William & Mary Law Review

Volume 13 (1971-1972)
Issue 2

Article 9

December 1971

Administrative Law - Federal Communications Commission Fairness Doctrine - Applicability to Commercial Advertising. Friends of the Earth v. FCC, __F.2d__, 22 P&F Radio Reg. 2d 2145 (D.C. Cir. 1971)

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CURRENT DECISIONS

Administrative Law—Federal Communications Commission Fairness Doctrine—Applicability to Commercial Advertising. *Friends of the Earth v. FCC*, — F.2d —, 22 P & F Radio Reg. 2d 2145 (D.C. Cir. 1971).

An environmental group sought free air time on Station WNBC-TV to inform the public that widely-advertised automobiles and leaded gasolines contribute to air pollution. When the broadcaster refused to provide air time, petitioner lodged a complaint against the broadcaster for failure to fulfill its fairness doctrine obligations with respect to the advertisements. The Federal Communications Commission ruled that such product advertisements do not raise a controversial issue of public importance.[1]

On appeal, the Court of Appeals for the District of Columbia Circuit held that the fairness doctrine entitles environmental groups to rebut editorial messages that are implicit in product advertising if the licensee has failed to present contrasting viewpoints with respect to the controversy surrounding automotive pollution of the air.[2] The decision represents an important expansion of the fairness doctrine's applicability to commercial advertising.

The regulation of radio and television program content began with the Radio Act of 1927[3] and the Communications Act of 1934,[4] wherein the public interest standard of broadcast licensees was enunciated.[5]

1. Soucie, *FCC Announcement*, 19 P & F Radio Reg. 2d 994, 997 (1970). As will be seen, a controversial issue of public importance must be found to exist before the fairness doctrine is triggered. Petitioner initially wrote to WNBC-TV, citing numerous advertisements for high-powered automobiles and leaded gasolines which allegedly presented the point of view that powerful engines in large automobiles were necessary for a full life and were compatible with a clean environment. When WNBC-TV refused to air spot announcements which would have asserted that these products are significant contributors to air pollution, petitioner filed a complaint with the FCC. The Commission dismissed the complaint without hearing or oral argument. The dismissal brought criticism in legal periodicals. *See, e.g.*, Comment, 39 U. Cin. L. Rev. 766 (1970); Comment 24 Vand. L. Rev. 131 (1970).

2. Friends of the Earth v. FCC, — F.2d —, 22 P & F Radio Reg. 2d 2145, (D.C. Cir. 1971).

3. Ch. 169, 44 Stat. 1162 (1927), *as amended*, 47 U.S.C. §§ 151-609 (1970).

4. Ch. 652, 48 Stat. 1064 (1934), *as amended*, 47 U.S.C. §§ 151-609 (1970). (Among other changes brought about by this legislation, the Federal Communications Commission became the successor to the Federal Radio Commission.)

5. 47 U.S.C. § 303(g) (1970). Among the enumerated powers and duties of the

Observers were concerned that a limited group could exercise undue control and influence over public opinion through the use of the public airwaves,[6] and early legislation attempted to minimize that danger.[7]

With a clear purpose, the Federal Communications Commission set about the formulation of the fairness doctrine through developmental case law, applying fairness standards in a variety of factual contexts.[8] In 1949, the Commission released its *Report on Editorializing by Broad-*

Commission are: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." The Commission has recognized this standard in several opinions and policy statements. *See, e.g.*, Great Lakes Broadcasting Company, 3 F.R.C. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930). This case is also significant because it represents the Commission's initial statement of the fairness doctrine in its present structure. The Radio Act of 1927 had limited the scope of the Federal Radio Commission to considerations of licensee coverage of political candidates. The Commission in *Great Lakes* extended the fairness concept to licensee handling of any controversial issue that affected the public. The "equal time" doctrine for political candidates, which is embodied in section 315 of the Communications Act, and the fairness doctrine are now separate entities with a common origin.

6. For an interesting and informative account of the legislative history of the regulation of radio program content, see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968). The author quotes Herbert Hoover, who said at the Third Annual Radio Conference in 1924: "It would be unfortunate, indeed, if such an important function as the distribution of information should ever fall into the hands of the Government. It would be still more unfortunate if its control should come under the arbitrary power of any person or group of persons. It is inconceivable that such a situation could be allowed to exist . . . ." *Id.* at 449.

7. In FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), the Supreme Court, interpreting the intent of Congress, observed:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses . . . . In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority.

8. *See, e.g.*, Great Lakes Broadcasting Company, 3 F.R.C. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930) (consistent failure to broadcast various points of view resulted in Commission denial of application for modified license); Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938) (license application denied because applicant refused to broadcast points of view differing from his own); WBNX Broadcasting Company, 12 F.C.C. 805 (1948) (in joint application by 17 applicants for five available FM radio channels the Commission heard testimony from the American Jewish Congress concerning alleged prejudice of some of the applicants); Lawrence W. Harry, 13 F.C.C. 23 (1948) (local newspaper turned down in its application for broadcast license due to undesirability of concentration of control of mass communications media).

cast Licensees,[9] which is still regarded as the fundamental description of the fairness doctrine. In the report, it was stated that licensees have an affirmative duty to allocate a reasonable amount of time for the exposure of all public issues[10] and to seek a balanced presentation[11] of controversial issues of public importance.

During the 1950's and the 1960's, the doctrine was applied frequently to censure overt licensee editorializing,[12] and in 1964 the Commission published its so-called "Fairness Primer," a compilation of decisions intended to provide fairness guidelines for broadcasters.[13] Although the doctrine had been mentioned previously in connection with product advertising,[14] it was not until 1967 that the Commission was forced to

9. 13 F.C.C. 1246 (1949).

10. *Id.* at 1249. It should be noted here that the language of the report clearly reveals the Commission's intent to make licensee fairness a matter for the broadcaster's discretion. Indeed, the report stated that "[t]he standard is not so rigid that an honest mistake or error in judgment on the part of a licensee will be . . . condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation . . . on such issues." Consequently, Commission inquiries are limited to determinations of whether the licensee has acted reasonably and in good faith. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964).

11. 13 F.C.C. 1246, 1254-55 (1949). Note that the report does not require the broadcaster to furnish equal time for opposing viewpoints on controversial issues; he need only afford responsible spokesmen for both positions reasonable opportunity to use his facilities. *See also* Television Station WCBS-TV, Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 932-33 (1967).

12. *See, e.g.*, Letter to The Evening News Association, 40 F.C.C. 441 (1950) (licensee censured for failure to present pro-union viewpoint during much-publicized Detroit labor strike); Lamar Life Broadcasting Co., 40 F.C.C. 556 (1963) (frequent anti-integration editorials call for presentation of pro-integration viewpoint in Jackson, Mississippi); Cullman Broadcasting Co., 40 F.C.C. 576 (1963) (national controversy over nuclear test ban treaty calls for balanced presentation of viewpoints).

13. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964). In this catalogue of Commission determinations on the fairness doctrine, the 1949 report was again recognized as the statement of the Commission's basic policy on fairness. The 1964 report also evidences the Commission's feeling that the doctrine has received Congressional support. (In 1959, Congress amended section 315 of the Communications Act to incorporate the Commission's 1929 decision in order to bring controversial issues within the doctrine.)

14. *See* Sam Morris, 11 F.C.C. 197 (1946), in which the National Temperance and Prohibition Council of Washington, D.C. petitioned the FCC urging that a local station's license renewal be denied. The licensee, the petition claimed, pursued a policy of selling "choice" air time to liquor distributors and refused to sell equally valuable time for the broadcasting of messages which would have urged abstinence.

The Commission, which refused to consider the issue on its merits as to the licensee involved, noted: "Ordinarily, differences . . . based upon diversity of preferences and commercial competition do not raise issues of public importance . . . . But it must be recognized that under some circumstances it may well do so . . . . It can at least be

rule on the doctrine's applicability to commercial advertisements on radio and television.[15] In *Applicability of the Fairness Doctrine to Cigarette Advertising*,[16] the Commission recognized that editorializing which is implicit in product advertisements raises questions of fairness within the meaning of the doctrine.[17] In *Cigarette Advertising*, it was held that continuous broadcasts of cigarette advertisements which implied that smoking was desirable raised a controversial issue subject to the purview of the fairness doctrine.[18] Fairness required presentation of the anti-smoking viewpoint.[19]

Since *Cigarette Advertising*, the Commission has been deluged with fairness complaints arising from commercial advertisements.[20] Until *Friends of the Earth*,[21] such complaints consistently were dismissed

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said that the advertising of alcoholic beverages over the radio can raise substantial issues of public importance." The Commission pointed out that the mere fact that the occasion for the controversy happened to be the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it fairly.

15. Although the issue was raised in *Sam Morris*, the Commission avoided real confrontation with the problem until 21 years later. From the broadcaster's standpoint, application of fairness principles to commercial advertising is potentially more troublesome than is regulation of substantive program content. Broadcasters contend that application of the principle is more difficult in the advertising situation and that it could hurt licensee profits. It was perhaps this concern which delayed the judicial determination that fairness principles attach to product advertisements.

16. Television Station WCBS-TV, Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967), *aff'd sub nom* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom* Tobacco Institute Inc. v. FCC, 396 U.S. 842 (1969). This landmark case was initiated by a complaint from a citizen who asked for free air time to respond to pro-smoking views he said were implicit in broadcast cigarette commercials. Specifically, the petitioner objected to "all cigarette advertisements which by their portrayals of youthful or virile-looking . . . persons enjoying cigarettes in interesting . . . situations deliberately seek to create the impression that smoking is socially acceptable . . . and a necessary part of a rich full life." Banzhaf v. FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968).

17. Banzhaf v. FCC, 405 F.2d 1082, 1087 (D.C. Cir. 1968). The decision directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint," and suggested numerous public service announcements each week to be made by the American Cancer Society or the Department of Health, Education and Welfare. Equal air time, as urged by the petitioner Banzhaf, was denied.

18. 9 F.C.C.2d at 949.

19. *Id.*

20. *See, e.g.*, Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971) (military recruitment advertisements); Retail Store Employees Union, Local 880 v. FCC, 436 F.2d 248 (D.C. Cir. 1970) (labor strike advertisements).

21. Friends of the Earth v. FCC, — F.2d —, 22 P & F RADIO REG. 2d 2145 (D.C. Cir. 1971).

because of the Commission's reluctance to extend the sweep of the cigarette decisions to other advertising situations.[22]

The Circuit Court's expansion of the fairness doctrine in commercial advertising seems both reasonable and necessary. Clearly, the pollution issue raised in *Friends of the Earth* merits the kind of vigorous debate that the doctrine was intended to insure. At the same time extension of the doctrine will present difficult problems.[23] For example, questions relating to the limits that will be placed on the doctrine's extension,[24] and how expansion of the doctrine will affect licensee revenues[25] remain unanswered. These are problems of particular concern to broadcasters, who feel that it is impossible to determine when the doctrine is applicable.[26] But viewed in light of the Commission's historic reluctance to impose harsh sanctions on licensees,[27] the difficulties of the broadcaster

22. *See* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971). Note also the severe restrictions placed on *Cigarette Advertising*. The Commission there stressed that its ruling was "limited to this product—cigarettes." It stated further that two key factors were controlling in the decision: (1) government involvement in the controversy over health hazards caused by smoking, and (2) the government's conclusion as stated in the Surgeon General's Report that normal use of the product can be a hazard to the health of millions of persons. 9 F.C.C.2d 921, 943 (1967).

23. The Commission is well aware of the problematic road that lies ahead for the fairness doctrine. In June, 1971, it issued a public Notice of Inquiry inviting comments from all interested parties who could suggest reasonable means of attaching greater clarity and effectiveness to the fairness doctrine.

24. *Friends of the Earth* provided an appropriate opportunity for the expansion of the *Banzhaf* decision, since the pollution issue raised in automotive advertisements concerns the health of American citizens as surely as did cigarette advertisements. Additionally, as in *Banzhaf*, automotive pollution has stirred a great deal of Congressional concern. What result will follow when controversial issues are not so closely related to health hazards? How far will the doctrine be extended? These problems were foreseen at the time of *Banzhaf*. Petitioners asserted then that the ruling could not logically be limited to cigarette advertising alone, and asked about the applicability of the doctrine to other products, such as fluoride toothpastes, aspirin, detergents, candy, girdles, and even table salt. 9 F.C.C.2d 921, 942-43.

25. The Commission's present rule provides that if one position on a controversial issue of public importance is broadcast, the licensee has an affirmative duty to seek a responsible spokesman for the other point of view. Licensees contend this duty will cause extra bookkeeping, more free air time and other financial problems. *See* note 11 *supra*. This argument was rebutted in *Cigarette Advertising*. 9 F.C.C.2d at 943-45.

26. Broadcasters and other fairness doctrine critics disparage the doctrine's alleged lack of clarity. It is submitted, however, that continued case-by-case development of the doctrine is unlikely to impose serious hardship on licensees who have made good faith efforts to discharge their fairness obligations. *See* note 28 *infra*. In any event, the problem of uncertainty seems outweighed by the immediacy of the public right to balanced presentation of issues carried over public airwaves.

27. To date, the Commission has refused only one license renewal application on the basis of fairness violations. *See* Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970),

are diminished considerably.[28] Furthermore, the problems that do exist seem capable of the kind of solution that will enable the fairness doctrine to deal fairly with the public as well as the licensee.

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Constitutional Law—STATE ACTION—CLOSING RATHER THAN DESEGREGATING RECREATIONAL FACILITIES. *Palmer v. Thompson*, 91 S. Ct. 1940 (1971).

In 1963 the City of Jackson, Mississippi, reacting to a declaratory judgment,[1] closed four city-owned swimming pools and surrendered the lease on another,[2] rather than operate the pools on a desegregated basis. Black citizens of Jackson brought a class action to compel the city to reopen the pools on an integrated basis.[3] The court of appeals, in a divided opinion, affirmed the district court's finding that the closing was in the interest of peace, order, safety, and economy, and that the closing of the pools was not a denial of equal protection of the laws to Negroes.[4]

reconsideration denied, 21 P & F RADIO REG. 2d 22, *appeal pending*, D.C. Cir., No. 71-8181, *noted in* 71 COLUM. L. REV. 452 (1971). *Brandywine* marks the first instance of the Commission's willingness to deal severely with a fairness violator. In *Brandywine*, the licensee was cited for failure to comply with general obligations of fairness as well as other administrative infractions. 24 F.C.C.2d 18, 22 (1970).

28. Additionally, the licensee's obligation is merely one of good faith discretion, and reasonable judgment. *See* note 10 *supra*. But the burden of proof of good faith compliance with the doctrine is on the licensee. Complainants have the burden of presenting evidence that tends to show non-compliance, but once a prima facie showing of failure is made, the burden shifts to the licensee. *See* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969), *noted in* 83 HARV. L. REV. 1412 (1970).

1. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd per curiam*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963). The district court ruled that Jackson's enforced segregation in the operation of its public parks, golf courses, swimming pools, zoos, libraries, auditoriums and other recreational facilities constituted a denial of equal protection of the laws. However, the court noted with approval the policy of voluntary separation of the races in Jackson and declined to issue an injunction forbidding the discriminatory practices. 206 F. Supp. at 543.

2. This pool, in Leavell Woods Park, was subsequently operated on a "whites only" basis by the original lessor, the Jackson Y.M.C.A. Another pool, initially sold to the Y.M.C.A., was later bought by Jackson State College and used by members and guests of its predominantly black student body. Palmer v. Thompson, 91 S. Ct. 1940, 1943 (1971).

3. This decision is not officially reported.

4. Palmer v. Thompson, 391 F.2d 324 (5th Cir.), *rehearing*, 419 F.2d 1222 (5th Cir. 1970).