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OCT 13 1970

OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

OCT 14 1970

In the Matter of the Obligation of a Licensee to Devote Time to the Presentations of Views and Information on the Health Hazards of Cigarette Smoking.	)
Action on Smoking and Health (ASH), and John F. Banzhaf, III, Petitioners.	)

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PETITION FOR RULE MAKING

Petitioners, for the reasons hereinafter stated, do respectfully petition the Federal Communications Commission to institute a rule-making proceeding for the purpose of promulgating a rule relating to the obligation of licensees to devote time to the presentation of views and information on the health hazards of cigarette smoking subsequent to January 2, 1971 when cigarette commercials will leave the air by act of Congress.

Petitioners, for the reasons hereinafter stated, do respectfully petition the Federal Communications Commission to institute a rule-making proceeding and to promulgate a rule substantially or exactly as stated below:

[PROPOSED RULE]

The obligation of a licensee to devote a significant amount of time to the presentation of views and information on the health hazards of cigarette smoking continues notwithstanding that it has discontinued the broadcasting of cigarette commercials sponsored by tobacco companies.

INTEREST AND STANDING OF PETITIONERS

Petitioner Action on Smoking and Health (ASH) is a national non-profit charitable, scientific, and educational organization which serves as the legal action arm of the anti-smoking community by utilizing legal action against the problems of smoking. ASH has in excess of 8000 individual contributing members who support its activities and whose interests in the problems of smoking ASH seeks to further. In addition, ASH is supported and sponsored by a wide variety of health, educational and social welfare organizations, and a distinguished panel of individual Sponsors including leading figures in the fields of medicine and public health, as well as other nationally known public figures. Attached and hereby made a part of this petition is material more fully describing ASH, its supporting organizations, and its Board of Sponsors. ASH has initiated and engaged in numerous proceedings involving anti-smoking messages before the Federal Communications Commission which were responsible in part for the Commission's enforcement of its initial ruling requiring stations to devote a significant amount of broadcasting time to messages about the health hazards of smoking. ASH has filed a number of complaints relating to cigarette advertising and promotion with the Federal Trade Commission, and has testified and appeared through a petition for the amendment of a rule in the Commission's rule-making proceedings. Thus its standing to initiate and participate in actions before such agencies on behalf of the interests of its contributing members, supporting organizations, project groups, and individual sponsors has been clearly established.

ASH therefore brings this petition on behalf of itself as an organization; on behalf of the interests of its distinguished Trustees and Sponsors; on behalf of the interests of its supporters including numerous health organizations; on behalf of other members of the viewing public concerned about the problem of smoking; and on behalf of millions of children who, but for the continuation of the so-called "anti-smoking" messages, would otherwise take up a deadly habit. [See, e.g., Associated Industries v. Ickes, 134 F.2d 694 (2d Cir.), dismissed as moot 320 U.S.

707 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); National Association for the Advancement of Colored People v. State of Alabama, 357 U.S. 449 (1958); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Barrows v. Jackson, 346 U.S. 249 (1953); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966)].

Petitioner John F. Banzhaf, III is an adult male citizen of the United States and a resident of Washington, D.C., who is vitally interested both individually and professionally with the problems of smoking. As a private citizen he filed the petition with the F.C.C. which led to a ruling requiring all radio and television stations broadcasting cigarette advertisements to devote a significant amount of time free to messages about the health hazards of smoking [F.C.C. 67-1029, 5063; RM-1170]. He successfully defended this decision in the United States courts [Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied 90 S.Ct. 50 (1969)] and, through ASH, participated in the enforcement of the decision. Petitioner Banzhaf is Executive Director of ASH. He petitions on behalf of himself and all other persons similarly situated.

IN SUPPORT OF REQUEST FOR DECISION ON THIS ISSUE BY RULE-MAKING

Petitioners reasonably believe, based upon an article in today's Wall Street Journal [copy attached], that the Commission is planning to consider the issue of the obligation of a broadcaster to devote time to the presentation of views and information on the health hazards of cigarette smoking subsequent to January 2, 1971 in the very near future, and to do so in a closed proceeding not based upon any formal request and without the opportunity for interested parties to submit comments, present arguments, introduce evidence, etc. Petitioners respectfully suggest that this is inappropriate, in violation of the Commission's rules, and in violation of statutory requirements as interpreted by the courts. Petitioners therefore respectfully move the Commission not to

consider this vital issue in the above stated manner, but rather to consider it in a formal rule-making proceeding so that all interested parties may participate and present their views, and so that the rights of all will be protected.

It is clear beyond any doubt that this issue is one of very broad impact which will affect the great majority of licensees. It is also clear that the ruling will not be adjudicatory since it will not involve determination as to the past conduct of any licensee or other individual or organization, and will be only prospective in application. Of necessity it will involve the determination of only "legislative" type facts rather than "adjudicative" type facts. Any determination on this issue, moreover, would affect tens of millions of dollars worth of broadcast time, thousands of health messages presented by leading health organizations such as the American Cancer Society, the American Heart Association, the National Tuberculosis and Respiratory Disease Association, etc., and virtually every viewer and radio listener in the United States. If the effects of the messages in the past few years is any guide, it will significantly effect the sale and consumption of billions of cigarettes, and the smoking habits of millions of Americans, particularly young children who will not have heard and/or understood the messages which have already been broadcast. Clearly these reasons alone indicate that it would not serve the public interest for this issue to be decided by only five men, however well intentioned and informed, without the benefit of information and argument which can be provided by other interested parties.

The Administrative Procedure Act defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." and "rule making" means "agency process for formulating, amending, or repealing a rule." Clearly a decision such as the Commission is considering would be one of "general applicability" and of "future effect", and it is designed to "interpret" its previous statement of

law and/or policy requiring stations to broadcast views on the hazards of cigarette smoking. It is important to note that this is clearly a matter of interpretation as the Commission's earlier ruling hinged on at least two separate grounds. As it pointed out "This obligation stems not from any esoteric requirement of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility." Thus the Commission's proposed statement would have to be an interpretation of its earlier decision involving at least in part the limits of that obligation in the absence of cigarette commercials.

It is also clear that in making this decision the Commission must decide a number of significant factual issues which it cannot do on the record -- or more precisely, in the absence of a record -- now before it. It has been suggested, for example, that the Commission might determine that the question of whether or not to smoke is no longer a controversial issue of public importance. But this decision is far more difficult to make than the determination that an issue is a controversial issue of public importance. For the latter, one need only consider the importance of the issue and note there are responsible spokesmen with views on either side. As the Commission repeatedly emphasized in its decision reaffirming the application of the fairness doctrine to cigarette advertising, it did not and could not weigh the evidence or take sides in the controversy [see, e.g. paragraph 62].

On the other hand, to conclude that the issue which the Commission only three years ago held was so controversial and of such great public importance that broadcasters had to make millions of dollars worth of time available free for it is no longer "controversial" requires a factual determination that there is no longer any controversy. Yet the same spokesmen, the tobacco companies and the Tobacco Institute, continue to maintain that the case against smoking has not been established. Members of Congress so testified, stated, and found in their consideration of a piece of legislation only one year ago. This very day there is an item in newspapers around the country in which the

tobacco industry is challenging the findings of the American Cancer Society that cigarette smoking has been shown to cause lung cancer. And week after week the U. S. Public Health Service provides digests of articles on the issue of smoking from around the country. Could one possibly find -- particularly in the absence of any testimony or evidence -- that this issue is no longer controversial or of public importance.

Finally, the Commission will recall that in making its initial determination that cigarette advertising was subject to the fairness doctrine, it violated its own rules requiring a response from the respondent party. Its ruling was further challenged by many of the parties because it was made without giving interested parties the right to participate. The Commission replied that it had "followed long established procedures in this respect." But on the issue now before the Commission there are no such "long established procedures" since this is not a fairness doctrine complaint against one station or about one particular broadcast. The Commission also sought to justify its procedure by noting that it had allowed arguments and presentations by all parties in its reconsideration. But, as the Court of Appeals noted in affirming, "As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency" [Banzhaf v. F.C.C. 405 F.2d 1082, 1104 (1968)] and further justified the rule by noting that it would have no effect until after the submission of views by all parties and the careful consideration of these by the Commission. It this case any decision decreasing the obligation of a broadcaster to devote time to this issue would become effective before or even without the opportunity for participation by interested and affected parties. It would furthermore seem to be particularly inappropriate to substantially reverse or modify a decision which the Commission had finally made only after an opportunity for all interested persons to be heard and where the reviewing court found this opportunity to be a necessary prerequisite to the issuing of such a rule.

Petitioners' request for the promulgation of the proposed rule rests upon at least three separate grounds. Since the inception of commercial television, the viewing public has been bombarded by cigarette commercials. Cigarettes are and have for some time been the most widely advertised product of television. The cost of purchasing the time for the commercials easily reaches into the tens of billions of dollars. Since television has been acknowledged to be the most effective medium for the promotion of cigarettes, and for creating the air of social acceptability and necessity required for their sale, the cumulative effect of this bombardment has been to brainwash and condition generations of Americans as to the advantages of smoking. When one includes the radio commercials also, the total effect is and has been literally overwhelming.

Even assuming that the Commission decision of September 8, 1967 was immediately complied with and has been faithfully followed by all licensees, the limited number of health warning messages which have been presented during the past three years cannot begin to counterbalance and outweigh the cumulative effect of decades of cigarette commercials. This is true both with respect to overall societal attitudes and for many individuals whose prior conditioning was too firmly implanted to be affected by the messages. Since most experts agree that societal attitudes and "image" are important considerations in affecting a child's decision to smoke, this lingering effect of the one-side presentations will continue long after the actual commercials have left the air. It is for this reason -- to make up for and to counterbalance the decades of one-sided presentations and their lingering remnants -- that the rule proposed is required.

Reasonable men may differ as to when the issue of cigarette smoking became a controversial issue of public importance but it is clear that it happened far before the time that one of the Petitioners first brought this matter to the attention of the Commission. The so-called

"Surgeon General's Report" reported that cigarette smoking was a serious health hazard in 1964. Large respected and responsible organizations like the American Cancer Society had been attempting to educate the public to their findings of the dangers of smoking since at least the 1960's. As the Commission so clearly held in 1962, it does not take a major Government finding and subsequent legislation to make an issue -- particularly a health issue -- controversial and of public importance [Report on "Living Should be Fun", Inquiry, 33 F.C.C. 101, 107, 23 R.R. 1559 July 18, 1962 : fluoridation of water, nutritive qualities of white bread, high potency vitamins, etc.]. It is also respectfully suggested that the Commission cannot determine when smoking became a "controversial issue of public importance" in the absence of any record such as would be created by a rule-making proceeding.

It might be suggested that such an argument in support of the proposed rule is inappropriate because it punishes a licensee for past conduct, some of which may have been innocent. But it is implicite in the fairness doctrine, and in the Commission's handling of it, that the remedy for failing to present both sides of the issue must come after the initial one-sided broadcast is presented, and in some cases there may be a long lapse of time. The broadcaster's inconvenience is subject to the public's right to be informed. Here the length of time may be longer but the history of one-sided presentations goes back for decades, and the cumulative effect on the public's beliefs and smoking habits is beyond question.

Another and perhaps more basic principle upon which the proposed rule can be based is that stated by the Commission in its "CONCLUSIONS" section of the opinion reaffirming the station's obligation to provide time for the anti-smoking viewpoint. As the Commission itself said:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, re-

> quired by the public interest. The licensee, who has a duty "to operate in the public interest" (§315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the legislative history of the Cigarette Labelling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter -- that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

In affirming this determination, the U. S. Court of Appeals clearly indicated that its decision was not based on the validity of the fairness doctrine. It noted that the Commission itself "asserted that it 'clearly had the authority to make this public interest ruling' under the public interest standard of the Communications Act and relied upon 'the licensee's statutory obligation to operate in the public interest.'" [p. 1091] Although noting that the "public interest" and indeed even the "public health" standard might be too broad, the Court nevertheless held that the Commission had the authority to require anti-smoking viewpoints to be presented even in the absence of a fairness doctrine because "the public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government whereever its regulatory power otherwise extends." As it condluded:

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> Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view

> of the potentially grave consequences of a decision to continue -- or above all to start -- smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly.

A third basis for the proposed rule is that broadcasts presenting smoking in a favorable light will continue even after the Congressional ban on sponsored cigarette advertisements, as will so-called "hidden commercials" now being promoted by the tobacco industry. As to the first point Petitioners remind the Commission that a number of performers continue to smoke on the air, obviously creating or presenting a favorable viewpoint on this issue. Although one may argue that such a broadcast is not sponsored by a tobacco company, it nevertheless presents smoking in a very favorable light. To the young viewer, a broadcast showing someone whom he looks up to as being a "star" smoking on the air may have more impression upon him than a dozen obviously staged situations in advertisements. Although the amount of cigarette smoking in the movies appears to be decreasing, there remains a large number of movies to be shown on television which feature smoking in an enjoyable and carefree atmosphere. In fact one could find in many motion pictures the same kind of presentations which this Commission and the Federal Trade Commission pointed to in cigarette advertising. Since a broadcaster is responsible for everything he broadcasts regardless of commercial sponsorship or profit motive, it follows that broadcasts of this kind will continue to create and convey the same impressions and ideas which the Commission ruled create the obligation to provide free time for opposing opinions.

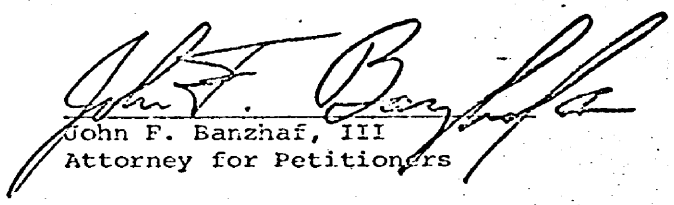
In addition to the above, Petitioners alledge upon information and belief, and offer to present evidence in support of, that the tobacco industry is now taking steps to get hidden commercials on the air in violation of the spirit of the 1969 cigarette act. In particular it appears that they are offering financial inducements to movie makers to feature cigarette smoking and/or cigarette ads in films which will eventually be shown on television. It also appears that they are offering similar inducements to insure that during the televising of certain sports

programs the cigarette advertisement will continue to be presented to the viewer. Thus, despite the congressional ban, there will continue to be a significant number of broadcasts on the air which will have the effect of inducing and persuading people to smoke, and the fairness doctrine clearly requires that there be a reasonable amount of time for the presentation of the opposing viewpoint.

CONCLUSION

Petitioners respectfully request the Commission to postpone any decision on the issue of the obligation of broadcasters to present views on the dangers of smoking; to institute a rule-making proceeding on that subject so that all interested parties may, as they have a right to, present views and arguments for the Commission's consideration; and to promulgate a rule as proposed by Petitioners.

Respectfully submitted,



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