# THE WAGES OF ZEALOTRY: The FTC under Siege

Ernest Gellhorn

THE FEDERAL TRADE COMMISSION, an agency that has had its ups and downs over the years, is now under attack as never before. This contrasts sharply with its recent standing as the darling of consumer professionals and Congress. Its budget used to be regularly increased and its authority expanded. Yet today the commission—and some would say consumerism generally—is in substantial retreat. Congressmen vie in the drafting of legislation that would overturn or cripple FTC actions and strip the commission of its plenary power to protect consumers. The news is filled with stories of agency mismanagement and regulatory excess. The questions are, why now and why this particular agency?

Consumer protection has been a standard around which both liberals and conservatives have been rallying ever since 1962 when President Kennedy focused national attention on the needs of the "unrepresented" public. Shortly thereafter Ralph Nader put auto safety in the headlines. An articulate constituency developed to force a powerful regulatory regime on the auto industry, and this in turn became the model for the environmental crusade. But the consumer movement's major contribution was to force a closer look at the Federal Trade Commission and its alleged ineffectiveness.

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Consumer pressure led the Nixon administration to refurbish and reinvigorate the commission. By 1975 a Democratic Congress and Republican President had joined to give the agency additional powers to protect consumer rights. The capstone for the consumer movement came three years ago, however—with the election of then Nader favorite Jimmy Carter to the presidency and the subsequent appointment of consumer activist Michael Pertschuk as FTC chairman. As staff chief of the Senate Commerce Committee (then chaired by consumer champion Warren G. Magnuson), Pertschuk was a principal architect of many federal consumer laws (including those expanding the FTC's powers) and seemed the ideal choice to lead the commission into the 1980s. His obvious skills on Capitol Hill seemed to assure the commission of necessary congressional support.

This early promise was not to be. Since 1977 few regulators have stumbled more clumsily and few agencies have fallen from congressional and public favor more quickly. The FTC is today a beleaguered agency confronted daily by editorial criticism, business scorn, judicial reversal, legislative challenge, and presidential

"support" notably lacking in enthusiasm. Nor has the assault yet run its course. Thus, despite its wide-ranging legal authority, the FTC appears, in the short run at least, to be a greatly weakened regulatory force.

Whether the commission will survive this onslaught, or whether what is left will be worth saving, currently attracts most of the attention. But the ultimate survival of the FTC is subordinate to the question of why the commission has faltered—and why so badly. What is it that has led to this rapid and dramatic shift in public attitude? Why is it that today few will defend the FTC, when only a couple of years ago few questioned even those of its actions that richly deserved questioning?

**Changing Attitudes or Regulatory Overkill?**

One possibility is that the FTC is in some part the coincidental victim of a (similarly puzzling) change in attitude toward governmental regulation in general, or toward the consumer movement—and its point agency, the FTC—in particular. But in fact there has not been a fundamental change. Other consumer action agencies, such as the Consumer Products Safety Commission (CPSC) and the Occupational Safety and Health Administration (OSHA), seem to have weathered a similar cooling in the public's ardor for their respective missions. These agencies also have come under outspoken criticism for being insensitive to the perils and costs of big government, for exceeding the limits of their mandates, and for operating clumsily—with little regard to whether the costs they impose on business outweigh any conceivable public benefits. And they too found themselves abandoned by former friends at the first sign of trouble. Yet these agencies have survived, more or less intact, possibly because both Congress and the public realized that the alternative of no regulatory oversight of the market was even less desirable.

Or it might be argued that these other agencies weathered the storm while the FTC faltered because of their greater adaptability to a new public mood. For example, three years ago OSHA was a favorite target, criticized for regulating everything from ice water to toilets in the name of employee safety. In response, OSHA was flexible enough to change its approach and methods, if not its fundamental goals. First, it cut back sharply the number of regulations that employers were expected to meet, dropping trivial requirements and creating exemptions where regulatory benefits seemed slight. More important, it began to shift its program from the scattershot all-risks-are-equal approach to a new emphasis on the major, crippling hazards—such as cancer-causing agents. Also, along with the CPSC, it sought to limit regulatory intrusions (but not effectiveness: quite the contrary) by reliance on performance standards rather than design requirements, on ends rather than means. Instead of demanding that employers or producers adopt particular safety devices or product designs, both agencies now look to results—and firms are thereby encouraged to meet regulatory targets at lower cost and with greater freedom of individual choice. The CPSC also has explored closely monitored self-regulation as an alternative. And recently the Environmental Protection Agency (EPA) has taken steps to disarm its critics by experimenting with such approaches as the "bubble" and the "offset," concepts that seek to harness competitive forces to regulatory goals. In essence, these approaches look at all emissions of particular kinds being discharged by a plant (in the case of the "bubble") or in a geographical area (the "offset" program) and regulate only totals; a firm is allowed to select which emission sources within the "bubble" are cheapest or easiest to clean up, or to arrange with others in the surrounding area to lower their pollution levels so as to offset the pollution likely to be generated by a new plant. Thus, instead of focusing on irritating and inefficient measures that seek to limit discharges smokestack by smokestack and sewer pipe by sewer pipe, the agency goes after overall pollution control.

The curious fact is, the Federal Trade Commission has shown comparable flexibility in responding to its critics—but to no comparable avail. For example, after investigating practices in the funeral industry, the commission's staff proposed a rule that not only would have prohibited morticians from observing bans on price advertising and other restrictive practices but also would have required them to provide itemized prices for the components of a funeral and to specify other business practices. The rule, in other words, looked in two directions at once: it sought both to remove existing re-

straints on market competition *and* to specify in detail how these businesses must operate once the barriers were eliminated. After public hearings, however, the commissioners came to understand the inherent conflict between the two halves of the rule—that is, between trusting competition when freed from improper restraints and yet insisting on FTC-required business practices to ensure service to customers. Thus, they instructed the staff last March to drop the second half of the rule. The result seems sensible so far, but this new-found flexibility has neither satisfied the industry nor improved the commission's public image.

This shift in approach, which is being replicated more or less in several other FTC rules (on hearing aid sales practices, for example), reveals an agency increasingly pressured on its proper role and more sensitive to striking an appropriate balance between protecting customers from overreaching sellers and ensuring marketplace freedom for robust competition. Nevertheless, the pressures on the FTC have not abated; nor do they seem likely to abate any time soon. Congress, for example, is apparently bent on denying the commission the authority to issue its funeral industry rules—to cite just one instance among many.

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Perhaps, then, the difference between the FTC and the other consumer protection agencies is that the latter are relative newcomers to the government—entering fields that have not been previously regulated. That is to say, many of their shortcomings could be forgiven (and ultimately forgotten) as typical of regulatory growing pains—not unlike some of the problems of the National Labor Relations Board in the 1930s, for example, right after the Wagner Act was adopted. Challenges to regulatory authority and procedures are by no means unusual in an agency's early years. But instant wisdom in selecting enforcement priorities and techniques is not expected.

The FTC, however, is no callow youth. To be sure, it had not previously used its rulemaking powers as vigorously as it has since 1975 when those powers were reaffirmed and additional remedies were authorized. And some of those who criticize its performance—in particular, the funeral industry—reflect primarily an almost inevitable complaint about having their practices carefully reviewed for the first time and held up to new standards. But the commission's essential statutory authority has remained unchanged for over sixty-five years. It has long attacked industry-wide practices with a variety of adjudicative and rulemaking actions, and this authority has been exercised in one form or another for several decades.

## The Role of the Courts

Another possibility is that the decline in the commission's fortunes can be blamed on the courts. Here the evidence is mixed. On the one hand, the courts are subjecting all administrative agencies to a harder look than in the past years. Yet the burden of proof remains heavily on those appealing the agencies' actions, and, even so, the FTC's substantive decisions and orders as well as its procedural rulings have fared notably poorly in recent years.

In December 1979, for example, the commission's new vocational schools rule—adopted after five years of preparation and the first to be issued under its new authority—was summarily overturned by the prestigious Second

Circuit Court of Appeals. Citing numerous "procedural and substantive errors," the court held that the commission had not complied with its own organic act: (1) it had failed to define with specificity the abusive acts or practices that were unfair or deceptive and justified the new rule; (2) the rule's refund provisions providing for a strict pro rata return of tuition to any student failing to complete a course was overly broad and not rationally connected to the end of preventing deceptive enrollment practices; and (3) the job-placement statistical portion of the rule, imposing a rigid formula and severely restricting disclosure of job-related information, was both inaccurate and incomplete. As the court concluded, "We think that Congress expected more [of the Federal Trade Commission] than this."

Without making the effort to tally reversal percentages—especially because such statistical measures are easily manipulated—a reader of court opinions reviewing FTC performance gets the impression that surprising numbers of its actions are rejected on appeal and, more significantly, that judicial confidence in commission processes is at a low ebb. Still, this

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dissatisfaction probably has not been a major force in the drive to curb the commission's actions. As with arguments in any legal brief, judicial reservations have been used by FTC opponents to score points; but the wounds that have been inflicted on this account have surely not been fatal. Review of FTC actions in the courts occurs sporadically in jurisdictions dispersed throughout the country, and neither Congress nor the public habitually follows judicial oversight of agency decisions with care.

Similarly, as suggested before, the FTC's current plight cannot be traced simply to a revisionist view of consumer protection. The FTC has not been immune, of course, from the sharp questioning now being directed at almost every facet of government regulation of business. But the commission's critics have not generally asserted that consumer fraud or business chicanery should be free from all regulatory control. The "high cost of dying" was documented long ago, and few will hasten to defend the integrity and quality of most used-car sales practices. Indeed, even those most upset with the FTC's performance in recent years acknowledge that if the commission did not exist it would probably have to be invented. Market imperfections are all too frequent and significant to leave consumers unprotected.

### Stepped-Up FTC Activities

It might be more instructive to review specific commission activities in the past three years for some signals of why the FTC is now under siege. Again, several actions can be identified as having generated controversy and criticism. While not necessarily providing the missing evidence, these actions do, however, show the range and scope of the dissatisfaction—unease may come closer—with FTC performance. Two cases in the antitrust area of FTC responsibility are typical. One is the complaint against the ready-to-eat cereal companies for their alleged shared monopoly, and the other is the action against the major oil companies for dominating the petroleum market. Both cases are already several years old, and neither seems close to resolution. The theory in the first case is novel and untested; in the second, there seems to be no rational theory at all. In both the commission has struggled with numerous discovery questions in trying to secure the necessary documents, and its prosecutorial staffs have suffered from constant turnover. The Pertschuk commission inherited both cases, however, and cannot be blamed for the failures—except that it has enthusiastically embraced the cases as its own. Still, neither respondent stands especially tall in public esteem, and these actions hardly constitute the bedrock for public retaliation against the commission.

Similarly, an examination of the commission's consumer protection activities suggests reasons for generalized discontent, but not in most instances for the bitter opposition the FTC now faces. There are, to be sure, some twenty rulemakings under way (or recently completed), and in them the agency has not limited itself to minor targets. If these rules and the parallel adjudicative complaints are approved, the commission will have extended the reach of its authority from morticians to

doctors and lawyers and to such large and diverse industries as insurance, autos, and drugs. Yet again, all but three of these proceedings were begun by Pertschuk's predecessors, and the complaint in Congress—as recently as the 1977 oversight hearings—has often been that the FTC has moved too slowly (and in some cases too cautiously), not too vigorously. Most of the rules have been controversial; but often the controversy can be traced to the fact that the commission has focused on new targets and added bite to its bark. That is, general acceptance (and even applause) would probably have outweighed the criticism—although the FTC's constant procedural errors and the mistakes of sloppy or inadequate lawyering would still have given its critics considerable ammunition. But the eyeglass, hearing aid, and funeral industry rules were all grounded in solid showings of widespread abuses and serious impediments to competition. They were all started after congressional hearings or a nudge from the oversight committees. And in each instance it seems that the rule that will be (or has been) finally approved has been designed to provide consumers with basic protection from sharp practices without unnecessarily restricting competition. Some balance has in fact been struck.

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On the other hand, each also has been changed significantly in the course of the proceedings as the commission has discovered that the rules originally proposed were as likely to create problems as to solve them. The FTC's practice has been to accept sweeping staff proposals that seek to regulate as well as to open markets. Usually these original drafts have reflected only a dim awareness of industry operations or economics, or both, and have virtually invited sharp criticism. After thus needlessly raising tempers and the noise level of the debate, the commission has narrowed these rules and limited their reach. But by then it has turned neutrals or even potential allies into implacable foes and has polarized those who would be covered by the rule.

As this recital suggests, the commission's stepped-up activities, often ill-prepared and inadequately considered, have made it vulnerable to attack. Its actions have frequently come close to the line of unacceptable conduct. Still, it seems that the commission would have survived with only serious bruises if nothing more could be pointed to. Few of its opponents had altogether clean hands, and fewer still were in a position to mount a substantial attack. Thus, had the commission continued on the ambitious course of the early 1970s, when many of its current actions were already under way, it does not seem likely that public and congressional attention would have focused so intensively or destructively on it. But the commission did not stop there.

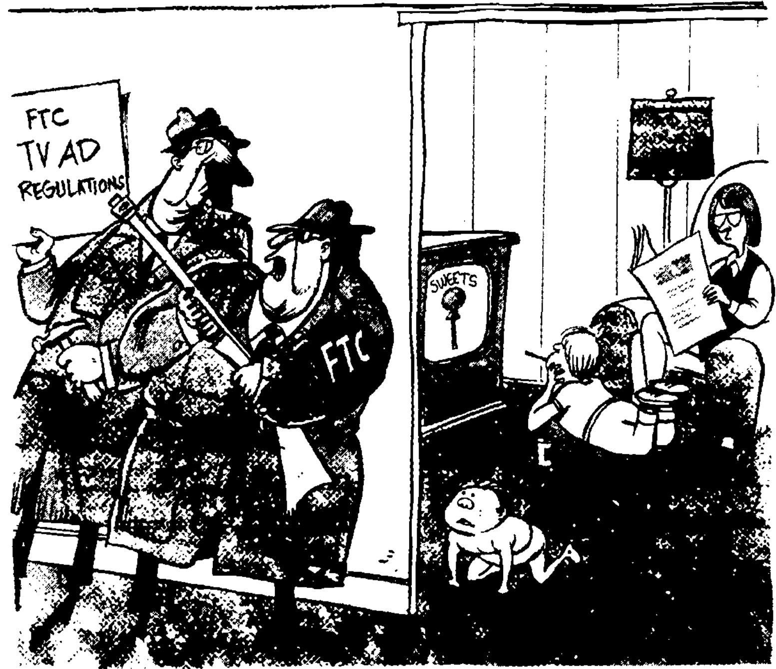
### The "Kid-Vid" Rule—Buying Trouble

One action taken by the FTC since 1977 stands out in particular—for virtually every one of its critics, in Congress and out, has relied on it when excoriating the commission's failings: that is its proposed rule, announced last April, to ban or regulate television advertising directed at children. A pet project of Chairman Pertschuk, it more than any other action seems to have encapsulated what so often has disturbed FTC watchers. It also has been the catalyst for current efforts to subject the commission to a legislative "cease and desist" order. Had the FTC not committed so much of its institutional capital to this one proposal, its other actions probably would have not been enough to fuel all-out war. But the so-called kid-vid rule changed the whole atmosphere and the tone of argument. It was viewed with alarm as an example of regulatory overkill by an activist, runaway commission. It sent tremors through the business community and caused one-time supporters to reexamine their commitments.

Thus the proposed rule and its related proceedings are worth a closer examination—which reveals that both are badly flawed. The problems can be grouped into four overlapping categories:

(1) The proposal is complex and confusing. Indeed, in a study of several hundreds of pages, the commission staff could not settle on any one recommendation. Instead it suggested three possible actions and four less restrictive

alternatives, ranging from a ban on all television ads aimed at young children to tight controls on ads promoting sugared products that allegedly cause tooth decay. Aside from reflecting uncertainty, the proposals also are highly impractical because children watch television at all hours—in fact, more than 90 percent of all television viewing by children is outside the weekend "ghetto" hours—and children are seldom a majority of any particular audience. As a consequence, any ban to be meaningful would have to be imposed over a very broad time period and would seriously affect most television advertising. The alternative would be to apply the ban more narrowly; but that would affect only a trivial amount of the TV advertising that reaches children, raising the question of why the proposal was made in the first place. Either way, one wonders whether any of the FTC's proposals are worth serious consideration. Because sugared products are only one of many factors contributing to tooth decay, an advertising ban might in fact be misleading—and not especially effective.

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*"Rush the ol' lady while I grab the kid's sucker!"*

(2) The legal and policy questions are singularly difficult and raise fundamental questions about the FTC's proper role. A first question is whether the FTC has the authority to control TV advertising directed at children. Television is subject to regulation by the Federal Communications Commission, of course, and, after extensive hearings, that agency had previously declined to regulate either the quality or quantity of children's programming or to ban commercials within such programs. Even aside from the jurisdictional issue, there is the further question whether the Federal Trade Commission's mandate covers truthful advertising directed specifically at children. Because the products being advertised are not intrinsically harmful, it is not obvious that the advertising is "unfair" or that it causes enough harm to lose its protection under the First Amendment. The FTC staff has argued that the effects of sugared products on children are cumulative and that the situation is therefore similar to cigarette advertising—which was removed from the electronic media (but not from print) by an act of Congress. In any case, the cigarette ban expressly distinguished cigarette ads as sui generis on the ground that cigarettes are harmful even when consumed in small amounts. This ban, in other words, is not readily transferable. An even more important and related question is whether *any* government agency should undertake the role of determining whether admittedly truthful ads can be shown on television to children—especially because children are under at least nominal parental control and the actual purchases being encouraged by the ads are made by their parents. Numerous critics have argued that the FTC's authority to prevent or prohibit unfair trade practices was never intended to endow it with such expansive powers as to intrude into the fabric of American family life. Even some of the FTC's most sympathetic supporters wondered whether the commission had not overstepped its proper bounds. Thus on August

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13, 1979, an editorial in the *Washington Post* asked:

> Did it ever occur to you that sometime it might become the job of government to determine the age at which the magical moment arrives when a child can tell the difference between television commercials and programs? It probably didn't because that question . . . is somewhat beyond the scope of government's normal role. Yet it lies at the heart of an FTC inquiry into the necessity and desirability of restricting advertising on children's TV programs. . . .

The *Post* concluded that these "are matters that parents are better able than government to decide"; the FTC, it had said some time earlier, had never been appointed "national nanny."

(3) Even if all these factual, legal, and policy concerns could be satisfied, they seemed a shaky foundation on which to force a substantial restructuring of the television industry. Children's programming is, of course, dependent on advertising revenues and currently generates over $600 million of revenue annually, a good part of which is plowed back into program support. It may not have been the FTC's intention to dismantle the economic base of television, but it is hard to see how an effective rule could have any other impact. What was even more disturbing, however, was the commission's apparent lack of concern that its action could or probably would have such an effect. It seemed particularly precipitous and unwise in view of the Federal Communications Commission's prior decision not to intrude on commercial sponsorship of children's programming. It is a rather persuasive regulatory benchmark that rulemaking proceedings should neither be initiated nor set for formal hearing without first exploring the field, establishing a substantial need and foundation for effective action, and showing that the suggested recommendation promises a reasonable solution to a real problem. Contrary to FTC practice, under the 1975 act rulemaking is supposed to be more than a fact-testing process.

(4) Finally, in so sensitive an area, it seemed particularly important that the commission act carefully and judiciously in deciding whether any restrictions should be imposed on children's TV advertising. But where tact and finesse were called for, the commission blundered badly. When the most knowledgeable and perceptive of its members, Commissioner Robert Pitofsky, decided not to participate because he once had been active in an organization that was now sponsoring the rule, the FTC lost a thoughtful and articulate spokesman. Even worse, the chairman was disqualified by court order—and probably rightly so. Television advertisers had been particularly outraged at what appeared to be Chairman Pertschuk's abandonment of any pretense of objectivity when, in various speeches, he complained that "advertisers seize on the child's trust and exploit it as a weakness for their gain" and then concluded that "children's advertising is inherently unfair." The last comment was particularly galling: this, after all, was the issue the FTC would ultimately have to resolve. It seemed pointless to require affected parties to engage in a costly rulemaking proceeding when a principal decision maker already had made up his mind. The immediate fairness problem was resolved when the U.S. Court of Appeals for the District of Columbia ruled in December 1979, in a split decision, that disqualification in rulemaking is justified "only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." Applying this standard, the appellate court disagreed with the trial judge's conclusion that "the Chairman has conclusively prejudged [the] factual issues" and that his "further participation [would be] improper" and would violate "fundamental due process." On the larger issue of the fairness of the entire proceeding, however, a separate decision of another panel of the court included the unusual note that the FTC's special procedures adopted for this rulemaking raised "serious doubts about the validity" of its actions, even though the court also found it premature to decide the issue at that time. The court tartly observed that it was "difficult to read the record . . . without becoming disturbed at some of the Commission's unique steps."

Armed with these examples of FTC inadequacy, the commission's natural opponents—businesses subject to its orders or under scrutiny for the first time—went on the attack. Not surprisingly, they have been able to present a convincing case. The kid-vid rulemaking has become the lightning rod, focusing the attention and firepower of the opposition. This one

"worst case" provides a virtual catalog of the deficiencies often argued to be present in other FTC actions: a confused and confusing program is proposed even though it is inadequately supported and may well be beyond the agency's authority or, for that matter, government's responsible role; although the rule is likely to have a profound impact on an industry, that possibility is not seriously evaluated; and the proposal is pressed with emotion and enthusiasm but with little attention to the basic requirements of fair play. Where the agency's guiding legal standard is so vague—"unfair" trade practices—and its discretion therefore so broad, the qualities of mind and the discipline of thought it brings to the task are particularly important. And here the chairman's zeal has been not only disturbing but unseemly.

**Counsels of Caution, Lessons of Excess**

In reviewing the past three years at the FTC one cannot help but feel a measure of sympathy for the commission and especially its chairman. His motives apparently are pure, and his goals laudable; his enthusiasm and dedication, and those of his staff, suggested a happy future for consumerism and the FTC. It now seems obvious that this promise will not be met. Yet it is not easy to sort out all the pieces and decide why this has occurred.

In part it seems clear that the commission was caught in a shift of public attitude away from consumerism and the use of government to protect consumers from abusive business practices. On the other hand, public concern with bloated government and unnecessary interference in private affairs was neither sudden nor wholly unpredictable—nor does this concern extend to the abandonment of every governmental program. The basic message that government agencies should exercise great care in identifying new areas of regulation and restrict their intervention to the least intrusive level, on a rigorous comparison of costs and benefits—this message has been clearly heard for some time. Regulatory programs are now rightly judged not only by their substantive results but also by the care and sensitivity with which they are drafted, adopted, and implemented. The wisdom of policy tends to emerge only in retrospect; rigorous analysis and thoughtful preparation (or their absence) are readily observed. New regulatory ventures are not automatically ruled out. But they carry a heavy initial burden of acceptability that cannot be avoided by rhetoric or zeal.

In the past three years, Chairman Pertschuk and his staff not only have ignored these warnings but also have taken a number of significant missteps that made the commission an easy target. In his zeal to impose a new order, the chairman has too often ignored the niceties of fair process, failed to develop a solid factual and legal foundation for his cases and rules, and relied on rhetoric as a substitute for reason. As a result, Congress now feels compelled, as one senator pointedly put it, to send a message that cannot be ignored. And in case there be any possible misunderstanding, Congress also is prepared to take the next step and substantially curtail the commission's authority. The precise contours of this curtailment are still undetermined. That the FTC will no longer have plenary power to protect American consumers from abusive business practices seems evident. Whether it is in fact desirable to limit administrative choices in this field—overreaction or not, and whatever the provocation—apparently is no longer even debatable.

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Providing leadership for the FTC is a difficult task. The commission was given a dual and, some would say, inconsistent mandate: to ensure a competitive market *and* to protect consumers from overreaching practices. Steering a coherent (not necessarily middle) course may be all but impossible, and perhaps Mr. Pertschuk should not be asked to assume all the blame. Congress has been neither clear nor precise in its mandate. On the other hand, simple enthusiasm or belief in "boldness and bold action" is no substitute for careful, solid craftsmanship. Had the chairman imposed more rigorous standards of performance on himself and his staff, he might have anticipated or avoided most of the commission's recent problems—and served the consumer more effectively in the end. ■