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Applying the Fairness Doctrine to Environmental Issues - Friends of the Earth v. FCC, 449 F.2d 1164

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COMMENTS

APPLYING THE FAIRNESS DOCTRINE TO ENVIRONMENTAL ISSUES—*Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971)*

The recent decision of the District of Columbia Court of Appeals in *Friends of the Earth v. FCC*[1] may become a valuable tool for environmentalists in their struggle to secure a fair presentation by the broadcasting media of their views on pollution. Since much of the earth's pollution is caused by the manufacture and use of products, the sale of which is unceasingly promoted by radio and television advertising, the effect of the decision may be enormous. *Friends* is the most recent in a series of cases which invokes the application of public interest standards that have always guided the conduct of broadcast licensees. These cases have gradually expanded the standards and the fairness doctrine to the area of product advertising. A brief discussion of the fairness doctrine and a review of the cases preceeding *Friends* should facilitate insight into the many problems underlying the decision.

I

The fairness doctrine grew out of the public interest standards of the Federal Radio Act of 1927 and the Communications Act of 1934.

> The doctrine is grounded in the recognition that the airways are inherently not available to all who would use them. It requires that those given the privilege of access hold their licenses and use their facilities as trustees for the public at large, with a duty to present discussion of public issues and to do so fairly by affording reasonable opportunity for the presentation of conflicting views by appropriate spokesmen.[2]

The Federal Communication Commission's 1949 Report on Editorializing of Broadcast Licensees[3] set forth the basic requirements of the doctrine. These requirements were reaffirmed by

1. 449 F.2d 1164 (D.C. Cir. 1971).
2. Fairness Doctrine and Public Interest Standards, 36 Fed. Reg. 11825 (1971) [hereinafter cited as 1971 Notice].
3. Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055 (1949).

the Commission in its 1964 Report[4] where it is said of the 1949 Report:

> The Report . . . remains the keystone of the Commission's fairness policy today. . . . In essence, the Report established a two-fold obligation on the part of every licensee seeking to operate in the public interest: (1) that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so, he be fair—that is, that he affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[5]

The doctrine has been tested and sustained by the Supreme Court as within the Commission's statutory delegation of authority and in accord with the First Amendment.[6] The doctrine is not the same as the public interest standard required by section 315(a) of the Communications Act.[7] The public interest standard requires licensees to present controversial issues of public importance whether or not they are raised by individuals other than the licensee. The fairness doctrine on the other hand requires the licensee to encourage a reasonable and fair presentation of contrasting sides of an issue once it is raised. This obligation is incurred even at the licensee's expense if no sponsorship is available. The most common application of the doctrine occurs with respect to political broadcasts, personal attacks, as dealt with in *Red Lion Broadcasting Co., Inc. v. FCC*,[8] and discussion of controversial national policies. The licensee has discretion to determine how the contrasting sides will be presented and who will be the spokesman. There is no requirement of equal time for each side, except in specified cases, and no requirement that views be aired concurrently.[9] A licensee is judged on his overall performance on the presentation of both sides of any issue. One important guideline in evaluating whether he has adequately discharged his obligation is that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[10] Furthermore, "[a] license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizen."[11]

4. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) [hereinafter cited as 1964 Report].
5. *Id.* at 10426.
6. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).
7. 47 U.S.C. § 315(a) (1964).
8. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 377 (1969).
9. 1964 Report, *supra* note 4.
10. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969).
11. *Id.* at 389.

II

It was not until 1967 that the Commission applied the doctrine to product advertising. The 1964 Report did not even mention product advertising as possibly presenting a controversial issue. In September, 1967, the Commission applied the fairness doctrine to cigarette advertising. This is the first time that the public health criterion appeared. The opportunity arose when the complainant, Banzhaf, conclusively demonstrated the existence of the danger to public health and the official concern on the issue by presenting many governmental and legislative documents relating to the subject. The basis for the final decision was that normal use of cigarettes "had been found by the Congress and the Government to represent a serious potential hazard to public health."[12] The obligation of the licensee to inform listeners of the detrimental effects of smoking stemmed "not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility."[13]

The decision was important in two ways. First, it found a controversial issue implicit in product advertising itself. Second, it used the need to warn citizens of the dangers to public health as the standard to trigger the fairness doctrine.

All parties appealed from the Commission order and the final decision was left for the court in *Banzhaf v. FCC.*[14] The order was challenged by Mr. Banzhaf on the grounds that the Commission failed to grant equal time to the anti-smoking side. The attack by the broadcasting media and the tobacco industry was on several grounds, two of which warrant recognition here.

The first issue dealt with whether or not the Commission had exceeded its delegation of authority in attempting to define a public interest obligation of licensees for cigarette advertising in particular. The court found the power to define public interest standards inherent in the Commission's ability to grant or deny licenses on the basis of programming. As long as the Commission did not attempt to censor programming, the delegation was not exceeded. And, since public health was definitely within the scope of the public interest, it did not exceed its authority by this ruling.

The second issue dealt with the First Amendment constitutionality of the FCC's control over licensees. The petitioners argued, analogizing the broadcast media to the newspaper industry, that the

12. Applicability of the Fairness Doctrine to Cigarette Advertising, 32 Fed. Reg. 13162, 13173 (1967) [hereinafter cited as Cigarette Ruling].

13. *Id.*

14. 405 F.2d 1082 (1968), *cert. denied,* 396 U.S. 824 (1969).

FCC could not constitutionally control radio and television programming or content except in regards to technological aspects of broadcasting. In rejecting their argument the court held the Commission's ruling constitutional and noted (1) that the cigarette ruling did not ban any speech, (2) that product advertising is not ordinarily associated with the interest of the First Amendment and, (3) that the ruling, in fact, promotes the First Amendment policy of fostering the widest possible debate and dissemination of information on matters of public importance.

At the time of the *Banzhaf* decision, the *Red Lion* case had not yet been decided by the Supreme Court and the questions of delegation of authority and of the constitutionality of the fairness doctrine were as yet unsettled. The *Red Lion* case decided those issues in favor of the FCC in regards to the general application of the doctrine. Furthermore, the Supreme Court denied *certiorari* of the *Banzhaf* decision[15] after its decision in *Red Lion* had been made. *Banzhaf* remains the law, pending the outcome of the FCC's hearings on the entire fairness doctrine question which are presently being conducted.[16]

III

The *Friends of the Earth* decision is a logical extension of the *Banzhaf* decision and the cigarette ruling. This case arose on an analogous set of facts. In February 1970 the petitioners, Friends of the Earth and Mr. Soucie, wrote to WNBC-TV complaining that the spot advertisements of automobile and gasoline companies, which depict large-engine cars and high-test gasolines as efficient, clean, socially responsible and necessary, implicitly presented one side of the controversial issue of air pollution. They urged that the fairness doctrine, based on the decision in *Banzhaf*, ought to apply. They asked WNBC to make known how it would discharge its obligation to present the other side of the issue. The licensee replied that the cigarette ruling was expressly limited to that product. It repudiated the plaintiffs' statement that there was any controversial issue implicitly presented and referred to programs which had been broadcast concerning the pollution issue which, it claimed, satisfied the public interest obligation.

The plaintiffs considered the licensee's response quite unsatisfactory. As the Court of Appeals noted:

> Petitioners professed difficulty in seeing how "The World of the

15. Tobacco Institute v. FCC, 396 U.S. 824 (1969).
16. 1971 Notice, *supra* note 2.

> Beaver" and "The Great Barrier Reef" programs, cited by the licensee, had much relevance to the problem of the pollution of air in New York City by automobiles.[17]

Accordingly, they filed their complaint with the FCC. As in *Banzhaf,* the petitioners presented uncontradicted evidence that the advertised products created an unhealthy environment and that their use was the subject of a good deal of governmental attention. They pointed to the National Environmental Policy Act of 1969 as evidence of such governmental attention. It states:

> . . . [I]t is the continuing policy of the Federal Government . . . to use all practicable means . . . in a manner calculated to foster the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[18]

Petitioners also pointed to many other expressions of congressional and administrative concern in this area as demonstrating the fact that the Commission's own standard for applying the doctrine as set forth in *Banzhaf* had been fulfilled. They contended that having established this, the fairness doctrine should be triggered requiring immediate action on the part of the licensee to explain his past actions and future programs in regard to the issue presented. Although petitioners asserted that they would be financially unable to purchase broadcast time, they volunteered their services to help produce spot advertisements that could be used for airing their views.

The Commission, although noting the similarity between *Banzhaf* and the present case, held that the fairness doctrine did not apply to gasoline and automobiles. It based its conclusion, as pointed out by the dissent, on some rather dubious distinctions. First, the majority tried to demonstrate the uniqueness of the cigarette case by saying that cigarette smoking did not involve competing interests since it was a habit and not a necessity like gas and oil, and, that the benefits and detriments inherent in use of the products in the present case were more complex and, therefore, could not be treated by a simple solution like that in *Banzhaf.* Secondly, unlike *Banzhaf,* since no one was proposing that everyone should immediately stop driving automobiles, there was no reason to stop advertising them. Thirdly, since action could effectively be taken by Congress against the product itself (theoretically not possible in the cigarette case because of pos-

17. 449 F.2d at 1164, 2 ERC 1901, 1903, (D.C. Cir. 1971).

18. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

sibilities of bootlegging) attention should not be devoted to the peripheral area of advertising.[19]

The Commission's ultimate reason for rejecting the fairness doctrine was that the result would determine the present system of television programming which is financially dependent upon sponsorship and product advertising. This would occur because advertising urging the use of products would be closely associated with advertisements warning of the detriments inherent in their use. Theoretically, this process would drive advertising away from television. In turn, the public would suffer from the fact that issues would be hidden rather than discussed. Such a result would contravene the public interest standards of the Communications Act. Thus the Commission decided that the public interest standards as set forth in *Red Lion* were paramount and prevented the application of the fairness principals of *Banzhaf* in this case.

The dissenting commissioner, Nicholas Johnson, summed up the majority opinion:

> The issue here is whether the highway and oil lobbies we hear so much from on our television set will permit us to hear of the alternatives. . . . What the majority really says today is that our present system of commercial television depends for its livelihood on duping the American consumer into buying faulty products he may not need, for reasons unrelated to their merits, that may indeed be killing him.[20]

The court of appeals simply failed to see the logic in the majority's distinctions between the cigarette ruling nad automobile advertising any more, they stated, than the asthmatic in New York City for whom increasing air pollution is a mortal danger.

> Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. *When . . . the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact* and the relevance of *Banzhaf* inescapable.[21] (Emphasis added)

The court apparently saw little merit in the argument that the system might be undermined. For, although mentioning that the argument had been made, they said nothing of it.

19. *In re* Gary Soucie, 1 ERC 1625 (1970).
20. *Id.* at 1635.
21. Friends of the Earth v. FCC, 449 F.2d at 1164, 2 ERC 1901, 1905, (D.C. Cir. 1971).

The court also noted that even though the Commission took great pains in its cigarette ruling to limit the decision to cigarettes, it has itself been obliged to moderate its own views in its recent decisions in the *Chevron* case[22] and the *Esso* case.[23] In the *Chevron* case the Commission admitted that product commercials could argue controversial issues and raise fairness responsibilities. In *Esso,* the Commission applied the fairness doctrine to a commercial advertising Standard Oil of New Jersey's development of Alaskan oil reserves. There the Commission held that the licensee had not met his responsibilities and ordered him to submit within ten days a written statement of what material he intended to add to the programming in order to satisfy the fairness obligations. The court further notes that the Commission itself had taken the responsibility for re-examining the entire fairness question.[24] Not trying to predict what the outcome of that proceeding would be, the court held that the case was indistinguishable from the *Banzhaf* case and that the Commission could not reasonably refuse to extend the cigarette commercial ruling to automobile and gasoline advertising. Since the fairness doctrine questions cannot wait until license renewal time for disposition, the court decided that the case would be remanded to decide the issue of whether or not the licensee had fulfilled his fairness responsibilities. The court intended that its disposition would follow the Commission's own procedure in the *Esso* case.

IV

There are several guidelines which are important to asserting the fairness doctrine in regard to product advertising and the environmental issue. The advertising must implicitly or explicitly present one side of a controversial issue. This criterion is satisfied when (1) there is or may be a danger to public health inherent in the normal use of the product, and (2) the issue has received public attention in the form of Congressional or governmental action. Once it is decided that the doctrine is applicable, the question of whether or not the licensee has complied with his obligations is determined on the basis of reasonableness. Great weight is given to the licensee's discretion in determining how the obligation will be met. The effectiveness of the doctrine, in actuality, is questionable. Note that it took eighteen months for Mr. Soucie to get a decision on the legal question. Perhaps the process will be much more responsive now that the major issues appear temporarily settled.

22. *In re* F-310 Gasoline Advertising, 2 ERC 1824 (1971).
23. *In re* National Broadcasting Co., 2 ERC 1716 (1971).
24. 1971 Notice, *supra* note 2.

It is apparent from the *Esso* case that public health is not the only subject that can trigger the fairness doctrine in regard to environmental issues. In that case the controversial issue was (1) whether or not there was a need to quickly develop Alaskan oil and (2) whether or not oil companies were capable of developing and transporting oil without environmental damage.[25] There are many issues that are controversial today, examples being land use without adequate planning, depletion of natural gas resources at an alarming rate, pollution by municipal utilities and sewage disposal. Any or all could be sufficient to justify the application of the doctrine. The only obstacle may be the Commission's and the court's hesitancy to apply it.

That the implications of the doctrine are extensive can hardly be doubted. The Commission itself has certainly realized that fact. It has stated:

> We recognized of course that many advertised products have negative aspects in use. Automobile [sic] . . . raise most serious environmental problems. Such problems are raised by a host of other products or services–detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc. The list could be extended greatly.[26]

The possibilities are numerous and the court seems, at present, to be in the mood to enforce realistic and long-needed dissemination of information by the broadcast media through the use of the fairness doctrine.

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25. 2 ERC 1824 (1971).
26. *In re* Gary Soucie, 1 ERC 1625, 1627 (1970).