

Application, for Review  
 Complaint, Formal  
 Declaratory Ruling, Request for Denied

Application for review of staff's ruling denying the complaint and request for declaratory ruling denied. Commission modifies ruling, however; sufficient grounds were not presented to warrant reversal.

FCC 81-370

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Request for Declaratory Ruling of  
 Paul Loveday and Californians for Smok-  
 ing and No Smoking Sections

## ORDER

(Adopted: July 30, 1981; Released: August 7, 1981)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on November 28, 1980, by Paul Loveday *et al*, of the Broadcast Bureau's ruling of October 30, 1980.\*

2. The Bureau's ruling (see Attachment A, page 7) stated that "[the complainants had not submitted] any conclusive evidence which establishes that the tobacco companies are exercising editorial control over CARE advertisements. . . ." To the extent that "conclusive" may imply an unwarranted burden on complainants in cases such as these, we will modify the Bureau's ruling by striking "conclusive." The Bureau's decision, with which we agree, was based primarily on a finding that the licensees did not act unreasonably. The information before the Bureau did not show that there was any editorial control of the CARE advertisements by "the tobacco companies."

3. Except as modified above, we believe the Bureau's ruling was correct, and the Application for Review does not contain sufficient grounds to warrant a reversal of the ruling. Therefore, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
 WILLIAM J. TRICARICO, *Secretary*.

\* A copy of that ruling is appended (Attachment A).

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

01127

Oct. 30, 1980

IN REPLY REFER TO:  
8330-H  
C10-1275  
C10-1264  
C10-997  
C10-768

Mr. Paul L. Loveday  
Attorney at Law  
Two Embarcadero Center, 24th Floor  
San Francisco, California 94111

In re: Request for Declaratory Ruling  
by "Californians for Smoking  
and No Smoking Sections."

Dear Mr. Loveday:

This is in reference to the Request for Declaratory Ruling that you filed on October 17, 1980 on behalf of the "Californians for Smoking and No Smoking Sections" (the "Committee") concerning advertisements opposing Proposition 10 by "Californians Against Regulatory Excess" ("CARE"). The Committee states that Proposition 10 represents "a measure placed on the November 4, 1980 California election ballot by the signature initiative process" which would "create smoking *and* no smoking sections in indoor public places." The Committee supports the adoption of Proposition 10; CARE opposes its adoption.

Background\*

It is the Committee's contention that CARE is acting as the "agent and alter ego" of the tobacco industry<sup>1</sup> since CARE derives substantially all or "virtually 100%" of its funds from the industry<sup>2</sup> and has relinquished editorial control over its advertisements to the industry. Essentially, the Committee's contentions are based on the following: (1) CARE and "Californians for Common Sense," organized to oppose a similar ballot proposition in 1978, retained the same legal counsel and advertising firm and further involved similar campaign themes and strategies; (2) the four largest cigarette manufacturers are "acting in concert" by contributing funds to CARE according to their respective market shares in California, as was the case in 1978; (3) the tobacco industry took personal credit for defeating the 1978 ballot proposition;<sup>3</sup> (4) the four cigarette manufacturers "deferred massive spending on advertisements against Proposition 10 [until] . . . the day *after* the cutoff date for disclosing campaign expenditures" allegedly to conceal their campaign involvement;<sup>4</sup> (5) CARE has employed former spokespersons for the Tobacco Institute to advocate its cause; and (6) Proposition 10 represents a "national campaign" launched by the tobacco industry to oppose restrictive legislation aimed at smoking, as evident by the activities in Dade County, Florida, where a similar ballot proposition is being considered.<sup>5</sup> The Committee also points out that CARE misrepresented its Board of Directors to the

\* Footnotes are at the end of this ruling.

Californian licensees by including Mr. James Collins, the President of the California Restaurant Association, as a member. The Committee adds "only an examination of the files and records of Excess [CARE] can disclose how many other misrepresentations there are in Excess' [CARE's]. . . letter to Station Managers."

The Committee concludes that given the significant financial support provided by the tobacco industry and its alleged control over the CARE campaign, the California broadcast licensees have not "adequately fulfill[ed] their obligations of reasonable diligence" and "have participated with the Tobacco Industry in acts of affirmative deception by running a sponsorship identification statement ("Tag-line") stating that such advertisements were 'Paid for by Californians Against Regulatory Excess' when in fact" they were paid for by the tobacco industry.<sup>8</sup> The Committee is requesting that the Commission: (1) declare that the sponsorship identification statement attached to CARE advertisements is "misleading" and in violation of Section 317(c) of the Communications Act and Section 73.1212 of the Commission's Rules and Regulations; and (2) direct all California broadcast station licensees to identify all CARE advertisements as "paid for by the Tobacco Industry" rather than "Californians Against Regulatory Excess."

In support of its request, the Committee cites *Amendment of the Commission's "Sponsorship Identification" Rules (Sections 73.119, 73.289, 73.789 and 76.221)*, 52 FCC 2d 701 (1975); *In re KOOL-TV*, 26 FCC 2d 42 (1970); and *United States v. WHAS, Inc.*, 385 F. 2d 784 (6th Cir. 1967). The Committee distinguishes the instant case from *VOTER*, 46 RR 2d 350 (B/c. Bur. 1979) and *National Welfare Rights Organization*, 41 FCC 2d 187 (1973), since here the tobacco industry allegedly has exercised editorial control over CARE advertisements.

The Committee asserts that time is of the essence, in light of CARE's "media blitz" during the final days before the election which has swayed voters to oppose Proposition 10, according to recent polls. The Committee believes that if the CARE advertisements are "properly" identified as paid for by the tobacco industry, the "credibility" of such advertisements would be diminished in the eyes of the voters.<sup>7</sup>

On October 27, 1980, by its attorney, CARE filed its response.<sup>8</sup> CARE represents that it is a bona fide nonprofit corporation and political committee, with 12 Board members,<sup>9</sup> organized for the purpose of "educat[ing] California voters about excessive government regulation, and specifically, to oppose a California state ballot measure, Proposition 10, on the November 4, 1980 general election ballot." CARE cites *VOTER*, *supra*, and contends that the California broadcast station licensees "have acted properly and within their discretion in concluding that [it] is the entity, and the only entity, they must identify as sponsor of [CARE's] political spot announcements." CARE asserts that it has "wholly and fairly disclosed its contributions under California's campaign reporting and disclosure laws" and although "the four tobacco companies are the major contributors," a fact which has been "widely publicized,"<sup>10</sup> CARE exercises "editorial control over its spot ads" and "it is not controlled by the tobacco companies."

CARE rejects the allegations contained in the Committee's request and states that:

- (1) The campaign management of [CARE] is independent of any and all tobacco companies and any of its trade associations.
- (2) The use by [CARE] of some experts who have previously worked on anti-smoking campaigns, which employment was sometimes by design and sometimes by coincidence, is demonstrative of good management and not of conspiratorial intentions.
- (3) The allegations that [CARE's] campaign is similar to the 1980 Dade County Florida anti-smoking campaign is not at all substantiated and is false.
- (4) The allegations that [CARE's] campaign is similar to the California Proposi-

tion 5 campaign in 1978 is correct. Committee acknowledges that it is appealing to the residue of voter disapproval of Proposition 5.

CARE added that it has not retained any current employee of the tobacco companies or the Tobacco Institute, but for the voluntary work of two employees of the Institute, who assist in the "distribution of literature throughout California."

CARE included a declaration of Richard S. Woodward, a partner of the advertising firm retained by CARE, in which he stated that his firm has contracted with CARE to prepare scripts and submit them to that organization's Board and legal counsel for clearance. Mr. Woodward also stated that Mr. Nelson, the organizer and campaign manager of CARE, was on site during most of the production of the CARE advertisements.

CARE states that the Committee is asking the Commission to determine whether or not a political committee is an independent, bona fide organization. CARE further states that broadcasters have the responsibility "to exercise reasonable diligence to determine the identity of who paid for sponsored material." CARE concludes by stating, "to shift that responsibility to the Commission would literally place the Commission in the 'thicket' of all political campaigns. . . ."

On October 26, 1980, counsel for the Committee contacted a staff attorney of this office. The Committee asserted that CARE's documents prove that the tobacco industry directs the campaign strategy and exercises editorial control over the CARE advertisements, which it believes is essentially demonstrated by the following:

(1) On July 27, 1980 a CARE "Update" was sent to its committee from Mr. Bergland, Chairman of CARE, which discussed the filing of a lawsuit challenging statements concerning Proposition 10, prior to any Board meeting, indicative of the Board's lack of control over campaign strategy;

(2) There were only four Board meetings held, only one of which was in person, the remainder were telephonic. Only one of the four meetings had a quorum. Thus, CARE's representations to California broadcast station licensees that the Board "meets regularly" is incorrect and moreover, CARE's actions are not in compliance with its bylaws.

(3) The Board meetings were conducted on 8/26/80, 10/6/80, 10/13/80, 10/20/80. The advertising firm of Woodward, McDowell & Larson was retained in September and CARE's advertisements were being aired on 9/30/80. The time sequence suggests that CARE's Board did not meet after the advertising firm was retained and before the advertisements were completed and carried by the stations. The Committee maintains that the CARE Board did not have an opportunity to preview the advertisements and, thus, did not exercise editorial control over their content.

On October 27, 1980, counsel for CARE responded to the Committee's reply, during a phone conversation with a staff attorney of this office. CARE stated that, due to an oversight, it neglected to mention the Board's first organizational meeting which was held on June 16, 1980. In attendance were Mr. Bergland, Mr. Dohr and Mr. Benson. CARE also explained that a political committee which is comprised of individuals with diverse interests, occupations and responsibilities, unlike a private corporation or an on-going organization, often experiences difficulties in scheduling meetings and commanding appearances at such, which accounts for its irregular meetings. CARE, however, states that Mr. Bergland (Chairman and President of the Board), Mr. Dohr (Treasurer) and Mr. Nelson (Senior Campaign Manager and Organizer of CARE) meet regularly, supervise the campaign and exercise complete editorial control over CARE advertisements. CARE denies that the tobacco industry exercises any control whatsoever over the organization's activities or strategies.

## Discussion

The thrust of this request is that the sponsorship identification statements attached to CARE advertisements are inadequate and improper under Section 315 of the Communications Act and Section 73.1212 of the Commission's Rules and Regulations. To summarize, the Committee contends that the tobacco industry—specifically, the four major cigarette manufacturers—are the actual sponsors of CARE advertisements and the true strategists behind CARE's campaign drive and should be identified as such; CARE asserts that it exercises control over all of the advertisements and the campaign, not the cigarette manufacturers, and that the sponsorship identification statements are correct. Both organizations have contacted the various broadcast station licensees throughout California to make their positions known. The issue presented is whether the California broadcast station licensees have failed to exercise reasonable diligence to identify the sponsor of the CARE advertisements.

Section 317 of the Communications Act provides, in pertinent part, that:

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is broadcast, be announced as paid for or furnished, as the case may be, by such person .

\* \* \* \* \*

(c) The licensee of each radio station shall exercise *reasonable diligence* to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section (emphasis added).

The corresponding rule is contained in Section 73.1212 of the Commission's Rules and Regulations and provides, in pertinent part, that:

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

\* \* \* \* \*

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, *fully and fairly disclose the true identity* of the person or persons, or corporation, committee, association or other unincorporated group, or *other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or valuable consideration is received*, or by whom the material or services referred to in paragraph (d) of this section are furnished. *Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent* (emphasis added).

The basic premise of the sponsorship identification requirements is that the public is entitled to know by whom they are being persuaded. *VOTER, supra* at 352; *National Welfare Rights Organization, supra* at 195; *Applicability of Sponsorship Identification Rules*, 40 FCC 141, 141 (1963).

Section 317 and Section 73.1212 impose a duty upon licensees to exercise reasonable diligence to ascertain the identity of the sponsor of broadcast material. The obligation

to exercise reasonable diligence to determine the actual sponsor of broadcast material, of course, does not cast licensees in the role of "insurers" as to the complete accuracy of sponsorship identification statements; they have an affirmative obligation to ascertain and identify the sponsor, no more—no less. *National Welfare Rights Organization, supra* at 195. The Commission's responsibilities in these matters is not to substitute its judgment for that of the licensees or to pass on the bona fide nature of an organization; rather the Commission, as a government licensing agency, reviews its licensees' decisions to determine if it can be said that they exercised reasonable diligence.

We believe that the Bureau ruling in *VOTER, supra*, is dispositive of this request. The case of *VOTER* concerned a ballot proposition (involving the establishment of a county public power system), in which advertisements opposing the ballot were aired as being sponsored by a political committee ("Westchester Citizens"). The Committee was funded in substantial part or completely by the Consolidated Edison Company. The complainant argued that Con Edison should have been substituted or added to the sponsorship identification statement. The Committee admitted that it received substantial financial assistance from Con Edison, but maintained that it exercised editorial control over all of its advertisements.

After noting that "longstanding Commission policy has been that an entity paying for advertising time and editorial control over the message must be identified as the sponsor of the statement," the Bureau stated that:

[W]e cannot conclude that any licensee, in evaluating the facts before it regarding the advertisement, failed to exercise reasonable diligence by accepting the representations of *Westchester Citizens*. The substantial proportion of Con Edison's role in *Westchester Citizens* funding might suggest a basis for further inquiry to some licensees. On the other hand the *Westchester Citizens* by-laws, represented assertion of editorial control over these advertisement, and the weight of precedent suggest that those licensees who accepted *Westchester Citizens*' advertisements as offered did so in good faith and without closing their eyes to any attempted misrepresentation. Indeed, some licensees may conclude, either on the facts thus far provided by the *Westchester Citizens*, or additional information not now before us, that, in its view, "Con Edison" alone is the appropriate identification. In such a case, we would have no basis for finding that the licensee has acted unreasonably (emphasis added). *Id.* at 352; see also, *National Welfare Rights Organization, supra* (announcements paid for by a private corporation, but controlled and directed by the American Academy of Pediatrics, were properly identified as "presented as a public service announcement by the American Academy of Pediatric").

In the same fashion, on the basis of all the information before us, we cannot determine that any California broadcast station licensee acted unreasonably by failing to exercise reasonable diligence in accepting the representations of CARE and ultimately airing the CARE advertisements as offered. On the other hand, if some licensees substituted the sponsorship identification statements with "Paid for by the Four Major Tobacco Companies," we would have no basis for concluding that they acted unreasonably.

The Committee submitted a rather voluminous record (consisting of studies, polls, newspaper articles and declarations) in an attempt to demonstrate that the tobacco companies are controlling CARE. While it has been shown that substantially all or "virtually 100%" of CARE's funds have come from the four major tobacco companies, a fact that CARE readily admits in its response, there has not been any conclusive evidence which establishes that the tobacco companies are exercising editorial control over CARE advertisements, or for that matter over CARE's entire campaign efforts or any other drive aimed at defeating similar legislation like that pending in California. More importantly, there has been no evidence that the California broadcast station

licensees have dismissed this matter without exercising reasonable diligence to ascertain the true sponsor in compliance with their obligations under Section 317 and Section 73.1212.

#### Conclusion

Based on all of the foregoing, we cannot conclude that any broadcast station licensee has violated the sponsorship identification provisions of the Communications Act or the Commission's Rules and Regulations. To hold otherwise would require this agency to investigate the nature of political committees organized to support or oppose an election matter (e.g., whether or not corporate formalities were adhered to), to second-guess broadcast station licensees' judgments and to rule on the basis of hindsight, rather than reviewing licensees' decisions to determine if they acted reasonably and in good faith.

In closing, "we continue to urge caution and the exercise of reasonable diligence on the part of our licensees to take appropriate steps to ascertain the fullest factual information as to the true identity of political and controversial issue sponsors." *VOTER*, *supra* at 352.

Due to the imminence of the election, pertinent parts of this ruling were relayed by phone conversation to the respective attorneys on October 30, 1980.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

SINCERELY,  
STEPHEN F. SEWELL, *Acting Chief*,  
COMPLAINTS AND COMPLIANCE DIVISION,  
BROADCAST BUREAU.

FOOTNOTES

- <sup>1</sup> The Committee apparently refers to the four largest cigarette manufacturers in the country as comprising an "entity," known as the "tobacco industry." Such manufacturers include Lorillard, R. J. Reynolds Tobacco, Brown and Williamson Tobacco Co. and Phillip Morris.
- <sup>2</sup> According to the Committee, approximately 99.6% of CARE's financing comes from the tobacco industry (the four major cigarette manufacturers and to a small extent the tobacco distributors; The Committee's figures are derived from the financial disclosure statements that CARE filed in California pursuant to California election laws.
- <sup>3</sup> In this connection, the Committee enclosed a newspaper article, entitled "The tobacco industry: How it snuffed out Proposition 5." The article quoted Richard Woodward, of Woodward, McDowell and Larson (the advertising firm that was retained by "Californians for Common Sense" in 1978 and CARE in 1980) and Ed Grefe, vice president for public affairs of Phillip Morris, as describing their campaign strategy to defeat the 1978 ballot proposition in California. The Committee asserts that this indicates that the tobacco industry exercised control over the campaign and editorial control over the advertisements.
- <sup>4</sup> A comparison of the financial disclosure statements covering the periods of "1/8/80 through 9/23/80" (executed 9/29/80 and "9/24/80 through 10/20/80" (executed of 10/23/80) shows that the major cigarette manufacturers did, in fact, channel more funds into CARE during the latter period, in the form of loans or otherwise. However, this fact alone does not demonstrate that the cigarette manufacturers attempted to conceal their "support" of CARE.
- <sup>5</sup> With respect to the "national campaign," the Committee enclosed a copy of an article that appeared in the *United States Tobacco Journal*, shortly after the ballot proposition was defeated in 1978, which warned that the "the entire tobacco industry . . . has an important stake in what happens in the nation's most populous state—a state which incidentally accounts for more than 9% of the nation's cigarette consumption—impacts nationally (as with "Proposition 3")." In addition, the Committee points out that the tobacco industry has also significantly contributed to the "Floridians Against Increased Regulation" ("FAIR"). Moreover, the Committee represents that the same agents have been employed in both the prior and the current campaigns in Florida and California. In fact, the advertising firm of Woodward, McDowell and Larson was retained in both prior campaigns, but is now only working for CARE on the California proposition. Lance Tarrance was the only "agent" retained in all four campaign drives by the respective political committees. Finally, the Committee contends that the tobacco industry, in an effort to alleviate the effect of adverse legislation, has been instrumental in drafting "watered down legislation that *appears* to protect nonsmokers but in reality does not." As an example of such "diluted" legislation, the Committee attached a copy of the 1978 Greene Bill (SB 2026). The financing disclosure statement filed by "Californians for Common Sense" in 1978 reveals a payment of \$20,000 to state Senator Bill Greene, but it does not specify what services were rendered. It should be noted that none of these representations conclusively substantiate tobacco industry involvement.
- <sup>6</sup> The Committee attached correspondence that it sent to all the California broadcast station licensees, advising them of their obligation to exercise "reasonable diligence" to ascertain the true identity of the entity on whose behalf advertisements are purchased. The Committee proceeded to explain that virtually all the funds received by CARE are from the out-of-state tobacco industry, and thus the tag line "*Californians Against Regulatory Excess*" is deceptive and should be substituted with the "tobacco industry." In their response, CARE attached correspondence that it sent to the licensees which

denied allegations that it was operating as a "front" for any person, company or industry, admitted that it received "tobacco" funds, but emphasized that it maintained control over CARE advertisements and campaign strategies. The Committee forwarded letters received by several stations which essentially denied their request for substitution of tag-lines on CARE advertisements. It should be noted that a sponsorship identification statement referring to the "tobacco industry" may be deceptive and misleading, in that there is no particular entity known as such, and further that CARE is, in fact, incorporated in California and has Californians serving on its Board.

- <sup>7</sup> The Committee cites two studies, the Roper Poll of 1978 commissioned by the Tobacco Institute and the Fairbanks/Canapary/Maullin Poll commissioned by CARE, which indicate that the tobacco industry's "credibility" is low. The Committee further claims that the tobacco industry is cognizant of their low esteem, which explains "their" desire to operate through a "front organization" like CARE.
- <sup>8</sup> A copy of that response was sent to a staff attorney of this office of October 25, 1980, at her request.
- <sup>9</sup> As mentioned before, Mr. Collins has denied that he was a member of CARE's Board of Directors. By declaration of Eileen Padberg, of Robert Nelson and Associates (Robert Nelson organized CARE), CARE represents that it was its understanding that Mr. Collins was, in fact, serving on the Board and that all notices of meetings and other informative data was forwarded to him, accordingly. Eileen Padberg also stated that Mr. Kiker participated in one telephonic Board meeting on Mr. Collin's behalf and at his request.
- <sup>10</sup> Both CARE and the Committee have furnished the Commission with newspaper articles which report the influx of the tobacco industry's financial support.