adjudicative proceedings. The facts and circumstances giving rise to this inquiry are immediately hereinafter set forth.

In its Decision of December 23, 1969, in *American Chinchilla Corp.*, 1970 Trade Reg. Rep. par. 19059, the Commission ruled that when an adequate showing of financial inability is made, a respondent in a proceeding before it is entitled to have legal counsel furnished by the Government: "[E]lemental fairness and concern for the rights of litigants who appear before the Commission require that the Commission sees to it that any respondent who requests counsel on grounds of indigency be accommodated." In furtherance of the *American Chinchilla* ruling, the Commission on December 15, 1970, issued a policy statement on procedures for assessing the claims of respondents who assert that they cannot afford to retain counsel:

"If, at any time after a proposed complaint issues, a person or partnership requests counsel on the grounds of indigency, the Commission shall immediately assign a Hearing Examiner to make findings on the indigency claim. He shall furnish the claimant with a 'Statement of Financial Status' and require it to be filled out promptly. He may question the claimant or require the production of such documents as he deems necessary to make findings on the claim. The findings shall be promptly forwarded to the Commission, which shall then rule on the claim on the basis of the claimant's financial condition, including his

present and potential income and assets in relation to his existing obligations to provide himself and his dependents with the necessities of life.

"If the Commission concludes that the claimant is financially unable to retain counsel, the matter will then be referred to the Committee on the Federal Trade Commission of the American Bar Association's Antitrust Section for the designation of counsel from a panel of attorneys screened by such Committee as competent and able to represent respondents in FTC procedings. Claimant shall then have the option to accept the services of the designated counsel or to appear on his own behalf in any subsequent proceedings."

Pursuant to the above actions, the Antitrust Section of the American Bar Association has agreed to designate a list of attorneys who will be willing and able to represent indigent respondents on a no-fee basis. Accordingly, the Commission desires to be advised as to the extent of its authority to pay expenses incident to the defense of an indigent respondent in a Commission adjudicative proceeding. Specifically, the Commission would like to know whether or not it is authorized to pay any or all of the following:

1. Transcript costs;
2. Attendance fees, mileage and subsistence expenses of witnesses or deponents who appear at the instance of the indigent respondent;
3. Traveling and other out-of-pocket expenses in connection with the proceeding incurred by the attorney representing the indigent respondent;
4. Traveling and subsistence expenses incurred by the indigent respondent to attend the proceeding when his presence at the proceeding is deemed necessary by his counsel.

In addition, the Commission also desires to be advised as to whether or not it is authorized to pay expenses incurred by an indigent intervenor in the course of a Commission adjudicative proceeding. The facts giving rise to this inquiry are immediately hereinafter set forth.

On June 29, 1970, the Commission issued a complaint against The Firestone Tire & Rubber Company charging the respondent with false and deceptive advertising with respect to the price and safety of its tires. Thereafter on July 29, 1970, Students Opposing Unfair Practices, Inc. (hereinafter SOUP), a corporation formed by a group of George Washington University Law School students, filed a motion to intervene in the proceeding, for leave to proceed *in forma pauperis* and for disclosure. Upon denial of the motion and upon denial of an amended, but similar motion, SOUP filed a request for leave to file an interlocutory appeal. By order of October 23, 1970, the Commission directed the hearing examiner "to permit SOUP to intervene for the limited purposes of:

"(1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

"(2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

"(3) Exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary."

Thereafter, on November 17, 1970, SOUP filed a renewed motion to proceed *in forma pauperis* in the proceeding to the extent that the Commission had allowed SOUP to intervene. The hearing examiner has certified the motion to the Commission.

Accordingly, the Commission desires to be advised as to whether or not it is authorized to pay any or all of the below-listed expenses incurred by an indigent intervenor in the course of a Commission adjudicative proceeding:

1. Transcript costs;
2. Attendance fees, mileage and subsistence expenses of witnesses or dependents who appear at the instance of the indigent intervenor;
3. Traveling and other out-of-pocket expenses in connection with the proceeding incurred by the attorney representing the indigent intervenor;
4. Traveling and subsistence expenses incurred by the intervenor to attend the proceeding when his presence at the proceeding is deemed necessary by his counsel.

Disposition of SOUP's motion for leave to proceed *in forma pauperis* has been partially held in abeyance pending a determination of the extent to which the Commission is authorized to pay the expenses enumerated above; at the same time, the *Firestone* matter is currently pending before a hearing ex-

aminer. Therefore, the Commission requests that this application for decision be given expedited consideration.

This application is made by direction of the Commission. Accompanying this application are separate letters from Commissioners MacIntyre and Jones.

MYLES W. KIRKPATRICK, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. STAATS: I am writing this letter, supplementing the letter of Chairman Kirkpatrick, in order to underscore the public significance to the Commission's discharge of its statutory responsibilities of its request for authorization from you to pay the particular items of expense enumerated in the Chairman's letter to you in connection with indigent respondents and indigent intervenors. The considerations for both parties are similar but the facts respecting the two situations are somewhat different so I will deal with them separately.

1. COMPENSATION OF NECESSARY HEARING EXPENSES CONCERNING INDIGENT RESPONDENTS

The Commission, in a unanimous opinion, ruled that elemental fairness required it to make sure that any individual named as a respondent in a Commission proceeding have effective access to counsel.[1]

Even though the American Bar Association has offered to make counsel available without fee, there are still a variety of out of pocket expenses for a respondent incident to exercising his right to defend himself against allegations of law violation brought by the government.

It is axiomatic that granting a bare right to counsel is a futile gesture unless it results in fact in the fair hearing which the grant of counsel was designed to achieve as a matter of fundamental right for the indigent respondent. A hearing without the benefit of a transcript and without witnesses, cannot be a fair hearing.

Indeed the Congress of the United States has already recognized the need to provide compensation for these trial preparation expenses as a necessary adjunct to the right of criminal defendants to a fair trial.[2] The fact that we are concerned here with administrative hearings does not change this basic principle.[3]

The Supreme Court has recently ruled directly on this point and has held that due process requires that indigent plaintiffs cannot be required to pay

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[1] In its decision, the Commission pointed out that:

"We can think of nothing less conducive to fairness and due process in administrative procedures than to pit the power of the state, armed with all the panoply of the legal machinery (funds, investigatory resources, staff of skilled attorneys, etc.) against a single individual and then to deny that individual the right to counsel when he denies the allegations and specifically asserts that he cannot afford counsel.

* * * * * * *

"Elemental fairness and concern for the rights of litigants who appear before the Commission require that the Commission see to it that any respondent who requests counsel on grounds of indigency be accommodated." *American Chinchilla Corp., Trade Reg. Rep.* § 19,059 at 21, 323 (1970). (A copy of this Option is attached.)

[2] The Criminal Justice Act of 1964, 18 U.S.C. § 3000A (1964), *as amended,* 18 U.S.C. § 3006A (1965–1969), provides in subsection (e) that the court must authorize reasonable compensation for investigative, expert and other services necessary to an adequate defense if it finds in an ex parte proceeding that the services are necessary and that the defendant is financially unable to obtain them.

[3] In fact, the financial burdens associated with presenting an adequate defense to a Federal Trade Commission proceeding are, in certain respects, likely to be more onerous than the comparable burdens imposed on a criminal defendant. For example, the criminal defendant is constitutionally entitled to be tried in the area where the alleged crime was committed, whereas the Federal Trade Commission possesses nationwide jurisdiction and conducts most of its hearings and appellate arguments in Washington, D.C.; thus, the cost of assembling witnesses and attending proceedings is likely to be much higher for the respondent in a Commission adjudication than for a criminal defendant.

either court fees or costs for service of process.[4] The Supreme Court stated that:

"[D]ue process does prohibit the State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial disolution of their marriages." *Boddie, et al.* v. *State of Connecticut*, U.S. S. Ct. March 2, 1971 (39 LW 4294; Text of Opinion attached.)

In reaching this view, the Supreme Court noted that plaintiffs in this case could no more be regarded as voluntary litigants than a "defendant called upon to defend his interests in court."

Explaining the rationale for its decision, the Supreme Court stated:

"It is to courts, or other quasi-official judicial bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanisms must function strictly within these bounds can we hope to maintain an ordered society that is also just."

The Court also pointed out that according to minimal standards of due process, "absent a countervailing State interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard," and that "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."

Thus the Supreme Court has confirmed the essential need to reimburse these expenses to make meaningful an indigent respondent's right to a fair hearing.

The issue which we are presenting you here, therefore, concerns the extent to which the Federal Trade Commission can and must go towards making this bare right to counsel a reality. The Commission is authorized to expend funds for items normally incident to the conduct of adjudicatory proceedings since such items are "necessary expenses" under the appropriation acts, *see, e.g.*, Pub. L. No. 91–126 (November 26, 1969) and Federal Trade Commission Act, Section 2, 15 U.S.C. §§ 42, 49 (1964). Pursuant to this authorization, the Commission today pays the attendance fees, mileage and subsistence expenses of witnesses or deponents who appear at the instance of Commission Attorneys. Similarly, Commission funds are expended to pay for the cost of several copies of the transcript for the use of its attorneys in the course of their presentation of their case to the examiners and the Commission. Commission funds are used to reimburse all of the necessary travel expenses of its own attorneys which are incurred in the course of their interviewing witnesses and the like in preparing this case.

The Commission has ruled that a fair trial requires the respondent to have the same opportunity to defend his side of the case. In contrast to some agencies which are primarily engaged in licensing or ratemaking activities, the Federal Trade Commission conducts its adjudicative procedures as a purely adversary process with the Commission's case presently wholly by staff counsel acting in a prosecutorial capacity. Therefore, it is clear that elemental fairness requires that no lesser right be accorded to indigent respondents and to their counsel in the course of their preparation for the same hearing.

In essence, the Commission has determined here that to properly fulfill its adjudicative function, it is necessary to make provision for the representation of indigent respondents. Because the determination is not contrary to the statutes governing the Commission's activities and in view of the deference accorded agency interpretations of the statutes it administers, the expenses reasonably necessary to provide for adequate representation of indigent re-

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[4] In this case, appellants brought a class action challenging the constitutionality, as applied to them, of state statutes requiring payment of court fees and costs for service of process as a precondition for bringing an action of divorce. A six-man majority of the Supreme Court, with two Justices concurring, upheld the appellant's contention that it was a violation of due process for the State to bar access to its courts by means of fee requirements which prevented indigent persons from obtaining a hearing on the merits of their claims.

spondents by counsel are clearly "necessary expenses" as envisioned by the appropriation acts, *see, e.g.*, Pub. L. No. 91–126 (November 26, 1969) and the Federal Trade Commission Act, Section 2, 15 U.S.C. §§ 42, 49 (1964).

2. COMPENSATION FOR NECESSARY HEARING EXPENSES INCURRED BY INDIGENT INTERVENORS

The items of expense which we request authorization to pay for indigent intervenors to make their participation in Commission proceedings effective and realistic are just as "necessary" to the Commission's discharge of its adjudicatory responsibilities as those for indigent respondents.

Both respondents and intervenors are parties to Commission proceedings, both are indigent, and the presence of both is essential to the conduct of these proceedings. While this is more immediately evident in the case of indigent respondents, it is in fact equally true both legally and factually for indigent intervenors *once they have been accorded the right to intervene.*

Both the Federal Trade Commission Act itself and the Commission's Rules of Practice recognize the importance of intervention and specifically authorize the Commission to grant intervention in proper cases.[5]

The Commission has stated that it will allow intervention in its proceedings where the prospective intervenors demonstrate that they are seeking to raise "substantial issues of law or fact which would not otherwise be properly raised or argued," and that "the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's resources on a necessarily longer and more complicated proceeding. . . ."[6]

The Commission in granting intervention here ruled that the participation of these intervenors in this case is in effect supplementary to the Commission attorney's own presentation of the facts and arguments as to why the public interest requires a particular kind of order to be entered in this proceeding. Thus, since the intervenors in this case have been granted intervention for the exactly same purpose, they should not be treated any differently. Their witnesses and their participation are exactly comparable and serving identical objectives as the Commission's own witnesses and attorneys.

If the intervenors were not *adding* something to the Commission's case, they would not have been granted the right to intervene. The point here is, therefore, that since the Commission can make these out-of-pocket payments for the witnesses and expenses of its own attorneys as "necessary expenses," these same expenses for intervenors are equally "necessary." No special funds would be required to enable the Commission to make these payments. These payments would be made out of the same funds available to the Commission for the payment of the fees and other expenses of witnesses called by the Commission's own attorneys in this proceeding.

In view of the Commission's decision to grant intervention, it is clear that the intervenors in this case are in fact serving a public purpose by their intervention.

Unless the Commission can now make the payments here requested, its decision to grant this party the right to intervene will become a meaningless gesture unless they can get financing elsewhere and the public interest to be served by the intervention will be effectively defeated.

In a true sense, the expenses which the Commission seeks to pay in both these situations are "necessary expenses." They are necessary in the case of indigent respondents in order to make valid and effective their right to counsel which the Commission has ruled they have and which the Supreme Court has indicated may indeed be a matter of constitutional right. In the case of intervenors, they are necessary in order to make realistic the *public* purpose which gave rise to the Commission's decision that the requested intervention in this case would serve a public interest.

I sincerely join my voice to those of my fellow commissioners in urging you to rule on the Commission's request that its right to pay these limited

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[5] See Section 5(b) Federal Trade Commission Act, 15 U.S.C. § 45(b) (1964); Federal Trade Commission Rules of Practice § 3.14, 16 C.F.R. § 3.14 (1970).

[6] *In re The Firestone Tire & Rubber Co.*, Docket No. 8818 (Opinion and Order Granting Limited Intervention, Oct. 26, 1970).

items of expenses which are essential to enable the Commission to discharge its statutory obligations be confirmed by you.

Sincerely yours,

MARY GARDINER JONES,
Commissioner.

FEDERAL TRADE COMMISSION,
Washington, D.C., March 17, 1971.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. STAATS: Reference is made to the matter presented to you by the Chairman of the Federal Trade Commission on this date pursuant to 31 U.S.C. § 74 regarding an application for a decision of the Comptroller General.

First, I wish to advise you that I participated in and approved the action of the Commission in requesting the Comptroller General for an opinion on the question whether the Federal Trade Commission is authorized under the law to pay for certain expenses incurred or which may be incurred by persons who have or who may request the Federal Trade Commission to permit them to participate in adjudicative proceedings the Commission has directed against other persons. It should be kept in mind that the question thus posited involves a request by persons that the U.S. Government pay their expenses to participate in proceedings in which they are not required to participate. That is the situation regarding applicant SOUP, Inc., the facts concerning which are detailed on pages 3 and 4 of the letter to you from the Chairman of the Federal Trade Commission. That is the only question of this kind immediately before the Federal Trade Commission.

Of course, future and less acute questions will be faced by the Commission concerning expenses of indigent respondents to complaints issued by the Commission. This problem is discussed commencing on the first page of Chairman Kirkpatrick's letter to you and extends through the second page and the top of page 3.

As a member of the Federal Trade Commission I consider the second of the above questions quite different from the first. Therefore, it is my request that in your response to the application of Chairman Kirkpatrick's letter to you for a decision concerning the Commission's authority that you treat these two questions separately and provide in your decision the answers to each, whether or not the answers are the same or different.

Moreover, it is my view as a member of the Federal Trade Commission that your response to this request for your opinion should be controlled by the provisions of the law you administer and your duties thereunder. If views of any one of my fellow Commissioners are to be construed that your decision should be influenced by what the Federal Trade Commission or any one or more of its members hold about meaningful gestures and the public interest, I want you to know I do not share that thought.

Sincerely yours

EVERETTE MACINTYRE,
Commissioner.

Mr. BANZHAF. Senator, the next group it is my privilege and honor to introduce to you goes by the acronym of STATIC, student task force against telecommunication information concealment. I think they are a particularly apt group to be heard this morning before you. Unlike SOUP, which started its work a year ago, and thus has had a chance to compile a number of successes, they have just recently filed their petition, and yet, their petition has provoked an immediate response from the Federal Communications Commission. I think again they indicate the vast potential for citizen intervention and participation at the regulatory agency, and in this case, most of their successes, I think, I hope, lie ahead as the Commission will act.

On my right is the chairman of the group, Mr. Howard Sribnick.

Also with him are Mr. Robert Ross, Stephen Spivak, David Swersky, and Arthur Wineburg.

STATEMENT OF HOWARD SRIBNICK, CHAIRMAN, STUDENT TASK FORCE AGAINST TELECOMMUNICATION INFORMATION CONCEALMENT (STATIC); ACCOMPANIED BY ROBERT ROSS, STEPHEN SPIVAK, DAVID SWERSKY, AND ARTHUR WINEBURG

Mr. SRIBNICK. Senator, have you ever heard this announcement:

> . . . and now, ladies and gentlemen, stay tuned while we explain our obligations under the Fairness Doctrine to present both sides of any controversial issue of public importance. Next week at this same time we'll tell you how you can take away our broadcast license if we do not serve the public interest.

Senator KENNEDY. I have not heard that announcement.

Mr. SRIBNICK. You probably never have, since no broadcaster would run it unless he was required.

However, under a rule STATIC has proposed to the FCC, a station would have to do exactly that; and even under a rule the FCC proposed in response to our petition, a station would be required to indicate on a regular basis in prime time that its license was up for renewal and how citizens could complain to the FCC.

For many, many years the FCC has functioned as little more than a rubber stamp in its broadcast license renewal process, renewing licenses with little if any examination of the station's performance. Only over the past several years, and largely as a result of a court decision giving citizens and citizen groups standing to oppose license renewals, has the FCC even begun to exercise its statutory function of insuring that the public's airwaves are operated in the public interest. As a result of this decision, and as a result of the impact organized groups can have on the broadcast industry through the FCC, the Commission has seen an ever increasing input into its processes from organizations such as the United Church of Christ, Action on Smoking and Health (ASH), ad hoc citizen groups, and specialized public interest communications law firms such as "Citizens Communication Center." Although many broadcasters do not see it this way, the result has been beneficial to the public as the FCC has been forced to examine the performance of challenged stations to see if they have operated in the public interest. As a result, stations have presented more anti-smoking messages, given more attention to the needs of blacks, payed closer attention to their obligations under the fairness and personal attack doctrines, and otherwise begun to serve as the public trustees they are in law. if not in fact.

However, by any reasonable measure, the public input into this vital decision and policymaking process is still minimal. Many stations continue to flout even the clearest and most basic obligations. The major reason for this is the public's lack of knowledge of the broadcasters obligations and their rights to have those obligations enforced. Books such as Nick Johnsons "How To Talk Back To Your TV Set" have become very popular because of this need, but they cannot begin to do the job of educating the public so that its members can take an active and effective part in the responsible regulation of broadcasting.

STATIC feels that the most effective remedy would be to use the vast power of television itself to educate the viewers. It believes that in return for the grant of a valuable monopoly a broadcaster has an affirmative obligation to inform its audience of the public's ownership of the airwaves, of the obligations this ownership places on the broadcaster, and of the public's right to intervene in license renewal proceedings. The latter is particularly important because it is by and through the license renewal process that the citizen can have the greatest impact, and the FCC can have the most significant effect on the broadcasters.

Therefore STATIC filed on January 8, 1971, a petition for rulemaking with the FCC which, if successful, would require the broadcaster to inform the public on a regular basis of its obligations and the public's rights with respect to broadcasting and broadcast licenses. In February the Commission issued a notice of inquiry of proposed rulemaking which included some of what our proposed rule would have encompassed. The notice cites our petition, and notes that it will use our proposals as a comment on their proposed rule. The Commission's proposal, like our suggestion, requires the broadcaster to advise the public on a regular basis that its license is coming up for renewal and to indicate how viewers may register a protest. It fails to include, however, STATIC's proposal that broadcasters affirmatively inform the public of their obligations and of the public's corresponding rights. It seems to us that the Federal Communications Commission would never have proposed such a rule on their own initiative. Although the Commission was in the process of studying the broadcaster's responsibility for informing the public at the time our petition was filed, we believe that our work and our petition was a catalyst behind this proposed rule.

We would be remiss, however, if we did not indicate at least two reasons why the Commission's water-down version of our proposal would be but a first step towards remedying the present situation. In the first place, the public has been kept ignorant so long of the fact that broadcasters had any obligations whatsoever that they would not know enough to complain about even flagrant violations of many existing rules. For example, although many stations now present editorial opinions on controversial issues of public importance, most say nothing about their obligations, or at most say that they "welcome responsible opposing viewpoints." Few if any advise the viewer that the station has an affirmative obligation to seek out and to present—free of charge—such responsible opposing viewpoints. Without the educational portion of our proposal, therefore, many fairness doctrine violations, to take only this one example, would go unreported.

A more important problem is that the rights which are announced will be meaningless unless the FCC acts fairly and effectively when violations are brought to their attention. It is not enough to tell a ghetto resident that he has a right to live in a house free of housing violations unless there is a mechanism through which even one unskilled in legal matters can effectively enforce such a right. Likewise, unless the FCC begins to act as a guardian of the public airwaves, rather than an apologist for the broadcasters, even announcements

such as STATIC has proposed will do no more than raise additional false hopes among the consumer, and give them a dead end address to which they can mail their complaints. In short, although we view the FCC's proposal as a watered-down version of our proposed rule, it is still a significant example of the responsiveness of a regulatory agency to citizen intervention. However, it is still only one small step for the viewer who, despite rhetoric and changes in administration, still watches an ever increasing "vast wasteland."

Thank you.

Senator KENNEDY. Thank you very much. Let me ask, what was your reception down at the Commission? What kind of cooperation did you receive down there?

Mr. SRIBNICK. Mr. Spivack?

Mr. SPIVACK. Well, Senator, as far as cooperation is concerned, there was definitely something lacking. When we filed our petition for rulemaking we did receive a response from the Commission that the petition had been filed. However, we received no other information from them and, in fact, when they came out with their proposed rule, the way we found out about it was in the Wall Street Journal, we read it. And in investigating it further, we found that our proposed rule, that they were using our petition for rulemaking as a comment without informing us of such decision, and furthermore, they said that we could, of course, come in their actual proceedings, and file additional comments on their proposed rule. However, we were never informed that we were going to have this opportunity, and as I have said, the only way we found out about it was through an article in the Wall Street Journal.

Mr. BANZHAF. I might say, Senator, this is not at all unusual at the Federal Communications Commission. They seem to have a habit of not even bothering to inform consumer intervenors of what action, if any, is being taken on their petitions. I have had this happen to me a number of times with a number of groups that have worked with me, and for what it is worth, I have not been notified officially that the FCC has ordered antismoking messages on the air. I am still waiting.

Senator KENNEDY. There are other groups, are there not, who are pursuing the public interest independently before the Federal Communications Commission?

Mr. SRIBNICK. There are currently law firms, as mentioned, The Citizens Communications Center, and the United Church of Christ pursuing the public interest. Nicholas Johnson, in his book, mentioned about 10 such groups, and apparently there is something of a ground-swell of public interest in the broadcast area.

Senator KENNEDY. Do you think it is really realistic to expect that broadcasters could be required to announce the procedures by which they would actually lose their licenses?

Mr. SRIBNICK. Yes. Their licenses, and the airwaves are owned by the public. They have a responsibility which we feel they are negligent in carrying out, and the only way to make sure that they do carry it out responsibly is to hold up the truth to them that they would lose their license.

Senator KENNEDY. Do you see any conflict with any first amendment rights here?

Mr. SRIBNICK. Well, not as large as the conflict of having a certain group of people control the airwaves, meaning the broadcasters, at the expense of everyone else losing their first amendment right to use the airwaves.

Senator KENNEDY. Do you see a distinction between broadcasting and the written or the published press, where on the one hand the broadcasters, as you point out, are licensed to use the public airwaves, and the writing press obviously are not required to be licensed? Anybody in effect could set up a mimeograph machine in a cellar but you can't just start a radio station. Therefore, as I understand it, the whole development of the law is quite a bit different.

Mr. SRIBNICK. Mr. Wineburg?

Mr. WINEBURG. Yes. The licensing procedures in the broadcasting field were created in response to a scarce resource, a frequency spectrum. Everybody has the opportunity as well as the right to print a newspaper. One reason we felt that this rule was very important today is that the number of newspapers being published in the United States is falling, decreasing significantly, and that the access to news is being limited by the number of newspapers, number of magazines, and the number of radio and TV stations. We felt that that rule would open up avenues of access to current events and community interests, that if there was only one newspaper in a community and it was not serving the function that there was no other or alternative way but to have the radio and TV station serve that function.

Senator KENNEDY. What other kinds of recommendations did you have, perhaps maybe somewhat less dramatic, but in trying to reach your goal? Do you have some?

Mr. SRIBNICK. In our petition for rulemaking we wanted the broadcasters to inform the public as to what ownership of the airwaves entails. For example, the fairness doctrine, the right to respond to controversial issues.

Senator KENNEDY. Realistically, if you put dissertations on the fairness doctrine in prime time, how many people do you think are going to watch them?

Mr. SRIBNICK. I think the broadcasters have the expertise to make it attractive enough to make people watch it. They apparently can make people watch practically anything.

Senator KENNEDY. Well, the public turned off the President the other night.

Mr. SRIBNICK. I said "practically" anything.

Senator KENNEDY. But realistically, do you not think it is going to be extremely difficult to expect people to watch, no matter how it is packaged, these various announcements? Perhaps you do not need great numbers, perhaps if you just alert the more active or interested people in a community they will sort of carry the ball.

Mr. SRIBNICK. We would hope so, and we would hope this would be an educational process, that TV would be able to educate the public as to their responsibility and their rights, and it seems to be the only choice we have. Any other way of educating the public just does not seem to be as effective.

Senator KENNEDY. Have you reached any evaluation of the Vice President's attacks on the broadcasting industry?

Mr. SRIBNICK. I do not know if we are privileged to speak here about that.

Senator KENNEDY. Well, I suppose that the broadcasters would say they are getting it from both ways: they are getting it in terms of the administration's and the Vice President's attack on news management, and they are getting it from underneath as well in terms of the recommendations that you are making. And the Commission might say that if we are to follow these kinds of procedures we are going to have to double, triple, or quadruple our staff, because we are going to get bogged down with so many different kinds of applications, challenges, and procedures to be followed that it will frustrate the whole operation.

Mr. SRIBNICK. I do not think that the input from the political side and the public interest side is equal. I think the FCC listens a lot harder to what comes out of the Hill than what comes out of public interest groups. Also, if serving the public—if that is what they are going to do, which is what they are supposed to do—means a larger staff, then I think that perhaps they need a larger staff.

Senator KENNEDY. Do you see the advantage of continuing the oversight that your group has been involved in with the establishment of something like a "Public Counsel Corporation," which would provide a continuing vehicle for pursuing the kinds of recommendations that you have made and then reporting to the Congress periodically?

Mr. SRIBNICK. If there was a group that was on-going I think that in itself would be an advantage. One disadvantage that we have is that we are students here, we have other responsibilities, and our time here is usually for 3 years. So an on-going group with this responsibility I think would be an advantage to the public.

Senator KENNEDY. As I mentioned before, we would be interested in your recommendations for other rule changes and what you have done, because we like to follow these up with the various agencies themselves and get their reactions and responses over a period of time.

Thank you very much. We would like to try, toward the end of the morning, to get into some other more general discussions, and so perhaps you can remain with us through the course of the morning. I want to make sure we give everyone a chance to talk.

(Material relating to STATIC follows:)

B. EXHIBITS RELATING TO TESTIMONY OF STATIC (STUDENT TASKFORCE AGAINST TELECOMMUNICATIONS INFORMATION CONCEALMENT)

1. S.T.A.T.I.C. Petition for Rule Making Filed with F.C.C.
2. F.C.C. Notice of Inquiry and Notice of Proposed Rule Making: In the Matter of Formulation of Rules
3. Letter from Chairman, F.C.C., to Senator Edward M. Kennedy
4. Letter from Commissioner Johnson, F.C.C., to Senator Edward M. Kennedy

1. STATIC Petition for Rule Making Filed with FCC

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

IN RE PUBLIC RIGHTS IN THE BROADCASTING MEDIA

PETITION FOR RULEMAKING

JANUARY 8, 1971.

Pursuant to 5 USC Section 553, the statutory authority, and 47 CFR Section 1, 40(a), the Commission authority, STATIC, Student Taskforce Against Tele-

communication Information Concealment, a group of students from George Washington University Law School, as members of the general public, respectfully request that the Commission adopt as part of their Rules and Regulations requirements for licensees designed to give the public effective notice of their rights vis a vis the licensees as established by statute, administrative policies and decisions, and judiciary review decisions.

II. SUMMARY OF THE PROBLEM

The Federal Communications Act of 1934 was passed in part in recognition that the electronic mass media should serve the public. The Act empowered the Federal Communications Commission to regulate the use of the frequency spectrum. The rights of the public to complete coverage of controversial subjects and to inoffensive and factual transmission of news were included in the statutory language.[1] Correlatively, the licensee, as a condition of being granted the license to broadcast, has the duty to serve the public interest by respecting these rights.

These duties the licensee owes the public have been further delineated since 1934 through administrative policy statements and judicial review. The licensee's programming, it is now recogized, must be balanced and fair, and "That the license responsibility is to be exercised in the interest of, and as a trustee for the public at large."[2] Furthermore, the public has standing at Commission hearings. Nonetheless, the public is not made aware of their rights, and they are unable to fully, protect their interests. The duties of the licensee must include informing the public of its rights through the media. Otherwise, the statutory rights of the public serve merely to protect the licensees from competition. They will not insure that the interests of the public be served.

The Commission does not have the resources to effectively monitor and identify the licensees who violate the public trust. In the thirty-six years of existence, the Commission has expanded the personnel in its broadcast bureau three-fold, while the number of licensed stations has increased ten-fold. The Commission requires the licensee to ascertain the community needs and program acordingly. In this way the licensees satisfy their statutory requirement of public service. The Commission cannot independently evaluate each community's needs, and should not depend solely on the licensees evaluation of its own performance.

Therefore, as a mode of illucidating the public interest the Commission should invite the licensee to open direct avenues of communication with the public.

III. PROPOSED SOLUTION

In order to actualize the statutory intent and purpose it is necessary that the licensees be required to inform the public of its rights and of the duties owed by the licensees. In order to effectively administer the Act, and present Commission policy, the Commission should adopt our petition for rulemaking which would require the licensees to give effective notice to the public of its rights.

IV. THE RATIONALE OF THE PRESENT SYSTEM

The original Federal Radion Commission (1927) and the succeeding Federal Communications Commission (1934) were created in response to two problems involving the allocation of the frequency spectrum: the prevention of technical interference and the choice of who is to operate upon the limited number of frequencies.[3] The allocating mechanism adopted by Congress was licensing.

The problem of preventing technical interference was easily solved. The FCC limited the number of licenses to transmit and regulated their power and frequency transmission.

The second problem was more intractable. The Commission is instructed to grant or renew a license "if in public interest, convenience, or necessity."[4]

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[1] 47 U.S.C. 315a 303 m/1/d.
[2] Office of Communication of the United Church of Christ v. FCC 359 F. 2d 994 (1966).
[3] Coase, Federal Communications Commission, 2 J. Law & Econ. 8 Oct. '58.
[4] 47 U.S.C. 309a.

This language was taken from public utility legislation and lacked any definite criteria for the Commission.

The relationship between the broadcast industry and the public is special and unique. The FCC could not issue licenses on a first come basis and depend upon competition to protect the public interest. The major theorem of the competitive model is that the interaction of buyers and sellers insures the interest of each one is maximized. However, in commercial broadcasting, the licensees are the sellers and the advertisers are the buyers. Therefore, the public interest is not directly considered if the broadcasting industry is unregulated.

Moreover, the technically limited frequency spectrum created an oligopolistic industry structure which necessitates regulation. However, regulating the profits of the licensee as if he were a common carrier of public utility was quickly rejected. It was felt that this type of regulation would in no way protect the public interest.

On the other hand if the public was merely a third party beneficiary of a contract between the owner of the broadcast station and its advertisers who pay to broadcast, the public would not have any rights cognizable in a judiciary forum. This is not the case.

Thus, the vague language of the statute considering the "public interest" must involve a special kind of regulation. One side argued for precise legislative standards for licenses while the other side advocated permitting administrative discretion.[5] The statutory language permits administrative discretion.

The FCC enabling legislation, subsequent FCC policy statements and decisions, and judicial review decisions have better defined the role of the public and formalized the relation among the parties of interest.

V. THE RIGHTS OF THE PUBLIC

Numerous conflicting policies and actions can be rationalized under the rubric of public interest. Nonetheless, some definite meaning to "serving the public interest" has been acquired, since the Federal Communications Act of 1934, through administrative policy decisions and judicial review.

The statutory language explicitly defined three aspects of what would serve or insure the public interest: the airways were to be fully utilized;[6] controversial subjects were to be covered completely;[7] offensive and unfactual transmission of news was prohibited.[8]

The function of the FCC is not only to issue and renew licenses, but as importantly to insure that the public interest is considered by the licensee. To those who argued that we should "regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other, Mr. Justice Frankfurter answered:

"But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience or necessity.'

". . . The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. . . . The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of who is financially and technically qualified to operate a station? Since the very inception of federal regulation of radio, comparative consideration as to the

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[5] McDonald, Need for Standards in Selection of Licensees, 17 L.R. 61 Fall '64.
[6] 47 U.S.C. 303.
[7] 47 U.S.C. 315a.
[8] 47 U.S.C. 303/m/1/d.

services to be rendered have governed the application of the standard of "public interest, convenience or necessity'." [9]

In subsequent proceedings the Commission further defined the statutory language. Full utilization of the airways means in part that the public is to be protected from overcommercialization.[10] The licensee's programming must be balanced; thus, the Commission identified fourteen areas in which the licensee must provide programming. These areas include programming of religion, education, politics, sports, entertainment, news, agriculture, weather and public affairs, editorializing, service to children and minority groups, opportunities for local expressions, and development and use of local talents.[11] Recognizing the importance in a democracy of public response to controversial issues, the Commission formulated the Fairness Doctrine.[12]

The licensee's programming must be relevant to the community. In Simmons v. F.C.C. 1969F2d 670/1948/, the D.C. Court of Appeals upheld an F.C.C. ruling that a licensee who makes no effort to structure its programs to the particular needs of the community does not satisfy the public service responsibility of a broadcast licensee. A licensee must not only be cognizant of the community needs, but his programming must reflect the various interests of the community.[13]

In the Office of Communication of United Church of Christ v. FCC, 359 F2d 994, it was recognized that the public does have standing before the FCC to enforce its rights. Thus the court recognized the public as an active participant in broadcasting. In order to make this participation more effective the public must be informed of its rights.

Considering that the airways are public property which the licensee is merely given permission to use at nominal cost, the duties the licensee owes the public are not oppressive. They do not even endanger the licensee's monoply profits.

VI. IN RESPECT OF THE RIGHTS OF THE PUBLIC

The rights of the public are essential in the mass communication media industrial structure, and yet the licensees appear to pay more lip service to the public's needs and interest. To realize how true this statement is, students of the mass communication media consider it axiomatic that the present performance of licensees with respect to public service can be improved.[14]

Thus, under the present system, the rights of the public are well documented and recognized, and yet there is no effective mechanism to insure that these rights are honored.

Unsurprisingly, the public has not acted vigorously to protect its own rights. In fact, most of the public is unaware of its rights.

"Most people believe that radio and television are like the weather. Bad weather exists. But it is no one's fault. Accordingly, nothing can be done about it. The same is widely believed to be true of radio and television." [15]

The public may also be apathetic to the duties the licensee owes them. Even if the people are apathetic, an opinion that no one has taken the trouble to verify, their apathy is no excuse for not informing them of their rights. Democracy is principled upon the proposition that the public has rights and has the freedom and information to exercise those rights. Rights of which the public has no knowledge are not rights at all.

VII. THE TREND TOWARD ACTIVE PUBLIC PARTICIPATION

The broadcast license is issued by the FCC for a three year term. Upon expiration, the licensee is eligible to renew.[16] The statutory criterion for licens-

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[9] National Broadcasting Co. v. United States, 319 U.S. 190, 213, 215–17 (1943).

[10] 317 FCC Annual Report 92 (1963).

[11] 25 Federal Regulation 7291, 7295 (1960).

[12] In the Matter of Editorializing by Broadcast Licensees, Docket #8516 13 FCC 1246 (1949) Sec. 3.

[13] Capital Broadcasting Co.

[14] Barrow, The Attainment of Balanced Program Service in Television, 52 Va. L. Rev. 633 (1966).

[15] Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study. A Statement by Commissioners Kenneth A. Cox and Nicholas Johnson, 14 FCC "2d 1 (1968)."

[16] 47 U.S.C. 307.

ing is: "whether the public interest, convenience and necessity will be served by the granting of such application."[17] Since the statutory language of licensing criterion is vague, the Commission has had to develop its own operational criteria consonant with the statute.

As recently as ten years ago, the Commission's criteria was criticized as confusing. The reason, Judge Friendly argued, was that the Commission mistook evidentiary items for elements of policy. He sought to isolate two main elements of policy: the community should have the programming best adapted to its needs, and ownership of the mass communications media should be diversified.[18] The FCC officially adopted similar guidelines.[19] The evidentiary items such as local ownership, integrated ownership management, and management participation in civic affairs are supposed to relate to an applicant's ability to achieve the policy goals.[20] For example. the local applicant was considered better aware of the community needs, and therefore more likely to be able to program in accordance with those needs. It was even better if the local applicant participated in civic affairs, because that indicated an awareness and interest in the welfare of the community. Furthermore, the fulltime participation by the applicant in the station's operation was of substantial importance because that enhanced the probability the station would be responsive to public needs and demands.

The use of such propositions to develop evidentiary items is understandable in hearings for new licenses. In an application for a license, empirical evidence concerning the relevance of the proposed programming to the community's needs is not available. However, in a license renewal hearing, the public's evaluation of the licensee's programming is readily available, is pertinent, and should be ascertained.[21]

The 1970 Policy Statement directly addresses this issue in the first step. In addressing this issue, the Commission has neglected to create a mechanism by which it can obtain an objective evaluation of the public's needs. It must be remembered that the adversarial function within the administrative system is different from that within the courts. The Commission has two roles—advocate for the public—and judge. The Commission cannot independently access the public's interest and needs, so it gives that duty to the licensee. The licensee is required to complete FCC Form 303 Sec IV–B Part I which asks: "to state the methods used . . . to ascertain the needs and interests of the public served by the station (and to identify) representative groups, interests, and organizations which were consulted." To satisfy this requirement, a licensee need simply talk to many important ("representative") people and organizations in the community.[22] The applicant is also asked to list typical programs which "have served public needs and interest." Still missing is any well defined idea of what are the public needs and interests to be served. More blatantly missing is the use of any general public response in order to ascertain the needs and interests of that public. Unsurprisingly, two commissioners concluded in 1968 that the licensee's local surveys were useless.[23] Nonetheless, in determining whether the licensee's programming has been "substantially attuned," the Commission relies upon the licensee's own local surveys.

It is unquestioned that the FCC lacks the resources to properly police the Commission's broadcast bureau staff was only three times larger than when it began operations. That staff was responsible for more than 7500 operating broadcasting stations, an amount ten times greater than the number of operating stations when the Commission began operation. Although the Act of 1934 provided for "any party in interest (to) file with the Commission a petition to deny any application," the public was not considered a party in interest

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[17] 47 U.S.C. 309a.

[18] The Fed. Admin. Agencies, 1962, 57–9.

[19] 1 FCC 2d 393, 1965.

[20] Ibid. p. 58.

[21] One reason the 1970 Policy Statement omits diversification of ownership as an item of policy is because diversification is a surrogate measure of the likelihood of diverse programming designed to meet the community needs. In license renewal proceedings, direct evidence of licensee's past record is available to evaluate whether his programming was substantially attuned to the community needs, and surrogate measures are not needed.

[22] WHDH: The FCC and Renewal Proceedings, 82 Harv. L. Rev. 1693 (1963).

[23] 14 FCC 2d 9.

until 1966. Chief Justice (then Judge) Warren Burger recognized that the Commission lacked resources and that: "The theory that the Commission can effectively represent the listener interest in a renewel proceeding . . . is no longer valid assumption."[24] The remedy was to extend standing to intervene in license proceedings to "responsible spokesmen for representative groups in the listening community." It remains for the public to protect its own interests in light of Chief Justice Burger giving judicial recognition to the right of the public to protect its rights.

The trend toward public participation in the mass electronic media is not complete. The FCC requires the licensees to consider the public interest in forming its programming by consulting representative public groups. It is our contention that the community's needs cannot be ascertained adequately by delegating the duty to the licensee. A more efficient means would be to give the public the duty to protect its rights.

Therefore, we propose that the FCC adopt the following rule:

I. The licensee shall be required to provide a specified period of time, to be determined by the FCC, to broadcast informative, impartial and effective statutes and administrative policy decisions. Such broadcasts shall be aired notice to the public at large of its rights and the licensee's duties under existing at intervals specified by the FCC, but in no event less than once every six months, and shall be made during the prime hours of 7:00 to 10:00 P.M.

II. Such broadcasts should be designed to impartially and effectively inform the public at large of its rights and licensee's duties including the following topics which are meant to be exhaustive.

(a) The Fairness Doctrine including:

(1) right to reply to controversial programs, editorials, or opinions aired or expressed by licensee.

(b) right to reply to personal attacks made by persons whose views have been broadcast by the individual licensee. Such time being provided by such licensee.

(c) complete coverage of controversial subjects or programs.

(d) right to unoffensive and factual transmission of news.

(e) right to complaint either to station itself or to the FCC concerning any and all grievances felt by individual members of the community by licensee.

(f) right to intervene in licensee renewal proceeding including:

(1) right to petition against granting of said license

(2) right of complaint to licensee or FCC

(3) explanation of the requirements under Rule 1.580 concerning license renewal.

(g) the licensee's duty to provide balanced programming in the interest of public spirit and taste without overcommercialization by such licensee's sponsors

(h) the licensee's duty to actively ellicit public opinion concerning its overall operation

(i) activities of other groups contesting renewals

In order to insure the public's right under the proposed rule we recommend that each individual licensee be required to maintain a log of all responses made by the public to said licensee concerning all aspects of the licensee's performance as well as the action taken by the licensee regarding such responses. The maintenance of such a log would greatly facilitate the interaction between the licensee and the community being served as well as providing an effective aid in determining a licensee's performance in regard to the license renewal procedure. By having the individual licensee be responsible for maintaining a record of public response and actions taken accordingly, a large portion of the burden of policing the broadcast frequencies would be handled by the public at large, thereby reducing the role of the FCC in this area.

Thus, we believe that the individual licensees and the communities they serve, could through the operation of the proposed rule reach a considerably higher level of mutual discourse and cooperation while furthering broadcast standards, community interest, and effective utilization of the broadcast fre-

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[24] Federal Communications Commission reply to Illinois Citizens' Committee for Broadcasting, FCC 70-1141, Oct. 21, 1970.

quencies. This proposed rule will also make Rule 1.580 more effective by giving the public information upon which to make complaints.

We do not believe that this rule would be followed by increased dependence of the public on the Commission or an increased workload on the Commission's staff. Rather, just the opposite will occur. This rule will encourage monitoring and discourage frivolous complaints by the public because the public will be aware of what the licensee's duties are. Furthermore, this rule will encourage the formation of responsible civic groups which can open avenues of discourse with the licensee, and when necessary, provide the means to make program agreements like those in Rochester and Texarkana, bypassing the Commission.

Unlike the Illinois committee,[24] the present petition for rulemaking does not ask the licensee to delegate to an outside organization the right to broadcast announcements. It does not depend on the FCC finding license renewal a controversial issue falling under the Fairness Doctrine but rather follows the Commission's implicit suggestion that the proper method through which to enlarge the licensee's requirement for publication of information is the rulemaking procedure.

Wherefore, these arguments considered, the Commission is respectfully requested to issue an appropriate notice of proposed rulemaking.

Respectfully submitted,

/S/ Howard Leslie Sribnick.
Chairman, STATIC.

2. FCC Notice of Inquiry and Notice of Proposed Rule Making: In the Matter of Formulation of Rules

FCC 71-156

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

In the matter of formulation of rules and policies relating to the renewal of broadcast licenses, Docket No. 19153.

Notice of Inquiry and Notice of Proposed Rule Making

Adopted: February 17, 1971; Released: February 23, 1971.

By the Commission: Commissioner Wells concurring in the result.

INTRODUCTION

1. The Commission is re-examining in this and an associated proceeding (Docket No. 19154) its renewal processes in the commercial broadcast field. Programming is the essence of service to the public, the principal ingredient of which is the diligent, positive and continuing effort by the licensee to discover and fulfill the needs and interests of his area (*En Banc Inquiry re: Programming*, 25 F.R. 7291, 7295, (1960)).

2. Recent experience has pointed up the need to revise our renewal policies. During the past year there has been a significant increase in the number of petitions to deny or complaints directed to license renewal applications. Many of these petitions and complaints contend that the licensee has not met the above-noted obligation. In most instances the points raised in these filings were not communicated to the licensee during the license period; indeed, little or no dialogue occurred between the petitioner and the licensee prior to the filing of the renewal application. This is a patently unsatisfactory situation.

3. The proposals set out in the following four sections are designed to remedy that situation and to promote the fulfillment of public interest obligations by the licensee. Parts II and III are applicable to broadcasting generally, Parts I and IV exclude educational broadcasters (proposals regarding revised requirements for educational broadcasters will be forthcoming shortly), with Part IV pertaining just to commercial television (a revised renewal form for commercial radio will be considered at a later date). In brief, the purpose here is to simplify the renewal process by concentrating on the essential elements, to ensure a *continuing* dialogue on these elements between the licensee and the community, and finally, if there is to be resort to Commission processes,

[24] Federal Communications Commission reply to Illinois Citizens' Committee for Broadcasting, FCC 70-1141, Oct. 21, 1970.

to provide more orderly procedures, fair to both petitioning parties and to the licensee.

4. Specifically, the proposals in this docket are designed to ensure that: (1) the licensee will remain conversant with and attentive to community problems and needs throughout the license period; (2) the licensee will make known to the public his responsibility to continually ascertain the most significant problems and needs of his service area and to present programs designed to deal with these problems and needs; (3) the public will be continually encouraged by the licensee to make comments, complaints, and suggestions regarding the operation of the station; (4) any complaints regarding the operation of a station will be communicated to the licensee immediately and every effort will be made during the license period by both the complainant and the licensee to resolve differences and problems through discussion on the local level; (5) if this dialogue is ineffective and a petition to deny the station's license renewal is filed, reasonable time periods will be provided for the petitioners to examine the license renewal application before filing the petition, for the station to reply to the petition, and for the petitioners to comment on the station's reply, with no extensions to be granted without the consent of all parties; (6) the Commission will be able to more easily determine, as one criterion in evaluating petitions to deny license renewal, the extent to which the petitioners had made a genuine effort to communicate their complaints to the licensee during the license period.

5. With respect to commercial television licensees, the Commission proposes to eliminate from the renewal form all information not essential to the Commission in making its public interest finding. The Commission also proposes that the licensee make an annual programming report needed for nationwide annual statistics; the report will include a list of community problems and concerns and programs directed thereto.

6. In its actual renewal processes for commercial television, the Commission will pay particular attention to (1) community feedback, facilitated by the proposals in this docket; (2) the applicant's actual programming during the past renewal period as compared to the programming proposed in his previous renewal application in the critical programming categories (i.e., local programs, news, public affairs, etc.) which are in the proposed annual report and renewal form; and (4) any information suggesting violtion of the Act and/or Commission rules and policies.

7. In connection with (3) in the preceding paragraph, using the nationwide data base when it is available, the Commission will rank each station within a yet to be determined group (groupings may be determined by market, by revenues, or by a combination of factors) in each critical programming category. The parties are requested to comment on the appropriate groupings. The staff will then be instructed to closely scrutinize the renewal applications of those stations whose rankings fall below an appropriate level (e.g., 10%) and make a summary report of the application to the Commission. In so doing, it is not implied that all such applicants will be designated for hearing or even subject to further inquiry. Rather, the purpose of the process is, as stated, to ensure close scrutiny of all such applicants in order to delineate those whose performance is of such a borderline nature as to warrant inquiry and further showing. The grouping of stations and the levels below which stations will receive close scrutiny will, when determined by the Commission, be made a matter of public record. The Commission will also be assured that it does not, willy-nilly, renew an applicant which could not be said to meet statutory test of Section 307(d).

8. As can be seen, this is a far-ranging proceeding with many facets. The Commission has, of course, reached no final conclusion on these proposals and would welcome comments and alternatives. After gaining experience with any approach adopted in this proceeding, the Commission could consider its extension to other fields. Finally, as stated at the outset, the proceeding is part of an overall inquiry, involving actions as to the survey requirements (see FCC 71–176) and in the comparative renewal hearing process (see Notice of Inquiry, FCC 71–159, issued this day). The latter particularly bears on the overall renewal process, since it involves the proper balancing of the competitive spur and stability factors, to promote to a maximum extent "the public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act; See *NBC* v. *U.S.*, 319 U.S. 190 (1943)).

9. The Commission has received complaints concerning the public's right

to inspect locally maintained records of the licensee required by Section 1.526 of the Rules. The Commission believes it important to reaffirm this vital aspect of *existing* renewal policy. It has, therefore, today issued a Public Notice titled "Availability of Locally Maintained Records for Inspection by Members of the Public" (FCC 71–157).

I. PROPOSED RULE MAKING TO ADOPT RULES REQUIRING BROADCAST NOTICE OF THE MANNER IN WHICH THE PUBLIC MAY EXPRESS OPINIONS ABOUT BROADCAST SERVICE AND THE MAINTENANCE OF A LOCAL PUBLIC FILE OF OPINIONS RECEIVED BY LICENSEES

1. In this section, we give notice of proposed rule making in the above-captioned matter. The Commission has consistently stated that its licensees are expected to remain conversant with community needs and problems throughout the license period. This obligation was clearly stated in the *Network Programming Inquiry*, 25 Fed. Reg. 7291, at 7295 (1960).[1] The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This is a duty of the licensee and may not be delegated to others. Our proposal here is designed to better implement this all-important responsibility of the broadcast licensee.

2. The Commission notes an increase in the number of petitions to deny license renewal applications and in the number of informal complaints submitted concerning stations whose renewal applications are being processed. These petitions and objections often concern conduct of stations or incidents which occurred in the past. It is therefore apparent that there are complaints about station operation which are not communicated to licensees when the complaints arise. In its recent decision in *WSM, Inc.*, et al., 24 F.C.C. 2d 561, at 563–4 (June 29, 1970),[2] the Commission stated that it:

". . . does not condone the practice of community groups waiting until long after an application for renewal of license has been filed before raising any complaints they may have concerning a station's policies or program practices. Complaints concerning a licensee's hiring or employment practices should be brought to the attention of the licensee and/or Commission immediately upon their occurrence, and this can be done any time during the license period. Likewise, community groups can and should take any complaints they may have concerning a licensee's programming or program policies to the licensee at any time during the license period. Such practices should serve to encourage better relationships between the licensee and concerned community groups. The practice of waiting until long after a renewal application is filed before seeking correction of alleged past derelictions of a licensee (which it has been given no prior opportunity to consider) is disruptive of the Commission's processes."

3. To ensure licensees remain conversant with and attentive to community problems throughout the license period and to promote resolution of complaints as they arise at the local level through discussion between complainant and the licensee (rather than through Commission inquiry), the Commission proposes to incorporate as Section 73.1202 of its rules a requirement that a notice to the public informing them of their interest in station performance and of the appropriate manner in which to express their satisfaction or complaints with station operation be broadcast by every commercial licensee throughout the license period, except during the period from six months prior to expiration of the license to 30 days prior to expiration, during which time the proposed renewal application notices included in Section III of this docket are being broadcast. The Commission is proposing that these announcements be aired every eighth day, but will, of course, consider written comments before making a final determination regarding the frequency of the announcements as well as their content. The announcement wil linclude the following information:

I. For Commercial Radio Stations:

(a) The station's call letters.

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[1] F.C.C. 60-970, 20 R.R. 1902.

[2] 19 R.R. 2d 476, at 479.

(b) A statement that the frequency on which the station operates is public property and that the station was granted on (give date of last renewal grant) a three year license by the Federal Communications Commission in Washington, D.C., to serve the public interest, convenience and necessity.

(c) A statement that the Commission has indicated that service in the public interest obligates the broadcaster to make a continuing, diligent effort to determine the most significant problems and needs of his service area and to provide programming to help meet those problems and needs.

(d) A statement that to remain informed of the adequacy of its performance, the station requests its viewers or listeners to inform it of their opinions, criticisms or suggestions.

(e) A request that comments regarding the station's performance be as specific as possible.

(f) The appropriate name and address to which comments should be mailed.

(g) A statement indicating that comments may also be sent to the Federal Communications Commission, Washington, D.C. 20554.

II. For Commercial Television Stations:

(a) The station's call letters.

(b) A statement that the frequency on which the station operates is public property and that the station was granted on (give date of last renewal grant) a three year license by the Federal Communications Commission in Washington, D.C. to serve the public interest, convenience and necessity.

(c) A statement that the station is required to submit an annual filing with the Commission indicating what the licensee considered during the past year to be the most significant problems and needs of the public which he served and what programs the station aired during the year that were addressed to those problems and needs.

(d) A statement that the above filing is available for public inspection at the station's business office (or station's main location) during regular business hours. Give address and business hours.

(e) A statement that to remain informed of the adequacy of its performance the station requests its viewers or listeners to inform it of their opinions, criticisms or suggestions.

(f) A request that comments regarding the station's performance be as specific as possible.

(g) The appropriate name and address to which comments should be mailed.

(h) A statement indicating that comments may also be sent to the Federal Communications Commission, Washington, D.C. 20554.

The differences in the announcement proposed for television from that proposed for radio results from the fact that the Commission's proposal for an annual reporting of community problems and concerns and programs that dealt with them is presently limited to television. (See Section IV of this docket.) If future examination of issues related to renewal of radio licenses suggests that such annual reports should be submitted by radio stations, presumably announcements by radio and television stations would become identical. If the Commission decides to adopt this rule making before it adopts rule making requiring annual reporting for television licenses, the Commission could in the interim require television stations to air the proposed radio announcement.

5. The notices, a sample of which is attached as Appendix A would be required to be made during the following time periods:

(a) For commercial television broadcast stations, between 8:00 P.M. and 10:00 P.M.

(b) For commercial AM and FM broadcast stations, between 7:00 P.M. and 9:00 A.M., but if such stations do not operate during these hours, then between 4:00 P.M. and 7:00 P.M.

The Commission welcomes comments on the above or other appropriate time periods (e.g. 6–11 P.M., 8:30–10:30 P.M.) and on whether all or merely a substantial percentage of the announcements should be required within the specified periods of maximum viewing or listening.

In the case of television broadcast stations such notice would be broadcast orally with camera focused on the announcer; at the end of the notice, a signboard with the licensee's address for receiving complaints would be shown.

During the period between 30 days prior to expiration of the license and

the date of license renewal, stations would broadcast every eighth day the appropriate (radio or television) announcement herein, except for the mention of the date of the last renewal grant. Commencing on the eighth day following the date of renewal, the regular announcement would be resumed and be broadcast every eighth day thereafter.

6. All written comments and suggestions received by the licensee concerning operation of the station would be maintained in a local file, available for inspection by the public, except when the person making the comment or suggestion has specifically requested that his communication not be made public or where the licensee feels that it should be excluded from availability for public inspection because of the special nature of its content, such as a defamatory or obscene letter. In accordance with Section 1.526 of the Commission's rules such file would be kept for seven years. Licensees would be required to separate written comments by subject categories to facilitate inspection by members of the public. Subject categories would include comments on technical operation; comments on advertising; comments regarding employment practices; comments complimentary of programming; comments adversely critical of programming; and comments suggesting new programming. If comments in one letter relate to more than one subject category, the correspondence is to be filed under the category which, in the licensee's judgment, receives the most attention in the letter.

7. Nothing in this proposed rule making would be construed as preventing the Commission from considering formal or informal complaints containing material and substantive matters which have been filed at any time concerning any applications submitted to the Commission.

Appendix A

1. Part 73, Subpart H, of the Commission's Rules is amended by adding Section 73.1202, to read as follows:

73.1202 Public Notice of Licensee Obligations.

Each licensee of a commercial AM, FM, or television station, except international or television translator stations, would make an announcement informing the public of the licensee's obligation to the public and of the appropriate method for individuals to express their opinion of the station's operation. Such announcement would be given at least once every eighth day throughout the license period except during the period from six months prior to expiration of the license to 30 days prior to expiration, during which time the renewal application notices in Section 1.580 of the Commission's Rules would be broadcast. Such announcements would be aired during the following time periods:

(1) For commercial television broadcast stations, between 8:00 P.M. and 10:00 P.M.

(2) For commercial AM and FM broadcast stations. between 7:00 A.M. and 9:00 A.M., but if such stations do not operate during these hours, then between 4:00 P.M. and 7:00 P.M.

In the case of commercial television broadcast stations, such notices would be broadcast orally with camera focused on the announcer; at the end of the notice, a signboard with the licensee's address for receiving complaints would be shown.

The announcement would contain the following information:

For Commercial Radio Stations:

(a) The station's call letters.

(b) A statement that the frequency on which the station operates is public property and that the station was granted on (give date of last renewal grant) a three year license by the Federal Communications Commission in Washington, D.C., to serve the public interest, convenience and necessity.

(c) A statement that the Commission has indicated that service in the public interest obligates the broadcaster to make a continuing, diligent effort to determine the most significant problems and needs in his service area and to provide programming to help meet those problems and needs.

(d) A statement that to remain informed of the adequacy of its performance, the station requests its viewers or listeners to inform it of their opinions, criticisms or suggestions.

(e) A request that comments regarding the station's performance be as specific as possible.

(f) The appropriate name and address to which comments should be mailed.

(g) A statement indicating that comments may also be sent to the Federal Communications Commission, Washington, D.C. 20554.

For Commercial Television Stations:

(a) The station's call letters.

(b) A statement that the frequency on which the station operates is public property and that the station was granted on (give date of last renewal grant) a three year license by the Federal Communications Commission in Washington, D.C., to serve the public interest, convenience and necessity.

(c) A statement that the station is required to submit an annual filing with the Commission indicating what the licensee considered during the past year to be the most significant problems and needs of the public which he served and what programs the station aired during the year that were addressed to those problems and needs.

(d) A statement that the above filing is available for public inspection at the station's business office (or station's main location) during regular business hours. Give address and business hours.

(e) A statement that to remain informed of the adequacy of its performance, the station requests its viewers or listeners to inform it of their opinions, criticisms or suggestions.

(f) A request that comments regarding the station's performance be as specific as possible.

(g) The appropriate name and address to which comments should be mailed.

(h) A statement indicating that comments may also be sent to the Federal Communications Commission, Washington, D.C.

During the period between 30 days prior to expiration of the license and the date of license renewal, stations are to broadcast the appropriate announcement herein, except for the mention of the date of the last renewal grant. Commencing on the eighth day following the date of renewal, the regular announcement would be resumed and would be broadcast every eighth day thereafter.

All written comments and suggestions received by the licensee concerning operation of the station will be maintained in a local file, available for inspection by the public, except when the person making the comment or suggestion has specifically requested that his communication not be made public or where the licensee feels that it should be excluded from availability for public inspection because of the special nature of its content, such as a defamatory or obscene letter. In accordance with Section 1.52 of the Commission's rules such file would be kept for seven years. Licensees will be required to separate written comments by subject categories to facilitate inspection by members of the public. Subject categories will include comments on technical operation; comments on advertising; comments regarding employment practices; comments complimentary of programming; comments adversely critical of programming; and comments suggesting new programming. If comments in one letter relate to more than one subject category, the correspondence is to be filed under the category which, in the licensee's judgment, receives the most attention in the letter.

Appendix B

Sample Announcement for Television:

The channel on which this station operates is public property. On (date of last renewal grant), we were granted a three year license by the Federal Communications Commission to operate this channel in the public interest.

Each year we are required to submit to the Commission a list of what we consider to have been the most significant problems and needs of this community during the past year and the programs we aired during the year that were addressed to those problems and needs. This filing is available for public inspection at our business office (address) during our regular business hours of —— a.m. to —— p.m., Monday through Friday.

In order that Station ——— may better serve our viewers, we request that you inform us of any opinions, criticisms or suggestions you may have regarding our station operation. Comments or suggestions should be as specific as possible and should be mailed to (name and mailing address). Your letters will be made available for public inspection at our business office unless otherwise requested. Comments may also be sent to the Federal Communications Commission, Washington, D.C. 20554.

Sample Announcement for Radio:

The frequency on which this station operates is public property. On (date of last renewal grant), we were granted a three year license by the Federal Communications Commission to operate this frequency in the public interest. We are obligated to make a continuing, diligent effort to determine the most significant problems and needs of this community and to provide programming to help meet those problems and needs.

In order that Station ——— may better serve the needs and interests of our listeners, we request that you inform us of any opinions, criticisms or suggestions you may have regarding our station operation. Comments or suggestions should be as specific as possible and should be mailed to (name and mailing address). Unless otherwise requested, your letter will be made available for public inspection at our business office (address) during our regular business hours of —— a.m., to —— p.m., Monday through Friday. Comments may also be sent to the Federal Communications Commission, Washington, D.C. 20554.

II. PROPOSED RULE MAKING TO AMEND SECTIONS 1.516(e)(1), 1.539(a), 1.580(i), AND 1.580(j) OF THE COMMISSION'S RULES RELATING TO THE TIME FOR FILING APPLICATIONS FOR RENEWAL OF BROADCAST STATION LICENSES, PETITIONS TO DENY SUCH APPLICATIONS, OPPOSITIONS TO SUCH PETITIONS AND REPLIES TO SUCH OPPOSITIONS

1. In this section notice of proposed rule making is given in the above entitled matter. The proposals herein would amend the Commission's rules to change the deadline for filing applications for ren.wal of broadcast station licenses from 90 days prior to the expiration date of the license sought to be renewed to four months before that date. They would also provide that requests for extensions of time in which to file petitions to deny renewal applications will not be granted unless all parties concerned, including the renewal applicant, consent to such requests. Finally, they would lengthen the times in which to file oppositions to petitions to deny renewal applications and replies to such oppositions. The proposed amendments are set forth in the Appendix hereto. The following information and discussion explain why the Commission believes the rule changes to be necessary.

2. Prior to June 25, 1969, the Commission rules (Section 1.539) provided that applications for renewal of broadcast station licenses be filed at least 90 days before the expiration date of the license involved.[3] Applications for construction permits for new broadcast stations and for modification of construction permits and licenses of existing stations that were mutually exclusive with applications for license renewal, and petitions to deny renewal applications, could be filed at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing. The rules (Section 1.580) also provided that after the renewal application had been filed, local public notice of the filing be published in a newspaper and broadcast over the station involved and that subsequent verification of the giving of such public notice be filed with the Commission.

3. In a rule making proceeding, Docket No. 18495, the rules were amended, effective June 25, 1969, insofar as they pertained to the filing of mutually exclusive applications and petitions to deny, and the giving of local notice of filing. The 90-day filing provision was not changed and remains in effect today. *Broadcast License Renewal Applications*, 20 F.C.C. 2d 191 (1969).

4. New Section 1.516(e) and amended Section 1.580(i), adopted in the aforementioned proceeding, established a cutoff date after which applications mutually exclusive with renewal applications, and petitions to deny such applications, could not be filed. The cutoff date was designated as the end of the first day of the last full calendar month of the expiring license term. In the case of license renewal applications not timely filed 90 days before the expiration date, the cutoff date was established as the 60th day after the Commission gives public notice that it has accepted for filing the late-filed renewal application. The purpose of establishing a cutoff date was to provide

[3] An exception to this requirement was that applications for renewal of licenses for experimental or developmental broadcast stations could be filed up to 60 days before expiration.

for orderly and timely processing of renewal applications by setting a date certain, before the expiration of the license terms, by which the Commission and the renewal applicant might be informed about the filing of mutually exclusive applications and formal petitions to deny.

5. New Section 1.580(m), also adopted in the proceeding mentioned above, changed the local notice requirement by providing that the local notice of renewal applications be given during the 6-week period preceding the filing of the application rather than after the filing, and that verification of the giving of such public notice be filed with the Commission at the same time the renewal application is filed. The purpose of changing from a post-filing notice to a pre-filing notice was to give a longer period of notice to the public and afford additional time for re-publication of defective notices in order to expedite processing and make for timely action on renewal applications.

6. Since the adoption of the pre-filing notice rule and the cutoff date for the filing of formal petitions to deny renewal applications, community groups, from time to time, have requested extensions of time in which to file such petitions. In support of such requests, they have averred that they were engaged in discussions with the stations about such matters as their programming and employment policies and practices, that they preferred to resolve these matters by discussion, that they would file formal petitions to deny if discussions failed, and that an extension of time was therefore essential. Typically, such requests have been made at the last minute.

7. On several occasions we have expressed our views concerning such last-minute pleadings. Thus, in *WSM, Incorporated, et al.*, 24 F.C.C. 2d 561 (1970), we referred to the 1969 amendment of the rules which provides for pre-filing notification to the public, and stated, at 562:

" . . . The purpose of the publication rule is to insure that all residents and interested parties in the communities will be advised of the fact of the filing of applications and will be afforded an opportunity to submit whatever comments they may have concerning the licensee's stewardship. This rule also insures that the orderly administration of the Commission's processes will not be thwarted by the filing of belated pleadings or complaints. In this latter regard, each licensee should be afforded an opportunity to respond to allegations made against it in time to avoid undue delay in the processing of its application."

8. In the same document we also stated that we do not condone the practice of community groups waiting until long after renewal applications have been filed before registering complaints about a station's policies or program practices. We further stated that complaints about a licensee's hiring or employment practices, or programming, or programming policies should be made to the licensee or the Commission, as the case might be, during the license period, for this would encourage better community service and better relations between the licensee and community groups. The document also pointed out that the practice of making late complaints is disruptive of the Commission's processes.

9. Another expression of our views appeared in a recent Memorandum Opinion and Order dealing with requests by community groups for extensions of time in which to file petitions to deny renewal applications of various broadcast stations serving the Chicago area, which alleged that discussions with the stations were in progress (FCC 70–1174, adopted November 2, 1970). In that document, we made the following statement (at para. 3):

"We have noted an increase in "last minute" filings of requests for extensions of time in circumstances like these. [Footnote omitted.] Based on our recent experience, we believe that a revision of our procedures is called for—one which will afford a better opportunity to interested persons to file a petition to deny and at the same time insure orderly and proper renewal processing. To that end, we intend to explore means which may provide a longer period of time during which renewal applications will be available for inspection and which will essentially provide that to obtain an extension of time all interested parties must join in the request."

10. In the 1969 action setting the present cutoff date two months after the filing date, we concluded that 60 days was sufficient for the filing of petitions to deny. *Broadcast License Renewal Applications*, 20 F.C.C. 2d 191. However, as indicated in the preceding paragraph, a revision appears to be necessary. We

have found that many of the community groups do not have legal counsel, and many members of such groups are employed during daytime hours and can only examine applications on a part-time basis. We are of the view that if the time for filing renewal applications is set at four calendar months before expiration of license (instead of the present 90 days), and then end of the first day of the last full calendar month of the expiring license term is retained as the cutoff date for filing petitions to deny, the resulting three-month period should be sufficient for such groups to examine renewal applications on file in the community, to discuss problems with station licensees and, if desired, to file timely petitions to deny. We are proposing to amend the rules accordingly.

11. As previously mentioned, the late-filed pleadings which we have been receiving are disruptive of the Commission processes. We believe an additional month will provide community groups interested in the performance of local stations with ample time to examine renewal applications and will thereby eliminate the necessity for seeking last-minute extensions of time. Moreover, where such requests are based on a claim of negotiations with the station, we are proposing that no extensions of time will be granted unless all parties concerned, including the renewal applicant, consent to such requests.[4] The time which we are proposing would allow all interested parties a reasonable period to prepare and file petitions to deny. Absent any such filings, licensees are entitled to a prompt renewal unless problems are encountered in processing the renewal application. Coupled with the proposed publication requirements (Section III of this docket), this course appears to represent a reasonable balance between necessary safeguards for the expression of the public interest by community groups and the need for orderly application processing.

12. Concerning license renewal applications that are not timely filed, present rules provide that the cutoff date for filing petitions to deny is the 60th day after the Commission gives public notice of acceptance for filing of the late-filed application (para. 4, *supra*). This means that, under the present rules, parties have about the same length of time in which to file formal petitions to deny whether the renewal application is timely or untimely filed. Since the same considerations apply, we are proposing to amend Section 1.516(e)(1) to provide that in the case of late-filed applications, the cutoff date for filing petitions to deny will be the 90th day after the Commission gives public notice of acceptance for filing of the application. Thus, under the proposal, 90 days would be provided for filing petitions to deny late-filed renewal applications, and 3 calendar months would be allowed for filing petitions to deny timely-filed applications.

13. In connection with the filing of petitions to deny renewal applications, another problem has come to our attention. Section 1.580(j) of the rules provides, among other things, that renewal applicants have 10 days in which to file oppositions to petitions to deny, and that parties filing petitions to deny may reply to such oppositions within 5 days after the time for filing the oppositions has expired. It has been urged by applicants for renewal of license that a period of 10 days is often inadequate for preparing an opposition. Moreover, it is said that 5 days are not sufficient for preparing a reply to an opposition. It appears that there is merit to these allegations and that longer periods such as 30 days and 20 instead of the present 10 and 5 days would be preferable. Additionally, in the interest of avoiding unnecessary delay in renewal processing, we believe that the time for filing replies to oppositions should run from the date of filing of the oppositions rather than (as provided in the present rules) from the date on which the time for filing oppositions has expired. Using this approach, if a renewal applicant were to file an opposition

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[4] Our reasons for this requirement are obvious. If the parties are engaged in good faith, serious negotiations, clearly those negotiations should continue, and possible resort to the Commission should await their outcome. It follows that a licensee engaged in such negotiations would give its consent to an extension of time, with such other safeguards as would appropriately protect the putative petitioner's right to file with the Commission, in the event the negotiations are unsuccessful. On the other hand, if the station is not interested in such negotiations, there is no reason for an extension based on a claim of negotiations, and the petition should be filed within the ample time proposed to be provided, unless a compelling showing can be made of unusual circumstances warranting a deviation from the above policy.

before the time for filing oppositions had expired, the time for filing a reply would commence to run from the former date. We are proposing to amend Section 1.580(j) in accordance with the foregoing.

14. As we stated in paragraph 8, we believe that complaints about a station should be made to the licensee or to the Commission during the license period. Our proposal to change the filing date for renewal applications, which is designed to give local groups more time to examine renewal applications, is in no way meant to change that view. In fact, to encourage the ongoing registering of opinions about station operation during the license period, we have today adopted a Notice of Proposed Rule Making (Section I of this docket) in which we invited comments on proposed rules that would require licensees to broadcast at least once every eighth day over their stations a notice to the public informing them of their interest in station performance and of the appropriate manner in which to express their satisfaction or complaints with station operation. In short, we cannot stress too strongly the importance of a continuing dialogue between station and community, rather than a triennial spirit of interest. See discussion in Section I, *supra*, paragraph 3.

15. If after evaluating the comments and reply comments filed in this proceeding, the rules as proposed, or modification thereof, are adopted, the Commission will then give consideration to the question of what is the first group of renewal applications to which they should be applied in order to allow for an orderly transition from the old rules to the amended ones. Parties are invited to comment on this point as well as on the proposed amendments made herein.

16. Authority for the adoption of the rule amendments proposed herein is contained in Sections 4(i), 303, 308, 309, and 315(a) of the Communications Act of 1934, as amended.

It is proposed that Part 1 of Chapter I of Title 47 of the Code of Federal Regulations be amended as follows:

1. The first proviso of Section 1.516(e)(1) is proposed to be amended by changing "60th" therein to "90th".

2. Section 1.539(a) is proposed to be amended to read as follows:

§ *1.539 Application for renewal of license*

(a) Unless otherwise directed by the Commission, an application for renewal of license shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed, except that applications for renewal of license of an experimental or developmental broadcast station shall be filed not later than the first day of the second full calendar month prior to the expiration date of the license sought to be renewed. If any deadline prescribed in this paragraph falls on a nonbusiness day, the cutoff shall be the close of business of the first full business day thereafter.

* * * * * * *

3. Section 1.580(j) is proposed to be amended by deleting the period at the end of the first sentence, substituting a colon therefor, and adding after the colon a third proviso reading as follows:

And provided further, That requests for extension of time to file petitions to deny applications for renewal of license will not be granted unless all parties concerned, including the renewal applicant, consent to such requests.

4. Section 1.580(j) is proposed to be amended to read as follows:

§ *1.580 Local notice of the filing of broadcast applications, and timely filing of petitions to deny them*

* * * * * * *

(j) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in Section 1.45 except that as to a petition to deny an application for renewal of license, an opposition thereto may be filed within 30 days after the petition to deny is filed, and the party that filed the petition to deny may reply to the opposition within 20 days after the opposition has been filed.

* * * * * * *

III. PROPOSED RULE MAKING TO AMEND SECTIONS 1.580(c), 1.580(d), AND 1.580(m) AS TO NOTICES OF THE FILING OF RENEWAL APPLICATIONS

In this section, we propose to amend Sections 1.580(c), 1.580(d) and 1.580(m) of the Rules to require the renewal applicant to broadcast the following announcements concerning the filing of his renewal application described herein:

The pre-filing notice in Appendix D following, would be broadcast for the first time on the first day of the sixth full calendar month prior to the expiration of the license. It would be broadcast every eighth day thereafter until the renewal application has been filed with the Commission. The post-filing notice in Appendix D would then be broadcast, beginning on the date on which the renewal application has been filed. It would be broadcast every eighth day thereafter until the first day of the first calendar month prior to the expiration of the license. Both announcements would be made during the following time periods:

(a) For commercial television stations, between 8:00 P.M. and 10:00 P.M.

(b) For standard and FM broadcast stations, between 7:00 A.M. and 9:00 A.M., but if such stations do not operate during these hours, then between 4:00 P.M., and 7:00 P.M.

(c) For noncommercial educational stations, at the same time as commercial stations, except that such stations need not broadcast the announcement during any month during which the station does not operate.

In the case of television broadcast stations and noncommercial educational television stations, such notices will be broadcast orally with camera focused on the announcer; at the end of the notice, a signboard with the licensee's address and the Commission's Washington address will be shown.

In the case of television broadcast stations, such notices would be broadcast orally with camera focused on the announcer; at the end of the notice, a signboard with the licensee's address and the Commission's Washington address will be shown.

During the period beginning on the first day of the sixth full calendar month prior to the expiration of the license up to the date of expiration, the public notice requirements proposed in Section I of this docket would be waived.

It should be noted that under the proposed amendments, the renewal applicant will no longer be required to publish in a newspaper a notice of his renewal filing.

At the time of filing his renewal application, the licensee would be required to submit a statement setting forth the date and imes a which he pre-filing notice included herein had been broadcast and the post-filing notice included herein would be broadcast.

The statement in the proposed announcements that further information concerning the Commission's renewal processes is available at the station reflects the Commission's intention to publish a booklet explaining renewal procedures and to require licensees to have a legible copy of the booklet available for public inspection. It is assumed that by the time this rulemaking is completed, the booklet will be ready for distribution to all licensees and that the Commission will, without another notice of proposed rulemaking, amend its Rules (e.g. Section 1.526) to require that one copy of the booklet be readily available to the public at any time during the station's regular business hours.

Authority for the adoption of the proposed rule is contained in Sections 4(i), 303, 307, 308, 309, 311(a) and 315(a) of the Communications Act of 1934, as amended.

Appendix D

Sections 1.580(c), 1.580(d) and 1.580(m) of the Commission's Rules are hereby amended to provide the following:

During the period beginning on the first day of the sixth full calendar month prior to the expiration of a broadcast station license to the date on which the renewal application is filed, all applicants for the renewal of station licenses shall broadcast the following announcement every eighth day:

The frequency/channel on which this station operates is public property. On (date of last renewal grant) we were granted a three year license by the Federal Communications Commission to operate this frequency/channel in the public interest, convenience and necessity.

Pursuant to the provisions of the Communications Act of 1934, as amended, notice is hereby given that the broadcast license of Station (*Call letters, city*

and state) will expire on (*date of expiration*) and that we are required to file with the Federal Communications Commission, no later than (*a date 120 days prior to the expiration date*), an application for license renewal.

A copy of this application will, upon filing with the Commission, be available for public inspection at our business office (*address*) during our regular business hours of —— AM to —— PM. Monday through Friday. The renewal application will include reports by this station regarding its performance during the last three years, analysis of complaints and suggestions we have received from the public during the past three years, and projections of our programming during the next three years.

Members of the public who desire to bring to the attention of the Federal Communications Commission facts concerning whether this station has operated in the public interest and/or facts relating to our renewal application will have until (*date thirty days before expiration*) to file formal comments and petitions. The Commission welcomes informal comments at any time.

Further information regarding the Commission's process of renewing broadcast licenses and deadlines for relevant filings by both broadcasters and the public is available at our business office (*address*) or may be obtained from the Federal Communications Commission, Washington, D.C. 20554.

During the period beginning on the date in which the renewal application is filed to the first day of the last full calendar month prior to the expiration of the license, all applicants for the renewal of station licenses shall broadcast the following announcement every eighth day:

The frequency/channel on which this station operates is public property. On (*date of last renewal grant*) we were granted a three year license by the Federal Communications Commission to operate this frequency/channel in the public interest, convenience and necessity.

Pursuant to the provisions of the Communications Act of 1934, as amended, notice is hereby given that the broadcast license of Station (*Call letters, city and state*) will expire on (*date of expiration*) and that we have filed with the Federal Communications Commission an application for license renewal.

A copy of this application is available for public inspection at our business office (*address*) during our regular business hours of —— AM to ——PM, Monday through Friday. The renewal application includes reports by this station regarding its performance during the last three years, analysis of complaints and suggestions we have received from the public during the past three years, and projections of our programming during the next three years.

Members of the public who desire to bring to the attention of the Federal Communications Commission facts concerning whether this station has operated in the public interest and/or facts relating to our renewal application will have until (*date thirty days before expiration*) to file formal comments and petitions. The Commission welcomes informal comments at any time.

Further information regarding the Commission's process of renewing broadcast licenses and deadlines for relevant filings by both broadcasters and the public is available at our business office (*address*) or may be obtained from the Federal Communications Commission, Washington, D.C. 20554.

Both announcements shall be made during the following time periods:

(a) For commercial television stations, between 8:00 p.m., and 10:00 p.m.

(b) For standard and FM broadcast stations, between 7:00 a.m., and 9:00 a.m., but if such stations do not operate during these hours, then between 4:00 p.m., and 7:00 p.m.

(c) For noncommercial educational stations, at the same time as commercial stations, except that such stations need not broadcast the announcement during any month during which the station does not operate.

In the case of television broadcast stations and noncommercial educational television stations, such notices will be broadcast orally with camera focused on the announcer; at the end of the notice, a signboard with the licensee's address and the Commission's Washington address will be shown.

During the period beginning on the first day of the sixth full calendar month prior to the expiration of the license up to the first day of the last full calendar month prior to renewal, the public notice requirements proposed in Section I of this docket would be waived.

Authority for the adoption of the proposed rule is contained in Sections 4(i), 303, 307, 308, 309, 311(a) and 315(a) of the Communications Act of 1934, as amended.

IV. INQUIRY AND PROPOSED RULE MAKING TO AMEND SECTION IV–B OF FORM 303 APPLICATION FOR RENEWAL OF TELEVISION STATION LICENSE AND ADOPTION OF ANNUAL REPORTING FORM FOR TELEVISION STATION LICENSEES

1. This section constitutes a Notice of Inquiry and Proposed Rule Making in the above-entitled matter. Form I in Attachment A would replace Section IV–B of the renewal application for commercial licensees. Form II in Attachment A would be filed annually.

2. The new Part IV–B of the renewal form eliminates some questions in the present form. But questions which solicit specific quantitative information have been retained and refined so that licensees would be required to break down programming of news, public affairs and "other" by time segments similar to the way local programming has been broken down in the part (e.g., 6:00 p.m.–11:00 p.m.). Licensees would also be asked to elaborate on their programming of public affairs by indicating what network public affairs programs were offered but were not carried and what programs were aired instead.

3. When the present form was adopted in 1966, the Commission indicated that while there was general agreement on the necessity for reporting on ascertainment procedures and the station's response to community needs, there was disagreement on the details that should be required in the reporting (5 FCC 2d 178). While, as indicated in today's Public Notice (FCC 71–177) renewal applicants will now be required to apply the Primer in answering Part I of Section IV–B of the current form, the Commission believes that a more appropriate method for commercial television stations to report on ascertainment might be for them to submit an annual report listing what the licensee considers were the most significant problems and needs in his service area during the preceding twelve months and listing the programs televised during that period that dealt with those problems and needs. The new public announcement proposed in Part I of this docket would refer to the annual submissions and would invite viewers to examine the lists and make comments and suggestions to the licensee. This would encourage continuous dialogue between the licensee and members of the public concerning what both consider to be the major problems and needs of the community.

4. In addition to an annual reporting of problems and needs and programs designed to meet them, television licensees would be required to submit quantitative information regarding program performance in specified program categories during the composite week announced by the Commission each July or early August. These reports, along with the lists of community problems and needs and programs directed to them, would be submitted each year on or before September 1st, and, barring unusual circumstances (e.g. a complaint filed during the license period in which the material in the annual reports is germane), would be filed without evaluation at that time by the Commission. The purpose of these reportings are; first, to provide the Commission with yearly nationwide statistics regarding television programming during a given composite week—statistics which are not now available to the Commission but which would be valuable in shaping any new policies in this area and in simply making more informed the Commission, or Congress or other interested persons; second, to enable the Commission to make a more complete evaluation of programming performance of the licensee during the past renewal period and; third, if necessary, in a comparative hearing (where upgrading during the last year of the renewal period would not be determinative in concluding that a station was providing substantial as opposed to minimal service—see 22 F.C.C. 2d 2040) to enable the Commission more readily to ascertain if programming during the first two years of the license period differed significantly from programming during the third year. It is important to emphasize that initiation of annual reporting would not constitute the initiation of an annual renewal process and that except in unusual circumstances, evaluation of the station's performance by the Commission would still take place only every three years.

5. The definitions used for "news," "public affairs," "other programs" and "local programs," would remain the same. These definitions read:

(a) "News programs" (N) include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis and sports news.

(b) "Public Affairs programs" (PA) include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels,

round tables, and similar programs primarily concerning local, national, and international public affairs.

(c) "Other programs" (O) include all other programs excluding entertainment and sports.

(d) A "local program" (L) is any program originated or produced by the station, or for the production of which the station is substantially responsible, and employing live talent more than 50% of the time. Such program, taped, recorded, or filmed for later broadcast shall be classified by the station as local. A local program fed to a network shall be classified by the originating station as local. All non-network news programs may be classified as local. Programs primarily featuring syndicated or feature films, or other non-locally recorded programs shall be classified as "Recorded" (REC) even though a station personality appears in connection with such material. However, identifiable units of such programs which are live and separately logged as such may be classified as local (e.g., if during the course of a feature film program a non-network 2-minute news report is given and logged as a news program, the report may be classified as local).

Parties may comment on the above definitions in light of these proposals and indeed we specifically raise the issue whether the news and public affairs categories should not be viewed together. (See Notice of Inquiry (FCC 71–159), paragraph 4, issued this day.)

6. While Parts I, II and III of this docket apply equally to both television and radio licensees, this Notice of Inquiry and Proposed Rule Making applies only to commercial television stations. Evaluation of Section IV–A of Form 303 for commercial AM and FM renewal applicants will take place at a later date. At such time the Commission will reach a decision regarding the need for a new renewal form for radio and/or annual reporting by radio licensees.

Authority for this proposal is contained in Sections 4(i), 303, 307, 308, and 315(a) of the Communications Act of 1934, as amended.

Appendix E

Annual programming reporting form

1. Using the form provided (Firm I, in Attachment A) list what you consider to be the most significant problems and needs of your service area during the past twelve months. (DO NOT LIST MORE THAN 10). Indicate (1) the number of programs or program segments (excluding ordinary news inserts. By news inserts, we refer to the daily or ordinary news coverage of breaking newsworthy events; an insert in a newscast that is not merely coverage of breaking events but rather seeks to deal in more depth or analysis with some problem should be counted); (2) the amount (hours and minutes) of program time; and (3) the amount (hours and minutes) of local programming devoted during the past twelve months to each of these problems or needs.

2. As Exhibit No. —— give for each problem or concern listed in Form I a brief description of each program or program segment aired by the applicant during the past twelve months that addressed itself to that problem or need. Identify each program by source and indicate the time of broadcast.

3. State the total hours of operation during the composite week: ———.

4. Using the form provided (Form II in Attachment A) state the amount of time (rounded to the nearest minute) the applicant devoted in the composite week to the categories (see Definitions) listed. Commercial matter within a program segment should be excluded in computing time devoted to that particular program segment (e.g., a 15-minute news program containing 3 minutes of commercial matter shall be counted as a 12-minute news program).

5. Using the form provided (Firm II in Attachment A) state the amount of time (rounded to the nearest minute) the applicant devoted in the composite week between the hours of 6–11 P.M. to the categories (see Definitions) listed. Commercial matter within a program segment would be excluded in computing time devoted to that particular program segment.

6. If the applicant was affiliated with one or more national television networks during the past year, specify which and list all of the individual network public affairs programs during that period that the applicant was offered but never carried and indicate what programs were aired instead. If an entire network public affairs series[5] was not carried, the applicant may so indicate without having to list each individual program within that series, but still having to indicate what programs or program series were aired instead.

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[5] e.g. *Face the Nation, Meet the Press, Issues and Answers.*

Appendix F

New Section IV–B of Form 303

1. Using the form provided (Form I), list what you consider to be the most significant problems and needs of your service area during the past twelve months (DO NOT LIST MORE THAN 10). Indicate (1) the number of programs or program segments (excluding ordinary news inserts[6]), (2) the amount (hours and minutes) of program time and (3) the amount (hours and minutes) of local programming devoted during the past twelve months to each of these problems or needs.

2. As Exhibit No. ——, give for each problem or need listed in Form I a brief description of each program or program segment aired by the applicant during the past twelve months that addressed itself to that problem or need. Identify each program by source and indicate the time of broadcast.

3. State in Exhibit No. —— the methods by which the applicant during the past three years determined the problems and needs of the public served by his station.

4. Does the applicant anticipate any significant new problems and needs in his service area during the next renewal period? Yes —, No —. If Yes, indicate in Exhibit No. —— the new problems and needs.

5. Does the applicant expect to air during the next renewal period any new programs or program services devoted to significant problems and needs of his service area? Yes —, No —.

If Yes, indicate in Exhibit No. —— the new program or program services and briefly describe these.

6. Does the applicant, during the next renewal period, plan to change the methods described in his answer to Question 3 for determining the problems and needs of the public served by his station. Yes —, No—.

If Yes, describe in Exhibit No. —— the changes planned by applicant.

7. In Exhibit No. —— summarize and comment upon the complaints and suggestions received by the applicant from members of the public during the past renewal period in each of the following categories: (1) technical operations, (2) advertising, (3) employment practices, (4) criticisms of programming, (5) compliments on programming, (6) suggested programming.

8. State the total hours of operation during the most recent composite week: ———.

9. Using the form provided (Form II) state the amount of time (rounded to the nearest minute) the applicant devoted in the most recent composite week to the categories (see Definitions) listed. Commercial matter within a program segment should be excluded in computing time devoted to that particular program segment (e.g., a 15-minute news program containing 3 minutes of commercial matter shall be counted as a 12-minute program).

Attach as Exhibit No. —— a brief description of each program included in each category. Indicate the source (see Definitions) and the number of minutes of all programs listed as News, Public Affairs and all other programs, exclusive of entertainment and sports.

10. Using the form provided (Form II), state the amount of time (rounded to the nearest minute) the applicant devoted in the most recent composite week between the hours of 6–11 P.M. to the categories listed. Commercial matter within a program segment would be excluded in computing time devoted to that particular program segment.

Attach as Exhibit No. —— a brief description of each program included in each categories. Indicate the source and the number of minutes of all programs listed as News, Public Affairs and all other programs, exclusive of entertainment and sports.

11. State (a) the total number of public service announcements, (b) the number of public service announcements involving local organizations and (c) the number of public service announcements aired between 8 A.M.–11 P.M. during the most recent composite week.

12. State the number of 60-minute segments of the most recent composite week (beginning with the first clock hour and ending with the last full clock

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[6] By news inserts, we refer to the daily or ordinary news coverage of breaking newsworthy events; an insert in a newscast that is not merely coverage of breaking events but rather seeks to deal in more depth or analysis with some problem should be counted.

hour of each broadcast day) containing the following amounts of commercial matter.

A. Up to and including 8 minutes.——
B. Over 8 and up to and including 12 minutes. ——
C. Over 12 and up to and including 16 minutes. ——
D. Over 16 minutes. ——

List each segment in category D above, specifying the amount of commercial time in the segment, and the day and time broadcast.

13. If the applicant was affiliated with one or more national television networks during the past year, specify which and list all of the individual network public affairs programs during that period that the applicant was offered but never carried and indicate what programs were aired instead. If an entire network public affairs series* was not carried, the applicant may so indicate without having to list each individual program within that series, but still having to indicate what programs or program series were aired instead. e.g. *Issues and Answers, Face the Nation, Meet the Press.*

14. In the applicant's judgment does the information supplied in Question 8 through 13 adequately reflect its past programming: Yes— No—.

If "no", applicant may attach as Exhibit No. —— such additional information as may be necessary to describe accurately and present fairly its program service.

15. State the proposed total hours of operation during a typical week: ———

16. State the minimum amount of time the applicant proposes to devote normally each week to the categories listed below. Commercial matter within a program segment shall be excluded in computing time devoted to that particular program segment.

	Total minutes	Percent of total time on air	Local minutes	Percent of total time on air
1. News				
2. Public affairs				
3. All other programs, exclusive of entertainment and sports				
4. Local (total local programing, including local programs in 1, 2, and 3				

17. State the minimum amount of time the applicant proposes to devote normally each week between the hours of 6–11 PM to the categories listed below.

	Total minutes	Percent of total 6–11 p.m.	Local minutes	Percent of total 6–11 p.m.
1. News				
2. Public Affairs				
3. All other programs, exclusive of Entertainment and Sports				
4. Local (total Local programing, including local programs in (1), (2), and (3)				

18. State (a) the minimum total number of public service announcements, (b) the minimum number of public service announcements involving local organizations and (c) the minimum number of public service announcements aired between 8 AM–11 PM which the applicant proposes to present during a typical week.

19. What is the maximum amount of commercial matter in any 60-minute segment which the applicant proposes normally to allow? ——— If applicant proposes to permit this amount to be exceeded at times, state under what circumstances and how often this is expected to be exceeded at times, state under what circumstances and how often this is expected to occur, and the limits that would then apply.

I. List what you consider the most significant problems or needs of your service area during the 12 months ended July 30. Do not list more than 10. Complete columns 2, 3 and 4 for each item listed.

(1) Problem or need (Do not list more than 10)	Programs devoted to this problem or need broadcast during the 12 months ended July 30 [1] (2) No. of programs or program segments [2]	(3) Total program time (In hours and minutes)	(4) Local program time included in col. 3 (In hours and minutes)	Leave blank
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				

[1] If the report does not cover the full 12 month period, indicate period covered: ———, 19—— to———, 19——.
[2] Do not count ordinary news inserts.

FORM II

Composite week data (1)	All programs: Minutes (2)	All programs: Percent of total time operating [1] (3)	Local programs only: Minutes (4)	Local programs only: Percent of total time operating [1] (5)
Total time operating		100		(1)
News		(1)		(1)
Public Affairs		(1)		(1)
All other (exclusive of entertainmet and sports)		(1)		(1)

[1] All percentages are of the total time found at the top of column 2 in the check box.

Composite week data for 6-11 p.m. time period	All programs: Minutes	All programs: Percent of total time operating	Local programs only: Minutes	Local programs only: Percent of total time operating [2]
Total time operating during 6-11 p.m		100		
News during 6-11 p.m				(2)
Public affairs during 6-11 p.m				(2)
All other (exclusive of entertainment and sports) during 6-11 p.m				(2)

[2] All percentages are of the total time operating between 6-11 p.m., found at the top of column 2 in the check box.

FILING PROCEDURES

All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on any or all sections of this docket on or before May 3, 1971, and reply comments on or before June 3, 1971. Comments directed toward a particular section of the docket should be labeled as such.

In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the commission.

On January 8, 1971, a petition for rule making (RM-1737) was filed by STATIC (Student Taskforce Against Telecommunication Information Concealment), a group of George Washington Law School students. The petition requested that the Commission adopt a rule which would require periodic announcements by licensees designed "to give the public effective notice of their rights vis a vis the licensees. . . ." The material to be included in the announcement suggested in the petition is broader in scope than that in the announcement we are proposing in Section III of this docket. Because the STATIC

proposal is so similar in purpose to our own, we are considering the STATIC petition as a comment in this proceeding rather than issuing a separate proposed rule making regarding the STATIC petition. STATIC may of course file additional comments if it so desires.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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3. Letter from Chairman, FCC, to Senator Edward M. Kennedy

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., May 13 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: This is in reply to your letter of April 5, 1971, offering to include as part of the hearing record, my observations on the March 30, 1971 testimony of two student groups (*TUBE and STATIC*) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.

The TUBE petition for rule making, seeking a ban on deceptive television advertising, was filed on January 13, 1970. A public notice briefly describing the petition and assigning it a file number was issued on January 16, 1970. A copy of the Notice (Report No. 701) is enclosed. It was not the Commission's practice at that time to communicate directly with petitioner to notify him that such a public notice had been issued. The practice has since been changed, and petitioners now are directly notified. Following issuance of such a public notice, interested persons are afforded a period of 30 days in which to comment. Service of comments on petitioner is required, and petitioner is afforded 15 days in which to reply. 47 CFR 1.405. No comments either supporting or opposing the petition were filed during this 30 day period. During March and April 1970, however, the Commission received several letters from members of Congress and public groups supporting the petition, particularly as it applied to advertising directed to children. On April 6, 1970, TUBE filed a "Supplement to Petition for Rule Making." Public Notice of the supplement was given on April 10, 1970. A copy of the Notice (Report No. 714) is enclosed. Issuance of this Notice reinstituted the 30 and 15 day periods afforded for comment and reply. One additional letter supporting the petition, particularly as to advertising directed to children, was received.

The TUBE petition was formally presented to the Commission in July 1970, and was considered by the Commission in meetings held during July and August. The Commission did not at this time either grant or deny the petition but directed the staff to look further into the questions it presented and, specifically, to discuss the subject with staff members of the Federal Trade Commission. Discussions, in August and sporadically since, have been inconclusive. Principally, they have related to measures which might be taken by this agency to enhance the effectiveness of the FTC in dealing with deceptive commercials. The whole area remains under consideration at the staff level and has not again been presented formally to the Commission.

In the interim, the Commission has issued a "Notice of Inquiry and Notice of Proposed Rule Making" dealing with the related, but more limited, subject of commercials directed to children (FCC 71–71, copy enclosed). Specific complaints alleging deceptive advertising have been filed against Chevron and Mattel and are pending consideration by the Commission. Also, the FTC has increased its activity in this area, and it is possible (contrary to the premise of the TUBE petition) that that agency, which is expert on the question of deceptive advertising, may be able to deal effectively with the situation. Certainly, the FCC stands ready to cooperate fully in that effort.

In short, the TUBE petition and the general question of deceptive commercials have been given extensive consideration. However, the Commission moves cautiously in matters relating to program (including commercial) content, seeking to correct abuses by methods which will intrude least upon freedom of expression. I cannot assure TUBE that final action on its petition is imminent or that its specific proposals will ultimately be adopted. I can assure them, however, that the petition has had and continues to have a constructive effect in the Commission's consideration of the sensitive problems involved.

As noted in the testimony of STATIC, its petition for rule making is being

considered as a comment in Docket No. 19153, concerning the "Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses." A copy of the "Notice of Inquiry and Notice of Proposed Rule Making (FCC 71–156) is enclosed. (Reprinted *supra.*)

Since issuance of the Procedure Review Committee's Notice of May 8, 1970 (copy enclosed) and your thoughtful letter of May 12, 1970 to the Chairman of that Committee urging greater efforts to publicize information relevant to broadcast licensing, the Committee has substantially completed work on a procedure manual designed to aid the citizen in dealing with broadcast stations and in participating in broadcast matters pending before the Commission. The manual is currently under review by the staff of the Broadcast Bureau. This is the booklet referred to on page 21 of the Notice in Docket 19153 (FCC 71–156). It should be noted, however, that the manual is not limited to the renewal process, but covers anything from filing a complaint to participation as a party in hearing proceedings or in rule making. The manual will reflect such revised renewal procedures as are adopted by the Commission in Docket No. 19153 and we now anticipate that it will be issued with the Commission's final Report and Order in that proceeding.

Sincerely,

DEAN BURCH,
Chairman.

PETITIONS FOR RULEMAKING FILED, JAN. 16, 1970

File No.	Rule No.	Petitioner	Date received	Nature of petition
RM-1549	Part 95	Stuart J. Lipoff, Oak Park, Ill.	Jan. 6, 1970	Request amendment of part 95 to provide special "help" base stations, permit use of only 1 frequency by any licensee, require all transmitters to have automatic identifiers, require 6 months equipment technical check up, require equipment dealers to report call sign and serial number of licensees purchasing class D equipment.
		Filed by Stuart J. Lipoff, Petitioner		
RM-1550	Part 97, Subpart C 97.61; Part 97, Subpart B 97.7	Andrew G. Bourassa, WA1LJJ, Laconia, N.H.	Jan 8, 1970	Amendment of part 97 to provide 25 Khz additional telephony space for extra class and 25 Khz additional telephony space for extra and advanced class operating in the 80, 40, 20, and 15 meter bands.
		Filed by Andrew G. Bourassa, Petitioner		
RM-1551		Black Efforts for Soul in Television, Washington, D.C., Citizens Communications Center, Washington, D.C., William D. Wright, Washington, D.C., and Albert H. Kramer, Washington, D.C.	Jan. 9, 1970	Request the Commission to adopt a rule, that would clarify the standards to be applied all comparative broadcast proceedings, i.e., in all proceedings to determine which of several competing applicants for a mutually exclusive broadcast license should be awarded the license. Further request that the Commission set as many days for oral hearings as may be necessary before the full Commission on the standards to be applied in these proceedings.
		Filed by Black Efforts for Soul in Television, Citizens Communications Center		
RM-1552	Sec. 73.202	Billy D. Pirtle, Terrell, Tex.	Jan. 9, 1970	Request amendment of the FM table of assignments by making the following changes:

City	Present	Proposed
Terrell, Tex		300-C
Corsicana, Tex	300-C	228-A
or in lieu thereof: Terrell, Tex		296-A

Or make a channel available to Terrell, Tex., to provide for Kaufman County the opportunity to have a first full time aural service.

Filed by Billy D. Pirtle, Petitioner

RM-1553		Termination of unfair broadcasting excesses (TUBE), Washington, D.C.	Jan. 13, 1970	Request adoption of Standards designed to eliminate deceptive advertising from television.

Filed by Jonathan S. Bowers, Lawrence H. Cohen, Peter M. Nemkov, and Richard Portugal, Members

OFFICE OF THE SECRETARY, PETITIONS FOR RULEMAKING FILED, APRIL 10, 1970

File No.	Rule No.	Petitioner	Date received	Nature of petition
RM-1590	Sec. 97.25(c)	The American Radio Relay League, Inc., Newington, Conn.	Mar. 27, 1970	Request amendment of rules regarding lincense and operating experience requirements for the amateur extra class license to allow examination credit for the former head of an amateur extra class license.
		Filed by Robert M. Booth, Jr., General Counsel		
RM-1591	Sec. 97.9(a)(1)	The American Radio Relay League, Inc., Newington, Conn.	Mar. 27, 1970	Request amendment of rules regarding license and operating experience requirements for the amateur extra class license to reduce experience requirement to 1 year.
		Filed by Robert M. Booth, Jr., General Counsel		
RM-1592	Part 95	Robert J. C. Murray (KLD 0523), Seattle, Wash.	Mar. 30, 1970	Request amendment of part 95, citizens radio section of the rules relating to prohibited uses, operator's licenses and operational emergency signals.
		Filed by Robert J. C. Murray, Petitioner		
RM-1593	Part 97	Joseph Santangelo (W1NXY) Waltham, Mass.	Mar. 30, 1970	Request amendment of volume 6, part 97 of rules and regulations in regard to incentive license frequency allocations.
		Filed by Joseph Santangelo, Petitioner		
RM-1594	Sec. 73.202	Family Stations, Inc., Station KEAR-FM, San Francisco, Calif.	Mar. 30, 1790	Request institution of rule making proceedings looking toward the following change in the FM table of assignments for Carson City, Nev. Channel No. — Present: 234, 247; Proposed: 234, 243
		Filed by L. Adrian Roberts, Attorney		
RM-1595	Sec. 73.202	John Pembroke, Charleston, S.C.	Apr. 7, 1970	Request amendment of the rules so as to assign FM radio channel 300C to Charleston, S.C.
		Filed by John Pembroke, Petitioner		
		PETITION FOR RULEMAKING SUPPLEMENTED[1]		
RM-1553		Termination of unfair Broadcasting Excesses (TUBE) Washington, D.C.	Jan. 13, 1970	Request adoption of Standards designed to eliminate Deceptive Advertising from Television.
		PETITION FOR RULEMAKING AMENDED		
RM-1536	Sec. 97.51	The American Radio Relay League, Incorporated, Newington, Conn.	Apr. 3, 1970	Amended so as to add the following as subsection (3). A specific unassigned call sign may be assigned to the previous holder of a call sign having the same two or three letter suffix in the same or another call sign area. This provision shall not be available to previous holders of two letter call signs in areas outside the continental limits of the United States.
		Filed by Robert M. Booth, Jr., General Counsel		

[1] Supplement to petition for rulemaking filed on Apr. 6, 1970.

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

In the matter of Petition of Action for Childrens Television (ACT) for rule making looking toward the elimination of sponsorship and commercial content in children's programming and the establishment of a weekly fourteen hour quota of children's television programs. Docket No. 19142, RM–1569.

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

Adopted: January 20, 1971; Released: January 26, 1971.

By the Commission: Commissioners Bartley, Robert E. Lee, and Wells dissenting; Commissioner Johnson concurring and issuing a statement.

1. Notice of Inquiry and Notice of Proposed Rule Making in the above-captioned proceeding are hereby given.

2. By a submission received February 5, 1970, Action for Childrens Television (ACT) requested that the Commission adopt certain guidelines for television programming for children. The specific proposals of ACT are:

(a) There shall be no sponsorship and no commercials on children's programs.

(b) No performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs.

(c) Each station shall provide daily programming for children and in no case shall this be less than 14 hours a week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified:

(i) Pre-school: Ages 2–5 7 a.m.–6 p.m. daily; 7 a.m.–6 p.m. weekends.

(ii) Primary: Ages 6–9: 4 p.m.–8 p.m. daily; 8 a.m.–8 p.m. weekends.

(iii) Elementary: Ages 10–12 5 p.m.–9 p.m. daily; 9 a.m.–9 p.m. weekends.

3. By Public Notice (Mimeo No. 44628) of February 12, 1970, the Commission announced that it had accepted the ACT submission as a petition for rule making, and assigned it file number RM–1569. Over 2,000 letters and other short memoranda were filed in support of the ACT proposal. A few letters were filed in opposition. The listed broadcasters, broadcaster associations and advertiser oriented organizations filed comments, which, in the main, opposed the ACT proposals.[1] ACT filed a detailed reply statement together with two statistical exhibits.

4. The letters filed in support of the ACT proposal contained, for the most part, general expressions of support for better programming and less "hard sell" advertising on children's programs. The 20 or so letters opposing the ACT request rest mainly on the contention that parents should exercise proper control over their children's choice of programs.

5. The most lengthy pleadings in opposition to ACT's proposals will be dealt with in summary. The first of the most basic objections presented is that the three requests of ACT are violative of the First Amendment to the Constitution and Section 326 of the Communications Act of 1934, as amended. The second objection is that adoption of the proposals would contravene the long-standing policy whereby the Commission charges the licensee with the duty of making programming decisions that serve the public interest. The next objection is that the proposal is unworkable because of the difficulty of definition and classification of children's programs. The last objection is that prohibition of commercials on children's programs will be self-defeating in that it will dry up the major sources of children's programs because of the problem of funding such programs. Other correlative or subsidiary propositions raised in the pleadings are that the proposals would have a severe inhibiting effect on UHF television and other marginal television stations; that the NAB Code has been and is fully capable of regulation of this problem; and that the Commission should not substitute its judgment for proper parental control over the programming for children.

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[1] The following parties filed statements in response to the Public Notice: Licensees filing statements: American Broadcasting Companies; Broadcast-Plaza Inc.; Broadcasting Services, Inc.; Connecticut Television, Inc., et al.; Doubleday Broadcasting Company; The Houston Post Company; Hubbard Broadcasting, Inc., et al.; Kern County Broadcasting Co.; Meredith Corporation; National Broadcasting Company, Inc.; Palmer Broadcasting Company; Storer Broadcasting Company; Triangle Broadcasting Corporation; Van Curler Broadcasting Corporation; Westinghouse Broadcasting Company, Inc.; WGN Continental Broadcasting Company; WKY Television System, Inc., et al.; WTVY, Inc. *Licensees filing Reply Statements:* Bonneville International Corporation; Columbia Broadcasting System, Inc. *Broadcaster Associations filing Statements:* National Association of Broadcasters; North Dakota Association of Broadcasters; Virginia Association of Broadcasters. *Other Statements:* Toy Manufacturers of America, Inc., Cognivision, Inc.; Ecumedia; American Association of Advertising Agencies; National Confectioners Association of the United States, Inc., et al.

6. In support of their First Amendment and Section 326 contentions, the parties so arguing cite a number of well-known cases, including *U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); and *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Also cited, in support of the arguments concerning the limitations on the Commission's role in the program selection process, are past Commission pronouncements such as the *1960 Program Policy Statement*[2] and *Butte Broadcasting Company, Inc.* 22 F.C.C.2d 7 (1970).

7. We recognize the importance and significance of these pronouncements and the concepts expressed in them. It may be that, ultimately, we will conclude that they substantially limit otherwise appropriate Commission action in this area. But it is also apparent that there are high public interest considerations involved in the use of television, perhaps the most powerful communications medium ever devised, in relation to a large and important segment of the audience, the nation's children. The importance of this portion of the audience, and the character of material reaching it, are particularly great because its ideas and concepts are largely not yet crystallized and are therefore open to suggestion, and also because its members do not yet have the experience and judgment always to distinguish the real from the fanciful.

8. The Commission does not have in its files sufficient data on children's TV programming upon which we can evaluate the situation to determine whether these public interest considerations in fact amount to a substantial public interest question as to whether the present use of the medium in this respect is as satisfactory as should be expected. Thus, we know that on many stations programming designed for children is available in substantial amount, but occasionally there have been complaints that in particular cases it is not. We also are aware that on some such programs there is vigorous selling of products designed for children's use. In order to arrive at an informed determination in this area, we need the data which this inquiry proceeding is designed to elicit through the questions set forth below. This information will give us an idea of the scope of the problem if in fact one exists, and of how it may best be approached. We emphasize that we have not reached conclusions as to the matters referred to in paragraphs 5 and 6 above. In light of the above considerations, our authority to conduct this Inquiry proceeding, pursuant to Section 403 of the Act, is not seriously open to challenge.[3]

9. *Definition of "children's programming"*. As noted above, one of the arguments against the ACT proposal is the difficulty of defining "children's programs". This is, indeed, not an easy matter, and we are not proposing, at this time, any final definition for comment. The matter of a suitable definition is among the general questions set forth in paragraph 11, below. However, it is also necessary to set forth some general guidelines for stations and others to use in presenting their material herein, so that there can be some uniformity and reasonably accurate evaluation. The programs chiefly involved herein are those which are *primarily designed for* children of the ages mention by ACT and referred to above. However, stations and other parties are also invited to list and comment on other programs which are of substantial interest to children even though not primarily designed for them.

10. The Commission is inviting comments and data on a number of questions. With respect to specific data requested, the Commission is setting up a composite week so that a representative sample may be secured, as well as to give specific guidelines and to somewhat alleviate the burden on the television networks and television station licensees. The Commission hopes and urges that all television networks and station licensees will furnish the specific program data requested for the composite week. The composite week for the specific data will be:

Sunday, September 13, 1970.

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[2] *Report and Policy Statement re: Commission en Banc Programming Inquiry* (Docket 12782), 20 R.R. 1901, FCC 60-970 (1960).

[3] It will be appropriate to re-examine the First Amendment question at such time as we contemplate definitive action. This Inquiry and the information elicited through it could be pertinent, among other things, to the Commission's duty, under Section 4(i) of the Act, to transmit to Congress significant data concerning the use of radio, and also legislative recommendations. It is also conceivable that the extent of the problem would be pertinent to the question of whether the First Amendment and Section 326 do apply to limit the Commission's role.

Monday, February 16, 1970.
Tuesday, June 23, 1970.
Wednesday, April 8, 1970.
Thursday, October 2, 1969.
Friday, August 14, 1970.
Saturday, December 6. 1969.

The listing of questions should not be construed as limiting in any way the area of comment.

11. (a) Data and comments are invited on the following questions:

1. What children's programs[4] were broadcast over your television network or television station? (Give name, date, time and length.) The listing of programs for the composite week should state whether the program was network produced, a syndicated production, locally produced or from other sources. The listing should also classify the programs as to being either entertainment or educational. It should also state whether it is an original showing or a re-run of the program. A short descriptive summary of each program would greatly assist the Commission in analyzing the data.

2. For each program listed above, list the sponsor or sponsors, or, if it were "participating", please so indicate). State with particularity the nature of the sponsorship or commercial participation, *i.e.*, the products, stores or services advertised, and the total commercial time on each program.

3. Give the same information as in 2, above, for all commercial announcements adjacent to children's programs, *i.e.*, all those presented after the end of the previous program and before the opening of the next program.

4. For each program listed above, state, if possible, whether the performers on the show conducted or participated in the delivery of commercial copy on the program; and whether there were any other oral reference to, or visual exposure of, a product by brand name.

5. For each program listed, state which age group, if any, it was designed for or of particular interest to.

6. Set forth your definition of "children's programs" used in the compilation of the data submitted pursuant to this Notice.

(b) General questions.

1. What types of children's programs not now available do parties believe commercial TV stations should present?

2. To what extent, generally and with respect to particular programs and types of programs, does "children's programming" have benefits to children beyond the fact that it holds their interest and attention and thus removes the need for other activity or parental attention?

3. What, generally speaking, is a definition of "children's programming" which could serve for the Commission's use in this connection? To what extent do children, particularly in the higher age groups mentioned by ACT, view and benefit from general TV programming?

4. What restriction on commercials short of prohibition—*e.g.*, on types of products or services, what can be said, number, divorcement from program content, etc.—would be desirable? Comments should take into account in this connection the provisions of the NAB Television Code and its guidelines.

5. To what extent should any restriction on commercial messages in children's programs also apply to such messages adjacent to children's programs?

12. We have also labelled this as a Notice of Proposed Rule Making, although as shown by the above discussion its primary focus is as an inquiry. Our reason for so designating the proceeding is two-fold. First, in the foregoing discussion, we have given notice of the subject matter and the issues, as required by the Administrative Procedure Act. Thus, the subject matter is children's programming on television, and the issues are the appropriate definition of children's programming; the nature of the commercials associated with such programming (*e.g.*, no commercials or a limited number of commercials; no commercials by performers; divorcement from content of show, and the appropriateness and legality of the specification of the amount of time to be devoted to various categories of children's programming). Second, while

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[4] See paragraph 9, above. The information mentioned in these questions particularly relates to programs designed primarily for children, of the age groups mentioned herein. Parties are also invited to give as much information as is feasible with respect to other programs which are of substantial interest to, though not primarily designed for, children.

we believe that the data to be collected from this inquiry is the most appropriate first step in this area and have reached no conclusion, tentative or final, on the desirability of a rule, it may be that on the basis of the data and the comments, a clear basis for a rule will emerge. If so, we wish to be in a position to take definitive action. In sum, by proceeding in this fashion, we insure the achievement of the prerequisite step—the collection of an adequate data base—and at the same time maintain maximum flexibility to take such action as the public interest may call for (*e.g.*, further notice of proposed rule making; a policy statement).

13. Authority for the institution of this inquiry proceeding is found in Section 403 of the Communications Act of 1934, as amended. Authority for the institution of the rule making proceeding is contained in Sections 4(i) and 303, 307(d) and 309 of the Communications Act of 1934, as amended.

14. Pursuant to applicable procedures set forth in Section 1.51 and 1.419 of the Commission's Rules, an original and 14 copies of all material requested by this proceeding should be submitted on or before May 3, 1971, and reply comments on or before June 1, 1971. All relevant material will be considered by the Commission. In reaching its decision, if any, in this proceeding, the Commission may also take into account other relevant data before it, in addition to the specific data invited by this Notice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

ACTION FOR CHILDREN'S TELEVISION

[Petition for Rule Making (RM–1569) by Action for Children's Television (ACT)]

Concurring Opinion of Commissioner Nicholas Johnson.

"We brag in this country that we are concerned with our children. We are, really, not."—Senator Abraham Ribicoff.[1]

By public notice of February 12, 1970—over ten months ago—this Commission announced that it had accepted, as a petition for rule making, a submission by Action for Children's Television urging the adoption of the following rules to govern all programming for children's television:

(a) There shall be no sponsorship and no commercials on children's programs.

(b) No performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs.

(c) Each station shall provide daily programming for children and in no case shall this be less than 14 hours a week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified:

(i) Pre-school: Ages 2–5, 7 a.m.–6 p.m. daily; 7 a.m.–6 p.m. weekends.

(ii) Primary: Ages 6–9, 4 p.m.–8 p.m. daily; 8 a.m.–8 p.m. weekends.

(iii) Elementary: Ages 10–12, 5 p.m.–9 p.m. daily; 9 a.m.–9 p.m. weekends.

In response to the notice over 5,000 letters and other short memoranda were filed in support of the ACT proposal. Only a few letters were filed in opposition. Members of the broadcast industry and product and advertising associations filed 23 substantial pleadings in opposition. ACT, through counsel, filed a substantial reply pleading together with two lengthy exhibits prepared by research organizations.

Now, at long last, the Commission acts in the form of a "Notice of Inquiry *and Notice of Proposed Rule Making*." (Emphasis added.) But there are no rules proposed at all.

In reality, this is simply another case of "Due Processing them to death." It is Kafkaesque that, aften ten months, after 15 volumes of comments, this Commission has to tell concerned parents that ". . . we . . . have reached no conclusion, tentative or final, on the desirability of a rule. . . ."

I believe that we should at the very least be ready by now to adopt specific proposals—those proposed by ACT or whatever our own ingenuity could de-

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[1] *Cong. Rec.*, Dec. 9, 1970, S19728 (daily ed.).

vise—as a Proposed Rule Making. But that is not to be, and children will be barraged with potentially harmful propaganda for the next months and even years.

As William F. Fore has said, ". . . Saturday morning cartoons may not incite our Nation's children to violence and rioting in the streets, but they may put the best parts of their minds to sleep. Which is worse?" Joseph Seldin has said: "Manipulation of children's minds in the fields of religion or politics would touch off a parental storm of protest and a rash of Congressional investigations. But in the world of commerce children are fair game and legitimate prey."

Chairman Burch has taken a leading role in attempts to bring Big Broadcasting closer to a realization of its awesome responsibility for one of our Nation's most precious resources: our children. He invited the ACT members to an almost unprecedented personal presentation by private citizens of their concerns to the Commissioners. He supported putting their proposal out for comment. He has delivered public speeches to broadcasters and written articles on the subject. He has met privately with network executives.

It is especially tragic and regrettable, therefore, that this commendable public leadership cannot see a flowering in something more substantial than this action. Of course, we cannot *know* now what rules we would ultimately adopt; but then we seldom do in proposed rule makings (most of which never become final, and certainly not in their proposed form.) And of course it is desirable that the proceeding at least be denominated as a Notice of Proposed Rule Making. But the upshot is that the Commission today should have been able to put forward the terms of *some* rule, that it has not done so, that ultimate relief is therefore delayed, and that the continued exploitation of our children for commercial purposes will continue.

[From the FCC News, May 8, 1970]

FCC Procedural Review Committee Submits Proposals for Comment

The FCC's Procedural Review Committee, appointed in January to study possible methods for improving Commission legal procedures, has submitted four proposals for the reactions of interested groups and individuals. The Committee said it had not reached any final conclusions on the proposals nor have they been given to the Commission for consideration.

The proposals deal with the simplification or elimination of comparative hearings, assigning counsel in cases of financial need, establishing an office of public counsel in the Broadcast Bureau and other Bureaus, and publication of a booklet on Commission procedure.

In the proposal to "Simplify or Eliminate Comparative Hearings" the Committee suggests methods to reduce in number, or eliminate comparative hearing proposals including establishment of a system of priorities to grade applicants. It suggests that applicants in the first priority might be made up of local residents who have no media interests, and the grant made after a comparative hearing, or to the first applicant, or even by lot. The Committee said one of the major points to be resolved in this proposal is whether an amendment to the Communications Act is necessary before evidentiary comparative hearings could be eliminated.

Since it is a common practice in court proceedings to assign free counsel to indigent defendants in criminal cases, the Committee is asking for comments on the proposal to have the Commission appoint counsel from the communications bar to represent various parties which cannot afford the cost of legal advice when faced with the threat of Commission sanctions.

Another proposal would establish an office of public counsel in the Broadcast Bureau, and possibly in other Bureaus of the Commission. At the present time the various divisions and offices of the Broadcast Bureau help individuals and prospective licensees with the preparation of applications and in the proper procedure in filing pleadings and complaints. An office of public counsel would centralize these functions and act as a clearing house for information in such matters.

The fourth proposal would have the Commission publish a "Booklet on Commission Procedure" which would describe in simple terms how interested groups or individuals may exercise their rights under Commission rules and policy. The booklet would also explain procedures dealing with application filings, the fairness doctrine, equal time requests, complaints, and other subjects relative to Commission operations.

The Committee asked that interested parties and individuals who wish to comment on the proposals do so by May 18, 1970.

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4. Letter from Commissioner Johnson, FCC, to Senator Edward M. Kennedy

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 14, 1971.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: I am pleased to reply to your letter of April 5 to Chairman Burch requesting observations from each of the Commissioners on the testimony of two law student groups, TUBE (Terminating Unfair Broadcasting Excesses) and STATIC (Students Taskforce Against Telecommunication Information Concealment), before your Subcommittee on Administrative Practice and Procedure. I have waited until now to reply in order to afford Chairman Burch the opportunity to decide whether to bring this matter before the whole Commission. I have recently learned of his decision to reply to you in his individual capacity. That reply describes a pattern of procedural delay of such magnitude that I feel compelled to comment.

In January 1970, TUBE filed a Petition for Rulemaking with the FCC seeking a rule proscribing deceptive advertising on television. TUBE cited specific examples of deceptive advertising, including deliberate lying to the public, and described some of the harm which such advertising causes, including, for example, financial loss (falling most severely on the poor), and harm to one's health (toothpastes which remove enamel from teeth, drug products which will not do what they promise but may instead have harmful "side effects"). TUBE also complained of misleading claims directed at children, who are particularly vulnerable. Now, after some 15 months, this Commission has failed to take any public action on this petition other than the issuance of a public notice briefly describing the petition and assigning it a file number. Yet, as the TUBE representative testified before your Subcommittee:

In the meantime, the Commission did have time to warn broadcasters that they had to be aware of the meaning of all of the words used in rock music played over their stations. Why, we ask, are broadcasters who must carefully scrutinize the lyrics of all popular songs immune from any obligation to protect their viewers from deceptive ads which bilk them of millions of dollars and frequently constitute a health, safety, and/or environmental threat?

I find it difficult to answer that question within the framework of the FCC's mandate to regulate broadcasting in the public interest. *Broadcasting* magazine has reported that the proposal that the FTC and the FCC conduct joint hearings on television programming aimed at children, with emphasis on commercials (proposed by FTC Chairman Kirkpatrick and considered a possible means of responding to TUBE's demands) "appears to be dying from lack of attention." (*Broadcasting*, March 1, 1971, p. 7.) The FCC has traditionally booted most of the responsibility for radio and television commercials to the FTC. One of the consequences has been the occasional failure of both agencies adequately to address very significant policy questions of broadcast commercialism.

I am frankly most disturbed by Chairman Burch's statement in his letter to you that "I cannot assure TUBE that final action of its petition is imminent. . . ." This refusal to address the merits of a petition by a group of citizens duly filed with this agency constitutes, in my view, a *prima facie* case of a denial of due process, because, as you know, it is nearly impossible to get a court to hear a case such as this before the agency involved acts; thus, by "sitting on" this petition, the FCC is sitting on petitioners' rights.

With respect to the testimony of the representative of STATIC, I have little to add except my agreement with the following caveat:

[U]nless the FCC begins to act as a guardian of the public airwaves, rather than an apologist for the broadcasters, even announcements such as STATIC has proposed will do no more than raise additional false hopes among [consumers], and give them a dead-end address to which they can mail their complaints.

I believe your Subcommittee would provide a valuable service by continuing to scrutinize the Commission's administrative procedures in dealing with public interest groups.

You can be sure, when this matter does come before the Commission, that I will make every effort to encourage its speedy resolution. Should our consideration at that time reveal explanation not now known to me I will write you again.

Sincerely,

NICHOLAS JOHNSON, *Commissioner.*

Mr. BANZHAF. Senator, the next group that I have the privilege to introduce today goes under the acronym of FLITE, and it stands for "future lawyers investigating transportation employment." I think this group is particularly significant in terms of your hearing today because they likewise have had a very limited success and, in fact, the success which they have had has been despite, rather than because of, the agency before which they are operating, which is the CAB. By and large they have been met with nothing but rejection and frustration, and yet I think the idea they are seeking to propose is a very, very important and significant one; one which might even go far beyond the confines of this hearing today and might, in fact, serve as a possible subject for a later hearing. The idea is simply that of using this vast regulatory apparatus which regulates in one way or another a large part of American industry, and using this to bridge this ever-widening gap between black and white. In short the idea is to force the Federal regulatory agencies, as part of their job, and as part of their regular scrutiny of a large number of applications, or licenses, mergers, acquisitions, route changes, fare increases, and rate increases and so on, to ascertain in at least some minimal manner that the person seeking the license is an equal opportunity employer and complies with fair hiring and promotion rules and regulations.

Speaking for FLITE is Mr. Larry Hannaway, on my right. Next to him is Mr. Gene Mechanic, and on the other end is Mr. Mark Weinstein. Mr. Blair and Mr. Hemmons could not be with us this morning.

STATEMENT OF LARRY HANNAWAY, CHAIRMAN, FUTURE LAWYERS INVESTIGATING TRANSPORTATION EMPLOYMENT (FLITE); ACCOMPANIED BY GENE MECHANIC, AND MARK WEINSTEIN

Mr. HANNAWAY. Our group is a little different than the other groups in that we are concerned not too much with consumerism and its ramifications as we are with the broad problem of racial equality in this country, and we feel that the independent regulatory agencies could do much to effectuate a policy of racial equality within their own agencies in regard to their regulatees. This is just as a preface to my statement of our group.

American Airlines, a government contractor and equal opportunity employer, has 4,685 professional employees including pilots and in-

structors. Despite the large number of qualified black pilots who took the Government at its word and learned this valuable skill in the Armed Forces, less than one-half of one percent of American professional employees are Negro. Of its officials and managers, not quite 3 percent are members of any minority group, and this number is lower, not higher, than during the prior quarter, and lower, not higher, than the corresponding quarter for the past year. When it comes to service workers including skycaps, and building cleaners, however, I am proud to tell you that the record of American is very unbiased. In fact, 75 percent of the personnel in this area are members of minority groups, and 72 percent are black.

Senator KENNEDY. Is this pretty typical of all of the other airlines as well?

Mr. HANNAWAY. Absolutely.

Senator KENNEDY. You are not just trying to separate American?

Mr. HANNAWAY. No, I am not.

Senator KENNEDY. You started off with American, but your general conclusion from the data that you were able to gather and from your observations is that this is pretty typical for other airlines?

Mr. HANNAWAY. Absolutely.

Senator KENNEDY. Thank you.

Mr. HANNAWAY. Ordinarily, this material would not come to light nor would it be considered by the CAB. However, American Airlines has asked the CAB to approve a merger with Western Airlines. FLITE felt that it was high time the regulatory agencies began doing some regulating in this vital area.

It is no secret that the goal of equal opportunities for all American citizens, regardless of race, has not been achieved and that it is a major part of the so-called civil rights problem which is tearing this Nation apart. A variety of approaches have proven inadequate to the magnitude of the problem.

Senator KENNEDY. What is the authority for the regulatory agencies to require additional minority employment? What is the legal authority for such action?

Mr. HANNAWAY. Well, what you are asking me is what the statutory mandate would be that would enable them to effectuate the policy?

Senator KENNEDY. Right.

Mr. HANNAWAY. There are certain criteria that the Civil Aeronautics Board takes into consideration before it either awards a group or approves a merger. These come under public interest considerations. At this stage they have taken into consideration labor relations, they take into consideration environmental impact of all of this group, and all this group is saying is that they should take into consideration the hiring practices of the airlines rather than viewing their function as simply transporting airplanes around the country, and it appears to be such a problem that we have been very upset that nothing has been done before we went up there.

Mr. BANZHAF. As a slightly broader answer to your question, Senator, I think that most of our major Federal regulatory agencies at some place in their statutes are required to consider the broad idea of public interest in approving or in passing on all of these mergers

and licensing and so on, I think it is also very clear in terms of the problems this country is facing, our legislative history and a series of executive orders, that "public interest" today clearly includes equal opportunities for all Americans, regardless of color.

Senator KENNEDY. What about the other agencies? Have you looked into that?

Mr. HANNAWAY. Yes. What I just said to you was that the CAB does not, as a part of their inquiry, ask or determine whether a company has complied with national laws and public policy with respect to equality in hiring and promotion. The Federal Communications Commission has at least taken the first halting step in that direction. You may recall in the Washington Post a while ago there was a story about the FCC investigating A.T.&T. as to hiring practices. This is precisely the kind of thing that we would like the CAB to be doing in regard to the airlines, to answer your inquiry.

By statute, the CAB is required to approve a large number of mergers, route allocations and changes, and other matters before they can become effective. If one considers all of the airlines, and all of the other companies with which they are corporatively related, it appears that a substantial segment of American enterprise must regularly submit itself to examination by the CAB. Furthermore, because many of the proposals to the CAB are worth millions of dollars to the companies and often require approval within a short time period, the CAB would have considerable leverage in making the airline industry good citizens.

FLITE has sought to persuade the CAB to exercise its power in this area through two approaches. In the first, FLITE filed a petition for rulemaking which called upon the CAB to adopt a rule under which they would consider the hiring and promotion practices of applicants in passing upon applications for routes and mergers. Under this proposal the applicants would be required to submit information relevant to the inquiry and the Board or other interested parties could cross-examine or submit additional contrary information. This rule has received the support of Senators Hart and Javits, as well as the black caucus of the House of Representatives and formal support of the NAACP.

Because petitions for rulemaking have a way of dragging on intermidably, FLITE also sought to intervene in a pending proceeding involving an application for CAB approval of a proposed merger between American and Western Airlines. That is where we get the statistics that I mentioned before, Senator.

FLITE believed that as the CAB had to consider the public interest before it makes a decision on the merger, it should consider the hiring practices of both of these airlines as part of the public interest consideration. The CAB, however, has denied us intervention, apparently because we have no individual economic interest. However, both American and Western Airlines agreed to submit statistical information as to the races of their employees. It is important to emphasize that this was done at the request of FLITE and not at the urging of the CAB. FLITE is appealing this decision denying them intervention. Regardless of the outcome of the appeal, FLITE intends to participate as interested parties in the hearing on

the merger which will take place shortly. Although this provides for only limited participation in the merger proceedings, it is the only vehicle we have to assert our case. If we have done nothing else, we have opened the door to further challenges by groups which can show a greater direct economic interest.

FLITE is extremely disappointed in the disinterest of the Civil Aeronautics Board in effectuating the expressed intention of the Nation in equal opportunity employment.

FLITE feels that the independent regulatory agencies should regulate to the limit of their statutory mandate, particularly with respect to such a serious problem which has persisted far too long. Unfortunately, it often seems that the regulatees are regulating the agency. FLITE believes that industries like the airlines, because of the many special advantages they receive, must also shoulder their share of responsibilities. They are being asked to do no more than the law requires of all employers; to be an equal opportunity employer. Yet, unless American Airlines can somehow explain its employment statistics, it seems hard to see how they have been an equal opportunity employer; and without this kind of affirmative evidence, the CAB should hold up a proposed merger until they make a good faith effort to catch up. In the meantime we hope that other efforts will be made, by groups like ours or through legislation, to require the major regulatory agencies to affirmatively regulate to effectuate our Nation's policy of equal opportunity employment.

Mr. MECHANIC. Senator, I would just like to conclude that opening statement just to say that our group attempted to deal with an issue that along with the war in Vietnam we consider one of the most basic causes of the illness which is permeating our Nation; that is, bigotry and prejudice. We feel that it is the duty of the policymakers of the United States to establish enforceable programs to alter the presently unfair distribution of economic resources. There lies the heart of many of our problems. All factions of Federal bureaucracy, especially regulatory agencies, must stop being the pawns of corporate material interests and begin to consider the interests of the public.

Senator KENNEDY. You are satisfied that the agency has power to get the various airlines to take these steps, or do you want them just to set it up as a goal? I mean, do you want them just to make a policy statement that they are interested in nondiscrimination?

Mr. HANNAWAY. We are sure they can take the steps. They are statutorily able. They would not be going outside their mandate to take these steps.

Senator KENNEDY. Last year the Federal Power Commission ruled that it did not have the authority to adopt equal employment requirements for the industry it regulates.

Mr. HANNAWAY. Well, I will tell you why I think that they have——

Senator KENNEDY. Are you familiar with that? I understand that arose in a California decision, and if that is the situation with regard to the FPC, then why does it not apply to the CAB?

Mr. HANNAWAY. Senator Javits received a letter from the CAB in response to his putting pressure on the CAB to adopt our rule. They said in that letter that they were in the process of adopting a policy

of inspecting the airlines as to their hiring practices, so evidently they agree with us to the extent that it is statutorily possible.

Senator KENNEDY. Well, if they say they are reviewing it, that does not mean much to me. Just reviewing the statistics in terms of airlines might be of some interest, but I do not see how it could achieve anything very worthwhile.

Mr. HANNAWAY. Well, I can just say in answer to your question, environmental pollution 3 years ago was considered by the Civil Aeronautics Board to be impossible to reach. The CAB thought it would be impossible to regulate the airlines as to environmental pollution. As it is today, because of a case, because of a group like ours, something like ours, a citizens group, they now do examine the environmental impact of the airlines. We view our cause as simply an extension of that. I think Mark wants to say something.

Mr. WEINSTEIN. I draw a distinction between the Federal Power Commission, and their statutory mandate may be different from the Board itself.

Senator KENNEDY. That is what I am interested in.

Mr. WEINSTEIN. We are going directly on the basis of what the Board's mandate is under the Federal Aviation Act, and we think it is inclusive under that mandate.

Senator KENNEDY. Are you looking at this in terms of other agencies as well?

Mr. WEINSTEIN. One in particular, being the Federal Communications Commission, is under a similar statutory mandate, and they have undertaken an affirmative program in this field. Therefore, we would like the Civil Aeronautics Board to do the same.

Mr. BANZHAF. Senator, I could add a footnote here. We have tried to consider the whole problem of which Federal regulatory agencies might be able to act in this area. It is very clear that the Federal Communications Commission can because it has reacted in response to petitions for rulemaking filed by the United Church of Christ, and as was previously mentioned, have undertaken an examination of the problem with respect to the ITT. There are probably some agencies where they cannot. We do not really have the resources and have not been able to examine all of the agencies. We picked the CAB because it looked like the second most likely one, and also, quite frankly, where citizen intervenors might have a very effective pressure point on the problem.

Senator KENNEDY. I would think they would be some of the largest employers, too.

Mr. BANZHAF. Right. What we are hoping is that this idea may be spread to other agencies and that additional groups with the time and the resources, particularly those concerned with black and urban problems, may be encouraged by this and make similar investigations and similar petitions before our other Federal regulatory agencies; and, in addition, in many cases State and perhaps even local regulatory agencies.

Mr. HANNAWAY. Going back to your question, we have found that the Civil Aeronautics Board could do one of two things. It could give them one of two options. The second option that we have given them is in regard to the merger of American and Western.

Now, they can talk in terms of the statutory mandate in regard to the public interest and say that it does not include an examination of hiring practices of the airlines. They could say that, but in regard to our rulemaking petition, there is no problem there, absolutely, as long as we get, if we can get the proper support. If we can get the proper support I think that they would adopt that rule. That is the way we feel.

Mr. MECHANIC. I just wanted to say that as far as enforcing it, just like you have the interest on each side, and in case of the environment the Department of Transportation goes down to the CAB and they sort of oversee the manner in which the CAB handles environmental issues, and you could have, I do not know if you would want to use the present agency or something, but have the same thing as far as equal opportunities for employment, or even the EEOC protecting those issues and interests because they have expertise, so they could determine whether the airline is discriminating or not and then the CAB can take action based on their findings.

Mr. HANNAWAY. I would also like to mention that we went to the EEOC trying to get statistics, and it is all perfectly available, they know this, these small, if you will, statistics that American Airlines has, and that we feel is true through the whole industry. The EEOC knows this, and it would be a far simpler matter for them than certainly before the Civil Aeronautics Board or than it is for the Transportation Department to absorb environmental problems.

Senator KENNEDY. What is the record of CAB itself in terms of minority employment; do you know?

Mr. HANNAWAY. You mean employment at the agency itself?

Senator KENNEDY. Yes. I am wondering if this helps to explain what generally appears to be an indifferent attitude by an agency?

Mr. HANNAWAY. I think they are covered by something, but I do not recall. I recall our looking into that.

Mr. MECHANIC. It does seem to me that they are. I hate to use conservative and liberal terms and so forth, but it seems to me that their reaction to us was perhaps a little bit worse than even most other agencies, and I have only been to a few others, but the CAB is still—maybe it is their location, which is way up on Connecticut Avenue instead of being down here somewhere, but I do not think they are not even up on Executive Order 11248, which I imagine you are talking about, as much as some of the other agencies are.

Mr. HANNAWAY. They view their function, Senator, simply as transporting airplanes around the country, and they do not view their statutory mandate in a broad way. To make them view it in a broad way is something that appears to be really the problem, considering the immense amount of power and wealth and employment in the airlines industry, and the fact that the Civil Aeronautics Board is sort of a clubby atmosphere of airlines in which they simply are concerned with whether X airline should fly from Phoenix to such-and-such or Y airlines should do it, and it seems to me to be a very narrow view of a statute, where if they had a social conscience could really effectuate the Nation's policy of racial justice.

Senator KENNEDY. Well, I suppose you are just trying to extend the reasoning of the order which requires the employment of mi-

nority members on various governmental contracting jobs. The Congress of the United States can certainly tell people in the public accommodations business, who run these small inns, that they have got to permit blacks the opportunity to stay in a rooming house or a hotel. And I suppose what you are asking is whether one of the instruments of the Congress—which the regulatory agencies supposedly are—should apply the principles of equal employment to tens of thousands of people who work for corporations over which the Congress has exercised regulatory control. You are just trying to extend the reasoning and spirit of other steps which have been taken by the Congress in recent years. I am not sure that I understand completely the direct statutory authority for that. It varies, evidently, with different agencies. I think that it is a very worthwhile goal, and one that ought to be encouraged, and I would hope that if you find places where that authority does not exist then you should recommend to us legislative changes that ought to be made to remedy that situation.

Mr. BANZHAF. Senator, I might add that the FLITE petition to the CAB does contain a rather extensive analysis and discussion of the national racial problem and many steps that the executive and legislative branches have taken to correct them, and an analysis of the CAB statute and some of the cases decided which indicate, at least to us, that they do have that authority. We will, of course, be submitting this for the record.

Senator KENNEDY. Of course, as I understand, to determine whether they do have the power, the CAB has to be willing to issue the regulations in the first instance. If they are unwilling to do that, then it appears very difficult.

Mr. BANZHAF. There are a number of recent cases though where an agency has refused to act believing that it had no statutory authority, and the courts have permitted review, and where they found that the agency did have authority it remanded it back to the agency to consider, now that they know that they have the power, whether or not they will do it.

Mr. HANNAWAY. We petitioned them to adopt a rule that is a very broad rule and it is simply that the Civil Aeronautics Board—well, you have a copy of it, I believe, and it is a very broad rule, and what we hoped for was a redefinition by the courts and people like say a hypothetical black pilots association coming up and challenging a merger or a route award on the basis of this board rule, and having it redefined later. The rule is extremely broad, and that is why we hoped so much for its adoption, and we do think it will be adopted.

In all fairness to the Civil Aeronautics Board, we have not received that much hostility on the ruling.

Senator KENNEDY. It certainly appeared to be more satisfactory to have rulemaking rather than intervention in individual cases.

Mr. HANNAWAY. It is much easier, Senator. That is right, it is easier.

Senator KENNEDY. This subcommittee has looked into the Office of Contract Compliance on various governmental contracts, for example, in the textile cases, and in contracts that were let by the Defense Department in which companies did not have adequate affirmative

action plans for the development of minority employment. We were getting into the Government responsibilities in these areas. We have made some progress I think, but it certainly seems that your extending the same reasoning into other areas of equal employment opportunity is a very worthwhile effort.

Mr. HANNAWAY. Thank you.

Senator KENNEDY. Thank you, gentlemen.

(Material relating to FLITE follows:)

C. EXHIBITS RELATING TO TESTIMONY OF F.L.I.T.E. (FUTURE LAWYERS INVESTIGATING TRANSPORTATION EMPLOYMENT)

1. F.L.I.T.E. Petition for Rule Making Filed with C.A.B.
2. F.L.I.T.E. Petition to Intervene in Proceedings to Consider Proposed Merger of American and Western Airlines.
3. F.L.I.T.E. Brief in Support of Petition to Intervene.
4. C.A.B. Order Denying F.L.I.T.E. Petition to Intervene.
5. Information Relating to Employment of Minorities Filed with F.A.A. by Airlines in Response to Request by F.L.I.T.E.
6. Letter from Senator Proxmire to C.A.B. in Support of F.L.I.T.E. Petition.
7. Letter from N.A.A.C.P. re F.L.I.T.E. Petition
8. Letter from C.A.B. to Senator Javits re F.L.I.T.E. Petition.
9. Letter from Chairman, C.A.B., to Senator Kennedy.

1. F.L.I.T.E. Petition for Rule Making Filed with C.A.B.

Before the Civil Aeronautics Board, Washington, D.C.

IN THE MATTER OF THE PETITION FOR A NEW RULE OF THE BOARD'S ECONOMIC REGULATIONS

PETITION OF FUTURE LAWYERS INVESTIGATING TRANSPORTATION EMPLOYMENT FOR RULE MAKING

F.L.I.T.E.,
National Law Center, George Washington University,
820 20th Street, NW., Washington, D.C.

DECEMBER 18, 1970

I. INTRODUCTION

Now come five George Washington University law students, under the name of Future Lawyers Investigating Transportation Employment (FLITE), and petition the C.A.B. to adopt a rule whereby in the segment awarding or merger procedure, the Civil Aeronautics Board must investigate the hiring practices of all applicants to make sure that such practices are consistent with the Nation's goal of racial equality.

II. NATIONAL TRENDS IN RACIAL EQUALITY

The national trend towards racial equality is prevalent in all aspects of society. The passage of the Civil Rights Act of 1964 demonstrated the Congressional and Executive desire to eliminate minority discrimination in numerous areas, including employment practices.

Title VII of the Act in part provides that:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportuni-

ties or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The preceding part of the Civil Rights Act of 1964 had a specific purpose—to effectuate a national policy of nondiscrimination in hiring employees.

The United States Government, as the representative of the various national interests, has attempted to instill this policy on the population by instituting a doctrine of equal employment opportunity, both within its own ranks and within the labor force which has direct financial connections with it.

This is illustrated by President Nixon's memorandum to heads of departments and agencies on March 28, 1969:

"The concept of nondiscrimination is inherent in the Civil Service Act of 1883 which calls for a federal service based on merit and fitness alone. 'Nondiscrimination' was broadened by President Eisenhower to 'equal employment opportunity' with his issuance of Executive Order 10590 in 1955. In the years that followed, other Executive Orders designed to insure equal opportunity in the employment, development, advancement and treatment of employees of the Federal Government have been issued. This series of Presidential directives reflects continuing support for this program at the highest levels of government . . .

"Meanwhile I want every reasonable effort made to insure that the Federal Government is an equal opportunity employer. I further urge you, if you have not already done so, to communicate your personal support for this program to all officials and employees of your agency."

The Federal Government, therefore, has officially become not merely a "nondiscriminating" employer, but an "equal opportunity" employer. This position illuminates the realization that the Nation's interests can no longer exclude a large segment of citizens merely because of their race, sex, or national origin. To do so would amount to not only morally reprehensible actions, but to social and economic catastrophe. Thus, the government has issued guidelines and regulations to establish equal opportunity employment within its own departments and agencies in anticipation of the overall societal effort to follow suit.

President Johnson attempted to be more explicit in this area than any previous President when he issued the following order requiring:

". . . head of each executive department and agency to establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment . . ." and to achieve "the promotion and insuring of equal opportunity for all persons, without regard to race, creed, color, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts." Executive Order No. 11,246, 3 C.F.R. 339 (1965), "as amended"; Executive Order No. 11,375, 3 C.F.R. 320 (1967).

The policy enunciated by President Johnson has been officially continued by President Nixon.

"It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

"As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government . . .

"The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1 . . ." Executive Order No. 11,478, 34 Fed. Reg. 12985 (1969).

The judicial system has rejected discriminatory policies, as demonstrated by the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954), and in *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954) where they said "that classification based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

The executive, legislative and judicial branches of American government have all deemed the issue of nondiscrimination as one of the most important issues

today. The government has attempted to incorporate this policy throughout its structure.

"Each agency shall be primarily responsible for obtaining compliance with the equal opportunity clause, the order, the regulations in this part, and orders issued pursuant thereto." 41 C.F.R., Chapter 60–1.6(a).

Pursuant to the responsibility placed upon it by executive orders, the Civil Service Commission, in addition to issuing regulations covering compliance procedures, has issued general policy statements and regulations designed to implement the orders. 5 C.F.R. Part 713 (1969) "as amended" 34 Fed. Reg. 9795, 11537, 13656, 14023, 15595 (1969). Agencies are required to send "Action Plans" to the Civil Service Commission outlining how they intend to insure equal employment opportunity. The Commission states that "Agency plans of action must be specific and realistic program plans, including short- and long-range objectives, designed to achieve definite progress in equal opportunity employment at all agency levels." *Federal Personnel Manual*, Ch. 713, App. A, at A–1(b) (1968).

Upon a determination of discrimination the head of the agency involved has the authorization to "require any remedial action . . . determined to be necessary or desirable to effectuate the resolution of this issue and to promote the policy of equal opportunity." 5 C.F.R. section 713.221(a).

The effect of all these programs is to demonstrate the importance of equality of opportunity in the United States, with the Federal Government as the leader.

III. POLICY EFFECTUATION IN C.A.B. PROCEEDINGS

When awarding a certificate to an airline, the Board must determine whether such application is "required by the public convenience and necessity." Federal Aviation Act 401(d)(1); 49 U.S.C. § 1371(d)(1). Section 102 of the Act (49 U.S.C. § 1302) requires the Board to consider "among other things":

". . . development of an air transportation system properly adapted to the present and future needs of the . . . commerce of the United States.

". . . the regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in such transportation . . .

". . . the promotion of an adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

". . . the promotion of safety in air commerce.

This is a regulatory statute authorizing the Board to take an active, broad role in the development of air transportation to insure that the interests of all parties are taken into consideration before a certificate is awarded. The courts have recognized this and have determined that the Board must weigh the social and economic effects of a certificate of public convenience and necessity before awarding it. *Outagamie County, Wisconsin* v *C.A.B.*, 355 F.2d 900, 907 (CA 7, 1966). The Board must "weigh the rights of all parties concerned against the broad cosiderations of paramount public interests." *Airport Comm. of Forsyth City, N.C.* v. *C.A.B.*, 300 F.2d 185, 186 (CA 4, 1962).

The concept of public "convenience and necessity" requires broad consideration in the public interest of environmental pollution. *F.P.C.* v. *Transcontinental Gas*, 365 U.S. 1 (1961, air pollution); labor relations, *I.C.C.* v. *Railway Labor Executives Assoc.*, 315 U.S. 373 (1942), *Western Airlines* v. *C.A.B.*, 194 F.2d 211 (CA 9, 1952); civil rights, *United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (D.C., 1966); (see also *Potomac Citizens Assoc.* v. *C.A.B.*) Even aesthetic disruptions and injury to historic sights must be a part of an agency's consideration. *Udall* v. *F.P.C.*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference* v. *F.P.C.*, 354 F.2d 608 (1965).

The message from these cases is that the agency, before it awards a certificate of public convenience and necessity, should look to see whether all the public's interest is being served. In the C.A.B.'s case, this means both the passengers in the air and the people on the ground.

Before awarding a certificate to any airline, the C.A.B. should make certain that that airline's hiring practices are in accordance with this country's goal of racial equality. FLITE would like the C.A.B. as a regular part of its procedure to examine in depth the hiring practices of applicants for a segment or merger which is located in a part of the country that has a large Black or

Chicano population. Particularly in this instance, the hiring practices of the airline should reflect to some extent the composition of the public which it serves. Yet it does not.

Thus, we petition the Civil Aeronautics Board to adopt the following rule: "Before awarding a segment or approving a merger, the Civil Aeronautics Board should make certain that the hiring practices of the airline in question are in accordance with the nation's expressed goal of racial equality in employment."

Respectfully submitted.

ALFRED HEMMONS.
E. LAWRENCE HANNAWAY.
GENE B. MECHANIC.
MARK WEINSTEIN.
THOMAS BLAIR.

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2. F.L.I.T.E. Petition to Intervene in Proceedings to Consider Proposed Merger of American and Western Airlines

Before the Civil Aeronautics Board, Washington, D.C.

Docket No. 22916

JOINT APPLICATION OF AMERICAN AIRLINES, INC., AND WESTERN AIRLINES, INC., FOR APPROVAL UNDER FEDERAL AVIATION ACT OF 1958, AS AMENDED, OF THE TRANSACTIONS CONTEMPLATED BY AMERICAN AIRLINES AND WESTERN AIRLINES

PETITION OF FUTURE LAWYERS INVESTIGATING TRANSPORTATION EMPLOYMENT (F.L.I.T.E.) FOR LEAVE TO INTERVENE

FLITE,
George Washington Law School,
720 20th Street, NW.,
Washington, D.C.

JANUARY 7, 1971.

PETITION OF FLITE FOR LEAVE TO INTERVENE

(1) Now comes FLITE (Future Lawyers Investigating Transportation Employment), a public interest group of five George Washington University Law students investigating the hiring practices of air carriers.

(2) FLITE asks leave to intervene to assure that the Civil Aeronautics Board in considering the merger application examines the equal opportunity hiring practices of the applicants, as a part of the "public interest" considerations.

(3) If leave to intervene is granted FLITE assures the Civil Aeronautics Board that it will not unduly broaden the issues.

(4) If leave to interevene is granted FLITE assures the Civil Aeronautics Board that it will not delay the proceedings.

(5) In the public interest we seek to be made an intervenor, to receive exhibits, to present briefs, and testimony and to question witnesses, as the situation requires.

Respectfully submitted.

FLITE (Future Lawyers Investigating Transportation Employment).
By MARK WEINSTEIN.
ALFRED HEMMONS.
GENE B. MECHANIC.
E. LAWRENCE HANNAWAY.
THOMAS A. BLAIR.

CERTIFICATION

We, Gene Mechanic, Mark Weinstein, Alfred Hemmons, Lawrence Hannaway and Thomas Blair, do hereby certify that we are the members of Future Law-

yers Investigating Transportation Employment (FLITE) at 720 20th Street, NW., Washington, D.C. We also certify that the foregoing Petition will be served on all parties on which the application herein was served.

FLITE:
MARK WEINSTEIN.
E. LAWRENCE HANNAWAY.
ALFRED HEMMONS.
GENE B. MECHANIC.
THOMAS A. BLAIR.

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3. F.L.I.T.E. Brief in Support of Petition to Intervene

Before the Civil Aeronautics Board, Washington, D.C.

Docket No. 22916

JOINT APPLICATION OF AMERICAN AIRLINES, INC. AND WESTERN AIRLINES, INC. FOR APPROVAL UNDER FEDERAL AVIATION ACT OF 1958, AS AMENDED, OF THE TRANSACTIONS CONTEMPLATED BY AMERICAN AIRLINES AND WESTERN AIRLINES

PETITION OF FUTURE LAWYERS INVESTIGATING TRANSPORTATION EMPLOYMENT (F.L.I.T.E.) FOR LEAVE TO INTERVENE

FLITE.
George Washington Law School,
720 20th Street, NW.,
Washington, D.C.

JANUARY 7, 1971.

I. INTRODUCTION

Problems of discrimination based on skin color or national origin are nothing new in this country. It was too often true that the ideals of this country as to freedom and justice for all meant freedom and justice for all except poor minorities. Justice and freedom for these peoples were empty words recalled from a high school civics class and nothing more. Over the past twenty years the nation has expressed a desire to end this hypocrisy and to treat men according to their ability rather than their skin color. Much progress has been made toward achieving this end, but the goal of racial equality has not yet been realized. It is the duty of every man, both in his career and in his private life, to strive to put into practice those principles of love and compassion that can so easily be found on the lips of the government. Only then will racial discrimination cease. FLITE feels that the Civil Aeronautics Board can play a significant role in these efforts. As an expressed goal of the nation, it would seem that all agencies of the government of that nation should as far as possible try to effectuate this goal. The Civil Aeronautics Board has the statutory power to make a significant contribution to this effort: Through its function in approving mergers and awarding and deleting segments, the Board goes through a decision making process where it takes into account many factors before a final determination is made on the application. One of these factors is: Would approval of this merger or the awarding of this segment be in the public interest? In determining whether it would be in the public interest, FLITE feels that the Civil Aeronautics Board should investigate the hiring practices of the applicants to see if these hiring practices are in accord with America's goal of racial equality. In so doing, the Civil Aeronautics Board could make a meaningful contribution to race relations in the United States.

II. THE GOAL OF RACIAL EQUALITY IN EMPLOYMENT

Over the past thirty years the United States of America has decided that the ideals of the country must apply to minorities. Racial discrimination in employment has been viewed to be a great problem by the nation.

The first "fair employment practices" machinery (FEP) was established in

July, 1940 to facilitate the employment of blacks. Continued discrimination in industry, however, resulted in Executive Order No. 8802 (July 25, 1941), which set up the Committee on Fair Employment Practices within the Office of Production Management, designed to eliminate discrimination in employment due to race, creed, color or national origin. This committee had power to investigate complaints and correct valid grievances. It could make recommendations to the President and to other government agencies.

The next significant step occurred in late 1946, when President Truman appointed a special committee to study the problem of civil rights and make recommendations for further implementation of an antidiscrimination program. The Committee on Civil Rights reported in 1947 that discrimination in employment was a serious problem throughout the country, and particularly in the District of Columbia. It cited a wartime statement of a ranking D.C. official that "Negroes in the District of Columbia have no right to ask for jobs on the basis of merit," on the grounds that whites own most of the property and pay the bulk of municipal taxes. It also noted that Negroes received discriminatory treatment in private employment, with three-fourths of all black workers in Washington classed as domestics, service workers or laborers in 1940.

The committee unanimously recommended the enactment of a federal fair employment practices act prohibiting all forms of discrimination in private employment based on race, color, creed or national origin. It also endorsed the enactment of similar laws by the various states, and the issuance by the President of an order against discrimination in government employment with adequate machinery for enforcement.

In February, 1948, President Truman endorsed these recommendations in a special message to Congress, urging, among other things, the enactment of a federal fair employment practices law. At approximately the same time, the President issued an order for the elimination of racial and religious discrimination in federal employment and the establishment of a fair employment board within the Civil Service Commission. The President also required equality of treatment for all persons in the armed services, regardless of race, color, creed or national origin.

On January 18, 1955, President Eisenhower issued Executive Order No. 10590 which enunciated an official policy of nondiscrimination in federal employment, made department heads responsible for carrying out the directive, and created the President's Committee on Government Employment Policy. The task of this committee was to implement a nondiscriminatory policy by hearing and judging individual complaints, by circulating information to the various agencies, and by sponsoring conference to discuss the problems involved. On March 6, 1961, President Kennedy issued Executive Order No. 10825, which abolished the Committee on Government Employment Policy and transferred its functions to the newly established President's Committee on Equal Employment Opportunity.

The reports of this committee indicated that the proportion of blacks in the middle and upper grade jobs in federal employment (Civil Service grades 12 through 18) had risen since initiation of this program. Between 1961 and 1964, Negro employment in these categories had increased by about 125 percent. The percentage of Mexican American employees in these brackets, most notably within the five southwestern states, had also increased.

Perhaps the most significant effort undertaken by the federal government in the field of merit employment is the establishment by Congress of the Equal Employment Opportunity Commission, as provided by Section 705 of the Civil Rights Act of 1964. The Commission, composed of five members appointed by the President, is empowered to take action against discrimination in private employment whether based on race, color, religion, sex or national origin. Complaints may be initiated either by aggrieved individuals or by members of the Commission itself when they have reason to believe that a violation of the law has occurred.

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

This section applies equally to private employment agencies in referrals to jobs, and to labor unions in membership and hiring-hall policies. Discrimination is prohibited in apprenticeship and on-the-job training programs, thus supplementing and strengthening a previous regulation to the same effect issued by the United States Department of Labor with respect to such programs registered with the department's Bureau of Apprenticeship and Training (29 CFR Part 30, effective January 17, 1964, printed in the Federal Register, December 18, 1963, Title 29—Labor).

Thus, the passage of the Civil Rights Act of 1964 meant that employers would be subject to the provisions of at least three measures relating to discrimination in employment: the state or local fair employment practice laws and regulations, Title VII of the Civil Rights Act, and executive orders governing contractors with the government.

In the area of government contracts the country has also expressed its goal of equality in employment. Two executive orders issued during World War II established the policy of requiring nondiscrimination in businesses holding government contracts. The first committee specifically created to carry out this program was the President's Committee on Government Contract Compliance, set up by President Truman in December, 1951. The committee, comprising representatives of the major contracting agencies and six other members named by the President, was empowered to examine the procedures of federal departments, confer with responsible officials, and make recommendations for the prevention or elimination of discrimination in contracting firms.

The functions performed by this committee were later assumed by the President's Committee on Government Contracts, established by President Eisenhower on August 13, 1953. This second committee had broader powers than its predecessor. It received complaints and transmitted them to the appropriate contracting agency for action, and initiated and reviewed surveys of contractors. In addition, it conducted and encouraged educational programs in industry and among private groups, in cooperation with state, local and nongovernmental instrumentalities.

The nondiscrimination clause in government contracts was further broadened in 1954 by Executive Order No. 10557, which forbade discrimination in all aspects of personnel practices, including employment, promotions, transfers, recruitment, layoffs, rate of pay, apprenticeship programs, and many others. Under this clause, the contractor is obligated to post, in conspicuous places, the notices of this nondiscrimination policy and to insert similar provisions in his subcontracts.

In March, 1961, President Kennedy issued Executive Order No. 10925, which established the President's Committee on Equal Employment Opportunity as a successor to President Eisenhower's Committee on Government Contracts. The President's Committee on Government Employment Policy (established by President Eisenhower in 1955) was abolished, and its responsibility to prevent discrimination in federal government employment practices was transferred to the new committee. On this committee the Vice President served as Chairman and the Secretary of Labor as Vice Chairman, but the major administrative functions were performed by the Executive Vice Chairman designated by the President. Executive heads and representatives of several major government departments, together with spokesmen for business, labor and community groups, served as members. On September 24, 1965, President Johnson issued Executive Order No. 11246, abolishing this committee and transferring its functions to the Department of Labor and the Civil Service Commission. The Secretary of Labor has established the Office of Federal Contract Compliance within his department to administer the relevant provisions of the order.

The government's antidiscrimination program has broad application to contractors and subcontractors. An equal employment clause must be inserted into each contract between an agency and a private firm, and between the prime contractor and all subcontractors. This requirement applies to purchase orders and bills of lading, and Executive Order No. 11246 (and, earlier, Executive Order No. 11114) extends it to construction contracts which are financed or assisted in any way by the federal government. The Secretary of Labor may,

by regulation, exempt certain classes of contracts, subcontracts, or purchase orders from the requirements of the order, namely: (1) instances where the work is to be performed outside the United States and no recruitment of domestic American workers is involved; (2) contracts for standard commercial supplies or raw materials; (3) contracts or orders involving less than specified amounts of money or numbers of workers; or (4) subcontracts below a specified tier. The Secretary may also exempt a particular agency from inserting any or all of the otherwise stipulated provisions in contracts, subcontracts, or orders, in specific cases where he determines that special circumstances require the exemption.

The federal government has attempted to end racial discrimination in employment in the public sector. Executive orders issued over the past five years evidence the urgency of this project. In regard to the government itself, recent Presidents have been more explicit than in the past. President Johnson issued the following Executive Order requiring:

"(The) head of each executive department and agency to establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment . . ." and to achieve "the promotion and insuring of equal opportunity for all persons, without regard to race, creed, color, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts." Executive Order No. 11246, 3 C.F.R. 339 (1965), as amended Executive Order No. 11375, 3 C.F.R. 320 (1967).

The policy enunciated by President Johnson has been officially continued in the present administration. President Nixon's memorandum to heads of departments and agencies on March 28, 1969, stated:

"The concept of nondiscrimination is inherent in the Civil Service Act of 1883 which calls for a federal service based on merit and fitness alone. 'Nondiscrimination' was broadened by President Eisenhower to 'equal employment opportunity' with his issuance of Executive Order 10590 in 1955. In the years that followed, other Executive Orders designed to insure equal opportunity in the employment, development, advancement and treatment of employees of the Federal Government have been issued. This series of Presidential directives reflects continuing support for this program as the highest levels of government . . .

"Meanwhile I want every reasonable effort made to insure that the Federal Government is an equal opportunity employer. I further urge you, if you have not already done so, to communicate your personal support for this program to all officials and employees of your agency."

The federal government, therefore, has officially become not merely a "nondiscriminating" employer, but an "equal opportunity" employer. This position illuminates the realization that the nation's interests can no longer exclude a large segment of citizens merely because of their race, sex, or national origin. To do so would amount to not only morally reprehensible actions, but to social and economic catastrophe. Thus, the government has issued guidelines and regulations to establish equal employment opportunity within its own departments and agencies in anticipation of the overall societal effort to follow suit.

Thus, President Nixon's Executive Order No. 11478 says:

"It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

"As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government . . .

"The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1 . . ." Executive Order No. 11478, 34 Fed. Reg. 12985 (1969).

Detailed regulations have been established to enhance the efficiency of assuring equal employment opportunity within the federal government. "Each agency shall be primarily responsible for obtaining compliance with the equal oppor-

tunity clause, the order, the regulations in this part, and orders issued pursuant thereto." 41 C.F.R., Chapter 60–1.6(a).

Pursuant to the responsibility placed upon it by executive orders, the Civil Service Commission, in addition to issuing regulations covering compliance procedures, has issued general policy statements and regulations designed to implement the orders. 5 C.F.R., Part 713 (1969), as amended, 34 Fed Reg. 9795, 11537, 13656, 14023, 15595 (1969). Agencies are required to send "Action Plans" to the Civil Service Commission outlining how they intend to insure equal employment opportunity. The Commission states that "Agency plans of action must be specific and realistic program plans, including short- and long-range objectives, designed to achieve definite progress in equal employment opportunity at all agency levels." *Federal Personnel Manual*, ch. 713, app. A, at A–1(b) (1968).

Upon a determination of discrimination the head of the agency involved has authorization to "require any remedial action . . . determined to be necessary or desirable to effectuate the resolution of this issue and to promote the policy of equal opportunity." 5 C.F.R., section 713.221(a).

Of recent government plans to establish equality in employment opportunities, perhaps the most far reaching is that instituted by the Department of Labor through its Order of June 27, 1969, which initiated the Philadelphia Plan.

The Department of Labor, in an attempt to combat blatant discrimination by contractors and unions, issued the first Philadelphia Plan in 1967, requiring government contractors to take affirative action to hire minority workers. This initial plan was dropped and the later one soon adopted. The Labor Department's Brief announced that such a plan will be extended nationwide and thereby reach and affect innumerable industries and unions. The Philadelphia Plan's basic power lies in the thesis that discrimination in employment affacts not only the worker himself but another entire generation as well. The Office of Federal Contract Compliance cannot accept a construction bid, even though it be the lowest submitted, unless the contractor agrees to make a good faith attempt to broaden his recruitment base and meet the Labor Department's employment goals for minority workers in six affected trades. Thus, the federal government has officially required that contractors and unions who have federal contracts to establish equal employment opportunity.

The United States judicial system has used federal statutes, such as the Civil Rights Act of 1964, and the Constitution to promote equal employment opportunity not merely within the fields of federal employees and federal contractors, but throughout this society. The judicial interpretation of discriminatory hiring practices has emerged from cases such as *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954), where the Supreme Court said that "classification based solely on race must be scrutinized with particular care, since they are contrary to our traditions and thus constitutionally suspect."

The Supreme Court refused to reverse a U.S. Circuit Court of Appeals for the District of Columbia decision which illuminated the significance of equal opportunity employment.

"The conclusion that racial discrimination may impede its victims in asserting their rights stems from a number of factors—fear, ignorance of rights and a feeling of low self-esteem engendered by repeated second class treatment because of race and national origin. Discrimination in employment is no different in this respect than discrimination in other spheres." In *Brown* v. *Board of Educaton of Topeka*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873, 38 A.L.R. 2d 1180 (1954) the Supreme Court stated: "To separate (Negroes) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . ."

This submissiveness has been recognized by union leaders, businessmen, government officials, and psychologists. George Meany, president of the AFL–CIO, referred to the reluctance of Negro employees to file complaints under fair employment practices laws because of the fear of retaliation. Hearings before Subcommittee on Employment and Manpower, Senate Committee on Labor and Public Welfare on S. 773, 88th Congress, first session, p. 153 (1963).

Senate and House hearings on equal employment bills are laced with references to the degradation, disillusionment, lack of motivation, and lessening of incentive to improve, which result from racial discrimination in employment. Senate Hearings, Subcommittee on Employment and Manpower, Senate Committee on Labor and Public Welfare on S. 773, 88th Congress, first session (1963). House Hearings, Before General Subcommittee on Labor, House Committee on Education and Labor, on H.R. 405, 88th Congress, first session, pp. 66–67 (1963). H.R. Rep. No. 570, 88th Congress, first session, p. 3 (1963). H.R. Rep. No. 914, 88th Congress, first session (1963).

Dr. Kenneth Clark has shown that discrimination-induced self hatred in Negro inhabitants of slums, due in good part to discrimination in empolyment, creates a feeling of inferiority and lack of motivation to assert themselves to change their condition. In all this, discrimination in employment either establishes or reinforces the effect of discrimination in other areas—an inhibition to act for change. *United Packinghouse Workers* v. *NLRB*, 416 F.2d 1106, 1136 (D.C. Cir. 1969); cert. denied, 396 U.S. 903 (1969).

Executive orders have instituted equal employment opportunity within the federal government. Further, executive, administrative, and legislative policies have propagated equal employment opportunity by any federal contractor. The Civil Rights Act of 1964 expressly forbids discrimination in hiring. The judicial system has attempted to protect all these rights and has supported equal employment opportunity and has refused to permit discrimination in hiring because of race.

The interest of the nation in equal employment opportunity has been expressed in every conceivable way. The regulatory agency should take this interest into consideration by investigating the hiring practices of its regulatees as a normal part of its regulatory function, by incorporating it into its public interest considerations. "Public interest" at a regulatory agency is an ever broadening concept. In recent years certain considerations have been viewed as being in the "public interest" which would have been thought to be totally outside the sphere of the regulatory agency's functions twenty years ago.

III. THE CONCEPT OF PUBLIC INTEREST IN REGULATORY AGENCIES

Regulatory agencies have been given the power to regulate the activities of an industry to the extent of their various statutes. In so regulating these activities, the agencies have been called upon in recent years to consider the interest of the public as a part of their regulatory scheme.

In *F.P.C.* v. *Transcontinental Gas*, 271 F.2d 942 (1960), reversed 365 U.S. 1 (1960), a New York public utility company applied to the F.P.C. for approval of a contract that would allow the company to purchase natural gas directly from the Texas producer. The F.P.C. decided that the public had an interest which would be served by allowing this contract, that is, in decreasing air pollution. So, the F.P.C. decided to approve the contract because it was justified by the public interest. That the public interest should be a major part of the consideration of a regulatory agency was further stated by Justice Douglas in *Udall* v. *F.P.C.*, 387 U.S. 428 (1967). In this case the Pacific Northwest Power Company wanted to construct a hydroelectric power plant. The Supreme Court remanded to the F.P.C. because in approving the plant, it had failed to explore alternative courses of action. Justice Douglas held that the test of whether a license be issued is not simply whether the project will be beneficial to the licensee and whether the region will be able to use the additional power, but is whether the project will be in the public interest. This requires an exploration of all the factors relevant to that public interest.

Public interest is an expanding concept. In *Scenic Hudson Preservation Conf.* v. *F.P.C.*, 354 F.2d 608 (1965), Consolidated Edison of New York wanted approval of plans to construct a hydroelectric power plant on the Hudson River. The court, in discussing the Federal Power Commission approval, said that the F.P.C. had failed to make a thorough study of possible alternatives and to make a study of injury which might result to asthetic, conservational and recreational sites. The court said: "In this case as in many others the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly

calling balls and strikes for adversaries before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

Taken together, *Udall* and *Scenic Hudson* stand for two propositions. One, the scope of public interest cannot be limited to the interests of the consuming public and the regulated industry. Demand and dollar outlays for the proposed service cannot be controlling. Noneconomic factors must be included in the balance. Two, the regulatory agency must fill any gaps in the record before making a decision. It must seek to interpret issues, even those beyond its regulatory jurisdiction. As was said in *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153 (1967), where a power company sought review of an F.P.C. order for retroactive licensee payments, "the statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest . . . the breadth of agency discretion is, if anything, at zenith when the action relates primarily not to the issue of ascertaining whether conduct violates the statute or regulations but rather to the issues of policies, remedies and sanctions including enforcement and voluntary compliance programs in order to arrive at effectuation of Congressional objectives." Thus, it appears that a regulatory agency has a broad public interest mandate. The regulatory agency should try where possible to give effect to congressional intent in areas outside the statutory subject. In *City of Chicago* v. *F.P.C.*, 385 F.2d 629 (1967), the court said as much when it stated that "a regulatory agency may, should and in some instances must give consideration to objectives expressed by Congress in other legislation, assuming they can be related to objectives of the statute administered by the agency." Congressional intent in regard to equality of the races in general and equal opportunity employment in particular (supra) is most evident. This Congressional intent should be incorporated into regulatory agencies' decision making processes where it is possible. There seems little doubt that the intent of Congress in this area is there. The vehicle to effectuate this intent should be that an examination of the regulatee's hiring practice should be included in the public interest considerations of the agency. Certainly an effectuation of this intent would not only ensure that millions of Americans would be judged only by their ability but that the economy would be significantly strengthened, and the welfare rolls significantly decreased. Thus, there would be a direct economic benefit to the country and to the industry to be regulated.

The Federal Communications Commission has now recognized this national goal and has attempted to effectuate it through its statutory mandate. In *United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (1966), the broad question of racial equality was met head-on by the F.C.C. It seems that WLBT, a television station in Mississippi, had failed to serve the general public because it provided a disproportionate amount of commercials and entertainment and did not give fair and balanced presentation of controversial issues, including the race issue. Blacks made up almost fifty percent of the prime service area and yet their point of view was not given. The United Church of Christ alleged that they represented this interest and that they wished to intervene to block the license renewal. The Commission denied the petition to intervene on the ground that standing is predicated upon the invasion of a legally protected interest interest or upon an injury which is direct and substantial and that the petitioners could assert no greater interest or claim of injury than the members of the general public. The Commission did say that regardless of standing the Commission does consider the contentions advanced in circumstances such as these and said that it did so here. The Commission went on to say that there were serious issues here as to whether the licensee's operations had met the public interest standard. Yet, the Commission held no hearing but granted a license of renewal. The court held that the grant of a renewal was erroneous and that a hearing must be held to determine whether the interest of the public was satisfied. Although the court was primarily concerned with the standing of United Church to challenge the license, still it recognized the importance of racial equality in the context of the Federal Communications Act. It recognized that the television station cannot discriminate against blacks by refusing to program controversial topics having to do with race relations because this was in violation of the Fairness Doctrine, the ultimate standard to which every licensee is held.

Thus, in the context of the Fairness Doctrine the concern of the Federal Communications Commission is evident. The interest of the nation in racial equality demands that the Fairness Doctrine operate not to exclude a view representing a substantial number of the listening public.

Regarding concern for the hiring practices of its licensees, the Federal Communications Commission has recently felt that it is in the public interest that the industry it regulates does not practice discriminatory hiring practices.

The F.C.C. has adopted a program whereby it investigates the employment practices of its broadcast licensees and communications common carriers. For example, it has currently set down as issues in a hearing concerning American Telephone and Telegraph Company's application for an increase in rates for long distance message telephone service the following:

1. Whether the existing employment practices of AT&T tend to impede equal employment opportunities in AT&T and its operating companies contrary to other purposes and requirements of the Commission's rules and the Civil Rights Act of 1964.

2. Whether AT&T has failed to inaugurate and maintain specific programs, pursuant to Commission rules and regulations, insuring against discriminatory practices in recruiting, selection, hiring, placement and promotion of its employees.

3. Whether AT&T has engaged in pervasive, systemwide discrimination against women, blacks, Spanish-sur-named Americans and other minorities in its employment policies.

4. Whether any of the employment practices of AT&T, if found to be discriminatory, affect the rates charged by that company for its services, and if so, in what ways is this reflected in the present rate structure.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, what order of requirements, if any, should be adopted by the Commission.

These issues come from the Memorandum Opinion and Order adopted and released on January 21, 1971 (FCC 71–75, 58371, Docket #19143).

The Commission has repeatedly stated its concern regarding discriminatory employment practices by its licensees. In its Notice of Proposed Rule Making to require communications common carriers to show non-discriminatory employment practices, adopted November 19, 1969 (Docket No. 18742), 34 Fed. Reg. 19200, the Commission, in noting that the common carriers operate in a unique public interest capacity, stated that when consideration regarding authorization of a communications common carrier is undertaken, "the Commission must consider whether the applicant has violated or is in violation of the Civil Rights Act or pertinent State or local laws or ordinances in the field." In the same proceeding, the Commission went on to say that "both because of the special position granted comunications common carriers by the government, and the relationship between service to the public and the carriers' employment practices, it would be intolerable to countenance discriminatory employment practices."

On August 5, 1970, the Commission adopted comprehensive rules and regulations requiring communications common carriers to show nondiscrimination in their employment practices (*In the Matter of Rule Making to Require Communications Common Carriers to Show Nondiscrimination in Their Employment Practices*, 24 FCC 2d 725, 1970), thus becoming the first independent regulatory agency to adopt such a program applicable to its regulated industry. The F.C.C. had earlier adopted similar rules applicable to its broadcast licensees. *In the Matter of Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240 (1969) and 23 FCC 2d 430 (1970). In adopting its proposed rules prohibiting discriminatory employment practices by its licensees and permittees, the Commission recognized that its "independent responsibility to effectuate the strong national policy against discrimination in employment, and that it need not be dependent upon the judgment of some other forum to maintain its own affirmative program for insuring compliance with this Act." 24 FCC 2d 725 (1970).

By the adoption of the above rules requiring communications common carriers to show nondiscrimination in their hiring practices, contained in new Sections 1.815, 21.307, and 23.49 of the F.C.C.'s Rules and Regulations, 47

C.F.R. §§ 1.815, 21.307, 23.49, the Commission has undertaken a systemmatic program to insure equal employment in the communications industry. As regards communications common carriers, the general policy of nondiscrimination is expressed in Sections 21.307(a) and 23.49(a) of the Commission's Rules and Regulations. These sections provide that "equal opportunity in employment shall be afforded by all common carrier licensees and permittees to all persons, and no personnel shall be discriminated against in employment because of sex, race, color, religion or national origin." To insure nondiscrimination in the employment practices of common carriers and broadcast licensees, the Commission has provided in Sections 21.307(d) and 23.49(d). 47 C.F.R. §§ 2.307(d), 23.49(d), that complaints "indicating a general pattern of disregard of equal employment practices" received against a particular licensee or permittee could be investigated by the Commission.

What is in the public interest in the regulatory agency is an expanding concept to be construed broadly. The Civil Aeronautics Board should take note of this expansion and especially of the action of the Federal Communications Commission in the AT&T case. The country has expressed in no uncertain terms its interest in equal employment opportunity. The expanding concept of public interest provides regulatory agencies with an opportunity to effectuate this goal within their respective industries. This they must do (see *City of Chicago* v. *F.P.C.*, supra), for Congressional intent on this subject should be incorporated into their statutory mandate where possible. It is possible at the Civil Aeronautics Board. Both the Federal Aviation Act and the expansion of public interest considerations at the Board itself provide the C.A.B. with an opportunity to contribute to the expressed national goal of racial equality in employment.

IV. THE CONCEPT OF PUBLIC INTEREST IN THE C.A.B.

Section 102 of the Federal Aviation Act requires the Civil Aeronautics Board, when awarding a segment or approving a merger, to consider in determining whether such approval is required by the public convenience and necessity, "among other things,

"a. The encouragement and development of an air transportation system properly adapted to the present and future needs of the domestic commerce of the United States.

"b. The regulation of air transportation in such manner as to recognize and preserve the highest degree of safety in, and foster sound economic conditions in, such transportation.

"c. The promotion of an adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

"d. The promotion of safety in air commerce." 49 U.S.C. § 1302 (1964).

This is a section of a regulatory statute the purpose of which is to require the Board to take into consideration in their procedure the interest of the public in air transportation. As was said in *Outagamie County* v. *C.A.B.*, 355 F.2d 900 (1966), where the Board determined that one airport as opposed to two should serve two cities, the Board was required to consider several factors or matters as being in the public interest. Although the Court affirmed the Board order that one airport was proper, it said that in determining this the various competing interests must be balanced against the broad public interest in promoting and developing airlines systems adapted to present and future needs of commerce, of country, its postal service and its national defense. So too in *Airport Commission of Forsyth County, N.C.* v. *C.A.B.*, 300 F.2d 185 (1962). In this case, the Board ordered a discontinuance of service at the airport in Winston-Salem, North Carolina. It did so because it felt that another airport in the general area could better serve the purpose. In deciding to affirm the Board's order the Court said that under the authority vested in the Civil Aeronautics Board by the Federal Aviation Act, the Board is charged with the duty to develop an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service and of the national defense, and the promotion of adequate, economical and efficient service by air carriers. One means by which the Board carries out

its policies, the Court went on to say, is its power to control air commerce by the issuance of certificates of public convenience and necessity to commercial airlines. It is the duty of the Board in issuing these certificates to weigh the rights of all parties concerned against broad considerations of paramount public interests in making its decisions.

That racial equality in employment is of paramount public interest, that it is part of the broad public interest, cannot be doubted. The nation has an interest in racial equality in employment which should be effectuated by the Board in its role as a regulator of air transportation. The Civil Aeronautics Board has imposed labor protective provisions on an airline as a convenience and necessity. A Board order to this effect was affirmed in *Western Airlines* v. *C.A.B.*, 194 F.2d 211 (1952), where the Court said that the Civil Aeronautics Board, by virtue of the Act, has power to condition its approval on a transfer of a certificate of public convenience and necessity and of air carried properties incident thereto, by imposition of terms bearing some just relation to public interest. Provisions for protection of employees does bear a just relation to public interest. So too should racial equality in employment bear such a just relation to public interest.

In 1969 a further dimension was added to the concept of public interest at the Civil Aeronautics Board: the dimension of environmental impact of a certificate award. *Palisades Citizens Association* v. *C.A.B.*, 420 F.2d 188 (1969) expanded the scope of public interest considerations to the furthest point to date at the C.A.B. This case arose out of a Board proceeding to inquire into the necessity of helicopter service between Washington, D.C. and Baltimore, Maryland. A group of citizens filed for leave to intervene in the proceedings on the basis of an interest in the reduction of noise and air pollution.

The citizens asserted that inquiry into these areas of public inconvenience was most relevant to the Board's statutory study. At the pre-hearing conference the citizens requested that the applicants be made to demonstrate at the hearing the facts respecting the degree of environmental impact flowing from the proposed service. This request was denied. The citizens were denied appearance as formal parties but were allowed under Rule 14 of the Procedural Regulations to participate as interested parties. Citizens appealed this denial to the Board, which upheld the examiner's ruling as to formal intervention. Citizens were, it should be understood, allowed to participate in the proceedings as an informal as opposed to a formal party.

The Court affirmed the Board's order as to intervention but said: "In affirming the Board's order in this case let us first caution the Board that questions relating to environmental impact of proposed services upon persons and property lying below the routes are substantial and clearly relevant to the Board's certificate inquiry." 420 F.2d 188, 191. Further, the Court said that section 1302 of Title 49 of the Code requires the Board, in determining the public convenience and necessity, to consider specific things (supra, 49 U.S.C. § 1302). In talking about this section the Court said: "This is clearly the three foot mark on the yardstick of public interest and a basic measure of the Board's responsibilities. No agency entrusted with determinations of public convenience and necessity is an island. It fits within a national system of regulatory control of industry. Its decisions affect not only its primary interest groups but also the general public at large. For example, were the Civil Aeronautics Board to award a route certificate to a carrier which employs aircraft powered by chlorine gas due to its assertion of cheaper rates to the air traveler, the impact of such an award would not only affect the competing carriers but also the air breathing public below. Regardless of the efficiency of the air service, the deadly pollution must nullify the grant. To say that the environmental impact of that service is not a proper consideration of the Board in its certification proceeding is folly." 420 F.2d 192.

An examination by the Board in a merger proceeding or in a segment awarding proceeding of the hiring practices of the applicants should be a regular part of the procedure. The nation has an interest in equal opportunity employment which can and should be effectuated by the Board as part of its public interest considerations. If the Civil Aeronautics Board were to award a segment or approve a merger where one or more of the applicants had a discriminatory hiring policy, the Board could not be giving the correct meaning to "public interest," just as an award to an applicant

who uses polluting aircraft would indicate that the Board had not given correct weight to the public interest. Yet, such could be the case, for at this time equality in employment is not part of the public interest consideration of the Board. As was said in *Palisades* v. *C.A.B.*, supra, no agency entrusted with determinations of public convenience and necessity is an island. It fits within a national system of regulatory control of industry and, as such, should within its power effectuate the policy of the nation as to racial equality. It matters little that the other agencies also have the responsibility of investigating racial discrimination in hiring. This cannot be used by the Board as a reason not to consider it. As the Court said in regard to the environmental issue, "The Civil Aeronautics Board has been given the scales of public interest. It must effect a balance. This is so even though we recognize that certain other governmental departments have been given the explicit authority to consider the various aspects of environmental impact specifically." 420 F.2d 192. This is true as to racial equality in employment also. That other agencies of the federal government, such as the Equal Employment Opportunity Commission, investigate the hiring practices of industry cannot be an excuse for the Civil Aeronautics Board to ignore this area. The C.A.B. must where possible incorporate the Congressional intent into its regulatory scheme (supra) even though other agencies also have direct responsibility for carrying out this policy.

Racial equality in employment is the goal of the public; it has been expanded by the representatives of the people. The concept of public interest at the Civil Aeronautics Board is broad enough to include labor relations and environmental pollution. Certainly it must be broad enough to include the public's interest in racial equality in employment, since this is far more explicit than its interest in environmental pollution. It is time for the Civil Aeronautics Board to make its contribution to race relations in the United States. Before it approves the merger of American Airlines and Western Airlines, it should carefully examine the hiring practices of each to see if those hiring practices are in accord with the expressed national goal of racial equality in employment.

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4. C.A.B. Order Denying F.L.I.T.E. Petition to Intervene

United States of America, Civil Aeronautics Board, Washington, D.C.

Docket 22916

Issued under delegated authority, March 5, 1971.

AMERICAN-WESTERN MERGER CASE

Order 71-3-42

ORDER GRANTING AND DENYING PETITIONS FOR LEAVE TO INTERVENE

Petitions for leave to intervene in the above-entitled proceeding have been filed by or on behalf of the persons listed in ordering paragraph 1.

Pursuant to authority duly delegated by the Board in the Board's Regulations, 14 CFR 385.11, it is found that these petitioners have a sufficient interest in the subject matter of the proceeding which may not be adequately represented by existing parties, and that the granting of the petitions will not unduly broaden the issues or delay the proceeding.

A petition for leave to intervene has also been filed by five George Washington University law students designating themselves as FLITE (Future Lawyers Investigating Transportation Employment).

Pursuant to authority duly delegated by the Board in the Board's Regulations 14 CFR 385.11, it is found that these petitioners have failed to establish a right under the statute to be made a party; a property, financial or other interest; how the order which may be entered in the proceeding will affect them; or that their interest will not be represented by existing parties, or by an appearance pursuant to Rule 14 of the Procedural Regulations.

Accordingly, it is ordered:

1. That the petitions for leave to intervene filed by or on behalf of the following listed persons be and they are hereby granted:

Air West
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Braniff Airways, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Kodiak Airways, Inc.
National Airlines, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Airlines, Inc.
Wien Consolidated Airlines, Inc.
Albany, New York
Greater Anchorage Chamber of Commerce
Buffalo Area Chamber of Commerce
City of Cleveland
City of Dallas *et al.**
City and County of Denver *et al.**
State of Hawaii
Hawaii Air Cargo Shippers Assn.
City and County of Honolulu
City of Houston, Texas *et al.**
City and Borough of Juneau
Aviation Department of Kansas City, Missouri
City of Kansas City, Missouri *et al.**
Las Vegas Parties
City of Los Angeles
Los Angeles Area Chamber of Commerce
Massachusetts Port Authority
City of Memphis, Tennessee *et al.**
City of Ketchikan *et al.**
Minneapolis-Saint Paul Metropolitan Airports Commission
Public Service Commission of Nevada
City of Oakland, California *et al.**
Public Utility Commissioner of Oregon *et al.**
City of Phoenix, Arizona *et al.**
City of Portland *et al.**
Greater Reno Chamber of Commerce *et al.**
County of Sacramento *et al.**
San Diego Unified Port District *et al.**
City of San Jose, California
Tucson Airport Authority
City of Tulsa, Oklahoma *et al.**
Utah Agencies
State of Washington Utilities and Transportation Commission *et al.**
Allied Pilots Association
Air Line Dispatchers Association
Air Line Pilots Association, International
Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
Flight Engineers' International Association, AFL–CIO
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
Transport Workers Union of America, AFL-CIO
United States Department of Justice
Department of Transportation
City of San Antonio, Texas *et al.**

2. That the petition for leave to intervene filed by FLITE (Future Lawyers Investigating Transportation Employment) be and it is hereby denied.

Persons entitled to petition the Board for review of this order pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period unless before that date a petition for review is filed or the Board gives notice that it will review this order on its own motion.

By William J. Madden
Hearing Examiner

(SEAL) HARRY J. ZINK, *Secretary.*

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* Indicates a joint petition by two or more organizations with a common interest.

Exhibit No. AW 46

5. Information Relating to Employment of Minorities Filed with F.A.A. by Airlines in Response to Request by F.L.I.T.E.

F. L. I. T. E. REQUEST

A. AMERICAN

EQUAL EMPLOYMENT OPPORTUNITY
EMPLOYER INFORMATION REPORT EEO-1

Joint Reporting Committee
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

PLEASE USE THIS FORM FOR YOUR CONSOLIDATED REPORT

SIC=451

CO=0981503 U=0981503 E1=1319127980 S=2

AMERICAN AIRLINES INC
633 THIRD AVE
NEW YORK NY 10017

1 OF 46

1-0020097

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☐ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2, this section)

a. AMERICAN AIRLINES, INC. (UNITED STATES)

Address (Number and street)	City or town	County	State	ZIP code
633 Third Avenue	New York		N.Y.	10017

b. Employer Identification No. 13 1 5 0 2 7 9 0

2. Establishment for which this report is filed.

a. Name of establishment AMERICAN AIRLINES (UNITED STATES)

Address (Number and street)	City or town	County	State	ZIP Code
633 Third Avenue	New York		N.Y.	10017

b. Employer Identification No. (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company AMERICAN AIRLINES, INC.

b. Employer Identification No. 13 1 5 0 2 7 9 0

Address (Number and street)	City or town	County	State	ZIP code
633 Third Avenue	New York		N.Y.	10017

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☐ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☐ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section G; otherwise complete ENTIRE form.

☐ Yes ☐ No 3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract at any tier under any prime Government contract, amounting to more than $10,000; or (b) serve as a depository of Federal Government funds; or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) hold a Federal Government bill of lading in any amount?

Exhibit No. 46

F. L. I. T. E. REQUEST

A. AMERICAN

Section D—EMPLOYMENT DATA

Employment at this establishment--Report all permanent, temporary, or part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros. *In columns 1, 2, and 3, include ALL employees in the establishment including those in minority groups.*

Job Categories (See Appendix (4) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (5) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian * (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian * (10)	Spanish Surnamed American (11)
Officials and managers	3483	3156	327	52	7	13	21	9		1	1
Professionals	4069	4042	127	30	6	6	10	2	2		1
Technicians	1670	1550	120	23	13	8	12	3			
Sales workers	10457	2969	7488	101	23	1	50	305	44	6	85
Office and clerical	3305	1109	2296	106	14	14	26	173	24	8	72
Craftsmen (Skilled)	6605	6605		102	54	87	121				
Operatives (Semi-skilled)	5757	5726	31	956	57	15	356	14			
Laborers (Unskilled)											
Service workers	500	471	19	350	3	1	64	12	1		4
TOTAL →	35,845	24,477	10,368	1621	162	145	650	518	71	15	163
Total employment reported in previous EEO-1 report	24,735	24,606	9,529	1557	124	120	470	377	57	7	116

(The trainees below should also be included in the figures for the appropriate occupational categories above)

Formal On-the-job trainees		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	White collar	219	200	19	18		2	1	4			
	Production	15	15		0			3				

*In Alaska include Eskimos and Aleuts with American Indians

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 ☐ Visual Survey
   2 ☐ Employment Record
   3 ☐ Other—Specify.....
3. Dates of payroll period used—
   12/31/69
4. Pay period of last report submitted for this establishment
5. Does this establishment employ apprentices?
   This year? 1 ☐ Yes 2 ☐ No
   Last year? 1 ☐ Yes 2 ☒ No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 ☐ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on combined basis
2. Is the major business activity at this establishment the same as that reported last year?
   1 ☐ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manfacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one
1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. ☐ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date
Charles I. Keeling, Jr.	Vice President	Charles I. Keeling Jr.	4/20/70

Name of person to contact regarding this report (Type or print)	Address (Number and street)	ZIP code	Telephone Area Code	Number	Extension
Title: Manager-Personnel Relations	630 Fifth Avenue New York, N. Y.	10017	212	[illegible]	3007 or

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (c) of Title VII

WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW. U.S. CODE, TITLE 18, SECTION 1001

FLITE REQUEST—A. AMERICAN

MINORITY PERSONNEL BY JOB CATEGORY—FOURTH QUARTER, 1970

[Headcount and percent of total category headcount]

Job categories	Total company head-count	Total minority head-count	Total in prior quarter	Total same quarter prior year	Distribution by minority group			
					Negro	Spanish American	Oriental	American Indian
Officials/managers (includes private payroll)	3,568	96	99	101	55	21	7	13
Percent		2.69	2.73	2.85	1.54	.59	.20	.36
Professionals (includes pilots/flying instructors)	4,685	51	64	64	22	13	9	7
Percent		1.09	1.29	1.29	.47	.28	.19	.15
Technicians (includes flight engineers, EDP personnel)	1,512	57	63	55	26	14	12	5
Percent		3.77	4.05	3.67	1.72	.93	.79	.33
Sales workers (includes stewardesses agents, sales representatives)	10,316	727	787	705	493	149	79	6
Percent		7.05	7.25	6.65	4.78	1.44	.77	.06
Office and clerical (includes stores and communications employees)	3,102	872	426	417	223	96	35	18
Percent		11.99	12.93	12.49	7.19	3.09	1.13	.58
Craftsmen (skilled) (aircraft and plant maintenance mechanics)	6,408	433	423	442	164	131	61	77
Percent		6.75	6.62	6.72	2.56	2.04	.95	1.20
Operatives (semiskilled) (includes fleet and ground services, aircraft cleaners)	5,652	1,327	1,428	1,402	928	329	61	9
Percent		23.48	24.21	24.06	16.42	5.82	1.08	.16
Service workers (includes stewards, skycaps, guards and building cleaners)	440	333	358	401	319	13	1	
Percent		75.68	74.76	76.38	72.50	2.95	.23	
Total	35,604	3,396	3,648	3,587	2,230	766	265	135
Total percent		9.52	9.86	9.73	6.25	2.15	.74	.38

FLITE REQUEST—B. WESTERN

Employees, Jan. 1, 1971

Classification:	*Number*
Black	527
Spanish surname	458
Oriental	244
American Indian (including Eskimos)	54
Other	7,866

6. Letter from Senator Proxmire to CAB in Support of F.L.I.T.E. Petition

UNITED STATES SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C., January 15, 1971.

CHAIRMAN,
Civil Aeronautics Board,
Washington, D.C.

DEAR SIR: I would like to call your attention to the attached letter from "FLITE". As you can see, "FLITE" is a group of law students at George Washington University who are concerned about the hiring practices of the major airlines in this country.

I feel that their request is justified, and I urge the Civil Aeronautics Board to answer their request.

I am looking forward to hearing from you concerning this situation.

Sincerely,

WILLIAM PROXMIRE.

7. Letter from N.A.A.C.P. re F.L.I.T.E. Petition

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
New York, N.Y., January 18, 1971.

FLITE,
National Law Center, George Washington University,
Washington, D.C.

GENTLEMEN: This is to advise that the NAACP has contacted the CAB in support of your petition on equal employment.

Sincerely yours,

J. FRANCIS POHLHAUS,
Counsel, Washington Bureau.

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8. Letter from CAB to Senator Javits re F.L.I.T.E. Petition

CIVIL AERONAUTICS BOARD,
Washington, D.C., February 11, 1971.

Hon. JACOB K. JAVITS,
U.S. Senate, Washington, D.C.

DEAR SENATOR JAVITS: This will acknowledge the recent communication from your office regarding the petition of Future Lawyers Investigating Transportation Employment (FLITE) that the Board institute a rule making proceeding to require the Board, before awarding a route or approving a merger, to ascertain that the hiring practices of the airline in question are nondiscriminatory.

For some time the Board's staff has been considering what action the Board might take with respect to air carriers under its jurisdiction in order to foster the national policy of eliminating racial discrimination where it exists. In particular, the staff has been engaged, in recent weeks, in studying the findings and recommendations contained in the 1970 Report of the United States Commission on Civil Rights on the Federal Civil Rights Enforcement effort, with a view toward developing appropriate procedures as necessary. The staff is also considering the legal question as to the extent of the Board's authority in this area, as well as the best and most efficient method of insuring that employment practices in the air transport industry are nondiscriminatory. The petition of FLITE will be duly considered in this connection.

It is anticipated that the Board will be taking action in this area in the near future, and I shall see to it that you receive copies of any Board proposals on the subject.

Pursuant to your request, the petition of FLITE is returned.

Sincerely,

JOHN W. DREGGE,
Director, Community and Congressional Relations.

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9. Letter from Chairman, CAB, to Senator Kennedy

CIVIL AERONAUTICS BOARD,
Washington, D.C., April 19, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: Thank you for your letter of April 5, 1971, regarding recent testimony by Future Lawyers Investigating Transportation Employment (FLITE) before your Subcommittee on Administrative Practice and Procedure. As you point out, FLITE's testimony dealt in part with its petition before the Board for a rule under which the Board would consider hiring and promotion practices of applicants for routes and mergers.

For some time the Board's staff has been considering what action the Board might take with respect to air carriers under its jurisdiction in order to foster the national policy of eliminating racial discrimination where it exists. In particular, the staff has been engaged, in recent weeks, in studying the findings

and recommendations contained in the 1970 Report of the United States Commission on Civil Rights on the Federal Civil Rights Enforcement Effort, to which you allude, with a view toward developing appropriate procedures as necessary. The staff is also considering the legal question as to the extent of the Board's authority in this area, as well as the best and most efficient method of insuring that employment practices in the air transport industry are nondiscriminatory. The petition of FLITE will be duly considered in this connection.

It is anticipated that the Board will be taking action in this area in the near future, and I shall see to it that you receive copies of any Board proposals on the subject.

In connection with the denial of FLITE's petition to intervene in the American-Western merger case, it should be pointed out that FLITE's assertion that the denial was apparently due to FLITE's lack of an "individual economic interest" is somewhat incomplete. The hearing examiner, in denying FLITE's petition to intervene, found that FLITE had "failed to establish a right under the statute to be made a party; a property, financial or other interest; how the order which may be entered in the proceeding will effect them; or that their interest will not be represented by existing parties, or by an appearance pursuant to Rule 14 of the Procedural Regulations" (Order 71-3-42, March 5, 1971). It is relevant to note in this regard that, as FLITE testified before your Subcommittee, both American and Western have agreed to submit for the record statistical information regarding the races of their employees, and FLITE states that it intends to participate in the hearing presumably as a Rule 14 paricipant. For your information, a copy of Rule 14 is enclosed.

Sincerely,

SECOR D. BROWNE,
Chairman.

Rule 14 of the Board's Rules of Practice:

§ 302.14 *Participation in hearing cases by persons not parties.*

* * * * * * *

(b) *Participation in hearings.* Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

Mr. BANZHAF. Senator, the next group that I have the privilege of introducing has the acronym of FATS, and it stands for "fight to advertise the truth about saturates." As they will explain, they are concerned about the problems of fats in American diets. I think this is a very good illustration of two things, which is why I have asked them to come.

Senator KENNEDY. I am glad we have a girl student here.

Mr. BANZHAF. I think FATS has got a number of good ideas. They filed these, as they will explain, with the Food and Drug Administration, asking the FDA to issue a two-part rule. An article appeared in the Wall Street Journal shortly thereafter indicating that the rule was about to issue. We have now heard rumors of a variety of industry pressures on the agency, and this rule, which several months ago was announced as being about to issue, has not yet issued. We would like to ask why.

Another thing that this group I think is particularly important for is to illustrate a very vital role that public interest advocates can play. What this group has done basically is to take the recom-

mendations of major health organizations such as the American Heart Association, which at this point can only make a recommendation and not take legal action, and has translated those recommendations into a formal petition to a regulatory agency. In other words, they drew upon existing information and proposals of established organization which for a variety of reasons are unwilling to engage directly in the regulatory process, and they bring these recommendations before the appropriate agencies.

This I think is a very, very vital role that legal activists can play, in corporation and in conjunction with other existing organizations.

Chairing and speaking for FATS on my right is Mr. Richard Slippen. Also Mr. Barry Baime, Mr. Howard Feinstein, Susan Lautz, and Howard Zimmerman. Mr. Slippen.

STATEMENT OF RICHARD SLIPPEN, CHAIRMAN, FIGHT TO ADVERTISE THE TRUTH ABOUT SATURATES (FATS), ACCOMPANIED BY BARRY BAIME, HOWARD FEINSTEIN, SUSAN LAUTZ, AND HOWARD ZIMMERMAN

Mr. SLIPPEN. Thank you, Professor Banzhaf.

Over 600,000 Americans die every year from coronary heart disease. The United States, with its high standard of living and its advanced medical technology, has one of the highest rates of heart disease deaths in the world. People who suffer from heart disease are advised by their physicians that, among other things, they must watch their diet—a rather simple request but an almost impossible task. Someone suffering from heart disease is generally required to cut down on his intake of cholesterol from foods containing saturated fats. But how can such a person do this? Let me suggest to you that under the current policies of the Food and Drug Administration he cannot.

Let us for a moment imagine a husband and wife shopping in a supermarket after having been advised that the husband's recent chest pains have been diagnosed as the beginning of heart disease. He has been ordered by his doctor to go on a low cholestrol diet which, his physician has explained, means the intake of foods low in saturated fat. Therefore, he must eat only those foods low in cholesterol or those with little saturated fat content. His inability to follow his doctor's advice begins as soon as he walks down the aisles of that store. Most food labels will not even mention saturated or unsaturated fats. Those that do proclaim that they are high in unsaturates. But what does that mean? Against what standard is the word high being used? Does this statement mean that a product high in unsaturates excludes the harmful saturates high in cholesterol? There are no answers to these questions and it is the consumer whose health and very life is endangered.

Another common dietary problem for those who must restrict their intake of cholesterol because of heart disease is vegetable fat. It is an accepted fact that the cholesterol level in some vegetable fat is lower than that of animal fat. But this itself is misleading because there are many different kinds of vegetable fats used in vegetable oils. Moreover, advertisements have conditioned the consumer to believe that pure vegetable oil is safe. Actually, some of these oils, like

corn oil, are in fact low in saturated fat, while others, like coconut oil, are very high in saturated fat and therefore dangerous. But one looking at any product containing vegetable fat or oil would see no specification. Thus the purchaser sees the term vegetable oil or fat never knowing what specific kind of oil or fat it is.

On December 2, 1970, FATS and Mr. James Turner, the author of "The Chemical Feast," filed a petition with the FDA requesting that they finally recognize the overwhelming medical evidence that there is a causal relationship between cholesterol and heart disease and the advisability of regulating dietary fat intake as a preventative measure. In accordance with that conclusion we petitioned the FDA to issue a regulation requiring food products to label:

(1) Percentage of total fat in the food;

(2) Percentage of total fat which is saturated;

(3) Percentage of total fat which is unsaturated;

(4) The number of grams of unsaturated fat in the container or package;

(5) The effect that the food is useful in a fat modified diet as recommended by a physican.

Furthermore, because of the inability of the consumer to know whether the vegetable oil he sees on the label refers to corn and other oils low in saturated fats, or coconut oil which is dangerously high in saturated fat, and because the use of the terms vegetable oil and vegetable fat do not reveal the specific type of fat or oil, we petitioned the FDA to require that vegetable oil and fats, as foods or ingredients, be labeled by their common or usual names such as corn oil, coconut oil, etc.

In our petition, we collected and brought together the findings of the Inter-Society Commission for Heart Disease Resources, the American Heart Association's National Diet Heart Study, and the 1969 White House Conference on Food, Nutrition, and Health, just to name a few, which support our contention that overwhelming medical evidence exists to establish a causal relationship between cholesterol and heart disease and the need for a fat labeling requirement.

Since the FDA's rejection of the proposed change in labeling policy in 1966, several other nations, among them Canada, Sweden, Finland, Norway, have taken notice of the increase in medical evidence linking saturated fat intake, cholesterol, and coronary heart disease. One might ask at this point why the United States, whose own medical researchers are responsible for many of these findings, cannot recognize the work of these medical scientists and heed their recommendations? This is a serious question to ponder and one that might possibly be a subject of further investigation.

What has been the response of the FDA since the filing of our petition last year? For a long while we heard nothing. Phone calls and letters to the FDA were futile efforts. There was not even any notification that our petition was being read or considered. Up to this moment we have received only two indications that the FDA has even recognized the existence of our petition. Our efforts to gain support for our petition were disappointing, especially in the Congress. Of the approximately 30 Senators we contacted only you, Senator Kennedy, and Senator Bayh of Indiana showed interest. The administration's total indifference to the changes we sought was also disappointing except for the Assistant Secretary of HEW for

Health and Scientific Affairs' inquiry into the status of our petition. On December 15, 1970, Mr. Sam Fine, Associate Commissioner for Compliance of the FDA, citing the Assistant Secretary's interest wrote us that we might "expect shortly to be advised of the direction of the FDA intends to go." That is the last we have heard from the FDA. Again in December, an article appeared in the Wall Street Journal which reported that the FDA was considering the issuance of regulations which were phrased in almost the exact language that we used in our petition. This faint glimmer of hope has dissipated because of the passage of time and the rumors of industry pressure on the FDA.

Section 701(e)(1) of the Food, Drug, and Cosmetic Act clearly states that the Secretary of HEW shall publish a proposal such as ours and shall afford all interested persons an opportunity to present their views orally or in writing. We would like to know, as I hope the committee would like to know, why the FDA has neither published our proposal or afforded an opportunity for others to express their views for or against it? Why did the agency withdraw when it was on the verge of issuing the proposed rule? If the FDA is undecided about the merits of our petition is it not their responsibility to solicit the views of others? Are they afraid that those of us who are concerned with 600,000 deaths in the United States alone every year will speak too strongly and convincingly if given the opportunity? Is the FDA's decisionmaking process to be a closed, secret balancing of economic and political interests or is it to be an open, objective consideration of evidence to be submitted by interested parties? If it is to be the latter then the FDA must act on our petition so that we and others can forcefully speak out for those hundreds of thousands of Americans who suffer and will suffer from America's number one killer—heart disease.

We wish to thank the committee for this opportunity to be heard and hope that the questions we have raised will become the committee's questions as well.

Senator KENNEDY. Now, as I understand it, it has been well documented that the saturated fats give you higher cholesterol and that increases the chance of death by heart attack? I think that is a medically sound statement?

Mr. SLIPPEN. Yes, sir.

Senator KENNEDY. But they have not been able to show that if you have a low cholesterol, you necessarily decrease the incident of heart attack?

Mr. SLIPPEN. That is still an open question. There is much evidence on both sides.

Senator KENNEDY. But that has not been tested out to medical satisfaction?

Mr. SLIPPEN. No; that has not been established as a fact.

Mr. KENNEDY. I suppose you are merely suggesting is that if there is a question on this—if there is any doubt— we ought to at least get the information on the potential health hazards?

Mr. BANZHAF. Senator, I think I should indicate here that although there is less than an absolute medical certainty on this point, groups like the American Heart Association feel that there is sufficient evidence, particularly when weighed against the alternative health consequences to warrant this action, and they are now going on record as advising Americans to modify their diets.

And second, as you say, for those Americans who are convinced, or at least unwilling to take the risk, they ought to have the opportunity to modify their diet in this way, if they wish to; in other words, to have the freedom to choose what they eat.

Senator KENNEDY. The Scandinavians have reached medical conclusions to their satisfaction?

Mr. SLIPPEN. Yes, sir. The four countries that I have mentioned, through the health departments of these countries, have suggested and made advertisers publish this, and this is part of their official statement—that they do recommend fat modified diets.

Senator KENNEDY. The NIH now has studies going on in this area, as I understand?

Mr. SLIPPEN. Yes. There have been many studies, and studies we have mentioned here are rather current ones, but even in 1966 when the American Diabetes Association recommended very much this same proposal there was very strong evidence at the time, but the FDA at this time chose not to recognize the evidence that existed then.

Senator KENNEDY. I suppose that this is in some ways like the tobacco industry saying that it has not been proved to a medical certainty that smoking causes cancer? There will always be the same kinds of forces that for one reason or another will do everything they can to insure that whatever studies are made that there are sufficient questions raised to make a conclusive ruling extremely difficult.

Mr. SLIPPEN. I think one of their fears is that if such a proposal as we have recommended is carried into effect that they will have to label things on their products that I think they are a little embarrassed to label.

Senator KENNEDY. Such as what?

Mr. SLIPPEN. For example, the cooking oils. All these products generally say is vegetable oil, and there is a great divergence within the vegetable oil field. For example, vegetable oils which contain corn oils are very low in saturates, and therefore, very low in cholesterol. If there is someone who must be on a low cholesterol, low fat diet this would be very advantageous. It is very possible that the same corn oil a few weeks later could contain coconut oil, and coconut oil as a vegetable oil is one of the most dangerous to someone who must be on a low fat or modified diet.

Senator KENNEDY. If that was all printed on the bottle do you think the housewife is really going to change her buying habits?

Mr. SLIPPEN. We have found it is true. There is a great lack of information, and we think that the FDA is responsible and, like the Scandinavian countries, should make an affirmative effort to inform the public of the dangers. I should make very clear that our proposal at this time is essentially for people who have been recommended by their physicians to go on a fat modified diet, and therefore, the physician has told them what they can and what they cannot eat. But that information is rather useless, because consumers go into a supermarket and still cannot follow their doctor's orders, because the products just do inform them accurately in light of what their doctor has told them.

Senator KENNEDY. Why is the industry so opposed to this kind of thing?

Mr. SLIPPEN. The fact is that the market shifts, and I might say with vegetable oil, I think this is a good example. One week the market on coconut oil might be very advantageous to the industry, and they might use that in their products. Next week it might be a corn oil, and the next week it might be a safflower oil. If they had used all of these changes and put it on their label, those who were on a fat modified diet, and those who were informed of the fact by their doctors that they must stay away from certain things, would stay away from these products. In response to your question about the public: we took a survey with our petition, and I would like one of our other members to talk about some of the results we have found.

Miss LAUTZ. Senator Kennedy, one thing we did find was that while we took our survey, which was done mostly in grocery stores, and not just in the Washington area, we found that the housewives were interested in this problem, that many of them said that their husbands had been advised to stay away from certain foods, and that if the labeling were made more clear and more definite they certainly would pay more attention to what they bought. Currently, the labeling shows nothing, so they have no choice at all, and our contention is that the public definitely has the right to have a choice.

Senator KENNEDY. Well, one might say that if there is a consumer demand for it, why haven't the companies done it on their own?

Mr. SLIPPEN. Well, admittedly there has not been a strong enough consumer demand, but there has been, as we have mentioned, this strong medical evidence.

Senator KENNEDY. Let me ask you, do you think the FDA has the authority to do what you are asking? Are you satisfied?

Mr. SLIPPEN. Yes, sir; they do. Within the Federal Food, Drug and Cosmetic Act it clearly states that the FDA does have this power.

Senator KENNEDY. I suppose what you are really attempting to do with the food industry is less than what was done with regards to the whole question of cancer: there you had the Federal Government prohibiting television advertising. You are not of the opinion that the medical evidence is sufficiently compelling to suggest a ban, but that there ought to be at least a publication, labeling of the amounts of fats in the foods? All you are trying to do is just get at the question of information and labeling?

Mr. SLIPPEN. Precisely.

Senator KENNEDY. Which is at best an extremely modest step and an extremely reasonable one—and given the accumulation of information on studies that have been made so far, as far as I can see, completely warranted. I have a particular interest in this, and as the Chairman of the Health Committee, in this whole area, so I would like to assure you that I will follow with a good deal of interest the results of this.

Do any of you gentlemen have anything further that you wanted to add?

Mr. FEINSTEIN. I just want to say that I agree with your point. We are not asking for a total ban on advertising as with tobacco. We are asking for a modest proposal, and this is why I think the

response from the FDA has been so disappointing. We are not asking for revolutionary change, but merely that the FDA fulfill its obligations to the public.

Senator KENNEDY. It is very reasonable. 335,000 Americans die of cancer every year. I think what you gentlemen are attempting to point out is that there is a national concern equal to that over lung cancer and heart disease. That is the leading killer in terms of a health hazard to American people. Yet what you are trying to suggest is not that we take the dramatic steps of prohibition of advertising, but merely to insure information for the consuming public, and it seems to me to be an extremely reasonable and worthy request. It is a great service.

Mr. FEINSTEIN. Thank you.

Senator KENNEDY. Thank you very much.

(Material relating to FATS follows:)

D. EXHIBITS RELATING TO TESTIMONY OF FATS (FIGHT TO ADVERTISE THE TRUTH ABOUT SATURATES)

1. FATS Petition to FDA (including exhibits)
2. Article Reporting FDA Action on FATS' Petition
3. Letter from FDA to Senator Edward M. Kennedy

1. FATS Petition to FDA (including exhibits)

DECEMBER 2, 1970.

COMMISSIONER OF FOOD AND DRUGS,
Department of Health, Education and Welfare,
Washington, D.C.

DEAR SIR: The undersigned, F.A.T.S., Inc. and Mr. James S. Turner, submit this petition pursuant to section 701(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act with respect to the repeal and issuance of regulations under section 403(j) of the Federal Food, Drug, and Cosmetic Act, and with respect to issuance of a regulation under Section 401 of said Act:

Attached hereto, in quintuplicate and constituting a part of this petition are the following:

(A) The proposed regulations in the form proposed by the petitioner.

(B) A statement of the grounds upon which the petitioner relies for the repeal and issuances of said regulations.

(C) If the petition seeks the amendment or repeal of an existing regulation, a reference to the section of Title 21, Chapter I, of the Code of Federal Reguluations where it appears.

Very truly yours,

FATS, INC. and
Mr. JAMES S. TURNER (Petitioners).

(Per Section 701(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act, and Title 21, Chapter I, Section 2.65 of the Code of Federal Regulation.)

Mail address: 1908 Q Street NW., Washington, D.C.

Before the Food and Drug Administration

FATS, INC. AND MR. JAMES S. TURNER, 1908 Q STREET NW., WASHINGTON, D.C., PETITIONERS

PETITION TO REVISE FDA REGULATIONS ON LABELING OF FOOD FAT CONTENT AND LABELING OF FOOD CONTAINING VEGETABLE OILS AND FATS

I. SUMMARY

On December 10, 1959, the Federal Register published a policy statement of the Food and Drug Administration which categorized as false or misleading

"any claim, direct or implied, in the labeling of fats and oils or other fatty substances offered to the general public that they will prevent, mitigate, or cure diseases of the heart or arteries." 24 Federal Register 9990, Dec. 10, 1959; Title 21, Ch. 1, Code of Federal Regulations, Section 3.141. (*Exhibit 1*). While acknowledging public concern over the role of fatty foods in regard to blood cholesterol and heart and artery disease, the policy statement denied both the existence of a causal relationship between blood cholesterol and these diseases and the advisability of regulating dietary fat intake as a preventive measure.

Subsequently, evidence of a causal relationship between dietary fat intake and heart disease continued to be submitted to the F.D.A., along with recommendations from doctors and medical associations that the F.D.A. change its policy so as to aid doctors in prescribing modified fat diets for their patients. Accordingly, upon the recommendations of the American Diabetes Association and heart doctors E. Cowles Andrus, Herbert Pollack, Frederick J. Stare, Irvine H. Page, Laurance W. Kinsell, and Benjamin M. Maker, the F.D.A. in 1965 announced a *proposed* regulation which would have required foods represented for special dietary use in regulating fat intake to list on their labels information concerning their unsaturated fat and saturated fat content. (30 Federal Register 6984, May 25, 1965) (*Exhibit 2*).

After consideration of evidence for and against the proposal, the F.D.A. rejected the change in labeling policy, but stated that *"The proposal may be resubmitted or another may be made at some future time when additional facts bearing on the issue of appropriate labeling requirements have been developed."* (31 Federal Register 3301, March 2, 1966). (*Exhibit 3*).

Petitioner contends that since the above rejection, "additional facts" in the form of medical evidence have demonstrated more conclusively than ever that:

(a) atherosclerotic heart disease continues to be the most serious medical problem in the nation;

(b) a causal relationship between dietary intake of saturated fats and blood cholesterol exists;

(c) a causal relationship between blood cholesterol and atherosclerotic heart disease exists;

(c) a causal relationship between blood cholesterol and atherosclerotic heart disease exists;

(d) a regulation permitting labeling of fat content of foods having special dietary use in regulating fat intake would aid, and is desired by, doctors in prescribing fat-modified diets for patients.

Accordingly, petitioner asks that the Food and Drug Administration repeal the 1959 regulation (*Exhibit 1*) and issue the following regulation (or one similar to it in purpose and effect):

"If a food, containing 20% or more of fat by wet weight, and whose fat content consist of 25% or greater cismethylene interrupted polyunsaturated fatty acids and no more than 20% saturated fatty acids, purports to be or is represented for special dietary use by man by reason of its use as a means of regulating the intake of fatty acids, its label shall bear an accurate statement.

(A) of the percentage of total fat in the food;

(B) of the percentage of total fat which is saturated;

(C) of the percentage of total fat which is unsaturated;

(D) of the number of grams of unsaturated fat in the container or package;

(E) to the effect that the food is useful in a fat-modified diet as recommended by a physician." (for example: "corn oil is useful in reducing blood cholesterol," or "safflower oil is recommended for low cholesterol diets."

The F.D.A. has the authority to issue such a regulation under the Federal Food, Drug and Cosmetic Act, section 403(j) (*Exhibit 4*), and the corresponding regulations concerning labeling of special dietary foods: 21 C.F.R. Section 1.11; 21 C.F.R. Section 125.2; and 21 C.F.R. Section 125.6 (*all at Exhibit 5*).

Concurrently, because of the importance of certain vegetable oils and fats for their high unsaturated fat and low saturated fat content, and because use of the terms "vegetable oil" and "vegetable fat" do not reveal the specific type of fat or oil, petitioner asks that the F.D.A. require that vegetable oil and fat, as foods or ingredients, be labeled by their "common or usual names" such as "corn oil," "coconut oil," etc. The F.D.A. has the authority to issue

such regulations under the Federal Food, Drug, and Cosmetic Act, Section 401 (*Exhibit 6*).

Petitioner will show that these two regulations, if issued by the F.D.A., would not only help implement accurate and informative labeling as required by the F.D.A., but would strongly aid doctors in prescribing fat-modified diets for their patients, and would thus contribute to the fight against the country's number one medical problem, atherosclerotic heart disease.

II. THE PETITIONERS

F.A.T.S., Inc. is a non-profit corporation registered under the laws of the District of Columbia. F.A.T.S. stands for "Fight to Advertise Truth About Saturates;" its officers and members are Richard Slippen, Susan Lautz, Howard Feinstein, Barry Baime, and Howard Zimmerman. James S. Turner is a consultant to the Center for Responsive Law in Washington, D.C. F.A.T.S., Inc. and Mr. Turner contend that now F.D.A. labeling regulations concerning fat content and vegetable oils and fats are urgently needed to help doctors and consumers to combat atherosclerotic heart disease. The members of F.A.T.S., Inc. and Mr. Turner are personally affected in this matter by virute of the fact that they are consumers of vegetable oils and fats, and other foods whose fat content and composition is not clear under present labeling practices.

III. EVIDENCE CONCERNING THE CAUSAL RELATIONSHIP BETWEEN FAT INTAKE, BLOOD CHOLESTEROL, AND HEART DISEASE, AND THE DEMAND FOR A NEW FAT-LABELING POLICY

A. *Medical evidence since 1966 indicating a causal relationship between fat intake, blood cholesterol, and heart disease*

Since the F.D.A.'s reaffirmation in 1966 of its 1959 policy against food labeling which would indicate a causal relationship between fat intake and heart disease (*Exhibits 1 and 3*), medical evidence showing that a major cause of coronary heart disease is the buildup of blood cholesterol caused by dietary intake of saturated fats has become widespread.

The Inter-Society Commission for Heart Disease Resources report entitled "*The Priary Prevention of the Atherosclerotic Diseases*," published in the December 1970 issue of *CIRCULATION*, the official journal of the American Heart Association, gives a thorough summary of the relationship between dietary fat intake and heart disease (*Exhibit 7*). This study represents the concerted, lifelong work of the outstanding medical scientists in this field, and marks the first time that such a broad-based study has made dietary recommendations as preventative measures against coronary heart disease. The report demonstrates the status of coronary heart disease as by far the leading cause of fatalities in the United States (over 600,000 annually), and shows that the U.S. has one of the highest heart disease death rates in the world. The report's international studies show that populations consuming diets high in saturated fats have high blood cholesterol levels and high incidence of coronary heart disease, while populations with diets low in saturated fat intake ranked low in both categories (Exhibit 7 at pp. 1-5). "Differences in C.H.D. [coronary heart disease] prevalence, incidence, and mortality rates among the populations of these countries were significantly related to saturated fat intake and serum cholesterol level." (Exhibit 7 at p. 5).

An important section of the report deals with experimental studies in which persons in populations with high heart disease rates were given diets reduced in saturated fats and cholesterol and increased in polyunsaturated fats. Three major studies, in Los Angeles, New York, and Helsinki (areas with high heart disease rates), reported "a sizeable decrease in the incidence of new coronary events in the experimental [diets low in saturates and high in poly unsaturates] compared with their respective comparison groups ["usual diet"] . . . all are consistent in showing a reduction in C.H.D. incidence and indicate the potential for C.H.D. prevention through modification of dietary fat composition." (*Exhibit 7 at pp. 12-13*).

Additional evidence of the causal relationship between saturated fats and heart disease was presented in the American Heart Association's *National Diet Heart Study* Final Report, published as a supplement to the March, 1968 edition of *Circulation* (*Exhibit 8*). The study, undertaken in six locations in

the United States, administered a diet modified to include (a) moderate reduction in the percentage of calories derived from total fat and saturated fat; (b) increase in the percentage of calories derived from polyunsaturated fat and an increase in the polyunsaturated-to-saturated fat ration; and (c) moderate reduction in dietary cholesterol.

The study personnel concluded that "Extensive evidence implicates diet as a key factor in the etiology of atherosclerosis, and suggests that the disease can be prevented by changes in the diet, particularly by lowering serum cholesterol levels." (*Exhibit 8 at p. I-1*). The seriousness of the heart disease problem and the necessity and practicality of modification of fat intake was expressed in the study's recommendations:

"(a) Incidence and mortality of premature C.H.D. in United States are extremely high, showing no signs of diminishing, and constitute tremendous challenges to medical science and public health, for preventative action.

(b) There is overwhelming evidence that the incidence of premature C.H.D. is strongly associated with serum cholesterol level.

(c) Serum cholesterol level can be safely lowered by modification of the usual American diet in ways that are acceptable to large numbers of people." (*Exhibit 8 at p. I-21*).

The 1969 White House Conference on Food, Nutrition and Health also took notice of the increasing evidence linking dietary fat intake with heart disease, and in its Final Report the conference acknowledged that many persons are attempting to modify fat intake on their own or as medically prescribed, and asked that labeling of fat content be permitted for foods used to regulate dietary fat intake (*Exhibit 9 at p. 53*).

Dr. Michael Jacobson, a microbiologist and Research Associate of the Salk Institute for Biological Studies, and consultant to the Center for the Study of Responsive Law summed up the prevailing medical opinion in a letter to F.D.A. Deputy Commissioner James Grant on October 5, 1970:

"There is general agreement in the medical community that saturated fats raise cholesterol levels in the blood and that high cholesterol levels cause or are associated with atherosclerosis. Countless scientific experiments have demonstrated the relationship between saturated fats and cholesterol levels. A significant number of epidomiological studies have shown that high cholesterol levels correlate with the risk of developing conorary heart disease." (*Exhibit 10 at p. 3*).

Dr. Jacobson goes on to urge dietary fat intake modification in fighting heart disease, and concludes that,

"Because the probability is so great that changing the kinds of fat we eat will diminish the prevalence of atherosclerosis, the F.D.A. should do everything it can to encourage this change. The F.D.A.'s first step in this direction should be to require that food labels bear a complete description of the food content." (*Exhibit 10 at p. 4*).

The evidence is summarized in the *Inter-Society Commission for Heart-Disease Resources* report

"Within any population group, again with few exceptions, the risk of developing premature C.H.D. increases as the serum cholesterol level rises. This fact has been extensively documented for the American male population in several prospective epidemiological studies. The relationship between level of serum cholesterol and disease is continuous. With increasing cholesterol concentration risk is increased." (*Exhibit 7 at p. 4*).

B. *Recent developments in foreign nations in the field*

Since the F.D.A.'s rejection of the proposed change in labeling policy in 1966, several other nations have taken notice of the increase in medical evidence linking saturated fat intake, blood cholesterol, and coronary heart disease. The Canadian Food and Drug Directorate has responded to the heart disease problem by promulgating regulations aimed at aiding consumers in following medical advice concerning fat intake in their diets (*Exhibit 11*).

An even stronger policy has been implemented by the Scandinavian countries. On May 3, 1968, Sweden's National Board of Health and Welfare, together with the Medical Boards of Finland and Norway, issued a statement informing the public that "Cutting down on the total consumption of fat in combination with a reduction in the amount of saturated fats and a relative

increase in the quantity of polyunsaturated fats can diminish the risk of atherosclerosis." The joint policy statement called on the cooperation of doctors, others giving advice on nutrition, the food industry, and the mass media in not only encouraging fat-modified diets, but in accurate and extensive dissemination of information to consumers in areas of labeling and advertising:

"Proposed menus and the composition of recipes for large-scale catering should meet the requirements of nutritional physiology and the food value should be calculated. Consumer information on questions of nutrition should be circulated in the press and on the radio and TV on the basis of the points made above." (*Exhibit 12*).

C. *Evidence of changes in policy by FDA officials and persons advising the FDA since 1966*

Both F.D.A. officials and medical personnel advising the FDA in this area have acknowledged a causal relationship between saturated fats, cholesterol, and heart disease, and have recommended changes in labeling policy.

Dr. Herbert L. Ley, then Director of the Bureau of Medicine of the F.D.A., wrote to Commissioner Goddard on August 14, 1967 a memorandum favoring a change in fat labeling policy and including a proposed regulation. Dr. Ley stated that "The Bureau of Medicine recognizes that this position represents a major change in policy. Nevertheless, the position is recommended as the only one reasonable at this time." (*Exhibit 13*).

Another recommendation for change, citing the Canadian regulations (*Exhibit 10*) and again proposing a specific labeling policy, came in a November 14, 1967 memorandum from the Bureau of Science Director, Dr. William H. Sumerson, to Associate Commissioner J. K. Kirk. This recommendation too noted the growing inadequacy of the 1959 regulation: "We believe it is recognized that with the publication of a proposal as recommended either by the Bureau of Medicine or the Bureau of Science, a change in the 1959 Policy Statement is desirable and perhaps necessary." (*Exhibit 14*).

The 1966 rejection of the proposed change in fat-labeling policy of the previous year was due in part to the American Medical Association's Council on Foods and Nutrition's urging that the F.D.A. await the results of the Council's study of fat labeling (*Exhibit 3*). When the Council's report was submitted to the F.D.A. in May of 1967, it noted that medical evidence showed that regulation of fat content would be helpful in preventing coronary heart disease, and made specific recommendations for a new labeling policy (*Exhibit 15*).

Thus, one year after the F.D.A. rejected a change in labeling policy at the request of the Council because the latter felt that the proposed change ". . . would not assist physicians in prescribing diets and would not be particularly helpful to patients in selecting food for use in a fat-modified diet." (*Exhibit 3*), the Council's report stated:

". . . informative product labeling would assist the physician in prescribing diets with a modified fat content and would aid the patient in his selection of foods. . . . Labeling would permit and stimulate development and marketing of foods with modified fatty acid content, a development which the Council encourages and feels is necessary for long term diet modification." (*Exhibit 15 at p. 1*).

Two months prior to the submitting of the Council's report, the F.D.A. announced the approval of the drug Atromid-S as effective in lowering blood cholesterol. At the time of the announcement, the 1959 fat-labeling policy statement was in effect as a regulation, 21 C.F.R. Section 3.41, stating in part:

"The role of cholesterol in heart and artery diseases has not been established. A causal relationship between blood cholesterol levels and these diseases has not been proved." (*Exhibit 1*).

Yet in announcing the approval of Atromid-S (the F.D.A. has also approved the drug Coloxin for the same purpose), the Director of the Office of New Drugs, Robert M. Hodges, stated:

"This drug is effective in lowering serum cholesterol. We believe there is enough of a consensus among leading cardiologists that lowering the cholesterol level will prevent arterial and heart diseases." (*Exhibit 16*).

The F.D.A. has thus created a double standard with respect to drugs and food as to the relationship between cholesterol and heart disease.

The entire situation is summarized in the recommendations of the *Inter-Society Commission for Heart Disease Resources'* report in the December 1970 issue of *Circulation*, released this week. Because of the seriousness of the medical problem and the evidence supporting a causal relationship between fat intake and heart disease, the report urges that,

"The F.D.A.'s regulation with respect to labeling of foods should be re-reviewed and unpdated. A new approach to labeling is needed—to allow the consumer easily to identify nutrient content (particularly the amount and type of fat and cholesterol) in all foods . . . and to encourage the manufacture of nutritious products low in saturated fats and cholesterol." (*Exhibit 7 at p. 23*).

The petitioners contend that the above evidence, together with the recommendations of many more physicians (see F.D.A. General Correspondence File No. 533.61, "Polyunsaturated Fats and Oils"), indicates the importance of the repeal of 21 C.F.R. Section 3.41 and the adoption of petitioner's proposed regulation, or one similar to it, by the F.D.A. under its authority per Section 403(j) of the Federal Food, Drug, and Cosmetic Act (*Exhibit 4*), and the corresponding regulations on special dietary foods (*Exhibit 5*).

IV. LABELING OF VEGETABLE OILS AND FATS

The importance of accurate labeling of vegetable oils and fats in aiding regulation of fat intake is summarized in the Final Report of the National Diet Heart Study (*Exhibit 8* at p. I-346):

"Poly-unsaturated dietary fats and tend to reduce the blood cholesterol level. Poly-unsaturated fats are usually liquid oils or vegetable origin. Familiar examples are corn, cottonseed, safflower, and soybean oils. . . . Saturated dietary fats tend to raise the blood cholesterol level. Saturated fats are usually the solid fats of animal origin. . . . Coconum oil [a vegetable oil], the fat in chocolate, and some solid cooking fats are also saturated. . . . Mono-saturated fats have very little apparent effect one way or the other on blood cholesterol. Olive oil is one example of a mono-unsaturated fat."

The report went on to indicate the importance of listing on labels whether or not the vegetable oil is hydrogenerated, a distinction currently not required:

". . . Some vegetable oils can be made solid at room temperature by hydrogenation. Hydrogenated shortenings and margerines vary greatly in composition: some contain little poly-unsaturated fat, others contain a considerable amount."

A labeling bill introduced in the California State Legislature this year, sponsored by the California Heart Association, emphasized this distinction (*Exhibit 17 at p. 2*).

Consumers wishing to use particular vegetable oils which are high in poly-unsaturated fats face an impossible task, because, as Dr. Jacobson notes in his letter to Deputy Commissioner Grant (*Exhibit 10 at pp. 4-5*).

"Current labeling practices do not enable the shopper to distinguish between vegetable oils from different sources, and of different qualities. . . . As doctors know, coconut oil contains an even higher proportion of saturated fats than butter, and as food manufacturers know, cononut oil often masquerades under the name "vegetable oil" in lists of ingredients."

Accordingly, the petitioner asks that under the authority of the Federal Food, Drug, and Cosmetic Act, section 401 (*Exhibit 6*), the F.D.A. promulgate regulations requiring that all references to vegetable oils and fats in foods and ingredients be by their "common and usual names," in this case the specific types of vegetable oil or fat, such as "corn oil," "cononut oil," etc. The petitioner contends that references to "vegetable oil" on labels constitutes misbranding under the Federal Food, Drug, and Cosmetic Act, section 403(a) ("false or misleading in any particular") (*Exhibit 4*). Such labeling is not "false," but is "misleading" under the statutory definition (Section 201(n) of the Act):

". . . there shall be taken into account (among other things) not only representations made or suggested by word . . . but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual." (*Exhibit 18*).

In the case of coconut oil labeled as vegetable oil, the "consequences which may result" might be increased danger of coronary heart disease, as pointed out in the Inter-Society Commission for Heart Disease Resources in their December, 1970 *Circulation* report:

"Coconut oil is one of the most potent agents for elevating serum cholesterol level. Labels that read 'made with vegetable oil' give an erroneous implication that the product is to be preferred over one containing dairy fat." (*Exhibit 7 at pp. 21-22*).

The petitioners contend that a label reading "vegetable oil" is also misbranding under section 403(f) of the Act, which states that

"Any word, statement, or other information required . . . to appear on the label or labeling [must be] placed thereon with such conspicuousness . . . and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." (*Exhibit 4*).

The F.D.A. applied this test shortly after enactment of the Act in ordering the manufacturer of a product labeled "Oil for Salads Cooking" to change the label to read "Corn Oil," on grounds that the initial label violated section 403(f). (Trade Correspondence 273, May 7, 1940) (*Exhibit 19*). In the same case, the F.D.A. designated "Corn Oil" as the ingredient's "common or usual name."

The need for a policy of labeling vegetable fats and oils by their "common or usual names" was stressed in the Final Report of the 1969 White House Conference on Food, Nutrition and Health:

"The consumer relies upon labels attached to packaged foods as a prime source of information about the contents, nutritional value, and safety of these foods. It benefits him little to possess the knowledge and understanding of his personal food needs and desires if pertinent information regarding the constituents or properties of foods is not contained in the labeling, so as to afford a rational basis for selection. . . . The labels of all foods, including those for which a definition and standard of identity have been prescribed, should list the common or usual names of all ingredients. . . . Food ingredients should be declared in terms of their sources such as . . . "peanut oil" rather than just vegetable oil." (*Exhibit 9 at p. 137*).

This F.D.A. policy of requiring labeling on the basis of "common or usual names" is also present in section 403(g) of the Act (requiring "common names" for optional ingredients in foods having a standard of identity), and section 403(i) of the Act, which calls for the use of common or usual names" of foods and ingredients in products without standard identities. (*Exhibit 4*).

The F.D.A.'s interpretation of "common or usual name" is still further emphasized in 21 C.F.R. Section 1.10: "The name of an ingredient . . . required by section 403(i)(2) of the act ['common or usual name'] to be borne on the label shall be a specific name and not a collective name." (*Exhibit 20*).

This policy was upheld by the U.S. Court of Appeals in *Brunatto Cheese Manufacturing Corp.* v. *Celebrezze*, 356 F.2d 874 (2d Cir. 1966), *cert. denied*, 385 U.S. 827 (1966). The Court interpreted "common or usual name" as used in section 401 as "that name by which the product is known to the community at large," and deemed correct the F.D.A.'s requiring of a specific food name instead of the more general one proposed by the manufacturer: "Thus the Commissioner could find that the public knew as Mozzarella two different cheeses, and that there was a separate standards of identity." (*Exhibit 21*).

The petitioners thus contend that F.D.A. law and policy requires labeling of vegetable fats and oils by their specific names. Without such a policy, doctors will be greatly hindered in prescribing fat-modified diets for their patients, and manufacturing of vegetable fats and oils high in unsaturated fat will continue to be economically unfeasible. The seriousness of the situation was pointed out by Dr. Benjamin M. Baker, a member of the National Diet Heart Study's Executive Committee, in a letter to F.D.A. Commissioner Larrick in 1964:

"If there is no label on commercial products stating whether the vegetable oil they contain is saturated or unsaturated, the medical prescription is meaningless. . . . Furthermore, the National Diet-Heart Study and others are doing everything possible to induce manufacturers to product acceptable foods of polyunsaturated fat content. It is much easier and cheaper for manufacturers to hydrogenate vegetable oils before they are used in food manuftcure. If expense and trouble of production to manufacturers is increased, it seems only

proper for them to have the right to label their products facutally." (*Exhibit 21*).

The petitioners contend that the issuance of regulations under section 401 of the Food, Drug, and Cosmetic Act to require labeling of all vegetable oils and fats by their specific names, including the prefix "hydrogenated" when applicable,

(a) conforms to F.D.A. law and policy;

(b) is economically feasible and equitable; and

(c) most importantly, would be a vital aid in the fight against coronary heart disease in the United States.

V. CONCLUSION

Atherosclerotic heart disease is the most serious medical problem in the United States. The medical evidence linking dietary intake of saturated fats, blood colesterol, and atherosclerotic heart disease has caused many Americans to modify the fat intake of their diets. To best help doctors prescribe specific dietary changes for these persons, the Food and Drug Administration should change its policies on the labeling of fat content in food and the labeling of vegetable oils and fats. Accordingly,

The petitioners pray that:

(1.) The F.D.A. repeal its 1959 regulation on fat labeling, and issue a regulation such as the one proposed by petitioners on page 3 of this petition, which would require foods purporting to be for special dietary use in regulating the intake of fatty acids to state on their labels the following information:

(A) The percentage of total fat in the food;

(B) The percentage of total fat which is saturated;

(C) The percentage of total fat which is unsaturated;

(D) The number of grams of saturated fat and unsaturated fat in the food; and

(E) A statement to the effect that the food is useful in a fat-modified diet as recommended by a physician.

(2.) The F.D.A. issue a regulation requiring the labeling of all vegetable oils and fats, as foods and ingredients, by their specific, respective names, including the prefix "hydrogenated" when applicable.

The petitioners ask that this proposal be published in the Federal Register, as per 21 C.F.R. Sections 2.65 and 2.66.

Respectfully submitted,

HOWARD FEINSTEIN.
RICHARD SLIPPEN.
HOWARD ZIMMERMAN.
SUSAN LAUTZ.
BARRY BAIME.
JAMES S. TURNER, Esq.

LIST OF EXHIBITS

1. 24 Federal Register 9990—Dec. 10, 1959.
2. 30 Federal Register 6984—May 25, 1965.
3. 31 Federal Register 3301—March 2, 1966.
4. Federal Food, Drug, and Cosmetic Act—Section 403.
5. Special Dietary Regulations: 21 C.F.R. 1.11; 21 C.F.R. 125.2; 21 C.F.R. 125.6.
6. Federal Food, Drug, and Cosmetic Act—Section 401.
7. "The Primary Prevention of the Atherosclerotic Diseases"—Position Paper for the Inter-Society Commission for Heart Disease Resources (In Dec. 1970 *Circulation* Magazine).
8. "The National Diet-Heart Study Final Report"—American Heart Association (New York, 1968).
9. White House Conference on Food, Nutrition and Health—Final Report (1969).
10. Letter from Dr. Michael Jacobson to Deputy Commissioner Grant (Oct. 5, 1970).
11. Regulations of the Canadian Food and Drug Directorate.
12. Joint Policy Statement of the Scandinavian Nations (May 3, 1968).

13. Memorandum from Dr. Ley to Commissioner Goddard (August 14, 1967).
14. Memorandum from Dr. Summerson to Associate Commissioner Kirk (Nov. 14, 1967).
15. Report of the American Medical Association, Council on Foods and Nutrition (on Fat Labeling)—(May 5, 1967).
16. "FDA's Reasoning in Drug Approval Raises Questions"—*Washington Post*, March 16, 1967; p. F-4.
17. Assembly Bill No. 1387—California State Assembly (May 8, 1970).
18. Federal Food, Drug, and Cosmetic Act—Section 201(n).
19. F.D.A. Trade Correspondence No. 273 (May 7, 1940).
20. 21 C.F.R. 1.10.
21. *Brunetto Cheese Manufacturing Corp.* v. *Celebrezze*, 356 F.2d 874 (2d Cir. 1966), *cert. denied*, 385 U.S. 727 (1966).
22. Letter from Dr. Baker to Commissioner Larrick (June 1964).

Exhibit 1

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

Subchapter A—General

Part 3—Statement of General Policy or Interpretation

Status of Articles Offered to the General Public for the Control or Reduction of Blood Cholesterol Levels and for the Prevention and Treatment of Heart and Artery Disease Under the Federal Food, Drug, and Cosmetic Act

Under the authority vested in the Secretary of Health, Education, and Welfare by the Federal Food, Drug, and Cosmetic Act (sec. 701(a), 52 Stat. 1055, as amended; 21 U.S.C. 371) and delegated to the Commissioner of Food and Drugs by the Secretary (23 F.R. 9500), and pursuant to the Administrative Procedure Act (sec. 3, 40 Stat. 2v7; 5 U.S.C. 1002), the following statement of policy is issued.

§3.41 Status of articles offered to the general public for the control or reduction of blood cholesterol levels and for the prevention and treatment of heart and artery disease under the Federal Food, Drug, and Cosmetic Act.

(a) There is much public interest and speculation about the effect of various fatty foods on blood cholesterol and the relationship between blood cholesterol levels and diseases of the heart and arteries. The general public has come to associate the term "cholesterol" with these diseases. A number of common food fats and oils and some other forms of fatty substances are being offered to the general public as being of value in the control or reduction of blood cholesterol levels and for the prevention or treatment of diseases of the heart or arteries.

(b) The role of cholesterol in heart and artery diseases has not been established. A causal relationship between blood cholesterol levels and these diseases has not been proved. The advisability of making extensive changes in the nature of the dietary fat intake of the people of this country has not been demonstrated.

(c) It is therefore the opinion of the Food and Drug Administration that any claim, direct or implied, in the labeling of fats and oils or other fatty substances offered to the general public that they will prevent, mitigate, or cure diseases of the heart or arteries is false or misleading, and constitutes misbranding within the meaning of the Federal Food, Drug, and Cosmetic Act. (Sec. 701, 52 Stat. 1055, as amended, U.S.C. 371. Interprets or applies sec. 403(a), 52 Stat. 1047; 21 U.S.C. 343(a)).

Dated: December 7, 1950.

[SEAL]

Geo. P. Larrick,
Commissioner of Food and Drugs.

[F. R. Doc. 59-10454; Filed, Dec. 9, 1959; 8:40 a.m.]

Exhibit 2

Department of Health, Education, and Welfare

FOOD AND DRUG ADMINISTRATION

[21 CFR Part 125]

OILS, FATS, AND FATTY FOODS FOR REGULATING INTAKE OF FATTY ACIDS IN DIETARY MANAGEMENT

Proposal To Require Label Statements

There was published in the FEDERAL REGISTER for December 10, 1959 (21 CFR 3.41), a statement of policy by the Food and Drug Administration concerning the status of articles offered to the general public for the control or reduction of blood cholesterol levels and for the prevention and treatment of heart and artery disease under the Federal Food, Drug, and Cosmetic Act. The policy statement expressed the view that any claim, whether direct or implied, in the labeling of fats and oils or other fatty substances, offered to the general public, that such foods will prevent, mitigate, or cure heart or artery diseases is false and misleading and is considered as misbranding under the Federal law.

At the time of publication of the statement of policy the Food and Drug Administration pointed out that the policy statement does not interfere in any way with legitimate research and clinical evaluation of the possible role of unsaturated fats in the diet in lowering blood cholesterol and preventing heart disease.

In May 1964, the Food and Drug Administration reported the results of a consumer survey which showed that labeling terms such as "polyunsaturated," "unsaturated," "low in cholesterol," and similar statements mislead many people to believe that these foods will reduce blood cholesterol and thus be effective in treating or preventing heart and artery diseases. Other misleading phrases include "ask your doctor," "better for people's health," "are you concerned about saturated fats," and "better for you because it's made from 100 percent golden corn oil."

In the light of the survey results, in May 1964 the Food and Drug Administration reaffirmed its official statement of policy of December 10, 1959. The Commissioner again pointed out that the 1959 policy statement pointed out that the 1959 policy statement did not and does not interfere in any way with legitimate research and clinical evaluation of unsaturated fats in the diet, but does intend to prevent the promotion of foods to the lay public for their use without medical supervision in attempting to reduce blood cholesterol.

Since the release of the consumer survey report, the Food and Drug Administration has received a recommendation from clinicians working in this field of medicine that labeling statements be allowed to assist them in recommending food to their patients which would help guide the patient in selecting the kind of diet his physician has prescribed for him.

Clinicians who have made such a recommendation to the Food and Drug Administration are:

E. Cowles Andrus, M.D.
Herbert Pollack, M.D.
Frederick J. Stare, M.D.
Irvine H. Page, M.D.
Laurance W. Kinsell, M.D.
Benjamin Baker, M.D.

Also, the Food and Drug Administration has received a recommendation from the American Diabetes Association that labeling requirements be established which would provide for label statements of precise percentages of the polyunsaturated, monounsaturated, and saturated fatty acid content of edible oils and fats.

Therefore, in response to such requests, and without in any way modifying the prior statement of policy or of endorsing these proposals, and pursuant to the authority provided in the Federal Food, Drug, and Cosmetic Act (secs. 403(j), 701(e); 52 Stat. 1048, 1055, as amended; 21 U.S.C. 343(j), 371(e)) and delegated to the Commissioner by the Secretary of Health, Education, and

Welfare (21 CFR 2.90) the following regulation is proposed in order to provide proponents an opportunity to support a regulation which will carry out their recommendations.

§125. Label statements relating to oils, fats, and fatty foods used as a means of regulating the intake of fatty acids in dietary management.

(a) If a food purports to be or is represented for special dietary use by man by reason of its use as a means of regulating the intake of fatty acids, its label shall bear an accurate statement of the number of grams of saturated fatty acids, the number of grams of monounsaturated acids, and the number of grams of polyunsaturated fatty acids contained in an ordinary serving, and in 100 grams of the food.

(b) Compliance with the provisions of subparagraph (a) of this section shall not be construed as relieving any food from compliance with the requirements of section 403(a) of the Federal Food, Drug, and Cosmetic Act.

Any interested person may, within 60 days from the date of publication of this notice in the FEDERAL REGISTER, file with the Hearing Clerk, Department of Health, Education, and Welfare, Room 5440, 330 Independence Avenue SW., Washington, D.C., 20201, written comments, preferably in quintuplicate, on this proposal. Comments may be accompanied by a memorandum or brief in support thereof.

Dated: May 18, 1965.

GEO. P. LARRICK,
Commissioner of Food and Drugs.

[F.R. Doc. 65-5498, Filed, May 24, 1965; 8:48 a.m.]

Exhibit 3

Department of Health, Education, and Welfare

FOOD AND DRUG ADMINISTRATION

[21 CFR Part 125]

OILS, FATS, AND FATTY FOODS FOR REGULATING DIETARY MANAGEMENT

Notice of Proposed Rule Making Terminated

In the matter of establishing requirements for label statements relating to oils, fats, and fatty foods used as a means of regulating the intake of acids in dietary management:

In response to recommendations from a number of clinicians and from the American Diabetes Association that labeling of edible fats, oils, and fatty foods be required to show precise percentages of polyunsaturated, monounsaturated, and saturated fatty acid content, the Food and Drug Administration had published in the FEDERAL REGISTER of May 25, 1965 (30 F.R. 6984), a notice of proposed rule making designed to implement these recommendations.

The proponents of the proposed regulation contended that such label statements would assist physicians in recommending special diets to their patients and would assist patients in complying with their physicians' recommendations. While it was and continues to be the position of the Food and Drug Administration that dietary manipulation of blood cholesterol levels has not been established as an effective means of preventing, mitigating, or curing diseases of the heart or arteries the proposed regulation was published to provide proponents the opportunity to support a regulation designed to implement their recommendations.

The time for filing comments on the proposal was extended to October 22, 1965, by a notice published in the FEDERAL REGISTER of July 27, 1965 (30 F.R. 9323).

Numerous comments from individual physicians, nutritionists, persons affiliated with associations, State and city officials, food and drug firms, and trade associations have been received and evaluated. A broad spectrum of opinion is

represented in the comments ranging from pronounced views favoring the proposal, statements opposing it, and the view that the role of fats in the diet has not been sufficiently clarified and defined to permit a sound decision on the available scientific evidence.

While the American Heart Association and the American Diabetes Association filed comments in support of the proposal, the American Medical Association's Council on Foods and Nutrition has commented in opposition on the grounds that the proposed regulation would not assist physicians prescribing diets and would not be particularly helpful to patients in selecting food for use in a modified-fat diet. The Council has indicated its readiness to conduct a comprehensive evaluation of the composition of modified-fat diets, including a review of current methods for identifying products specifically designed for use in such diets. The Council urged the Food and Drug Administration to reject the proposal as drafted or postpone action on the proposal for a year to permit completion of the study and submission of findings to the Food and Drug Administration. Representatives of the affected industries have offered to assist the Council in this study and have urged that no favorable action be taken on the proposal until the Council has completed its study.

The Food and Drug Administration endorses the objectives of this study as it has encouraged all legitimate research in this area. Due consideration will be given to the findings when submitted.

On the question of whether the proposed labeling requirements would assist physicians in recommending special diets to their patients and patients complying with their physicians' recommendations, it is apparent that the record compiled does not support the proponents' contention.

Accordingly, the Commissioner of Food and Drugs, having considered the comments received and other relevant information, concludes that the proposed subject regulation should not be adopted. The proposal may be resubmitted or another may be made at some future time when additional facts bearing on the issue of appropriate labeling requirements have been developed.

This action is taken pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 403(j), 701(e), 52 Stat. 1048, 1055, as amended; 21 U.S.C. 343(j), 371(e)), and under the authority delegated to the Commissioner by the Secretary of Health, Education, and Welfare (31 CFR 2.90).

Dated: February 18, 1966.

JAMES L. GODDARD,
Commissioner of Food and Drugs.

[F.R. Doc. 66–2179; Filed, Mar. 1, 1966; 8:49 a.m.]

Exhibit 4

FEDERAL FOOD, DRUG, AND COSMETIC ACT

MISBRANDED FOOD

SEC. 403 [343]. A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If it is offered for sale under the name of another food.

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

(d) If its container is so made, formed, or filled as to be misleading.

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(f) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the laebling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

(h) If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 401, and its quality falls below such standard, unless its label bears, in such manner and forms as such regulations specify, a statement that it falls below such standard; or

(2) a food for which a standard or standards of fill of container have been prescribed by regulations as provided by section 401, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

(i) If it is not subject to the provisions of paragraph (g) of this section unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings without naming each: *Provided*, That, to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary.

(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

(k) If it bears or contains any artificial flavoring, articficial coloring, or chemical preservative, unless it bears labeling stating that fact: *Provided*, That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream. The provisions of this paragraph with respect to chemical preservatives shall not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the produce of the soil.

(l) If it is a raw agricultural commodity which is the produce of the soil, bearing or containing a pesticide chemical applied after harvest, unless the shipping container of such commodity bears labeling which declares the presence of such chemical in or on such commodity and the common or usual name and the function of such chemical: *Provided, however*, That no such declaration shall be required while such commodity, having been removed from the shipping container, is being held or displayed for sale at retail out of such container in accordance with the custom of the trade.

(m) If it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements, applicable to such color additive, as may be contained in regulations issued under section 706.

Exhibit 5

§ 1.11 Special dietary uses.

(a) The term "special dietary uses", as applied to food for man, means particular (as distinguished from general) uses of food, as follows:

(1) Uses for supplying particular dietary needs which exist by reason of a physical, physiological, pathological or other condition, including but not limited to the conditions of diseases, convalescence, pregnancy, lactation, allergic hypersensitivity to food, underweight, and overweight;

(2) Uses for supplying particular dietary needs which exist by reason of age, including but not limited to the ages of infancy and childhood;

(3) Uses for supplementing or fortifying the ordinary or usual diet with

any vitamin, mineral, or other dietary property. Any such particular use of a food is a special dietary use, regardless of whether such food also purports to be or is represented for general use.

(b) No provision of any regulation under section 403 (j) of the act shall be construed as exempting any food from any other provision of the act or regulations thereunder, including sections 403 (a) and (g) and, when applicable, the provisions of Chapter V of the act.

[20 F.R. 9529, Dec. 20, 1955]

§ 125.2 General label statements.

(a) If a food (including food to which any one or more of §§ 125.3 to 125.8, inclusive, is applicable) purports to be or is represented for any special dietary use by man, its label shall bear a statement of the dietary properties upon which such use is based in whole or in part. Such statement shall show the presence or absence of any substance, any alternate of the quantity or character of any constituent, and any other dietary property of such food upon which such use is so based.

(b) If a food (including food to which any one or more of §§ 125.3 to 125.8, inclusive, is applicable) purports to be or is represented for special dietary use by reason of its use for treating any disease resulting from a dietary deficiency in man, its label shall bear, in addition to the information required under paragraph (a) of this section, adequate directions for such use.

§ 125.6 Label statements relating to certain food used in control of body weight or in dietary management with respect to disease.

If a food purports to be or is represented for special dietary use by man by reason of its use as a means of regulating the intake of protein, fat, carbohydrate, or calories, for the purpose of controlling body weight, or for the purpose of dietary management with respect to disease, the label shall bear a statement of:

(a) The percent by weight of protein, fat, and available carbohydrates in such food; and

(b) The number of available calories supplied by a specified quantity of such food.

Exhibit 6

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Chapter IV—Food

DEFINITIONS AND STANDARDS FOR FOOD

SEC. 401 [341]. Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: *Provided*, That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packaging and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing.

Exhibit 7

The Primary Prevention of the Atherosclerotic Diseases

POSITION PAPER FOR THE INTER-SOCIETY COMMISSION FOR HEART DISEASE RESOURCES

(Prepared by the *Atherosclerosis Study Group, Chairman:* Jeremiah Stamler, M.D., *Members:* Rodney R. Beard, M.D., William E. Connor, M.D., Victor G. deWolfe, M.D., Joseph Stokes III, M.D., Park W. Willis III, M.D.)

(*Epidemiology Study Group, Chairman:* Abraham M. Lilienfeld, M.D., *Members:* Thomas R. Dawber, M.D., Joseph T. Doyle, M.D., Frederick H. Epstein, M.D., Lewis H. Kuller, M.D., Warren Winkelstein, Jr., M.D.)

"In view of the fact that atherosclerotic complications cause a majority of the deaths in this country and a substantial proportion of the disability, it is recommended that immediate efforts be made to prevent premature atherosclerotic complications."

Second National Conference on Cardiovascular Diseases,
Summary Papers, 1964.

"Coronary Heart Disease has reached enormous proportions, striking more and more at younger subjects. It will result in coming years in the greatest epidemic mankind has faced unless we are able to reverse the trend by concentrated research into its cause and prevention.

"The Board expressed a wish that countries most affected by cardiovascular diseases increase their efforts both to set up efficient service for control and to carry out more extensive research programmes."

Executive Board, World Health Organization, 1969.

CONTENTS

I. The Need for a National Commitment to Primary Prevention as the Principal Means of Controlling a Major Public Health Problem—Coronary Heart Disease and Other Atherosclerotic Diseases.
II. The Possibility of Achieving Primary Prevention of Atherosclerotic Diseases.
- A. Association of risk factors with atherosclerotic diseases—major risk factors.
  - Diet and serum lipids.
  - Hypertension.
  - Cigarette smoking.
  - Combinations of major risk factors.
- B. Association of risk factors with atherosclerotic diseases—other risk factors.
  - Diabetes mellitus and asymptomatic hyperglycemia.
  - Obesity.
  - Sedentary living.
  - Psycho-social tensions.
  - Family history.
- C. Modification of risk factors.
  - Changes in diet composition.
  - Control of cigarette smoking.
  - Drug treatment of hypertension.
  - Control of multiple risk factors.
- Summary.

III. Recommendations for Primary Prevention.
- A. A National Policy Commitment to a Strategy of Primary Prevention.
- B. Definitive Field Trials of Primary Prevention.
- C. Diet and Food Modifications.
  1. Calories.
  2. Cholesterol.
  3. Saturated fats.
  4. Meats.
  5. Dairy products.
  6. Baked goods.
  7. Fats and oils.
  8. Egg yolks.
  9. Definition and labeling of foods.
  10. Government food and nutrition programs.
  11. Public and professional nutrition education.
- D. Elimination of cigarette smoking.
  1. Advertising and sale of cigarettes.
  2. Mass media education program.
  3. Education program in the schools.
  4. Cigarette vending machines.
  5. Smoking in public facilities.
  6. Use of tobacco tax funds.
  7. Government subsidies for tobacco cultivation and export.
  8. Socioeconomic planning for the phase-out of the tobacco industry.
- E. Detection and control of hypertension.
- F. Community programs for individuals highly susceptible to premature atherosclerotic diseases.
- G. Drugs for the treatment of hyperlipidemia; exercise programs.

IV. Primary Prevention of Premature Atherosclerotic Diseases—Perspective.

I. THE NEED FOR A NATIONAL COMMITMENT TO PRIMARY PREVENTION AS THE PRINCIPAL MEANS OF CONTROLLING A MAJOR PUBLIC HEALTH PROBLEM—CORONARY HEART DISEASE AND OTHER ATHEROSCLEROTIC DISEASES

Atheresclerosis is the major specific type of arteriosclerosis afflicting mankind. Its hallmark is an accumulation of fatty materials (lipids), cholesterol most prominently, in the walls of medium and large arteries. The clinical manifestations of this disease reflect the ischemic complications of *severe* atheresclerosis. The central problem, therefore, is the prevention of the severe form of this disease, particularly its premature occurrence, e.g., before age 65.

Morbidity, disability and mortality rates from atherosclerotic diseases—coronary heart disease (CHD), cerebrovascular, aortic, renal vascular and peripheral vascular disease—remain extremely high in the United States and constitute one of the principal challenges to medical science and public health. This report is based principally on the extensive research data available concerning the critical problem of coronary heart disease. However, its conclusions are probably applicable to atherosclerosis wherever it occurs.

The National Health Examination Survey of 1960–62 estimated that 3.1 million American adults age 18 to 79 had definite coronary heart disease and 2.4 million had suspect CHD, together representing about 5 per cent of this population (Table 1) (1). It was further estimated that of Americans under age 65, almost 1.9 million had definite CHD and 1.6 million had suspect CHD.

Every year about a million persons in the United States experience either a myocardial infarction or sudden CHD death. There are over 600,000 deaths each year due to CHD. (Table 2) (2). Over 200,000 more succumb to atherothrombotic disease of major arterial vessels in other parts of the body (2, 3). Approximately 165,000 of the coronary deaths occur in persons under 65 years of age, with a greater toll (3 to 1) among men than women. For middle-aged men, the United States has one of the highest CHD death rates in the world (Table 3) (4, 5). Analysis of mortality trends give no sign that these high death rates are decreasing (Fig. 1) (3).

A North American man has about one chance in five of developing clinical CHD before age 60, mostly in the form of myocardial infarction (Fig. 2) (6, 6a-k). About 25 percent of those experiencing a first premature heart attack die within three hours of onset of symptoms, often prior to hospitalization and before medical care can be obtained (Table 4) (6, 6a-k, 7). Another 10 percent die within the first weeks after their attack. For those middle-aged persons fortunate enough to recover, prognosis for longevity is markedly impaired. They are approximately five times as likely to die within the next five years as those without a history of previous coronary disease (6, 6a-k, 7–9). In most cases death is due to recurrent acute coronary episodes. Clinical atherosclerotic disease in the arteries of other organs is similarly associated with a reduced life expectancy.

These facts strongly indicate that major progress in controlling atherosclerotic diseases is possible only by primary prevention—reducing first clinical episodes by preventing severe atherosclerosis and its complications. This must be the main strategic thrust of a national effort to control coronary heart disease during the years ahead.

II. THE POSSIBILITY OF ACHIEVING PRIMARY PREVENTION OF ATHEROSCLEROTIC DISEASES

A. *Association of risk factors with atherosclerotic diseases—major risk factors:* Many studies conducted over the past 25 years have demonstrated associations between certain biochemical, physiological and environmental factors and the development of premature coronary heart disease. Numerous risk factors for CHD have been identified such as habitual diet high in saturated fat-cholesterol-calories, elevated blood lipids,[1] hypertension, cigarette

[1] "Hyperlipidemia" is the generic term for elevation of one or more of the blood (serum) lipids, i.e., cholesterol, triglycerides, phospholipids. The most extensive research on the relationship between the blood lipids and the atherosclerotic diseases has involved serum cholesterol. Recent evidence suggests that elevated serum triglycerides may also be related to increased risk of CHD.

The water-insoluble serum lipids are dissolved in the blood stream by combination with proteins to form several types of serum lipoproteins. The association between lipoprotein patterns and CHD is currently under further study to assess whether any of the types have predictive or diagnostic value over and above that of serum cholesterol and triglyceride levels alone or in combination (38).

smoking, hyperglycemia (diabetes mellitus), obesity, sedentary living, psychosocial tensions, and a positive family history of premature atherosclerotic disease.

Of central importance in evaluating the association between risk factors and CHD is the finding that arterial lesions cannot generally be produced experimentally in animals without a substantial modification of the *diet* involving increased intake of cholesterol and fat, leading to elevation of *serum lipid levels*.[2] Similarly, with very few exceptions, human populations consuming diets high in saturated fat and cholesterol have high mean serum cholesterol levels and high incidence and mortality rates from premature CHD. Human populations consuming diets low in cholesterol and saturated fat have low mean serum cholesterol levels and low incidence and mortality rates from premature CHD. Within any population group, again with few exceptions, the risk of developing premature CHD increases as the serum cholesterol level rises. This fact has been extensively documented for the American male population in several prospective epidemiologic studies (Fig. 3, cf. also Fig. 11 below) (6, 6a-k). The relationship between level of serum cholesterol and diseases is continuous. With increasing cholesterol concentration risk is increased. There is no evidence of a critical level of serum cholesterol which separates high from low risk individuals.

Detailed data on relationships among diet, serum lipids and premature CHD are available from many studies. For example, the International Atherosclerosis Project quantitated the degree of atherosclerosis of the aorta and coronary arteries at autopsy in over 31,000 persons age 10 to 69 who died during 1960–65 in 15 cities throughout the world. Marked geographic differences in the extent and severity of atherosclerosis were observed (Fig. 4) (22). Populations in those countries with a high intake of saturated fat and high serum cholesterol levels had more severe atherosclerotic lesions than did populations in countries with low saturated fat intake and low serum cholesterol levels. Decedents from the United States showed the greatest degree of involvement.

Repeated analyses of international mortality statistics have yielded comparable findings. The most recent data deal with mortality rates for 22 developed countries including the British Commonwealth, Europe and North America (Table 3) (4, 5). The sizeable differences in CHD mortality rates for middle-aged males correlate positively with differences in nutritional factors, e.g., total calories, saturated fat, and cholesterol. The United States is near the top of the list with high per capita levels for all of these indices and for mortality.

Data collected in research on living populations are consistent with those from autopsy studies and mortality statistics. An extensive report from a prospective international study of 18 population samples in seven countries—Finland, Greece, Italy, Japan, Netherlands, United States and Yugoslavia—deals with observations on approximately 12,000 men originally age 40–59 who have been studied for about a decade (39, 40). On initial examination, marked differences in prevalence of CHD were recorded among the population samples from the seven countries (Fig. 5) (40). For samples with high prevalence of CHD, including middle-aged American men, the rate was over four times greater than those from countries with low prevalence.

Data on five year CHD incidence and mortality rates are consistent with the prevalence data (Fig. 5 and Table 5) (40). The highest five year incidence rates were recorded for men from Eastern Finland and the United States—over 120 and 80 per 1,000 respectively. In contrast, five year incidence rates were about 20 per 1,000 or less for men in Corfu, Crete, Dalmatia and Japan. Differences in CHD mortality rates were frequently paralleled by differences in total mortality rates (Table 5) (40). This finding supports the conclusion that the differences in CHD rates were not due to diagnostic variability. Differences in CHD prevalence, incidence and mortality rates among the populations of these countries were significantly related to saturated fat intake and serum cholesterol level (Figs. 6–8) (40).

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[2] Comprehensive reviews of research (animal, experimental, clinicopathologic and epidemiologic) on the atherosclerotic diseases are available in the recent scientific literature (10–37). This section summarizes evidence considered most pertinent to the matter of achieving primary prevention.

Recent clinical studies using angiography to assess narrowing of coronary arteries have further strengthened the evidence on the association between serum lipid levels and CHD. Middle-aged patients with substantial narrowing of the coronary arteries had levels of serum cholesterol, triglycerides or both significantly higher than those of patients without such narrowing (41).

Hypertension also aggravates the atherosclerotic process, particularly in the presence of hyperlipidemia. This conclusion is supported by impressive clinical and experimental data as well as by prospective epidemiologic findings demonstrating significant correlations between blood pressure and the subsequent development of CHD (Fig. 9, 11) (6, 6a-k). This relationship between blood pressure and CHD risk is continuous. At each higher step of the blood pressure scale risk is increased. Hypertension has also been established as a major risk factor for cerebrovascular disease, including atherothrombotic cerebral infarction and cerebral hemorrhage (Fig. 9) (6, 6a-k).

The 1964 Surgeon General's report on *cigarette smoking established* that on the average cigarette smokers in the United States have a 70 percent greater chance of developing CHD than non-smokers (42). Recent data from several prospective studies in this country have confirmed this finding and strengthened the association between smoking and atherosclerotic diseases (6, 6a-k, 43–45). The largest of these has involved one million men and women (46). This showed that for each sex and age group CHD mortality increased with increased intensity of cigarette smoking (Table 6) (46). Men age 45–54 smoking two or more packs of cigarettes a day were at highest risk.

The younger the age group, the higher the relative risk associated with cigarette smoking (Table 7) (6, 6a-k, 47, 48). It has also been demonstrated that the association between cigarette smoking and CHD risk is independent of such other risk factors as serum cholesterol level and blood pressure (Fig. 10) (6, 6a-k, 49, 50). In addition, three studies have recently shown that atherosclerosis of aorta and/or coronary arteries is more severe at autopsy in persons who had been habitual cigarette smokers prior to death compared to those who had never smoked (Fig. 11) (51, 54).

Finally, as the annual supplements to the Surgeon General's report have noted, research progress has been recorded in elucidating possible mechanisms whereby smoking may exert its deleterious effect on the atherogenic process (43–45).

Morbidity and mortality rates from CHD among Americans living in the same communities differ markedly particularly when classified with respect to all three of the foregoing risk factors—*serum cholesterol, blood pressure and cigarette smoking*—considered simultaneously. Detailed data are now available from the pooled findings of six major U.S. prospective studies dealing with 7,594 middle-aged American men free of clinical CHD at initial examination (Fig. 12) (6, 6a-k). Those free of the three risk factors—hypercholesterolemia, cigarette smoking and hypertension—experienced much lower CHD morbidity and mortality rates over a ten-year period than did the groups of men with any two or all three of these traits. CHD mortality rate was one-third to one-sixth as high and the sudden death rate was one-fourth to to one-sixth as high. As a result of the low mortality rate from atherosclerotic diseases, the men free of these major risk factors had less than one-third the ten-year mortality rate from all causes than the men with these traits, and about one-fifth the total mortality rate of those with all three risk factors.

These impressive findings indicate that these three risk factors—hypercholesterolemia, hypertension and cigarette smoking—are properly designated major risk factors for premature atherosclerotic diseases, especially coronary heart disease. This designation is appropriate, first because of the impact of these factors on risk, particularly when present in combination, second because of the consistency of the findings from multiple studies, and third because of the frequency of occurrence of these factors singly and in combination in the American population. All three are potentially amenable to prevention and control.

B. *Association of risk factors with atherosclerotic diseases—other risk factors:* Clinical *diabetes mellitus* has been recognized for years as a serious risk factor for atherosclerotic disease. This relationship has been extensively documented in retrospective studies dealing with coronary, cerebrovascular and peripheral vascular disease (29, 55). These investigations have shown that diabetes have atherosclerotic disease more often, more severely and more pre-

maturely than nondiabetics. A long-term prospective study in industry of persons age 25–64—involving an average of more than 73,000 men and women—has confirmed the role of diabetes as a risk factor, especially when hypertension is also present (Table 8) (56).

Recent retrospective studies also indicate that persons with manifestations of atherosclerotic disease (coronary, peripheral and cerebral) exhibit abnormalities in glucose tolerance more frequently than clinical controls (29, 55).

Finally, long-term prospective studies in U.S. population groups indicate that *asymptomatic hyperglycemia*—so-called chemical or sub-chemical diabetes—is also an independent risk factor for atherosclerotic disease of major coronary, cerebral and peripheral arteries (Figs. 13 and 14) (29, 55, 57–59).

Obesity is another trait implicated as a significant coronary risk factor. For many years, data have been available from life insurance actuarial studies indicating that overweight persons have an increased risk of dying from coronary and cerebrovascular disease. Risk is a function of degree of overweight (60). Although these data indicate an increase in risk, it is smaller than that recorded for such factors as hypercholesterolemia, hypertension and cigarette smoking.

Long-term prospective studies have also noted an increased risk of CHD in overweight men in the United States (6, 6a-k, 29, 61). However, the findings are not entirely consistent. They suggest that the association between overweight and CHD risk may be largely attributable to the increased proneness of overweight men to hypertension, hyperlipidemia and diabetes. Moderate overweight—in the absence of these risk factors and cigarette smoking—apparently is associated with only a modest increase in risk.

Epidemiological evidence suggests that *sedentary living* contributes to the risk of premature atherosclerotic diseases in the economically developed countries (25, 29, 62–67). This evidence is not entirely consistent nor has the role of possible confounding variables been fully clarified. Furthermore, the apparent impact of sedentary living on risk of coronary heart disease observed in some studies is less than that for the major risk factors.

Psycho-social tensions related to personal life situations and/or those inherent in cultural circumstances have long been suspect as factors related to premature CHD. This view has recently received support from several studies. For example, data from investigations on personality-behavior patterns and social incongruities are consistent with this hypothesis. Data have also been obtained indicating a detrimental effect of social and geographic mobility and urbanization (16, 25, 29, 68–71). These various psycho-social influences may be conditioning or aggravating risk factors in our society, particularly in the presence of other traits enhancing proneness to premature CHD. Clinical experience indicates that emotional crises and unusual fatigue may precipitate acute events (e.g., myocardial infarction, stroke) in persons with pre-existing severe atherosclerotic disease.

Most of the positive findings indicating association between various psycho-social factors and premature CHD have been recorded in single investigations and they require confirmation. This is understandable in view of the complexity of measurement in this area.

Coronary heart disease has long been thought to be related to *family history*. Evidence exists indicating an increased risk of CHD in close relatives of persons who experience a heart attack early in life, e.g., prior to age 50 (20, 28, 29, 35, 36, 72–75). There are numerous examples of multiple premature attacks within families. In contrast there is little evidence for familial aggregation when the disease first occurs late in life. It is likely that some of this predisposition is mediated by familial resemblances in risk factors, e.g., hypercholesterolemia, hypertension and diabetes. Most of the predisposing influences are under both genetic and environmental control; families share not only genes but also living habits such as eating patterns and smoking.

C. *Modification of risk factors:* Certain risk factors can be avoided, controlled or corrected by appropriate changes in mode of life. Thus, prevention or control of hyperlipidemia may be effected for most persons by acceptable modification of the diet (17, 19, 24, 25, 28, 29, 33, 34, 38, 64, 76). Weight reduction alone frequently lowers elevated serum triglycerides, blood pressure and plasma glucose levels of obese patients. In addition, well-tested pharmacologic measures are available for the control of hypertension not responsive to dietary management alone (Fig. 15) (29, 64, 77, 78). Cigarette smoking is

also amenable to prevention or correction on a large scale, as shown by recent declines in the proportion of cigarette smokers in the American population (Fig. 16 and Tables 9, 10) (79–82).

Research studies have been done to evaluate long-term effects of modifying diet composition, cigarette smoking and hypertension.

Changes in diet composition: Studies have been conducted in both animals and man to determine whether changes in composition of the diet have an effect on the atherosclerotic process, and on incidence and mortality from CHD. Change from a high to a low cholesterol diet has resulted in a decrease in size of atherosclerotic plaques in experimental animals (18, 26, 29). Evidence on this matter, available for many years from research with non-primate species, has recently been supplemented by significant confirmatory findings on reversibility of lesions in primates (Table 11 and Fig. 17) (83).

In man, data on the opposite trend—i.e., effects of increasing saturated fat and cholesterol intake—have been reported in several epidemiologic studies. For example, migrants (e.g., Japanese Neapolitans) to the United States from areas with low coronary heart disease death rates have higher serum lipid levels and higher CHD death rates, especially for males, as compared to rates in their native countries (12, 27, 29).

Reports are also available indicating that reduction in calorie, fat and cholesterol intake can lead to regression of lesions in man (29). Data on this matter in the older literature have recently been supplemented by physiologic evidence suggesting partial regression of peripheral atherosclerosis in persons with Type III hperlipoproteinemia treated by diet and a drug to lower serum lipids (84).

Results of experimental studies of dietary changes in man have recently been reported. Studies in Los Angeles, Helsinki and New York have dealt with primary prevention of CHD (85–87). All three investigations utilized diets reduced in saturated fat and cholesterol. Polyunsaturated fat was added to replace saturated fat removed from the diet. As a consequence the diets—particularly in the Los Angeles study—were high in polyunsaturated fat. In the New York Anti-Coronary Club, polyunsaturates were used for partial replacement of saturates. This study also placed obese volunteers on weight reducing diets during their initial months in the project.

The Los Angeles study was a double blind random trial among veterans living in domiciliary facilities. The Helsinki study is a comparison of two mental hospital populations. The New York study compared volunteers placed on a fat modified diet with a somewhat similar group of volunteers on their usual diet. Several hundred men have participated in each study for several years. These three studies reported a sizeable decrease in the incidence of new coronary events in the experimental compared with their respective comparison groups (Figs. 18–20) (85–87). In the Los Angeles study, the effect appeared to be substantially greater in men under age 65 at entry.

Two studies (Los Angeles and Helsinki) also reported mortality findings. Their data indicate that diet change was associated with reductions in CHD mortality rates, although statistical significance was not reached. The Helsinki study also recorded a sizeable reduction in total mortality rate, paralleling the decrease in CHD death rate but again, statistical significance was not reached. The Los Angeles study did not note any decrease in total mortality. The lower death rate from atherosclerotic disease was offset in the experimental group by a higher death rate from non-cardiovascular causes, including a statistically significant excess of deaths from malignant neoplasms. This last finding has posed a question concerning possible carcinogenic effects of diets very high in polyunsaturated fats.

The results of these three studies are encouraging with regard to the possibility of preventing CHD and other atherosclerotic diseases by dietary fat modification. However, they are not conclusive as to the preventive value of dietary change. Each dealt with a relatively small group and had one or another additional flaws, e.g., high drop-out rates, absence of a suitable control group, lack of double blind design (88, 89). Nonetheless, all are consistent in showing a reduction in CHD incidence and indicate the potential for CHD prevention through modification of dietary fat composition.

Control of cigarette smoking: The Surgeon General's reports on "The Health Consequence of Smoking" have concluded that cessation of cigarette smoking is followed by a reduction in CHD risk (42–45). This determination was based

on evidence obtained from several studies. Two were large prospective studies designed to assess differential mortality among adults classified according to their smoking history. Both reported that CHD mortality rates of former cigarette smokers were well below rates of current smokers, especially among younger groups (Fig. 21) (46–48, 54). The differential CHD mortality between former and current smokers was greater when the group of former smokers was restricted to those who stopped smoking for reasons other than doctor's orders. Similar findings were observed in a longitudinal study of mortality among British physicians and in the Western Collaborative Group Study (Table 12) (44, 90, 91). In the latter it was found that the CHD incidence rate for middle-aged male ex-smokers was intermediate between rates for men who never smoked and men who were heavy cigarette smok.ers at entry. This finding was recorded after adjusting for several concomitant risk factors (e.g., serum cholesterol, blood pressure, physical activity).

Further, the combined experience of adult males followed prospectively by the studies cooperating in the Pooling Project showed that the age-adjusted incidence rate of severe forms of CHD among male ex-smokers was about as low as that observed for males who had never smoked, and was much lower than the rate for men smoking a package or more of cigarettes per day at entry (Fig. 11) (6, 6a-k). Again, the findings were independent of serum cholesterol and blood pressure.

The consistent findings of all these studies provide highly suggestive evidence in support of the concept that cessation of cigarette smoking is of value in the effort to prevent CHD.

Drug treatment for hypertension: Drug treatment for patients with diastolic blood pressures averaging from 115 to 129 mm. Hg has produced marked reductions in morbidity from hypertensive complications (Table 13) (77).

Recently an important report was published on the Veterans Administration Cooperative Study of drug therapy for male hypertensive patients with diastolic blood pressures averaging between 90 and 114 mm. Hg (so-called "mild" hypertension) (78). Three hundred eighty such hypertensive men were randomly assigned to either active antihypertensive agents or placebos and followed for periods of one to 5.5 years (average 3.3 years). Fifty-six of the placebo treated patients developed morbid events, as contrasted with 22 of the actively treated patients. Life-table analysis indicated that the estimated risk of developing a mordid event over a five year period was reduced from 55 to 18 percent by treatment (Fig. 22) (78). Major nonfatal and fatal cardiovascular events (terminating morbid events) occurred in 35 patients of the control group as compared to 9 patients in the treated group. Nineteen deaths related to hypertension or atherosclerosis occurred in the control group and 8 in the actively treated. In addition to the morbid events, 20 patients—all in the control group—developed persistent elevation of diastolic blood pressure to 125 mm. Hg or greater. The beneficial effect of treatment was more evident in the patients with higher initial blood pressures than in those with lower levels at entry.

Treatment apparently was most effective in the prevention of congestive heart failure and stroke, and least effective in preventing clinical manifestations of severe coronary atherosclerosis. The limited size of the study precluded a definitive assessment of ability to prevent premature CHD by drug treatment of hypertension. However, the data currently available support the judgment that effective long-term therapy for hypertension may help to prevent CHD and other atherosclerotic diseases.

Control of multiple risk factors: Only one investigation has attempted to explore the possibility of prevention by control of multiple risk factors—hyperlipidemia, obesity, hypertension, cigarette smoking and sedentary living. This Chicago Coronary Prevention Evaluation Program has used diets low in saturated fat and cholesterol, and moderate in calories, total fat, polyunsaturated fat, carbohydrate and salt (29). It has avoided recommending diets high in polyunsaturated fat. It has encouraged cigarette smokers to abandon this habit and urged sedentary men to take up regular, frequent, moderate exercise to enhance cardiopulmonary fitness. Its participants are 519 coronary-prone men originally age 40–59. They are compared with over 3,200 matched men from the U.S. national cooperative Pooling Project (6, 6a-k).

This study, still in progress, has reported encouraging effects on CHD and total mortality (Fig. 23) (88). Like the other "first generation" field trials

described above, the investigation is limited by relatively small sample size, as well as lack of a randomly assigned control group. Therefore, its findings on the possibility of preventing premature death in high risk middle-aged males can be viewed only as suggestive (88, 89).

SUMMARY

Converging lines of epidemiological, clinical and experimental evidence, both animal and human, support the judgment that the relationship between the risk factors, particularly the major risk factors—i.e., hypercholesterolemia, cigarette smoking, hypertension—and the development of coronary heart disease is probably casual. This should not be interpreted as implying that the evidence on this matter is conclusive. Nevertheless, the data strongly indicate that to a considerable degree coronary heart disease in the United States, particularly in the under 60 age group, results principally from the impact of these three widely prevalent risk factors. This critically important conclusion rests on the following foundations: Confirmatory data are available from many sources on the epidemiologic associations; these associations persist when confounding variables are taken into account; the associations are strong and consistent; they are in accord with findings from other research disciplines and are biologically plausible in terms of reasonable pathogenetic mechanisms and concepts of multi-factorial etiology relating apparent cause and disease. Alternative hypotheses to account for the associations do not fit the majority of observations to date.

The research findings on risk factors strongly indicate the possibility of effective primary prevention of atherosclerotic disease, particularly premature coronary heart disease (Tables 14–16) (76,92).

III. RECOMMENDATIONS FOR PRIMARY PREVENTION

A. *The Commission recommends that a strategy of primary prevention of premature atherosclerotic diseases be adopted as long-term national policy for the United States and to implement this strategy that adequate resources of money and manpower be committed to accomplish:*

Changes in diet to prevent or control hyperlipidemia, obesity, hypertension and diabetes

Elimination of cigarette smoking

Pharmacologic control of elevated blood pressure.

B. *The Commission recommends that a Special Committee be established at a high level of the Federal Government to develop coordinated plans for large-scale, long-term trials to determine the effect of various interventions, particularly diet modification, on the rates of premature atherosclerotic diseases in the United States.* The Commission recognizees that differences of opinion exist with regard to the likely beneficial effect of various types of change, particularly fat modification of the diet, on premature CHD in the United States. The public health importance of CHD makes it mandatory to conduct such trials (76, 94, 95).

The Commission further recognizes that even if planning were to start immediately, the American public would probably have to wait at least 10 years for results of these studies. At times urgent public health decisions must be made on the basis of incomplete evidence. Therefore, the Commission recommends that actions with regard to the reasonable and safe changes described below be promptly implemented.

C. *The Commission recommends the following modifications of diet for the general public, and particularly for individuals with marked increase in risk of premature atherosclerotic disease.*

1. *Caloric intake be adjusted to achieve and maintain optimal weight.* Correction of obesity is known to be frequently associated with significant control of certain CHD risk factors, e.g., fall in blood pressure of some hypertensive patients, decrease in blood glucose levels in some patients with maturity-onset diabetes, decline in elevated serum triglyceride levels. It is generally agreed that this measure is a reasonable and safe aspect of any prophylactic regimen.

2. *A reduction of dietary cholesterol to less than 300 mg. per day.* The average daily diet in the United States contains approximately 600 mg. of cholesterol. Substantial reductions in amount of cholesterol in the diet has

been found to lower concentration of cholesterol in the serum of most people. Since cholesterol is present in many protein sources of high biological quality, careful planning is necessary to lower intake of cholesterol without impairing intake of protein.

3. *A substantial reduction of dietary saturated fats.* This change will lower concentration of cholesterol in the serum of most people. The ideal quantity of fat needed in the diet is not known but moderation in intake is considered desirable, e.g., less than 35 percent of total calories from all fats. *Intake of less than 10 percent of total calories from saturated fats is of critical importance for attainment of optimal serum cholesterol levels for most people.* Unsaturated fats may be used in moderation to replace a portion of the saturated fats, i.e., 10 percent of calories from mono- and up to 10 percent from polyunsaturated fats. With proper control of saturated fat, cholesterol and calorie intake, as recommended above, ingestion of large amounts of polyunsaturated fats—i.e., 10 percent or more of total calories—is generally not necessary for control of serum lipid levels. International data indicate that populations with low serum lipid levels and low CHD mortality rates habitually consume diets low in saturated fat and cholesterol, and low or moderate in total fat and polyunsaturated fat—not high in the latter (5, 40).

With these dietary principles, requirements for optimal nutrition can be met for all sectors of the population, including infants, children, adolescents, pregnant and lactating women, and older persons.

Changes in the environment to aid the American people to improve their diet should be a major aspect of this effort at prevention. Recent research has shown that it is entirely possible to prepare foods commercially in ways that will contribute substantially to the control of hyperlipidemia. In the National Diet-Heart Study, many foods were prepared with sizeable reductions in content of total fat, saturated fat, cholesterol and calories (76). This was done with dairy and meat products, baked goods, frozen desserts and other foodstuffs. It was demonstrated that modified foods can be made in forms that are highly acceptable to the consumer.

The Commission therefore recommends that the food industry be encouraged by the medical profession and the government and supported by the general public to make available leaner meats and processed meats, dairy products, frozen desserts and baked goods reduced in saturated fats, cholesterol and calories, and visible fats and oils (margarines, shortenings, mayonnaises, salad dressings, oils) of low saturated fat and cholesterol content.

For this purpose the Commission further recommends that comprehensive review and revision of policies and regulations be conducted to aid in accomplishing the following objectives:

a. *The production of red meat low in saturated fats and meat products (e.g., sausages, hot dogs and cold cuts) low in saturated fats and cholesterol.* In the United States it is widespread practice to keep beef cattle in stalls and feed them heavily to produce meat with a high fat content. To produce red meat low in saturated fats will require changes in cattle breeding and feeding practices. Processed meat products (sausages, hot dogs, cold cuts, etc.) low in saturated fats and cholesterol can be produced so that they are completely acceptable to the consumer (76). At present, processed meats cannot be made with vegetable oils because of U.S. Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), state and/or local regulations which define this as adulteration. It is necessary therefore to encourage:

Development of strains of animals that convert higher proportions of feed to protein rather than fat.

Shift to range feeding with earlier slaughter of cattle to yield leaner animals.

Modernization of laws and regulations relating to the definition of meat products.

Further development of high quality vegetable protein products.

Development of an intensive educational program concerning the cooking of lean meats to assure their optimal palatability and acceptability without the use of added saturated fats.

b. *Reduction in saturated fat and cholesterol content of dairy products.*

Industry and government should review and establish policies (including pricing policies) that will encourage development of low-fat, low-cholesterol milk and milk products, and use of cows producing large amounts of high protein,

low fat milk. Wholesale pricing of dairy products is still based on butter fat content, a practice persisting from the days when measurement of butter fat was used to detect skimming or watering of milk.

The dairy industry should be helped and encouraged to develop techniques for reducing saturated fat and cholesterol in cheeses of all varieties. Total fluid milk consumption in the United States is decreasing while consumption of cheese is steadily increasing. At current levels of consumption significant control of hyperlipidemia seems unlikely unless composition of cheeses can be altered. The National Diet-Heart Study demonstrated that limited progress has been made in this area, and further progress certainly is possible.

Industry should be stimulated to develop creamers low in total fats, saturated fats and cholesterol. Changes in labeling and advertising of cream substitutes are needed, so that their actual food composition is clear. The so-called non-dairy-fat creamers currently on the market present a special problem. These products are characterized by a high content of coconut oil and/or hydrogenated vegetable oil and therefore of saturated fat (96). Coconut oil is one of the most potent agents for elevating serum cholesterol level. Labels that read "made with vegetable oil" give an erroneous implication that the product is to be preferred over one containing dairy fat.

c. *Reduction of saturated fat, cholesterol and calorie content of baked good.* As the National Diet-Heart Study demonstrated, nutritionally excellent baked goods of all types can be prepared commercially in completely acceptable forms with reduced saturated fat, cholesterol and calorie content. *Widespread marketing of these fat modified products should be encouraged.*

d. *Promotion of fats and oils low in saturated fats and cholesterol for table spreads, shortenings, cooking and salad dressings, etc.* In some areas of the country, state and/or local laws prohibit the use of butter substitutes in restaurants and institutions. *These laws should be repealed.*

e. *Reduction of egg yolk consumption.* The yolk of the egg is the single highest source of cholesterol in the average American diet, as well as a source of considerable saturated fat. Ingestion of two eggs a day—in visible and/or invisible form (i.e., in prepared foods)—will seriously hamper dietary programs aimed at reducing serum cholesterol. *Consequently the public should be encouraged to avoid egg yolk consumption, and the food industry should be presuaded to minimize egg yolk content of commercially prepared foods.* Food manufacturers have recently developed low cholesterol and low saturated fat egg substitutes which may be used successfully in quantity cookery and for scrambled eggs, omelettes, etc. Such developments should be encouraged.

f. *Modernization of regulations on labeling and definition of foods.* In December 1959 the Food and Drug Administration introduced into the Federal Register the statement: "The role of cholesterol in heart and artery diseases has not been established" (97). Consequently, it ruled that advertising claiming that the consumption of a food product might protect against diseases of the heart and arteries was false and misleading. The Federal Register in May, 1965 published a proposal favorable to the labeling of edible fats. This was supported by the American Heart Association and the American Diabetes Association. In February 1966 however, the FDA rejected the recommendation to label edible fats and oils, but endorsed a study of this problem to be conducted by the Council on Foods and Nutrition of the American Medical Association. The Council completed its report and transmitted it to the FDA. The report favored such labeling but the FDA took no action.

The FDA's regulation with respect to labeling of foods should be reviewed and updated. A new approach to labeling is needed—to allow the consumer easily to identify nutrient content (particularly the amount and type of fat and cholesterol) in all foods, including commercially prepared mixed dishes, and to encourage the manufacture of nutritious products low in saturated fats and cholesterol.

Correspondingly rules and regulations of the USDA, state and local agencies on foodstuff definition, adulteration, etc., should be modernized to permit and encourage production, advertising and the sale of products low in saturated fats and cholesterol (e.g., processed meats), made with moderate amounts of unsaturated oils instead of large amounts of saturated fats.

g. *Improvement in school lunch, food stamp, other supplementary food pro-*

grams and government administered nutrition practices (e.g., Armed Forces, Veterans Administration facilities). Policies, regulations, practices and educational aspects of these programs should be revised to encourage improved eating habits including consumption of low saturated fat, low cholesterol diets among children, teenagers, young adults and low income groups (98).

h. *Development of a comprehensive and sustained public and professional nutrition education program.* To effect the required changes in dietary habits, it is essential that the entire community be actively involved through a comprehensive and sustained public and professional education program. This will deepen understanding and appreciation of the need for primary prevention and inform the public and health professions on ways of selecting and preparing foods consistent with sound nutritional practices.

Special emphasis must be directed toward developing effective instructional programs on nutrition in the educational curricula at all levels. For this purpose, particular attention should be given to the institutions training health professionals with expertise in nutrition—e.g., college and university home economics departments, hospital dietitian instruction programs, schools of medicine, dentistry and nursing, and teachers' colleges. These sources should develop educational programs based on modern concepts of sound nutrition. Succeeding generations should have the advantage of this knowledge beginning in elementary school.

Food manufacturers have an excellent opportunity to provide public education through advertising. They should be encouraged to call attention in their advertising to the type and amount of fat and the cholesterol content of their products.

There is a great need for extensive and continuous dissemination by the news media of information on diet, as well as other risk factors. Public service communications in this area should be substantially strengthened and broadened.

With proper education, information and the availability of fat modified foods, it will be possible for most Americans to make desirable changes in their diets without major dislocation of personal eating habits.

Americans should be encouraged to modify habits with regard to all five major sources of fat in the U.S. diet—meats, dairy products, baked goods, eggs, table and cooking fats. Specifically a superior pattern of nutrient intake can be achieved by altering habits along the following lines:

Use lean cuts of beef, lamb, pork and veal, cooked to dispose of saturated fat and eaten in moderate portion sizes;

Use lean meat of poultry and fish;

Use fat-modified[3] processed meat products (frankfurters, sausage, salami, etc.);

Use organ meats (e.g., liver) and shellfish in moderation since they are higher in cholesterol than muscle of red meat, chicken and fish;

Avoid fat cuts of meat, addition of saturated fat in cooking meat, large meat portions and processed meats high in saturated fat;

Use low fat and fat modified dairy products;

Avoid high saturated fat dairy products;

Use fat modified baked goods (pies, cookies, cakes, sweet rolls, doughnuts, crullers);

Avoid baked goods high in saturated fat and cholesterol;

Use salad and cooking oils, new soft margarines and shortenings low in saturated fat;

Avoid butter, margarine and shortenings high in saturated fat;

Avoid candies high in saturated fat;

Avoid egg yolk, bacon, lard, suet;

Use grains, fruits, vegetables, legumes.

D. *The Commission recommends that high priority be given to the elimination of cigarette smoking as a national habit.*

1. *Efforts should be made to reduce smoking among young people by strict restraints on advertising and the sale of cigarettes.* All advertising of tobacco in the mass media (including television, radio, newspapers and magazines) should be discontinued. Short of this all advertising should carry an honest, frank, highly visible warning for potential consumers.

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[3] Throughout this set of guidelines *fat modified* refers to products made with reduced saturated fat and cholesterol content.

2. *The mass media education program emphasizing the health hazards of smoking should be continued indefinitely to redress the imbalance created by decades of cigarette advertising.*

3. *Education programs on the risks of smoking should be strengthened and extended throughout the school system beginning with the early primary grades.* Parents, teachers, health professionals and other adults in positions of responsibility (e.g., television entertainers and sports personalities) should be made aware of the serious adverse influence of their own smoking habit as a poor example for children who may become lifelong cigarette smokers. It is noteworthy that physicians have been particularly successful in giving up cigarette smoking and are in a unique position to exert great influence in helping their patients stop smoking.

4. *Cigarette vending machines should be removed from all medical facilities and public buildings or, preferably, banned altogether.*

5. *The prohibition against smoking in large meetings and mass transit facilities should be vigorously enforced.*

6. *Revenues from progressive increases in taxes on tobacco should be earmarked for smoking control programs and the care of patients with diseases associated with smoking.*

7. *Current large subsidies by government for growing and exporting tobacco should be critically reviewed with the objective of making economic supports for agriculture consonant with national health goals.*

8. *Planning by appropriate social science experts should go forward for the orderly phase out of the tobacco industry without major economic dislocation of those whose livelihood is involved.*

E. *The Commission recommends a major national effort to detect and control hypertension.* Recent studies have shown that the prevalence of elevated blood pressure is generally high in the United States, especially in the Negro population (Table 17) (99). Many hypertensives have not been identified; many others known to have the disease are not receiving adequate therapy. Programs are urgently needed to identify hypertensives in the community and assure their subsequent treatment. The recently published positive results from the Veterans Administration field trial of drug therapy for so-called "mild" hypertension underscore the potential significance of such programs (78).

F. *The Commission recommends that community programs be developed and expanded for the detection and treatment of persons of all ages who are very susceptible to premature atherosclerotic diseases due to combinations of the major risk factors.*

This recommendation is premised on extensive experience demonstrating that effective community programs for prevention of disease generally combine measures addressed to the entire population with concerted efforts for the detection and care of high risk individuals. All available evidence indicates that this well-established principle applies to the prevention of the atherosclerotic diseases.

On the basis of recent experience detection programs are likely to identify a very large proportion of the population—e.g., about 20 or 30 per cent of middle-aged adults—as being at unusually high risk. For such individuals, community services should be provided to assist their physicians in long term management.[4] Such programs will require the training and use of large numbers of allied health professionals, as well as physicians.

G. *The Commission presents the following observations on drug treatment of hyperlipidemia and on exercise programs, and their possible role in the preventive effort:*

Drugs for the treatment of hyperlipidemia have been developed in recent years. For example, several years of experience with cholestyramine, clofibrate, dextrothyroxine and nicotine acid have demonstrated that they will reduce cholesterol and triglyceride levels in the blood of many patients especially if they are abnormally high. What is yet to be determined is whether the biochemical action of these or similar drugs will exert any favorable effect on the course of the atherosclerotic diseases and whether long term continued use of these substances produces significant deleterious effects. Clinical indications for the prescription of these drugs are now being defined. For example, they are possibly indicated for specific types of patients with

[4] Detailed proposals concerning these community services will be presented in subsequent reports of the Commission.

marked hyperlipidemia, incapable of being normalized by diet alone. In this situation the risk of progression of atherosclerotic disease may outweigh any as yet unrecognized hazards of long-term medication. There is a need for further development and evaluation of relatively nontoxic drugs for the lowering of elevated blood lipids.

Regular exercise, particularly those forms of endurance exercise which enhance cardiovascular fitness, may have a role to play in the prevention of atheroscletoric diseases. It is important to emphasize, however, that exercise is not free of danger both to the musculoskeletal and the cardiovascular systems. This is particularly true for middle-aged individuals—especially coronary-prone persons—who suddenly take up vigorous exercise after years of minimal physical activity. Physicians and other professionals need aid in guiding a concerned public to avoid these problems. Research on the role and programming of exercise for the prevention of atherosclerotic diseases must be pursued vigorously to obtain more definitive information.

IV. PRIMARY PREVENTION OF PREMATURE ATHEROSCLEROTIC DISEASES—PERSPECTIVE

Success in the effort to control premature atherosclerotic diseases will require a steadily expanding, multifaceted, long-term national effort. The task is vast and complex, and will surely take years to complete. Nevertheless there is reason for optimism. Both the general public and health professions increasingly indicate their concern with the problem, their support for a central strategy focusing on primary prevention and their interest in proceeding expeditiously. As national statistics on time trends show, millions of Americans have already modified their diet, particularly their consumption of fat containing foods, and have stopped smoking cigarettes (79, 80, 100-104). Millions more are ready to respond to meaningful, effective leadership. American agriculture and the food industry are fully capable of making the changes needed to help implement the prevention effort. With a decisive national policy commitment—and corresponding allocation of resources over the next years—there is ample reason to believe that significant progress can be registered even by the Commission's first target deadline, 1975.

Exhibit 8

THE NATIONAL DIET-HEART STUDY FINAL REPORT

Published by the American Heart Association, 1968, New York, N.Y. American Heart Association Monograph No. 18.

Publication supported by Research Grant No. H–6007, U.S. Public Health Service, National Heart Institute.

The text of the study is included in Copy No. 1 of the petition; it can be found also at Vol. 37, No. 3, Supplement 1. (March, 1968) of *CIRCULATION* Magazine.

Exhibit 9

1969 WHITE HOUSE CONFERENCE

The Panel recommends: That national diet-heart studies as outlined above be organized and supported as an urgent priority activity; and that such studies be financed by Federal funds as a separate item over and above the normal appropriations for research.

Definitive results from these studies will undoubtedly require many, perhaps 10, years. In the meantime hundreds of thousands of premature deaths occur each year from diseases related to atherosclerosis. Efforts must be continued to apply the knowledge that is currently available, both in efforts at prevention and in treatment.

Batteries of tests have been developed to identify individuals with a high risk for coronary artery disease. Such tests can be applied in medical facilities or in so-called multiphasic screening centers, usually manned primarily by nonmedical personnel. These centers usually screen for diseases such as diabetes, abnormalities of the eye, diseases of the chest as well as coronary artery disease. Individuals screened out in these centers are referred

to their physicians for further examination, appropriate treatment, and follow-up.

The techniques for doing multiphasic screening have been fairly well developed and tested. However, follow-up of patients referred to their physicians and evaluation of end results in terms of disease prevention, reduction of morbidily and mortality have not been well established.

The Panel recommends:

1. That both public and private agencies as well as the health professions support multiphasic screening and multifactorial disease prevention, with particular emphasis on evaluation of end results. From the standpoint of diet modification, where indicated, community or hospital-based dietary counseling services undoubtedly will be required since most physicians have neither the time nor expertise to do this.

2. That research, both basic and applied, be intensified to further clarify the complex interrelations between diet, atherosclerosis and coronary heart disease. Research to develop objective indices of dietary adherence and long-term assessment of modified diets in the growth and development of the young also is needed.

3. That infancy and childhood be a focus of preventive and therepeutic concern because of the persistence of dietary and exercise practices established in youth, the particularly deleterious effects of juvenile onset obesity, and the growing evidence that the origin of atherosclerosis and hypertension may occur very early in life.

LABELING

Many persons already are attempting to modify their diets, either because they have been screened and found to be at high risk or on their own volition. In addition many physicians are prescribing special diets for patients who have had a heart attack, or who, for other reasons, are thought by the physician to merit such management.

Following such modified diets is made difficult by lack of good information on the fat content and the fatty acid composition of foods found on the grocery shelves. Current regulations prevent manufacturers from providing such information.

The Panel believes the consumer is entitled to know the content of the food he consumes. Furthermore such information is required by physicians in prescribing special diets.

The Panel recommends: That the regulatory agencies should permit and encourage the food industry on a voluntary basis, to label foods as to their content of fat and fatty acids for those foods which constitute major sources of fats in typical diets.

OBESITY

There is a high incidence of obesity in the United States. There is no question that this is due to a disparity between caloric intake and the expenditure of calories by physical activity. Important as the problem of obesity is in its own right, the two causal factors of increased intake of food and diminished activity have also been implicated in the high incidence of atherosclerosis and other degenerative diseases in the American public.

The implementation of the above modifying factors allows flexibility and should be monitored by experts in the specific field. The purpose of these recommendations is to encourage and not to inhibit the production of new foods. Statutory implementation of these recommendations should be studied.

CONSUMER INFORMATION

Introduction

Consumers have the inherent right to safe and nutritious foods which meet their specific individual needs and desires. This right cannot be assured unless the necessary information is available regarding the contents of foods and the safety of their components.

The objectives must be:

1. To facilitate the accumulation of information about food safety and quality.

2. To assure that the advertising and information policies of government and the food industry encourage dissemination of objective and impartial data.

3. To develop educational programs and methods for consumer feedback to Government and industry, whereby consumer needs and desires can exert greater influence on safety and quality of available foods. Achieving these objectives must be a major component of the national nutrition policy of the next decade.

Improving food labeling

The consumer relies upon labels attached to packaged foods as a prime source of information about the contents, nutritional value and safety of those foods. It benefits him little to possess the knowledge and understanding of his personal food needs and desires if pertinent information regarding the constituents or properties of foods is not contained in the labeling, so as to afford a rational basis for selection.

Recommendation

It is recommended that all foods should have listed on their labels their food components in descending order of concentration. Where deemed necessary by the Food and Drug Administration, food labels should also list the percentage of food components as an aid to consumed assessment of quality. The existence of definitions and standard of identity for any food should not exempt that food from all requirements for listing ingredients on the label, including such food addities as would be required on the label in the absence of a standard.

The labels of all foods, including foods for which a definition and standard of identity have been prescribed, should list the common or usual names of all ingredients including food additives and their functions, provided that, to the extent that compliance with this requirement as regards food additives are irrevelant, impractical, misleading, or may result in unfair competition, exemptions should be established by regulations promulgated by the Secretary, Health, Education, and Welfare. In the rare case where exception is deemed necessary, it should be arrived at by public procedure that assures consumer participation in that decision.

Food ingredients should be declared in terms of their sources such as "wheat protein-hydrolysate" rather than just "protein hydrolysate", "potato starch" rather than just "starch", and "peanut oil" rather than just "vegetable oil."

A feasibility study should be made by a broadly representative expert committee to be established by the Secretary of Health, Education, and Welfare of a uniform and easily understood system of dating and designing place of origin of those foods meriting such designation.

It is further recommended that present authority be invoked within the next 3 months to establish a practical and reasonable timetable for the full implementation of these policies.

Popular reference on food safety

The public lacks understandable yet authoritative information about food safety and potential food toxicity. It is entitled to information about the food additives now in use, the foods in which they are used, the reasons for their use, the way decisions on their use and safety are reached, the degree of risk, the areas in which questions remain as to safety, and the steps being taken to correct those situations which are not completely satisfactory. Naturally occurring toxic substances in foods microbiological hazards of foods, and methods by which these risks are being or should be lessened are also a matter of legitimate consumer concern.

Exhibit 10

CENTER FOR STUDY OF RESPONSIVE LAW,
Washington, D.C., October 5, 1970.

Mr. JAMES GRANT,
Deputy Commissioner,
Food and Drug Administration,
Rockville, Md.

DEAR MR. GRANT: It was good to learn from you that the FDA is once again thinking about proposing regulations for the labeling of fats in foods.

Because of the intimate relationship between dietary fat and atherosclerosis and because every possible weapon should be employed in the fight against atherosclerotic diseases, I hope that the question of fat labeling has top priority at the FDA.

Enclosed is an outline of my thoughts on the question of why the saturated fat and polyunsaturated fat contents of foods should be stated on the label.

I will be following the progress of this matter with great interest and an encouraged by *your* interest in the matter.

Sincerely yours,

MICHAEL F. JACOBSON.

LABELING OF FATS IN FOODS

Atherosclerotic diseases—heart disease and stroke—kill three-quarters of a million Americans every year, and are probably the number 1 medical problem in the country today. For the past fifty years scientists have been trying to understand the causes of atherosclerosis. Their work has shown that several factors, one of them being fats in the diet, greatly increase the risk of developing atherosclerosis. Saturated fats, it has been learned, contribute to atherosclerosis and, hence, such fat should be consumed in moderation, especially by middle-aged men whose blood cholesterol levels are high.

Most doctors recognize the relationship between fat and heart disease and many doctors have urged (without success) the FDA to require better labeling of fats in food. Better labeling would enable "high-risk" persons to avoid saturated fat and would heighten health-consciousness among the general public. The governments of several foreign nations (Canada, Sweden, Norway, Finland) have recognized that saturated fat may lead to heart disease and have assumed the responsibility of educating their citizenry toward better health. It is high time the FDA followed suit.

New labeling requirements, of course, will not by themselves wipe out heart disease and stroke. But if we truly desire to diminish the incidence of atherosclerotic disease, we will have to mount a multi-faceted campaign and one of the facets will be better labeling of foods.

In addition to medical reasons, there are important non-medical reasons for having information about fat content on food labels. These reasons have to do with misleading advertising and a citizen's right to know what he is buying. Taken together, the medical and non-medical reasons, which are discussed below, constitute a powerful argument for better labeling practices.

1. There is general agreement in the medical community that saturated fats raise cholesterol levels in the blood and that high cholesterol levels cause or are associated with atherosclerosis. Countless scientific experiments have demonstrated the relationship between saturated fats and cholesterol levels. A significant number of epidemiological studies have shown that high cholesterol levels correlate with the risk of developing coronary heart disease.

American Heart Association booklets and dozens of scientific papers could be quoted to prove that a cross-section of scientists and physicians agree that atherosclerosis is related to dietary fat and that better labeling of fats and oils would be an important step in combatting atherosclerosis. But an even better source of quotes would be FDA's own files (No. 533.61), in which, I believe, are letters from such notables as:

Dr. Jeremiah Stamler (Director, Heart Disease Control Program, Chicago Board of Health).
Dr. Fred Stare (Harvard University School of Public Health).
Dr. Ancel Keys (American Heart Association).
Dr. Theodore Van Itallie (Columbia University College of Physicians and Surgeons).
Dr. Laurence Kinsell (American Diabetes Association).
Dr. Herbert Pollack (American Diabetes Association).
Dr. Robert Olson (University of Pittsburgh Graduate School of Public Health).

All of whom agree that dietary fat intake is indeed related to atherosclerosis and heart disease.

Despite the fact that a direct relationship between saturated fats and heart disease has not been proven conclusively, there is a mountain of data which supports that hypothesis. Few responsible and unbiased persons contend otherwise. It is a shame that 2000 Americans are killed daily by heart attacks and strokes while we wait for the last elusive shred of evidence to prove that certain kinds of fat contribute to the death toll. Because the probability is so great that changing the kinds of fat we eat will diminish the prevalence of atherosclerosis, the FDA should do everything it can to encourage this change. The FDA's first step in this direction should be to require that food labels bear a complete description of the fat content.

2. Many persons are instructed by their physicians to substitute polyunsaturated fats for saturated fats in their diet. The best that these persons can now do is to switch from animal fats to vegetable oils, because current labeling practices do not enable the shopper to distinguish between vegetable oils from different sources and of different qualities. The person who must reduce his intake of saturated fats and eats only vegetable fats may use products containing coconut and as a result may end up in the hospital. As doctors know, coconut oil contains an even higher proportion of saturated fats than butter, and as food manufacturers know, coconut oil often masquerades under the name "vegetable oil" in lists of ingredients. Nutritional labeling of fats would enable patients to follow their doctors' orders and stay alive and well.

3. People have a basic right to know what they are buying. Just as one assumes that he will be told the make, model and horsepower of a car he is considering purchasing, so one should be told the make, source and nutritional quality of the fat or oil he is buying. Although many persons do not care about the nature of the oil, the needs and rights of those who do care must be met, regardless of whether their caring is based on health needs, religion or partiality to the dairy or soybean industry. Additional information on food labels would enable people to know all the important facts about the fats and oils they purchase.

4. Nutritional labeling of fats should have an effect on total sales of fats and oils. While sales might shift from animal fats to vegetable oils, it would be irresponsible to preserve the commercial status quo at the expense of the health of the nation. While new FDA actions may benefit the vegetable oil industry, FDA inaction benefits the meat and dairy industries. As Commissioner Edwards, has said, the FDA must be responsible to the needs and the health of the public at large, and must let the chips fall where they may as far as industry is concerned.

5. The current lack of requirements regarding the nutritional labeling of fats tacitly encourages the use of advertising that misleads, defrauds and insults the public. Labels and advertisements scream "High in Polyunsaturates," but the shopper has no way of knowing how high is "High" and cannot compare one brand's high to another's. One of the blatant examples of this kind of insult is Procter & Gamble's Crisco, which advertises that it is twice as high in polyunsaturates as shortening made the old-fashioned way. For the shopper, the question now becomes, "how high is 'twice as high'?" In addition, information about the saturated fat content, which is probably more significant (for atherosclerosis) than the polyunsaturated content, is never divulged. Well-conceived labeling requirements would prevent such misleading advertising.

RECOMMENDATIONS

1. The fat (as well as protein, carbohydrate and moisture) content of foods should be declared on labels.

2. The percentages of saturated and polyunsaturated fats should be declared on the labels of all products containing a significant amount of fat. These percentages should also be declared on the labels of all products containing a significant amount of fat. These percentages should also be declared in advertisements for cooking oils, margarine, butter, artificial dairy products, etc.

3. The FDA should conduct or encourage an educational campaign in the mass media to advise those segments of the population which are most susceptible to atherosclerosis of changes they should make in their dietary habits and life style.

Exhibit 11

Regulations of the Canadian Food and Drug Directorate

B.09.020—No person shall in an advertisement to the general public or on the label of a food make any statement regarding, or any general or specific claim based on the fatty acid or cholesterol content of a food, except as provided in Section B.09.021.

B.09.021—Where the proportion of cis-methylene interrupted polyunsaturated fatty acids contained in the total fat is at least 40% in the case of an oil and at least 25% in the case of a shortening, margerine like product, and the proportion of saturated fatty acid does not exceed 20% in either case, a person may, in an advertisement or on the label of such products state:

(a) the percentage of saturated fatty acids, on a total fat basis; and

(b) the percentage of polyunsaturated fatty acids on a total fat basis, where it is calculated as total cis-methylene interrupted polyunsaturated fatty acids.

If those statements are grouped together and given equal prominence in the advertisement or on the label.

Exhibit 12

Joint Policy Statement of the National Board of Health and Welfare of Sweden; the Medical Board of Finland; the Medical Board of Norway; May 3, 1968

RECOMMENDATIONS

(1) The supply of calories in the diet should in many cases be reduced to prevent overweight.

(2) The total consumption of fat should be reduced from 40%—the present figure—to between 25% and 35% of the total number of calories.

(3) The use of saturated fat should be reduced and the consumption of polyunsaturated fats be increased simultaneously.

(4) The consumption of sugar and products containing sugar should be reduced.

(5) The consumption of vegetables, fruit, potatoes, skimmed milk, fish, lean meat and cereal products should be increased.

RECOMMENDATIONS FOR CARRYING OUT THE ABOVE

To carry out the above program, we require the cooperation not only of doctors but of all those who give instruction on questions of nutrition or who are responsible for catering on a large scale, particularly in schools, the military forces, hospitals and similar institutions and other eating places.

It is of pressing important that the food industry pay attention to the recommendations made here in their choice of raw products and in the manufacture of cooked meats and provisions, other semi-prepared foods and ready-cooked. The industry ought to specify the contents used in a better way than before.

Proposed menus and the composition of recipes for large-scale catering should meet the requirements of nutritional physiology and the food value should be calculated. Consumer information on questions of nutrition should be circulated in the press and on the radio and TV on the basis of the points made above.

Exhibit 13

Memorandum From Dr. Ley (Director, Bureau of Medicine) to Commissioner Goddard, August 14, 1967

"Based on a review of the problem, FDA files, and the comments and recommendations of experts who were unanimous in their opinion, the Bureau of Medicine makes the following recommendations:

a. That the labeling of a food containing 20 percent or more of fat by wet weight should be mandatory in respect to fats. The labeling should state that the food contains polyunsaturated, monounsaturated, or saturated fats and

provide a quantitative statement of the amount of each type of fat or fatty acid. No medical claims would be permissable in labeling.

b. An educational program to explain and publicize this policy on quantitative labeling and its place in overall dietary control must be undertaken cooperatively by medical organizations and the government.

The Bureau of Medicine, based on the unanimous opinion of the experts in the field of nutrition believes that the 20 percent of fat by wet weight is a more realistic and effective cut-off point than the AMA suggestion of 10 percent by dry weight. The 20 percent by wet weight figure would include all of the foods which have a significant amount of fatty acids. We also believe that any mention of "polyunsaturates, etc." should make the quantitative labeling mandatory with no medical claims permissable.

The Bureau of Medicine recognizes that this position represents a major change of policy. Nevertheless, the position is recommended as the only reasonable one at this time."

Exhibit 14

MEMORANDUM FROM DR. SUMMERSON (DIRECTOR, BUREAU OF SCIENCE) TO ASSOCIATE COMMISSIONER KIRK, NOVEMBER 14, 1967

"We recommend, therefore, that a new section be added . . . which would read as follows:

If a food which contains 25 or more percent cis-methylene interrupted polyunsaturated fatty acids and 20 or less percent saturated fatty acids on a fresh (wet weight) basis purports to be or is represented for secial dietary use by man by reason of its use as a means of regulating the intake of a particular class of fatty acids, its label shall bear a statement:

(a) Of the percent composition of total fat, cis-methylene interrupted polyunsaturated fatty acids and saturated fatty acids, expressed as the esterified fat or fatty acid on a fresh (wet weight) basis;

(b) Of the number of grams of the food in an ordinary serving unit; and

(c) To the effect that the food is useful in a fat-modified diet as recommended by a physician.

We believe it is recognized that with the publication of a proposal as recommended either by the Bureau of Medicine or the Bureau of Science, a change in the 1959 Policy Statement is desirable and perhaps necessary."

Exhibit 15

AMERICAN MEDICAL ASSOCIATION,
May 5, 1967.

JAMES L. GODDARD, M.D.,
Commissioner of Food and Drugs, Food and Drug Administration, Department of Health, Education, and Welfare, Washington, D.C.

DEAR DOCTOR GODDARD: The Council on Foods and Nutrition of the American Medical Association wishes to report upon its further consideration of the proposal to require label statements for fats, oils, and fatty foods. In a letter to the Administration dated October 20, 1965, the Council objected to the proposed regulation (Federal Register, May 25, 1965) and volunteered to make a comprehensive evaluation of the problems posed by the regulation. This evaluation, now completed, included (1) review of the composition of fat modified diets and of current dietary recommendations, (2) compilation of data supplied by industry regarding the fat and fatty acid composition of a variety of food products, and (3) calculation of the sources of fat and the fatty acid composition of the usual American diet.

The Council has concluded that informative product labeling would assist the physician in prescribing diets with a modified fat content and would aid the patient in his selection of foods. It is suggested that the Administration permit the voluntary labeling of the fatty acid composition of foods which contain 10 or more percent fat on a dry weight basis. Labeling would permit and stimulate development and marketing of foods with modified fatty acid content, a development which the Council encourages and feels is necessary for long term diet modification.

The Council is deeply concerned by the deaths last year in the United States of some 640,000 people from arteriosclerotic and degenerative heart disease (Statistical Bulletin, 48, 11, 1967, Metropolitan Life Insurance Co.). Available data demonstrate that (a) the risk of developing coronary heart disease is associated with serum cholesterol levels and that (b) serum cholesterol levels can be lowered by regulating the kind and amount of dietary fat. The rationale for dietary control of hypercholesteremia and of other hyperlipemias is analogous to that used in the approval of the New Drug Application for Atromid-S. Dr. Robert M. Hodges, Director of the FDA's Office of New Drugs, said, "We believe there is enough of a consensus among leading cardiologists that lowering the cholesterol level will help prevent (arterial and heart diseases). On that basis there is a need for such drugs." (The Washington Post, Thursday, March 16, 1967) Although data are available suggesting that the risk of developing coronary disease may be reduced by lowering serum cholesterol through dietary means, only now are studies beginning to determine the value of reducing serum cholesterol with drugs under the auspices of the National Heart Institute's Coronary Drug Project.

The usefulness of dietary control was reported by P. Leren (Acta Med. Scand. 466 Suppl., in press). The recurrence of coronary attacks in men in Oslo given a modified diet (which lowered the mean serum cholesterol by approximately 17%) was compared with those who continued their usual diets. New attacks were reduced nearly 50%, especially in younger men, approximately the amount which would be predicted from epidemiologic studies evaluating the relationship between serum cholesterol and heart attacks.

On previous occasions, the Council has advocated that physicians consider modified fat diets in the management of hypercholesterolemia and hypertriglyceridemia (JAMA 181, 411, 1962). The Council reaffirmed its position (JAMA 194, 1149, 1965) and extended its recommendations to include "young men vulnerable to coronary disease in an attempt to prevent the rise in serum lipids which, in time, might put them into high-risk categories." These statements were offered as guides to the physician in the management of patients, not as recommendations to the general public. The Council has emphasized the need for professional guidance if fat modified diets are to be successful. Not only must polyunsaturated fats be introduced into the diet but a large portion of the saturated fat must be eliminated.

The Council has consulted many who are opposed to the original labeling proposal and many of the other suggested procedures. The principal arguments put forth are summarized below.

(1) Labeling would promote a "fat power race" with each manufacturer striving to produce a product with a slightly higher level of polyunsaturated fatty acids than competitors, and through advertising, would promote these differences even though they may not be of physiological significance. Competition for oils rich in linoleic acid would result in increased prices which would be disadvantageous to those who have the greatest need for such products.

(2) The supply of vegetable oils is inadequate to meet the need should the population in general be attracted toward such products. Increased use of the highly unsaturated vegetable oils is unavoidable due to the practical considerations of food preparation in the home.

(3) Labeling may lead to ineffective self-medication by portions of the population.

(4) The total dietary fat must be regulated in fat modified diets, the mere labeling of only a few products high in fat will not facilitate effective regulation.

(5) The establishment of product classes on the basis of fat level and fatty acid composition as a technique to expedite labeling would inhibit new product development.

(6) The meat and dairy industry produces substantial amounts of animal fat that must be marketed.

(7) The trend toward the consumption of highly unsaturated margarines, shortenings and vegetable oils is now well established, thereby, obviating the need for the proposed labeling.

The Council is cognizant of the importance of these arguments. Nevertheless, informative labeling is needed to enable the physician to guide the patient's food choices and to enable the patient to adhere to diet instruc-

tions. Labeling would also facilitate development and marketing of fat modified foods appropriate for use in fat modified diets.

It is clear that those individuals with unusually high levels of serum cholesterol have a greater need for a modified diet than the average individual. Effective control of the diet of an individual within the family can be achieved more readily by manipulation of the diet of the entire family. Accordingly, it is probable that the consumption of products rich in highly unsaturated oils may increase considerably. The Council recognizes that any pronounced shift in food preferences of the public would inevitably result in some dislocation of current markets and price structures.

Increased demand for linoleic acid may require agricultural changes, primarily, an increased production of soy oil. The USDA (Economic Research Service, G. W. Kromer: Outlook for Fats, Oils and Oilseeds in 1966/67) indicated that soy oil constitutes about 2/3 of our total food fat supply. The expandability of soy oil production is noted by the increase from 3.0 billion pounds in 1957 to an estimated 6.2 billion pounds in 1966. Production of the other highly unsaturated vegetable oils is relatively inflexible; cottonseed oil production has varied between 1.4 and 2.0 billion pounds during this interval whereas corn oil production has increased but is only about 1/10 the supply of soy oil (USDA, Fats & Oils Situation, Economic Research Service, Aug., 1966).

The Council on Foods and Nutrition of the American Medical Association offers the following recommendations concerning the proposal to label fats, oils, and fatty foods. It is felt that acceptance and implementation by the Administration would aid the physician in his diet prescription and would encourage patient adherence to fat modified diets.

(1) Labels of foods which contain 10 or more percent of the dry weight as fat be permitted to indicate the fatty acid composition of the contained fat.

(2) Label information should include the fat content of the product as purchased in percent, and the percentage of saturated, monoenoic and polyunsaturated fatty acids expressed as the esterified fatty acids.

(3) Labeling the fatty acid content of foods should be voluntary program permitted at the discretion of the manufacturer.

(4) The manufacturer should be permitted to call attention in his advertising to the fatty acid content of the product. However, since optimal results with a fat modified diet require regulation of all sources of fat and cholesterol within the diet, no claims for the prevention or mitigation of disease should be permitted either on the product label or in associated advertising.

Sincerely,

PHILIP L. WHITE, Sc.D.,
Secretary.

Exhibit 16

[From The Washington Post, March 16, 1967]

FDA'S REASONING IN DRUG APPROVAL RAISES QUESTIONS

(By Morton Mintz)

Suppose an experimental drug should be demonstrated to be safe and effective in the treatment of arteriosclerosis, which includes coronary heart disease. Surely the Food and Drug Administration would approve it for sale: millions of Americans have arteriosclerotic diseases, which cause hundreds of thousands of deaths each year.

Such a straightforward connection between drug and disease, however, does not apply to the approval the agency gave recently to Atromid-S, which is to go on the prescription market by about May 1. Because such a connection is lacking, the wisdom of FDA's action is being debated in scientific circles.

Fuel was added to the argument by a paper given by Dr. Donald J. Svoboda on research that he, Dr. Daniel Azarnoff and other colleagues did at the University of Kansas Medical Center.

Dr. Svoboda told the American Association of Pathologists and Bacteriologists, meeting at the Sheraton-Park, that the livers of male rats treated with a close chemical relative of Atromid-S showed remarkable increases in the numbers of a recently identified class of microbodies—compacted particles of

enzymes first observed with electron microscopy. In addition these rat livers developed cell structure abnormalities. With withdrawal of the drug the rat livers regained structural normality.

Essentially, this research is a refinement of previous work described in the FDA-approved prescribing instructions for Atromid-S. What relevance it may have, if any, for human users, is not known.

When Atromid-S was tried in humans there were effects on the liver, the blood, the gastrointestinal tract and the hair—but these effects were infrequent or assumed not to have been caused by the drug. In a variety of laboratory animals effects on various organs also were found.

What most reassured the FDA and others, however, was that use of Atromid-S in more than 3000 patients—some received it for as long as four years—has not been shown to impair the function of the liver or to cause other serious problems. At the same time, it is acknowledged in the prescribing instructions that "only after long-term clinical trials have been completed can definite conclusions be drawn."

None of this reaches an underlying question: Should approval be given any drug which, like Atromid-S, uses a biochemical mechanism to reduce the levels in the blood of the fatty substance known as cholesterol?

In connection with the release of Atromid-S—which was developed in England but is being marketed here by Ayerst Laboratories—Dr. Robert M. Hodges, director of the FDA's Office of New Drugs, said:

"This drug is effective in lowering serum cholesterol [by 7 to 35 per cent]. We believe there is enough of a consensus among leading cardiologists that lowering the cholesterol level will help prevent [arterial and heart diseases]. On that basis there is a need for such drugs."

The "need for such drugs" is a hypothesis currently being tested by the National Heart Institute's Coronary Drug Project.

Rather than await the results of the work being done by its sister agency in the Department of Health, Education, and Welfare, the FDA is piling atop the presumption of a cause-effect relation between high cholesterol and disease a presumption that drugs are needed to lower cholesterol.

These presumptions do not square even with FDA's own official position that a causal relation "has not been proved." That position was published in 1959, and restated in 1964 and is formally still in effect.

Even assuming that there will be shown to be a relation between high fat levels in the blood and the rate at which fat is deposited in the arteries, changes in diet—without drugs—can reduce the blood-fat levels in many patients. And other factors are believed to contribute to heart attacks, including lack of exercise, obesity and smoking.

The effects on the liver of male rats discussed in the paper by Dr. Svoboda serve only to raise additional questions, although no one knows what significance his findings may have, no one pretends to feel more assured because of them than one would had they not been made. At the same time, encouragement is derived from the absence of the effects on the liver in the few monkeys he tested, monkeys being closer to man than rats.

Atromid-S (clofibrate) is the first anti-cholesterol drug cleared by FDA since the spring of 1960, when marketing of MER/29 (triparanol) was allowed.

Exhibit 17

Amended in Assembly May 8, 1970

California Legislature—1970 Regular Session

ASSEMBLY BILL No. 1387

Introduced by Assemblyman Roberti, March 19, 1970.—Referred to Committee on Health and Welfare

An act to add Section 26495.5 to the Health and Safety Code, relating to food.

The people of the State of California do enact as follows:

SECTION 1. Section 26495.5 is added to the Health and Safety Code, to read:

26495.5. A food shall be deemed to be misbranded if it contains more than 5 percent by weight of fats or oils or any combination thereof and if its label does not have the following information:

(a) Each fat and oil shall be named as to its specific source and listed in descending order of predominance in the food.

(b) The word "hydrogenated" or "partially hydrogenated" shall precede the name of each fat or oil when such is the case.

LEGISLATIVE COUNSEL'S DIGEST

AB 1387, as amended, Roberti (H. & W.). Misbranded food.

Adds Sec. 26495.5, H. & S.C.

Specifies that food is misbranded if it contains more than 5 percent by weight of fats or oils or any combination thereof and if its label does not bear specified information.

Exempts from such provisions any food subject to regulation by the Agricultural Code.

To become operative July 1, 1971, unless on or before that date the Director of Public Health finds and declares that federal legislation is enacted and becomes effective which regulates the labeling of food as to the content of the fats or oils or the combination of fats or oils whether or not such federal legislation is applicable to foods in intrastate commerce.

Vote—Majority; Appropriation—No; Fiscal Committee—*Yes.*

(c) The phrase "contains _____ grams of fats and oils (_____ grams polyunsaturates, _____ grams *monounsaturates*, _____ *grams* saturates)", with the blanks to be filled in with the correct numbers of grams of each substance "in the food, shall immediately precede the first fat or oil named.

(d) If the food label bears a list of ingredients, the listing therein of fats, oils, and other ingredients in descending order of predominance in the food shall satisfy the requirements of subdivision (a) provided that each fat and oil is named as required in this section.

(e) This section shall not be applicable to any food subject to regulation pursuant to the Agricultural Code.

SEC. *2. This act shall become operative on July 1, 1971, unless on or before that date the Director of Public Health finds and declares that federal legislation has been enacted and become effective which regulates the labeling of food as to the content of the fats or oils, or the combination of fats and oils, whether or not such federal legislation is applicable to foods in intrastate commerce.*

Exhibit 18

§ 201—FEDERAL FOOD, DRUG, AND COSMETIC ACT

(h) The term "device" (except when used in paragraph (n) of this section and in sections 301(i), 403(f), 502(c), and 602(c) means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

(i) The term "cosmetic" means (1) articles intended to be rubbed, poured, sprinkler, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

(j) The term "official compendium" means the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, official National Formulary, or any supplement to any of them.

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(l) The term "immediate container" does not include package liners.

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

(o) The representation of a drug, in its labeling, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

Exhibit 19

Federal Food, Drug, and Cosmetic Act

BLENDED EDIBLE OILS—LABELING

The letter discusses the labeling required for cans of blended edible oils. A product containing but one ingredient is not entitled to exemption from Section 403 (i) (2).

TC–273—May 7, 1940

Correspondent requests advice as to the labeling for cans of blended edible oils.

"We enclose a copy of the new Act and general regulations. Your attention is called to Section 403 (e), (f), and (i) (2). As you indicate, the firm name and address should be prominently set forth on each main display panel of the label, together with the net contents statement and the list of ingredients. * * * The specific oils should be listed on the label in the descending order of predominance by weight. If in any case, one oil, such as olive oil, is present in relativity small amounts, we believe that, in order to insure compliance with the Act, it will be necessary to indicate the percentage of that particular oil. For example, instead of 'Flavored with Olive Oil,' as suggested by you, we believe the statement should be 'Flavored with—per cent Olive Oil' in the case of a mixture containing a small amount of olive oil."

Correspondent submitted specimen lithographed can for "* * * Oil for Salads & Cooking 1 Pint Net Made from Golden Corn" and requested an exemption from Section 403 (i) as provided for in Section 902 (a) (2) of the Act.

"You will note that the power of exemption provided for in Section 902 is limited to cases of foods fabricated from two or more ingredients, and we understand that your product consists solely of corn oil. The requirements of Section 403 (i) and Section 403 (f) of the Act will, therefore, make it necessary that the label be revised so that the common or usual name 'Corn Oil' is set forth on the label with such conspicuousness as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. We do not feel that the running statement 'Made from Golden Corn' satisfies the requirement as to the common or usual name of the article.* * *"

Exhibit 20

§ 1.10 Food; labeling; designation of ingredients.

(a) The name of an ingredient (except a spice, flavoring, or coloring which is the ingredient of a food other than one sold as a spice, flavoring, or coloring), required by section 403(i)(2) of the act to be borne on the label of a food, shall be a specific name and not a collective name. But if an ingredient (which itself contains two or more ingredients) conforms to a definition and standard of identity prescribed by regulations under section 401 of the act, such ingredient may be designated on the label of such food by the name specified in the definition and standard, supplemented, in case such regulations require the naming of optional ingredients present in such ingredient,

by a statement showing the optional ingredients which are present in such ingredient.

(b) No ingredient shall be designated on the label as a spice, flavoring, or coloring unless it is a spice, flavoring, or coloring, as the case may be, within the meaning of such term as commonly understood by consumers. The term "coloring" shall not include any bleaching substance.

(c) An ingredient which is both a spice and a coloring, or both a flavoring and a coloring, shall be designated as spice and coloring, or flavoring and coloring, as the case may be, unless such ingredient is designated by its specific name.

(d) In the case of fabricated foods, including mixtures of food ingredients, where the proportion of an expensive ingredient or ingredients present has a material bearing on price or consumer acceptance, the label of such food shall bear a quantitative statement of such ingredient(s) if the label without such declaration may create an erroneous impression that such ingredient or ingredients are present in an amount greater than is actually the case. For example, a label designation of identity as "cottonseed oil and olive oil" for a mixture containing 80 percent or more of cottonseed oil would rquire a declaration of the percent of olive oil present. Similarly, a representation by vignette or statement of identity that a breakfast syrup is made from a mixture of sugar syrup and maple sugar syrup would necessitate a quantitative declaration of the maple sugar syrup unless more than 20 percent maple sugar syrup is present.

(e) In the case of an assortment of different item of food, when variations in the items that make up different packages packed from such assortment normally occur in good packing practice and when such variations result in variations in the ingredients in different packages, such food shall be exempt from compliance with the requirements of clause (2) of section 403(i) of the act with respect to any ingredient that is not common to all packages. Such exemption, however, shall be on the condition that the label shall bear, in conjunction with the names of such ingredients as are common to all packages, a statement (in terms that are as informative as practicable and that are not misleading) indicating that other ingredients may be present.

(f) A food shall be exempt while held for sale from the requirements of clause (2) of section 403 (i) of the act (requiring a declaration on the label of the common or usual name of each ingredient when the food is fabricated from two or more ingredients) if said food, having been received in bulk containers at a retail establishment, is displayed to the purchaser with either (1) the labeling of the bulk container plainly in view or (2) a counter card, sign, or other appropriate device bearing prominently and conspicuously the information required to be stated on the label pursuant to clause (2) of section 403 (i).

(g) Propylene glycol or glycerin present in quiescently frozen confections because of use as a carrier for food-grade emulsifiers and stabilizers is exempt from the requirements of section 403(i) (2) of the act (requiring a declaration on the label of the common or usual name of each ingredient when the food is fabricated from two or more ingredients).

(h) Ingredients shall be listed by common or usual name in order of decreasing predominence. The declaration shall be presented on any appropriate information panel in adequate type size, without obscuring design, vignettes, or crowding. The entire ingredient statement shall appear on a single panel of the label.

[20 F.R. 9528. Dec. 20, 1955, as amended at 31 F.R. 3115, Feb. 26, 1966; 33 F.R. 10733, July 21, 1967; 32 F.R. 13278, Sept. 20, 1967]

§ 1.11 Special dietary uses.

(a) The term "special dietary uses", as applied to food for man, means particular (as distinguished from general) uses of food, as follows:

(1) Uses for supplying particular dietary needs which exist by reason of a physical, physiological, pathological or other condition, including but not limited to the conditions of diseases, convalescence, pregnancy, lactation, allergic hypersensitivity to food, underweight, and overweight;

(2) Uses for supplying particular dietary needs which exist by reason of age, including but not limited to the ages of infancy and childhood;

(3) Uses for supplementing or fortifying the ordinary or usual diet with

any vitamin, mineral, or other dietary property. Any such particular use of a food is a special dietary use, regardless of whether such food also purports to be or is represented for general use.

(b) No provision of any regulation under section 403 (j) of the act shall be construed as exempting any food from any other provision of the act or regulations thereunder, including sections 403 (a) and (g) and, when applicable, the provisions of Chapter V of the act.

[20 F.R. 9529, Dec. 20, 1955]

Exhibit 21

BRUNETTO CHEESE MANUFACTURING CORP., C. & F. Cheese Distributors, Inc., Falcone Dairy Products, Inc., J. J. Giammalvo, Inc., M. Maggio Co., Pollio Dairy Products Corp., Sorrento Cheese Company, Inc., Sunbury Cheese Company, Inc., and Italian Fresh Cheese Manufacturers, Petitioners,

v.

ANTHONY J. CELEBREZZE, Secretary of Health, Education, and Welfare of the United States, Respondent. No. 131, Docket 29567.

United States Court of Appeals Second Circuit.

Argued Jan. 4, 1966.
Decided Feb. 4, 1966.

Petition for review of an order of the Secretary of Health, Education and Welfare promulgated under Federal Food, Drug, and Cosmetic Act, defining and setting standards of identity for certain cheeses. The Court of Appeals held that substantial evidence supported order of Federal Food and Drug Administration Commissioner which required midwestern producers of cheese to adopt name "Low-Moisture Mozzarella," and as long as name chosen was appropriate it was no argument that Commissioner rejected another name for such cheese which was also appropriate.

Affirmed.

Martin A. Fromer, New York City, for petitioners.

Robert E. Kushner, Asst. U.S. Atty., Southern Dist. of New York (Robert M. Morgenthau, U.S. Atty., Southern Dist. of New York, William W. Goodrich, Asst. Gen. Counsel for Food and Drugs, Joanne S. Sisk, Atty., U.S. Dept. of Health, Education and Welfare, on the brief), for respondent.

Before MOORE, SMITH and ANDERSON, Circuit Judges.

Per Curiam.

Petitioners, fresh cheese manufacturers of the northeastern United States, and their trade association, seek review of an order of the Secretary of Health, Education, and Welfare under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 341, promulgating definitions and standards of identity for Mozzarella, Scamorza, Part-skim Mozzarella and Part-skim Scamorza cheese. We find the order based on substantial evidence in the record and affirm the order.

The regulations establish standards of identity for the Mozzarella cheese manufactured by petitioners, and for a cheese manufactured by midwestern producers, which is also sold as Mozzarella, but which has a lower moisture content.

After a hearing on standards proposed by the National Cheese Institute, representing midwestern producers, the Commisioner issued tentative findings establishing two basic standards of identity, and using "mozzarella" as the name for petitioners' product, manufactured in the east, and "pizza cheese" for the low moisture product. The midwestern producers protested, on the grounds that the consuming public, which had previously purchased this product as Mozzarella, would be confused, that there were other uses for this cheese than for pizza, that other cheeses were used for piza and that recipes in general circulation called for mozzarella cheese. The Commissioner altered the findings to adopt "Low-Moisture Mozzarella" as the name for the midwestern product.

[1] Petitioners attack the choice of this name. The findings must be supported by substantial evidence, § 701(f) (3) of the Act, 21 U.S.C. § 371(f)

(3); Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 63 S.Ct. 589, 87 L.Ed. 724 (1943). The court cannot substitute its judgment for that of the administrative agency if the findings are so supported. Under § 401 of the Act, 21 U.S.C. § 341, the Secretary is to promulgate regulations establishing a reasonable definition and standard of identity for a product, under the product's common or usual name so far as is practicable, "[w]henever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers."

While there was evidence to indicate that the two cheeses are different in color, taste, texture, and consistency, and it was not disputed that the eastern cheese was of earlier origin, and more closely resembles authentic Italian Mozzarella, there was also evidence that the consuming public identified as Mozzarella the midwestern product. Most of the midwestern producers included the name mozzarella in their labels. There was testimony that the midwestern cheese was marketed throughout the country and known as Mozzarella, and that due to its high moisture content and resultant perishability the eastern cheese was not marketed to any great extent outside the east. Yet the consuming public was not confined to the east.

[2] Thus the Commissioner could find that the public knew as Mozzarella two different cheeses, and that there was a need for separate standards of identity. Accordingly he preserved the name Mozzarella for each, but added the description "low-moisture" to the midwestern product. The Act requires that the product when given standards be known by its "common or usual name so far as practicable." Thus the ultimate question is whether there was substantial evidence on the record to support the name chosen. Petitioners do not appear to disagree that common or usual nam means that name by which the product is known to the community at large. United States v. Crescent-Kelvan Co., 164 F.2d 582 (3 Cir. 1948) (construing similar language in § 502(e) of the Act, 21 U.S.C. § 352(e)).

[3] The fact that some midwestern producers labeled their product also as "pizza cheese" indicates more a recommended use than a name. There was substantial evidence that the consuming public identified the low-moisture product as Mozzarella. And as long as the name chosen is appropriate, it is no argument that the Commissioner rejected another name which is also appropriate. Columbia Cheese Co. v. McNutt, 137 F.2d 576 (2 Cir. 1943). We cannot substitute our judgment for his. Since his finding is supported by substantial evidence the order is affirmed.

Exhibit 22

LETTER FROM DR. BENJAMIN M. BAKER TO F.D.A. COMMISSIONER LARRICK, JUNE, 1964—EXCERPT

". . . If there is no label on commercial products stating whether the vegetable oil they contain is saturated or unsaturated, the medical prescription is meaningless.

Furthermore, the National Diet-Heart Study and others are doing everything possible to induce manufacturers to produce acceptable foods of polyunsaturated fat content. It is much easier and cheaper for manufacturers from many points of view, to hydrogenate vegetable oils before they are used in food manufacture. If expense and trouble of production to manufacturers is increased, it seems only proper for them to have the right to label their products factually."

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2. Article Reporting FDA Action on FATS' Petition

[From the Wall Street Journal, Dec. 15, 1970]

FDA WEIGHING A CHANGE IN LABELING RULES THAT MAY BUOY VEGETABLE-FAT FOOD FIRMS

(By Jonathan Spivak)

WASHINGTON.—Dropping a long-standing prohibition, the Food and Drug Administration probably will soon propose that food concerns be allowed to label products for the type of fat content.

The action could accelerate a move to the marketing and consumption of foods that are high in certain "polyunsaturated" vegetable fats and low in or free of "saturated" animal fats. For this reason it is likely to be opposed by the dairy industry, cattle-raisers and, perhaps other livestock producers.

Many medical experts believe diets that substitute polyunsaturated fats for saturated fats may be effective in preventing the occurrence or reoccurrence of diseases of the heart and arteries. Heart ailments are the major killers of Americans, accounting for about 600,000 fatalities annually.

Scientific evidence increasingly suggests that saturated fats contribute to high levels of cholesterol, a fatty substance manufactured by the body. Deposits of cholesterol, in turn, are thought to be responsible for narrowing arteries—one form of arteriosclerosis—leading to impaired blood circulation and heart disease.

But the experts readily concede that a firm cause-and-effect relationship between cholesterol and heart disease hasn't been proven and could take years to demonstrate. Furthermore, while experimental diets high in polyunsaturates and low in saturated fats have been shown to reduce blood levels of cholesterol in volunteers, it remains to be demonstrated that the substitution is of medical value.

FULL INFORMATION

The proposed FDA action will be justified on the basis of furnishing full information to consumers. The agency will insist that it isn't passing medical judgment on the "therapeutic" benefits of reducing intake of saturated fats. "We don't want to get caught in the middle of a scientific controversy," insists a ranking FDA official. "But I think we have a responsibility to assure the interested consumer and the interested professional that they can find this information (on fats) if they want it and the primary place is on the label."

Current FDA policy, adopted in 1959, is that label statements or claims about fat content, such as "high in polyunsaturates" are misleading to consumers because of an implication of unproven health benefits. These statements technically constitute misbranding and make the products subject to seizure.

The agency says that many concerns do, in fact, furnish such fat statements, particularly on margarines and oils. But the FDA concedes it has rarely taken regulatory action because of the magnitude of the task.

The new FDA policy would, thus, also be an effort to regulate more adequately a practice that is already taking place in the marketplace. It would be designed, as well, to encourage companies to develop special foods low in saturated and high in polyunsaturated fats, mainly through the use of particular vegetable proteins.

The opportunity, now prohibited, to make claims for low fat content is expected to increase the appeal of these products to consumers who want to alter their fat intake. It would accelerate the development, and marketing, for example, of breads, cake mixes and meat substitutes high in polyunsaturates.

DETAILS OF THE PROPOSAL

The FDA's proposed regulation—which still must receive the blessing of Health, Education and Welfare Secretary Richardson—wouldn't force companies to provide label information on fat content of foods. But it would strictly prescribe the type of such claims that can be made if companies elect to do so. Products would have to state the percentage of fat by weight; the percentage of fat by calories; and the percentage of fat that is polyunsaturated and saturated.

Saturated fats, mostly of animal origin, are fats in which all the carbon atoms, which form the backbone of the molecule, are linked to hydrogen atoms. Monounsaturated fats are those in which only one carbon atom isn't linked to hydrogen atoms. Polyunsaturated fats, which come mostly from vegetable sources, have more than one carbon atom that isn't linked to hydrogen atoms.

But complicating things for consumers is the food processors' chemical technique of "hydrogenating," or adding, hydrogen atoms to polyunsaturated vegetable oils to give them a more solid consistency at room temperature and a longer shelf life.

These "partially hydrogenated" oils, frequently found in margarines, can be far more saturated than the untreated oils.

The FDA fat labeling requirements would probably have their largest impact on margines, oils and salad dressings that are all high in fat content. The proposed regulation wouldn't apply to foods, such as milk, cottage cheese and other dairy products, that contain less than 10% of fat as offered to consumers. Some concerns might decide to comply simply by dropping any claims to polyunsaturation or fat content.

COMPETITIVE EDGE

But the fat labeling could offer a competitive advantage to products that contain types of vegetable oils, which are high in polyunsaturates. FDA nutritional experts note that the commonly used oils vary widely in the amount of saturation due largely to the amount of linoleic acid contained. These experts say safflower oil, the most expensive and in shortest supply, is 70% or 71% polyunsaturated fat; corn oil is 56% to 58% polyunsaturated; cottonseed oil is 51% to 52% polyunsaturated; soybean oil, which constitutes 80% to 85% of the oil available in the U.S., is 42% to 44%; peanut oil is 25%; and coconut oil, which is widely used in nondairy simulated whipped creams and other such substitute products hasn't any polyunsaturates.

Along with its fat labeling proposal, the FDA will propose a second requirement that all vegetable oils be identified as to source. This requirement would apply to all products containing vegetable oils, whether or not fat content claims were made.

Under present agency regulations, the companies merely listed "vegetable oil" or "partially hydrogenated vegetable oil" on the label without designating the specific type.

Presumably, if consumers had more information, they might seek to avoid foods containing vegetable oils that are high in saturated fats. In addition, food manufacturers might also try to formulate some their products with the more polyunsaturated oils.

But, technical problems could pose a barrier. Coconut oil, which is considered a high contributor to cholesterol formation, is preferred by the industry for some products because of its stability and other favorable chemical properties.

FDA officials are hoping that the two proposed regulations won't stir up a lot of industry opposition and can be quickly put into effect after a brief period for comment. However, opponents such as the cattlemen, could demand and receive a public hearing that would delay the effective date and might force the FDA to alter its proposal.

But Government nutritional experts believe the weight of medical opinion is moving towards the position that limitation of saturated fats in the diet to restrict cholesterol is a useful health measure.

Medical groups, such as the American Heart Association and the American Diabetes Association, have increasingly been pressuring the FDA to permit fuller product information so that their patients, and presumably consumers generally, could more intelligently modify their diets.

A prestigious group of non-Government medical experts is scheduled to issue its recommendations today in New York.

The FDA labeling recommendations, of course, wouldn't limit advertising of low-fat food products. This is regulated by the Federal Trade Commission. But FTC officials are considering adopting coordinated policies that would seek to prevent excessive, unproven health claims.

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3. Letter from FDA to Senator Edward M. Kennedy

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
PUBLIC HEALTH SERVICE,
FOOD AND DRUG ADMINISTRATION,
Rockville, Md., April 20, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: Commissioner Edwards has asked us to reply to your letter of April 5, 1971, with enclosures, concerning testimony given

two student groups before your Subcommittee on Administrative Practice and Procedure. This will also acknowledge receipt of the copy of your April 5, 1971 letter which you sent to Deputy Commissioner Grant.

As you are aware, present regulations require that only certain ingredients of standardized foods be declared on the label. However, it should be noted that manufacturers of standardized foods may provide a list of all ingredients if they so desire. Currently, all of the food standards are undergoing review and updating. As part of this review mandatory declaration of all ingredients of standardized foods is being considered.

The question of fatty acid labeling of the fats present in foods has been under consideration by this Agency for several years. Appropriate labeling regulations have been developed for discussion with several organizations within the Department of Health, Education, and Welfare concerned with heart disease and its prevention. The two principal groups are the Regional Medical Program and the National Heart and Lung Institute of the National Institutes of Health, both deeply involved in basic and applied programs related to heart disease. Any announcement in regard to diet fats and heart disease should reflect the position of the above-mentioned medical and research groups, as well as the Food and Drug Administration. We are coordinating this within the Department.

If we can be of further assistance, please let us know.

Sincerely yours,

M. J. RYAN,
Director, Office of Legislative Services.

Mr. BANZHAF. Senator, the next group I will introduce goes under the acronym of LABEL and it stands for "Law Students' Association for Buyers' Education and Labeling." Their concerns are obviously very closely related to those of the previous group, FATS, in that they are both concerned with giving the consumer information about what he is eating. I think, however, that LABEL illustrates one additional very important facet of this whole area of consumer intervention and that is this: That consumer groups——

Senator KENNEDY. Is the dog going to testify?

Mr. BANZHAF. Yes he is. I will introduce him in a minute.

Senator KENNEDY. Can we get his name for the record?

Mr. BANZHAF. Groups such as these which grew out of my classes at George Washington University or groups such as Ralph Nader is associated with are frequently accused of attacking industry and in effect being anti-industry. You probably recall it was only last week that Mr. Roach of GM called the legal activists such as Ralph Nader a threat to the free enterprise system. I think this group illustrates just the opposite. This is a group which became concerned about a problem of food labeling, and rather than marching into the FDA, attacking the food industry and proposing possibly unrealistic solutions, they went first not only to the FDA Library, but to a large retailer in Washington, D.C., the Giant Foods Corp., and asked for its cooperation.

They have worked closely with industry and industry representatives in formulating their proposals and, in fact, their proposals have been so persuasive that they have been able to persuade Giant Foods in Washington to go along with it. So, I think they are a very good example of the fact that my students and I are not necessarily anti-industry, we are not antiagency, we are not out to force something unnecessary upon the industry. If we are given half a chance, and where industry is responsive, groups such as this, I think, are more than willing to work along with industry.

Senator KENNEDY. Can we get a chair for the dog?

Mr. BANZHAF. Speaking as the chairman for the group is Mr. Arthur Koch. Others in the group are Louis Kaufman, Gary Laden, Joan Levy, and Ellis Saull, and the dog's name is Lexi. Lexi will illustrate the problems and explain to you that he, as a consumer, for some ironic reason, gets more information on his label on dog food, assuming he could read it, than most customers get on labels for their food products.

STATEMENT OF ARTHUR KOCH, CHAIRMAN, LAW STUDENTS' ASSOCIATION FOR BUYERS' EDUCATION AND LABELING (LABEL); ACCOMPANIED BY LOUIS KAUFMAN, GARY LADEN, JOAN LEVY, AND ELLIS SAULL

Mr. KOCH. Senator Kennedy, the Food and Drug Administration distributes a large number of posters such as this, urging consumers to "Read Labels Carefully." Ironically, it has also issued rules under which a number of food product labels give the consumer no information at all, while others are clearly misleading. These rules make it literally impossible, for example, for anyone in this room, not to mention the average American housewife, to determine what is in this bottle of mayonnaise, this can of coke, or this jar of jelly.

The problem, greatly oversimplified, is this: The FDA has established a large number of so-called "Standards of Identity."

Senator KENNEDY. I hope there's nothing wrong with mayonnaise.

Mr. KOCH. We are about to tell you, sir. There might very well be.

The original—and quite valid purpose—of these standards was to insure that certain manufactured food products which had become known to the consumer by common names would be substantially the same regardless of manufacturer; in other words, that all mayonnaise regardless of manufacturer would contain the same basic ingredients. However, the FDA has also ruled that ingredients in a great many products covered by a standard of identity need not be listed on the label. The result is a veritable labrynth of regulations which it took 5 second-year law students nearly 6 months to comprehend, and even with a clear understanding of this regulation, we still cannot tell you today what is in any particular food product which falls under a standard of identity.

Hundreds of hidden ingredients exist in standardized foods. While the FDA has a list of the possible ingredients which can go into any particular food (which is also published in the Code of Federal Regulations), no member of Congress—not even the President of the United States himself—could tell how much caffeine is in any particular cola drink or whether MSG is in the mayonnaise on his tuna fish sandwich. Some of the ingredients which are required to be in certain food products—such as caffeine in colas or egg yokes in mayonnaise—can be dangerous to certain people and yet need not be indicated in any way on the label. Even more confusing, in certain cases other ingredients may be listed and the possibly dangerous one omitted, thus confusing the poor consumer even more. In still other cases, the manufacturer has a choice as to whether or not to include a given ingredient, and he need not tell the potential buyer which decision he made.

This is absurd. What is even more absurd is that this can of dog food is more informatively labeled than any human food coming under a standard of identity. However, our canine friend here, Lexi, cannot read. He cannot benefit from the more informative label on this can of dog food. With all due respect to our canine friend, it is outrageous that he receives more informatively labeled food than any of us humans.

On February 25, 1971, LABEL filed with the Food and Drug Administration a petition for the promotion of a simple rule which would end all this.

Senator KENNEDY. Who is representing Lexi down there? It seems he gets more information than the consumer.

Mr. KOCH. Precisely, Senator Kennedy, and that is exactly what we are contending. We think it is really outrageous, and we are asking essentially that the Food and Drug Administration promulgate regulations that say human food must get the same ingredient labeling as that can of dog food you are holding in your hand, and we think that is not asking very much, and especially since humans can read and Lexi, as we will illustrate, cannot.

Senator KENNEDY. Do not discount Lexi.

Mr. KOCH. As a matter of fact, Lexi is one of our symbols.

Senator KENNEDY. Why is that so? I mean, we laugh about it, but it should be a matter of tremendous distress to the American consumer.

Mr. KOCH. Well, Senator, we understand that many State legislatures have really taken an interest for dog lovers and have required that it be listed so that the owners who seem to really care about their animals can tell what is in the food they serve their dogs. However, when it comes to apply it to American human food, apparently the American consumer is not quite as important. We think that there are many, many reasons why the American consumer must know, as with the dog food, what is in the food they eat, and they cannot tell.

Senator KENNEDY. You think the dog lobby is stronger than say the lobby for babies in this country?

Mr. KOCH. That is a very good possibility. What we really think though is that the food manufacturers are a greater lobby than the consumers.

Senator KENNEDY. Why do they refuse to support this?

Mr. KOCH. Well, there are a few reasons and fears, as we noted with some ingredients that have real potential danger. We do not say that they are really dangerous, but they are potentially dangerous to some people, such as say MSG in mayonnaise and egg yokes, and people with heart disease and other allergies must stay away from that. Caffeine must be in every drink that calls itself cola. Doctors have, many doctors have said, and we have researched it and included it in our petition, which we have submitted to you, that caffeine can be potentially dangerous to people with heart ailments and people who have a tendency toward bad hearts. Further, the fact is that Coca-Cola or cola drinks can add up to 80 different ingredients. Some of the names of these ingredients stretch across an entire page, which I could not even pronounce them to you, and

we feel if they had to put these things on the can some people might stop buying it. As a matter of fact, people might stop buying these products.

Further, we found out in such cases as the ice cream industry that ice cream companies change their ingredients, we are told, every single day they make that product, and they do not want to tell you that and they do not want to tell you they use the cheapest possible ingredients, every day according to the market value.

Senator KENNEDY. Does that not reflect itself in the cheaper products? Consumers might just find out that one ice cream is better than another, and the next time they go to the store they will buy the product that tastes better.

Mr. KOCH. Well, people do not know this, first of all; and then second, they would be forced to use better ingredients which would be more expensive for them, and I think that is one of the reasons. We have been told by some of the food people that this would mean changing the labels perhaps regularly if they wanted to do it, and at perhaps some expense to them, and we say that it may be better to clear up the ingredients than to keep changing the label.

On February 25, 1971, LABEL filed with the Food and Drug Administration a petition for the promotion of a simple rule which would end all this. Using their own standard—"Promoting honesty and fair dealing in the interest of the consumer"—LABEL asked them to issue the following rule:

For the purposes of promoting honesty and fair dealing in the interest of the consumer, all food manufacturers and distributors must list on the label, in the order of their predominance, all ingredients which are contained in their product.

So far, the FDA has not acted. Although a number of officials personally indicated their support for the petition and LABEL's position, they have not taken even the first step of publishing the proposed rule so that others may comment on it. However, in the interim, a number of other things have happened. I personally discovered an FDA official misinforming a group of food industry executives as to the extent of FDA ingredient labeling requirements. Second, in recently trying to do research in the FDA library, we were approached as if we were some kind of subversive group, our names were taken, and we were cautioned about the "limited use" of what we understand to be a public information library. In fact, we were told that "our youth alone" was enough to warrant this unusual procedure. Such harassment is not deserved by those who are only trying to work with and spur the Federal agencies into doing what they were supposed to be doing all along—namely, to protect the American public from misleading, deceptive, and unfair practices.

Ironically, LABEL has been treated better by the industry it was trying to affect than by the regulatory body responsible for protecting the public. Giant Foods, a major retailer in the Washington, D.C. area, saw the merit in our ideas and agreed to work with us by providing vital information about the food industry. Moreover, when we completed our project, they agreed with our basic position and have agreed to undertake a complete labeling program for prod-

ucts coming under their brand names. Here, for example, are two mockups of more informative labels which soon appear on Giant-brand cola drinks and mayonnaise jars. Their action is important; it proves not only that our proposal has substantial merit, but that it is not impractical and can be accomplished without a great deal of expense or inconvenience.

Senator KENNEDY. Now, we just heard from FATS a moment ago about the question of the kind of oil in mayonnaise. Now, do you show what kind of vegetable oil is in there?

Mr. KOCH. No, sir, not as yet. They have not gone that far. They are working with us in determining whether they will go further, but they have decided at least to tell consumers, unlike any other mayonnaise now, and according to the regulation any other mayonnaise does not even have to tell them what kind of vegetable oil is in there.

Mr. BANZHAF. I might say, the Giant people are under the direction of Esther Peterson who is now experimenting with a number of different ideas for telling the consumer about the various nutritional values in food.

Senator KENNEDY. Is this all done voluntarily by the Giant Food people?

Mr. BANZHAF. Yes, it is voluntary.

Senator KENNEDY. Are they the only group?

Mr. BANZHAF. So far as we know they are, and what they are doing is experimenting as to which means is most effective in informing the consumer in this area, rather than picking one and jumping into it and possibly confusing the consumer.

Senator KENNEDY. I know Mr. Danzansky. He is very active here in the community, and he is a progressive individual. I think we ought to let some of the other companies know what they are doing here.

Mr. KOCH. One other company, sir, that we had used as an example in our petition contacted us right after our filing date when we had the national CBS-TV coverage, and they were rather upset we singled out their product, and we recommended to them, we said that if you have nothing to hide why don't you undergo a labeling program as well, and by their request sent them out, within days, and this was over a month ago now, a letter explaining to them how this can be done, and offering to meet with them.

We got a letter back from them telling us how mad they were with our using them as an example, but they have not undertaken even to contact us further about undergoing a labeling program.

However, to persuade the food industry to list the ingredients on all of their products voluntarily would be too tedious. If Giant can do it, the entire food industry can do it, but the FDA must act to make them do it. A simple rule would do the trick. However, as today's hearings are illustrating, administrative agencies are less than responsive to consumer requests, even when a private public-interest organization does the necessary study and presents its proposal. Although food labeling itself is perhaps a narrow administrative issue, it seriously affects the health of our citizens. We cannot

let a Federal agency, such as the Food and Drug Administration, sit indefinitely on measures which are necessary to inform the American consumer and to protect the health and welfare of every single American citizen.

Thank you.

Senator KENNEDY. Let me just play the devil's advocate for just a moment. I suppose the food industry is going to suggest that if they follow these procedures, it will be more costly and this is going to raise the cost to the consumers.

Mr. KOCH. We say this is not true at all. As the Giant mockup shows, it is merely changing the label, and we are more than willing to wait until current stocks are used up so that when they have to reprint it they merely have to add a few lines, and we do not say they have to do this tomorrow. In fact, Giant a month ago announced it and will be doing it very shortly. In fact, we even hoped that we would have examples of Giant Food, but they are not yet ready. They will be going into the market very shortly.

Now, we are not saying that any food store has to do this tomorrow, but just with their next publishing of labels.

Senator KENNEDY. We have earlier testimony that some products change ingredients almost daily—ice cream, for instance. Now, how are you going to require that they are going to put all of the precise ingredients on the label where they might change frequently.

Mr. KOCH. I guess the real problem is in the vegetable oils, as the previous group announced, and they do change from either coconut oil or another kind, but this is done seasonally, and we suggest that they have perhaps two or three sets, and when they change they can revamp their entire equipment to put in vegetable oil, and change the labeling machine. Now, as far as daily changing of ingredients, I think we would be happy if it were printed on the package that "we cannot label this product because we change the ingredients daily"; and I think the American consumer would be very much amazed to know what is in the ice cream he is eating.

Miss LEVY. Senator, we do recognize the problem, and I think it should be pointed out that there are many products that at present either do not fall under standards of identity or would be listed as dietetic items, such as dietetic salad dressings that would also use vegetable oil. Under current regulations they do and they must list all of their ingredients. If they change their ingredients from day-to-day, from month-to-month, they must list it, and it has always been that way.

Senator KENNEDY. It is only for diets?

Miss LEVY. All dietetic products or all products that do not presently fall under a standard of identity.

Senator KENNEDY. You are saying that the standard labeling requirements for these dietetic products ought to apply across the board?

Miss LEVY. Yes.

Mr. KOCH. That, in essence, is what we are asking, no special categories for a privileged group of foods so that they do not have to label.

Senator KENNEDY. Why do you think companies are reluctant to do this? Why is this?

Mr. Koch. Well, as one man who represents a conglomerate of manufacturers told me, they have a good thing going and they might not want to change it. I think it is more that they are afraid to start telling people what is in some of these products.

For example, if cyclamates, as in that case, or similarly if some kind of rumor were spread around to the consumer that caffeine was not good, that would put a great restraint on all of the cola beverages; or if the word got around, and we understand there is a lot of research in MSG, and i the word got around it was harmful it would stunt the sales of a great many other products. It seems like a rather justifiable request on our part.

Another example would be the caffeine in cola drinks. Now, I know, for example, that my mother when I was a child would not let me have coffee simply because of the caffeine and the effect of keeping me awake. However, my mother always served me cola drinks, and we know that caffeine being a drug, and a stimulant, and because it works on the basis of body weight, has a much greater effect on a child, a small child, than it does on an adult like ourselves. It might very well be keeping America's youth up at night without them knowing why.

We feel very strongly that the choice of what you eat, and what the American consumer eats, should be his, and this choice should include the power to choose among ingredients. And this choice has literally been usurped by the Food and Drug Administration when they promulgate regulations allowing hidden ingredients not to be listed.

Senator KENNEDY. Have you met with any of these industry representatives at all?

Mr. KOCH. Yes, sir.

Senator KENNEDY. And what has been their reaction?

Mr. KOCH. I was contacted by a high official in the Grocery Manufacturers of America, and we met for several hours, and he told me up and down the line that he personally agrees with what we are doing, but he gave me many of the other examples of why, in quotes, "it cannot be done." He thinks it is a good idea, but like a lot of people, we have been told by many, many people, high officials in the Food and Drug Administration that they, personally, off the record, agree with what we are doing, but for some strange reason, now over a month later, we have not even been acknowledged by them without our going to them.

We understand also from some sources in New York with the Food and Drug Administration that there is a lot of industry pressure being put on them that is holding them back. I cannot understand why at least they would not publish our request and leave it

open for consumer remarks on the issue rather than just hiding it in their files somewhere.

Senator KENNEDY. Well, you make a representation in terms of industry. Do you know of industry pressure; is it on the record, or off the record?

Mr. KOCH. Most of it is off the record. Again, like many people have told us, and we have letters from one of the large mayonnaise manufacturers; and in that letter they tell us that we have a good point, and they say when it comes to people with allergies, they said people with allergies must know what goes into products, because although people may not be allergic to one ingredient some people are, and doctors do not know. We have been getting letters now as information of our project has disseminated around the country to the press, we have been getting letters from hospital dieticians recommending and urging the Food and Drug Administration to go along with this.

Senator KENNEDY. That is a good point.

Mr. KOCH. We have also heard again, off the record, that one of the largest cola manufacturers actually held a meeting on how to deal, in quotes, "with our group," and how not to allow this.

Senator KENNEDY. What did they decide?

Mr. KOCH. Well, they did not invite us to come, even though I offered, and they did not want to fly us down South, but we have not heard anything yet.

Senator KENNDEY. OK. Thank you very much.

Mr. KOCH. Thank you, Senator Kennedy.

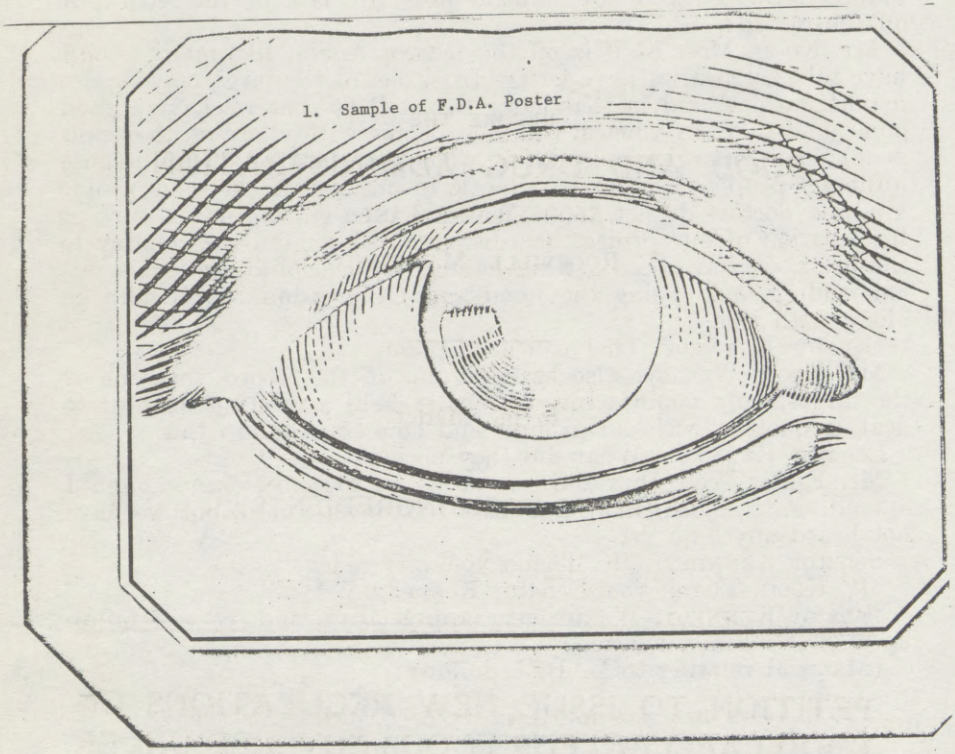
Senator KENNEDY. We are very appreciative, and we will follow up on this recommendation.

(Material relating to LABEL follows:)

F. EXHIBITS RELATING TO TESTIMONY OF LABEL (LAW STUDENTS' ASSOCIATION FOR BUYERS' EDUCATION IN LABELING)

1. Sample of F.D.A. Poster.
2. LABEL Petition to F.D.A.
3. Remarks of Congressman Rosenthal in Congressional Record re LABEL Petition.
4. Statement by James Turner, Center for the Study of Responsive Law, re LABEL Petition.
5. Statement of Virginia Citizens Consumer Council re LABEL Petition.
6. Statement by Giant Food re LABEL Petition.
7. Letter from Giant Food President, Joseph Danzansky, to Dean Robert Kramer of the National Law Center.
8. Samples of New Giant Food Labels Listing Ingredients.
9. Letter to Mrs. Virginia Knauer from LABEL.
10. Letter to Commissioner Edwards from LABEL.
11. Sample of Editorials in Support of LABEL's Petition.
12. Letter of Support for LABEL Petition from Senator Harrison Williams.
13. Letter of Support for LABEL Petition from Congressman Patten.
14. LABEL Proposed Rule in Federal Register.
15. Bill submitted as a result of LABEL Petition.
16. Letter from Giant Food, Inc. to Senator Edward M. Kennedy.

51-380 O - 71 - pt. 2 - 16



1. Sample of F.D.A. Poster

Read Labels Carefully

BEFORE THE

FOOD AND DRUG ADMINISTRATION

5600 FISHERS LANE

ROCKVILLE, MARYLAND

In the Matter

of

LABELING FOOD INGREDIENTS

PETITION TO ISSUE NEW REGULATIONS ON FOOD LABELING FOR FOODS COVERED UNDER STANDARDS OF IDENTITY

LABEL, INC.
Box 226
2020 F. Street N.W.
Washington, D.C. 20006
(202) 293-6478

INDEX

PAGE

Summary 1

Petitioners 1

I—Food and Drug Administration Policy 2

II—Arguments:

1. The purpose of the Standards of Identity is to insure quality and uniformity within standardized foods 7
2. The Food and Drug Administration regulations governing Standards of Identity are not in accord with the policies and purposes of the Federal Food, Drug, and Cosmetic Act 8
3. Standards of Identity have produced misleading and inadequate food labeling, contrary to the original intent of the law 15

III—Conclusion and Prayer 16

Exhibit A—Hellman's Mayonnaise Label (Photostat) 19

Exhibit B—Polaner Pure Red Raspberry Preserves Label (Photostat) 21

Exhibit C—Pepsi-Cola Label (Photostat) 23

Exhibit D—Coca-Cola Label (Photostat) 25

Exhibit E—Howard Johnson's Cola (Photostat) .. 27

Exhibit F—Illustration of More Informative Labeling (Photostat) 29

Exhibit G—Coca-Cola Syrup Label (Photostat) 31

Exhibit H—Food and Drug Administration Announcement as to Cola Beverages and Soft Drinks (Photostat) 33

Exhibit I—Category of Unlabeled Optional Ingredients Under the Standard for Non-Alcoholic Beverages (Photostats) 35

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PAGE

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21 U.S.C. 341 ..... 1, 2n, 3, 4, 7, 15, 16
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Summary

The Petitioner, LABEL, Inc., is a non-profit corporation registered under the laws of the District of Columbia. The goal of the organization is to promote more complete ingredient labeling on all food products. The petitioner respectfully suggests that the purpose of the Standards of Identity provided for by 21 U.S.C. § 341 (Definitions and Standards for Foods) was to insure the quality and uniformity of food products but not to deny the consumer the knowledge of ingredients and thus the right to make an educated choice. This petition respectfully requests the Food and Drug Administration to issue a rule under section 701(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act requiring all food manufacturers and/or distributors to label all ingredients which are contained in the food products they put forth for consumption.

Petitioners

LABEL is an acronym for Law Students Association for Buyers' Education and Labeling.

The officers and members of LABEL are Louis Kaufman, Arthur Koch, Gary Laden, Joan Levy, and Ellis Saull.

LABEL, INC., contends that a new Food and Drug Administration regulation is both required and needed to allow the consumer to make a knowledgeable choice with respect to the foods he eats.

The members of LABEL, INC., are personally affected in this matter by virtue of the fact that they are consumers.

I

Food and Drug Administration Policy.

In accordance with Congressional Intent,[1] the Food and Drug Administration has promulgated Standards of Identity "to promote honesty and fair dealing in the interests of consumers."[2] The Food and Drug Administration maintains that "food products are labeled with required information to guide and protect the consumer."[3] Further, in 1967, the Food and Drug Administration stated that "labeling requirements should be designed to give the consumer the fullest pertinent information possible in concise terms, completely factual and free from any element of trade puffery."[4] "Food standards are not a device to be used in the interest of industry to circumvent the consumer's right to choose."[5] It is clear that the stated policies of the Food and Drug Administration are both to inform and protect the consumer.

However, the American Consumer cannot determine the ingredients of the foods he eats. According to the White House Conference on Food, Nutrition, and Health:

> As a result of the maze of present laws and regulations governing food labeling, consumers are presented with confusing or incomplete information about the products they purchase. The label of an unstandarized food, must bear a full statement of ingredients whereas the label of a standardized food

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[1] Federal Food, Drug, and Cosmetic Act, Section 401, 21 U.S.C. 341.

[2] *Food Standards*, Facts for Consumers, FDA Publication No. 8, 1964.

[3] *Additives In Our Food*, FDA Publication No. 43, October 1968.

[4] *Food Standards* by L. M. Beacham, Reprint from FDA Papers, Sept. 1967.

[5] *Food Standards* by L. M. Beacham, Reprint from FDA Papers, Sept. 1967.

need not disclose the mandatory ingredients. Nutritional information may be required on the label of a special dietary food, but not on a general purpose food.

Consumers have requested and are entitled to more meaningful and useful information than is now provided them about food. Such reforms as required statement of properties, a declaration about the amount of any characterizing ingredient, and simplification of ingredient designation, will help the consumer understand the product more fully and help him to make more intelligent purchasing decisions.[6]

This confusing state of affairs is due to the way in which the Food and Drug Administration has in the past implemented 21 U.S.C. 341 which authorizes the Secretary of H.E.W. to "promulgate regulations fixing and establishing for any food . . . a reasonable definition and standard of identity."

Section 341 of title 21 of the U.S.C. reads as follows:

DEFINITION AND STANDARDS FOR FOOD

Whenever in the judgment of the Secretary such action will promote honesty and fair dealing *in the interest of consumers, he shall promulgate* regulations[3] fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: *Provided,* That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due con-

[6] Final Report, *White House Conference on Food, Nutrition and Health,* at pp. 120-121 (1970).

sideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. *In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label.* Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing.

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[3] F.D.C. Regs., parts 10, 14-20, 22, 25, 27, 29, 31, 36, 37, 42, 45, 46, 51, 53.

For the purposes of this petition, as an aide to understanding the confused state of the present F.D.A. standards, the following is a hypothetical food standard which assumes that Product X is a product for which a Standard of Identity has been promulgated under 21 U.S.C. § 341:

Product X; identity; label statement of optional ingredients.

Product X contains ingredients A, B, and C.

Product X must contain at least one of the following: D, E, or F.

Optional Ingredients

Product X may contain G, H, I, or J, or any combination thereof. If it contains I and/or J, the names of those ingredients must appear on the label.

With all due respect it is suggested that present FDA regulations have resulted in four vague and misleading categories of ingredient labeling, which we, for the purposes

of this petition, will designate as follows: [These definitions will be used throughout this petition.]

(a) *Mandatory Ingredients*: There are ingredients that are listed in the Standard of Identity which must be contained in the product. They do not have to be labeled. (Example: caffeine in cola drinks (21 C.F.R. 31.1) or ingredients A, B, C in the hypothetical standard.)

(b) *Permissible Mandatory*: These are ingredients which are listed by group in the mandatory category within the Standard of Identity, at least one of the ingredients within the group must be in the product. This means that of all those ingredients listed as mandatory in the Standard of Identity only some of them are actually contained within the product. If they are contained within the product under this group, they do not have to be labeled. (Example: the form of egg in mayonnaise (21 C.F.R. 25.1(c) or ingredients D, E, and F in the hypothetical.)

(c) *Labeled Optionals*: There are ingredients which are listed in the Standards of Identity as "optional ingredients", implying that they do not have to be in the product. Of these ingredients, there are those that must be labeled, by order of the Secretary of HEW, if they are contained in the product. (Example: calcium disodium EDTA in mayonnaise or ingredients I and J in the hypothetical.)

(d) *Unlabeled Optionals*: These are ingredients listed as optional ingredients in the Standard of Identity, which do not have to be labeled if they are included in the product because the Secretary has not so designated. (Example monsodium glutamate in mayonnaise (21 C.F.R. 25.1(a)(4) or ingredients G and H in the hypothetical.)

The fact that these four categories exist has resulted in inconsistent, incomplete, and misleading food labeling, as illustrated by the following examples:

1. *Many products list no ingredients whatsoever on their labels.*

Hellmann's Mayonnaise (Exhibit A), and Polaner Pure Red Raspberry Preserves (Exhibit B), are nationally distributed food products that do not list any ingredients on their labels. Thus the consumer is unaware of the existence of eggs in mayonnaise or sugar in raspberry preserves.

2. *Some products list only the coloring ingredient, without disclosing any other ingredients.*

Pepsi-Cola (Exhibit C), and Coca-Cola (Exhibit D), two well known soft drinks, tell the consumer that they are caramel colored, but list none of the more than seventy other ingredients. The consumer is unaware of the required presence of caffeine.

3. *Some products label several of their ingredients, but neglect to inform the consumer that this is only a partial disclosure.*

Howard Johnson's Cola (Exhibit E), lists five ingredients on its label. The average consumer could interpret this list to be a full disclosure of all the ingredients contained in this product. In fact, some of the major ingredients of this product are not labeled. Thus the consumer is unaware of the presence of caffeine.

4. *Pet food labeling is qualitatively and quantitatively more informative than the labeling required by the Food and Drug Administration for human foods.*

Exhibit F is illustrative of this more informative labeling. This shows that informative labeling is feasible.

5. *Retailers and Distributors often receive a more informatively labeled product than the consumer.*

The retailer using Coca-Cola syrup will be able to learn that Coke contains sugar, water, phosphoric acid, caffeine,

extractive from cocoa leaves (Cocaine removed) and cola nuts, and other flavorings, and that it is caramel colored (Exhibit G).

The retailer using pre-bottled Coca-Cola, and the consumer will be able to learn that Coke contains: "Caramel coloring."

6. *The Consumer has no way of determining the amount or quality of additives in his food.*

"The use of additives in food in the United States rose from 419,000,000 pounds in 1955 to 661,000,000 pounds in 1965—a 58% gain in ten years. It is estimated that the use of additives will soar to . . . 1.03 billion in 1975."[7] Due to the lack of labeling requirements under the Standards of Identity, many of these additives go into the product unlabeled.

II

ARGUMENTS

1. The purpose of the Standards of Identity is to insure quality and uniformity within standardized foods.

In 1938, Congress enacted Federal Administrative authority to create Standards of Identity for Foods (21 U.S.C. 341). The purpose of these standards was to insure a definite level of quality and uniformity for many foods.

Senator Royal S. Copeland, the sponsor of S. 5, which became the Food and Drug Act of 1938, in a report to the Senate from the Senate Committee on Commerce, commented on the purposes of the act. He stated that the pro-

[7] Longgood, William, *The Poisons in Your Food*, Pyramid Books, New York, 1960, p. 13.

visions concerning foods not under a Standard of Identity should help "the consumer . . . to obtain reasonable information regarding the composition of the food he buys." He further stated that if a definition and Standard of Identity for a product existed, "a consumer can be assured that the composition is the normal and proper one, and that optional ingredients if used will be labeled."[8] Moreover, in the reports which accompanied S. 5 to the Seventy-fifth Congress, it was declared, "the purpose of the Standards of Identity was to keep food manufactures from straying from time honored standards."[9] The original intent in the creation of food standards was to insure a standard of quality and uniformity in foods, and that any supplemental deviation from such standards would be made known to the consumer.

According to the Food and Drug Administration, "Food products are labeled with required information to guide and protect the consumer."[10] This objective is not being fulfilled. Adequate information as to the contents of food products should be on the label so that the consumer in the grocery store can make an informative decision of the product he buys. The FDA food labeling procedures must be modified if this objective is fulfilled.

2. The Food and Drug Administration regulations governing Standards of Identity are not in accord with the policies and purposes of the Federal Food, Drug, and Cosmetic Act.

The fact that major ingredients, such as caffeine, MSG, milk, and eggs are not listed on labels of standardized products conflicts with the policy and Congressional mandate of promoting honesty and fair dealing in the interest of the consumer.

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[8] S. Rep. No. 361; 74th Cong., 1st Sess. 12 (1935).

[9] S. Rep. No. 2139; 75th Cong., 3rd Sess. 5 (1938).

[10] *Additives In Our Food*, FDA Publication No. 43, October 1968.

Caffeine is a mandatory ingredient in cola drinks and as such does not have to be labeled. The consumer in the grocery store has no way of knowing this unless he happens to have a copy of Title 21 of the Code of Federal Regulations in his back pocket. For example, the presence of MSG and coconut oil in mayonnaise are hidden from the consumer.

In addition to promoting honesty and fair dealing, there are health reasons which would require the labeling of caffeine.

Modern medical evidence indicates a possible harmful effect of caffeine. "Dr. Samuel Bellet, Chief of Cardiology of Philadelphia General Hospital, has suggested that 'caffeine may be more important than smoking in setting the stage for heart attacks,' "[11]

Doctors Samuel Bellet, MD, Alfred Kershbaum, MD, and Laurian Roman, MD, writing for the *Archives of Environmental Health* make the following remarks about caffeine:

> These studies show that ingestion of cola drinks containing caffeine (sugar-free cola) alone results in a progressive increase in FFA [Free Fatty Acids]; when the cola contained caffeine plus sugar (regular cola), the FFA usually became lower in the first three hours and then tended to increase by the fourth hour after ingestion. These effects were quite similar to those obtained following the administration of coffee alone and coffee with sugar, respectively. The ingestion of carbonated water had no significant effect on FFA.[12]

What portion of the general consuming public knows that caffeine not only is present in every cola drink, but

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[11] Turner, James S., *The Chemical Feast*, Grossman Publishers, New York, 1970.

[12] Bellet, Samuel, Kershbaum, Alfred, Roman, Laurian, "Effect of Cola Drinks on Serum Free Fatty Acids", *Archives of Environmental Health,* November 1968, Volume 17.

that every cola drink *must* contain caffeine? 21 C.F.R. 31.1.

At one time, even the Food and Drug Administration announced that there should be "no tolerance for the amount of caffeine that may be added to cola beverages (TC 144). This TC stated further that 'we have consistently discouraged the addition of caffeine in any amounts to soft drinks which may be, and of course often are, consumed by young children. Parents may not always desire them to consume caffeine-containing beverages. Whether or not caffeine is present in a soft drink in an amount which may constitute a deleterious ingredient which may render the article injurious is a question of fact in each case.' " (Exhibit H).

Other ingredients which have been questioned as to their safety include monsodium glutamate, coconut oil, and cyclamates. Even many basic ingredients which have gone unquestioned for years are now controversial, including sugar, salt, eggs, and milk. Some consumers may need or wish to avoid products containing some or all of these ingredients.

Honesty and fair dealing with respect to labeling would enable people with allergies to determine what products they should avoid. Dr. Theron G. Randolph of Chicago's Human Ecology Research Foundation believes that "mental confusion, agitation, comas, and amnesia can be caused by repeated contact with the wrong food or substance." [13] Many consumers have adverse reactions to substances in their food, yet find themselves unable to avoid them due to inadequate labeling.

Those with heart diseases or the predisposition towards such diseases must likewise carefully watch what they eat. They must limit themselves as to cholesterol (*i.e.*, eggs,

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[13] Chicago's American, April 12, 1966, Article by David Noble: "Illness of Mind Tied to Allergies."

milk, cheese). These items are often unmarked and are often eaten without the knowledge of the consumer. 21 C.F.R. 19.500 *et seq.*, 21 C.F.R. 42.1 *et seq.*, 21 C.F.R. 18.520 *et seq.*

Honesty and fair dealing would also dictate that those who wish to restrict their intake of certain items for religious dietary reasons be enabled to do so with the help of informative labeling. The Jewish faith has a complicated system of dietary laws that excludes many items and prohibits the eating of certain items (such as milk derivatives) after the eating of others (such as meat derivatives). Although many products are marked with a "K" or an "(u)", religious Jews would not be restricted to these products if they knew what was in the foods they bought. Mormons also have items, such as caffeine, which they, by religious convictions, must not consume.

The existence of the category of unlabeled optional ingredients under the standard for Non-alcoholic beverages illustrates how the honesty and fair dealing standard has been ignored by FDA procedures. Here is but a glimpse of the ingredients which are included under this standard, but which need not be labeled:

> one or more of the emulsifying, stabilizing or viscosity-producing agents brominated vegetable oils, carob bean gum (locust bean gum), glycerol ester of wood rosin, gual gum, gum acacia, gum tragacanth, hydroxylated lecithin, lecithin, methylcellulose, mono- and diglycerides of fat-forming fatty acids, pectin, polyglycerol esters of fatty acids, propylene glycol alginate, sodium alginate, sodium metaphosphate (sodium hexametaphosphate). 21 C.F.R. 31.1(6)(i). (See Exhibit I for complete standard)

It is interesting to note that two of the ingredients (brominated vegetable oils and mono- and diglycerides of

51-380 O - 71 - pt. 2 - 17

fatty forming acids) are currently under FDA scrutiny.[14] Surely no consumer can be expected to know that these ingredients may be present in their soft drink, and there is no way for him to find out if the ingredient is actually present.

The curious category of permissible mandatory ingredients even further undermines the consumer's right to know what is in the food he eats. In many cases, if an ingredient is mandatory under the Federal Food, Drug, and Cosmetic Act, the ingredient may or may not be present. An example is milk in white bread (21 C.F.R. 17.1(2)). This does not comport with the plain meaning of the English word "mandatory." For example, the Standard promulgated for mayonnaise states that "mayonnaise dressing, is the emulsified semisolid food prepared from edible vegetable oil and one or both of the acidifying ingredients specified in paragraph (b) of this section, and one or more of the egg yolk containing ingredients specified in paragraph (c) of this section" (21 C.F.R. 25). Paragraphs (b) and (c) then list a number of ingredients from which the industry may choose to put in its product as a "mandatory" ingredient:

> b) The acidifying ingredients referred to in paragraph (a) of this section are: (2) Lemon juice or lime juice or both or any such juice in frozen canned, concentrated or dried form, or any one or more of these diluted with water.

The mayonnaise industry has discretion in choosing its "mandatory" ingredients. This concept of discretion makes a mockery of the word "mandatory," and leaves the consumer bewildered as to the ingredients of the foods he eats.

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[14] Petition of F.A.T.S., Inc. & Mr. James S. Turner, *Petition to Revise FDA Regulations on Labeling of Food Fat Content and Labeling of Food Containing Vegetable Oils and Fats* filed December 2, 1970.

Due to the inconsistency between the stated purposes and the subsequent application of Standards of Identity there has evolved an anomaly within the context of the Food, Drug, and Cosmetic Act. Products outside the Standards of Identity are more informatively labeled than products within the standard.

When a Standard of Identity is promulgated for a product, that product is excused from the more informative labeling requirements of unstandardized foods. Such a provision only makes sense if Standards, as originally intended, are tightly drawn, based on long usages, and easily understood by consumers. In fact, standards have not maintained their original purpose, and are of no substitutional value for informing consumers. In effect, all standardized products are misbranded pursuant to 21 U.S.C. 321(n):

> For the purposes of this Act—
>
> (n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

In essence, misbranding refers to both material omissions and commissions with respect to ingredient labeling requirements. Both of these routinely occur in present food standards.

The F.D.A. has recognized the fact that Standards of Identity have the potential of becoming a haven for mis-

branding as defined by 21 U.S.C. § 321 (n). Thus the F.D.A. has announced a policy to prevent such inconsistent activities:

> No provision of any regulation prescribing a definition and standard of identity . . . under section 401 of the act shall be construed as in any way effecting the concurrent applicability of the general provisions of the act and the regulations thereunder relating to adulteration and misbranding. (Title 21, Chapter 1, subchapter b, section 10.1(c).)

This regulation asserts that the Standards of Identity shall not excuse industry from conforming to standards of informative labeling. However, FDA action again has failed to achieve FDA Policy.

Consumers who spend hard earned money for food in order to maintain their families' health and welfare should be entitled to know the ingredients for which their money is being spent. Various qualities of ingredients are used in different food products. For example, the Standard of Identity for white bread states the following choices:

> Milk, concentrated milk, evaporated milk, sweetened condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, sweetened condensed partly skimmed milk, sweetened condensed skim milk, nonfat dry milk, or any combination of two or more of these. . . . 21 C.F.R. 17.1 (2).

There are marked differences in the value and nutritional benefits of these alternative ingredients. In reality, the only one who gets milked is the consumer. Such secret discrepancies in alternative ingredients flagrantly violate any standards of honesty or fair dealing which the statute may impose.

3. Standards of Identity have produced misleading and inadequate food labeling, contrary to the original intent of the law.

The assumption that a Standard of Identity is a substitute for informative food labeling is no longer valid. The absence from labels of the names of all mandatory ingredients and all non-designated optional ingredients can in no way be considered an adequate substitute for informative labeling. It is impossible for any consumer to learn from the FDA information program what goes into a product covered by a Standard of Identity. Even if he should obtain a copy of the standard, he will not know what composes the product.

Optional ingredients under Standards of Identity also contribute to the misleading effect of the standards.

Section 401 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 341, not only creates authority to promulgate standards for foods, but further authorizes the Secretary to "designate the optional ingredients which shall be named on the label." "Honesty and fair dealing" would dictate that all optional ingredients be labeled in order to avoid consumer confusion. Presently, however, this authority has been interpreted by the FDA to mean that the Secretary may pick and choose which of those optional ingredients included in a particular Standard of Identity will be listed on a label. It provides no standard other than *honesty* and *fair dealing* by which to make the choice. If this discretion has been vested in the Secretary, it has been abused.

The consumer has a right to know what ingredients are in the food products which he buys. Who should make the ultimate choice about the consumption of the ingredients in the foods he eats? By not requiring the labeling of all

ingredients, and thus effectively hiding the presence of many of them from the public, the FDA has usurped the consumer's right to make that choice.

III

Conclusion and Prayer.

Under the present labyrinth of FDA regulations, the consumer has no way to ascertain the ingredients contained within the product under the Standard of Identity. Instead, the Standard of Identity has become a sanctuary for hidden ingredients and additives.

The Federal Food, Drug, and Cosmetic Act and supporting FDA policy statements have invested the consumer with a right to know what is contained in the foods that he purchases. Moreover, there is an absolute need due to health, dietary, and religious purposes for there to be a full disclosure of food contents.

In order to correct this situation, the FDA must issue new regulations in accord with the import of 21 U.S.C. 341.

Accordingly, the petitioners pray that the Food and Drug Administration issue a new regulation (under 21 U.S.C. 341) requiring that:

> ***For the purposes of promoting honesty and fair dealing in the interest of the consumer, all food manufacturers and distributors must list on the label, in the order of their predominance, all ingredients which are contained in their product.***

The petitioners ask that this proposal be published in the Federal Register, as per 21 C.F.R. sections 2.65 and 2.66.

Respectfully submitted,

LABEL, INC.

LOUIS KAUFMAN
ARTHUR KOCH
GARY LADEN
JOAN LEVY
ELLIS SAUL

Mail address:

Room 226
2020 F. Street N.W.
Washington, D.C. 20006

Phone: 293-6478

Exhibit A

HELLMAN'S MAYONNAISE LABEL

(PHOTOSTAT)

(See opposite ☞)

18

16 FL. OZ. (1 PT.)

BEST FOODS, A DIV. OF CPC INTERNATIONAL INC.
ENGLEWOOD CLIFFS, N.J. 07632

Exhibit B

POLANER PURE RED RASPBERRY PRESERVES LABEL

(PHOTOSTAT)

(See opposite ☞)

20

polaner
PURE
red raspberry preserves

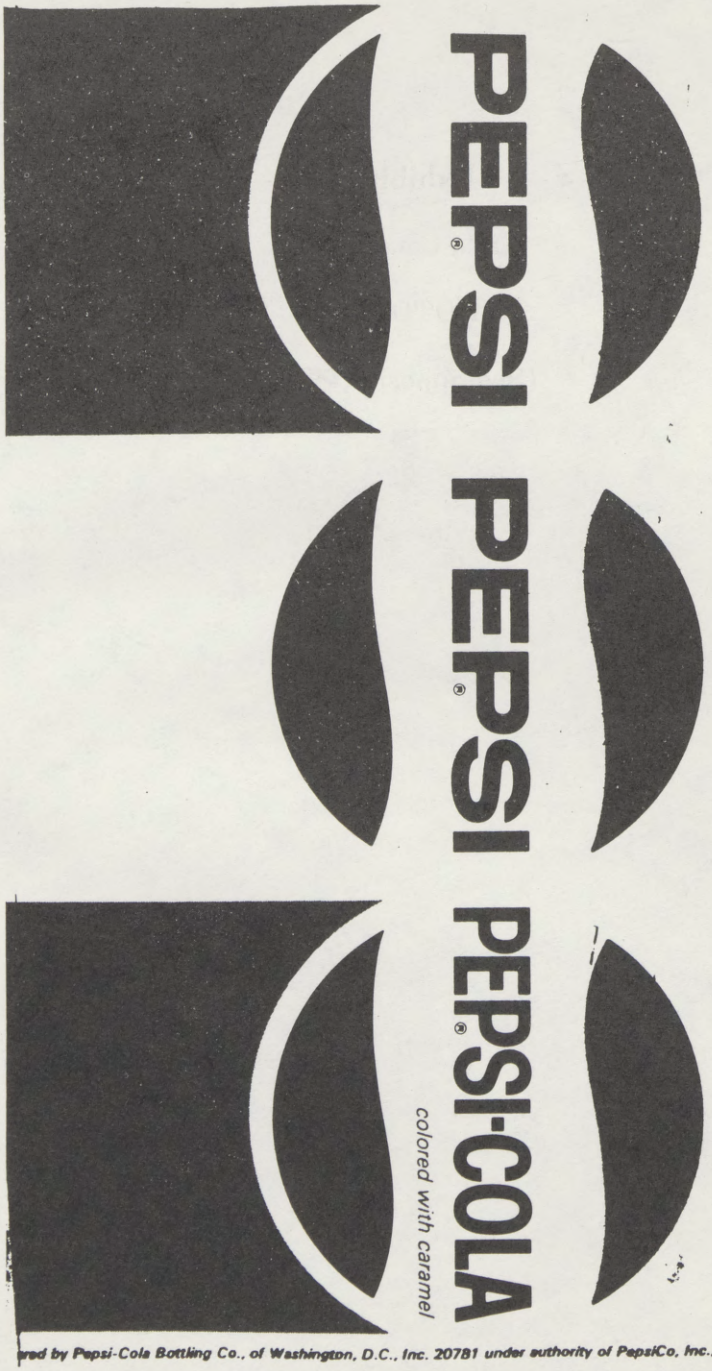
Exhibit C

PEPSI-COLA LABEL

(PHOTOSTAT)

(See opposite ☞)

Exhibit C



red by Pepsi-Cola Bottling Co., of Washington, D.C., Inc. 20781 under authority of PepsiCo, Inc., Purchase, N.Y.

Exhibit D

Coca-Cola Label

(PHOTOSTAT)

(See opposite ☞)

24

Exhibit D

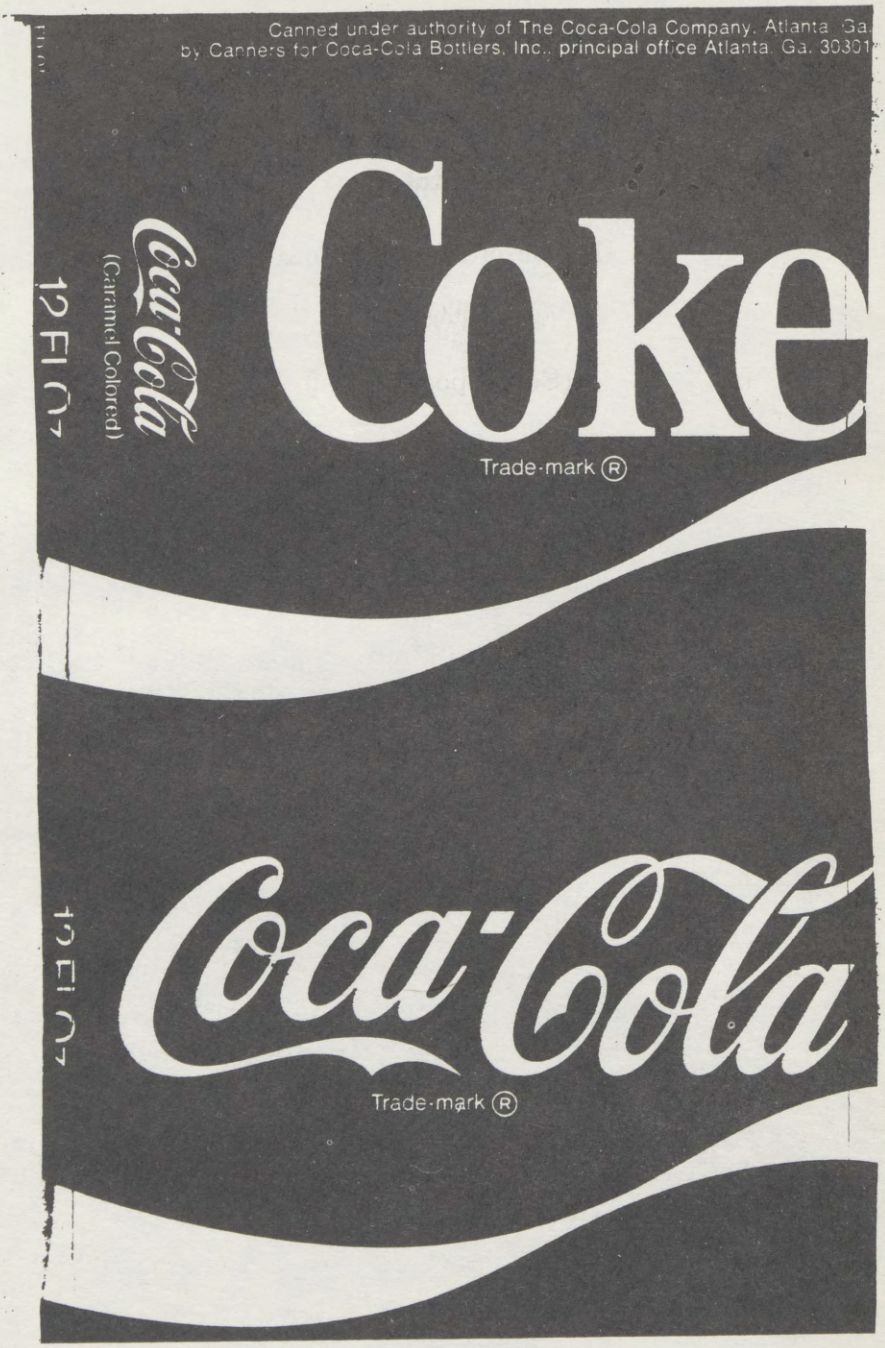

Canned under authority of The Coca-Cola Company, Atlanta, Ga.
by Canners for Coca-Cola Bottlers, Inc., principal office Atlanta, Ga. 30301
Coke
Trade-mark ®
Coca-Cola
(Caramel Colored)
12 FL OZ
Coca-Cola
Trade-mark ®
12 FL OZ

Exhibit E

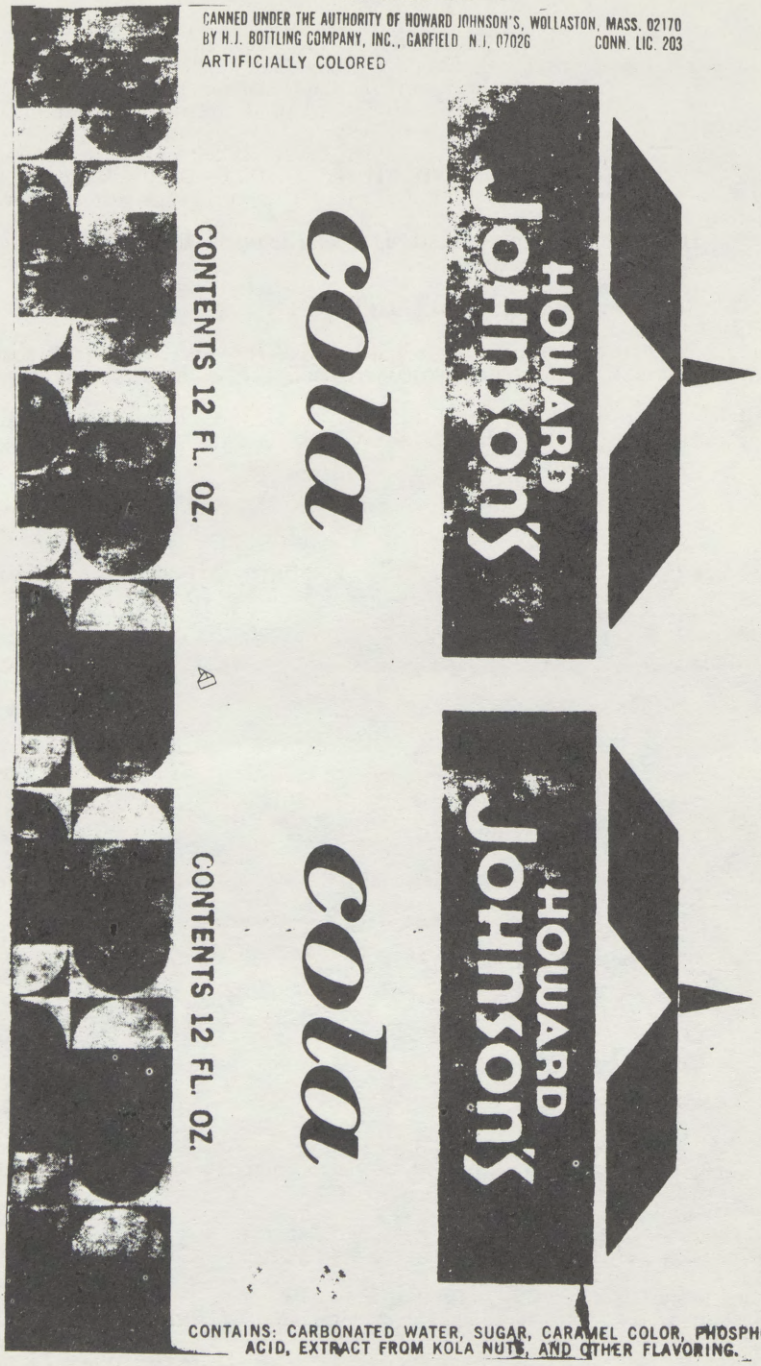
HOWARD JOHNSON'S COLA

(PHOTOSTAT)

(See opposite ☛)

26

Exhibit E



CANNED UNDER THE AUTHORITY OF HOWARD JOHNSON'S, WOLLASTON, MASS. 02170
BY H.J. BOTTLING COMPANY, INC., GARFIELD N.J. 07026 CONN. LIC. 203
ARTIFICIALLY COLORED

CONTAINS: CARBONATED WATER, SUGAR, CARAMEL COLOR, PHOSPHORIC ACID, EXTRACT FROM KOLA NUTS, AND OTHER FLAVORING.

51-380 O - 71 - pt. 2 - 18

Exhibit F

ILLUSTRATION OF MORE INFORMATIVE LABELING

(PHOTOSTAT)

(See opposite ☞)

28

NEW

PURINA

FLAVOR PLUS*™

FOR DOGS

Beef & Meat By-Products

*SUPPLEMENTED WITH VITAMINS & MINERALS

NET WT. 14 OZ.

PURINA® FLAVOR PLUS

BEEF AND MEAT BY-PRODUCTS

Tender, juicy chunks of beef and meat by-products are cooked in this can to lock in all the natural flavor and aroma. No cereal is added. And, Flavor Plus is fortified with additional vitamins and minerals not found in sufficient quantity in meat alone and necessary for a completely nutritious diet. Dogs love it. For a menu change, feed other delicious Flavor Plus* varieties.*

Ingredients: Beef, meat by-products, iodized salt, defluorinated phosphate, vegetable gum, seasoning, vitamin A supplement, vitamin B_{12} supplement, D activated plant sterol, vitamin E supplement, menadione sodium bisulfite (source of vitamin K activity), choline chloride, sodium nitrite, folic acid, niacin, calcium pantothenate, pyridoxine hydrochloride, riboflavin supplement, thiamin, manganese sulfate, manganous oxide, iron oxide, zinc oxide, copper oxide, cobalt carbonate, water sufficient for processing.

Guaranteed Analysis: Crude protein not less than 11.0% • Crude fat not less than 7.5% • Crude fiber not more than 1.0% • Ash not more than 2.5% • Moisture not more than 74.0% • Calcium (Ca) not less than 0.3% • Phosphorus (P) not less than 0.25% • Salt (NaCl) not more than 0.75% • Vitamin A not less than 1100 U.S.P. units per pound • Vitamin D_2 not less than 150 U.S.P. units per pound • Vitamin B_{12} not less than 0.005 mg. per pound. G-4450

Manufactured by RALSTON PURINA COMPANY
Checkerboard Square, St. Louis, Mo. 63199

NEW improved 9-Lives® CAT FOOD

Chicken parts & Kidney

NET WT. 6½ OZ. "Kitty Burgers"

PRODUCT OF U.S.A.

INGREDIENTS: Chicken Parts (Necks & Backs) and Kidney in a Gravy consisting of Fish Solubles, Modified Starch, Milk Solids, Salt, Wheat Flour.

Distributed by STAR-KIST FOODS, INC. Terminal Island, Calif. 90731, U.S.A.

NEW improved 9-Lives® CAT FOOD

Chicken parts & Kidney

NET WT. 6½ OZ. "Kitty Burgers"

Exhibit G

Coca-Cola Syrup Label

(PHOTOSTAT)

(See opposite ☛)

30

Exhibit G

A beverage syrup: Prepared with sugar and water; phosphoric acid, caffeine, extractives from coca leaves (cocaine removed) and cola nuts, and other flavoring material; colored with caramel.

The syrup in this package is ready for use

Any change or alteration except for the usual method of dispensing to the consumer, as indicated on this label, will constitute an invasion of the rights of The Coca-Cola Company.

Coke

Trade-mark ®

Chill Before Using

Exhibit H

Category of Unlabeled Optional Ingredients Under the Standard for Non-Alcoholic Beverages

(PHOTOSTATS)

(See opposite ☛)

32

EXHIBIT H

CONSUMER PROTECTION AND
ENVIRONMENTAL HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION
BUREAU OF COMPLIANCE

GUIDE 7201.2

COMPLIANCE POLICY GUIDANCE SYSTEM 7/8/69

SUBJECT: Caffeine, ingredient in carbonated beverages (soda water).

BACKGROUND:

Following enactment of the Federal Food, Drug, and Cosmetic Act, the Food and Drug Administration stated that it had announced no tolerance for the amount of caffeine that may be added to "cola" beverages (TC 144). This TC stated further that "we have consistently discouraged the addition of caffeine in any amounts to soft drinks which may be, and of course often are, consumed by young children. Parents may not always desire them to consume caffeine-containing preparations. Whether or not caffeine is present in a soft drink in an amount which may constitute a deleterious ingredient which may render the article injurious is a question of fact in each case."

When considered in the light of the Food Additives Amendment to the Federal Food, Drug, and Cosmetic Act, it was decided that caffeine is generally recognized as safe within the limitation of 0.02 percent in cola-type beverages. It was so listed in 21 CFR 121.101(d)(8).

In the proceedings leading to establishing the standard of identity for soda waters (21 CFR 31.1) the Commissioner of Food and Drugs explored the problem of whether caffeine should be a mandatory ingredient of cola-type beverages. A survey was made consisting of the collection and examination of a substantial number of cola-type beverages being marketed throughout the United States. The Commissioner's conclusion, published in the Federal Register of January 27, 1966, (31 F.R. 1066), stated that there is not a sound basis for making caffeine an optional rather than a mandatory ingredient.

Also in these proceedings the Commissioner considered the possibility of issuing a standard that would endeavor through labeling to differentiate between those cola-type beverages containing only the caffeine introduced through the kola nut extract and those containing added caffeine. However, it was apparent that there would be instances where analytical methodology would not provide a basis for this distinction.

Based on the preceeding and other considerations the standard of identity for soda water (21 CFR 31.1) was promulgated.

POLICY:

The standard of identity for soda water (21 CFR 31.1) requires that "cola" or "kola" beverages contain caffeine, not in excess of 0.02 percent, making no distinction between added caffeine and that introduced through the kola nut extract. Such beverages are considered in compliance with the standard if they contain caffeine in amounts that can be detected by A.O.A.C. analytical methods.

The standard for soda water also permits the addition of up to 0.02 percent caffeine to other soda waters. The presence of such added caffeine must be declared on the label in accord with subsection 31.1(d).

Exhibit I

Food and Drug Administration Announcement as to Cola Beverages and Soft Drinks

(PHOTOSTAT)

(See opposite ☞)

ments specified in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name without intervening written, printed, or graphic matter, except that the varietal name of the fruit used in preparing such preserve or jam may so intervene.

[28 F.R. 2987, Mar. 27, 1963, as amended at 28 F.R. 6915, July 6, 1963; 32 F.R. 14205, Oct. 13, 1967; 33 F.R. 10392, July 20, 1968]

PART 31—NONALCOHOLIC BEVERAGES

§ 31.1 Soda water; identity; label statement of optional ingredients.

(a) Soda water is the class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60° F. It may contain buffering agents as provided in paragraph (b) (5) of this section. It either contains no alcohol or only such alcohol (not in excess of 0.5 percent by weight of the finished beverage) as is contributed by the flavoring ingredient used. Soda water designated by a name, including any proprietary name provided for in paragraph (c) of this section, which includes the word "cola" or a designation as a "pepper" beverage that, for years, has become well known as being made with kola nut extract and/or other natural caffeine-containing extracts, and thus as a caffeine-containing drink, shall contain caffeine in a quantity not to exceed 0.02 percent by weight.

(b) Soda water may contain optional ingredients, but if any such ingredient is a food additive or a color additive within the meaning of section 201 (s) or (t) of the Federal Food, Drug, and Cosmetic Act, it is used only in conformity with a regulation established pursuant to section 409 or 706 of the act. The optional ingredients that may be used in soda water in such proportions as are reasonably required to accomplish their intended effects are:

(1) Nutritive sweeteners consisting of the dry or liquid form of sugar, invert sugar, dextrose, fructose, corn sirup, glucose sirup sorbitol, or any combination of two or more of these.

(2) One or more of the following flavoring ingredients may be added, in a carrier consisting of ethyl alcohol, glycerin, or propylene glycol:

(i) Fruit juices (including concentrated fruit juices), natural flavoring derived from fruits, vegetables, bark, buds, roots, leaves, and similar plant materials.

(ii) Artificial flavoring.

(3) Natural and artificial color additives.

(4) One or more of the acidifying agents acetic acid, adipic acid, citric acid, fumaric acid, gluconic acid, lactic acid, malic acid, phosphoric acid, or tartaric acid.

(5) One or more of the buffering agents consisting of the acetate, bicarbonate, carbonate, chloride, citrate, gluconate, lactate, orthophosphate, or sulfate salts of calcium, magnesium, potassium, or sodium.

(6) (i) One or more of the emulsifying, stabilizing, or viscosity-producing agents brominated vegetable oils, carob bean gum (locust bean gum), glycerol ester of wood rosin, guar gum, gum acacia, gum tragacanth, hydroxylated lecithin, lecithin, methylcellulose, mono- and diglycerides of fat-forming fatty acids, pectin, polyglycerol esters of fatty acids, propylene glycol alginate, sodium alginate, sodium carboxymethylcellulose, sodium metaphosphate (sodium hexametaphosphate).

(ii) When one or more of the optional ingredients in subdivision (i) of this subparagraph are used, dioctyl sodium sulfosuccinate complying with the requirements of § 121.1137 of this chapter may be used in a quantity not in excess of 0.5 percent by weight of such ingredients.

(7) One or more of the foaming agents ammoniated glycyrrhizin, gum ghatti, licorice or glycyrrhiza, yucca (Joshua-tree), yucca (Mohave), quillaia (soapbark) (Quillaja saponaria Mol.), and enzyme-modified soy protein in a carrier of propylene glycol.

(8) Caffeine, in an amount not to exceed 0.02 percent by weight of the finished beverage.

(9) Quinine, as provided in § 121.1081 of this chapter, in an amount not to exceed 33 parts per million by weight of the finished beverage.

(10) One or more of the chemical preservatives ascorbic acid, benzoic acid, BHA, BHT, calcium disodium EDTA, erythorbic acid, glucose-oxidase-catalase enzyme, methylparaben or propylparaben, propyl gallate, potassium or sodium benzoate, potassium or sodium bisulfite, potassium or sodium metabisulfite, potassium or sodium sorbate, sorbic acid,

EXHIBIT

sulfur dioxide, or tocopherols; and in the case of canned soda water, stannous chloride in a quantity not to exceed 11 parts per million calculated at tin (Sn), with or without one or more of the other chemical preservatives listed in this subparagraph.

(11) The defoaming agent dimethylpolysiloxane in an amount not to exceed 10 parts per million.

(c) (1) The name of the beverage for which a definition and standard of identity is established by this section, which is neither flavored nor sweetened, is soda water, club soda, or plain soda.

(2) The name of each beverage containing flavoring and sweetening ingredients as provided for in paragraph (b) of this section is "_____ soda" or "_____ soda water" or "_____ carbonated beverage," the blank being filled in with the word or words that designate the characterizing flavor of the soda water; for example, "grape soda."

(3) If the soda water is one generally designated by a particular common name; for example, ginger ale, root beer, or sparkling water, that name may be used in lieu of the name prescribed in subparagraphs (1) and (2) of this paragraph. For the purposes of this section, a proprietary name that is commonly used by the public as the designation of a particular kind of soda water may likewise be used in lieu of the name prescribed in subparagraphs (1) and (2) of this paragraph.

(d) Soda water that contains the optional ingredient caffeine as provided for in paragraph (b) (3) of this section, artificial flavoring, artificial coloring, or any combination of these shall be labeled to show that fact by the label statement "with _____" or "_____ added," the blank being filled in with the word or words "caffeine," "artificial flavoring," "artificial coloring," or a combination of these words, as appropriate. If the soda water contains one or more of the optional ingredients set forth in paragraph (b) (10) of this section, which has or is intended to have a preservative effect in the finished beverage, it shall be labeled to show that fact by one of the following statements: "_____ added as a preservative" or "preserved with _____," the blank being filled in with the common name of the preservative ingredient. If soda water contains quinine salts, the label shall bear a prominent declaration either by use of the word "quinine" in the name of the article or by separate declaration.

(e) The label statements prescribed in paragraph (d) of this section for declaring the optional ingredients present shall appear on a labeling surface of the beverage in such a manner as to render the statement likely to be read by the ordinary individual under customary conditions of purchase or use of such beverage. These statements shall immediately and conspicuously precede or follow the name of the beverage, wherever such name is prominently displayed, without intervening, written, printed, or graphic matter; *Provided*, That, where such name is part of a trademark or brand, then other written, printed, or graphic matter that is also a part of such trademark or brand may intervene if the label statements required by this section are so placed as to be conspicuously related to the name of the beverage.

(Secs. 401, 701, 52 Stat. 1046, 1055 as amended, 70 Stat. 919; 21 U.S.C. 341, 371) [31 F.R. 1066, Jan. 27, 1966, as amended at 31 F.R. 5490, Apr. 7, 1966; 32 F.R. 449, Jan. 17, 1967; 32 F.R. 1128, Feb. 1, 1967; 32 F.R. 2941, Feb. 16, 1967; 33 F.R. 8593, June 12, 1968; 34 F.R. 9838, June 26, 1969; 34 F.R. 12087, July 18, 1969]

PART 36—SHELLFISH

CANNED SHRIMP

Sec.

36.3 Canned wet pack shrimp and canned dry pack shrimp in non-transparent containers; fill of container; label statement of substandard fill.

CANNED OYSTERS

36.5 Canned oysters; identity; label statement of optional ingredients.

36.6 Canned oysters; fill of container; label statement of substandard fill.

RAW OYSTERS

36.10 Oysters, raw oysters, shucked oysters; identity.

36.11 Extra large oysters, oysters counts (or plants), extra large raw oysters, raw oysters counts (or plants), extra large shucked oysters, shucked oysters counts (or plants); identity.

36.12 Large oysters, oysters extra selects, large raw oysters, raw oysters extra selects, large shucked oysters, shucked oysters extra selects; identity.

36.13 Medium oysters, oysters selects, medium raw oysters, raw oysters selects, medium shucked oysters, shucked oysters selects; identity.

3. Remarks of Congressman Rosenthal in Congressional Record re L.A.B.E.L. Petition

[From the Congressional Record, No. 37, Vol. 117, Washington, Mar. 17, 1971]

THE RIGHT LABEL

Hon. BENJAMIN S. ROSENTHAL,
Wednesday, March 17, 1971

Mr. ROSENTHAL. Mr. Speaker, LABEL, is an acronym for Law Students' Association for Buyers' Education and Labeling. Its members, five students at George Washington University Law School, have submitted a petition to the Food and Drug Administration calling for a full disclosure of all ingredients in order of predominance on the label of food products.

I have long advocated strengthening our food labeling requirements. I have introduced a Better Labeling Act both in the last session and this session of Congress.

This petition, which I place in the RECORD, is the first project of this new group. I support their efforts and hope that they will continue to work for reforms on behalf of consumers:

THE RIGHT LABEL

SUMMARY

The Petitioner, LABEL, INC., is a non-profit corporation registered under the laws of the District of Columbia. The goal of the organization is to promote more complete ingredient labeling on all food products. The petitioner respectfully suggests that the purpose of the Standards of Identity provided for by 21 U.S.C. § 341 (Definitions and Standards for Foods) was to insure the quality and uniformity of food products but not to deny the consumer the knowledge of ingredients and thus the right to make an educated choice. This petition respectfully requests the Food and Drug Administration to issue a rule under section 701(e)(1)(B) of the Federal Food, Drug, and Cosmetic Act requiring all food manufacturers and/or distributors to label all ingredients which are contained in the food products they put forth for consumption.

PETITIONERS

LABEL is an acronym for Law Students Association for Buyers' Education and Labeling.

The officers and members of LABEL are Louis Kaufman, Arthur Koch, Gary Laden, Joan Levy, and Ellis Saull.

LABEL, INC., contends that a new Food and Drug Administration regulation is both required and needed to allow the consumer to make a knowledgeable choice with respect to the foods he eats.

The members of LABEL, Inc., are personally affected in this matter by virtue of the fact that they are consumers.

I. FOOD AND DRUG ADMINISTRATION POLICY

In accordance with Congressional Intent,[1] the Food and Drug Administration has promulgated Standards of Identity "to promote honesty and fair dealing in the interests of consumers."[2] The Food and Drug Administration maintains that "food products are labeled with required information to guide and protect the consumer."[3] Further, in 1967, the Food and Drug Administration stated that "labeling requirements should be designed to give the consumer the fullest pertinent information possible in concise terms, completely factual and free from any element of trade puffery."[4] "Food standards are not a device to be used in the interest of industry to circumvent the consumer's right to choose."[5]

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[1] Federal Food, Drug, and Cosmetic Act, Section 401, 21 U.S.C. 341.
[2] *Food Standards*, Facts for Consumers, FDA Publication No. 8, 1964.
[3] *Additives In Our Food*, FDA Publication No. 43, October 1968.
[4] *Food Standards* by L. M. Beacham, Reprint from FDA Papers, Sept. 1967.
[5] *Food Standards* by L. M. Beacham, Reprint from FDA Papers, Sept. 1967.

It is clear that the stated policies of the Food and Drug Administration are both to inform and protect the consumer.

However, the American Consumer cannot determine the ingredients of the foods he eats. According to the White House Conference on Food, Nutrition, and Health:

"As a result of the maze of present laws and regulations governing food labeling, consumers are presented with confusing or incomplete information about the products they purchase. The label of an unstandardized food, must bear a full statement of ingredients whereas the label of a standardized food need not disclose the mandatory ingredients. Nutritional information may be required on the label of a special dietary food, but not a general purpose food.

"Consumers have requested and are entitled to more meaningful and useful information than is now provided them about food. Such reforms as required statement of properties, a declaration about the amount of any characterizing ingredient, and simplification of ingredient designation, will help the consumer understand the product more fully and help him to make more intelligent purchasing decisions." [6]

This confusing state of affairs is due to the way in which the Food and Drug Administration has in the past implemented 21 U.S.C. 341 which authorizes the Secretary of H.E.W. to "promulgate regulations fixing and establishing for any food . . . a reasonable definition and standard of identity."

Section 341 of title 21 of the U.S.C. reads as follows:

"DEFINITION AND STANDARDS FOR FOOD

"Whenever in the judgment of the Secretary such action will promote honesty and fair dealing *in the interest of consumers, he shall promulgate* regulations (F.D.C. Regs. parts 10, 14–20, 22, 25, 27, 29, 31, 36, 37, 42, 45, 46, 51, 53) fixing and establishing for any food, under its common or usual name, so far as practicable, a reasonable definition and standards of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: *Provided,* That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the precribing of any standard of quality for any canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. *In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label.* Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing."

For the purposes of this petition, as an aide to understanding the confused state of the present F.D.A. standards, the following is a hypothetical food standard which assumes that Product X is a product for which a Standard of Identity has been promulgated under 21 U.S.C. § 341.

Product X; identity; label statement of optional ingredients.

Product X contains ingredients A, B, and C.

Product X must contain at least one of the following: D, E, or F.

OPTIONAL INGREDIENTS

Product X may contain G, H, I, or J, or any combination thereof. If it contains I and/or J, the names of those ingredients must appear on the label.

With all due respect it is suggested that present FDA regulations have resulted in four vague and misleading categories of ingredient labeling, which we, for the purposes of this petition, will designate as follows: [These definitions will be used throughout this petition.]

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[6] Final Report, *White House Conference on Food, Nutrition and Health,* at pp. 120–121 (1970).

(a) *Mandatory Ingredients:* There are ingredients that are listed in the Standard of Identity which must be contained in the product. They do not have to be labeled. (Example: caffeine in cola drinks (21 C.F.R. 31.1) or ingredients A, B, C in the hypothetical standard.)

(b) *Permissible Mandatory:* These are ingredients which are listed by group in the mandatory category within the Standard of Identity, at least one of the ingredients within the group must be in the product. This means that of all those ingredients listed as mandatory in the Standard of Identity only some of them are actually contained within the product. If they are contained within the product under this group, they do not have to be labeled. (Example: the form of egg in mayonnaise (21 C.F.R. 25.1(c)) or ingredients D, E, and F in the hypothetical.)

(c) *Labeled Optionals:* There are ingredients which are listed in the Standards of Identity as "optional ingredients", implying that they do not have to be in the product. Of these ingredients, there are those that must be labeled, by order of the Secretary of HEW, if they are contained in the product. (Example: calcium disodium EDTA in mayonnaise or ingredients I and J in the hypothetical.)

(d) *Unlabeled Optionals:* These are ingredients listed as optional ingredients in the Standard of Identity, which do not have to be labeled if they are included in the product becauce the Secretary has not so designated. (Example monosodium glutamate in mayonnaise (21 C.F.R. 25.1(a)(4) or ingredients G and H in the hypothetical.)

The fact that these four categories exist has resulted in inconsistent, incomplete, and misleading food labeling, as illustrated by the following examples:

1. *Many products list no ingredients whatsoever on their labels:*

Hellmann's Mayonnaise (Exhibit A), and Polaner Pure Red Raspberry Preserves (Exhibit B), are nationally distributed (food products that do not list any ingredients on their labels. Thus the consumer is unaware of the existence of eggs in mayonnaise or sugar in raspberry preserves.

2. *Some products list only the coloring ingredient, without disclosing any other ingredients.*

Pepsi-Cola (Exhibit C), and Coca-Cola (Exhibit D), two well known soft drinks, tell the consumer that they are caramel colored, but list none of the more than seventy other ingredients. The consumer is unaware of the required presence of caffeine.

3. *Some products label several of their ingredients, but neglect to inform the consumer that this is only a partial disclosure.*

Howard Johnson's Cola (Exhibit E), lists five ingredients on its label. The average consumer could interpret this to be a full disclosure of all the ingredients contained in this product. In fact, some of the major ingredients of this product is not labeled. Thus the consumer is unaware of the presence of caffeine.

4. *Pet food labeling is qualitatively and quantitatively more informative than the labeling required by the Food and Drug Administration for human foods.*

Exhibit F is illustrative of this more informative labeling. This shows that informative labeling is feasible.

5. *Retailers and Distributors often receive a more informatively labeled product than the consumer.*

The retailer using Coca-Cola syrup will be able to learn that Coke contains sugar, water, phosphoric acid, caffeine, extractive from cocoa leaves (Cocaine removed) and cola nuts, and other flavorings, and that it is caramel colored (Exhibit G).

The retailer using pre-bottled Coca-Cola, and the consumer will be able to learn that Coke contains: "Caramel coloring."

6. *The Consumer has no way of determining the amount of quality of additives in his food.*

"The use of additives in food in the United States rose from 419,000,000 pounds in 1955 to 661,000,000 pounds in 1965—a 58% gain in ten years. It is estimated that the use of additives will soar to . . . 1.03 billion in 1975."[7] Due to the lack of labeling requirements under the Standards of Identity, many of these additives go into the product unlabeled.

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[7] Longgood, William, *The Poisons in Your Food,* Pyramid Books, New York, 1960, p. 13.

II. ARGUMENTS

1. The purpose of the Standards of Identity is to insure quality and uniformity within standardized foods

In 1938, Congress enacted Federal Administrative authority to create Standards of Identity for Foods (21 U.S.C. 341). The purpose of these standards was to insure a definite level of quality and uniformity for many foods.

Senator Royal S. Copeland, the sponsor of S. 5, which became the Food and Drug Act of 1938, in a report to the Senate from the Senate Committee on Commerce, commented on the purpose of the act. He stated that the provisions concerning foods not under a Standard of Identity should help "the consumer . . . to obtain reasonable information regarding the composition of the food he buys." He further stated that if a definition and Standard of Identity for a product existed, "a consumer can be assured that the composition is the normal and proper one, and that optional ingredients if used will be labeled." [8] Moreover, in the reports which accompanied S. 5 to the Seventy-fifth Congress, it was declared, "the purpose of the Standards of Identity was to keep food manufacturers from straying from time honored standards." [9] The original intent in the creation of food standards was to insure a standard of quality and uniformity in foods, and that any supplemental deviation from such standards would be made known to the consumer.

According to the Food and Drug Administration, "Food products are labeled with required information to guide and protect the consumer." [10] This objective is not being fulfilled. Adequate information as to the contents of food products should be on the label so that the consumer in the grocery store can make an informative decision of the product he buys. The FDA food labeling procedures must be modified if this objective is fulfilled.

2. The Food and Drug Administration regulations governing Standards of Identity are not in accord with the policies and purposes of the Federal Food, Drug, and Cosmetic Act

The fact that major ingredients, such as caffeine, MSG, milk, and eggs are not listed on labels of standardized products conflicts with the policy and Congressional mandate of promoting honesty and fair dealing in the interest of the consumer.

Caffeine is a mandatory ingredient in cola drinks and as such does not have to be labeled. The consumer in the grocery store has no way of knowing this unless he happens to have a copy of Title 21 of the Code of Federal Regulations in his back pocket. For example, the presence of MSG and coconut oil in mayonnaise are hidden from the consumer.

In addition to promoting honesty and fair dealing, there are health reasons which would require the labeling of caffeine.

Modern medical evidence indicates a possible harmful effect of caffeine. "Dr. Samuel Bellet, Chief of Cardiology of Philadelphia General Hospital, has suggested that caffeine may be more important than smoking in setting the stage for heart attacks.'" [11]

Doctors Samuel Bellet, MD, Alfred Kershbaum, MD, and Laurlan Roman, MD, writing for the *Archives of Environmental Health* make the following remarks about caffeine:

"These studies show that ingestion of cola drinks containing caffeine (sugar-free cola) alone results in a progressive increase in FFA [Free Fatty Acids]; When the cola contained caffeine plus sugar (regular cola), the FFA usually became lower in the first three hours and then tended to increase by the fourth hour after ingestion. These effects were quite similar to those obtained following the administration of coffee alone and coffee with sugar, respectively. The ingestion of carbonated water had no significant effect on FFA." [12]

What portion of the general consuming public knows that caffeine not only is present in every cola drink, but that every cola drink *must* contain caffeine? 21 C.F.R. 31.1.

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[8] S. Rep. No. 361; 74th Cong., 1st Sess. 12 (1935).
[9] S. Rep. No. 2139; 75th Cong., 3rd Sess. 5 (1938).
[10] *Additives In Our Food*, FDA Publication No. 43, October, 1968.
[11] Turner, James S., *The Chemical Feast*, Grossman Publishers, New York, 1970.
[12] Bellet, Samuel, Kershbaum, Alfred, Roman, Laurian, "Effect of Cola Drinks on Serum Free Fatty Acids", *Archives of Environmental Health*, November 1968, Volume 17.

At one time, even the Food and Drug Administration announced that there should be "no tolerance for the amount of caffeine that may be added to cola beverages (TC 144). This TC stated further that we have consistently discouraged the addition of caffeine to any amounts to soft drinks which may be and of course often are, consumed by young children. Parents may not always desire them to consume caffeine-containing beverages. Whether or not caffeine is present in a soft drink in an amount which may constitute a deleterious ingredient which may render the article injurious is a question of fact in each case.' " (Exhibit H).

Other ingredients which have been questioned as to their safety include monosodium glutamate, coconut oil, and cyclamates. Even many basic ingredients which have gone unquestioned for years are now controversial, including sugar, salt, eggs, and milk. Some consumers may need or wish to avoid products containing some or all of these ingredients.

Honesty and fair dealing with respect to labeling would enable people with allergies to determine what products they should avoid. Dr. Theron G. Randolph of Chicago's Human Ecology Research Foundation believes that "mental confusion, agitation, comas, and amnesia can be caused by repeated contact with the wrong food or substance." [13] Many consumers have adverse reactions to substances in their food, yet find themselves unable to avoid them due to inadequate labeling.

Those with heart diseases or the predisposition towards such diseases must likewise carefully watch what they eat. They must limit themselves as to cholesterol (*i.e.*, eggs, milk, cheese). These items are often unmarked and are often eaten without the knowledge of the consumer. 21 C.F.R. 19.500 *et seq.*, 21 C.F.R. 42.1 *et seq.*, 21 C.F.R. 18.520 *et seq.*

Honesty and fair dealing would also dictate that those who wish to restrict their intake of certain items for religious dietary reasons be enabled to do so with the help of informative labeling. The Jewish faith has a complicated system of dietary laws that excludes many items and prohibits the eating of certain items (such as milk derivatives) after the eating of others (such as meat derivatives). Although many products are marked with a "K" or an "(u)", religious Jews would not be restricted to these products if they knew what was in the foods they bought. Mormons also have items, such as caffeine, which they, by religious convictions, must not consume.

The existence of the category of unlabeled optional ingredients under the standard for Non-alcoholic beverages illustrates how the honesty and fair dealing standard has been ignored by FDA procedures. Here is but a glimpse of the ingredients which are included under this standard, but which need not be labeled:

One or more of the emulsifying, stabilizing or viscosity-producing agents brominated vegetable oils, carob bean gum (locust bean gum), glycerol ester of wood rosin, gual gum, gum acacia, gum tragacanth, hydro-xylated lecithin, lecithin, methylcellulose, mono- and diglycerides of fat-forming fatty acids, pectin, polyglycerol esters of fatty acids, propylene glycol alginate, sodium alginate, sodium metaphosphate (sodium hexametaphosphate). 21 C.F.R. 31.1(6)(i). (See Exhibit I for complete standard)

It is interesting to note that two of the ingredients (brominated vegetable oils and mono- and diglycerides of fatty forming acids) are currently under FDA scrutiny.[14] Surely no consumer can be expected to know that these ingredients may be present in their soft drink, and there is no way for him to find out if the ingredient is actually present.

The curious category of permissible mandatory ingredients even further undermines the consumer's right to know what is in the food he eats. In many cases, if an ingredient is mandatory under the Federal Food, Drug, and Cosmetic Act, the ingredient may or may not be present. An example is milk in white bread (21 C.F.R. 17.1(2)). This does not comport with the plain meaning of the English word "mandatory." For example, the Standard promulgated for mayonnaise states that "mayonnaise dressing is the emulsified semisolid

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[13] Chicago's American, April 12, 1966, Article by David Noble: "Illness of Mind Tied to Allergies."

[14] Petition of F.A.T.S., Inc. & Mr. James S. Turner, *Petition to Revise FDA Regulations on Labeling of Food Fat Content and Labeling of Food Containing Vegetable Oils and Fats* filed December 2, 1970.

food prepared from edible vegetable oil and one or both of the acidifying ingredients specified in paragraph (b) of this section, and one or more of the egg yolk containing ingredients specified in paragraph (c) of this section" (21 C.F.R. 25). Paragraphs (b) and (c) then list a number of ingredients from which the industry may choose to put in its product as a "mandatory" ingredient:

(b) The acidifying ingredients referred to in paragraph (a) of this section are: (2) Lemon juice or lime juice or both or any such juice in frozen canned, concentrated or dried form, or any one or more of these diluted with water.

The mayonnaise industry has discretion in choosing its "mandatory" ingredients. This concept of discretion makes a mockery of the word "mandatory," and leaves the consumer bewildered as to the ingredients of the foods he eats.

Due to the inconsistency between the stated purposes and the subsequent application of Standards of Identity there has evolved an anomaly within the context of the Food, Drug, and Cosmetic Act. Products outside the Standards of Identity are more informatively labeled than products within the standard.

When a Standard of Identity is promulgated for a product, that product is excused from the more informative labeling requirements of unstandardized foods. Such a provision only makes sense if Standards, as originally intended, are tightly drawn, based on long usages, and easily understood by consumers. In fact, standards have not maintained their original purpose, and are of no substitutional value for informing consumers. In effect, all standardized products are misbranded pursuant to 21 U.S.C. 321(n):

For the purposes of this Act—

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

In essence, misbranding refers to both material omissions and commissions with respect to ingredient labeling requirements. Both of these routinely occur in present food standards.

The F.D.A. has recognized the fact that Standards of Identity have the potential of becoming a haven for misbranding as defined by 21 U.S.C. § 321 (n). Thus the F.D.A. has announced a policy to prevent such inconsistent activities:

"No provision of any regulation prescribing a definition and standard of identity . . . under section 401 of the act shall be construed as in any way effecting the concurrent applicability of the general provisions of the act and the regulations thereunder relating to adulteration and misbranding. (Title 21, Chapter 1, subchapter b, section 10.1(c).)"

This regulation asserts that the Standards of Identity shall not excuse industry from conforming to standards of informative labeling. However, FDA action again has failed to achieve FDA Policy.

Consumers who spend hard earned money for food in order to maintain their families' health and welfare should be entitled to know the ingredients for which their money is being spent. Various qualities of ingredients are used in different food products. For example, the Standard of Identity for white bread states the following choices:

"Milk, concentrated milk, evaporated milk, sweetened condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, sweetened condensed partly skimmed milk, sweetened condensed skim milk, nonfat dry milk, or any combination of two or more of these. . . . 21 C.F.R. 17.1(2)."

There are marked differences in the value and nutritonal benefits of these alternative ingredients. In reality, the only one who gets milked is the consumer. Such secret discrepancies in alternative ingredients flagrantly violate any standards of honesty or fair dealing which the statute may impose.

3. Standards of Identity have produced misleading and inadequate food labeling, contrary to the original intent of the law

The assumption that a Standard of Identity is a substitute for informative food labeling is no longer valid. The absence from labels of the names of all

mandatory ingredients and all non-designated optional ingredients can in no way be considered an adequate substitute for informative labeling. It is impossible for any consumer to learn from the FDA information program what goes into a product covered by a Standard of Identity. Even if he should obtain a copy of the standard, he will not know what composes the product.

Optional ingredients under Standards of Identity also contribute to the misleading effect of the standards.

Section 401 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 341, not only creates authority to promulgate standards for foods, but further authorizes the Secretary to "designate the opional ingredients which shall be named on the label." "Honesty and fair dealing" would dictate that all optional ingredients be labeled in order to avoid consumer confusion. Presently, however, this authority has been interpreted by the FDA to mean that the Secretary may pick and choose which of those optional ingredients included in a particular Standard of Identity will be listed on a label. It provides no standard other than *honesty* and *fair dealing* by which to make the choice. If this discretion has been vested in the Secretary, it has been abused.

The consumer has a right to know what ingredients are in the food products which he buys. Who should make the ultimate choice about the consumption of the ingredients in the foods he eats? By not requiring the labeling of all ingredients, and thus effectively hiding the present of many of them from the public, the DA has usurped the consumer's right to make that choice.

III. CONCLUSION AND PRAYER

Under the present labyrinth of FDA regulations, the consumer has no way to ascertain the ingredients contained within the product under the Standard of Identity. Instead, the Standard of Identity has become a sanctuary for hidden ingredients and additives.

The Federal Food, Drug, and Cosmetic Act and supporting FDA policy statements have invested the consumer with a right to know what is contained in the foods that he purchases. Moreover, there is an absolute need due to health, dietary, and religious purposes for there to be a full disclosure of food contents.

In order to correct this situation, the FDA must issue new regulations in accord with the import of 21 U.S.C. 341.

Accordingly, the petitioners pray that the Food and Drug Administration issue a new regulation (under 21 U.S.C. 341) requiring that:

For the purposes of promoting honesty and fair dealing in the interest of the consumer, all food manufacturers and distributors must list on the label, in the order of their predominance, all ingredients which are contained in their product.

The petitioners ask that this proposal be published in the Federal Register, as per 21 C.F.R. sections 2.65 and 2.66.

LABEL, Inc.,
LOUIS KAUFMAN,
ARTHUR KOCH,
GARY LADEN,
JOAN LEVY,
ELLIS SAUL.

4. Statement by James Turner, Center for the Study of Responsive Law, re L.A.B.E.L. Petition

[Press Release, James Turner]

FULLY INFORMATIVE FOOD LABELING

The petition filed today with the FDA by the group of George Washington University Law Students known as "LABEL" brings before the agency, in official form, a question which has remained unresolved for more than thirty years since the Food Drug and Cosmetic Act of 1938 was passed. The fact that caffeine could be added to cola and "pepper" drinks without saying so on the label, and that monosodium glutamate could be added to mayonnaise without label indications, has long been a source of concern to advocates of honest labeling and safe food consumption. Now, a group of highly motivated law students has finally forced the FDA to face the issues legally.

In addition, through a series of negotiations conceived and conducted by the students, a major food marketing concern, the GIANT supermarket chain. in the Washington, D. C. area, has been persuaded to voluntarily make a number of changes sought by the students through mandatory regulation. Having the insight and tenacity to pursue both the formal legal remedy, as well as the persuasive marketplace remedy, makes the student campaign a unique example of effective action by concerned and informed citizens. These students have established a method of action which should be repeated by groups of citizens across the country.

Hopefully, the FDA will find the commitment to action and concern for the public necessary to respond rapidly and respectfully to the petition. Too often in the past the FDA has found it easy to ignore citizen concern. The student action filed today signals an end to that situation. Now, if FDA can muster up the courage to match the responsibility of GIANT and the "LABLE" group, the entire nation will be positively served.

5. Statement of Virginia Citizens Consumer Council re L.A.B.E.L. Petition

VIRGINIA CITIZENS CONSUMER COUNCIL, INC.,
Alexandria, Va., February 25, 1971.

STATEMENT BY LAURA HOROWITZ PREPARED FOR DELIVERY AT PRESS CONFERENCE OF LABEL (LAW STUDENTS' ASSOCIATION FOR BUYERS' EDUCATION IN LABELING)

My name is Laura Horowitz. I am a board member and supermarket chairman of the Virginia Citizens Consumer Council. We are a statewide group representing 70,000 consumers through individual and organizational memberships.

I am here today to express our support of LABEL's efforts to bring about full disclosure of ingredients in food sold at retail and to get the Food and Drug Administration to better serve consumers. John Banzhaf and his students are doing important work which we appreciate and welcome.

As an organization, we have worked from our start for complete, honest labeling of products offered for sale. We currently have two committees—supermarkets and environment—involved in this area. We feel very strongly that consumers have a right to know exactly what they are buying—not only so they can make comparative value judgments while shopping, but also so they can avoid and fight health hazards such as dangerous food additives. Our committees will in the next few weeks be contacting supermarkets, manufacturers, and government officials. We will remind them that consumers want complete product information and urge them to take steps to see that we get it.

We hope and expect other groups will support LABEL too. We hope the press will follow through on behalf of the public to see how the FDA and industry respond. The Consumer Federation of America, a national group to which the VCCC belongs, is on record urging federal agencies to require percentage labeling of all ingredients of processed foods greater than one percent. The CFA has also "severely" censured the FDA for its disregard of consumer concerns.

As a consumer organization, we generally favor voluntary reform by business rather than government coercion. *However*, where business fails to take the necessary steps to end abuses and frustrations in the marketplace—and it has failed, by and large, in the case of product labeling—we support and encourage immediate, *strong* action by government agencies like the FDA.

We do recognize that there are some positive steps being taken by business *itself* to meet consumer needs and eliminate problem areas. Giant Food's announcement today and Mrs. Peterson's role at Giant are good examples. The open dating and unit pricing begun in some local supermarkets are others. To reverse the slogan on my button—WHEN BUSINESS CARES, CONSUMERS *ARE* AWARE.

Nonetheless, revolutionary as these long overdue reforms may seem in the corporate halls, they must be kept in perspective. They are mere *beginnings*, and not final solutions. Similarly, LABEL's petition is an important step *toward* needed reforms. We trust the FDA will respond to make the informa-

tion requested by LABEL readily available to all consumers, and that industry and retailers will move forward quickly . . . perhaps even voluntarily.

Then we can go on to other important issues.

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6. Statement by Giant Foods re L.A.B.E.L. Petition

[NEWS RELEASE]

GIANT FOOD INC.,
Washington, D.C.

Giant Food Inc. today announced a voluntary program of labeling product ingredients on some of its private label foods now covered by Food and Drug Administration "standards of identity." Giant is beginning by labeling the ingredients on its private label cola drinks and mayonnaise. Other products will be added to the list as soon as feasible. On products covered by such standards of identity, the manufacturer is not required to list the ingredients on the package.

Mrs. Esther Peterson, Consumer Advisor to the President of Giant Food, said that Giant is instituting the program at the request of a group of George Washington University Law students calling themselves LABEL, Inc. (Law Students Association for Buyers' Education and Labeling). LABEL asked Giant to work with them in evaluating the feasibility and desirability of voluntary ingredient labeling of products covered by standards of identity. After several meetings and thorough study, Giant concluded that disclosure of this information would be in the public interest as defined in the company's Consumer Bill of Rights. ("The Right to be Informed").

Joseph B. Danzansky, President of Giant Food Inc. lauded the members of LABEL, who are students of Professor John F. Banzhaf, for their responsible approach to the reform of the marketplace and their desire to work "within the system." "The actions you have proposed enhance the value of standards of identity," he observed, "which were developed to provide the consumer with dependable and consistent levels of quality for many of the foods we eat. The listing of ingredients covered by those standards is a logical step in bringing the 1938 legislation into line with today's knowledge and today's consumer requirements."

Danzansky also observed that voluntary disclosure is also good business, and expressed his confidence that there would be an industry-wide movement to follow Giant's action. "I think business is aware that voluntary compliance is infinitely preferable to a legislative remedy," he said. "This action has been recommended repeatedly by such responsible groups as the White House Conference on Food, Nutrition and Health, the President's Consumer Advisory Council, the Food Marketing Commission and others, and it is only right for the food industry to take the first step."

FEBRUARY 24, 1971.

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7. Letter from Giant Food President, Joseph Danzansky, to Dean Robert Kramer of the National Law Center

GIANT FOOD INC.,
Washington, D.C., March 2, 1971.

DEAN ROBERT KRAMER,
George Washington University Law School,
Stockton Hall, Washington, D.C.

DEAR DEAN KRAMER: Last week, I had the privilege of participating in a news conference with Professor John Banzhaf and a group of his law students calling themselves "LABEL, Inc." At the request of the students, Giant had agreed to a voluntary program of labeling product ingredients of some of our private label foods now covered by FDA "standards of identity." This move by Giant paralleled a petition to the FDA by the students asking for the mandatory disclosure of all ingredients on all foods now covered by "standards of identity."

I wish to commend these students for their responsible approach to the reform of the marketplace and for their desire to work "within the system."

Our company did not agree with every detail of the students' petition (although we are in accord with the overall concept). Nevertheless, we feel that when students and other young people express a genuine desire to work to improve our system instead of striking out blindly at it, business has a responsibility to facilitate their work and to make orderly change possible. There is no reason why students should not be able to leave institutions of higher learning with memories of constructive alliances with the business community, instead of the memories of negative responses and knee-jerk reactions which so often typify such encounters.

Professor Banzhaf deserves our congratulations and warmest encouragement as he works to make his students both relative to the needs of today's society and supporters rather than detractors of that society. As an alumnus of both George Washington University's undergraduate school and its law school, I regret that similar opportunities were not available to students in my day.

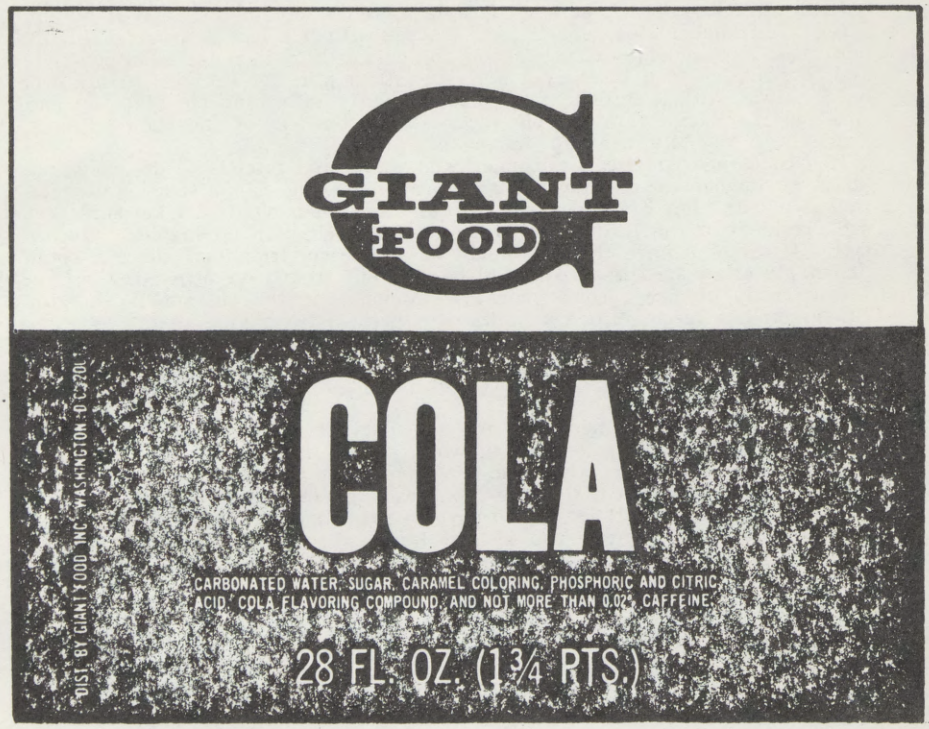
Sincerest personal regards and best wishes.

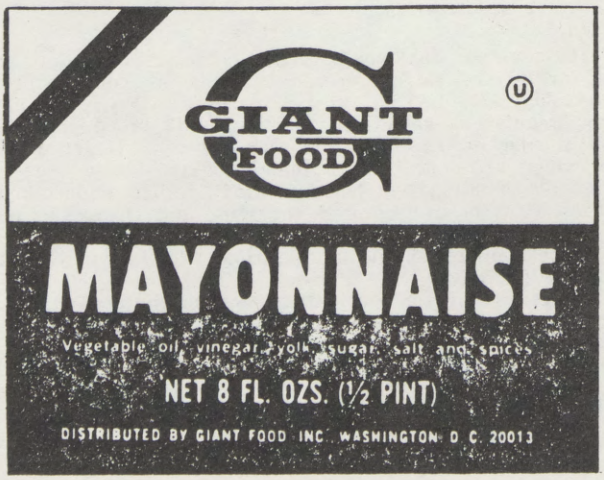
Yours truly,

JOSEPH DANZANSKY,
President, Giant Food, Inc.

8. Samples of New Giant Foods Labels Listing Ingredients

GIANT'S NEW LABELING





9. Letter to Mrs. Virginia Knauer from L.A.B.E.L.

LABEL, INC.,
LAW STUDENTS ASSOCIATION FOR BUYERS' EDUCATION AND LABELING,
Washington, D.C., March 11, 1971.

MRS. VIRGINIA KNAUER,
The President's Special Assistant for Consumer Affairs,
The New Executive Office Building,
Washington, D.C.

DEAR MRS. KNAUER: Last week I came to your office in the hope of finding a few brief moments of your time to discuss with you how a group of highly motivated law students are attempting to do something in the area of complete and informative food labeling. I arrived with a glimmer of hope in my eye, but was met with a statement by your Secretary informing me that you had time only for "important" people such as the President of the United States. Students, I was told, are not "important" people.

If a concerned American consumer who wants and intends to do something about an inadequate and inconsistent Food and Drug Administration Regulation is not an "important" person in your office, then who is? I am sure that the President of the United States does not himself go shopping in a grocery store. I cannot believe that a woman of your reputation and concern could knowingly allow such an attitude to be sent out from your own office.

Our group of five second year law students at the George Washington University has recently filed a petition with the FDA asking that:

"For the purposes of promoting honesty and fair dealing in the interest of the consumer, all food manufacturers and distributors must list on the label, in the order of their predominance, all ingredients which are contained in their product."

Won't you please try to find a few moments at your convenience to meet with us? We are trying so hard to work within the system and to exhaust all the remedies that are available. We have taken the attitude with various industries and governmental bodies concerned by our petition that we want to work with people rather than to have to fight against them.

Better yet, could I invite you to have lunch with our group and to discuss the matter then. My apartment is just a few minutes walk from your office.

Sincerely,

ARTHUR KOCH,
Chairman, LABEL, Inc.

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10. Letter to Commissioner Edwards from L.A.B.E.L.

APRIL 15, 1971.

Commissioner CHARLES C. EDWARDS,
Food and Drug Administration,
Rockville, Md.

DEAR COMMISSIONER EDWARDS: LABEL, Inc., stands for Law Students Association for Buyers' Education and Labeling. As you are probably aware, on February 25, 1971, LABEL filed a petition with your office requesting that a new regulation be issued requiring all "food manufacturers and distributors to list on the label, in the order of their predominance, all ingredients which are contained in their product."

Since the day of filing our petition, LABEL has undertaken an all out effort to meet with those officials in the Food and Drug Administration who would be concerned with our petition in order to discuss with them the purpose and reasoning behind our petition and to answer any questions those officials might have.

During the course of these meetings, we encountered a situation which we feel must be brought to your attention.

On Wednesday, March 31, 1971, LABEL met with Dr. Virgil O. Wodicka, Director of the Food Division of FDA. The appointment with Dr. Wodicka had been arranged by your secretary. In a letter from your office to Dean Robert Kramer of the National Law Center, the George Washington University,

received by his office on March 18, 1971, you stated that an appointment had indeed been set up with Dr. Wodicka's office in order to discuss our petition.

This appeared at the time to be the official response of the Administration to our desire for cooperation on the petition. Upon arriving at Dr. Wodicka's office we received a most cordial welcome, but upon beginning our discussion we were quite surprised to learn that despite nearly two weeks notice, Dr. Wodicka had not done us the courtesy of reading our petition. In fact, he did not have an official copy of the petition present, nor was he able to locate the whereabouts of the petition anywhere in his agency.

We inquired if he had been aware of our coming, and Dr. Wodicka replied that he had, and he had also been aware of your letter to the Dean, but he simply had not read the petition.

As a consequence of Dr. Wodicka's lack of preparation, we were forced to spend much valuable time explaining the basic concepts contained within our petition.

Upon informing Dr. Wodicka of the nature of our request, he seemed to indicate that he agreed with the abstract concept of full ingredient labeling for all standardized foods. Yet Dr. Wodicka continued by stating that he did not see how such a concept could be developed into a workable plan of operation.

Dr. Wodicka indicated that were the FDA to issue a regulation requiring all manufacturers and distributors of standardized foods to make a full ingredient disclosure, it would be at once swamped with all types of out-crys from the members of the food industry, out-crys with which he simply did not wish to deal. Dr. Wodicka went on to state that in order to enforce such a regulation, he would have to mobilize many of the resources at his disposal, and as he so simply put it, "I have far better things to do with the time and energy of my staff."

Dr. Wodicka indicated that were he to consider the question of food labeling at all, it would be on a standard by standard basis so that the requests of each food industry could be met.

We must state that we found Dr. Wodicka's attitude toward our petition, and toward LABEL, as a group of concerned citizens, highly disturbing.

Dr. Wodicka's lack of professionalism in not showing us the courtesy of reading our petition, was inexcusable. His willingness, without having read our petition, to dismiss it as being both impractical and unimportant indicates an irresponsibility and a pre-conceived bias which should not be tolerated in a position of such great importance as that occupied by Dr. Wodicka.

We are convinced that the reception which LABEL received on March 31, 1971, was typical of the general attitude with which Dr. Wodicka regards the importance of the rights of the American Consumer. Our feeling has only been borne out by our discussions with those in the field of consumerism in whom we have the greatest respect and faith. In every case, those with whom we consulted, indicated that Dr. Wodicka's record indicated an attitude directly opposed to the very purpose of the Food and Drug Administration, namely "honesty and fair dealing in the interest of consumers."

It is for these reasons that LABEL felt compelled to bring this unfortunate meeting to your attention.

We feel that this is a most serious situation, one calling for immediate action. In the case of LABEL's petition, we are requesting that it be removed from the authority of Dr. Wodicka's office. We realize that this is a highly unusual request, but we feel it is the only way to insure that our petition receives the thorough and unbiased review it deserves.

In reference to future consumer groups, we can only leave it to the educated discretion of your office to take those steps which will ensure that their requests will be received with the professional attention and respect due those who have chosen to represent the group your office has pledged to serve, the American Consumer.

Thank you for your attention in this matter.

Sincerely,

ARTHUR KOCH,
Chairman, LABEL, Inc.

11. Sample of Editorials in Support of L.A.B.E.L.'s Petition

[From Tyrone, Pa., Herald, Mar. 3, 1971]

Full Labeling Please

Food processors can be expected to make many objectives to the idea of being required to list every ingredient, including additives for flavoring and the like, on food package labels. Unless they can argue something much more than inconvenience or a desire to protect supposed trade secrets, a requirement of this kind probably should be put into effect as a service to consumers.

The Law Students Association for Buyers' Education and Labeling, an acronymic group formed at George Washington University, notes that under present rules of the Food and Drug Administration some 225 ingredients need not be named on food package labels. This gives manufacturers and processors great leeway, sometimes to the clear disadvantage of the consumer.

It is noteworthy, for example, that persons on special diets need to know precisely what is in this or that food—and that at present they cannot be sure. Some persons with a heart condition are advised not to take caffeine, but makers of cola drinks containing caffeine are not required by law to state this on the label. Food containing monosodium glutamate—some mayonnaises, among others—are not so labeled, yet some persons may want to avoid this additive in view of questions about it raised by tests on laboratory animals.

The present FDA regulations give industry wide latitude in labeling foods. As noted above, there are many optional ingredients and some may cause difficulty for some consumers. The LABEL group's petition for a change in the rules making it mandatory to list all food ingredients is solidly grounded.

[From the Toledo Blade, Toledo Metropolitan Area, Mar. 8, 1971]

How Much Caffeine?

Almost everyone should be pleased by the report from George Washington University that a group of law students will petition the U.S. Food and Drug Administration to require soft drink manufacturers to list ingredients on their products' labels.

It is even more reassuring to note that the students have singled out caffeine, that pick-me-up ingredient whose effects are so familiar to everyone who has taken too many cups of coffee and winds up with a case of the jitters or a sleepless night.

The use of caffeine in some soft drinks is perhaps typical of a more general trend toward the increased use of additives in a variety of old and new food products. Nearly one billion pounds of various food additives will be used in the United States this year. A general condemnation of food additives would, indeed, be unjust, considering that most of the popular convenience foods on the market today—frozen pies, TV dinners, dehydrated potatoes, cake mixes, dry soups, brown-and-serve rolls, frozen fish sticks—could not exist without them and that most produce no known ill effects on the consumer.

In some instances, the chemical names of additives used in food products by law are listed on the package label. But even the most sophisticated consumer probably has difficulty in understanding the often-meaningless terms used to describe emulsifiers, flavor enhancers, antioxidants, sequestering agents, stabilizers, thickeners, anti-caking compounds, and other additives.

Caffeine, on the other hand, is a different cup of tea. Most people readily recognize its name and its effects, which can range from various degrees of stimulation in normal persons, to mild physical dependence with intense psychic craving in others, to outright danger for the victim of heart disease.

The FDA would be doing all consumers a service by acting favorably on the George Washington students' petition, and requiring that the caffeine content of all soft drinks be listed in a simple and direct fashion, perhaps as

a statement comparing the caffeine content of the drink to the caffeine content in a cup of coffee.

In the long run, concentrating on additives with known effects on the consumer, such as caffeine, could be of much greater practical value than requiring further listing of complex and perhaps meaningless chemical terms.

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12. Letter of Support for L.A.B.E.L. Petition from Senator Harrison Williams

U.S. SENATE,
COMMITTEE ON LABOR AND PUBLIC WELFARE,
Washington, D.C., April 2, 1971.

Hon. CHARLES C. EDWARDS,
Commissioner, Food and Drug Administration,
Rockville, Md.

DEAR MR. COMMISSIONER: It has recently come to my attention that on February 25, 1971, a concerned group of young citizens known as LABEL, Inc., filed a petition for rulemaking with the Food and Drug Administration. I have read their proposal, which calls for the full listing of ingredients on all food labels and feel that the proposal has substantial merit.

Mr. Gary Laden of LABEL, Inc., advised me today of his meeting with Dr. Virgil Wodicka, Director of the Bureau of Foods, yesterday. This meeting had apparently been scheduled for nearly two weeks, yet Dr. Wodicka was totally unaware of the petition, nor could a copy of it be found. Mr. Laden further advised me that, although the meeting lasted nearly two hours, he felt that Dr. Wodicka was unresponsive to the proposal and that the FDA would be unable to make a ruling on the petition in its present form.

Since a copy of the petition cannot be located at the Food and Drug Administration, I must presume that no steps have been taken by your agency to institute any form of action. It would seem, at the very least, a first step would be to publish in the Federal Register the proposals set forth by LABEL, Inc., so that all those concerned could render relevant commentary.

I urge you to give the LABEL petition a prompt and careful review and look forward to receiving a status report at the earliest opportunity.

Sincerely,

HARRISON A. WILLIAMS, JR.

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13. Letter of Support for L.A.B.E.L. Petition from Congressman Patten

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., May 5, 1971.

Dr. CHARLES C. EDWARDS,
Commissioner, Food and Drug Administration,
Rockville, Md.

DEAR DR. EDWARDS: I strongly believe that an imperative need exists for improving the labeling of food products. It is not only ironic, but incredible, that under present FDA regulations, firms that process dog food must list all ingredients on the container, but that the processors of food products consumed by people are very seldom required to list all ingredients. This is not only unfair to consumers, but is also potentially dangerous, because it means that millions of consumers do not know what they eat.

Consumers are astounded to find that many food products fail to list any ingredients on their labels. Some products list only part of their ingredients, but do not inform consumers that other ingredients are not disclosed on labels.

Present FDA food labeling regulations are deceptive and should be greatly improved. Caffeine, for example, is an ingredient in cola drinks, but does not have to be listed on the label. And because there is some medical

evidence that caffine may have a harmful effect, I believe it should be listed on all labels.

Another area where great improvement is necessary is in the use of additives, where a tremendous increase has taken place. A gain of 58% has occurred from 1955 to 1965: 419 million pounds, to 661 million pounds, and according to a recent estimate, the use of additives will increase to 1.03 billion pounds in 1975. I am not necessarily criticizing the use of additives, but I firmly believe that when they are used, consumers should know about them—and many additives now used are not labeled when they are included in food products.

Federal law now requires the FDA to "promote honesty and fair dealing in the interests of consumers," but it is evident to many that "honesty and fair dealing" are being ignored. In fact, virtual deception is being practiced, and consumers are being victimized. I strongly urge the FDA to give consumers the protection they deserve by issuing new regulations that require the listing of all ingredients contained in food products.

Sincerely,

EDWARD J. PATTEN.

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14. L.A.B.E.L. Proposed Rule in Federal Register

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOOD AND DRUG ADMINISTRATION

[21 CFR Ch. 1]

LABEL DECLARATIONS ON STANDARDIZED AND NONSTANDARDIZED FOODS

NOTICE OF PROPOSED RULE MAKING

Notice is given that a petition has been filed by LABEL, Inc. (Law Students Association For Buyers' Education and Labeling), Box 226, 2020 F Street NW., Washington, DC 20006, proposing amendment of the regulations setting forth definitions and standards of identity for foods in 21 CFR Subchapter B.

The petitioner proposes the issuance of new regulations requiring that: "For the purposes of promoting honesty and fair dealing in the interest of the consumer, all food manufacturers and distributors must list on the label, in the order of their predominance, all ingredients which are contained in their product."

Grounds given in support of the proposal are:

1. Adequate information as to the contents of standardized foods should be on the label to enable the consumer to make an informative choice of the food he buys.

2. The absence of the names of ingredients from the label of standardized foods does not promote honesty and fair dealing in the interest of the consumer.

3. Health and religious dietary reasons require full label disclosure of the names of all ingredients in standardized foods.

4. The absence of the names of all mandatory ingredients and nondesignated optional ingredients from the labels of standardized foods is an inadequate substitute for informative labeling and is misleading to the consumer.

The Commissioner of Food and Drugs recognizes that: (1) Some consumers desire more informative food labeling; (2) some food manufacturers and distributors have begun a program of revising their labels for standardized food to more fully inform consumers; (3) other members of the industry are considering labeling changes and (4) the failure to reveal material information may result in food being misbranded because the labeling is misleading.

The Commissioner is aware that in its final report to the President, the White House Conference on Food, Nutrition, and Health stated that the consumer is entitled to more meaningful and useful information than is now provided by food labels.

To enable the Food and Drug Administration to determine the adequacy of present labeling for standardized and nonstandardized foods and the nature and extent of changes that are desirable in the labels of such foods, the

Commissioner invites comment on the petition of LABEL, Inc., and suggestions on any related subjects, including but not limited to: (1) Label declarations identifying each ingredient by its common or usual name; (2) label declarations classifying ingredients by function and source; and (3) the manner of presenting label information (order of predominance, placement on label, size and type of print, contrast and legibility, etc.).

Comments are invited on whether the Food and Drug Administration has the legal authority to promulgate regulations as proposed by LABEL, Inc., or whether new legislation must be enacted in view of provisions of the Federal Food, Drug, and Cosmetic Act; specifically, sections 401 and 403(g) applicable to standardized foods and section 403(i) applicable to foods for which standards have not been promulgated.

Pursuant to provisions of the act (secs. 401, 403, 701; 52 Stat. 1046, 1047, 1055, as amended; 21 U.S.C. 341, 343, 371) and under authority delegated to the Commissioner (21 CFR 2.120), interested persons are invited to submit their comments in writing (preferably in quintuplicate) regarding this proposal within 60 days after its date of FEDERAL REGISTER publication. Comments should be addressed to the Hearing Clerk, Department of Health, Education, and Welfare, Room 6-62, 5600 Fishers Lane, Rockville, Md. 20852, and may be accompanied by a memorandum or brief in support thereof.

The Food and Drug Administration is testing patterns of food labeling that will provide useful nutritional labeling information. When sufficient information has been developed, proposals regarding such labeling will be published for comment.

Dated: April 30, 1971.

CHARLES C. EDWARDS,
Commissioner of Food and Drugs.

[FR Doc. 71-6570 Filed 5-11-71; 8:45 am]

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15. Bill Submitted as a Result of L.A.B.E.L. Petition

[From the Congressional Record, May 24, 1971, p. H4254]

TRUTH IN FOOD LABELING

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from New York (Mr. Rosenthal) is recognized for 15 minutes.

Mr. ROSENTHAL. Mr. Speaker, today I am introducing the Truth in Food Labeling Act which would require that all ingredients contained in a food product be listed on the label.

The present ingredient labeling practices range from nonexistent to misleading. For far too long unsuspecting consumers have eaten foods which are harmful to them because the package label did not list all the ingredients. And with the advent of widespread usage of food additives, some of which might prove injurious to certain individuals, it is essential that Congress act to require a full disclosure of the package contents.

Knowing ingredients is especially important to persons with allergies and other dietary problems. Moreover, every one should have the right to know what he is eating.

At the core of the labeling controversy are the standards of identity. The original and quite valid purpose of these standards was to make certain that manufactured food products, which had become known to the consumer by their common names, would contain substantially the same ingredients regardless of manufacturers.

The Food and Drug Administration, however, later permitted manufacturers of foods covered by standards of identity to withhold from the label many, and sometimes all, of the ingredients contained in the product.

Even if one should obtain a copy of the standard for a certain food, it is often impossible to determine exactly what is in a product because of regulations which allow manufacturers a choice of optional ingredients to include in their product without requiring them to tell anyone. Ironically, it is often the potentially harmful ingredients that are not listed, such as caffeine in colas or eggs in mayonnaise.

This legislation proposes an amendment to the Food, Drug, and Cosmetic

Act. I was happy to note the other day that the FDA has published in the FEDERAL REGISTER and asked for comments on a petition that would accompilsh essentially the same purpose as this bill.

I am skeptical, however, that the FDA seriously intends to act on this matter in the near future. It has had the authority to administratively require full disclosure of all contents since passage of the Food, Drug, and Cosmetic Act in 1938.

Instead, over the years the agency has created a labyrinth of regulations which allow manufacturers to conceal all ingredients, require that some be listed without specifying that it is only a partial listing, and allow certain additives—such as colorings and seasonings—to hide behind generic names. There are relatively few products which FDA requires to list completely their contents on the label.

I find it incredible that one product which usually lists all its ingredients on the label should be dog food. Not only does the label list all ingredients, it also bears the nutrient percentages.

I would like to give credit to a group called LABEL, Inc., an acronym for Law Students Association for Buyers Education in Labeling. Its five members, Arthur Koch, Gary Laden, Ellis Saul, Louis Kaufman, and Joan Levy, under the auspices of Prof. John Banzhaf at George Washington University, initiated the petition which the FDA has just published in the FEDERAL REGISTER. I am grateful for their help in developing this legislation.

It was the stated purpose of Congress when it passed the Food, Drug, and Cosmetic Act in 1938 to "promote honesty and fair dealing in the interest of consumers." This mandate is being circumvented by the present complex labeling regulations. It is time for Congress to act to correct and simplify the labeling requirements in order to carry out the original stated purpose of the law it passed in 1938.

The bill I am introducing today is an important complement to "The Better Labeling Act," H.R. 4427, which I introduced earlier this year. That bill requires food manufacturers to list on their labels the nutritional content of the food product. It also requires, in the case of canned fruit and vegetable items, a statement of drained weight—the weight of the product without the packing liquid; and, in the case of combination processed items, such as "beef stew," "spaghetti and meat balls," and the like, a listing of ingredients by percentage weight.

Mr. Speaker, I would like to put in the RECORD the text of the "Truth in Food Labeling" bill plus a newspaper article which points up the very situation this legislation is aimed at correcting, with respect to food additives. The article was written by Douglas Bloomfield, consumer reporter for the Cleveland Plain Dealer.

I also wish to include an Associated Press dispatch that reports even Mrs. Virginia Knauer, the President's consumer assistant, is perplexed by this problem, at least as it applies to orange juice. It seems the Food and Drug Administration, according to Mrs. Knauer, has put off for more than 7 years, a ruling on labeling dilution of juice drinks. Unfortunately, although Mrs. Knauer was "absolutely astounded and more than a little disturbed," even she apparently has been unable to get any action out of the FDA, and she is supposed to be the President's top consumer advisor. This episode is further evidence of the need for the bill I am proposing today:

H.R. 8670

A bill to amend the Federal Food, Drug, and Cosmetic Act to require the labels on all foods to disclose each of their ingredients

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "Truth in Food Labeling Act."

Sec. 2. The Congress makes the following findings:

(1) There are no Federal laws or regulations which require the labels for all food products to state the name of each of the ingredients present in the products.

(2) The absence of such information is harmful to consumers who unknowingly consume food with ingredients which for health or dietary reasons they should not ingest.

(3) The purpose of the Federal Food, Drug, and Cosmetic Act is to

promote honesty and fair dealing in the interest of the consumer. This purpose cannot be met in the case of food products unless labeling requirements for all food products are changed to require the disclosure of all ingredients.

Sec. 3. (a) The next to the last sentence of Section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341) is amended to read as follows: "In prescribing a definition and standard of identity for any food or class of food, the Secretary shall require all manufacturers and distributors of food to include on the label all ingredients contained in such food in the order of their predominance in the food.

(b) Clause (2) of Section 403(g) of such Act (21 U.S.C. 343(g)) is amended to read as follows: "(2) its label bears the name of the food specified in the definition and standard and lists (in the order of their predominance and by their common name) each of the ingredients present in such food."

(c) Section 403(i) of such Act (21 U.S.C. 343(i)) is amended by striking out all after ", and" immediately after clause (1)) and inserting in lieu thereof "(2) in case it is fabricated from two or more ingredients, a listing (in the order of their predominance and by their common or usual name) of each such ingredient."

Sec. 4. The amendments made by Section 3 shall take effect on the first day of the seventh month beginning after the date of enactment of this Act."

[From the Washington Post, May 10, 1971]

What's What in Orange Juice

Scottsdale, Ariz.—The President's consumer adviser accused government and industry Friday of unconscionable delay in resolving consumers' doubts over whether they are getting flavored water or the real thing when they buy orange juice.

Virginia H. Knauer, special assistant for consumer affairs, said consumers are practically helpless in determining from title like "juice," "juice drink" and "drink ade" how much the product has been diluted.

She noted it has been seven years since the Food and Drug Administration proposed requiring that labels show the percentage of dilution in juice drinks.

"I was absolutely astounded and more than a little disturbed to find that seven years have now elapsed since the rules had first entered the Federal Register for comment, and no general public discussion, let alone resolution of the matters raised had transpired in the interim," said Mrs. Knauer in a speech read for her before the National Juice Products Association by one of her staffers.

Mrs. Knauer said she was amazed the FDA proposals permit as little as 50 per cent orange juice in any drink labeled orange juice drink.

"Women will wonder what they have been paying for all these years, flavored water or orange juice," said Mrs. Knauer.

[From the Plain Dealer]

Additives Fortify Food, But Some Are a Peril

(By Douglas Bloomfield)

There are more than 3,000 different chemical additives in our food supply. Many are useful. Others contribute only a cosmetic effect. Some are dangerous.

Additives help retard spoilage, improve flavor and add vitamins. They make beer foam, oranges orange and maraschino cherries red. But a few have been linked to heart disease, cancer and brain damage.

Dr. Jean Mayer, President Nixon's advisor on nutrition, has said: "We can live perfectly well without additives."

The U.S. Food and Drug Administration is suppose to keep a careful eye on additives, barring all not proven safe. But there appears to be a wide gap between theory and practice.

Even President Nixon is bothered. In his consumer message last fall, he

asked FDA to review and revise its list of food additives classified Generally Recognized as Safe (GRAS).

There is a concern within FDA as well. Leo Friedman, acting director of the agency's toxicology division, said: "It is becoming increasingly clear that untoward effects in people, stemming from food additives, are exceedingly difficult to recognize or even establish with any degree of certainty once suspicion has been aroused."

He feels that "every effort should be made to re-examine and update the safety evaluation of all such compounds at regular intervals."

A two-year investigation of FDA sponsored by consumer advocate Ralph Nader concluded that the agency "should face up publicly to what it knows privately about food additive regulations—that the program is a mess. The consumer might be more wary, and therefore better off, if there was no program of food standards designed to protect him."

Chemicals may get into foods in several ways:

Deliberately added as flavorings, preservatives, enhancers and so on.

Inadvertently introduced into food in manufacturing (from packages or machines, for example) or through natural processes such as formation of toxin-producing substances in mold.

From animals treated with veterinary drugs before being slaughterd.

The use of chemicals as food additives has increased by more than 50% in the past 10 years, according to FDA, which cautions that "many of these chemicals are known to be toxic in large quantities."

Last year FDA received 476 new applications for food additives. 62 were approved and 148 rejected.

Part of the consumer's problem in identifying what has been deliberately added to his food is FDA's requirement that technical, not common names be used. Thus water is hydrogen oxide and table salt is sodium cloride on some labels.

Using common names and issuing a dictionary of additives are two of the remedies proposed by consumer interests.

Many additives are not even listed on food labels. Neither, for that matter, are the ingredients of many products. These are all items that FDA accepts as standardized, such as mayonnaise, margarine, vinegar, ice cream, cocoa and macaroni. Even some nonstandardized foods are exempted from identifying spices, coloring, additives and other ingredients.

This can be dangerous for persons with allergies, diabetes and other problems who want to avoid certain ingredients such as eggs, sugar and milk. About 20 million Americans are in this category.

Nearly all standards were set at the request of the producers. When a standard of identity is agreed on, all products of that type must comply with the standard on ingredients. Use of some optional items is often allowed, but basic ingredients tend to be strictly controlled.

Nonstandardized foods must list ingredients in descending order of weight in the product, but there is no requirement that relative amounts be noted.

Pet foods tend to be more informatively labeled than human foods. This can be seen in a comparison of two cans of stew. The one for human consumption lists the ingredients, but not by percentages. The pet food label includes ingredients plus a percentage analysis by nutrient so the dog owner can get the best protein buy for his pet.

The human consumer, by reading food labels, has no idea how much beef in in his beef stroganoff, peanuts in peanut butter, orange juice in orange drink, strawberries in strawberry jam, meat in hot dogs or chicken in chicken soup.

Copies of standards for specific products are available to consumers who send a request to the FDA, Washington, D.C. Alert shoppers have learned that the difference between two or more brands or a standardized product is primarily price, and thus they are able to save money.

Industry strenuously fights efforts for full disclosure of ingredients, contending that this would require them to give secret recipes to competitors. Consumerists, however, contend that they would not be disclosing recipes or production methods, but would merely be telling customers what they are eating and how much of it.

"The various FDA food standards and exemptions now in force read like a catalogue of favors to special industrial interests," said the Nader study.

It called the GRAS list "a tool for a suppression of consumer information, allowing dozens of ingredients unknown to customers to be used in food."

The GRAS concept should be abolished, it added, and in the meantime the number of items should be drastically reduced, removing each chemical about which there is even a single doubt.

FDA Commisioner Charles C. Edwards said the review of the GRAS list requested by President Nixon is being done "within the concept of an over-all look at the safety of our food supply." He expects to be halfway through the list by next summer.

The study, Edwards said, will apply "1970 scientific knowledge to safety judgments which in fact were last made 15 to 20 years ago."

The FDA is responsible for evaluating all chemicals proposed as food additives and to establish a tolerance level for each. But it was allowed to exempt more than 600 chemicals from clearance requirements "because they were considered safe by experts" and put on the GRAS list, according to the agency.

Cyclamates were one of those "safe" chemicals. The artificial sweetener was banned last year as a possible cause of cancer. Another, still on the list, is mono-sodium glutamate (MSG), the flavor enhancer.

Recent studies indicate that MSG "is potentially hazardous," FDA, reports, but "available information is insufficient to justify action." Research is continuing.

Cyclamates were banned last fall under the Delaney amendment to the FDA law, which requires removal of any additive causing cancer in test animals.

Critics have asailed the law from both sides.

Some, like Edwards, feel it is too rigid and leaves no room for administrative or scientific discretion. They argue that even salt and sugar could be harmful in excessive amounts. This has not been proven, however.

The Nixon administration reportedly is planning to ask Congress to repeal the Delaney amendment.

Others like Nader say the law is not strong enough. They oppose giving political appointees such discretionary powers. They also want the measure to cover additives which may cause genetic damage and birth defects.

"In view of the possibility that other additives may be as dangerous as the cyclamates," says the agency, "it now appears essential that FDA and the food-additive industry jointly reevaluate over the next three years all of the known GRAS additives, other additives that have been unilaterally classified by the industry as GRAS, and some approved additives for which tolerances now in existence may have to be changed."

The Plain Dealer has learned that Nader may not be willing to wait three years and is considering filing suit in federal court to have the GRAS abolished.

In the use of many additives, Nader says, the agency "has permitted a sell-now, test-later posture by the companies, FDA has admitted that it has heavily relied on summary assurances by food companies about additives and has not checked in detail the raw test data."

Consumer interest want the government not to rely on industry labs but to do as much of the testing as possible and to supervise more closely testing it cannot do itself.

The additive problem can be seen well in five examples:

MSG, salt and sugar were added to baby food, with FDA permission, for no other purpose than to make the food palatable to mothers. Despite scientific evidence showing that MSG caused brain damage in mice and the urging of its removal by Dr. Mayer, FDA resisted taking action.

The baby food producers themselves finally removed the ingredient voluntarily in the wake of unfavorable publicity. But the FDA still has taken no further action of MSG or on any other unnecessary ingredients in baby food.

The presence of MSG must be listed on all products except mayonnaise. French dressing and salad dressing. Its function is to enhance flavor.

Red 4 is an artificial food coloring described by the World Health Organization as dangerous to humans. When the FDA considered declaring it unsafe, the producers of maraschino cherries argued that nobody eats enough of their products to do any harm. The FDA bowed to pressure and excluded Red 4 from all foods except maraschino cherries. No health warning is required on the label.

Cyclamates, the artificial sweetners, were first linked to cancer in FDA's own labs about 20 years before the agency slapped a ban on them.

Caffeine is added to cola and Dr. Pepper soft drinks, but the makers of those beverages won FDA permission to keep that information off their labels by having them declared standard ingredients. All other soft drinks containing caffeine, however, must reveal that fact on their labels. FDA scientists and officials opposed the exemption but bowed under pressure from the White House, a U.S. Senator and the industry.

The senator was Richard Russell, D-Ga., who called FDA to express "interest" in the matter, according to former Associate Commissioner Kenneth Kirk in an interview with Life magazine. The world's largest cola producer is one of Russell's constituents, Atlanta-based Coca-Cola.

Some approved food colorings in baked goods have been found to decompose during baking or to react with vitamins in food to form compounds whose effects are unknown.

The FDA reports that about 10 million Americans get some form of food poisoning every year.

Although development of new foods and new technology have ended some forms of contamination, these same "improvements" bring an increased threat to health.

"Technology has also contributed to the proliferation of products about which relatively little is known and has actually increased the potential for widespread food-borne epidemics to occur," FDA reports.

"At the same time," it continues, "changes in food processing methods have tended to disguise some common indicators of contamination, such as decomposition, noxious gases and discoloration, that used to alert consumers that food might be unsafe."

But safety is not the only consideration, according to Edwards. Effectiveness and quality of food also must be considered.

"If I am reading consumer complaints correctly, among other things, they are saying that at least for some foods, there must be a positive gain or benefit in the food or, in the case of food additives, there must be a positive reason for its use," he said.

Toward this end, he added, FDA plans to establish nutritional guidelines for selected classes of foods.

These would not be formal standards of nutritional quality, he explained, but informal guidelines for industry to follow voluntarily.

This would involve agency-industry collaboration on deciding how nutritional quality should be explained on food labels.

"We would then expect that commercial pressures would cause processors to use the guidelines in formulating and designing their products," Edwards said. "If they do so extensively, there will be no reason to consider a mandatory mechanism."

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16. Letter from Giant Food, Inc. to Senator Edward M. Kennedy

GIANT FOOD, INC.,
Washington, D.C., May 7, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: I was delighted to receive your very kind letter commending our company for its cooperation with the "LABEL" students from George Washington University Law School. We are also pleased that you like the other consumer programs we have been introducing during the past several months.

In our view, organizations such as LABEL which seek to change inequities in our system by working constructively within it have a right to expect the full support of the business community. Positive voluntary responses by business to sincere moves by young people can go a long way toward breaching the gulf which today separates our generations. You can be assured that we shall actively pursue this kind of joint effort in the future.

I shall be pleased to comment upon LABEL's testimony, as you requested.

First, you ought to know that Giant is not a party to the LABEL petition to FDA. Our company was approached by LABEL and asked if we

could voluntarily explore the possibility of listing the ingredients on some representative products covered by Standards of Identity to prove that such disclosure does not work an undue hardship on the food industry.

We studied the possibilities carefully and determined that there was no reason why we could not list such information. Such disclosure is in line with "The Right to be Informed" in Giant's Consumer Bill of Rights. Furthermore, it is in the best interests of those of our customers who might have dietary problems with some unlisted ingredients, such as eggs and caffeine, for example.

Consequently, Giant agreed to voluntarily list the ingredients in our private label cola drinks and in our private label mayonnaise products as a first step. Other private label products covered by Standards of Identity will be added when feasible.

We agree with the students that standards of identity which were promulgated to protect consumers during the New Deal may no longer be adequately serving the public interest in 1971, due to the explosion of additives, chemicals and other ingredients about which not everything is known. We believe, however, that it is possible to accomplish such constructive changes which are in the consumer interest through the competitive functioning of the marketplace. We think consumerism is good business, and we see evidence that other companies are getting the message too.

Now that Giant has pointed the way, I would hope that we could find it possible to give the food industry an opportunity to follow our example and voluntarily disclose ingredients covered by standards of identity. I think this would bring us the desired results without resort to government intervention. After a reasonable time, however, if industry does not avail itself of the chance to move voluntarily, the legislative approach could be viewed as reasonable and necessary.

In any event, Giant Food is committed to a program of full disclosure of ingredients covered by standards of identity. Furthermore, we encourage our colleagues in the food industry to join us in similar moves to protect the consumer's "Right to be Informed." I do not doubt that our industry will rise to the challenge.

Thank you once again for honoring us with your very kind letter. We shall do our best to live up to it. And thank you for the great work you are doing on behalf of our country and its people.

Please call on me if I can ever be of assistance in any way.

Sincerely yours,

JOSEPH B. DANZANSKY.

(Note: Letter from F.D.A. to Senator Kennedy, reprinted *supra* with materials relating to F.A.T.S., also relates to the L.A.B.E.L. petition.)

Mr. BANZHAF. The next group which is coming up goes under the acronym of SHOCK, which stands for "Students Hot on Conserving Kilowatts." I have asked them to appear this morning before you for a number of reasons. I think their project is, of course, very topical, what with recent blackouts, brownouts and increasing threats of the same as we go into the long hot summer.

They also have filed a petition which I think has a great deal of merit, and they have also had no response yet from the agency.

Even more important, it is very clear that the problem of power, power generation, reliability of electrical utilities, cost of supplying power etc. is a national problem. Yet, they filed their petition only with the regulatory body in the District of Columbia. We believe it has substantial merit and would hope that not only can we persuade the District of Columbia regulatory body to go along with it, but that it might serve as a model for additional regulatory bodies, both at the state level, and perhaps even more importantly, at the Federal level, where this problem really must, in the long run, be dealt with.

Seated on my right is David Permer, and Mark Steinberg, Susan Hentel, and Melvin Lefkowitz are with us. Adelaide Miller could not be here. She had another court appointment.

STATEMENT OF DAVID PERMER, CHAIRMAN, STUDENTS HOT ON CONSERVING KILOWATTS (SHOCK); ACCOMPANIED BY SUSAN HENTEL, MELVIN LEFKOWITZ, AND MARK STEINBERG

Mr. PERMER. Senator, can you even begin to imagine the impact an electrical blackout would have on Washington, D.C., the Nation's Capitol and nerve center? Even with provisions for emergency power in critical areas, the disruption on vital Government centers, not to mention the general public, would be overwhelming. Nevertheless, a combination of unchecked greed and very poor planning by PEPCO has made a power shortage this summer a near certainty.

Despite PEPCO's assurances to the contrary, prospects for this summer in Washington are dim. Peak electrical demand is expected to be 3,500 megawatts. PEPCO's generating capacity is listed at 4,100 megawatts, but this listing is deceptive. It assumes that PEPCO's Morgantown No. 2 plant with a capacity of 558 megawatts will be completed. However, since Morgantown No. 1 an identical plant which was supposed to be ready last summer, is still not operational, it is doubtful that its twin will be on schedule. As for the Morgantown No. 1 plant—it broke down last fall after only 3 weeks of operation. PEPCO has only recently announced what went wrong at the plant and lamely promises that it will be ready for the summer. In addition PEPCO's Dickerson generating plant, which has a capacity of 183 megawatts, also broke down this January. PEPCO admits that this one will not be in operation until late summer.

Senator KENNEDY. What did they break down from?

Mr. PERMER. Well, there are different problems with different plants. The big problems are the two Morgantown generators, which are 500 megawatt, and these appear to be design defects. As a matter of fact, PEPCO's president in the Sunday paper just announced that it was a matter of the turbine blades were too closely aligned, so this was primarily GE's fault. However, as I say, these two plants have never been in operation, and if they are going to be in operation for this summer it is going to be a very serious problem.

This sort of problem is not unusual in the electric utility industry, as they have been going to bigger and bigger generators and they have been finding design problems that they did not have with the smaller ones. I seriously doubt whether GE actually has found the solution to their design problems. They may have but, well, we will have to wait for a couple of months to find out.

Mr. BANZHAF. The hard way.

Mr. PERMER. Yes. With the other generators, these seem to be more of a mechanical, old generators breaking down, the type of thing that can be repaired with time.

In short, PEPCO may be over 750 megawatts—200—short of ex-

pected demands this summer, and expected demands have a way of being exceeded. Last September, after summer had passed, PEPCO was forced to reduce voltage and blackout selected areas. Again, in early February of this year, during what is supposed to be an off-peak period with no energy-consuming air conditioners operating, PEPCO had to drastically cut voltage just to meet demands.

Nor is this a short-term phenomenon. There is no reason to believe that similar crises will not occur next year and the year after that and so on into the future. Demand for electric power is increasing geometrically, while the power supply increases at an arithmetic pace. Is a future of consumers choking from air pollution and rationed electricity a necessity?

While investigating this power crisis, SHOCK discovered that much of the rapidly rising demand for electric power is created not by a growing population or expanding economy but by the deliberate efforts of the electric utilities who are busy promoting an additional consumption which they cannot supply. Per capita consumption of electricity is growing five times faster than the population. Last year, during an economic recession with little economic pressure for expansion, the need for electric power continued to grow at a rate of 7 percent. The electric power industry is able to create this growth rate through advertising, promotion, and a discount rate structure. In 1969, in the midst of a power crisis, PEPCO spent almost $3 million dollars on advertising and promotion—which incidentally is more than three times as much as they spend on all research and development including improving the reliability of power generation and limiting the adverse environmental impact.

Senator KENNEDY. Why do they do that? Why not just keep the $3 million and distribute it as dividends?

Mr. PERMER. Well, there are at least seven good reasons I know of why it is to their advantage to continue to advertise. In the first place, as you know, they get their revenues through the regulatory process where they determine what the rate base is, and then they multiply this in terms of the rate of return. So, the way a public utility increases its revenue is by increasing the rate base. In other words, they would have to build more plants all the time whether they need them or not, and so naturally, they are going to be stimulating demand.

In addition, if they go out and advertise, if the advertising is not effective, if it does not, in fact, result in the selling of more power, this does not decrease their profits, because advertising is an expense which is charged directly to the consumer. So, in other words, they do not even care whether it is effective, they do not have anything to lose.

Those I think are the primary reasons. A third I might want to mention is the fact that in a lot of respects the public utility is very much like the Federal Government, it justifies its existence only by continuing to grow, and when you talk about an individual within the bureaucracy, he can justify his pay raise by increasing the size of his staff underneath him and the things that he manages. So, they just continue to grow as fast as they possibly can whether there is any demand for it or not.

In addition to its advertising, PEPCO actively encourages and promotes increased consumption through its rate schedule, giving discounts of almost 80 percent for increased consumption. Thus in residential areas, although the initial cost per kilowatt-hour is 5 cents, those over 800 pay 1.2 cents. It is highly doubtful that this staggered rate structure is based solely on cost savings, and appears to be still another device for persuading people to increase consumption.

Recognizing the magnitude of the current power crisis and how PEPCO's policies contribute to it, SHOCK filed with the District of Columbia Public Service Commission a complaint and petition asking PEPCO to:

(1) Bar all advertising and promotional expenditures during the power crisis;

(2) Revise PEPCO's rate structure to remove the promotional aspects;

(3) Order PEPCO to spend at least 2 percent of revenues on research and development.

In response, PEPCO filed an answer denying our right as consumers to even bring such an action, and the Commission's authority to grant relief. To date the Commission has taken no action. It is our hope that the Commission will hold public hearings in the very near future so that action can be taken to avert a blackout.

In the past this Public Service Commission, as well as all others, has abdicated all control over growth rates of the electric utilities. The utilities have thus been free to adopt policies to maximize their growth rates. Previously this may have been in the consumers' interest but today it clearly is not. It is nothing short of lunacy to promote additional consumption when it is clear that present needs cannot safely and reliably be met, and when even present needs are resulting in unacceptable levels of air and water pollution. Perhaps the best method to adopt would be to have regulatory commissions establish an optimum growth rate through their normal regulatory process and to require the utility to tailor its practices to achieve that growth rate.

SHOCK filed its petition because it was concerned about the electrical power crisis and because it felt that its ideas and proposals would assist the Commission and serve the public interest. It was also our hope that the action of Washington's Public Service Commission might serve as a model for others around the country, since this is clearly a national phenomenon and requires a national solution. To date we have been denied even a hearing, and the long hot summer and unprecedented demands draws near.

Senator KENNEDY. Have you looked at any of the other areas of the country in terms of what might happen this summer, or has your study just been limited to the area served by PEPCO?

Mr. PERMER. PEPCO and the Washington area. Of course, I understand through the press and through more than normal interest that the New York area, Con Edison, is in just about the same boat. There is every reason to expect that Con Edison is going to have just as much problem as Washington.

As far as other areas, I am not really sure. I would imagine that Boston would be in a relatively tight situation also.

Senator KENNEDY. Do you really think that advertising really has much of an effect in terms of increased consumption? Is not increased consumption the result of increased air conditioning and other kinds of demands which now are associated with increased standards of living?

Mr. PERMER. Well, we have heard a lot of testimony here already about the effects of advertising from some of the other groups, and they have come up with some substantial evidence that advertising does, in effect, convince the public of whatever it is attempting to convince the public to do. I think a good answer to that question is that if it is not effective, then why do the utilities continue to do it. So, I am sure it has some effect, particularly when—well, I have seen several quotes from the Federal Power Commission attributing, as you know, they recently came out with their new revised figures for electrical power consumption in 1980 and 1990, and they attributed the growth in these productions from the past years to active promotion and advertising by the private utilities. So, at least the Federal Power Commission believes that advertising is effective for this purpose. It certainly has some effect. The only question is how much.

I think the rate structure is by far more significant an aspect. I think every indication is that with modifications in the rate structures demands could be reduced considerably and would, I'm sure, be the solution to the problem.

Senator KENNEDY. Well, how does the revision of the rate structure affect consumption? Does industry have an alternative to electricity?

Mr. PERMER. In some cases they do. Of course, it depends on who you are talking about. Yes; there is a very real possibility that a large enough industry could produce its own power. They could go to alternative energy sources. They just might decide that they do not need as much power as they are using. Power is so cheap now that people just burn it unnecessarily.

Most industries' electricity, their electricity expense is so small that when they talk about reducing expenses they just never consider reducing their use of electricity.

Senator KENNEDY. What about the homeowner? How does it affect him?

Mr. PERMER. Well, of course, much of the growth and demand in the future is expected to come from the consumption in all electric homes, where utilities are trying to use electricity for all purposes within the home. Certainly, and this change in the rate structure would result in the fact that the people that have all of the electric homes would pay a much higher bill, and it might even double their bill, but for the large majority of the people, for the people in the middle and the lower income brackets, who do not use electricity for central air conditioning and heating, this would result in a savings for them. It is really a question of putting the costs where they should be, putting the cost on the consumer that is causing the damage from the environmental pollution.

Senator KENNEDY. Would you review that just again, in changing the rate structure? How that would actually work?

Mr. PERMER. For the private homeowner?

Senator KENNEDY. Yes.

Mr. PERMER. Right. Now, as I cited in my statement, initially a consumer pays only 5 cents or pays 5 cents per kilowatt-hour. If he uses, let us say, the first 20 or 30 kilowatts it is 5 cents per kilowatt-hour. However, if he uses over 800 kilowatt-hours per month he pays 1.2 cents, and what we are saying is you want to even that out so that he would not be encouraged, you know, to buy two and get the third one free.

So, what we would do is we would charge probably 3 cents per kilowatt hour for everyone, no matter how much you use, and for the person that consumes only 100 kilowatt-hours a month, or 400 or 500 kilowatt-hours a month, this would probably be a reduction; but for someone who uses 800 or 1,000 kilowatt-hours a month, a large homeowner we are primarily talking about, the upper middle class, he would pay an increased bill.

Mr. BANZHAF. What we are thinking of is obviously the future. We are talking about the man now who is building a house, or who has a house which is heated by gas and is thinking of converting to electricity, and at the present moment it might be quite advantageous to go over and go to an all electric house. But, if he knew he would have to pay the same rate for every additional kilowatt-hour he is now paying, he might decide that he would rather stick with gas, and for the most part we do not know of too many blackouts with gas.

Senator KENNEDY. Why not reverse the rate structure and make it cheaper for the first amount bought and more expensive for the increases?

Mr. PERMER. I think that would probably be a good idea. It is difficult to say what the effect of these proposals we have would be on the growth rate, and there obviously what you have got to do is manipulate. I do not think there is any question that these changes are going to be made. It's a question of how soon, and we propose a neutral rate structure now. If that does not decrease demand eventually, certainly, the regressive rate structure would be the thing to do. It is what we want the utilities to do, and I think ultimately we are going to have to come to this. Someone is going to have to set a electric power growth rate for this country, that we are only going to grow at a growth rate of say 5 percent, and then each utility is going to have to adopt policies that will bring it within that growth rate; and for one utility they might not have to use a neutral structure, and another utility might have to charge three times as much for a big user as it does for a small user in order to decrease the usage of it.

But, it is coming to the point where the electric power industry is growing so rapidly that we are not, just not going to have any other choice.

Senator KENNEDY. Have any other State regulatory agencies adopted any of these recommendations?

Mr. PERMER. A couple of them are considering bans on promotional activities. I understand Vermont came very close to promulgating that rule, but then it was called back and it is sort of in limbo now. The primary effort in this area has come as a result of

gas and electricity competition where the gas manufacturers have gone in and attempted to stop the electric utilities from promoting their products, and it has been largely a matter of antitrust action. As far as I know no commission has ever considered limiting the demand for the purposes of protecting the environment, and it is just a matter that we just do not have enough power left.

Senator KENNEDY. You are satisfied that they have got the power to make these adjustments or changes?

Mr. PERMER. Well, if they do not they are going to have to get it. In the case of the District of Columbia Public Service Commission, they have a duty to provide reliable and safe service. These power shortages certainly indicate that PEPCO has very unreliable service, and also they are more unwilling to admit that they do have this power.

Other commissions presently indicate that they do not have it, but I think that the trend is that they are going to assume control over these areas.

Senator KENNEDY. Thank you.

(Material relating to SHOCK follows:)

F. EXHIBITS RELATING TO TESTIMONY OF SHOCK (Students Hot On Conserving Kilowatts)

1. SHOCK Complaint and Petition Filed with Public Service Commission of the District of Columbia.
2. Answer of Potomac Electric Power Company.
3. Further Motion of SHOCK.
4. Article Describing Action Taken by Another Power Company.
5. Letter from D.C. Public Service Commission Chairman to Senator Edward M. Kennedy.
6. Letter from D.C. Public Service Commission Chairman to Senator Edward M. Kennedy.

1. SHOCK Complaint and Petition Filed With Public Service Commission of the District of Columbia

COMPLAINT AGAINST CERTAIN POLICIES AND PRACTICES OF PEPCO AND A PETITION FOR SUCH RULINGS AS WOULD CORRECT THE HARM CAUSED BY THE AFOREMENTIONED POLICIES AND PRACTICES

SUMMARY OF COMPLAINT AND PETITION

Petitioners, a group of George Washington Law School students, known as SHOCK, charge that PEPCO has been negligent in discharging its duty to provide facilities which are safe and adequate. Through its advertising activities and rate structure, PEPCO has made a power shortage on the Washington area during the coming summer a near certainty. Moreover, PEPCO has failed to provide the Research and Development funds necessary to prevent the environmental damage its increasing generator capacity will cause. SHOCK therefore asks the District of Columbia Public Service Commission to, 1) bar all advertising and promotional activity of PEPCO, 2) revise PEPCO's rate structure to remove promotional aspects, and 3) order PEPCO to spend more on Research and Development.

I. *Jurisdiction*

Pursuant to the District of Columbia Public Utilities Act, Title 43 of the District of Columbia Code, we hereby file a complaint against certain policies and practices of the Potomac Electric Power Company, hereafter referred to as PEPCO, which is a public utility subject to the supervision of the District of Columbia Public Service Commission; and we hereby petition for such ruling as would correct the harm caused by the aforementioned policies and practices of PEPCO.

II. *Standing*

Complainants and petitioners are members of an informal and unincorporated association entitled Students Hot on Conserving Kilowatts, hereafter referred to as SHOCK, formed with the single purpose of investigating public utilities' policies and practices which effect power shortages and filing this complaint and petition. Membership consists of five law students at the National Law Center, George Washington University, whose names and addresses are as follows: Susan Hentel, 1 Third Street, N.E., Washington, D.C.; Melvin Lefkowitz, 402 "E" Street, S.E., Washington, D.C.; Adelaide Miller, 905 25th Street, N.W., Washington, D.C.; David H. Permar, 2007 Quebec Street, Adelphi, Maryland; Mark A. Steinberg, 7777 Maple Avenue, Takoma Park, Maryland. All complainants are recipients of electricity from PEPCO and either pay for such service directly to said company or pay through a monthly rental charge.

III. *Statement of Facts*

A. The demand for electric power in PEPCO's service area has been increasing at a rate greater than expected. The average residential consumer of PEPCO increased his demand in a four-year period, 1965–1969, from 5,200 kilowatt hours to 7,079 kilowatt hours or 41%. Even more indicative of the increase in consumer demand is the increase in peak load from its high of 1,874,000 kilowatt hours in 1965 to 2,759,000 kilowatt hours in 1969. These figures are for net 60-minute peaks and reflect growth of 47% in four years.[1] PEPCO's own predictions, which have been understated in the past, are startling for the coming decade. PEPCO predicts that net system peak demand will rise from 3,150 megawatts (1970) to 8,500 megawatts (1979), an increase of 170%.[2]

B. In order to meet this growth in demand, PEPCO is relying on the construction of new generating plants. There are several cogent reasons for expecting delay in the completion of these plants. Minimum lead time in the delivery of major conventional steam-generating equipment has grown from three to four years.[3] Labor problems involving shortages of skilled labor, poor productivity, and innumerable work stoppages are increasing.[4] Public demand for greater control of air and thermal pollution, as well as siting the land use, is increasing.[5] Thus, PEPCO must expect greater difficulty in obtaining licenses for the construction of these plants.

The November 29, 1970 shutdown of PEPCO's Morgantown #1 plant is highly indicative of the problems in this area. As of December 9, 1970, neither PEPCO nor Westinghouse Electric, the manufacturer of the generator, could give an explanation for the malfunction. PEPCO expects the unit which produces 556 megawatts (about 15% of the system's power supply) to be back in operation for the peak period during the summer of 1971. However, C. S. Weber, Westinghouse Electric regional vice president was quoted as saying it could take anywhere from five to ten months to repair this "very serious failure."[6] PEPCO's Morgantown #2 plant is scheduled for operation by June 1971. If it is unavailable during the 1971 summer peak, PEPCO will be 200 megawatts short of its need capacity according to its own figures.[7] This prediction is based upon Morgantown #1 operating at full capacity. If both are unavailable a real crisis will exist. For 1973, PEPCO is planning on purchasing 275 megawatts from Baltimore Gas and Electric's Calvert Cliffs plant. This plant has not yet been granted a certificate of convenience and necessity, and is receiving opposition from environmental groups.[8] If the Calvert Cliffs plant is not operational during the 1973 summer peak, PEPCO will have a reserve of only 1.3%.[9]

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[1] PEPCO Annual Report to Stockholders, 1969, p. 19.

[2] Letter from PEPCO to Maryland Public Service Commission, dated December 29, 1969.

[3] Donald C. Cook, "Capabilities of Electric Utilities to Fulfill Future Needs," *Public Utilities Fortnightly,* (July 16, 1970), p. 19.

[4] *Ibid.*

[5] *Ibid.*, p. 20.

[6] Washington Post, December 9, 1970, "Power Unit Fails at PEPCO" p. B1.

[7] Letter from PEPCO to Maryland Public Service Commission, dated December 29, 1969.

[8] Washington Post, December 8, 1970, "Calvert A-plant Assailed Over Radiation Levels" p. C1.

[9] Letter from PEPCO to Maryland Public Service Commission, dated December 29, 1969.

PEPCO's plans for 1974–1979 include an increase in capacity of 5,169 megawatts, a doubling of generating capacity.[10] Yet PEPCO's plans for construction and siting remain quite sketchy.

C. Even if PEPCO is successful in completing its building program on schedule, the limited reserve capability of the PJM system and the possibility of equipment breakdown makes the occurance of shortages and brownouts more likely in the future. The shortage of September 22, 1970, resulted from a failure of 30% of PJM's generating capacity.[11] This failure occurred primarily in the newer and bigger nuclear and non-nuclear plants, such as Oyster Creek and Keystone, which are similar to the Morgantown units and those PEPCO is planning to build in the 1970s.

Brownouts are harmful to the electric appliances used by PEPCO's consumers. Voltage reduction brought on by lack of available electrical capacity can damage the life of fluorescent lamps, cause a substantial temperature rise in induction motors, and result in shorter appliance life.[12] Thus, if a brownout or power outage occurs, it is the consumer, not PEPCO, who is penalized.

D. PEPCO's advertising and promotional activities increase demand for electricity. Indeed, increased demand is the raison d'etre of advertising and promotion. Therefore, to some extent the growth in demand referrd to in A above is created by advertising and promotion.

E. PEPCO's advertising and promotional expenses are a hidden tax on the consumer. Under the present rate-making system, advertising and promotional expenses are above the line operating expenses which are charged to the rate-payer in addition to PEPCO's profit. PEPCO has no incentive to insure the cost-effectiveness of its advertising since the expense does not affect its profits. On the other hand the consumers has no option to refuse to pay the tax. PEPCO has a state-created monopoly within its service area.

F. PEPCO's advertising and promotional activities designed to increase sales of electric heating also increase sales of electric air conditioning. Heating and air conditioning are commonly marketed in a unified system. Once a customer has become "sold" on electric heating despite its substantial disadvantages, he will undoubtedly also prefer electricity for air conditioning, where electricity is more effective. This confirms Joseph Fry's findings that customers prefer not just one product, but all similar products in brand line. Brand name, in other words, acts as a medium through which consumers generalize loyalties from one category of products to another.[13]

G. PEPCO's rate structure increases demand for electricity. It is promotional in nature, charging less per kilowatt hour as a customer increases his use. This pricing policy has an elastic effect (i.e., in the long run it will cause a greater increase in use than the percentage change in price.)[14]

H. An accelerated and expanded research and development program is needed to develop the technology necessary to meet future demands for electric power and to minimize the adverse environmental effects of electric power generation. According to the Atomic Energy Commission, 20 million tons of the total 142 million tons of annual air pollutants is contributed by power plants.[15] Areas in which research and development are most urgently needed are waste treatment and disposal, waste heat rejection, underground transmission systems, innovative siting concepts, siting considerations associated with new energy concepts, and natural environmental characteristics of a site.[16] The need for an expanded research and development program is fully evident in the area of product reliability. The recent Morgantown #1 breakdown indicates an inability by PEPCO to purchase generating equipment which is reliable and readily repairable.

I. PEPCO spends more than three times as much on advertising and promotional expenses than it spends on research and development. In 1969, PEPCO spent 1.5 million dollars on demonstrating and selling expenses and 1.2 million

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[10] *Ibid.*

[11] PJM Report on Operations for week ending September 25, 1970.

[12] Senator Lee Metcalf, Congressional Record, March 31, 1970.

[13] Joseph Fry, "Family Branding and Consumer Choice," *Journal of Marketing Research*, 1967, Vol. 4(3), pp. 237-247.

[14] *Electric Power and the Environment*, sponsored by the Energy Policy Staff, Office of Science and Technology, August 1970, p. 47.

[15] Selected Materials on Environmental Effects of Producing Electric Power, Joint Committee on Atomic Energy, U.S. Congress, (August 1969), p. 71.

[16] *Electric Power and the Environment, Op. Cit.*, p. 31.

dollars on advertising expenses, but only 0.7 million dollars on research and development.[17]

IV. *Position and Interests of SHOCK*

The petitioners are interested in insuring that the people of the District of Columbia have an adequate and reliable electric power supply without having to suffer injury and discomfort from air and therma lpollution, radioactive wastes, and electric generating plants and transmission lines. In many ways these two goals are conflicting and call for interest balancing on the part of the Commission and PEPCO. This the Commission and PEPCO have failed to do.

PEPCO's response to power shortages and increasing demand for electricity has been limited to building more and bigger power plants. PEPCO has failed to recognize or at least acknowledge that much of the increase demand for electricity is created not by increasing population or technology, but by PEPCO's own promotional activities and rate structure.

The yearly increase in demand for electricity in PEPCO's service area is now approximately 10%. There is serious doubt as to whether PEPCO can build fast enough to keep up with this growth rate without deterioration and disruption in its service. Even if it can, this growth will result in increased air and thermal pollution, greater danger from radioactive wastes, and more land being devoted to generating plants and transmission lines. There will be no commensurate decrease in cost or other benefit passed on to the rate-payer.

The petitioners believe that a demand growth rate of 5% a year is sufficient to meet the growing electric needs of the rate-payers and to provide for an increasing standard of living. Such a rate of demand growth is also adequate to provide PEPCO with a growing rate base and increased profits while reducing costs to the rate-payer.

PEPCO has at least two means of influencing demand growth rate: advertising and promotional activities and rate structure.[18] Petitioners therefore request a moratorium on all advertising and promotional activities of PEPCO designed to increase its number of customers or the amount of power used until PEPCO has a reserve generating capacity of 30% during summer peak loads, and until the yearly increase in demand growth falls below 5%. Petitioners also request a neutral rate structure in which the amount charged per kilowatt hour is not dependent on the number of kilowatt hours used.

Neither of these proposals will work to the disadvantage of PEPCO. PEPCO already has an assured market area with a steady growth rate which is protected by the Commission. PEPCO need not fear a loss in its position *vis-a-vis* Washington Gas Light Company since that company would gain nothing by advertising gas heat; it already has a commanding share of the market. On the other hand, if Washington Gas Light Company decides to engage in extensive advertising of gas air conditioning, this can only work to improve the summer-winter load balance.

Petitioners believe that the recent regulations promulgated by the Maryland Public Service Commission on December 7, 1970, are a step in the right direction but only a half way measure. The Maryland Commission action, while aiding the consumer, was basically done in the interest of the Washington Gas Light Company. The Maryland regulations still permit utilities to conduct their own advertising programs under their own name and provide appliances for exhibition and demonstration. These practices will still increase demand. This Commission has an opportunity to go beyond that of the Maryland Commission. It is the responsibility of this Commission to protect the consumer as well as competing utility companies. By banning all advertising and promotional activities the Commission will benefit the consumers and eliminate the practice the Maryland Commission found discriminating in competition.

Should the Commission fail to adopt our proposals, stated above, a secondary measure is proposed. The monies spent on advertising and promotional expenses should be taken out of the area of operating expenses. These funds

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[17] PEPCO Annual Report as filed with Maryland Public Service Commission, 1969.

[18] See Chapter VII, *Electric Power and the Environment*, sponsored by the Energy Policy Staff, Office of Science and Technology.

should be deducted directly from PEPCO's profits thus placing the cost of such activities on the stockholders and not on the public who are now paying for them in their per kilowatt hour rates.

Petitioners also request that PEPCO be ordered to devote 2% of its operating revenue to research and development to ameliorate adverse effects on the environment resulting from power production, and to develop more efficient means of power generation. Considering PEPCO's expected growth in the future and the problems that this growth will bring in comparison with PEPCO's relatively meager contribution to R & D in the past, this proposal is quite modest. We are only reiterating what has been previously suggested by the Energy Policy Staff: "We urge the regulatory commissions at the federal and state level to take positive action to assure that the utility industry can recover R & D expenses in its rates and *that utilities devote a reasonable portion of their large revenues to such expenditures*" [19] (emphasis added).

A. With respect to a moratorium on advertising and promotional activities, PEPCO is ". . . required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable." [20] According to the statement of facts in II above, PEPCO's service and facilities are not "safe and adequate." According to section 43–303, "the Commission shall have the power . . . to require and compel every public utility to comply with the provisions of [sec. 43–303]." A moratorium on advertising and promotional activities is a reasonable means of bringing PEPCO into compliance with the provisions of sec. 43–303.

If the Commission decides that it does not have the authority to directly order a moratorium on advertising, the Commission, under its rate-making authority in sec. 43–303, can disallow the inclusion of advertising and promotional expenses in operating expenses which are charged to the rate-payer.

B. With respect to the imposition of non-promotional rate structure, as suggested in A above, PEPCO has an affirmative duty to provide adequate service under sec. 43–301. Moreover, under sec. 43–411, "If upon investigation the rates . . . shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any provisions of [sec. 43–301], the Commission shall have power to . . . order to be substituted therefore such rates . . . as shall be just and reasonable". According to sec. 43–317, "no such [sliding scale of rates] shall be lawful until it shall be found by the Commission, after investigation, to be reasonable and just and not inconsistent with the purposes of the chapters 1–10 of this title." Under present conditions, a promotional rate structure is no longer consistent with the purposes of chapters 1–10 of title 43.

C. With respect to the devotion of 2% of operating revenue to R & D, sec. 43–208 requires that "whenever the Commission shall be of the opinion that repairs, improvements, or changes in . . . electric plant, . . . or that any addition of service or equipment ought reasonable be made thereto, . . . the Commission shall have the power to make and serve an order directing that such repairs, improvements, changes, or additions to service or equipment be made within a reasonable time and in a manner to be specified therein, and every such public utility is hereby required and directed to obey every such order of the Commission." Certainly the funding of R & D is comprehended within such a broad statement of the law.

VI. *Particular Relief Sought*

Petitioners pray that the District of Columbia Public Service Commission:

A. Place a moratorium on PEPCO's advertising and promotional activities designed to increase its number of customers or the amount of power used until:

1. PEPCO has a reserve generating capacity of 30% during summer peak loads, and
2. PEPCO has a yearly demand growth rate of less than 5%.

B. Establish a non-promotional rate structure in which the price charged per kilowatt hour is not dependent on the number of kilowatt hours used.

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[19] *Electric Power and the Environment, Op. Cit.*, p. 44.

[20] District of Columbia Public Utilities Act, District of Columbia Code, Article 43, Section 301.

C. Order PEPCO to devote 2% of its operating revenue to research and development.

D. As an alternative to A. take the cost of advertising and promotional activities out of operating expenses.

Respectfully submitted by the members of SHOCK.

SUSAN HENTEL.
MELVIN LEFKOWITZ.
ADELAIDE MILLER.
DAVID H. PERMAR.
MARK A. STEINBERG.

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2. Answer of Potomac Electric Power Co.

Before the Public Service Commission of the District of Columbia

In the Matter of the "Complaint Against Certain Policies and Practices Of Pepco And a Petition For Such Rulings As Would Correct The Harm Caused By The Aforementioned Policies And Practices" filed with the Public Service Commission of the District of Columbia on January 8, 1971.

ANSWER OF POTOMAC ELECTRIC POWER CO.

Potomac Electric Power Company ("Pepco"), a District of Columbia and Virginia corporation having its principal place of business at 929 E Street, N. W., Washington, D. C., and an electrical corporation as defined in §43–115, District of Columbia Code (1967 Edition), answers the above-referred to complaint and petition (the "Complaint") as follows:

1. Complainants Melvin Lefkowitz, David H. Permar and Mark A. Steinberg are not District of Columbia customers of Pepco and hence are not persons who have standing to compain to the Public Service Commision of the District of Columbia (the "Commission") with respect to Pepco's rates and rate structure, with respect to its advertising and promotional activities or with respect to its research and development expenditures. Accordingly, the Complaint by those complainants should be dismissed.

2. As individual residential customers of Pepco, the remaining complainants (Susan Hentel and Adelaide Miller) have an insufficient interest to warrant the institution by the Commission of a proceeding to enquire into the broad, generalized, conclusionary statements and charges set forth in the Complaint. Accordingly, the Complaint by those complainants should be dismissed.

3. Under Title 43 of the District of Columbia Code (1967 Edition), the Commission, as a matter of law, lacks power and authority (i) to forbid Pepco to engage in promotional activities designed to improve its annual load factor or to disallow the cost thereof as an operating expense, (ii) to require Pepco's rate structure to be one in which the price charged per kilowatt-hour is not related to the number of kilowatt-hours used, and (iii) to require Pepco to devote a specified percentage of its operating revenue to research and development. Thus the Commission lacks power to grant the relief sought by the complainants and the Complaint should, therefore, be dismissed.

4. Without attempting to answer specifically all the allegations and arguments made in part III of the Complaint, Pepco answers certain of them as follows:

A. Pepco denies that "The demand for electric power in PEPCO's service area has been increasing at a rate greater than expected" (Complaint p. 2).

B. Pepco admits that "In order to meet this growth in demand, [it] is relying on the construction of new generating plants", but denies that "there are . . . reasons for expecting delay in the completion of these plants" (Complaint p. 2) beyond their planned dates.

Further, Pepco denies that the shutdown of Morgantown unit No. 1 "is highly indicative" of any other problems (Complaint p. 3). The failure of that unit was peculiar to the unit and is not symptomatic of any general situation.

C. Pepco denies that "Even if [it] is successful in completing its building program on schedule, the limited reserve capability of the PJM system and the possibility of equipment breakdown makes the occurrence [sic] of shortages and brownouts more likely in the future" (Complaint p. 4).

If by the word "brownouts" the Complaint means voltage reductions, Pepco denies that those which it has placed in effect in the past were harmful to the electric appliances used by Pepco's customers.

D. Pepco admits that its advertising and promotional activities increase demand for electricity, but asserts that, more importantly, such activities improve Pepco's annual load factor, which operates to the benefit of all of Pepco's customers. Further, Pepco asserts tnat improved annual load factor, rather than increased demand, "is the raison d'etre of [its] advertising and promotion" (Complaint pp. 4 & 5).

E. Pepco denies that its "advertising and promotional expenses are a hidden tax on the consumer" (Complaint p. 5). Rather, they are a necessary and proper part of its operating expenses and are required by law to be treated as such. Further, Pepco denies that it "has no incentive to insure the cost-effectiveness of its advertising" (Complaint p. 5).

F. Pepco admits that its advertising and promotional activities designed to increase sales of electric space heating may also incidentally increase sales of electric air-conditioning. However, Pepco asserts that without such activities its annual load factor would more rapidly deteriorate, since electric air-conditioning appliances are, and will continue to be, in great public demand and are, and will continue to be, extensively advertised and promoted by persons other than Pepco. If Pepco's electric space heating promotional efforts were curtailed or discontinued, thus hampering the development of its winter load, it would nevertheless continue to have imposed on its system constantly growing air-conditioning usage demands, so that the disparity between its summer and winter loads would grow at an accelerated pace, to the economic disadvantage of the people of the District of Columbia.

G. Pepco denies that its rate structure is promotional in nature. Rather its character is derived from the fact that it is based on the cost to Pepco of supplying the service. The overall cost of Pepco's service to its customers is made up of both fixed and variable elements, and as the kilowatt-hour usage of any particular customer increases the fixed costs of his service, which are non-volume related, are distributed over an increasing number of kilowatt-hours, so that the cost to Pepco of each kilowatt-hour supplied becomes less. Further, it is generally true that the load factor of the larger consumer is higher than that of the smaller consumer, so that the cost to the Company of the kilowatt-hours furnished to the large consumer is less, per unit, than that of those furnished to the small consumer. Accordingly, under Pepco's existing rate structure, as usage increases the cost to the customer per unit (kilowatt-hour) decreases.

H. The electric utility industry is a user-oriented industry of which the principal objective, at any given time, is to furnish the best possible service at the lowest possible cost. Thus, traditionally, the consumer has not been required, or even expected, to finance, in the rates which he pays for service, large-scale research and development activities conducted by the utilities looking toward future improvements in the equipment used to supply the service. Rather, those activities have been conducted by the manufacturers of the equipment and paid for by the utilities in the prices which they pay for the equipment needed by them to supply their customers. Thus the costs of that research and development (performed by the equipment suppliers) have been capitalized as part of the utilities' rate bases. If an electric utility, such as Pepco, were to embark on research and development work "in the area of product reliability", as suggested by the Complaint (p. 6) with respect to the Morgantown unit #1 failure, it would, to that extent, be diverted from its principal responsibility of providing the best possible electric service at the lowest possible cost. For an electric utility to have facilities, and personnel, adequate to engage in fruitful research and development work with respect to the design and construction of turbine-generators, for example, would require it either to sacrifice the quality level of the service which it supplies to its customers or to add substantially to the cost of such service — either of which would mean that the present customer would be financing work which, if it produced the desired results, would be for the benefit of future customers and for which they would not be required to pay.

To ask that Pepco devote 2% of its operating revenue to research and development (as the Complaint does in the last paragraph of part IV) is to ask that each customer of Pepco contribute an additional amount, equal

to 2% of his monthly electric bill, to research and development for the benefit of future electric consumers. This, truly, would be a "hidden tax on the consumer" such as is referred to in paragraph E of part III of the Complaint.

5. Basically, Pepco's promotional activities, as pointed out above, are all aimed at improving its annual load factor and thus reducing the cost of its service to its customers. Contrary to what is suggested in the fourth paragraph of part IV of the Complaint, Pepco does not gain "increased profits" as a result of "a growing rate base" (Complaint p. 8). Instead, its rate base grows because it must supply its customers' ever-growing demands for service, and as that rate base grows Pepco must increase its return earned in order to service the increasing capital investment which finances that growing rate base. A utility such as Pepco does not have "profits" — it merely has return requirements for servicing its invested capital and attracting new investments.

6. Any material alllegations of fact made in the Complaint which are not hereinabove either specifically denied or admitted are hereby denied.

Wherefore, having fully answered the Complaint, Pepco prays that the same be dismissed.

Respectfully,

D. F. HUGHES,
Senior Vice President,
Potomac Electric Power Co.

Washington, D.C., *February 16, 1971.*

VERIFICATION

District of Columbia, ss.:

Before me, the undersigned, a Notary Public in and for the District of Columbia, on the 16th day of February, 1971, personally appeared in said District Dorsey F. Hughes, who, first being duly sworm, made oath and said that he is the Senior Vice President of Potomac Electric Power Company any duly authorized to execute and file the foregoing Answer in the name and on behalf of said Company, and that the statements therein are true to the best of his information, knowledge and belief.

(s) Dorsey F. Hughes,
D. F. HUGHES.

Subscribed and sworn to before me this 16th day of February, 1971.

INDIANA C. SHEPP,
Notary Public.

[SEAL]

My Commission expires June 14, 1975.

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 1971 I caused copies of the foregoing Answer to be mailed, first-class, postage prepaid, to the undernamed at their respectively indicated addresses:

Susan Hentel, 1 Third Street, N.E., Washington, D.C. 20002.
Melvin Lefkowitz, 402 E Street, S.E., Washington, D.C. 20003.
Adelaide Miller, 905 25th Street, N.W., Washington, D.C., 20037.
David H. Permar, 2007 Quebec Street, Adelphi, Maryland 20783.
Mark A. Steinberg, 7777 Maple Avenue, Takoma Park, Maryland 20012.

(s) Cornelius Means
CORNELIUS MEANS.

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3. Further Motion of SHOCK

Before the Public Service Commission of the District of Columbia

In the Matter of the "Complaint Against Certain Policies and Practices of Pepco and A Petition For Such Rulings As Would Correct The Harm Caused By The Aforementioned Policies And Practices" filed with the Public Service Commission on January 8, 1971.

FURTHER MOTIONS OF STUDENTS HOT ON CONSERVING KILOWATTS (SHOCK)

1. On January 8, 1971, SHOCK filed a formal complaint and petition with the Commission pointing out Pepco's inadequate power supply and asking the Commission to: (1) ban all of Pepco's advertising and promotional activities, (2) establish a non-promotional rate structure, and (3) order Pepco to spend 2% of its revenue on research and development.

On February 18, 1971, Pepco filed an answer denying that the petitioners have standing to bring the complaint or that the Commission has authority to grant the relief requested. They also denied most of the material allegations of the complaint and asked that the complaint be dismissed.

On April 1, 1971, the Commission directed us, if we desire, to make any further representations to the Commission by May 3, 1971, and the Commission staff to prepare a memorandum on the subject for the Commission by June 3, 1971.

On April 5, 1971, Senator Edward Kennedy forwarded to the Commission a copy of our testimony before the Senate Subcommittee on Administrative Practice and Procedure on March 30, 1971 in which we stated that we hoped the Commission, at a minimum, would hold a hearing on the issues raised by our complaint. Senator Kennedy inquired as to the status of the complaint and asked why the Commission had not taken any action to date.

On April 8, 1971, Chairman Avery responded to Senator Kennedy's letter stating that SHOCK had made no further motions following Pepco's answer and that, in any event, SHOCK had not specifically requested a hearing.

In reviewing the Commission's Rules of Practice and Procedure, SHOCK finds no reference to any provision for answers to answers, or that a party must request a hearing. In fact the wording of Rule 12.1 and 12.2 seems to suggest the Commission orders hearings only on its own motion. SHOCK felt that the issues were fairly raised by our complaint and the denials in Pepco's answer so that no further response was needed from SHOCK for the Commission to order a hearing. In any event, under the Commission's Rule 5.11 *SHOCK now formally moves for a hearing on the issues raised by our complaint*, believing that in view of the seriousness of the matter and the controverted material issues of fact and law which must be decided, such a hearing is clearly "necessary" within the meaning of Rule 12.2.

2. SHOCK would like to express its disappointment in the extremely negative attitude taken by Pepco in its answer to the complaint in issue. It was hoped that a stimulating discussion of the many problems faced by Pepco in supplying a safe, adequate, and reliable power in the future would have ensued. Instead, Pepco has taken a defensive approach and has denied that any problems exists, thus making the task of the Commission, Pepco, and SHOCK infinitely more difficult.

It is of utmost importance to remember that both SHOCK and the Commission are dependent upon Pepco to provide the information necessary to evaluate the issues raised by present complaint. Thus it would have been appropriate for Pepco to supply the following information in its answer:

A. A forecast of its demand through 1990, with yearly summer and winter peaks any yearly kilowatt hours consumed.

B. A detailed statement of how Pepco intends to meet the demand, including plants and transmission lines Pepco intends to build, where, when, what type, what capacity and power bought from and sold to other systems. This should include a yearly statement of overall capacity and subtotals of what capacity Pepco expects to have available for each summer and winter peak making allowances for maintenance and breakdowns.

C. A discussion of what caused the power shortages of September 1970 and February 1971, and how Pepco plans to avoid similar situations in the future.

D. A detailed statement of what Pepco spends on advertising, including the type of electric use advertised, how much it costs, what media and time, copies or samples of all such advertising, and how each of these advertising investments affects demand with respect to load and utilization factors. This should include any empirical evidence Pepco has as to the effect of different types and amounts of advertising on demand.

E. A detailed statement of promotional practices Pepco uses, including what type, how much they cost, what effect they have on demand with respect to load, and utilization factors. This should include any empirical evidence Pepco has as to the effects on demand of different types and amounts of promotion.

F. A complete breakdown of the factors Pepco considers in determining the cost of providing services to each class of rate payer in its rate structure, what each factor costs, how the sum of these costs relate to the rate charged that class, and how each class affects summer and winter peak utilization and load factor. Pepco should include in this statement any empirical evidence they have as to the effects of rate discrimination on load and utilization factors. Quite, frankly, SHOCK does not see how the Commission's staff can evaluate the issues raised by the present complaint without the information described above. Moreover, it would be extremely difficult for SHOCK to participate in any hearings without such information. Accordingly, under Rule 5.11 *SHOCK formally moves that the Commission direct Pepco to supply that information to SHOCK and the Commission as soon as possible.*

3. Without attempting to answer specifically all the denials and arguments made in Number 4 of Pepco's answer, SHOCK answers some as follows:

A. With respect to Pepco's denial in 4A, B & C of its answer that a power crisis exists, we need only mention the breakdown of the Dickerson plant in January of 1971, and the voltage reduction of early February of 1971. If Pepco is unaware of its power shortage, it is the last person of the District of Columbia to be so.

B. With respect to Number 4C of Pepco's answer, we are aware that up to this point Pepco has only used a 5% voltage reduction during power shortages, while the only available empirical evidence that voltage reductions are harmful to electrical appliances is a study of 10% voltage reductions. Pepco fails to recognize, however, that the voltage at the generators is not the same as that received by the rate payers furthest from the transformers. We therefore, under Rule 5.11, *formally move that the Commission direct Pepco during the next voltage reduction (we are reasonably confident that there will be more) it is to conduct tests as to a representative number of homes to determine the actual voltage received.* Further, when hearings are held, SHOCK will produce witnesses who will testify to damage which has occurred to their appliances during voltage reductions.

C. SHOCK is well aware of the advantages which incur to Pepco and its rate payers through improvement in the load factor as Pepco points out in Number 4D and F of its answer. Further SHOCK approves of the use of the rate structure as a means of improving the load factor. However, SHOCK disapproves and complains of advertising, promotion, and promotional rate structures which increase summer and winter peak demands. The fact is that Pepco engages in these activities for the purpose of improving BOTH load factor AND increasing demand peaks. All advertising and most promotional activities are incapable of discriminating between the uses consumers will make of electricity. Thus increases in the utilization factor (peak demand) are an inevitable result of any advertising and promotion. SHOCK therefore reiterates its request that the Public Service Commission bar all advertising and promotion which increases peak demand, and create a rate structure which is neutral with respect to the amount of power used. On the other hand, SHOCK suggests that the Public Service Commission encourage the use of the rate structure to stimulate off-peak use. The existing higher summer rates for large volume users, although relatively modest, is a good example.

D. Pepco is most ingenious in denying that advertising and promotional expenses are a hidden tax on the consumer in Number 4E while asserting that 2% of total revenue for Research and Development would be a hidden tax in Number 4H. In fact, both expenses would be or are paid fully by the rate-payer without any options to refuse, and in that sense are a hidden tax. The distinction to be made between the two is that advertising and promotional expenses no longer decrease cost and do stimulate peak demand and therefore create power shortages and environmental harm, all of which work to the disadvantages of the rate-payer. A Research and Development expense can be expected to alleviate the damage caused by advertising and promotion and is therefore in the rate-payer's advantage.

E. SHOCK challenges Pepco's denial in Number 4E that it has no incentive to insure the cost-effectiveness of its advertising and under Rule 5.11 *formally moves that the Commission direct Pepco to explain how these incentives work and to produce documents which will show the cost-effectiveness of its advertising.*

F. With respect to Pepco's assertion that the rate structure corresponds to

the cost of providing service, SHOCK recognizes that in the past the Public Service Commission has used cost as a means of determining the reasonableness of a given rate structure, but this is not to say that cost is an absolute determinate of the rate structure. If this were so, there would have to be a different rate for each individual rate-payer, since it is obvious that the cost of service to each rate-payer must vary slightly. Secondly, as many economists have pointed out, if we rigidly adhere to marginal costing and if, as Pepco contends, it is still a decreasing cost industry, then total revenue would be below total cost, an impossible situation. In fact, the only absolute requirement on the rate structure is that total revenue exceed all expenses and allow for a reasonably return on investment.

Pricing (rate structure) is a marketing tool. It is used to encourage some uses of a product and, at times, to discourage others. In the past when increased usage of electricity promised decreased costs, a promotional rate structure was in both Pepco's and the rate-payer's interest. Now, however, when Pepco is seeking rate increases for the purposes of building new generators, when Pepco is unable to meet summer and winter demands for its product, and when new generators promise ever increasing environment harm, increased usage is not in the rate-payer's interest and the rate structure should be accordingly modified.

Even if we adhere to a cost standard for determining the rate structure, the present system fails to consider several factors which increase the cost of service to large volume consumers. The present system does not consider the higher demand factors of the large volume user. The present system also uses a rolled-in average cost for allocating cost of service to new customers which does not reflect the true cost of providing service to them. Finally the present system does not take into account the greater environmental damage caused by serving high volume users.

4. SHOCK calls to the Commission's attention two recent *New York Times* articles concerning electrical use and advertising. In the Tuesday, April 20, 1971, edition (page 1, column 8) [copy attached as Exhibit A] in the article entitled "State Curb Urged on Electrical Use" attention is focused on New York City Environmental Protection Administration's six-month study of the power crises. The proposals as outlined in the article are similar to those made by SHOCK: (1) revamping the rate structure to penalize large users . . . (2) instituting a surcharge on electrical use during hours of peak demand . . . (3) levying an electrical use tax to reflect the social and environmental costs of power production. (4) banning all advertising and promotional efforts of utilities and appliance manufacturers that would encourage additional use of electric power. These and other proposals for compelling utilities to put a significant percentage of their revenues into research on lessening harmful environmental effects are worthy of the Commission's official notice. SHOCK has requested a copy of the 293-page study and requests the Commission's staff to acquire such and utilize it in its own study.

The second *Times* article of April 21, 1971 (page 1 column 5) [copy attached as Exhibit B] entitled "Con Ed says It Will Confine Ads To Urging Power Conservation" indicates that some members of the power community are able to recognize the problems and react to them.

SHOCK, while cognizant that Washington, D. C. is not New York City, believes the two municipalities have similar problems. Washington, unfortunately does not have an Environmental Protection Administration and cannot duplicate the six-month study prepared in New York. We strongly urge that the Commission's staff study and incorporate into their own report all relevant data, empirical evidence and conclusions found in the New York Study.

5. Although SHOCK recognizes that any action the Commission may now take with respect to our petition will come too late to reduce peak demand in Summer 1971, if the Commission acts promptly in granting relief it may reduce peak demand somewhat in Summer 1972 and have an increasingly beneficial effect in summers thereafter. Since these power shortages and the environmental damage of increased electrical generating capacity have a direct effect on the health and safety of the citizens of the District of Columbia, under Rule 5.11, SHOCK formally moves the Commission expedite proceedings in response to this complaint.

6. Finally, under Rule 5.11, SHOCK formally moves that the Commission direct its staff to allow SHOCK to review the contributions of the accounting,

engineering, and legal staffs to the memorandum the Commission directed the staff to prepare in its letter of April 1, 1971 and to allow SHOCK to participate in and comment on the coordination and final preparation of the memorandum by the Special Assistant Corporation Counsel. SHOCK further moves that the memorandum be made a matter of public record.

SUMMARY OF MOTIONS

Pursuant to Rule 5.11 of the Public Service Commission's Rules of Practice and Procedure, SHOCK formally moves that the Public Service Commission:

1. Grant a hearing on the issues raised by the January 8, 1971 complaint.
2. Order Pepco to produce the documents referred to in Number 2 above.
3. Order Pepco to conduct tests as outlined in Number 4B above.
4. Order Pepco to explain the nature of its incentives to insure the cost-effectiveness of its advertising and to produce documents demonstrating the cost-effectiveness of its advertising and promotion.
5. Expedite the proceedings on this complaint.
6. Allow SHOCK to participate in the production of the staff's memorandum on this issue and to make that memorandum public.

Respectfully,

DAVID PERMAR.

Washington, D.C., May 3, 1971.

[From the New York Times, Apr. 20, 1971]

Exhibit A

STATE CURB URGED ON ELECTRICAL USE

By Michael Stern

The city's Environmental Protection Administration warned yesterday that unrestricted growth in the use of electricity was threatening "irreparable damage" to the health and living conditions of New Yorkers.

It urged the creation of a temporary state commission to consider such drastic measures as the following:

Revamping the rate structure to penalize large users, who now get a price advantage over users of lesser amounts.

Instituting a surcharge on electrical use during hours of peak demand, such as the late afternoons and early evenings of torrid summer workdays.

Levying an electrical use tax to reflect the social and environmental cost of power production.

Banning all advertising and promotional efforts of utilities and appliance manufacturers that would encourage additional use of electric power.

6-MONTH STUDY COMPLETED

In a 293-page study that took six months to complete, and was released at a news conference yesterday, the administration was sharply critical of Federal and state regulatory agencies and the public and private producers of electricity for having no goal other than maximizing power consumption.

Noting that no present power-producing method was free of adverse effects on man's health and environment, the study said that continued growth in power consumption—now projected to increase by 450 per cent by 1990—would mean "an intolerable increase in air pollution, chronic respiratory disease, thermal pollution, radiation hazard and ruination of the landscape."

While deferring to the proposed temporary state commission in the task of establishing, over a two-year period, a "rational energy policy and environmental action plan for the state," the E.P.A. made some recommendations that it said should be implemented immediately. Among these were the following:

Banning the construction of any new nuclear power facility in the state until the state sets its own standards for the control of radiation hazards. The report says the control standards of the Federal Atomic Engery Commission are not stringent enough.

Requiring the state's Public Service Commission, which sets electricity rates, to deny increases to any utilities that fail to put a significant percentage

of their revenues into research on lessening environmental effects of power production, that fail to establish a fund for putting existing and future transmission lines underground or that fail to establish a fund to set up a backup power system to keep essential public services going during a blackout.

Increasing "vastly" Federal expenditures to develop nuclear fusion, solar and other energy sources and to find ways of controlling noxious emissions from plants that burn coal, oil and natural gas.

KRETCHMER CITES PROBLEMS

Discussing the study at the news conference, Jerome Kretchmer, the Environmental Protection Administrator, said "the principal question it posed is how much power do we need and how can we make rational decisions about power needs versus the need to protect the environment."

No agency of government now has this broad responsibility, Mr. Kretchmer said, with the result that decisions on where to put new power plants are made piecemeal and solely on the basis of power company projections of needs.

Agreeing that many of the study proposals would add significantly to the cost of producing power, Mr. Kretchmer said he was less concerned with the danger that some companies might leave the city than with "the danger that nobody will be able to work here if they can't breathe the air."

In outlining the impact on the city's environment of electric power production, the study said the Consolidated Edison Company's 11 plants here accounted for 40 per cent of the sulfur oxide emissions, 38 per cent of the nitrogen oxide emissions and 10 per cent of the emissions of particulate matter.

Each of these types of emissions can have both long-term and acute effects on health, the report said, and may cause a variety of respiratory ailments as well as deaths during temperature inversions when pollutants are trapped in stagnant air above the city.

POLLUTION LEVELS LISTED

For all three major types of pollutants, the study said, the city's levels are significantly higher than those established as safe in standards proposed by Federal and state authorities.

A spokesman for Con Edison said officers of the company had received copies of the report only late yesterday and would have no comment until they had an opportunity to read it.

The study was prompted in part by the controversy that developed last summer over the company's proposal to build a new fossil-level plant rated at 1,600-megawatts in Astoria, Queens. The study also was undertaken in response to a request for recommendations from a state commission now studying the development of policies for positioning new power plants.

Mr. Kretchmer said the study was being submitted to the Mayor's Interdepartmental Committee on Public Utilities, which, under the chairmanship of Milton Musicus, the Municipal Services Administrator, is reviewing the city's power needs and resources.

The study was prepared by three members of Mr. Kretchmer's E.P.A. staff: Neil Fabricant, general counsel; Robert Hallman, deputy general counsel, and Carolyn Harris, staff economist.

[From the New York Times, Apr. 21, 1971]

Exhibit B

CON ED SAYS IT WILL CONFINE ADS TO URGING POWER CONSERVATION

By David Bird

The chairman of the Consolidated Edison Company, Charles F. Luce, said yesterday that the utility had disbanded its sales promotion department and would use advertising only to urge customers to conserve electricity. Mr. Luce said he believed it was the first such action by any utility in the nation.

In his annual briefing for news media, Mr. Luce said demand was expected to grow so much by the nineteen-eighties that Con Edison would have to use the Atlantic Ocean as a site for new generating stations.

He said that the stations would have to be situated some 10 miles off shore because the utility would have used up all the cooling water available on inland sites by the end of the decade.

A Con Ed spokesman said the company had spent a declining amount of money on advertising in recent years, with less than $1-million budgeted last year. There was no estimate on how much money would be spent on advertising that urges customers to save electricity.

As an indication of what previous sales promotion had accomplished, Mr. Luce noted that while the utility was promoting electricity for home heating the number of housing units built that used this form of heating rose to 30 per cent from 5 per cent.

The utility had earlier suggested the building of new nuclear-powered generating plants linked by cable to the shore on manmade islands just off shore.

But now, Mr. Luce said, the thinking is that the plants will have to be moved out still farther to avoid running into problems of getting an Atomic Energy Commission license for plants that might be too close to the city's population.

Mr. Luce said consultants to the utility had proposed that the plants be built on giant concrete barges that would be towed out to their sites and either anchored there or sunk in place.

These plants, the utility executive noted, would create some unusual problems. One, he said, would be "whose territory is it, what's the jurisdiction out there.?

Another would be that of protecting them with large breakwaters to fend off 60-foot waves that could come with hurricanes.

THE "BIG ALLIS" QUESTION

Concerning the immediate future, Mr. Luce said that if the million-kilowatt "Big Allis" generator in Ravenswood, Queens, was in operation this summer the company's ability to provide power during the peak demand "ought to be as good as or a little better than last summer."

But even if Con Ed is "in better shape than last summer it will still be tough," he said.

It was the breakdown of the Ravenswood generator last July that was the main contribution to the crisis here last summer where Con Edison has to cut back on power by reducing voltage and even temporarily cutting off some customers in outlying sections.

There have been successive delays in getting the generator back into service, Mr. Luce said yesterday, and engineers now estimate the repairs should be completed in "late mid May." But, he added, there is no guarantee that the generator will not go out again.

One of the main reasons that Con Edison has cited for not being able to provide adequate power is that environmental considerations have blocked the building of plants on the ground that they cause too much pollution.

POINT OF DISAGREEMENT

While agreeing that the consumption of electricity had to be limited to protect the environment, Mr. Luce disagreed with suggestions by some environmentalists that electricity usage be cut back by charging higher rates to those who use the most.

The larger user, he said, is the Transit Authority and making the cost of subway riding higher might cause people to create more pollution by switching to automobiles. The second largest Con Ed customer, he said, is the city government, which uses the power for such things as street lights and public buildings.

Mr. Luce agreed with the environmentalists that more should be spent on research to find better ways of generating power.

He said Con Edison was spending about $3-million a year on research and development, "not a large amount at all." But, he said, any meaningful research is beyond the expertise of the economic capacity of the utility.

He noted that estimates of the cost of just prototype of a new nuclear breeder reactor for a power plant was $800-million.

This kind of money would have to come from some kind of national fund, Mr. Luce asserted. He suggested that a trust fund, like the Highway Trust Fund, be set up for the research and be financed through a tax on utility bills.

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 1971 I caused copies of the foregoing Further Motions to be mailed, first class, postage prepared, to the undernamed at their respective indicated addresses:

Dorsey J. Hughes, Senior Vice President, Potomac Electric Power Co., 929 E. Street, N.W., Washington, D.C. 20004.

Cornelius Means, Attorney for Pepco, 929 E. Street, N.W., Washington, D.C. 20004

DAVID H. PERMAR.

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4. Article Describing Action Taken by Another Power Company

[From the Washington Post, Apr. 22, 1971]

ADS TO PUSH WINTER USES OF ELECTRICITY

The Washington area's two major suppliers of electric power said yesterday they do not plan to follow the action of Consolidated Edison Co. of New York, which has disbanded its sales promotion department in favor of an advertising campaign aimed at urging conservation of power.

Charles F. Luce, chairman of Con Ed, said in New York on Tuesday that he thought his firm's action was the first such by an electric utility company. But a spokesman for Baltimore Gas & Electric Co. said it halted promotion of gas and electricity last fall.

Spokesmen for Potomac Electric Power Co., which serves the District and suburban Maryland, and Virginia Electric & Power Co., serving Northern Virginia, plan continued advertising campaigns aimed at increasing the use of electricity during winter months.

Officials of Pepco and Vepco emphasized that they had halted advertising of air conditioning several years ago but planned to continue promoting use of electricity in off-peak periods.

"It would be reprehensible for us not to promote winter use," said Vepco spokesman Mike Molloy in Richmond.

With billions of dollars being invested in new plants and equipment to meet summer peak demand, he continued, the utility's officials believe more efficient operations—and lower bills for consumers—can result only from increasing actual winter consumption.

Molloy said Vepco, which spends $1.8 million a year on advertising and promotion, had recently started a program of informing consumers how they can save money on their bills, "which is another way of trying to eliminate unnecessary demand."

Pepco spokesman N. Eugene Otto said his company spent just over $1 million on sales promotion and advertising in 1970, "strictly to building additional winter use, mostly heating and lighting." He noted that the summer demand peak lasted only two or three months.

Since occasional blackouts of the last decade, utilities have come under pressure to curtail promotion because demand was increasing faster than the supplies of energy.

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5. Letter from District of Columbia Public Service Commission Chairman to Senator Edward M. Kennedy

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
Washington, D.C., April 8, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: I have your letter of April 5, 1971, asking for information as to the status of a petition filed with the Commission by a group of law students from George Washington University called "Students Hot On Conserving Kilowatts (SHOCK)." I had not previously been aware of their appearance before your Committee and greatly appreciated receiving a copy of their testimony.

The petition was filed with the Commission on January 8, 1971. With the consent of the petitioners, the date for the filing of Pepco's response was extended to February 16, 1971, and the company filed an answer on that date. At the time Pepco's answer was received, the members of the Commission were deeply involved in the process of writing a decision on the request of The Chesapeake and Potomac Telephone Company for an increase in telephone rates. That order, a lengthy and extremely involved one which denied the company's application, was issued on March 29, 1971. As its next order of business, the Commission took up the SHOCK petition. Noting that the petitioners had not requested a hearing, and further noting that nothing had been heard from the petitioners since Pepco's answer was received, the Commission determined that it wished to afford the petitioners an opportunity for further comments before acting upon the petition. To this end, it addressed a letter to the SHOCK group on April 1, 1971, giving them an opportunity to file further comments by May 3, 1971. The staff of the Commission was also directed to provide the Commission with a memorandum commenting in detail on the issues raised in the petition. Copies of the complaint, the answer, and our April 1 letter are enclosed herewith. (Complaint and answer are reprinted *supra.*)

I can comment on the testimony offered before your Committee only to a very limited degree since the petition is still pending before the Commission and I cannot make definitive comments on the issues raised. I believe, however, that I can properly make two observations. First, the subject matter of this petition is one with which the Commission was not unfamiliar before the complaint was filed. The problems discussed are ones with which we have been concerned and with which we have been dealing on an almost daily basis, for the past several years. Second, this is not to say that the SHOCK petition itself has not received our serious consideration and I reject the apparent implication in their testimony that they have somehow been denied a hearing. As I pointed out earlier, their petition does not even request a hearing and they have not seen fit to file any motions or other pleadings following the receipt of Pepco's answer, despite the fact that they could have done so under our rules. The relatively brief delay between receipt of Pepco's answer and our further communication to the SHOCK petitioners was not caused by any lack of interest in their compaint but by the press of other Commission business of exceedingly great importance.

We will be happy to keep you informed of further developments in this proceeding and we appreciate your interest in these problems greatly. Please let us know if there is further information you require.

Sincerely yours,

GEORGE A. AVERY,
Chairman.

APRIL 1, 1971.

Re: Complaint Against Certain Policies and Practices of Pepco and a Petition for Such Rulings as Would Correct the Harm Caused by the Aforementioned Policies and Practices.

STUDENTS HOT ON CONSERVING KILOWATTS (SHOCK),
c/o David H. Permar,
Adelphi, Md.

GENTLEMEN: On January 8, 1971, your group of George Washington Law School students, styling yourselves SHOCK, filed with the Commission a formal complaint and petition dealing with certain policies and practices of the Potomac Electric Power Company ("PEPCO"). The complaint dealt generally with the problems in the area of adequate energy supply and asked for the following specific relief:

"A. Place a moratorium on Pepco's advertising and promotional activities designed to increase its numbers of customers or the amount of power used until:

1. Pepco has a reserve generating capacity of 30% during summer peak loads, and
2. Pepco has a yearly demand growth rate of less than 5%.

B. Establish a non-promotional rate structure in which the price charged per kilowatt hour is not dependent on the number of kilowatt hours used.

C. Order Pepco to devote 2% of its operating revenue to research and development.

D. As an alternative to A. take the cost of advertising and promotional activities out of operating expenses." Complaint, Page 12.

On February 16, 1971, Pepco filed an answer to the complaint in which it denied most of the salient allegations of the complaint and took issue with the conclusions suggested by the complainants. Pepco asked that the complaint be dismissed.

We have heard nothing from your group since the answer was filed. The Commission wishes to make an appropriate disposition of the complaint. Before determining upon appropriate action, however, the Commission wishes to have two things:

1. Any further comments which your group may wish to make in response to Pepco's answer;
2. A report from the Commission staff commenting on the issues raised and making whatever recommendations the staff may wish to propose.

To achieve these objectives, we direct hereby, that, should your group wish to make any further representations to the Commission in support of the relief they seek or in response to Pepco's answer, they shall do so in writing not later than the close of business on Monday, May 3, 1971.

The staff is further directed to provide the Commission with a memorandum commenting in detail on the issues raised by the complaint, the answer, and any further comments filed by your group. This memorandum shall be provided to us not more than thirty days after your group files comments as set forth in the preceding paragraph. The Accounting, Engineering and Legal staffs shall each make a contribution to this report, with the responsibility for coordination and final preparation vested in the Special Assistant Corporation Counsel.

By direction of the Commission:

JAMES H. BOHANNAN,
Executive Secretary.

6. Letter from D.C. Public Service Commission Chairman to Senator Edward M. Kennedy

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
Washington, D.C., June 10, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: On April 5, 1971, you wrote me asking for information about a petition filed with this Commission by a group of law students from George Washington University called "Students Hot on Conserving Kilowatts (SHOCK)". I replied on April 8, 1971. At that time I stated that I would keep you informed of further developments.

On June 8 the Commission issued an order in this proceeding and I enclose a copy of it herewith. It is largely self-explanatory and I will not elaborate on it further. If you have any questions, please let me know.

Sincerely yours,

GEORGE A. AVERY, *Chairman.*

Before the Public Service Commission of the District of Columbia

(Order No. 5466—June 8, 1971.—EL-30)

In the matter of the "Complaint Against Certain Policies and Practices of Pepco and a Petition for Such Rulings as Would Correct the Harm Caused by the Aforementioned Policies and Practices."

On January 8, 1971, a formal complaint and petition was filed with the Commission by a group of five George Washington University Law School students who styled themselves Students Hot on Conserving Kilowatts (SHOCK). The complaint addressed itself to problems in the area of adequate supply of electrical energy. After setting out certain allegations as to the history and causes of problems of adequate supply, and as to possible means of dealing with the problems, the complaint sought the following relief:

A. Place a moratorium on Pepco's advertising and promotional activities designed to increase its number of customers or the amount of power used until:

1. Pepco has a reserve generating capacity of 30% during summer peak loads, and

2. Pepco has a yearly demand growth rate of less than 5%.

B. Establish a non-promotional rate structure in which the price charged per kilowatt-hour is not dependent on the number of kilowatt-hours used.

C. Order Pepco to devote 2% of its operating revenue to research and development.

D. As an alternative to A, take the cost of advertising and promotional activities out of operating expenses.

The Potomac Electric Power Company (Pepco) filed an answer to the complaint on February 16, 1971. The answer raised questions as to the standing of some members of the SHOCK group. It alleged that the Commission lacked power to grant the relief sought in Paragraphs A, B, and C above. Finally, the answer denied a number of the material allegations of the complaint and asked that it be dismissed.

At this juncture, we examined the pleadings to determine what action should be taken thereon. We noted that complainants had not requested a hearing, nor had they filed any further documents with us indicating either their response to Pepco's answer or their views as to appropriate procedural steps. We also determined that we wished to have the staff's views on the issues raised. Accordingly, on April 1, 1971, we issued a twofold directive: SHOCK was given until May 3, 1971 to file further comments and the staff was directed to file a report with us within thirty days thereafter.

SHOCK's response to this action was a document filed on May 3 making certain motions. They can be summarized, as follows:

1. Grant a hearing on the issues raised by the January 8, 1971 complaint.

2. Order Pepco to produce certain documents.

3. Order Pepco to conduct tests as to voltage actually received by customers during voltage reductions.

4. Order Pepco to explain the nature of its incentives to ensure the cost-effectiveness of its advertising and to produce documents demonstrating the cost-effectiveness of its advertising and promotion.

5. Expedite the proceedings on this complaint.

6. Allow SHOCK to participate in the production of staff's memorandum on this issue and make that memorandum public.

We address ourselves to these further motions at this time.

1. *Request for hearing*

This is a request which, at this point, we are not prepared to grant. Section 43–408 of the D.C. Code, makes it very clear that the decision to hold a hearing is a matter committed to our discretion. In considering the question, a number of factors seem significant to us. First, the questions raised by the pleadings are certainly not new to us. The problems of adequate supply of electric energy, of promotional practices, and of rate structure have occupied a great deal of our time and attention during the past several years.

As the problems of assuring adequate capacity to meet demand have unfolded, we have engaged in a continuing series of meetings with Pepco, other companies in the PJM interconnected system,[1] other state commissions regulating PJM companies,[2] and the Federal Power Commission. We have required that Pepco file with us a series of reports on projections of capacity and demand. We joined with the other four commissions regulating PJM companies in a joint study, financed by the commissions, of the problems of reliability and adequate supply. That study was performed by Commonwealth Associates, a leading nationally known firm of consulting engineers.

We have been studying the matter of promotional practices continually for

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[1] Atlantic City Electric Co., Vineland Municipal Services, Baltimore Gas and Electric Co., Delmarva Power and Light Co., General Public Utilities System, Jersey Central Power and Light, Metropolitan Edison Co., New Jersey Power and Light Co., Pennsylvania Electric Co., Pennsylvania Power and Light Co., Philadelphia Electric Co., Public Service Electric and Gas Co., and UGI Corporation—Luzerne Electric Division.

[2] Pennsylvania Public Utility Commission, New Jersey Board of Public Utility Commissioners, Maryland Public Service Commission, and Delaware Public Service Commission.

some time. As a result of our discussions of these practices with company officials and with neighboring commissions, significant changes in promotional practices have already taken place. Well before the filing of the SHOCK complaint, we had told our staff to investigate this matter intensively and that investigation is still continuing.

Questions of rate structure were explored in the appropriate context, *i.e.*, a rate case, as recently as ten months ago. Pepco officials have already publicly announced that they intend to file another rate case in the near future. That proceeding will provide another opportunity to look at rate structure problems.

In short, therefore, the complaint has not raised questions which the Commission has not previously considered and dealt with. We are deeply involved in all these matters and a hearing is certainly not needed as a means of focussing our attention on them.

We note, moreover, that while complainants have now asked for a hearing, they have given no indication as to what that hearing would produce. We are not told whether they would be calling witnesses competent to testify on the questions they raise. They have not indicated whether they would propose to limit the hearing to oral arguments on the pleadings as filed, nor, if this is what they have in mind, what would thereby be added to the material in their pleadings.

We should make it clear that we are not averse in any way to providing these complainants, or any others with valid problems meriting our attention, with an opportunity to present their views to us. We do feel, however, that there is no indication in the present posture of this proceeding that a formal hearing would produce useful results.

Hence, we will not at this time grant complainants' request that a formal hearing be scheduled. We will, however, re-examine this question after receiving the staff report required by our directive of April 1, 1971. Further, we will permit complainants to file a memorandum with us by July 6, 1971, outlining the evidence they would propose to present at a formal hearing. By this, we mean we would like to know who their witnesses would be; generally what subject matter they would cover; and, what documentary evidence they would be presenting. With this information in hand, we can make a better judgment as to the utility of a formal hearing on those problems.

2. Request for information

Complainants set out a number of items of information which they deem to be necessary for adequate evaluation of the problems they raise. These include twenty-year forecasts of demand and capacity, reports on previous equipment outages, figures and other data on advertising outlays, descriptions of promotional practices and their effectiveness, and underlying data on rate structure. We have reviewed these requests carefully and find that, in every instance, we have the information, or something very similar, already in hand.

Pepco, and the other PJM companies, have been submitting demand and capacity forecasts to us for several years. We now have on hand the following information: (a) The 1970 National Power Survey Part II, issued April 1971; (b) Middle Atlantic Area Coordination Group Report to the Federal Power Commission pursuant to Order No. 383–2 (Docket R–362); and (c) System Load and Capacity Projection of Potomac Electric Power Company, dated October 28, 1970, and submitted to the Conference of State Commissions Concerned with the PJM Interconnection on that date. Both oral and written reports on the September 1970 and February 1971 outages were submitted to us. Pepco's advertising expenditures are set out in its annual reports, We do not have the detailed data on each advertisement, as suggested by complainants. However, the staff will be examining all of that material in the forthcoming rate proceeding. We have on hand a description of Pepco's promotional practices, both currently and in the recent past. The question of rate structure was examined just ten months ago in a rate proceeding, and will be again when Pepco seeks further rate adjustments as it has recently announced.

We see no need, therefore, to grant complainants' requests that the specific information described in their May 3 motion be prepared and submitted by Pepco. It would involve in large measure, a duplication of effort already undertaken.

3. Requests for voltage tests

Complainants ask that Pepco be required to test voltage actually received in customers' premises during a future voltage reduction. Before making a final decision on this request, we would like further technical guidance on the questions raised by complainants. Accordingly, we will direct our Engineering Bureau to file a report with us by July 6, 1971, providing us with a technical analysis as to whether a 5% voltage reduction could lead to reductions of 10% or more at the customers' premises.

4. Request for proof as to effectiveness of advertising

Complainants alleged in their complaint that Pepco had no incentive to ensure that their advertising is cost-effective. In its Answer, Pepco denied that allegation. Complainants now challenge that denial and demand that Pepco prove that its advertising is cost-effective. As an elementary matter of procedure, of course, Pepco's denial of complaints' allegation does not place upon it the burden of proving that its advertising is cost-effective. Rather, it is incumbent upon complainants to prove that it is not. We do not believe that the directive sought by complainants is either fair or sustainable upon court challenge. Moreover, we are not unaware that it is open to the staff or any protestant to challenge the efficacy of Pepco's advertising in a rate proceeding. We will deny this request.

5. Motion to expedite

Pointing to the urgency of the problem raised, complainants asked that the proceedings be expedited. We will give the problems discussed in the complaint our immediate and continuing attention. We have also, in this order, set early dates for further actions in this proceeding. We believe this is responsive to complainants' request.

6. Participation in staff study

Complanants asked that they be allowed to participate directly in the work of the staff which we directed to be undertaken on April 1, 1971.[3] We gave serious consideration to this request. We believe that the staff memorandum will be most useful to us if it reflects the independent judgment of the staff rather than a mixture of the views of the staff and the complaints.. Hence, we do not find merit in the kind of direct participation in the work suggested by complainants. However, we will permit complainants to submit a memorandum to the staff in which they may express their views as to the proper scope of the staff study within the framework established by our directive of April 1, 1971.

Inasmuch as we desire independent staff judgment, it should be clearly understood that the staff may accept or reject any views submitted. Such views should be submitted by June 18, 1971.[4]

Therefore it is *Ordered:*

1. That the Motions filed by complainants in this proceeding on May 3, 1971 be, and they are hereby, denied.

2. That complainants may file a memorandum not later than July 6, 1971 outlining, in accordance with the foregoing discussion, the evidence they would propose to present at a formal hearing.

3. That the Engineering Bureau of the Commission submit a report not later than July 6, 1971, analyzing whether a 5% voltage reduction can lead to voltage reductions of 10% or more at the customers' premises.

4. That, not later than June 18, 1971, the complainants may submit to the staff, with service upon Potomac Electric Power Company, a memorandum expressing their views as to the proper scope of the staff study undertaken pursuant to our directive of April 1, 1971.

By the Commission,

GEORGE A. AVERY, *Chairman.*

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[3] Our directive read, as follows: "The staff is further directed to provide the Commission with a memorandum commenting in detail on the issues raised by the complaint, the answer, and any further comments filed by your group. This memorandum shall be provided to us not more than thirty days after your group files comments as set forth in the preceding paragraph. The Accounting, Engineering and Legal staffs shall each make a contribution to this report, with the responsibility for coordination and final preparation vested in the Special Assistant Corporation Counsel."

[4] The staff study was originally due by June 3, 1971. On that date, we granted the staff's request for an extension until July 6, 1971. The staff's work may go forward pending receipt of complainants' memorandum. If the staff determines that more time is needed after it receives the complainants' memorandum, it may so request.

Mr. BANZHAF. Senator, the last group we will hear from this morning—and I hope you will have a little bit of time left to give you the opportunity to chat with all of them on some of the broader things that we are touching on here this morning—goes by the acronym of TUBE "termination of unfair broadcasting excesses." This is a group which has received nothing short of an Alice in Wonderland response to what we have considered and regarded as a meritorious petition.

Some 14 months ago they filed with the Federal Communications Commission a petition urging that Commission to do something about the problem of deceptive ads on television. They cited in their appendix a large number of deceptive ads and pointed out that the Federal Trade Commission really does not have the ability, the teeth in many cases, or simply the staff and resources to treat this entire problem, and asked that the FCC assume a burden within its own area.

The merits of their petition are very clearly illustrated by the fact that the Federal Trade Commission took their list of deceptive commercials and virtually went down that list and filed complaints against the deceptive advertisers. However, in all too many cases the ads continued because the FTC's procedures are so slow, and in large part because the FTC has no teeth.

They have received promise after promise, as have some Members of the Senate and the House from the FCC, that they would respond to this petition. To date there has been no response. We feel there should be very strong activity from the Federal Communications Commission which is supposed to be responding to the petition and protecting the public interest. There were four members of this group initially. Only two of them remain. This illustrates one of the problems that our groups have, Senator, and which many other student groups may have. Without additional support, modifications in programs and other changes, the groups have some difficulty in continuing. But the very fact that these two students have continued their efforts over 14 months, long after the course is over, the marks are in, and other concerns have come to their fore, indicates I think their concern and dedication with the problem. I am very proud to have with me on my right Mr. Peter Nemkov, who will speak for the group, and Mr. Jon Bowers.

STATEMENT OF PETER NEMKOV, CHAIRMAN, TERMINATION OF UNFAIR BROADCASTING EXCESSES (TUBE), ACCOMPANIED BY JON BOWERS

Mr. NEMKOV. Senator Kennedy, if you watched television within the past year you may remember Willie, the plumber. To refresh your memory, Willie is the "angel" who arrives with Liquid Drano to clear a clogged drain. Initially, a distressed housewife claims that she has used "two bottles" of another drain cleaner with no results. Willie, stating that the other drain cleaners won't cut grease like Drano, pours just one capful of "concentrated Liquid Drano" into the backed up sink and immediately the scene shifts to a clean and unclogged sink. The ad ends with the housewife emphatically de-

claring "if people used Liquid Drano in all their drains, they would never need plumbers."

This ad, like all too many others on television, is deceptive. Most of the deceptions in ads currently on television can be broken down into one of three categories. Interestingly enough, the Drano ad is a good illustration of all three categories.

The first category of deception is the deliberate misrepresentation and misstatement of fact. The Drano ad claims that its product will cut grease while the others are far less effective. Actually, as a recent report of Consumers Union pointed out, many other drain cleaners are far more effective, although many require greater caution in their use. Other similar misstatements of fact are Anacin's claim to relieve tension (it won't) and Listerine's claim to prevent colds (it won't).

The second type of deception arises from the presentation of materials from which the average consumer would reasonably imply something which is not true. In the Drano commercial an instant shift from a clogged to a clear sink after the use of Drano implies that whatever the cause of the clogged drain, a single capful applied once will immediately clear the drain. Actually, Consumers Union reported that although several cleaners would clear a clogged drain in 30 minutes, Drano would do so only if left overnight.

The third type of deception involves the deletion of pertinent or material facts as to the limitations or dangers of the product. Although the Drano ad urges people to use Liquid Drano "in all their drains," it actually cannot be used in drains with a garbage disposal, or in the toilet bowl drain. Moreover, the dangerous aspects of Drano are not even hinted at. Unfortunately, the whole picture of telling less than the whole story is employed quite frequently. Ads for enzyme detergents fail to warn of the need for presoaking, to explain that they work on only a limited type of stains, and to caution that they may burn clothing. Brightening toothpastes don't mention that the abrasives which do the brightening also remove enamel from teeth.

One additional point which should be noted is that many deceptive ads are deceptive only when presented on television. In other words, the deceptions could not be presented in other types of media. A prime example is the use of phony demonstrations such as the sandpaper shaving case several years ago or the Zerex photography to make the products appear not as they are. A particular objectionable example of this is the use made by toy manufacturers of backgrounds, angles, and superimpositions to make their toys appear larger and more lifelike than they in fact really are.

Although the FTC now appears to be cracking down on this problem, their powers—at least insofar as they have been upheld by the courts—are small. On the other hand, the FCC, the agency primarily responsible for regulating television, has immense power and by law must determine every 3 years whether a licensee is serving the public interest. In the distant past, the FCC did use its power to protect the public from misleading and deceptive ads. In recent times, however, they have sat back and attempted to leave the job to the FTC.

Our group, TUBE, believed that the problem of deceptive ads on television, many of which involve health, safety, and environmental deceptions, was important enough that the Federal Communications Commission should concern itself with it. We believed that a broadcaster who exercised no control whatsoever over its commercials, and who in fact was presenting seriously deceptive advertisements, could not reasonably be said to be operating in the public interest. We therefore filed a petition for rulemaking seeking a rule banning deceptive advertising on television. Included in the petition were arguments discussing the impact of television, the harm caused by deceptive advertisements, the shortcomings of relying on the FTC, the failure of voluntary industry regulation, and the authority of the FCC to act in this area. It proposed a code of standards, to be adopted by the Commission, which included the provisions proscribing deceptive advertising, defined the various forms of deception, and provided for sanctions against violating licensees. In support of the petition, TUBE submitted an appendix including approximately 30 deceptive ads then on television as an example of the problem.

Since the petition was filed in January 1970 the FCC has taken absolutely no action and has not even communicated with the members of TUBE. The FTC on the other hand, recognizing the merits of TUBE's petition, has initiated actions against many of the manufacturers whose deceptive ads were cited in the appendix. We understand that members of the FTC staff have met with members of the FCC staff to discuss the matter, and that the FTC staff are in favor of the proposal. Nevertheless, the FCC has remained immobile, and has itself engaged in some deceptions and other questionable practices.

For an example, in April 1970 Chairman Burch wrote to Senator Hart and Congressman Rosenthal, in response to their inquiries, to apologize for the Commission's delay in acting on the TUBE petition. He promised at that time that the petition would be presented to the Commission "certainly by the end of May." Incidentally, the Chairman also mentioned that the FCC staff members were discussing the TUBE petition with a staff member of the National Association of Broadcasters (NAB), an organization representing those whose practices TUBE is seeking to have regulated.

Further, "Broadcasting," the television industry trade journal, reported in articles on August 17 and 31, 1970 that Chairman Burch had indicated that he was about to take some action with respect to the petition. Finally, in December 1970 two TUBE members met with Chairman H. Rex Lee over the issue of the TUBE petition. We were told by Commissioner Lee that he had no doubt that the FCC had the authority to act in this area and additionally that he personally took exception to the various deceptive ads he saw on television. He assured the members of TUBE that action was imminent and would certainly occur by January. Now, some 14 months after the petition was filed, the Commission has not even published the petition so that other interested groups may comment and so that the industry's objections will be a matter of record. In the meantime, the Commission did have time to warn broadcasters that they had to be aware of the meaning of all of the words used

in rock music played over their stations. We do not understand this discrepancy. Why, we ask, are broadcasters who must carefully scrutinize the lyrics of all popular songs immune from any obligations to protect their viewers from deceptive ads which bilk them of millions of dollars and frequently constitute a health, safety, and/or environmental threat?

Senator KENNEDY. Let me ask you, even accepting the value of this kind of review by the Commission, do you think it is really possible for the Commission itself, to review all of the different advertisements to find out and to make value judgments whether they are deceptive or not?

Mr. BOWERS. The Commission itself has on various occasions notified the licensees that they do have a primary responsibility in this area even though the FTC, they have a liaison agreement with the FTC. They have told them that the licensee has the responsibility to eliminate all false, misleading and deceptive advertising and that is regardless of the FTC's action in this area. And yet, they do not seem to be holding them to that standard.

Senator KENNEDY. Do you expect these stations to review every one of the ads that comes along the line and to make value judgments as to what is going to be put on?

Mr. BOWERS. We think if the Commission undertook a program of educating the individual licensees through perhaps the publication of an advertising primer, which we suggested in our petition, that the licensee might be able to at least obtain a beginning knowledge of the idea of what deception is all about, at least in the three forms of deception that we indicated in our petition, and so they would be able to at least know when they had an ad that might be deceptive. Then they in turn could contact the FCC where they could get a preliminary statements as to whether the ad was deceptive or not.

We think that if the burden were transferred on the licensee he would, in turn, transfer that burden back to the advertising agency, and they would be more careful with what they put out. The situation now is that the licensee would just put on anything that comes into their hands.

Senator KENNEDY. Why do you think there has been such a reluctance to respond to you by the Commission?

Mr. NEMKOV. One thing we found out, just by speaking to staff members in the Commission, is that the FCC has this habit of conveniently forgetting or putting aside any petition they think is too controversial or they just do not choose to act on.

Another feeling we have is that there is a close working relationship between industry and the FCC. The FCC is supposed to regulate what goes on the air, but it seems to us now that the broadcasters are influencing the FCC as to what they, the broadcasters, can put on the air.

Senator KENNEDY. What are you going to do? Are you going to take away his license, the licenses of different broadcasting units if they run these ads?

Mr. BOWERS. We propose that if the licensee fails to undertake any kind of review; in other words, if he is negligent in his reviewing practices then that could lead to an indication that he was not

operating in the public interest. This is something like the Fairness Doctrine.

We want the licensee to be active in this area, not just to be able to delegate his responsibility to the FTC or advertisers.

Mr. BANZHAF. It should be clear that the Commission has also told licensees that if they exercise a reasonable judgment in an area they would not be subject to any penalty or revocation. What we are talking about here is not that the licensee has been or should scrutinize each and every ad and test for example, whether this gasoline additive will or will not work. Rather, where a licensee has put on notice, for example, by a specific complaint, with a correspondence from a viewer by an item in the Consumer's Report, by the issuance of the FTC complaint, or by an ad which on its face just has the appearance of deception; if in those cases he fails to take any reasonable action to insure himself that he's operating in the public interest, I think then and only then, and in a repeated instance of abuse, would the FCC take any action at all. But it is simply that first step, saying to the broadcaster that he has at least as much responsibility to look at his ad as he does the content of his program, or as the FCC has recently ruled in the lyrics of so-called rock songs, which is important.

Mr. NEMKOV. I would like to add that we are not per se against advertising, and we do not want to put the broadcasters in an untenable position, but what we do find is that a great deal of the deceptive ads on the air act to the detriment of the consumer. And we feel that the burden should be switched from the consumer, who has been made to suffer from these deceptive ads, to those responsible for putting them on the air, both the advertising agencies and the broadcasters themselves.

Senator KENNEDY. What percentage of these ads do you think are deceptive? Can you make any estimate?

Mr. NEMKOV. We have never made an accurate statistical guess or an accurate statistical analysis, but just from my own observations I would say somewhere between a third to a half, where if not hardcore deception certainly are questionable.

Senator KENNEDY. And your point is that if you are able to get the FCC to promulgate regulations and develop the kinds of procedures you suggest that they can reduce that dramatically, giving better protection to the consumers while not adding a very significant burden to the licensees themselves or even to the Commission?

Mr. NEMKOV. That is correct, but we would like to point out that we would like to see a rule that has some teeth in it, that is actually meaningful rather than just a nice policy statement, because one of the big arguments in the past was that the industry could self-regulate itself, and through research we found that does not happen at all.

We want to see some potential sanctions adopted so that if you have violators the sanctions will be there.

Mr. BANZHAF. Senator Kennedy, there are no more groups which I have asked to be here this morning.

Senator KENNEDY. I see a number of the participants still here and I was interested in whether they can all come up to the table now——

Mr. BANZHAF. We could have the chairmen come up to the table. Could we get the chairmen to come up?

Senator KENNEDY. Or his representative if the chairman is not here.

Mr. BANZHAF. While they are getting seated I would like to thank the subcommittee for the opportunity to be heard and for appearing before you today.

(Material relating to TUBE follows:)

G. EXHIBITS RELATING TO TESTIMONY OF TUBE (TERMINATION OF UNFAIR BROADCASTING EXCESSES)

1. T.U.B.E. Petition for Rule Making Filed with F.C.C.
2. Supplement to Petition for Rule Making
3. Letter of Support from Congressman Tiernan
4. Letter of Support from Congressman Rosenthal
5. Letter of Support from Consumers Union
6. Letter of Support from Action on Children's Television (A.C.T.)
7. Letter of Support from Institute for American Democracy
8. Letter from T.U.B.E. to F.C.C. re Status of T.U.B.E. Petition
9. Letter from Senator Nelson to F.C.C. re Status of T.U.B.E. Petition
10. Letter from Senator Hart to F.C.C. re Status of T.U.B.E. Petition
11. Letter from Chairman Burch to Senator Hart Promising Action on T.U.B.E. Petition by May 1970

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1. TUBE Petition for Rulemaking Filed with FCC

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

In the Matter of Adoption of Standards Designed to Eliminate Deceptive Advertising from Television.

PETITION FOR RULEMAKING

Pursuant to 5 USC Section 553, the statutory authority, and 47 CRF Section 1.401(a), the Commission authority, TUBE, Termination of Unfair Broadcasting Excesses, a group of students from George Washington University Law School, respectfully requests that the Commission adopt as part of their Rules and Regulations, standards (included herein) designed to eliminate deceptive advertising from television.

In support, whereof, the following is respectfully submitted:

CONTENTS

Introduction.
I. The Impact of Television.
II. The Harm Caused by Deceptive Advertisements.
III. The Failure of the Federal Trade Commission.
IV. The Inadequacy of Self-Policing.
V. The Responsibility and Authority of the Federal Communications Commission to Regulate.
VI. The Constitutionality of Federal Communications Commission Standards.
VII. The Code of Standards.
Appendices.

INTRODUCTION

Deceptive advertising is recognized as having a harmful impact upon the public. Due to the great potency of television, this impact is magnified and expanded. Thus, regulation is necessary to guard the public interest. Unfortunately, industry self-regulation has been found to be ineffective. Governmental agencies now responsible for such regulation, as the FTC, are effective in the determination of deceptive advertising on a case by case method, yet their enforcement policies and sanctions are weak and ineffective. Thus, it becomes the responsibility and obligation of the FCC to regulate deceptive advertising on television. This responsibility can be accomplished by the FCC's acceptance of standards for deceptive advertising.

I. THE IMPACT OF TELEVISION

With the increasing sophistication of our technology, the impact of television has had a tremendous significance which will continue to increase in the future. Recently, many social scientists have been concerned with the psychological effects of television. An acknowledged authority, Marshall McLuhan, suggests that a "world community" has been formed due to the effect of television. McLuhan states that T.V. is an instantaneous, electronic informational system and the viewer approaches T.V. as a reliable source of factual information.[1] Two other well-known social scientists, Paul Lazerfield and Robert Merton, found that the flood of information from television transforms the energies of the audience from active participation to passive knowledge. They described this phenomenon as "narcotizing dysfunction"; television actually drugs listeners into a state of passive reception.[2] In this state, the viewer is susceptible to any form of information that he receives from T.V. Use of television by educators further emphasizes the fact that people learn more easily from T.V. Today, many modern schools have installed closed circuit T.V. as a teaching tool. Television, therefore, has become an extremely potent source for the gathering of knowledge, knowledge which causes people to act.

In addition to television's ability to disseminate knowledge with great impact, the effectiveness of advertising has been enhanced by the recent sophistication in the science of motivation. Advertisers now make use of the following basic characteristics of human behavior to increase the effectiveness of their advertisements: people react when stimulated; inconsistency is a form of stimulation which creates a feeling of uncertainty; people resolve this uncertainty by seeking an answer to clarify this inconsistency.[3] Thus a product's advertisement on T.V. should stimulate the viewer into comparing that product with the one he is currently using. The claim of the new product, inconsistent with the performance of the old one, will create a feeling of uncertainty in the viewer's mind, and the viewer will resolve this uncertainty by purchasing the advertised product to see if the performance is consistent with the claims.[4] These psychological characteristics have been employed by the advertising industry to effectively sell their products through the television media. Hence, the advertiser is encouraged to provide sufficient stimulation in order to cause uncertainty about their product.*

As a consequence of this entire process, advertising encourages and is susceptible to excessive claims by advertisers which, ultimately, often leads to deception (See Appendices B–F). Deception is defined as the capacity or tendency to deceive the public. Actual deception need not be shown or found. *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F. 2d 666 (1967). The effect of the ad, more than anything else, constitutes deception:

". . . advertising deception may result from the use of statements which are not technically false or which may be even technically true, since the only relevant consideration is the impact of the statements on the general public, including the ignorant, unthinking and the credulous. *National Broadcasting Company, Inc.*, 14 RR 2d 315, 316 (1968)."

The tendency to deceive is the greatest among viewers that are the least sophisticated. "In evaluating the tendency of the language to deceive, the Commission should look not to the most sophisticated readers (or viewers) but rather to the least." *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869, 872 (1961).

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[1] *The Medium is the Message*, Marshall McLuhan, Bantam Books, New York, 1967.

[2] Lazerfield, Paul and Robert Merton, "Mass Communication, Popular Taste, and Organized Social Action," *Mass Communication*, ed. Wilbur Schramm (University of Illinois Press, Urbana, Illinois, 1960).

[3] Leavitt, Dr. Clark, "The Communication Response," *Psychology in Media Strategy*, ed. Leo Bogart (American Marketing Association, (1966), p. 27.

[4] Ittleson, Professor William H., *Psychology in Media Strategy*, ed. Leo Bogart (American Marketing Association, 1966), p. 44.

*To illustrate by example: A housewife has viewed three different ads for a detergent: the first states "X detergent will get your wash clean"; in the second, a wash cleaned with Y is compared with another and it is stated "Y gets wash cleaner". The third shows the same comparison but it is stated that "Z with bio-enzyme will get wash whiter than white—bright!" The housewife is most stimulated by the most extravagant claim. Originally she thought that the brand she was using was adequate. Now she is told that Z is the best and this creates uncertainty. She resolves her conflict by purchasing brand Z to test the validity of the claims.

The attractiveness of extravagant and even deceptive advertising is its effectiveness. Certain studies have shown that up to a certain point, the more extravagant the claim the more successful the ad.[5] Furthermore, disbelief of the consumer is no bar to the effectiveness of an exaggerated advertisement. Mr. Gerhold, Vice President and Director of Research for J. Walter Thompson Company has said that if you make a statement, repeat the claim often enough, loud enough, with enough vigor and sincerity, the problems associated with disbelief of the ad will disappear.[6]

II. THE HARM CAUSED BY DECEPTIVE ADVERTISEMENTS

Deceptive advertising on television leads to substantial harm. This harm takes various forms, and adversely affects all segments of society. One form, financial harm, may be realized through the monetary loss to an individual consumer each time he purchases a deceptively advertised product. The loss for each separate purchase may be small, but in a year's time these losses add up to a significant amount. Moreover, an individual's loss leads to a sponsor's gain. The sponsor, inducing sales by deceptive ads, gains huge profits from the total of these small individual sales. This gain is contrary to public policy.

The harm to one's health that can result from deception is direct and serious. This can occur because the advertisement omits a warning of serious side effects (cigarettes can kill, powerful mouthwashes may injure the mucous membrane of the mouth, brightening toothpastes contain abrasives which remove enamel from teeth), and furthermore, one might conceivably rely soley on the therapeutic claims of a product when medical advice is needed (Geritol isn't the panacea it so implies [see Appendix F–4]; Listerine will not prevent colds [see Appendix F–2]; analgesics do not relieve tension [see Appendix C–2]).

Unfortunately, the greatest amount of relative harm falls on those who can least afford it—the poor, particularly the inhabitants of the inner-city. Due to their lack of education and the feeling that they are members of a lower social class they are particularly susceptible to the misleading claims of products advertised on television which give the impression of being identifiable with the prosperous middle class. This harm is compounded, because in the inner-city, television, which is almost a universal appliance, is more extensively watched than elsewhere.[7]

Children are also easily taken in by misleading claims (see Appendix B). Children, especially pre-schoolers, are highly impressionable, and are usually unable to appreciate the fine distinctions between reality and illusion, truth and falsification, fact and exaggeration. Lacking the ability to properly place in perspective advertising claims, youth are susceptible to accepting blindly that which is represented as truth. Their parents, the eventual purchasers, are not in a position to judge either since they probably did not see the ad and know only that their child desires the advertised goods. Others have recognized the vulnerability of youth to misrepresentation, including the National Association of Broadcasters which has said:

"The broadcasters and the advertiser should exercise special caution with the content and presentation of television commercials placed in or near programs designed for children. Exploitation of children should be avoided. Commercials directed to children should is no way mislead as to the product's performance and usefulness." [8]

Finally, the harmful effects of deceptive advertising are felt within the industry. Here the snowball theory has taken effect. Once that first deceptive ad is aired, advertisers of competing products are forced into making similar claims to remain competitive. As a result, extragavant deceptive claims have become an accepted practice utilized by all. The effect of this is that now, if a manufacturer has a superior product he will probably begin his advertising

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[5] McGuire, Dr. William J., *Psychology in Media Strategy*, ed. Leo Bogart (American Marketing Association, 1966), p. 71.

[6] Gerhold, Paul E. J., "Basic Research and Advertising Practice: A Dialogue," *Psycology in Media Strategy*, ed. Leo Bogart (American Marketing Association, 1966), p. 68.

[7] *Report of the National Advisory Commission on Civil Disorders*, (New York, Bantam Books, 1968), Chapter 4.

[8] *The Television Code of the National Association of Broadcasters*, 14th ed. (1969), Section X, 3.

campaign by employing the exaggerated claims technique. The result is that the public has no firm basis upon which to distinguish product superiority.

The public is, therefore, the ultimate loser. For example: In 1956, Procter and Gamble marketed Crest with stannous fluoride, an additive which had been skillfully developed and researched at Indiana University. The stannous fluoride, by a process of coating the tooth, was proved to add to the effectiveness of ordinary toothpaste. However, from 1956 until 1960, Procter and Gamble, caught up in the exaggerated claims technique, developed campaigns centering on the themes of "Triumph over tooth decay" and "Look Mom, no cavaties." These ads, unable to inform the public of a proven product, gave Crest only 12% of the toothpaste market. The leader with 35% of the market was Colgate Dental Cream.[9] Its advertising was based on the results of tests which essentially showed that those who brushed after every meal with Colgate Dental Cream fared better than a control group which followed their ordinary brushing habits.[10] The fallacy in this test is that any toothpaste could have been substituted for Colgate Dental Cream with comparable results.

The unavoidable conclusion is that for four years the only proven effective anti-decay toothpaste was not reaching the public while the best seller was exploiting the results of irrelevant and misleading research. Thus, for four years the public was without an important product.

III. THE FAILURE OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission, the traditional agency responsible for the regulation of deceptive advertising, has proven to be ineffective. The FTC, by the Federal Trade Commission Act of 1914, initially was given broad jurisdiction and powers over misleading advertising. Under the Act (as amended in 1938), deceptive practices in commerce are declared unlawful, Section 5(a)(1), the Commission may prevent these deceptive acts, Section 5(a)(6), and the Commission's findings are conclusive, Section 5(c). However, the FTC has been remiss in executing this statutory delegated authority. The American Bar Association Report on the FTC states: "When actual performance is measured against the potential which the FTC continues to possess, the agency's performance must be regarded as a failure on many counts."[11]

The ineffectiveness of the FTC in controlling deceptive advertising has been in the area of enforcement. The main deficiencies are delay, ineffective sanctions, and the inability to reach those most responsible for the dissemination of deceptive advertising on television, i.e. the broadcast licensees.

One of the main problems of enforcement is the delay in making a determination of a deceptive practice during an investigation.* There is also delay in the actual elimination of a deceptive practice due to the lengthy appeal process. The Commission does not have the statutory power to halt a challenged activity immediately.† It must wait until the respondent has exhausted all the legal machinery available before a deceptive advertisement will be removed from the airwaves.

An example of delay involving a deceptive television commercial is the case *Carter Products, Inc.* v. *Federal Trade Commission* 268 F. 2d 461 (1959). This case involved misleading advertising claims made about "Carter's Little Liver

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[9] Bliven, Bruce, "Annals of Business," *The New Yorker,* Vol. 39 (March 23, 1963), pp. 83–84.

[10] Whiteside, Thomas, "Annals of Television," *The New Yorker,* Vol. 45 (September 27, 1969), p. 78.

[11] *Report of the ABA Commission Report to study the Federal Trade Commission.* American Bar Association, September 15, 1969, p. 35.

*The ABA Commission report states: "The number of investigations in that Bureau (Deceptive Practices) pending in 1969 (about 800) also is down sharply from the highs in the period 1962–1964 (about 1200 to 1350 per year). But again in terms of the length of time investigations remain in a pending status, the percentage pending 'over 2 years' was 52% in 1969, more than double the figure in each year during the period 1962–1964 and substantially higher than any single year since 1962." (*Workload and Manpower Reports*) (ABA Commission Report, p. 30.)

†An exception to this involves those deceptive commercials discussed in Section 12, 15 U.S.C. Section 52, i.e., "any false advertisement" likely to induce the purchase of foods, drugs, or cosmetics. In these cases, if the Commission should feel that delay during the pendency of administrative proceedings will work prejudice to the public due to the continued circulation of allegedly deceptive advertisements, it has available the recourse to the federal district court for a temporary injunction provided in Section 13(a) of the Act, 15 U.S.C. Section 53(a).

Pills." The FTC, in 1956, issued a cease and desist order against the respondent prohibiting him from using certain advertising claims. Through all the legal maneuvers possible, the respondent was capable of postponing his compliance with this order for over 13 years. It was only in 1969 that they were required to remove the deceptive commercials from the airwaves.

Another major problem of enforcement is that of the FTC's ineffectiveness in utilizing its sanction powers. This agency is ineffective in regulating deceptive advertising over the airwaves because it does not use its formal enforcement procedures as effectively and as often as it should. The FTC's formal or adjudicative proceedings are commenced by the filing of a complaint by the Commission, 16 CRF Section 3.11(a) and results in the issuance of either a cease and desist order, or a "consent" (non-contested) cease and desist order.

The cease and desist order is the only coercive legal enforcement tool generally available to the Commission. It is issued after hearing and appeals, and prohibits the respondent from employing the particular deceptive practice described. This order imposes no retroactive sanctions, but merely prohibits future repetition of that conduct against which it is aimed. Thus these sanctions are defective in that their scope is limited to future violations rather than imposing punitive measures for past violations. For example, the deceptive advertising campaign by an advertising sponsor may have already been presented to the public or may even have been terminated by the time of the issuance of the cease and desist order. The producer, already having achieved his intended objective, will be told not to use that deceptive ad again, but will not be punished for having already used it. Thus the producer will not be deterred from using other deceptive advertisements in the future. As long as the ads are not the same type that were sanctioned previously by the FTC, an advertiser is free to conduct any type of misleading campaign that he so desires.

The "Consent" (non-contested) cease and desist order is the other possible result of a formal adjudicative proceeding. For this result, all the formalities of a trial are dispensed with, and the respondent merely consents to the issuance of a cease and desist order. This order has the same force and effect as an order entered after a formal trial. Thus, as with the cease and desist order, an advertiser can successfully promote a deceptive advertisement and not be punished for his violations.*

Even when the Commission issues a cease and desist order, there may be a failure to diligently enforce its decision as is illustrated by the long history of the Commission's dealings with the J. B. Williams Company over advertising campaigns for Geritol.

J. B. Williams and Company, the manufacturer of Geritol, represented their product as being of benefit in the treatment of fatigue and other minor disorders such as nervousness and irritability. After three years of investigations as to the validity of these statements, the FTC, in 1962, issued a complaint stating that the respondent misrepresented the efficacy of their product. The Commission did not seek a preliminary injunction as they had the power to do. Three years passed before the Commission isued a cease and desist order, which was finally affirmed in 1967 by the Court of Appeals in the case of *J. B. Williams Company* v. *Federal Trade Commission,* 381 F. 2d 884 (1967).

As required, the respondent filed their first compliance report early in 1968. On November 14, 1968, the Commission held a public hearing to determine whether the new Geritol commercials complied with their order. In the FTC New Release of December 13, 1968, it was stated that the new commercials "not only failed to comply with the order, but . . . are no less objectionable than the commercials denounced by the Commission when it issued its original order herein."

Instead of seeking civil penalties (up to $5,000 per day for violations), the Commission merely asked for the submission of another compliance report.

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*In recent years, there has been a noticed decline in the Commission's use of formal enforcement procedures. This is revealed through an investigation into the workings of the Bureau of Deceptive Practices. The ABA Commission Report, stated that this bureau has over recent years issued fewer and fewer formal complaints. It issued 177 formal complaints in 1961, but only 129 in 1964. The number issued then fell to only 45 in 1968 and to 65 in 1969. Corresponding to this decrease in formal complaints, has been a decrease in the number of cease and desist orders issued after formal litigation. The Bureau of Deceptive Practices issued 180 cease and desist orders in 1961 and only 68 in 1969. (*Workload and Manpower Reports*) (ABA Commission Report, pp. 20–21).

Even after this report was submitted, the Commission found that certain Geritol commercials still violated the cease and desist order. Again, the FTC failed to impose civil sanctions for violations. As of September, 1969, the commercials were still being televised.

The Commission is also ineffective in regulating deceptive advertising over the airwaves because it cannot control those most responsible for its dissemination—the broadcast licensee. Section 14(b) of the FTC Act states:

"No publishers, radio-broadcast licensee, or agency or medium for the dissemination of advertising . . . shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission, the name and post office address of the manufacturer, packer, distributor, seller or advertising agency, residing in the United States, who caused him to disseminate such advertising."

Thus the FTC, even if it has issued a cease and desist order against a sponsor for deceptive commercial, can probably take no action against the broadcaster, the one who is showing this deceptive ad to the intended consumer.

IV. THE INADEQUACY OF SELF-POLICING

Self-policing by the industry itself has been generally inadequate. The National Association of Broadcasters, the self-created regulatory arm of the broadcasting industry, is always quick to claim that they can take care of any problems arising with respect to deceptive advertising. But for the most part, they cannot.

In 1962, Phil Edwards, the Chairman of Broadcast Advertisers Reports, which was monitoring television commercials in an attempt to ferret out deceptive advertising, announced he would no longer monitor for the industry. The NAB and the stations were ignoring the complaints. He stated: "Self-regulation on an industry-wide basis is not only deceptive, but it is impossible." [12]

It is clear that, that the economic structure of the industry itself precludes the possibility of effective self-policing. The broadcast licensee is dependent on advertising sponsorship for its very existence. It is idealistic to expect the industry to bite the hand that feeds it. (Broadcasters are not in a position to be selective unless all are required to conform to a uniform policy of regulation.)

Advertising agencies also are caught in the economic trap. As Max Geller, President of Weis and Geller, has said:

"Agencies don't get paid for sticking to principles. If a company wants to go haywire in its claims, the agency either goes along or loses the account. Agencies need the moral crutch of Uncle Sam's regulations to resist the pressure of client's in this Darwinian jungle." [13]

The NAB, purporting to be concerned over the issue of public health, has been remiss in their duties with respect to the advertising of cigarettes and analgesics. Amidst all of the anti-cigarette information presently available, the NAB introduced a plan of voluntary withdrawal of cigarette commercials by September 1, 1971; yet this plan calls for ending these ads a full year after the tobacco companies proposed withdrawal and actually a year and nine months from the time tobacco companies were willing to drop the ads providing broadcasters would release them from their contracts.[14] (Subsequently, the Senate has passed a bill that terminates the advertising of cigarettes on T.V. by January 1, 1971.) The NAB has not been able to eliminate deceptive advertisements for analgesics from television either. Earlier this year the Code Authority, a section of the NAB, surveyed its Medical and Science Advisory Panel on the extent of relief of tension by non-prescription analgesics. Certain analgesic advertisements claim that their products calm "jumpy nerves" and relieve "taut-tense nerves." The results of the survey reveal that in the doctors' expert opinions, none of the analgesics surveyed is capable of relieving tension, depression, jumpy or taut-tense nerves. The Code then advised the broadcasters of these findings presumably so that the

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[12] Edwards, Phil. "Deceptive Regulation," *Time*, Vol. 79, March 23, 1962, pp. 73–74.

[13] Geller, Max. "Madison Avenue v. The FTC." *Time*, Vol. 79, February 2, 1962, p. 61.

[14] Braren, Warren. Speech before the Advertising Age Media Work-Shop. December 3, 1969.

broadcasters could remove these deceptive advertisements from the air. Now, seven months later, these claims still persist. (See Appendix C–2).

As Warren Braren, the former head of the New York office of the Code Authority, said recently:

"The NAB still continues to see itself as the protector of the free enterprise system of broadcasting which is another way of saying don't interfere with the broadcaster's right to sell advertising time as he choses." [15]

V. THE RESPONSIBILITY AND AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION TO REGULATE

The Federal Communications Commission has a responsibility to control deceptive advertisements on television. Such responsibility is, in part, derived from the impact and potential of the media itself. Many deceptive advertisements would not have the great effect upon the public were it not for the ability of television to narcotize its viewers. It is the media which allows many advertisements to be so effective and the FCC has control over the media.

Thus, due to the fact that the media is the means for deception, the great impact of television, and the ineffectiveness of the Federal Trade Commission and industry self-regulatory organizations to control deceptive advertising, the responsibility of such regulation should be assumed by the Federal Communications Commission.

The FCC's effectiveness in this area is derived from its powerful point of leverage. This point of leverage is its power to grant licenses. This power, found in Sections 301 and 303 of the Communications Act, is pervasive and absolute as "Congress has occupied the field of television regulation in its entirety." *Opinion of the Attorney General of Massachusetts*, 7 RR 2d 2081 (1966). Anyone who desires to broadcast anything on the airwaves must have a license and once the license is obtained, the broadcaster has a virtual monopoly for the period of the license. *WFLI Inc.*, 12 RR 2d 18 (1968). A broadcasting license, of course, is not obtainable from any other source and and must be granted by the Federal Communications Commission. The "federal government has preempted the licensing and assignment of radio frequencies" (including television). *Opinion of the Attorney General of Michigan*, 12 RR 2d 2145 (1968).

The ultimate power of licensing is readily recognized by the licensees themselves. Any action by the Commission to limit the term of a licensee by granting a short term renewal, *In re Application of Melody Music, Inc. (WGMA)*, 6 RR 2d 973 (1966), *In re Application of WCHS-AM-TV Corp.*, 10 RR 2d 445 (1967). *In re Application of Eastern Broadcasting Co.*, 14 RR 2d 331 (1968), to deny a license in an application for renewal, *In re Application of Melody Music, Inc. (WGMA)*, 36 FCC 701 (1964), *Eleven Ten Broadcasting Corp.*, 22 RR 699 (1962), *In the Matter of WHDH, Inc.*, 15 RR 411 (1969), or to evoke a license, *In the Matter of Revocation of License of KWK Radio, Inc.*, 34 FCC 1039 (1963) is met by strong opposition by the licensee. The licensee should react; his economic life is at stake. In fact, potential economic loss is great. The licensees have a total market value of about $3 billion.[16] The only possible recovery for the licensee is to sell his equipment, but this step is small consolation for the fact that he has lost the value of his license without compensation and even worse, that he is out of business. The FCC, thus, can exercise a great deal of power over the licensee to eliminate the broadcasting of deceptive advertising. For, while a censured manufacturer can still produce products and a censured advertising firm can still produce ads, a broadcaster without a license ceases to exist.

The Federal Communications Commission's authority to regulate deceptive advertising is clearly within the scope of its powers. The Commission has on various occasions acknowledged its ability to act in related areas of deceptive broadcasting, and on many occasions, has regulated in this field.

The source of this power is found in the Communications Act itself where the Commission is granted the power to license a prospective broadcaster on the basis of "public convenience, interest, and necessity." *Radio Station WOW*

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[15] *Ibid.*

[16] "3 Billion in Stations Down the Drain?" *Broadcasting*, Vol. 76 February 3, 1969, p. 19.

v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1475 (1945).* The Communications Act also states that the Commission has the power to prescribe the nature of service to be rendered by station, Section 303(b), the duty to encourage the larger, more effective use of radio (which includes television), Section 303(g), and the authority for adoption of rules to carry out provisions of this Act, Section 303(r).

The Federal Communications Commission has a long history of acting in the public interest to prevent deceptive broadcasting. The earliest cases, including one coming from the Federal Radio Commission, predecessor to the FCC, showed the Commission acting against the use of airwaves to promote dangerous drugs and quack medicine. *KFKB, Broadcasting Ass'n., Inc.* v. *Federal Radio Commission*, 47 F. 2d 670 (1931), *In the Matter of the Farmers and Bankers Life Insurance Co.*, 2 FCC 455 (1936), *In the Matter of Oak Leaves Broadcasting Station, Inc.*, 2 FCC 298 (1935).

The Commission addressed itself directly to the problem of false, misleading, and deceptive advertising in 1960 when it established a duty on the licensee to eliminate this type of advertising.

"Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material, the licensee has additional responsibility to take all reasonable measures to eliminate any false, misleading or deceptive matter." [17]

The FCC restated this policy in the following year.[18]

A series of cases since these statements of policy clearly show that the FCC not only can but desires to eliminate fraudulent, deceptive, and misleading advertisements from the air. The Commission has viewed a variety of broadcasting practices as contrary to the public convenience, interest, and necessity and has used various sanctions to end these practices including letters of censure, short-term license renewal, denial of license renewal, and license revocation. The Commission has expanded upon its early rulings that limited the use of airwaves in the broadcasting of materials that lead to physical harm to the public. In *In the Matter of Television Statement WCBS-TV*, 9 FCC 2d 921 (1967), the Commission applied the "fairness doctrine" to the field of cigarette advertising. Deceptive use of audience survey ratings of a program was, in two instances, grounds for a short-term license renewal of one year instead of the usual three. *In re Application of Star Stations of Indiana, Inc.*, 3 RR 2d 745 (1964) and *In re Application of Western Broadcasting Co.*, 14 RR 2d 335 (1968). The FCC has also ruled in the area of fixed quiz shows issuing a letter of censure to a licensee in one case, *National Broadcasting Company*, 14 RR 2d 421 (1968) and granting a short term license renewal in another, *Melody Music*, supra p. 18 (1966). The Broadcasting of fraudulent contests resulted in the denial of license renewal in two cases, *Eleven Ten Broadcasting Corp.*, supra p. 18, and *Melody Music*, supra p. 18 (1964), and license revocation in a third case, *KWK Radio*, supra p. 18.

A special type of fraudulent contest, the "Lucky Bucks," has recently become the object of Commission action. The listening and viewing audience were led to believe that by staying tuned to that particular station, they would receive information which would enable them to win sums of money up to $1,000. However, in reality, the mathematical chances for winning for infinitesmal. The Commission issued two letters of censure, *National Broadcasting Company*, 14 RR 2d 315 (1968) and *In re Complaint Concerning Deceptive Advertising by Station WKYC*, 14 FCC 2d 683 (1968), stating that the practices of these licensee would be considered in the proceedings for the renewal of their licenses. Two licensees, *WCHS-AM-TV*, supra p. 18, and *Eastern Broadcasting Corp.*, supra p. 18, received only short term license renewals because they broadcast "Lucky Bucks" show on their station. In each of these cases, the Commission, in making specific reference to Public Notice 61-1316 placed responsibility directly on the licensee to limit deceptive and fraudulent adver-

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*That this phrase is important is evidenced by its present in Section III of the Communications Act no less than 14 times. Sections 303, 307(a), 307(d) twice, 309(a), 310(b) twice, 311(b), 311(c)(3) twice, 316(a), 317(d), 318 and 319(d).

[17] *Statement of Policy*, FCC Public Notice No. 60-970 (1960).

[18] *Licensee Responsibility with Respect to the Broadcast of False, Misleading, or Deceptive Advertising*, FCC Public Notice No. 61-1316 (1961).

tising on his broadcasts.[19] This responsibility, the Commission stressed, if improperly executed could lead to sanctions.

The Commission can act and has acted to prevent deceptive and fraudulent broadcasting from the air and thus far has prevented advertisements leading to public harm, fraudulent audience rating surveys, fixed quiz shows, fraudulent contests, and deceptive program advertising from being broadcast by their licensees. Deceptive commercial broadcasting has not yet been categorically eliminated and now is the time to include deceptive commercial advertising with those other forms of deceptive broadcasting and advertising and also prohibit this form of deception from the airwaves.

VI. THE CONSTITUTIONALITY OF FEDERAL COMMUNICATIONS COMMISSION STANDARDS

The arugment has been made at various times that Federal Communications Commission sanctions on the ground of "public interest, convenience, and necessity" are unconstitutional as violative of the First Amendment right to freedom of speech. On the basis of the law in this area, these objections are simply untrue. Granting or denying licenses to prospective broadcasters on the basis of the above criteria is merely one of the powers granted to the Commission by Congress. The denial to a station of a license, validly made, because the standard of "public interest, convenience, and necessity" has not been met is not a denial of free speech. *National Broadcasting Company* v. *United States*, 319 U.S. 190, 63 S. Ct. 997, 1943).

Standards for deceptive advertising, as long as they do not constitute "prior restraints," impositions of limitations before publication, do not constitute censorship. Standards will merely act as a guide for the Commission to determine whether a licensee, on the basis of his past performance is fit to perform in the future. In the KFKB case, supra p. 20, the court held that:

"There has been no attempt on the part of the Commission to subject any part of the appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of applicant's license, the Commission has merely exercised its undoubted right to take note of applicant's past conduct, which is not censorship." (At 672).

The Commission's action to limit excessive commercial broadcasting has even been construed as not to constitute censorship as evidenced in *Bay State Beacon, Inc.*, v. *Federal Communications Commission*, 171 F. 2d 826 (1948). In that case, the Commission went so far as to refuse to grant a permit for the construction of a broadcasting station to an applicant because the applicant's proposed broadcasting schedule allowed too much time for commercial broadcasting. Again the court held that such an act by the Commission was not censorship and did not violate the applicant's First Amendment right. Thus, FCC action in the area of regulation of deceptive advertisements on television is not unconstitutional.

VII. THE CODE OF STANDARDS

A method of eliminating these deceptive forms of advertising is the adoption by the Commission of general standards defining and proscribing deceptive and misleading advertising. Standards would create a broad, uniform guide instructing each licensee of his responsibility and obligations and could be used by the Commission with great accuracy in measuring the performance of any licensee. Members of the Commission, themselves, have on past occasions recognized the value of adopting standards. Regarding overcommercialization (i.e., too great a quantity of ads), the suggestion of adopting such standards was raised in *In the Matter of amendment of Part 3 of the Commission's Rules and Regulations with respect to advertising on Standard, FM, and Television Broadcast Stations*, 1 RR 2d 1606 (1964) and *Commercial Practices of Broadcast Licensees*, 2 RR 2d 885 (1964). In addition, both decisions made reference to the need for regulations in the area of the content and quality of commercial broadcasting. In the former decision, the Commission denied the adoption of standards at that time because suffi-

[19] *Ibid.*

cient information was lacking, but in general, they recognized the need for employing such standards:

"The establishment of generally applicable standards by means of rule-making procedures . . . may have a number of advantages. For, in addition to permitting an overall treatment of the problem, not available in a case by case consideration, the rules adopted would have the added advantage of being definite, of providing guidelines and guidance to licensees and of applying equally to all competitors in a given market." [20]

And in the latter decision, Chairman Henry in a dissent, quite specifically asks for the adoption of standards:

". . . the most fair and effective way for this Commission to regulate the commercial practices of broadcasters would be through the announcement of general standards—criteria which would let the public and industry know where they stand and what they can expect from us." (At p. 887).

Thus, it is proposed that the FCC accept a code of standards which would regulate deceptive advertising on television on an industry wide basis. The proposed standards recognize the ability of the Commission to effectively regulate television advertising through enforcement policies applicable directly to the licensees and the existing interaction and cooperation between governmental agencies. Further, the proposed regulations are aware of the necessity of advertisements to the broadcast industry, yet consider the balance between that necessity and the public welfare, good, and well being to be determinative of the responsibilities of the FCC as to advertising misrepresentation on television.

Following is a presentation of the Code of Standards (See Appendix A for a complete text of Code) and accompanying comments:

I. General Statement and Considerations

A. This proposed code establishes basic standards which define and regulate deceptive advertising on television. The code develops principles of aesthetic and ethical considerations and incorporates criteria which identify misleading advertisements. The intent is to foster Commission acceptance of its regulatory obligations and maximum utilization of current enforcement policies.

B. Broadcast licenses have certain responsibilities and obligations to the public in relation to media advertising.

1. Advertising messages should be presented with courtesy and good taste and function in accordance with the highest standards of ethical sensitivity, acceptability, and discretion in regard to the average viewing public.

2. Broadcast licensees must understand the great impact and affect of media advertising upon the general public, especially children and youth.

3. Concern for the public good and well-being should take precedence over consideration of economic expediency and institutional or individual advantage.

Comment: The proposed code is concerned with regulating deceptive advertising on television. Its motivating force is the public interest and well-being to be accomplished through industry-wide standards enforced by the FCC. The code holds the broadcast licensee to standards of good taste and discretion in regards to their viewing audience's composition and preferences. Evaluation of such audience composition by the licensee is to include consideration of "the ignorant, the unthinking, and the credulous" and children and youth. It further requires the licensee to be aware of the types of deception and their methods of presentation. The FCC will utilize these standards as criteria to determine the success of the licensees' efforts to eliminate these various forms of deception from their broadcasts.

The proposed standards are further concerned with the balance between the economic value of advertisements to the broadcast industry and the public interest, convenience, and necessity. The code in no way underestimates the value and necessity of advertisements to the viable functioning of broadcasting. Yet, this interest must be subordinate to the concern for the public. As the Commission has said:

"Thus, while it must be recognized that, as the only source of revenue for most broadcast stations, advertising is an indispensible part of the American system of broadcasting, it must be further recognized that broadcast stations cannot be operated primarily in the interests of advertisers in presenting their

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[20] *FCC Notice of a Proposed Rule Making*, FCC Public Notice No. 63-467 (1963).

message to the viewing or listening public, or primarily in the interests of the station licensees in the revenues to be derived therefrom; broadcast stations must be operated in the public interest—the interest of the viewing or listening public in the nature of the program service received." [21]

Hence, acceptance of these standards will allow FCC participation in regulatory procedures which requires no change in legislation, no change in basic inter-governmental relationships, and no change in the basic functioning of the FCC. The only change required by this proposed code is the acceptance by the FCC of greater responsibilities and obligations for the benefit of the average viewing public.

II. General Standards for Deception in Media Advertising

A. Criteria for the regulation of deceptive media advertising concerns identification of deceptive advertisements as to their ability to deceive, the applicability of the deception, and the method of deception.

B. Elements of deceptive advertisements:

1. An advertisement which has the tendency or capacity to deceive the average viewing public is proscribed.

2. Proscribed deception applies to the misrepresentation of a product's characteristics, performance, and/or appearance.

3. Proscribed deception applies to the methods of achieving misrepresentation in advertising:

a. Misrepresentation of facts to induce the purchase of goods.

b. Misrepresentation as to the implications derived from the totality of the deceptive advertisements.

c. Failure to disclose material facts .

Comment: The standards apply deception to misrepresentation of a product's characteristics, appearance, and/or performance. This includes both verbal and visual misrepresentations which can be attained by three methods, or techniques, of deception. The first method concerns a misrepresentation of fact. Such techniques include undisclosed simulations, mock-ups, distortion by cameras or props, or tampering with or abusing a competitor's product. Misrepresentation of fact is among the most common forms of deception and abounds on the media today in the form of advertisements for various consumer goods (See Appendices B-F). A second method does not necessarily require a specific misrepresentation of fact to be deceptive. This method of misrepresentation is successful in its ability to foster deception in a viewer's ultimate impression derived from a total advertisement. It is deception derived "from the sum total of not only what is said but of all that is reasonably implied." *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 167, (1942). Thus, there need be no specific misrepresentation. Rather, it is the impression derived from the totality of the advertisement or series of advertisements which creates the deception. Again, these advertisments exist on today's media in the form of certain advertisements (See Appendices B-F). The third form of deceptive advertisement may present the greatest danger, for it is the most devious and insidous in its nature. It involves simply the deletion from the advertisement of pertinent, necessary, or material facts as to a product's danger, limitations, or ineffectiveness. This is inverted deception. Rather than falsification of facts, advertisers hide them; rather than manipulation, there is deletion. Yet the result is the same. The average viewer is deceived, misinformed about a product's characteristics, appearance, or performance. Such deletion of material facts or non-disclosure of pertinent information which results in deceiving the average viewing public is equivalent to deception accomplished through implication or misstatement. "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such a method cannot excuse the deception by relying upon the truthfulness *per se* of the partial truth by which it has been accomplished." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (1950). Such deception can be found in various advertisements (See Appendices B-F).

III. Enforcement

The Commission shall, upon reasonable notice, take appropriate action against licensees who fail to comply with the provisions of these standards.

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[21] *Ibid.*

Appropriate action by the Commission is limited to only those sanctions provided for in the Communications Act.

Comment: These proposed rules recognize the powers granted to the FCC under the Communications Act of 1934 and propose that the Commission utilize certain provisions to require station licensees to operate "in the public interest, convenience, and necessity." The point of leverage by the Commission over the licensee, as stated before, is the power to license. All forms of Commission sanctions would be related to this power.

The Commission has a wide range of alternatives in enforcing these provisions. Probably the best summary of these alternatives is found in a 1959 memorandum by the U.S. Attorney General, William Rogers, to the President. His suggestions included:

"Adopt a program of more intensive scrutiny of licensee's past performances in connection with renewals. It might be appropriate for the Commission to adopt a system similar to that followed by the Internal Revenue Service which chooses a certain number of returns at random for a spot check in depth. The Commission might follow the same course by requiring narrative and detailed accounts of past operations, and, in addition to acting on specific complaints, choose a certain number of renewal applications or all the licensees in a particular community for close examination, requiring more detailed information where necessary, and setting questionable cases for hearing. The procedure would include consideration of advertising practices, material which has been advertised, and action taken on complaints by the FTC. The procedure should emphasize a comparison of the licensee's actual performance with the promises he made as to his programs and operations when his license was originally granted or last renewed. The licensees would thus be put on notice that from time to time they might have to give a detailed accounting as to their operation in the public interest." [22]

Further, the Commission, considering a licensee's qualifications during a license renewal hearing, may use existing inter-governmental relationships for aid in the determination of deceptive advertisements. For example, the FCC and FTC have already established a convenient working relationship between themselves.[23] Thus while the FCC could have assistance in determining whether a particular ad is deceptive, they alone would make a determination as to whether or not a licensee adhered to the standards for the elimination of deceptive ads. Ultimately, a licensee who failed to adhere to these standards could receive a letter of censure, be granted a short term license renewal, have its application for license renewal denied, or have its license revoked.

Wherefore, these arguments considered, the Commission is respectfully requested to issue an appropriate notice of proposed rule making looking toward the adoption of these standards designed to eliminate deceptive advertising on television.

Respectfully submitted,

TUBE *(Termination of Unfair Broadcasting Excesses)*.

By JANATHAN S. BOWERS.
LAURENCE H. COHEN.
PETER M. NEMKOV.
RICHARD PORTUGAL.

Appendices

Appendix A consists of a complete text of the proposed Code of standards.

Appendices B-F consist of a representative sampling of advertisements which may be deceptive. These ads have been broadcast within the last two months in the Washington metropolitan area by the three major networks: CBS, ABC, and NBC.

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[22] Laurent, Lawrence (ed.) *Equal Time: Private Broadcaster and the Public Interest*, Atheneum, New York, 1964, pp. 85–86.

[23] *Liaison Between FCC and FTC relating to False and Misleading Radio and T. V. Advertising*, FCC Public Notice No. 57–172 (1957).

Appendix A—Code of Standards

I. GENERAL STATEMENT AND CONSIDERATIONS

A. This proposed code establishes basic standards which define and regulate deceptive advertising on television. The code develops principles of aesthetic and ethical considerations and incorporates criteria which identify misleading advertisements. The intent is to foster Commission acceptance of its regulatory obligations and maximum utilization of current enforcement policies.

B. Broadcast licenses have certain responsibilities and obligations to the public in relation to media advertising.

1. Advertising messages should be presented with courtesy and good taste and function in accordance with the highest standards of ethical sensitivity, acceptability, and discretion in regard to the average viewing public.

2. Broadcast licensees must understand the great impact and affect of media advertising upon the general public, especially children and youth.

3. Concern for the public good and well-being should take precedence over considerations of economic expediency and institutional or individual advantage.

II. GENERAL STANDARDS FOR DECEPTION IN MEDIA ADVERTISING

A. Criteria for the regulation of deceptive media advertising concerns identification of deceptive advertisements as to their ability to deceive, the applicability of the deception, and the method of deception.

B. Elements of deceptive advertisements:

1. An advertisement which has the tendency or capacity to deceive the average viewing public is proscribed.

2. Proscribed deception applies to the misrepresentation of a product's characteristics, performance, and/or appearance.

3. Proscribed deception applies to the methods of achieving misrepresentation in advertising:

a. Misrepresentation of facts to induce the purchase of goods.

b. Misrepresentation as to the implications derived from the totality of the deceptive advertisement.

c. Failure to disclose material facts.

III. ENFORCEMENT

The Commission shall, upon reasonable notice, take appropriate action against licenses who fail to comply with the provisions of these standards. Appropriate action by the Commission is limited to only those sanctions provided for in the Communications Act.

Appendix B—Toys

SWINGEY DOLL

Setting: A number of children of various heights all wearing party clothes are in a decorated party room. Rock music is playing, and all of the children are dancing. One little girl is dancing with the toy doll (holding the doll's hand as the doll is standing on a table). The doll is dancing, making various rock-type movements. The camera shoots quickly around the room back-and-forth to the doll and to various children dancing.

Lyrics: Come on see the swingest dolly; she can swing while she's walking.

Little Girl: Come on Swingey; do your thing.

Lyrics: Come on Swingey; do your beat; shake your arms and shuffle your feet. Swing your head; Swingey do. Dance with Swingey and she dances with you.

Narrator: Swingey is the only doll that dances with you. Comes with her own record too. From Mattell.

Comment: The deception here is created by showing the doll in the context of human dancers. With the camera shots going rapidly back from the doll to the people and then back to the doll again, the viewer gets the false illusion

that the doll has many human-like dance motions. The doll in reality has few motions which, when seen alone, are not nearly as attractive as when they are seen in the context and motion of the party shown in the commercial.

DANCERINA DOLL

Setting: Several small children about five years old are sitting in a living room watching the balerina doll perform. The doll, held by a small girl, makes various ballet-like motions. Throughout the commercial the camera shoots to different angles of the doll. Tchaikovsky's "Nutchacker Suite" is being played in the background.

First Little Girl: It's a beautiful doll; it's like a real ballerina.

Second Little Girl: I want a Dancerina.

Superimposed Voice: There never was a doll like Dancerina. Only you know the secret of the magic crown.

Children: Polite applause in response to the performance.

Narrator: Dancerina, the ballerina doll, from Mattell.

Comment: The deception here is created by the camera rapidly showing many different angles of the doll as it is dancing. This process gives the false illusion that the doll has many more realistic dancing motions than it actually has.

JOHNNY LIGHTNING

Setting: Several small boys surround a race track. Dynamic music is playing in the background. The camera follows the cars and utilizes techniques that make the cars appear to slow down and speed up.

Narrator: Wow! Its long! Johnny Lightning, a ricochet raceway in five separate sets!—with bank turns—with giant loop-d-loop—(slow motion and stop action technique employed here)—with the incredible double jump through space—with straight ahead super speed tracks—with triple loop-d-loop! Two arches in every set which fit together—accessory packs too. It's for the wildest ride! New Johnny Lightning Ricochhet Set!

JOHNNY LIGHTNING

Setting: Several small boys surround a race track. Dynamic music is being played in the background. The camera follows the cars and utilizes techniques that make the cars appear to slow down and speed up.

Narrator: Here come the 1970 Johnny Lightning Challengers! New triple threat three engine dragster—the speed hungry spoiler . . . the bug bomb . . . the powerful smuggler . . . the sand stormer . . . the explosive TNT . . . and many more new models! They are beautiful, and they are fast. Race any other cars again the new Johnny Lightning Challengers, and see for yourself—exciting new cars! Alone or in sets. From Johnny Lightning.

Comment: The deception in both these ads is caused by the impression, the speed of the sound track and the camera technique used. The cars seem to speed up while going around the arches and down the straightaways. The double jump (the car jumping over a break in the track) is shown in slow motion and stop action. Furthermore, the camera is focused upon the car itself. These techniques give the impression of greater size, speed, and ability of the toy. The total impression derived by the viewer is inconsistent with the actual performance of the toy.

Appendix C.—Analgesics

ANACIN

Narrator: When you have a headache, remember: Two Anacin tablets have more of the one pain reliever doctors recommend most than four of the other leading extra strength tablets. The others contain additional pain relievers and two is the recommended dosage, but two Anacin contain more of the specific pain reliever than four of the others. Today's Anacin.

Comment: Although not specifically stated, the "specific pain reliever" referred to in the ad is aspirin. Aspirin is the pharmaceutical agent the average

consumer associates with the curing of headaches and tension and thus aspirin is what is naturally implied by the ad. All such tablets contain the same amount of "aspirin" and, thus the ad's comparison of two Anacin to four of the others is a misrepresentation of fact which the average consumer implies from the ad.

ANACIN

Narrator: Anacin relieves headache pain and so relaxes its tension. Anacin.

ANACIN

Narrator: Headache pain, stress, nerves, pain, its tension builds. There can be more to a headache than pain. Two Anacin tablets have more of the one pain reliever doctors recommend most than four of the other leading extra-strength tablets. The others contain additional pain relievers and two is the recommended dose—but two Anacin contain more of this specific pain reliever than four of the others. Anacin.

Comment: The deception in these two ads is the result of a material misrepresentation of fact. These ads give the impression that Anacin will relieve tension. Doctor's studies reveal that it will not.

Appendix D.—Household Goods

VEG-O-MATIC

Setting: The Veg-O-Matic utensil is sitting on a counter top. Throughout the course of the commercial, all of the different functions of the machine are demonstrated with complete ease.

First Voice: Here is what we meant about Veg-O-Matic: It slices a whole potato in one stroke; turns whole onions into zesty thin slices for hamburgers; now turn the dial and slices are automatically dices; the dial goes slice to dice and sliced onions become diced by the panful; dice carrots the same way; prepare celery for use this easily. Over five million Veg-O-Matics now in use; they must be good. And it's yours for just $7.77—Veg-O-Matic. Veg-O-Matics can slice a whole firm tomato like this in a stroke or make everybody's favorite, golden french fries—hundreds—in one minute. Veg-O-Matic; just $7.77. The perfect Christmas gift. Another great product from P.B.I.

Second Voice: Order Veg-O-Matic while they last at Woodward and Lothrop. Free delivery, charge it.

Comment: This ad creates the false impression that this product cuts and slices with ease. However, it can be used only with a great deal of difficulty. The Veg-O-Matic does not cut smoothly at all—food usually gets caught in the blades. In addition, the blades rarely make a complete cut, sometimes break, and are very difficult to clean.

LIQUID DRAINO

Setting: Housewife is standing before a clogged drain. Her sink is full of water and scum. The plumber enters.

Plumber: Look at that clogged drain.

Housewife: Willy, angel, I've tried. Yesterday one whole bottle of liquid drain cleaner. Today another.

Plumber: Tell you a secret. This one won't cut grease, but Liquid Draino sure does.

Housewife: Just one capful?

Plumber: It's concentrated, works right through standing water. (Plumber pours into sink and scene immediately shifts to a perfectly clean and unclogged sink.)

Housewife: Wow! It's unclogged! I'm spreading the word. If people use Liquid Draino in all their drains, they would never need plumbers.

Comment: The deception lies in the pouring of Liquid Draino into a sink full of water and the immediate switch of the picture to a clear sink—implying that Liquid Draino is so powerful that: (1) it can work to clear a drain through any obstacle (2) it will work first time, (3) it will work immediately.

MIRACLE BRUSH

Narrator: Miracle brush with its new patented nylon head removes every particle of dirt and lint instantly. Always brush in direction of arrow. Rotating the head enables you to brush both ways. Removes knots from sweaters in only seconds. Miracle Brush removes all types of pet hair easily. Removes all foreign material. Starts working when other brushes give up. To clean—simply brush backwards. Never needs a refill and sells for only $2.99.

Comment: The implication derived from the totality of the advertisement's claims is inconsistent with the products true performance.

Appendix E.—Enzyme Detergents

AJAX

Setting: A mother and her son are by her washing machine. The son's shirt is filthy. An Ajax salesman arrives and goes through a dialogue with the mother. During the dialogue, the detergent is put in the washing machine, along with the boy's dirty shirt; after a short passage of time, the shirt is taken out, very clear.

Mother: For once, one of you guys is going to prove your product works. Look (pointing to boy's shirt): mud, grass stains, egg yolk, beef gravy.

Salesman: Here, new Ajax.

Mother: Ajax? Oh, it's stronger than dirt.

Salesman: Now, with Enjax, it gets out harder to clean stains, too.

Mother: A good thing for both of us.

Comment: The deception in this ad is the omission of various facts. First, enzyme detergents require that the clothes be pre-soaked, often overnight, before washing. Second, the enzymes only act on certain types of stains (protein base stains). Third, once the enzyme action starts, it often doesn't stop, leaving acid-like burns in the clothes.

DRIVE

Setting: Delivery man enters kitchen of housewife just as she spills food all over the tablecloth.

Housewife: Good morning! (spilling of food). Oh, look at those stains! These stains are so bad. It'll have to go to the professional laundry (enters the animated blue dot, representing enzymes in Drive).

Dot: Wrong! Take it to this professional, Drive. Drive has me. I'm the professional stain remover professionals use. Drive is loaded with professional stain eaters (picture of enzymes eating stains). Drive eats strawberry jam from flowered percale; egg stains, even off orlons. Drive east orange juice, even from acrylics; not to mention yellowing from pillowcases or blood stains. Drive eats stains, but not fabrics or colors.

Housewife: Why it looks like new (removes tablecloth from washing machine). You said it, Drive is the professional.

Dot: Thank you, my lady. Because Drive has me, a professional stain remover laundrys use. From now on there's only one kind of cleaning for you and that's Drive professional clean. Buy Drive professional detergent, the professional.

Comment: For explanation of deception, see E-1.

FAB

Setting: The scene takes place in or near a home: The scene shifts as each person speaks. The women are housewives; the men are laborers.

First Woman: I'm glad because now my wash is as clean and as fresh as all outdoors.

First Man: I'm glad because now Mary doesn't care how dirty I get.

Second Woman: I'm glad because now these stains wash out.

Second Man: Glad! My wash cleans brightest.

Narrator: It's new Fab—the only detergent with lemon-freshened Borax and active enzymes to remove stains.

Singing Voice: They're always doing something good to Fab, it's true. Oh Fab we're glad they put active enzyme, lemon-freshened, Borax in you.

Comment: For explanation of deception, see E-1.

AXION

Narrator: If you should get a bloodstain on top of the usual dirt on a collar, should you throw the shirt away? No! You soak it in Colgate's new Axion. The enzyme active pre-soak that soaks out dirt and stains that detergents can't wash out and bleaches can't bleach out. Now this shirt had a bloodstain pre-soaked in Axion before detergent washing. No more stain. That's why you should try Colgate's new Axion .

Comment: For explanation of deception, see E-1.

OXYDOL

Narrator: How would you get these stains out. You'd need new Oxydol Plus—now a bleach detergent with an enzyme pre-soaker in it. For a better clean—better because what the enzyme pre-soaker can't get out the bleach can, and what the bleach can't get out, the enzyme pre-soaker can. New Oxydol Plus! For a better clean.

Comment: For explanation of deception, see E-1.

GAIN

Narrator: John, would you come over here please?

Fish Merchant: Yes.

Narrator: We're here at the San Pedro Wharf where the fish bloodstains put on John's apron are a day old. Look! Set in, locked in bloodstains.

Bystander: And they're dried in too.

Narrator: Virtually imposible for the conventional detergents, but not for the unbelievable detergent. New Gain with micro-enzyme action from Proctor and Gamble. Gain does a better job on stains. Actually unlocks them.

Bystander: By itself? How's it work?

Narrator: You see, stains are locked into fabric fibers. But Gain's enzymes act like little keys to unlock those stains bioligically. Gain gets clothes unbelievably clean.

Bystander: It does!

Narrator: Look, set in, dried in bloodstains virtually gone, gone, gone.

Bystander: Unbelievable.

Narator: Yes everything is unbelievably clean with the unbelievable detergent—Gain. Gain treats stains like dirt.

Comment: For explanation of deception, see E-1

LA FRANCE

Narrator: Have you noticed what's been going on between pre-soaks and bleach. It's called competition. Enters new enzyme La France—the one that works without pre-soaking. It whitens and brightens better than bleach, and it removes stains faster than pre-soaks—all in the wash cycle. New enzyme La France for whitening, it's better than bleach and for removing stains, it's faster than pre-soaks. New enzyme La France!

Comment: For explanation of deception, see E-1

Appendix F.—Miscellaneous

GOODYEAR TIRES

Setting: A parking lot scene. It's snowing and the wind is blowing. A car is shown in the snow, the wheels are spinning and two men are trying to push the car. Another person walks past the car to his car in the parking lot. He gets in and drives off through the snow without the slightest problem.

Narrator: If you can get to your car, we can get you home, on Goodyear Suburbanite Polyglas Tire—wider than our conventional winter tire. Hundreds of deep cleats pull you. Polyglas tires wear *longer*. If you can get to your car: Goodyear can get you home.

Comment: In addition to a dangling comparative (Polyglas tires wear longer), this ad is deceptive in the impression derived from the totality of the setting: A car in the snow will slip, slide.

LISTERINE

Setting: Children are shown coming in the front door wet and cold. Mother greets them, and send them upstairs.

Mother: O.K. upstairs and gargle with Listerine—you're soaking wet.

Child: Does Listerine keep me dry?

Mother: No silly. It's colds I'm worried about. We can't really stop'em, but this year we're going to fight back with lots of sleep, good food, and gargle twice a day with Listerine. I bet that'll help keep you in school.

Child: Do grown-ups od this too?

Mother: Of course we do.

Narrator: This cold season, fight back, with Listerine Antiseptic.

Comment: This is deceptive because the implication derived from the totality of the ad is that Listerine will aid in preventing colds. This it cannot do.

ULTRA-BRITE TOOTHPASTE

Song: "Ultra-Brite Toothpaste, the one with sex appeal."

Narrator: An Ultra-Brite smile is a healthy smile because regular brushing with Ultra-Britemeans the freshest breath, the brightest teeth. Helps prevent cavities, too!!

Song: Ultra-Brite gives your mouth sex appeal.

Narrator: For a healthy smile, get Ultra-Brite, the sex appeal toothpaste.

Comment: Ultra-Brite is harmful because it contains abrasives which remove enamel from teeth. Therefore, the ad deletes a material health factor, thus concealing a harmful side effect of the product.

GERITOL

Woman: Would you believe, I fould out I have iron poor blood?

Animated blood: I know I'm your iron poor blood—I'm pale and out of shape.

Woman: What can I do?

Blood: Take Geritol. Geritol changes iron-poor blood into iron rich blood.

Narrator: Geritol iron enters your blood stream fast—carrying its blood building iron throughout your body. Just two Geritol tablets contain twice the iron in a pound of calf's liver—plus seven vitamins for nutrition.

Blood: Look at me now! Geritol changed me from iron-poor blood to iron-rich blood.

Narrator: If iron-poor blood is your problem, take Geritol. It carries blood building iron throughout your body.

Woman: Why don't you try Geritol too?

Comment: This ad implies that Geritol is a panacea for iron-poor blood. This is not true. There are several causes of iron-poor blood that are not remedied by this product.

CHUX DIAPERS

Setting: A Chux diaper and a "similar disposable" diaper are placed next to each other. The narrator pours some water on each. The diapers are then picked up to show that the water soaked through the "similar disposable diaper."

Narrator: We have a most absorbing story for you about new softer disposable diapers. Take a similar disposable and new Chux. Pour the same amount of water on each. What happens? The other disposable absorbs some water. Chux absorbs it all because Chux concentrates thickness in the center where it's needed most. And of course Chux has a deep dry lining and water proof backing. New Chux—a most absorbing story.

Comment: The deception is that the implication derived from the comparison is fallacious. The comparison implies that similar disposable diapers do not have the keep-dry lining or water proof backing when in fact some of them do. It is this backing that prevents the diaper from allowing the water to pass through it.

2. Supplement to Petition for Rulemaking

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

In the Matter of Adoption of Standards Designed to Eliminate Deceptive Advertisingfrom Television, RM-1553.

SUPPLEMENT TO PETITION FOR RULEMAKING

I. INTRODUCTION

TUBE, in its original petition, delineated the need for appropriate Commission action in the area of television advertising. The petition requested the Commission to grant a rule making proceeding in this regard and proposed a Code of Standards designed to eliminate deceptive television advertising.

The petition offered general suggestions as to how the Code might be enforced. These included (1) choosing, at random or by community, licensee renewal applications and requiring those chosen to give detailed accounts of past advertising operations to determine if they had complied with FCC requirements and (2) consideration of action taken by the FCC and other governmental agencies on specific complaints. These procedures would yield information which would be crucial to the outcome of the renewal application.

Wishing to further aid the Commission TUBE now submits additional proposals which might be of assistance in arriving at an adequate enforcement procedure. The following proposals should not be considered as a single coherent system but rather as individual suggestions which could comprise part of the final enforcement procedure.

II. ENFORCEMENT PROPOSALS

A. "Advertising Primer"

Perhaps the greatest single problem in the area is the lack of licensee notice as to what constitutes deceptive advertising. To adequately inform the licensee it is proposed that the FCC, with the aid and assistance of the FTC, compile an "Advertising Primer" similar to the existing "Fairness Doctrine Primer" 29 F.R. 10415 (1964).

The "Primer" would contain the following: a statement of FCC rules and regulations proscribing deceptive practices, the proposed Code of Standards, relevant FCC and FTC rulings on deceptive advertising practices, the case law, and other related information.

Consequently the "Primer" would provide the needed notification so that the licensee could be held to a reasonable standard of detection and prevention. The "Primer" presents a logical technique for the effectuation of meaningful self-regulation.

However, since the "Primer" affords the necesary notification to hold the licensee to a reasonable standard, the Commission would be justified in taking appropriate action where it was shown that a licensee acted in bad faith or negligently.

TUBE feels that, even if no other action is taken by the Commission, the compilation and dissemination of a "Primer" is greatly needed and would have substantial effect in curbing the problem of deceptive advertising.

B. License Renewal Proposals

(1) It is proposed that the Commission add a new section to its existing license renewal application to cover advertising procedures. In this section the licensee would be required to show that his procedures for detection and prevention of deceptive advertising complied with FCC requirements.

In addition, this section would provide an opportunity for the licensee to indicate what procedure he follows when he receives a complaint or is in doubt as to whether an ad is deceptive. The licensee could also use this section to rationalize his airing of any ad subsequently found to be deceptive by the FTC or other governmental agencies.

The information set forth in this new section would be considered in determining whether the licensee had met his public interest requirements and thus could effect the status of his renewal application.

(2) It is essential that the FCC know if a licensee aired an advertisement

which was subsequently found to be deceptive. Two techniques for discovery are posible: The first would require the licensee to know which ads are found to be deceptive. This information could be obtained through notification by the "Advertising Advisory Board" (see Proposal C). If the Board is not established the information could be obtained by direct communication with government agencies and advertising agencies (or the network if the ad was network originated). The second technique would require the licensee to keep a log of all advertising aired. An examination of the log would reveal whether the licensee had broadcast any deceptive advertising.

Regardless of which technique were employed a determination that a licensee did indeed air a deceptive ad would have deleterious effects at renewal unless the licensee could show that in airing the ad he had acted in good faith and without negligence.

C. Advisory Board Proposal

It is proposed that the Commission establish an Advertising Advisory Board. It would be non-investigatory in nature and would aid and assist licensees in the determination of deceptive advertising. Thus any licensee who was in doubt as to whether an ad was deceptive could contact the Advisory Board. Any determination as to an ad's suitability for broadcast made by the Board would relieve the licensee of responsibility in case the ad were subsequently found to be deceptive.

The Board would also act on complaints filed with the Commission by notifying both the licensees and the FTC of these ads. In addition the Board would relay to the licensee all relevant actions and rulings made by the FTC and other governmental agencies with regard to deceptive advertising.

III. CONCLUSION

TUBE feels that its original petition documented the prevalence, impact and harm of deceptive television advertising. These arguments alone should be sufficient to justify a rule making proceeding.

The purpose of the Supplement is to point out the existence of feasible and potentially effective measures which could be adopted as techniques of enforcement.

However, it is important to emphasize that these proposals are only suggestions to be considered with other alternatives brought to light during the rulemaking proceeding. Formulation of the final enforcement procedures would be undertaken by the Commission and its staff making use of its special expertise in the area.

Respectfully submitted,

By JONATHAN S. BOWERS.
TUBE:
Broadcasting Excesses.
Termination of Unfair
By JONATHAN S. BOWERS.
LAURENCE H. COHN.
PETER NEMKOV.
RICHARD J. PORTUGAL.

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3. Letter of Support from Congressman Tiernan

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 26, 1970.

Hon. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR SIR: I have read through the petition for rulemaking (Public Notice RM–1553) which was filed by a group known as Termination of Unfair Broadcasting Excesses. This petition is a worthwhile one which deserves your consideration, for it goes to the heart of the FCC duty to protect the public interest. So far the Federal Trade Commission has shown no willingness to protect the consumer in this area, therefore the FCC should do its job.

The FCC has the power to stop deceptive advertisements. It has the duty to do so if the FTC fails to act. I hope you will heed this petition and lead the way in protecting the audience from blatant deception.

Sincerely,

ROBERT O. TIERNAN,
Member of Congress.

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4. Letter of Support from Congressman Rosenthal

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 7, 1970.

MR. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: As Chairman of the Special Consumer Inquiry of the House Committee on Government Operations, I have been informed of the petition against deceptive television advertising filed with you by the Termination of Unfair Broadcasting Excesses (TUBE).

I have followed with admiration the work of TUBE's mentor, Professor John F. Banzhaf III of the George Washington University Law School, in his campaign to aid the consumer, and I took the liberty of inserting in the Congressional Record TUBE's petition to you.

I hope you will issue a finding promptly on the validity of TUBE's charges, which if substantiated, demonstrate a grave need for stricter regulation of T.V. advertising practices.

I would appreciate receiving at your earliest convenience a status report of how you have disposed of the TUBE petition.

Sincerely yours,

BENJAMIN S. ROSENTHAL.

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5. Letter of Support from Consumers Union

CONSUMERS UNION,
PUBLISHER OF CONSUMER REPORTS,
Washington, D.C., April 9, 1970.

HON. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: After recently reading the Petition for a Proposed Rule Making, RM–1553, submitted by TUBE (Termination of Unfair Broadcasting Excesses), a group of George Washington University Law Students, we would like to take this occasion to support the TUBE request for the Commission to commence a rule-making proceeding.

The students have requested the Commission to take an act in order to do more than has been done to date to eliminate deceptive advertising from television. They are asking that you act pursuant to your authority to act in the "public interest, necessity, and convenience."

Consumers Union is strongly interested in the concept of having a national standard set via the rule-making route that would allow the Commission to force broadcasters to do a better job of policing and eliminating deceptive advertising. We strongly urge you to exercise your responsibility in this matter and act favorably on RM–1553.

Sincerely,

DAVID A. SWANKIN,
Washington Representative.

6. Letter of Support from Action on Children's Television (ACT)

APRIL 1, 1970.

Chairman DEAN BURCH,
Federal Communications Commission,
Washington, D.C.

DEAR MR. BURCH: On behalf of Action for Childrens Television, Inc., an organization with over 2,000 members and supporters across the country, I am writing to express my support for a Public Notice which has just been brought to my attention.

Petition RM. 1553, which requests adoption of Standards designed to eliminate deceptive advertising from television deals constructively with one of the pernicious aspects of advertising of childrens toys and other products. At present, children are exploited by the medium through excessive advertising on their own programs. In addition, much of the actual commercial is exaggerated and creates a false impression in the mind of an unsophisticated child.

Many mothers are well aware that the glamorous and often very expensive toy advertised on television merely frustrates and disappoints the child when bought. When they accede to a child's demands and buy a TV toy, it often leads to disappointment and unhappiness. When they take a firm line and try to explain that the toy is not exactly as portrayed on TV, they are again forced to be the ogre. Because when the toy fails, the child blames the parent who bought it, just as he blames the parent for not buying it.

More realistic advertising of toys and other children's products would alleviate this situation, and such advertisements would appear on those programs watched by the true purchasers, the parents. There is no place for advertising on specifically childrens programs. Subtle psychologically designed commercials created by adults should be shown on programs for adults.

Yours truly,

EVELYN SARSON, *President.*
ACTION FOR CHILDRENS TELEVISION INC.

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7. Letter of Support from Institute for American Democracy

INSTITUTE FOR AMERICAN DEMOCRACY, INC.,
Washington, D.C., April 9, 1970.

Mr. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR CHAIRMAN BURCH: The bright young men sponsoring the "Termination of Unfair Broadcasting Excesses" campaign are calling the nation's attention to what is clearly a conscience issue, the use of the channels to move products by commercials that are less frank and often emphatically misleading. I would not confine this to television.

Concern with the content of advertising should extend to radio as well and the scrutiny should not be confined to the methods used to promote products, but also should take cognizance of the efforts of corporations to use commercials to lay the base for legislative goals. For example, the national insurance company using celebrities to promote grassroots support for more stringent drivers license regulations has a clear self interest in purging the highways of marginal drivers. It strikes me, however, that the stations airing the commercials have an obligation to make contrasting viewpoints available to their audiences. It seems to me this is the logical projection of the FCC's

ruling that tobacco commercials carried with them the obligation to make available contrasting fare.

Similarly the utility planning a nuclear plant near a major waterway and chiding the opposition for being "old fashioned" is using the public broadcast facilities for political climate building and the cost of the commercials involved can be written off as advertising and hence ultimately passed along to the public in the rate making procedures.

The stations carrying such material do not appear to be making any great effort to give the audiences exposure to the other side of the argument. Since those who oppose utilities seldom have the money to engage in advertising campaigns, obviously a clear imbalance results.

The use of extravagant and misleading advertising techniques to move work-a-day products such as detergents, have created three evils as I see it. First, they tend to often mislead the consumer into making purchases which may be unnecessary. Secondly, they contribute to the growing lack of trust in the credibility of any statements from the media. Thirdly, they add to the difficulties of the smaller manufacturers and small companies competing in the consumer market. The latter simply cannot afford the production costs involved in creating the elaborately produced mirages which pass for product images. Advertisers face some pressure to match the extravagant claims of their major competitors. Even in cases of misrepresentation so extravagant that the Federal Trade Commission actually intervenes, the time lag between discovery and ultimate court order is great enough to make misrepresentation very profitable indeed.

It seems to me the lack of a federal agency which boldly investigates the truth of advertising claims and calls attention to half-truths and misrepresentations in a clear, loud voice works a hardship on those who would like to rely on reasonable advertising, and more importantly on the consumer.

Any proposal to encourage truth in advertising can be beneficial to the media and ultimately to the advertisers as well. If the guidelines are clear, and the enforcement prompt and firm, then the pressures of the market place will not force advertisers to go beyond them.

The domination of the prime time television by a relatively small number of advertisers, has produced a threat which simply could not have been foreseen when basic broadcasting laws were drafted. The enormous multi-sensory impact of the TV commercial can and does produce side effects which have a great deal to do with establishing our national attitudes and mores. At the very least, we have an obligation to see to it that commercials carried on what is essentially a public utility are truthful and in good taste. We have not yet learned to live with the great home hypnotic, but support for proposals such as those advanced by TUBE certainly can go a long way to advancing this public interest in this vital public medium.

Very truly yours,

CHARLES R. BAKER.

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8. Letter from TUBE to FCC re Status of TUBE Petition

TUBE,
TERMINATION OF UNFAIR BROADCASTING EXCESSES,
Washington, D.C., April 10, 1970.

COMMISSIONER,
Federal Communications Commission,
Washington, D.C.

DEAR COMMISSIONER: On January 13, 1970, we filed a petition for a proposed rule making, RM-1553, and the Commission subsequently issued a notice of the petition in its Public Notice of January 16, 1970. According to 47 CFR 1.405(a) and 1.407, the petition is to sit for 30 days in anticipation of comments and replies and then the Commission is supposed to decide on whether to hold rule making proceedings. Our understanding of the administrative process is that prior to action by the Commissioners, the petition is to be assigned to a department to be digested and analyzed. Our petition was assigned to the Rules and Standards Bureau shortly after the 30 days had expired, about February 20, 1970, and has been there ever since. But no action has been taken yet to prepare the petition for a Commission decision.

Numerous parties, consumer interest groups, senators and congressmen, and newspaper columnists have all expressed an interest in the subject matter of our petition yet there has been no Commission action. Our petition requesting standards for deceptive advertising addresses itself to an important and legitimate topic and we fail to understand the reason for this needless delay. We therefore seek your aid in expediting prompt Commission action on this petition.

Respectfully,

JONATHAN S. BOWERS.
LAWRENCE H. COHEN.
PETER NEMKOV.
RICHARD J. PORTUGAL.

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9. Letter from Senator Nelson to FCC re Status of TUBE Petition

U.S. SENATE,
COMMITTEE ON LABOR AND PUBLIC WELFARE,
Washington, D.C., March 31, 1970.

Mr. DEAN BURCH,
Chairman, Federal Communications Commission,

DEAR MR. BURCH: I am writing to inquire into the status of a Petition for Proposed Rulemaking, docket RM 1553, submitted by a group called TUBE.

It is my understanding that this petition has lain dormant in the Rules and Standards Division of the Commission for a month.

I would appreciate any elucidation you may be able to offer.

Sincerely yours,

GAYLORD NELSON,
U.S. Senator.

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10. Letter from Senator Hart to FCC re Status of TUBE Petition

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
Washington, D.C., March 26, 1970.

Hon. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: On January 13, 1970, a student group, calling itself TUBE, filed a petition for rulemaking. Public notice of the petition appeared on January 16, 1970, and the petition has been assigned docket number RM-1553.

It is my understanding that since the public announcement nothing further has been done to prepare the petition for Commission decision. I fully understand that the Commission's heavy workload sometimes results in delays but I would appreciate knowing when the student group might expect a decision on the merits of its petition.

Your cooperation in this matter is appreciated.

Sincerely,

PHILIP A. HART,
Chairman, Antitrust and Monopoly Subcommittee.

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11. Letter from Chairman Burch to Senator Hart Promising Action on TUBE Petition by May 1970

APRIL 13, 1970.

Hon. PHILIP A. HART,
Chairman, Antitrust and Monopoly Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR HART: This is in reply to your letter of March 26, 1970, concerning the status of a petition filed on January 13, 1970, by a group of Georgetown

law students called TUBE (Termination of Unfair Broadcasting Excesses), RM-1553. The petition requests rule making looking toward adoption by the Commission of an advertising code, designed to prevent the presentation of deceptive commercial advertising on television.

According to staff members who handle this and other broadcast rule-making matters, two of the authors of the petition visited our officers a few weeks ago and were informed that nothing had been done up to that time to prepare the matter for presentation to the Commission. I might point out that under our rules, public notice of petitions for rule making is given (January 16 in this case), and interested parties have 30 days thereafter to file statements in regard to the matter. Work on the matter commences as soon after that as professional people are available. In this case, no one has been available until very recently, both because of an unusual number of extended absences due to illness early this year and because of a number of other important matters of long standing, such as our recent "one to a market" decision concerning multiple ownership of broadcast stations. However, I am told that the matter will be presented to the Commission in the near future, possibly by the end of April and certainly before the end of May.

Some preliminary work has been done on the TUBE petition since the visit mentioned, including a discussion by one of our staff members with a member of the National Association of Broadcasters staff, to inquire as to the extent of the NAB's activity on deceptive advertising and what effect it has had.

The staff also points out that, while the petition is well drawn and represents a thoughtful contribution, it also presents some problems. For one thing, it is promised in part on the alleged ineffectiveness of Federal Trade Commission regulation in this area. As you probably know, the administration has introduced, and that agency is vigorously supporting, legislation to treat as criminal offenses conduct which has been well established as violative of the Federal Trade Commission Act. If adopted, this might have a deterrent effect on efforts at deception in advertising which the traditional "cease and desist" approach allegedly does not provide. Also, some of the examples mentioned in the petition as deceptive might involve subjective judgments, since they do not involve affirmative verbal misstatements but rather concepts such as total effect, camera use, and non-disclosure, which are perhaps more difficult areas. The problem is how that which is substantially deceptive can be barred without too sweeping a restriction on legimate freedom of expression in advertising.

In any event, I trust that this matter will be available for consideration in the near future, as mentioned above. I might also point out that this Commission operates closely with the Federal Trade Commission in bringing to the attention of broadcasters matters of which they should be aware in this area. I am enclosing a copy of a 1961 public notice describing the FTC-FCC liaison arrangement and the broadcaster's obligation, an arrangement which is still in effect.

I hope this supplies the desired information, and I will keep you advised of further developments in this matter.

Sincerely,

DEAN BURCH, *Chairman.*

(Note: Letters from FCC Chairman and from Commissioner Johnson relating to TUBE are reprinted with materials *supra* relating to STATIC)

Senator KENNEDY. It has been most informative and helpful and it has given us many things to follow up on. And I will make the point at this time in the record that we will make available to any of the agencies, these comments that have been made, if they would like to, and that will be made a part of the record.

The question that comes to my mind is that after you, as individuals and working with groups, delved into these various regulatory agencies, whether you really feel that you have had some kind of impact or whether it has been just a frustrating experience?

Mr. NEMKOV. I think it goes essentially to the issue of—it is an overused phrase—but the issue of the system and can the system work, and all of these, all of these groups here——

Senator KENNEDY. Well, let me ask you this: How many of you thought the system would work before you started?

Mr. NEMKOV. I thought it would. I gave it the benefit of the doubt.

Mr. PERMER. I thought we would get at least our request to have the petition printed in the Federal Register, at least that would be done, and they have not gone as far as that.

Senator KENNEDY. How many think the system will not work after you have been working in it?

Mr. HANNAWAY. I do. I think I can speak for the other two people that are here in regard to FLITE. I think that what we have found is precisely what we thought we would find, that the system is, unfortunately, is concerned with—Well, in effect, it appears to us that big business runs the country to a greater extent than we would like to see it, and that when principles, when moral principles come up against the question of dollars, it seems to me that money really talks, and big business really talks, and it is frightening the kind of economic power they have to preserve the status quo and to discourage any kind of change that is going to affect their profits. That is just my opinion.

Mr. NEMKOV. I would like to concur in that, especially what I found that happened to our group, and the inaction, and I hate to say this, but it seems that this is not so much a democracy as it is just a government of special interests.

The people with the money are the ones who are heard.

Senator KENNEDY. Is that such a big surprise? Did any of you feel when you started off on this that it was going to be very different?

Mr. HANNAWAY. No, but it comes from the lips of Government traditionally that it is something quite different from what the facts are; and when we talk about it, very quickly, I think what we see is the basic tradition that we hear, a lot of talk about liberty and equality and all of those fine words that are written down in the documents of this government, but, in fact, when you look into it a little deeper you find that the profit motive is, in fact, or appears to be the raison d'etre of the country's existence, and anything that deviates from that is, in fact, of secondary importance.

Mr. PERMER. I would like to add to that and say that it is not surprising to me that a given private industry wants to make a buck. I am not surprised that PEPCO is out to increase demand. What is surprising to me is how much PEPCO and industry in general and business in general has captured the Congress, the press and everyone else. I think in our case, with relationship to the power crisis, I think what is needed is a firm policy statement from our leadership, Congerss or the President, and the Congress has not yet come and and said that we are going to have a clean environment if this means that we have to shut down a plant, or that we have to curtail production, and until they do that I do not think any public service commission is going to ever grant the type of relief we would ask for. But, as soon as Congress passes a respectable environmental bill and motivates the nation in that respect I think the public service commissions will fall in line.

Senator KENNEDY. Well, you do not feel, in terms of the recent legislation that was passed on air and water pollution, and the establishment of standards, that they have teeth in them?

Mr. PERMER. Generally no. The last air pollution bill may yet prove to. If, for example, in 1975 General Motors does not produce a good car, if somebody shuts them down, then I would say the system is working, but I do not think it is going to shut them down if they do not produce a good car, and so on this point, generally speaking, I think our legislation has been bad and inadequate or has not been good and has not been enforced.

Mr. SLIPPEN. I think that the frustration that many of us feel is typified by the reception of the FATS petition, a quite moderate proposal. It is a very moderate suggestion, and is something that certainly has been suggested before and yet it has been ignored, and the public, we just feel that the public has a right to know. And the FDA has apparently said, through their inaction or negative action, we do not agree—the public does not have a right to know. There is medical evidence in their own documents, which is part of our petition, admitting certain things about fat labeling and about the causal relationships we have documented, yet then they turn around and make a policy statement denying everything they have admitted before.

So, therefore, we do feel a sense of frustration that this moderate, simple proposal has not been accepted and it has been ignored.

Mr. NEMKOV. I would like to say that the system, the Government as it exists now, with the present statutes, regulations and the way they are being enforced, has set up a means for change; but when we try to go through this means for change, at least my group especially, and some of the other groups, we are just confronted with a huge bureaucratic mass.

Now, if we were thwarted going through the given means for change, my only question, the question in my own mind is how do we achieve change?

Senator KENNEDY. How long have you been working on it?

Mr. NEMKOV. Well, admittedly it is short compared to five years or so, but we have not even had a preliminary response formally from the FCC. Now, I do not understand what is so hard about that.

Mr. SRIBNICK. Sir, the fact that you are proposing to set up a public interest law firm in the Congress to oversee agencies or set up initially to serve the public I think is an indication that something is wrong with agencies, and our surprise and our disappointment is basically the fact that we are not, a lot of us honestly thought when we went into these agencies that that is what they were set up to do, but as it turns out they are not.

Mr. KOCH. Senator Kennedy, I attended a meeting where a Food and Drug Administration high official was talking to people of the industry, and I got invited through another source, and it was sort of an open meeting; and I was a consumer representative there at the meeting. He was discussing how industry can change things from the Food and Drug Administration, and he said that in order to get a new regulation it would cost industry

at least $300,000 worth of testimony, papers, etc., research. And I got up and I asked a question, I said, you told us about the industry, and I would like to know would it take a consumer group such as LABEL $300,000 to change a rule, a regulation, and the man told me yes.

I was quite disturbed, since having spent out-of-pocket money, and I think that our great frustration comes from the fact that we thought the administrative agency was supposed to at least be set up on the principle of protecting the consumer and not protecting the industry from things that they do not want to tell the consumer. And therein lies the frustration I personally see, and I think our group sees.

Senator KENNEDY. Let me ask you just finally, all of you who have worked with the various groups, and worked exceedingly well—and I think you have made some important contributions through this involvement of yours—but when you are finished with school are you going to go and work for corporations or private law firms, or are you going to work for public law firms? You can all answer that one.

Mr. HANNAWAY. I think that law students generally today, especially in the East, are very hesitant to become the legal tool of corporations, and they have been, that has been the story of——

Senator KENNEDY. I was interested in you as an individual.

Mr. HANNAWAY. Myself, as an individual, I find that the significant change cannot be brought about without the fundamental change in the system, and that the present structure, I do not think we can effectuate that change and, therefore, my plans are to go back to northern New England, where I am from, and just try to lead a life according to my principles, and hope to effect some sort of change in the community there; because I do not really feel—I feel that the country on the whole is—I do not have much—I am not optimistic.

Mr. SLIPPEN. I for one would very much like to engage in public interest work, and possibly enter government service. Of course, these last couple of years, and possibly until 1972, the opportunities seem rather limited, for the government to be a vericle of public interest law. I would hope that they would be much greater in future years, and I think that feeling is shared by many of us. We feel very strongly about that. These last two years the opportunities to serve the needs of the poor and the consumer have been rather narrowed. We are very alarmed by the narrowing of these opportunities by the current administration and their indifference to the protection of all segments of our society.

Mr. KOCH. I personally have not really decided what I want to do with my legal background. If I find I want to be a lawyer, even. I do not know, but I do know that many of the large law firms in this country will not allow one of their lawyers to do things on their own, and I will never work for any place that will at least not allow me to work on my convictions. And I think at least everybody has a right to be defended, and not everything industry does, of course, is wrong.

But, on things such as large companies hiding things from the public, I would never get involved with that.

Mr. SRIBNICK. I think it is indicative of a rather sad statement of corporations that the amount of money being spent in the public interest law as opposed to corporate law is infinitesimal; and as for myself, I would like to go into public law or some kind of area where I could effect some changes, and I will do that until I feel I am wasting my time, and then I will fade into the woodwork like everybody else.

Senator KENNEDY. You have not reached that point yet?

Mr. SRIBNICK. No; not yet.

Mr. PERMER. I think I am probably a little older than most of the other members of the group here, and I have a child, and I guess what you are asking for as an answer to that question is am I willing to sell my soul for a price. I have to, in order to live, obviously, and I would much prefer to work in public interest law if I can support my family and live a generally acceptable life doing so. But, if I cannot, I am most certainly going to be practicing bad-man law 2 years from now.

Mr. BANZHAF. Senator, if I could get in a little bit of a moderating word, perhaps because I am older, perhaps because of a different vantage point; I started out more cynically, and I did not expect they would have any impact, really at all. I have been surprised at the amount of impact they have been able to have working with their limited resources and limited background on major Federal regulatory agencies. And quite frankly, I have to tell you that in many cases they were, although we sit around the table now and we are somewhat cynical, a number of the members of these groups have come to me with a great deal of shock and amazement and said, "My God, we are being taken seriously," and they say things like they are listening to our proposals, they have issued a proposal, or a rule, even though it is not the one we had wanted; or somebody is reading our petition, and I take it a good sign.

And for what it is worth, I am going to continue teaching this kind of law, and hope that agencies will at least be minimally enough responsive that students will be interested in doing it.

Senator KENNEDY. Well, I again want to thank you, Professor, and the members of the panel, for your appearance here today. I think it is some of the most heartening testimony and efforts that are being made in our Government today, and I feel just from this vantage point that it is having an important impact. I think that I have not been chairing this subcommittee much longer than you have probably been working in your various projects, but just in the limited time that I have been here I have seen significant changes being brought about through the kind of work that is being done by groups such as yourselves.

I think you really can make an impact and can make a difference, so I want to commend you for your appearances here and the statements you have made and your comments and recommendations. Your comments have been positive, and I think you have been critical only when criticisms should be made and can be turned into meaningful future action. I want to commend and thank all of you for your appearances here this morning.

And I think, Prof. Banzhaf, this has been enormously useful and

a tremendously enlightening hearing. And I just hope that those in our society who are so quick to condemn the young realize the very important service that you and others are performing to try to make the system work.

The subcommittee will stand in recess subject to the call of the Chair.

(Whereupon, at 1:05 p.m. the hearing in the above-entitled matter was concluded subject to the call of the Chair.)

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