IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9206. Complaint, June 16, 1986—Decision, May 8, 1990

This consent order prohibits, among other things, a Winston-Salem, N.C. tobacco corporation from misrepresenting the results, design, purpose or content of any scientific test or study concerning any association between cigarette smoking and health effects.

Appearances

For the Commission: *Judith D. Wilkenfeld.*

For the respondent: *Judith Oldham, Collier, Shannon, Rill & Scott,* Washington, D.C. *Floyd Abrams, Cahill, Gordon & Reindel,* New York, N.Y. and *W.A. Copenhauer, Womble, Carlyle, Sandridge & Rice,* Winston-Salem, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that R.J. Reynolds Tobacco Company, Inc., a corporation, (R.J. Reynolds or "respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. R.J. Reynolds is a New Jersey corporation, with its offices and principal place of business located at 401 North Main Street, Winston-Salem, North Carolina.

PAR. 2. Respondent manufactures, advertises, offers for sale, sells and distributes cigarettes and other tobacco products.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has disseminated or caused the dissemination of an advertisement entitled "Of cigarettes and science," attached hereto as Exhibit A.

PAR. 5. In this advertisement respondent has represented, directly or by implication, that:

(a) The Multiple Risk Factor Intervention Trial (The MR FIT study) was designed and performed to test whether cigarette smoking causes coronary heart disease;

(b) A major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe; and

(c) The MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease.

PAR. 6. The representations set forth in paragraph five are false or misleading.

PAR. 7. In light of the representations made in the advertisement, and because of the way in which the advertisement describes the MR FIT study and its results, respondent's failure to disclose:

(a) That men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or

(b) That the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality,

renders the advertisement deceptive.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Of cigarettes and science.

This is the way science is supposed to work.

A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory.

Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded.

But, to a scientist, both positive and negative results should be important. Because both produce valuable learning.

Now let's talk about cigarettes.

You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.

Much of this evidence consists of studies that show a statistical association between smoking and the disease.

But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is *caused* by smoking. Then they performed various experiments to check this theory.

We would like to tell you about one of the most important of these experiments.

A little-known study

It was called the Multiple Risk Factor Intervention Trial (MR FIT).

In the words of the *Wall Street Journal*, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost $115,000,000 and took 10 years, ending in 1982.

The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.

Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.

It was assumed that the group with lower risk factors would, over time, suffer significantly fewer deaths from heart disease than the higher risk factor group.

But that is not the way it turned out.

After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths.

The theory persists

We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.

Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.

They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But *not* scientific fact.

We believe in science. That is why we continue to provide funding for independent research into smoking and health.

But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one.

R.J. Reynolds Tobacco Company

DISSENTING STATEMENT BY CHAIRMAN DANIEL OLIVER

I respectfully dissent from the Commission's decision to issue a complaint challenging R.J. Reynolds' paid "editorial" titled "Of Cigarettes and Science." The challenged statement, as I read it, engages an issue that is a subject of public concern, and expresses a point of view that is unlikely to be articulated elsewhere. I believe that, as a matter of public policy, it is valuable for the public to hear all sides of an issue, and I am concerned about taking any action that may inhibit free expression of views that might not be popular to government regulators. Although, after reviewing the evidence presented to the Commission, I cannot conclude that issuance of this complaint is in the public interest, I, of course, express no view on the underlying legal and factual issues raised by this case.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, R.J. Reynolds Tobacco Company, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, R.J. Reynolds Tobacco Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by R.J. Reynolds Tobacco Company of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent R.J. Reynolds Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of New Jersey, with its office and principal place of business located at 401 Nottingham Street, Winston-Salem, North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of R.J. Reynolds Tobacco Company, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, R.J. Reynolds Tobacco Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or promotion of cigarettes that constitutes commercial speech under the First Amendment of the U.S. Constitution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that the MR FIT study was designed and/or performed to test whether cigarette smoking causes coronary heart disease.

B. Representing directly or by implication that the MR FIT study is credible scientific evidence that cigarette smoking is not as hazardous as the public or the reader had been led to believe.

C. Representing directly or by implication that the MR FIT study tends to refute the theory that smoking causes coronary heart disease.

D. Failing to disclose, in any discussion of the MR FIT study that questions the relationship between smoking and smokers' risk of coronary heart disease, that: (a) men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke: or (b) that the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality.

E. Misrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between

cigarette smoking and chronic or acute health; *except that* this paragraph shall not apply to: (i) any scientific test or study concerning the amount of tar and nicotine in any cigarette; or (ii) claims phrased as opinions unless (a) they are not honestly held, (b) they misrepresent the qualifications of the holder or the basis of his opinion, or (c) reasonable consumers are likely to interpret them as implied statements of fact.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The consent order the Commission issues today against R.J. Reynolds Tobacco Company ("Reynolds") is unusually and conspicuously weak. It provides less protection for consumers than the Commission sought when it issued the complaint in this proceeding, less protection than the Commission ordinarily would seek in a deceptive advertising case, particularly one with serious public health implications, and less protection than is justified under the circumstances. The order to which the majority has acceded conveys to me the troubling message that when a major cigarette company boldly runs an advertisement that misrepresents important scientific evidence about the relationship between smoking and health, this Commission will do precious little in response. I dissent.

Beyond its weakness, a more serious peril lurks within this order. The order implicitly represents that the Commission is protecting consumers from deceptive cigarette advertising, even in the guise of a paid-for editorial. Consumers may be lulled by this message into a false sense of security that they can trust what they read in cigarette ads. In recent years, the federal government had displayed an increasingly high degree of care and concern about the relationship between smoking and health, and consumers reasonably may assume from this order that the Federal Trade Commission is guarding their interests with the same high degree of care. In fact, the public health protection this order affords is so illusory that consumers might very well be better off it the Commission issued no order at all.

Nothing in the record or the litigation posture to date suggests a need to accept a weak, compromise order. Yet the remarkable concessions that the majority is willing to make to settle this case suggest a certain squeamishness about the Commission's authority to regulate deceptive advertisements that look like editorials, which is the only defense that Reynolds has asserted. Reasonable people may disagree about whether the First Amendment protects a deceptive advertisement that looks like an editorial, such as the so-called "MR. FIT" ad that Reynolds ran, but we can do more to protect consumers if we take a firm position one way or the other. If we announce that the Commission will not challenge advertisements that are designed to masquerade as editorials, we will warn consumers to be on guard and to exercise any natural suspicion they may have regarding the truth of a paid-for editorial advertisement.

On the other hand, if we intend to regulate such ads, we should do so decisively and demand remedies that are as rigorous as in any other deceptive advertising matter. By accepting this pared-down order, the majority implicitly asserts that the order is adequate and signals to the public generally that the Commission is protecting consumers.[1] At the same time, however, it signals to cigarette companies and other advertisers, through the specifics of the order, which will be studied by their legal experts, that they may shade the truth, or even deceive consumers outright, if they choose to try the advertising "editorial" approach in the future. Although certainly the Commission does not intend this result, in a very real sense the Commission itself is

[1] One of my colleagues has ventured so far as to say this is a "strong" order and a "victory for consumers." Statement of Commissioner Andrew J. Strenio, Jr., Concurring in the Commission's Acceptance of the Order for Public Comment, September 20, 1989 ("Strenio Statement") at 1, and Concurring Statement of Commissioner Andrew J. Strenio, Jr. ("Strenio Concurrence") at 1.

practicing a deception on the American consumer, and a dangerous deception at that.

This case involves a Reynolds advertisement that the Commission found reason to believe deceptively represented that a major government study tends to refute the theory that smoking causes coronary heart disease. When it issued the complaint, the Commission attached a proposed order ("notice order"). It indicated that if the facts were established as alleged, the notice order "should issue" and that the Commission might order additional protection as necessary or appropriate.

The heart of the notice order, as I read it, is Paragraph I-E, which along with Paragraphs I-A through I-D, constitute what usually would be known in Commission parlance as "core relief." The notice order, like other Commission orders, contains both "core" and "fencing-in" provisions. Core relief, to the best of my knowledge, has not been formally defined, but it generally refers to the Commission's primary law enforcement remedy, which is to prohibit the unlawful conduct. Its message is basically, "Do not do this again." The Commission's authority to impose core relief stems from Section 5(b) of the FTC Act. All other relief in Commission orders is characterized as "fencing-in" relief designed to "close all roads to the prohibited goal, so that [the core relief in the] order may not be by-passed with impunity." *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) (footnote omitted).

Reasonable minds sometimes differ over which provisions in a particular order constitute core or fencing-in relief, depending on how one views the scope of the misconduct at issue. From his earlier statement when the Commission accepted the proposed consent for public comment, it appears that Commissioner Strenio views Reynolds' misconduct narrowly, as consisting only of Reynolds' dissemination of a particular ad. He states that the core relief in the order includes only those provisions in Paragraphs I-A through I-D prohibiting Reynolds' further dissemination of that one ad. Strenio Statement at 1 n.2. He designates Paragraph I-E, which prohibits misrepresentations of tests or studies in discussing smoking and health, as fencing-in. *Id.* at 4. I believe that on this record, Reynolds has violated the law not just by disseminating a single deceptive ad but by the act of misrepresenting scientific tests or studies in advertising that discusses smoking and health, and, in my view, Commissioner Strenio's characterization of Reynolds' misconduct is unduly limited.

If the Commission had tried this case and had found liability, it doubtless would not hesitate to say that Reynolds had engaged in deceptive advertising by misrepresenting the nature or results of scientific tests or studies in discussing the relationship between smoking and health. It would then no doubt have imposed core relief, that is, relief that simply prohibits the unlawful conduct, with a provision much like Paragraph I-E of the notice order. The most obvious reading is that the Commission viewed Paragraph I-E of the notice order as core relief when it issued the complaint. That was certainly my understanding at that time and is so now.

Under Section 5(b) of the FTC Act, once the Commission finds liability, it automatically has authority to impose core relief. For fencing-in relief, the Commission also must show that the remedy is reasonably related to the violation and necessary to ensure the core relief. This is often easy to do, but it is nevertheless an additional step the Commission must take. My colleague's narrow and apparently solitary approach to defining core conduct, in my view, does not serve us well in this case and, if ever accepted by the Commission, could impose an undesirable and unnecessary burden on the Commission in future cases.

The core relief contained in Paragraph I-E of the notice order would prohibit Reynolds from:

> Misrepresenting in any manner, directly or by implication, the design, purpose, content, or results of any scientific test or study in any discussion of smoking and health.

This is a simple requirement that flows directly from the serious allegations in the complaint. Since the complaint issued, nothing has happened to suggest that its allegations are anything less than completely true. Yet the majority now accepts substantially less protection for consumers than it initially projected by adopting several notable limitations to the core prohibition quoted above. When combined, these limitations narrowly constrict the relief imposed and create a potential litigation quagmire should the Commission ever seek to enforce the order. No explanation for these major concessions on the part of the majority is readily apparent, and the resulting order is not more than a gesture in response to deceptive advertising claims that may cause grave consumer injury.[2]

[2] Although the order probably bars Reynolds from again disseminating the identical "MR. FIT" advertisement that gave rise to the complaint, even this is not entirely free from doubt.

The principal limitation to the substantive protections of the order narrows the core prohibition in Paragraph I-E to cover only those misrepresentations concerning scientific tests or studies "explicitly referred to" in a Reynolds advertising message. The usual language used to redress misrepresentations of tests or studies, as reflected in the notice order, extends to all references to such tests or studies, even if implicit[3] or generic. Allowing a company under order this much leeway to misrepresent the safety of its product is rare, at best. Indeed, I am aware of no other Commission order that is so limited. *See, e.g., Removatron International Corp.*, D. 9200, slip op. at 3 (Nov. 4, 1988) ("cease and desist from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study"), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *American Home Products Corp.*, 98 FTC 136, 425 (1981) ("cease and desist from . . . [m]isrepresenting in any manner any test, study or survey or any of the results thereof concerning. . ."), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Litton Industries, Inc.*, 97 FTC 1, 82 (1981) ("cease and desist from . . . [m]isrepresenting in any manner the purpose, sample, content, reliability, results, or conclusions of any survey or test"), *aff'd*, 676 F.2d 364 (9th Cir. 1982); *Sears, Roebuck & Co.*, 95 FTC 406, 526 (1980) ("cease and desist from . . . [m]isrepresenting. . . the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research"), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

Already this provision has spawned questions. Since the agreement was signed, counsel supporting the complaint and counsel for Reynolds have exchanged letters concerning interpretation of Paragraph I-E of the order. *See* attached correspondence dated August 17, 1989, from Judith Wilkenfeld and Judith Oldham. This correspondence is interesting, but it is not part of the order.[4] Perhaps the correspondence will help the Commission if it ever needs to enforce the order on this precise point. But other gaps in the coverage of Paragraph I-E have not been filled, even in this informal *post hoc* fashion. The purpose of the consent order is, after all, to reduce to

[3] Prohibiting misrepresentation in implicit references to scientific tests need not discourage accurate descriptions of the makeup of a product or its performance characteristics.

[4] The consent agreement signed by Reynolds and counsel supporting the complaint, consistent with the model order specification contained in the Commission's *Operating Manual* (Ch. 6.8 and Illustration 2), expressly states: "The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order." Consent Agreement at 2, ¶ 7.

writing any such "understandings" between the parties and to make those "understandings" binding.

It is entirely appropriate and desirable to bar Reynolds from making any deceptive statements that suggest the existence of scientific, empirical support or expert, scientific opinion for product claims in addition to those that explicitly mention a "test" or "study." What if, for instance, an advertisement deceptively uses phrases such as "experts agree," or "government agency reviews scientific evidence and concludes," or "empirical research shows," or "scientific data prove"? The number of other examples is limited only by the imagination of a good marketing department or advertising agency. Unlike the Commission's notice order, this order does not prohibit Reynolds from using these phrases deceptively.[5]

A comment filed with the Commission on behalf of the American Heart Association, the American Cancer Society, the American Lung Association and their umbrella group the Coalition on Smoking OR Health "agrees that it is essential" that the order should apply to references such as those I have just described.[6] The only way the Commission could ensure that the order so applies would be to delete the order provisions that plainly was drafted to exclude those references from the coverage of the order. This the Commission has not done. No quantity of earnest side pronouncements can cure that flaw because the Commission will not be the final arbiter of what the order covers. That honor will go to the courts and, it has been my observation, courts generally conclude that orders cover what they say they cover and do not cover that which they specifically exclude.

Another limitation on the core provisions of the order arises from the deletion of the simple phrase "smoking and health," which appeared in Paragraph I-E of the notice order and its replacement with the more narrow phrase "smoking and chronic or acute health effects." Under the revised language, the Commission will be able to enforce the order against only a more limited range of deceptive claims and Reynolds can contest the Commission's interpretation of

[5] One of my colleagues stoutly asserts that the order does bar such claims. Strenio Concurrence at 2. To support his point, he is reduced to citing another letter, thereby highlighting the unfortunate lack of coverage in the controlling document, the order itself. His assertion ignores the common sense flag that Reynolds negotiated this change in the order for a reason.

[6] Like my colleagues, I acknowledge the substantial expertise of the Coalition on the relationship between smoking and health and their related concern about the accuracy of advertising in this area. Because this order does not seem to promote what I understand to be the Coalition's ultimate goal, I regret that they endorsed the order and did not see fit to employ their considerable persuasiveness to urge a different result.

the additional words "chronic," "acute" or "effects," none of which is defined in the order.[7]

Still another limitation of the core prohibition appears in the language approved by the majority that condones misrepresentations "concerning the amount of tar and nicotine" in cigarettes. Such misrepresentations relate directly to the issues of smoking and health that are at the heart of this proceeding, and therefore, are well within the scope of the Commission's authority to impose relief. *See, e.g.*, *FTC* v. *Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946). The Commission previously has treated deceptive tar and nicotine claims as serious violations of Section 5. *FTC* v. *Brown and Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and remanded in part*, 778 F.2d 35 (D.C. Cir. 1985), *modified*, No. 83-1940 (D.D.C. April 4, 1986).

The final ornament in the now heavy load of exceptions that decorates Paragraph I-E further limits and complicates the provision by expressly allowing claims that are phrased as opinions unless (i) they are "not honestly held" (a particularly interesting subject for proof), (ii) they misrepresent the qualifications of the holder or the basis of his opinion, or (iii) reasonable consumers are likely to interpret them as implied statements of fact.[8] This provision serves no useful purpose for the Commission or the public, and it has not appeared in other Commission orders. The provision also substantially increases the likelihood that any enforcement of the order will be difficult and protracted.

In addition to the serious cuts it has approved in the core protections of the order, the majority also has departed from the Commission's routine practice by acquiescing in Reynolds' demand that the order expressly apply only to advertising or promotion of cigarettes "that constitutes commercial speech under the First Amendment of the United States Constitution." Because the Commission's jurisdiction necessarily is limited by the First Amendment, this language is

[7] It has been suggested that the new phrase has been defined by the World Health Organization. Even assuming, and I do not, that we want that definition to control, the order does not so specify.

[8] This provision derives from the Commission's Deception Statement, which is a statement of policy to which the Commission refers in exercising its prosecutorial discretion. Letters dated October 14, 1983, to The Honorable Bob Packwood, Chairman, Committee on Commerce, Science, and Transportation, United States Senate and The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, United States House of Representatives (reprinted in Appendix to *Cliffdale Associates, Inc.*, 103 FTC 110, 174-83 (1984)). The fact that the Commission finds this language useful in a policy statement the interpretation of which is solely within its own discretion does not make it palatable in an order, every word and phrase of which Reynolds may challenge in an enforcement proceeding.

superfluous. The Commission does not reference in its orders the defenses proffered by respondents and making an exception here is unnecessary and undesirable.

Perhaps more important, when combined with the provision placing "claims phrased as opinions" outside the scope of the order, this language tells Reynolds and other advertisers that promotional material cloaked in the mantle of opinion are beyond the reach of the Federal Trade Commission. The Supreme Court, in considering the analogous question whether material containing discussions of public issues nonetheless could constitute "commercial speech," refused to encourage such sophistry:

> We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60, 63 (1983) (*quoting Central Hudson Gas & Elec. Corp.* v. *Public Utility Comm'n*, 447 U.S. 557, 563, n.5 (1980)).

Finally, the majority fails to disassociate itself from the staff's letter of May 12, 1989 (attached), to Reynolds that sets forth the staff's "intent" about the scope of the order.[9] To be sure, the letter recites that Reynolds "predicates" its acceptance of the consent agreement simply on the "assurance that this letter will be forwarded to the Commission." It seems all too clear, however, that Reynolds hopes to achieve indirectly by this letter what the Commission has refused to grant it directly: a delineation of what the Commission will consider to be the limits of commercial speech developed without reference to a factual record.

It is well established that the staff has no authority to bind the Commission, but absent a direct and express disavowal of this letter, the Commission may be hard pressed to avoid arguments over the letter in an enforcement proceeding. The letter can serve only to undermine the force of the order it purports to construe. Another potential inconvenience might arise if, in an enforcement proceeding, the Commission asserts that this letter from complaint counsel interpreting one part of the order does not bind the Commission. The Commission might be hard-pressed to explain why the letter from

[9] As a condition of the settlement imposed by Reynolds, complaint counsel sent a letter to Reynolds setting forth examples of forms of speech that they characterize as noncommercial and therefore, in their opinion, outside the scope of the order.