

POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RUTH Y. GOLDWAY
COMMISSIONER

March 8, 1999

The Honorable John McHugh
Chairman, Subcommittee on the Postal Service
Committee on Government Reform and Oversight
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman McHugh:

I wish to supplement my written testimony of February 11, 1999, on H.R. 22, which I provided as an individual statement of one Commissioner on the Postal Rate Commission. Among other things, I had expressed the concern that H.R. 22 did not subject the Postal Service to federal laws and regulations concerning deceptive advertising. Subsequently during a discussion of H.R. 22 at the Commission for which subcommittee staff was present, a suggestion was raised that H.R. 22 as currently written would give the Federal Trade Commission ("FTC") jurisdiction over any deceptive advertising by the Postal Service. This suggestion was grounded in language contained in proposed 39 U.S.C. §409(d)(1)(C)(ii), which defines the Postal Service as a "person" subject to "section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition." I wish to expand upon my written testimony to clarify why FTC jurisdiction is problematic with H.R. 22 as currently written.

First, §409(d)(1) only covers conduct "with respect to any service which is not reserved to the United States under section 1696 of title 18" A substantial amount of the Postal Service's activities are still protected by the letter monopoly statutes.

Second, FTC jurisdiction extends only to a corporation "which is organized to carry on business for its own profit or that of its members . . ." ¹ The "break even" standard currently found in 39 U.S.C. §3621 would be deleted by H.R. 22, but it remains unclear whether all Postal Service operations would be considered

¹ 15 U.S.C. §44. See *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969) for a landmark decision explaining the scope of FTC jurisdiction over corporations.

to be of the type covered by FTC's "for-profit" jurisdiction because the scope of the FTC's "for-profit" jurisdiction is controversial.²

Third, H.R. 22 only subjects the Postal Service to FTC jurisdiction "to the extent that such section 5 applies to unfair methods of competition."³ Thus, H.R. 22 specifically excludes FTC jurisdiction regarding "unfair or deceptive acts or practices"⁴ As a matter of course, the FTC brings its antitrust cases under its "unfair methods of competition" authority.⁵ The "unfair or deceptive acts or practices" phrase gives the FTC authority over deceptive advertising, and it is under this standard that it has brought its modern false advertising cases.⁶ Congress added the "unfair or deceptive acts or practices" phrase under the so-called Wheeler-Lea Amendment to the FTC Act in 1938 precisely because questions had arisen in court rulings about the ability of the FTC to protect consumers under its "unfair methods of competition" authority.⁷ The Wheeler-Lea Amendment was adopted as a way to remove the requirement that the Commission prove competitive injury in its false advertising cases and to "set the stamp of legitimacy on its consumer protection activities"⁸

² A recent case discussed the differing views of the circuit courts of appeal on such jurisdiction. See *California Dental Ass'n v. F.T.C.*, 128 F.3d 720, 725-26 (9th Cir. 1997). The Supreme Court is reviewing the *California Dental* decision, and according to United States Law Week "the definition of 'profit' – the trigger for Federal Trade Commission jurisdiction over trade associations – was a focal point of discussion during oral argument before the Supreme Court last month." 67 U.S. Law Week 3503 (February 16, 1999).

³ Proposed 39 U.S.C. §409(d)(1)(C)(ii).

⁴ 15 U.S.C. §45(a)(1).

⁵ See, e.g., *F.T.C. v. Motion Picture Adv. Co.*, 344 U.S. 392, 393 (1953).

⁶ See, e.g., *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). For example, the FTC has noted that it "regulates food advertising under its statutory authority to prohibit deceptive acts or practices under Section 5 of the FTC Act." *FTC Enforcement Policy Statement on Food Advertising* (May 1994), at 4. The full ambit of FTC deceptive advertising authority is further explained in its so-called Deception Statement. See *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 (1984), reprinting as an appendix a letter dated Oct. 14, 1983, from the Commission to the Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives.

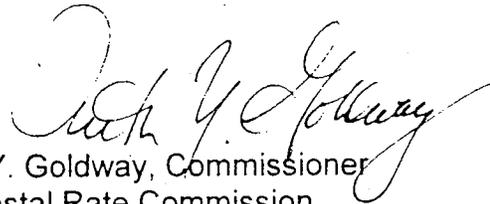
⁷ Section 5 of the FTC Act originally prohibited only "unfair methods of competition. FTC Act of 1914, ch. 311, §5, 38 Stat. 717. The "unfair or deceptive acts or practices" phrase was added by the Wheeler-Lea Amendment of 1938, ch. 49, §3, 52 Stat. 111 in response to the Supreme Court's limiting decision in *F.T.C. v. Raladam*, 283 U.S. 643, 649 (1931).

⁸ See Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 Georgetown L.J. 225, 231-35 (1981).

It should be noted as well that any residual authority the FTC might have to bring false advertising cases under its "unfair methods of competition" authority is clouded by H.R. 22's specific exclusion of FTC jurisdiction regarding "unfair or deceptive acts or practices" And certainly the FTC's lack of authority over not-for-profit organizations makes jurisdiction over the entirety of Postal Service operations highly problematic absent specific Congressional authorization.

If H.R. 22 is to be amended to grant the FTC authority over Postal Service unfair or deceptive acts or practices, including those that may occur under the mail monopoly, as I believe is both warranted and the intention of your subcommittee, the most unambiguous way to accomplish this would be to add an additional subparagraph to 39 U.S.C. §409 (perhaps as subparagraph (i)) specifying that the Postal Service shall be considered to be a "person" for purposes of section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a)(2), to the extent that such section 5 applies to unfair or deceptive acts or practices.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ruth Y. Goldway".

Ruth Y. Goldway, Commissioner
Postal Rate Commission

cc: Honorable Chaka Fattah