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Chance to escape fairness trap?

FCC, as promised by Burch, opens full inquiry into growing complexity of reply time, access

Twenty-two years after it was created as an innocent-sounding clause in a policy statement that at the time was thought to liberalize government control, the FCC's fairness doctrine is being subjected to a searching review. The announced purpose is to bring the doctrine more in line with the times, when the demand is not only for fairness but also for access to the air.

The FCC, in announcing a major inquiry and soliciting comments on a wide range of problems, made it clear there was little it would consider sacred. Two things, however, are called immutable: The fairness doctrine will not be scrapped; broadcasters will not be corrupted into common carriers.

FCC Chairman Dean Burch has been calling for months for such an inquiry. It was a main point of his address to the National Association of Broadcasters convention last spring (BROADCASTING, April 5). He has said that the demands for access, frequently supported by the courts, threaten to turn broadcasting into a message delivery service.

Fairness was enunciated as an FCC goal when the commission, in 1949, issued a notice permitting broadcasters to editorialize. For some years, after deciding what had become known as the Mayflower case, the commission had declared it illegal for broadcasters to air their own opinions. When Mayflower was rescinded, the common reaction was that the FCC had removed a gag. Nobody paid much attention to the passage stating that if broadcasters editorialized they must provide reasonable opportunity for the presentation of conflicting views.

Two of the four areas into which the new inquiry has been divided indicated the kinds of problems that were not foreseen in 1949: access to the broadcast media in response to the presentation of product commercials and access generally for the discussion of public issues.

The public's demand for access to respond to commercials was made manifest in the U.S. Court of Appeals in Washington the day after the commission adopted the notice of inquiry. An environmentalist group urged reversal of a commission order holding that automobile and gasoline commercials do not raise fairness-doctrine issues (see following story).

The two other areas to be covered in the inquiry are more traditional—the fairness doctrine generally and the doctrine's application to political broadcasts.

The inquiry is being undertaken, the commission said, to determine whether the policies put together from cases stretching back to the origins of regulated broadcasting should be retained or modified. Do these policies, the commission asked, promote the goal of "uninhibited, robust, wide-open debate?"

Most of the questions were more specific, and invited comment on what had been regarded as accepted wisdom: "Has the fairness doctrine prompted the 'more effective use of radio' in the discussion of controversial issues, or has it served to inhibit wide-open debate? Should the Cullman rule . . . which lays down the principle that the right of the public to hear contrasting views on significant public issues is so important that licensees must make time available without charge if necessary—be expanded, restricted, or otherwise refined?"

Richard E. Wiley, FCC general counsel, arguing before U.S. Court of Appeals in Washington:

"I don't think ads raise a controversial issue of public importance. If every product commercial were regarded as implicitly raising the fairness issue, commercial broadcasting would be in serious trouble."

The inquiry referred to one of the court decisions that played a major role in persuading Chairman Burch that the fairness doctrine required a fresh, hard look. It involved a union's complaint that a radio station had canceled union ads urging a boycott of a store whose commercials the station was carrying.

The U.S. Court of Appeals in Washington overturned the commission's action renewing the station's license without a hearing, and urged the commission to take a closer look at the fairness issue it said was involved (BROADCASTING, Nov. 2, 1970).

The commission noted that two of the court's basic considerations—that product commercials can carry implict messages and that pertinent national policies (equalization of bargaining power between workers and employers) should be taken into account—"have very wide application indeed."

Commercials promoting gasoline and other products, the commission said, raise implicit questions dealing with the protection of the environment. And some commercials, it added, might show persons in a way offensive to the national policy of equal rights and equal treatment of the sexes, races, religions and minority groups. What, it asked, are the consequences to the public interest if so many commercials are said to raise controversial issues?

Should there be some public-interest responsibility beyond that of fairness to carry views contrary to those con-

tained in the commercial? If so, should time be made available free or only on a paid basis? Is there some standard for distinguishing between commercials that give rise to fairness or public-interest duties and those that do not?

In discussing the question of access generally, the commission asked for comments on whether there is a feasible method of providing access for the airing of public issues outside the requirements of the fairness doctrine. The commission has held doggedly to the view that, in the absence of a fairness-doctrine obligation, there is no constitutional or statutory right of access on a paid basis for those wishing to express a view on a controversial public issue.

And last week it affirmed its view that licenses must operate their facilities as trustees for the public, with a duty to present conflicting views on controversial issues by appropriate spokesmen. For the fairness doctrine, it said, is grounded in the recognition that the airwaves are "inherently not available to all who would use them." The fairness rulings involving political broadcasts reviewed in the notice of inquiry included the so-called quasi-equal opportunities approach; it holds that if a licensee sells or gives time to one political party, it should afford the same treatment to rival parties. Should that approach be restricted, expanded or left alone, the commission asked.

The commission is allowing considerable time for offering comments—to Sept. 10, and to Oct. 25, for reply comments.

The commission vote to issue the notice of inquiry was 6 to 0, with two of the commissioners, Nicholas Johnson and Robert Wells, concurring. Absent was Robert E. Lee.

Where fairness faces critical test

Wiley sends himself to argue for FCC that cigarettes were unique

The fairness-doctrine case that to FCC officials means the "whole ball game" was argued in the U.S. Court of Appeals in Washington last week.

At issue was the appeal of the environmentalist group, Friends of the Earth, from the commission ruling last year rejecting the contention that automobile and gasoline commercials carried by NBC's WNBC-TV New York raise a fairness-doctrine issue.

Lose that case, commission officials say, and the whole ball game is lost. Broadcasters would be vulnerable to requests for free time to respond to a wide range of product commercials, with devastating results for the commercial system.

FOE argues that the commercials raise one side of the issue concerning pollution. It says time should be made available for messages warning of the danger of air pollution. And it notes that New York City, which supports its complaint, has been urging a reduction of in-town driving.

For Geoffrey Cowan, counsel for FOE, in his appearance before the appeals court, the issue was not as cataclysmic as it appeared to be for the commission. A line can be drawn between commercials for cars and gasoline and for other products, he said, and while he did not say where the line was, "the use of cars in New York City falls on the same side [of it] as cigarettes."

"The normal use" of the product—the test the court endorsed in upholding the commission's application of the fairness doctrine to cigarette advertising—raises a health-hazard issue, Mr. Cowan said. He noted studies indicating that the level of pollution in New York has already passed the danger point.

The importance the commission attaches to the case was indicated by the appearance of its general counsel, Richard Wiley, to argue it himself, in his first role in court since joining the agency last September.

The case is a prime example of the problems that the commission hopes to deal with in the sweeping inquiry it announced last week (see page 22). However, Mr. Wiley, in response to a question from the bench concerning the project, said it should not be taken to mean that the commission feels it was wrong in its decision in the FOE case.

The three-judge panel was composed of Roger Robb, Carl McGowan and Wilbur K. Miller. The presence of Judge Robb afforded some comfort to the commission attorneys, since he dissented in an earlier case in which the appeals court held that the fairness doctrine applied to commercials promoting the wares of a store that was engaged in a labor dispute.

However, Judge Robb questioned Mr. Wiley closely on the commission's rationale in distinguishing commercials for cigarettes from those for automobiles.

Mr. Wiley stressed "the pristine simplicity" of the cigarette question; it was simply one of whether to smoke or not to. "The same thing doesn't apply here," he said. The question of the use of automobiles is tied up with a whole range of other questions, including those dealing with alternative methods of transportation and different kinds of anti-pollution devices.

"The remedy in cigarettes," he said, "doesn't work in the complex situation here." Mr. Cowan's rebuttal was that the commission frequently applies the fairness doctrine to complex issues—the Vietnam war and race relations, among them.

Throughout the argument, Judge McGowan questioned the attorneys on whether WNBC-TV, apart from any fairness-doctrine obligation, had presented programing dealing with the pollution issue. Mr. Wiley had noted that the commission had held that broadcasters have an obligation to air discussions of such issues. And Lawrence McKay, who appeared for NBC, said WNBC-TV carried a heavy budget of programs on pollution including auto-caused pollution—50 such programs in the first five months of 1970 alone.

But for Mr. Cowan that was not the key issue. The question on which he sought to focus the court's attention was whether commercials promoting the purchase of cars in New York present one side of a controversial issue of public importance and obligate the station carrying them to afford time for reply.

Mr. Wiley, who described the ads involved as "nothing special—run of the mill . . . no discussion of public issues . . . buy our product: it's good," warned that virtually every ad could be read as raising a controversial issue.

"What about airplanes, detergents, especially those with phosphates? The list of products with ecological side effects is endless."

"Consider the practical effects" of a ruling extending the cigarette ruling, he urged the judges. "In the final analysis, it is the practical effects that will affect the public interest that are paramount."

The selling of 'Unselling'

End-the-war campaign, with heavy agency support, raises fairness questions

"Help Unsell the War," a public-service advertising campaign appeared likely last week to precipitate another type of battle—over the fairness-doctrine implications of the campaign.

Leaders of the movement invoked, at least implicitly, the spirit of the fairness doctrine in urging media to carry the end-the-war messages. But the first reaction of broadcasters was that if they carried the spots they might also be obliged to carry messages supporting President Nixon's Indochina-war position.

However, most of the broadcasters queried by BROADCASTING declined to comment on the ground that they had not yet received the "Unsell" material

and could not say what their response would be.

FCC sources were also reluctant to comment on the campaign's implications, apart from specific cases. It was emphasized, however, that if any issue is "controversial" and "of public importance," it is obviously the war, and the commission has so ruled in past cases. The question in any specific station's case may therefore hinge upon whether its other programming has presented both sides of the issue.

Coordinated by Alice M. Gregory, traffic director at LaRoche, McCaffrey & McCall, New York, the campaign was put together by some 300 creative and production persons in advertising (BROADCASTING, June 7). More than 125 print ads, 33 TV commercials and 31 radio spots have been produced for the campaign, asking citizens to write their congressmen urging the end of the Vietnam war by next Dec. 31.

Ten days ago (June 4) a special committee of "Unsell" workers sent letters to 8,000 persons in media asking for free time and space "to tell the other side of the story.' No response had been received as of last Wednesday (June 9). Although the committee did not cite the fairness doctrine by name, the letter said in part: "We think the sheer weight of federal government promotion and propaganda has provided the average citizen with a biased view of why the U.S. is in Vietnam at all and what is going on there.

" 'Unsell' is not blessed with any advertising funds, let alone the huge budgets with which the Pentagon has been selling the idea of our Vietnam involvement. Therefore we have to appeal to the media for free space and time."

Excerpt from radio spot in "Unsell the War" campaign:

"Boy: Last year I made a promise to my daddy. I promised him I'd take care of my mom, and just like him I'll love and I'll kiss her—goodbye. And then, like him, I'll die in Vietnam. Announcer: Stop it."

One spokesman for the "Unsell" committee said the fairness doctrine had not entered into the thinking so far, but that "we would understand that a station would give the other side a chance. We feel, however, that the other side has [already] gotten tremendous coverage." A spokesman for Ira Herken, a student at Yale University, New Haven, Conn., who nurtured the idea for the campaign, said the committee has hired counsel to study the fairness problem.

Station managers checked, however, were reluctant to comment on a supposition. Many of the managers approached said they had not received the material from the committee and therefore could not say whether the fairness doctrine would apply. The director of community affairs at a network-owned station said the campaign would have to be evaluated as all public-service campaigns are before being aired.

A station executive said if his station did air a spot for "Unselling," "as a matter of policy" it probably would present a commercial for an opposing viewpoint. He said: "There is no legal obligation, and we reject the contention we had to. But in the matter of fairness, we would present the other side."

There are 39 executives listed as members of the group's advertising-agency committee on the letter sent to the media which was signed by James J. McCaffrey, chairman of the board of LaRoche, McCaffrey & McCall and Maxwell Dane, chairman of the executive committee of DDB.

Meanwhile, a more experienced group of antiwar spokesmen—the Amendment to End the War Committee—launched a new radio spot campaign. Again, the spots are designed to win support for an amendment to be introduced by Senators George McGovern (D-S.D.) and Mark Hatfield (R-Ore.) to bring all American troops home from Indochina by the end of the year. (A similar amendment, introduced last year, was also accompanied by a broadcast-advertising campaign.)

The 60-second spot was to run last week and early this week on an estimated 100 stations in 20 states. It was created and narrated by Stan Freberg and his Thyme Inc., and was placed with the help of volunteers from Earle Palmer Brown and Associates, Washington public-relations firm. Estimated cost of the brief campaign was $45,000. The money was left over from funds collected for last year's campaign.

Programming

First Amendment parity on libel

Supreme Court sees broadcasting as part of press as it extends immunity to suits by private citizens

When it comes to libel, broadcasters are entitled to precisely as much First-Amendment protection as publishers. And for both groups, the Supreme Court ruled last week, the degree of that protection is considerable.

The high court, in a 5-to-4 decision, with two of the majority justices concurring in the result, held that not even a private citizen—or "little man"—may sue the news media for libel in matters "of public or general interest" unless he can prove malice or reckless disregard of the truth.

Thus the court extended the reach of the landmark *New York Times* case and succeeding cases that had limited that kind of protection to stories dealing with "public officials" or "public figures." "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private citizen is involved, or because in some sense the individual did not 'voluntarily' choose to become involved," Justice William J. Brennan Jr. wrote for the court.

The case is of particular significance to broadcasters since it was a radio station—Metromedia Inc.'s WIP(AM) Philadelphia—that benefitted from the decision. And throughout Justice Brennan's 27-page opinion and four separate concurring and dissenting opinions that accompanied it the print and broadcast media were commonly treated as "the press" or "the media."

Indeed the court, in a footnote, pointed out that the application of the First Amendment to broadcasting was not an issue. The petitioner, a Philadelphia distributor of nudist magazines who claimed to have been defamed in WIP newscasts, raised no question as to whether the First Amendment's guar-