

Interlocutory Order

92 F.T.C.

IN THE MATTER OF

[16 CFR 461]; CHILDREN'S ADVERTISING. 43 FR 17967
(1978)

TRR No. 215-60. Interlocutory Order, July 31, 1978

This order denies the petition of Chocolate Manufacturers Association for suspension or narrowing of the instant rulemaking proceeding.

TRR No. 215-60 ORDER DENYING CHOCOLATE
MANUFACTURER'S PETITION

The Chocolate Manufacturers Association ("CMA") has petitioned to suspend the rulemaking proceeding, or, in the alternative, to delete the proposals and issues turning on the safety of sugar-containing foods. CMA contends that the issue of sugar safety is properly a matter for the FDA and that the Commission should defer action on this issue pending the outcome of an impending FDA reevaluation of the safety of sugar. This petition has been certified to the Commission by the Presiding Officer. See Order No. 5.

CMA misapprehends the thrust of the Commission's rulemaking proposal. The central issue is whether television advertising directed towards children, including the advertising of products containing sugar, is unfair or deceptive. While issues of the health effects of sugared products will be considered, there will be no attempt made to decide whether sugar, as such, is a safe food or food additive. As petitioner correctly points out, such a determination is the province of the FDA. However, the fact that sugar is currently "generally recognized as safe" ("GRAS") does not mean that it has no adverse impact on health at any level of consumption or regardless of the manner in which it is consumed. To the extent that television advertising affects the consumption pattern of sugar by children, health issues connected with such consumption are properly subject to Commission examination. Similarly, merely because a product is composed entirely of ingredients that are GRAS does not mean that the product cannot be advertised in an unfair or deceptive manner. See, *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365 (7th Cir. 1964); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976).

The Commission clearly has jurisdiction over food advertising, both under its general mandate to prohibit "unfair or deceptive acts or practices," 15 U.S.C. 45(a)(2), and under its specific authority to prohibit false advertising of foods, drugs, and cosmetics, 15 U.S.C. 52. It is also clear that as between the Commission and the FDA, the Commission has principal responsibility over food advertising. See

Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 F.R. 18539, ¶ III. a. (1971). The December 19, 1977, letter from Dr. Kennedy cited by petitioner clearly indicates that the FDA does not believe that the Commission should suspend its proceeding pending an FDA determination on sugar safety. See also Staff Report, p. 159 n. 257. While the Commission will certainly consider any finding that the FDA may eventually make with respect to the issue of sugar safety, it does not believe that further delay on this issue is desirable or necessary, particularly in view of the fact that the GRAS status of sugar will not be determinative of the issues in the instant proceeding.¹ As the court of appeals noted in *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977), "this is an era of overlapping agency jurisdiction under different statutory mandates." Even if the Commission's rulemaking proceeding essentially overlapped with the proposed FDA evaluation of sugar (a contention that the Commission rejects), the Commission has authority to proceed. As the court noted in *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948, 953 (D.D.C. 1973):

In at least three cases, the courts, including this Court, have held that concurrent FDA-FTC proceedings involving the same or similar matters are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive.

Accordingly, the Commission declines to suspend or narrow the instant rulemaking proceeding.

These issues, along with other questions of the jurisdiction and authority of the Commission proposing the rule, were considered by the Commission in its decision to institute this rulemaking proceeding. Such issues are properly the subject of comment in this proceeding and the Commission encourages all interested persons to raise these issues in the proper forum, *i.e.*, as written or oral comments before the presiding officer. The Commission will then review all such comments before it determines what form of rule, if any, to promulgate. Rule 1.14, 16 C.F.R. 1.14.

The Commission notes that the CMA petition was inappropriately filed directly with the Commission. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer

¹ The decision in *Pfizer & Co.*, 66 F.T.C. 1000 (1964), cited by petitioners at p. 6 of its petition, involved a complaint brought only under 15 U.S.C. 52-57, and over which the FDA has specifically asserted jurisdiction. Neither situation exists here.

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as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

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This order denies various petitions filed by interested persons in the above rulemaking proceeding. The Commission made the following determinations respecting the questions raised in these petitions and motions:

1. Notice of proposed rulemaking is proper and need not contain specific proposed rule;
2. It is unnecessary to require proponents of proposed rule to proceed first;
3. Unlimited cross-examination by interested persons at legislative hearings is not necessary;
4. Schedule of proceedings will not be reviewed at outset;
5. Notice and opportunity to comment need not be given on procedures for conducting proceeding; and
6. Paragraph D(2) of procedures established for proceeding is proper.

ORDER DENYING VARIOUS PETITIONS

By Order of May 19, 1978, the Presiding Officer in TRR No. 215-60, Children's Advertising, certified certain questions to the Commission that were made in response to separate petitions by the Association of National Advertisers, Inc. ("ANA") and the American Association of Advertising Agencies, Inc. ("AAAA"). See Presiding Officer's Order No. 3. Since that time other petitions or motions raising these questions have been filed and the Presiding Officer has similarly certified them to the Commission. See Presiding Officer's Orders Nos. 6, 7, 8, 9, 10, 12, and 13. The Commission's determinations with respect to the questions raised in these petitions and motions are set forth below. Where the issues made by the various petitioners overlap, they are addressed together.¹

1. The Notice of Proposed Rulemaking is Proper And Need Not Contain a Specific Proposed Rule.

Petitioners argue that the notice of proposed rulemaking, 43 F.R. 17967 (1978), is deficient in that it does not contain a specific rule proposed by the Commission. The argument is made that Section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), requires that the notice contain "the proposed rule." In addition, petitioners claim that it is unfair to force them to comment on an ambiguous proposal, because

¹ The petitions of the ANA and the Toy Manufacturers Association raises all six questions that have been certified by the Presiding Officer; AAAA's petition and the Chocolate Manufacturers Association's petitions raise four of these issues (Nos. 1, 3, 5 and 6 addressed below); the Kellogg petitions raise two issues (Nos. 5 and 6); a letter from Irving Scher raises issue No. 5; and the remaining petitions or motions address themselves only to Paragraph D(2)(e) (question No. 6 below).