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PROBLEMS IN THE APPLICATION OF THE FAIRNESS
DOCTRINE TO COMMERCIAL ADVERTISEMENTS

I. INTRODUCTION

Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, [and] does not provide information on matters of public importance ....

The "fairness doctrine" is part of the common law of the Federal Communications Commission (Commission). According to this doctrine, all broadcasters, as public trustees acting in the public interest, have a duty to devote a reasonable amount of air time to the presentation of controversial issues of public importance, and to do so fairly by affording reasonable opportunity for the expression of opposing viewpoints. The origin of the fairness doctrine can be traced to the 1929 Great Lakes Broadcasting Co. decision, which held that "ample play for the free and fair

2. Some commentators have said that the fairness doctrine ceased to be mere common law and became a statutory requirement by virtue of the 1959 amendments to §315(a) of the Communications Act of 1934, 47 U.S.C. §315(a) (1970). See H. Geller, THE FAIRNESS DOCTRINE IN BROADCASTING 2 (1973); Note, The Fairness Doctrine and Access to Reply to Product Commercials, 51 IND. L.J. 756, 757 n.6 (1976).
3. The 1959 amendments were designed to exempt news programs from the "equal opportunities" requirement of §315(a), which commands that equal time be afforded to opposing candidates whenever a candidate for public office makes use of a licensee's broadcast facilities. 47 U.S.C. §315(a) (1970). The statute provides in pertinent part:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Id. (emphasis added).

However, an in-depth study of the legislative history of the fairness doctrine by the staff of the House Committee on Interstate and Foreign Commerce has indicated that Congress, by passing the 1959 amendments, intended neither to ratify nor reject the fairness doctrine, but only to insure that §315(a) would not interfere with the Commission policy of discretionary decisionmaking under the doctrine. Panel Discussion on the Fairness Doctrine and Related Subjects: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. App. A, at 183, 217 (1968) (Sup. Doc. No. Y41N8/4:90-33) [hereinafter cited as Panel Discussion]. Therefore, this Comment will treat the fairness doctrine as part of the common law of communications, without further reference to §315(a) of the Communications Act. But cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969) (Congress, by the 1959 amendments, plainly announced that the "public interest" standard required broadcasters to discuss both sides of controversial issues of public importance).

competition of opposing views" was required by the public interest. In response to some early Commission decisions that were interpreted by licensees as holding that the fairness doctrine prohibited broadcast editorializing, the Commission in 1949 issued the *Editorializing By Broadcast Licensees report (1949 Report).* This report was the first codified expression of the fairness doctrine and stated that the public had a paramount right to be presented with different viewpoints on controversial issues. Despite the great controversy surrounding this doctrine, the 1949

5. 3 F.R.C. ANN. REP. at 33. In *Great Lakes*, the Federal Radio Commission denied license modification to a radio station because it propogandized its own view to the exclusion of all others. *Id.* The Commission held that this principle would apply to any and all programs consisting of discussion of any issue or question of importance to the public. *Id.*

6. *Id.* The *Great Lakes* decision rested on the statutory interpretation of the Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163 (current version in the Communications Act of 1934, 47 U.S.C. §§ 302a(a), 303(f), 307(a), 307(d), 309(a) (1970), under which the Commission's predecessor, the Federal Radio Commission, was required to exercise all of its discretionary powers in "the public interest." *See id.* While a simple definition of the statutory standard is unavailable, one commentator has succinctly captured the underlying theory involved:

Congress could have decided to auction the broadcast frequencies to the highest bidder, or to allocate them to users with a 'rental' fee or with a requirement that a specified amount of free access to the station's time and facilities be given to groups and individuals. Instead, it chose a system of short term licensing, with the broadcast licensee obligated to operate in the public interest. This is referred to as the 'public trustee' concept, as contrasted with the notion of the FCC as merely a 'traffic director' that determines which entity is to operate on which frequency and with what power and antenna height.


7. *F. FRIENDLY, supra* note 3, at 21. In Mayflower Broadcasting Corp., 6 F.C.C. 333 (1940), the Commission agreed to renew the license of a radio station in Boston only upon the condition that its owner agree not to editorialize in the future. *Id.* at 340-41. The Commission's message was clearly stated: "In brief, the broadcaster cannot be an advocate." *Id.* at 340.

8. *Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949)* [hereinafter cited as 1949 REPORT]. The exact language of the Commission was as follows:

The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. *Id.* at 1249.


11. For a comprehensive discussion of the contrasting viewpoints on the fairness doctrine, *see Panel Discussion, supra* note 2.

For the reader to appreciate the potential costs and benefits of applying the fairness doctrine to commercial advertising, a brief sketch of the policy issues underlying the doctrine is presented. The standard justification for the fairness doctrine is that broadcasters are licensed by statute to operate in the public interest. H. GELLER, *supra* note 2, at 8-9. This reasoning has been attacked as circular. *See Panel Discussion, supra* note 2, at 81 (statement of Reuven Frank). Proponents also argue that the doctrine is necessary to insure full discussion of public issues, since the permanently limited number of broadcast frequencies necessarily excludes some
Report remained the only comprehensive statement of the fairness doctrine until the issuance of the report on the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act (1974 Fairness Report). This later report, with some minor modifications, generally reaffirmed the fairness doctrine obligations of broadcast licensees.

By examining the important Commission and federal court decisions, this Comment will trace the development of the fairness doctrine as applied to the specific area of commercial advertising. After Part II presents examples of the Commission’s early opinions on this subject, Part III will focus on the impact of the fairness doctrine with respect to the standard product commercial. The standard product commercial is one which urges use or consumption of a controversial product or service, but which makes

speakers. H. Geller, supra note 2, at 8. However, there are almost five times as many broadcast stations as there are daily newspapers. F. Friendly, supra note 3, at 212. Moreover, the United States Supreme Court has held unconstitutional a state “fairness” statute which imposed a right-to-reply upon newspapers. Miami Herald v. Tornillo, 418 U.S. 241 (1974). Nonetheless, the Court has held that the fairness doctrine does not violate the first amendment rights of broadcasters. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393–95 (1969) (emphasis added).

A final justification for the doctrine rests upon the legal premise that the public has a first amendment right to hear a full and balanced range of diversified opinion and a factual assumption that the fairness doctrine promotes this goal. See Panel Discussion, supra note 2, at 85–93 (statement of Harriet F. Pilpel). However, this factual assumption has been seriously questioned: “Broadcasting has at best an incremental and at worst a marginal effect on political consciousness.” Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 770–71 (1972).

12. See Notice of Inquiry in re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 30 F.C.C.2d 26, 27–28 (1971). In this report, one Commissioner noted that:

The Chairman, in an April speech before the National Association of Broadcasters, stated that it was time for another review of the fairness doctrine — that since the 1949 Report, we had been proceeding on an ad hoc basis and, after 22 years, it was time to look again at the whole subject — to let all interested persons participate in this important policy formulation, not just those involved in particular cases.

Id. at 36 (Wells, Comm'r, concurring).

Taking this “ad hoc” approach, the Commission over the years had formulated a common law of broadcasting fairness. Id. Once a licensee broadcasts a statement on a controversial issue of public importance, he must make reasonable efforts to broadcast the opposing view, including the solicitation of spokesmen and provision of free air time to those who cannot afford it. See Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963). However, the licensee retains the right to select an appropriate spokesman. See Richard G. Ruff, 19 F.C.C.2d 838, 839 (1969). Moreover, a consistent failure to allow the broadcast of opposing views has resulted in the nonrenewal of a broadcaster’s license. See Brandywine-Main Line Radio, Inc., 1969 F.C.C.2d 18, 34–35 (1970), aff’d, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). See also Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).


14. For instance, the Commission refused to act upon the most radical proposal before it, a suggestion by Chairman Richard E. Wiley to suspend temporarily the fairness doctrine in the largest radio markets. Reconsideration of the Fairness Report, 36 P & F Radio Reg. 1021, 1033 n.11 (1976).
no explicit statement on a controversial issue of public importance.\textsuperscript{15} Finally, Part IV discusses the recent cases applying the fairness doctrine to editorial commercial advertisements — "advertorials." Advertorials include institutional advertisements, which are designed to present a favorable public image of the sponsor rather than to sell a product.\textsuperscript{16} In some situations, the implicit messages conveyed by these commercials constitute statements on controversial public issues sufficient to raise fairness doctrine obligations.\textsuperscript{17}

II. EARLY APPLICATIONS TO ADVERTISING

The Commission's first statement regarding the applicability of the fairness doctrine to commercial advertising arose in the \textit{Great Lakes} decision, where the doctrine originated.\textsuperscript{18} In \textit{Great Lakes}, the Commission stated that while the public interest required the adequate presentation of opposing views, "[the] only exception that [could] be made to this rule ha[d] to do with advertising."\textsuperscript{19} The Commission's reason for this exception was its determination that commercial advertising provided the financial means by which broadcasting became possible.\textsuperscript{20}

Nevertheless, the advertising exception recognized in \textit{Great Lakes} was apparently ignored in \textit{Sam Morris}.\textsuperscript{21} In the latter case, the petitioner, acting on behalf of the National Temperance and Prohibition Council, requested that the Commission deny renewal of the license of a radio station which had broadcast advertisements "counseling the drinking of alcoholic liquors" into areas where local option laws prohibited the sale of alcoholic beverages.\textsuperscript{22} Mr. Morris alleged that the licensee refused to sell any time for messages which advocated abstinence from liquor.\textsuperscript{23} The Commission, although denying the petitioner's request, observed:

Ordinarily \ldots commercial competition [does] not raise issues of public importance \ldots [but] it must be recognized that under some circumstances it may well do so. [I]t can at least be said that the advertising of alcoholic beverages over the radio can raise substantial issues of public importance. It is hardly necessary to point out that the question whether the sale and consumption of alcoholic beverages should be prohibited by law is frequently an issue of public importance.\textsuperscript{24}

\textsuperscript{15} See note 27 infra.
\textsuperscript{16} See note 106 infra.
\textsuperscript{17} Id.
\textsuperscript{18} 3 F.R.C. ANN. REP. 32 (Fed. Radio Comm'n 1929). For a discussion of this case, see notes 5 & 6 and accompanying text supra.
\textsuperscript{19} 3 F.R.C. ANN. REP. at 32-33.
\textsuperscript{20} Id.
\textsuperscript{21} 11 F.C.C. 197 (1946).
\textsuperscript{22} Id. at 197.
\textsuperscript{23} Id.

It should be noted that the advertisements, as described by petitioner, did \textit{not} explicitly state a position on the issue of whether the sale and consumption of
Sam Morris was the last statement by the Commission on the subject of the applicability of the fairness doctrine to commercial advertising prior to the great cigarette controversy that began in 1967.

III. THE STANDARD PRODUCT COMMERCIAL

A. The Commission: Cigarettes Are A Unique Product

On January 5, 1967, John F. Banzhaf III wrote a letter to the Commission requesting that WCBS-TV, which had aired cigarette commercials depicting smoking as attractive and enjoyable, afford him or some other spokesman an opportunity to present a contrary viewpoint on the health hazards of smoking. In response, the broadcaster contended that the fairness doctrine could not be applied to “commercial announcements solely aimed at selling products.” However, Banzhaf had indicated in his complaint that his very purpose was to establish the applicability of the doctrine to such commercials. In a letter to the licensee, the Commission rejected the broadcaster’s position and instructed the station to assess alcoholic beverages should be allowed by law. Thus, it appears that Sam Morris became the first example of a standard product commercial held to raise issues of substantial public importance merely because ordinary use of the product was itself controversial. For a discussion of this problem, see text accompanying notes 27-105 infra.

25. Comment, And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 Calif. L. Rev. 1416, 1422 (1972). The issues of the applicability of the fairness doctrine to commercial advertising were not explicitly discussed in the 1949 Report, supra note 8, in Controversial Issues Programming, 40 F.C.C. 571 (1963) (reaffirming the fairness doctrine), or in Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) (“Fairness Primer,” examples of fairness doctrine violations). However, in Controversial Issues Programming, supra, the Commission did state:

It is immaterial whether a ... viewpoint is presented ... [in] a paid announcement, official speech, editorial or religious broadcast. Regardless of label or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint ... .

40 F.C.C. at 572 (emphasis added).

26. For a discussion of this issue, see notes 28-42 and accompanying text infra.

27. As used in this Comment, a “standard product commercial” refers to advertisements for products or services, the use or consumption of which is controversial. These commercials do not explicitly or implicitly make any statement about a controversial issue except that they urge consumption of the controversial product or service. 1974 Fairness Report, supra note 13, at 24. One example is an advertisement urging consumption of alcoholic beverages, without any mention as to whether or not the sale of such products should be prohibited by law. See notes 21-24 and accompanying text supra.


29. 8 F.C.C.2d at 381.

30. Id.

31. Id. The Commission stated:

We hold that the Fairness Doctrine is applicable to such advertisements. We stress that our holding is limited to this product — cigarettes. Governmental and private reports ... and congressional action ... assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a
whether sufficient time was being allocated to programming dealing with the adverse health effects of smoking.\textsuperscript{32} Although this letter prompted numerous petitions for reconsideration from broadcasters, advertisers, and other special interest groups,\textsuperscript{33} the Commission issued an opinion and order affirming its position.\textsuperscript{34}

In response to the petitioners’ argument that the fairness doctrine applied only to news, commentary, and editorial opinion, the Commission stated that the licensee’s overall duty to operate in the public interest required fairness in the presentation of controversial issues “in whatever context they may arise.”\textsuperscript{35} Despite this expansive statement, the Commission limited its ruling to the “unique situation” of cigarette advertising.\textsuperscript{36} The Commission noted that to its knowledge, no other advertised product had been determined to present such a significant threat to public health during normal use.\textsuperscript{37} Therefore, the Commission predicted that “instances of extension of the ruling to other products . . . would be rare, if indeed they ever occurred.”\textsuperscript{38} In a concurring opinion, Commissioner Loevinger expressed doubt that the Commission could “find a rational basis for holding that cigarettes differ from all other hazards to health and life.”\textsuperscript{39} Commissioner Johnson, however, criticized Commissioner Loevinger’s position as being a “slippery slope” argument.\textsuperscript{40} Lastly, the petitioners in

station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance — that, however enjoyable, such smoking may be a hazard to the smoker’s health.

\textit{Id.} at 381–82 (emphasis added). These words would return to haunt the Commission. See text accompanying notes 43–89 infra.

32. 8 F.C.C.2d at 382–83.
33. See WCBS-TV (Banzhaf), 9 F.C.C.2d 921 (1967).
34. \textit{Id.} at 949–50.
35. \textit{Id.} at 925 (emphasis added).
36. \textit{Id.} at 943. In support of this determination, the Commission stated that this was an issue of public health and safety, \textit{id.} at 926, since governmental and private reports all urged cessation of cigarette smoking because normal use of the product was a health hazard to millions of people. \textit{Id.} at 943.
37. \textit{Id.} at 943. The petitioners had predicted, with remarkable prescience, that a host of other products would trigger fairness doctrine complaints. See, e.g., National Health Federation, 36 P & F RADIO REG. 43 (1976) (fluoride); William H. Rodgers, 30 F.C.C.2d 640 (1971) (detergents) (see note 82 infra); Friends of the Earth, 24 F.C.C.2d 743 (1970) (automobiles) (see text accompanying notes 43–56 infra). However, the Commission rejected the notion that its holding would apply to such products. 9 F.C.C.2d at 942–43. The attempt by the Commission to limit its holding to cigarettes has been called the “weakest and least convincing part of the opinion.” Putz, \textit{Fairness and Commercial Advertising: A Review and A Proposal}, 6 U.S.F.L. REV. 215, 222 (1972).
38. 9 F.C.C.2d at 943.
39. 9 F.C.C.2d at 954 (Loevinger, Comm’r, concurring). Commissioner Loevinger expressed his concern that the logic of the decision may also apply to other products, and cautioned that such an extension of the fairness doctrine could lead “either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable.” \textit{Id.}
40. 9 F.C.C.2d at 957–58 (Johnson, Comm’r, concurring). Commissioner Johnson agreed that cigarettes were a unique product and therefore concluded: The slippery slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable cases. . . . By drawing the line at cigarette advertising we have
Banzhaf argued that the advertisements were not controversial because they did not make affirmative health claims or otherwise discuss the public health issue.\(^{41}\) The Commission disagreed, holding that the fairness doctrine was triggered by every cigarette commercial because they urged consumption of a controversial product.\(^{42}\)

The applicability of the Commission's new rule to other product commercials was tested by Mr. Gary Soucie on behalf of Friends of the Earth.\(^{43}\) In language which echoed the successful Banzhaf complaint, Mr. Soucie alleged that WNBC-TV in New York had aired automobile and gasoline commercials for large displacement engines and lead additive

frames a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began.

Id. However, one commentator has noted: "[T]he applicability of the fairness doctrine to advertising has followed a tortured course during the years following Banzhaf, and Commissioner Loevinger's 'slippery slope' fears have proved well founded." Simmons, Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective, 75 COLUM. L. REV. 1083, 1089 (1975).

41. 9 F.C.C.2d at 938. The importance of this distinction provides insight into the approach subsequently taken by consumer and environmental groups who sought broadcast time to attack other product commercials. An advertiser who made an implicit and perhaps unintentional statement on a controversial product was then vulnerable to counterbroadcasts whose proponents could make an explicit, and thus much more effective, statement of their position. This possibility was not ignored by broadcasters, who, in response to the new anti-smoking counterbroadcasts triggered by Banzhaf, asked the Commission to clarify its position as to whether licensees would be required to offer programming time to tobacco companies who wanted to state explicitly their viewpoint on the public health issue of cigarette smoking. Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C.2d 16 (1967). The Commission refused their request. Id. at 17.

For a time, according to Circuit Judge J. Skelly Wright, the tobacco companies' worst fears were realized: "In the immediate wake of Banzhaf, the broadcast media were flooded with exceedingly effective anti-smoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption." Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.C.C. 1971) (three-judge panel) (Wright, J., dissenting), aff'd mem. sub. nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972). The passage of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970), which banned the broadcasting of cigarette commercials altogether, marked a reversal in the decline of cigarette consumption. 333 F. Supp. at 589 & n.18 (Wright, J., dissenting). This relieved the broadcasters of their obligation to run anti-smoking messages, and freed cigarette manufacturers to promote their products exclusively in media not subject to the fairness doctrine without loss of competitive advantage. Id.

42. 9 F.C.C.2d at 938. The Commission's decision was affirmed on appeal. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The court of appeals also relied on the public health concept, stating the oft-quoted phrase: "[W]hatever else it may mean, however, we think that the public interest indisputably includes the public health." 405 F.2d at 1086. However, the court, unlike the Commission, did not explicitly limit its holding to cigarettes. Id. at 1099. The court stated only: "Thus, as a public health measure addressed to a unique danger authenticated by officials and congressional action, the cigarette ruling is not invalid on account of its particularity. It is in fact the product singled out for treatment which justifies the action taken." Id.

Mr. Banzhaf also appealed to the court, although he limited his appeal to the question of relief. The court denied his request for an order compelling the broadcasters to give him equal time. Id. at 1103.

fuels.\textsuperscript{44} The complainant contended that these advertisements conveyed a message that such products (and inferentially the air pollution they cause) were necessary for consumers to enjoy the good life.\textsuperscript{45} Asserting that this position stated but one side of a controversial issue of public importance, Mr. Soucie sought broadcast time for countercommercials urging the public to utilize small-engined cars and unleaded gasoline.\textsuperscript{46} However, the Commission adhered to its view expressed in \textit{Banzhaf} that “cigarettes are a unique product, permitting the simplistic approach adopted in that field.”\textsuperscript{47} The Commission further supported its \textit{Friends of the Earth} decision with an additional policy argument.\textsuperscript{48} The Commission stated that even if cigarettes were not unique in their effect upon the public health, it would not be consistent with the public interest standard of the Communications Act to apply the \textit{Banzhaf} rule generally to the field of product advertising.\textsuperscript{49} Such action, cautioned the Commission, might result in the undermining of the financial basis of broadcasting which is based on commercial advertising revenue.\textsuperscript{50}

Although he had so recently criticized Commissioner Loewinger’s doubts that a rational basis could be found to limit the \textit{Banzhaf} ruling to cigarettes,\textsuperscript{51} Commissioner Johnson chose to dissent in \textit{Friends of the Earth}.\textsuperscript{52} He now concluded that commercials promoting the use of products other than cigarettes may raise fairness doctrine obligations.\textsuperscript{53}

\begin{footnotes}
\item[44] 24 F.C.C.2d at 744. Mr. Soucie alleged that the normal use of these products had been found by executive and congressional action to pose a serious threat to public health in the form of air pollution. \textit{Id.}
\item[45] \textit{Id.}
\item[46] \textit{Id.}
\item[47] \textit{Id.} at 748. The Commission recognized that use of large cars and leaded gasolines raised environmental issues, but distinguished this problem from the hazards of cigarettes. \textit{Id.} at 746-47. Initially, the Commission emphasized that such products were socially useful, despite their environmental drawbacks, unlike cigarettes whose use was a mere habit “which can fade away.” \textit{Id.} at 746. Moreover, the Commission emphasized that the government was not urging people immediately to cease consumption of these products, as was the case with cigarettes. \textit{Id.} Secondly, the Commission held that direct governmental regulation of such products was more feasible than with cigarettes, since the latter, if prohibited, could be sold on the black market, whereas large cars and leaded gasoline could not. \textit{Id.} at 746-47.
\item[48] 24 F.C.C.2d at 748-49.
\item[49] \textit{Id.} at 748.
\item[50] \textit{Id.} at 749. Compare this position with that of the Federal Radio Commission in Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32 (Fed. Radio Comm’n 1929). See text accompanying note 19 \textit{supra}. The Commission did note in \textit{Friends of the Earth} that this restrictive ruling applied only to standard product advertisements, and that the fairness doctrine would remain fully applicable to commercials which dealt directly with issues of public importance. 24 F.C.C.2d at 749. See text accompanying notes 106-147 \textit{infra}.
\item[51] See note 40 and accompanying text \textit{supra}.
\item[52] 24 F.C.C.2d at 752 (Johnson, Comm’r, dissenting).
\item[53] \textit{Id.} at 753 (Johnson, Comm’r, dissenting). Commissioner Johnson now relied upon Commissioner Loewinger’s concurring opinion in \textit{Banzhaf}. \textit{Id.} See note 39 and accompanying text \textit{supra}. For Commissioner Johnson’s previous position, see note 40 and accompanying text \textit{supra}.
\end{footnotes}
B. The D. C. Circuit: Down the Slippery Slope

On the appeal of *Friends of the Earth*, the United States Court of Appeals for the District of Columbia rejected the Commission's proposition that for fairness doctrine purposes, cigarettes were a product unique from large automobiles and leaded gasoline. The court of appeals stated:

[Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway, do... ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that 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.]

Actually, *Friends of the Earth* was not the only decision in which the D.C. Circuit contravened the rule established by the Commission in *Banzhaf*. In *Retail Stores Employees Union v. FCC*, the court reversed the Commission and held that standard commercial copy urging radio listeners to patronize a department store for its stock, bargains, and service stated a position on a controversial issue of public importance when at the time of broadcast the department store was in the midst of a strike by its employees. The issue arose in the context of an order by the Commission renewing, without a hearing, the broadcasting license of a radio station. Having determined that a fairness complaint had been stated, the court

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55. *Id.* at 1169. The court noted: "The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger." *Id.*
56. *Id.* Although the court's decision was clear, the ultimate basis of its holding was not. In both *Banzhaf* and *Friends of the Earth*, the Commission based its decisions upon an interpretation on the "public interest" standard of the Communications Act, 47 U.S.C. § 307(d) (1970). *Friends of the Earth*, 24 F.C.C.2d 743, 745, 749 (1970); WCBS-TV (*Banzhaf*), 9 F.C.C.2d 921, 927 (1967). See note 6 supra. However, the court of appeals did not say that its result was commanded by the statutory standard requiring licensees to act in the "public interest." The court first noted that "the Commission was faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine." 449 F.2d at 1170. Nonetheless, the District of Columbia Circuit thought that the facts in *Friends of the Earth* required the Commission to apply the *Banzhaf* principle. *Id.* at 1169. See note 42 and accompanying text supra. While reaching this conclusion, the court did intimate that there was nothing compelling in the principle itself: "Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned." 449 F.2d at 1170 (emphasis added).
57. See notes 58–62 and accompanying text infra.
59. *Id.* at 258. In a reference to *Banzhaf*, the court noted that "[i]n dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit." *Id.*
60. *Id.* at 252.
61. *Id.* at 258.
remanded to the Commission for further proceedings on the question of the union's request for air time for spot announcements urging a consumer boycott during the strike.\(^{62}\)

However, it appears that the D.C. Circuit was not consistent in reversing the Commission in this area. In 1971, the court affirmed a Commission determination\(^{63}\) that military recruitment advertisements did not make a controversial statement concerning the draft, and therefore did not require broadcast licensees to program countercommercials for those who wished to espouse the view that it was undesirable for a young man to enlist in the military.\(^{64}\) It is submitted that the military recruitment cases

62. *Id.* at 259. The court reasoned as follows:
The ultimate issue with regard to the boycott was simply: whether or not the public should patronize Hill's Ashtabula....

Central to the Union's argument ... is the proposition that, in urging listeners to patronize Hill's ... [the] advertisements presented one side of a controversial issue of public importance. Hill's copy ... made no mention of the strike or boycott. ... But the advertisements did urge the listening public to take one of the two competing sides on the boycott question — they urged the public to patronize the store. ... It seems to us an inadequate answer to this argument merely to point out that Hill's copy made no specific mention of the boycott.

*Id.* at 258. It is submitted that if these advertisements made a statement on the boycott, it could not have been done more implicitly. There is no indication in the court's opinion that the store's radio copy changed in any way with the onset of the union boycott. Can it be that subsequent union activity changed previously innocuous commercial advertisements into statements on controversial public issues? At one point in its opinion, the court did note that "[t]he public policy of the United States has been declared by Congress as favoring the equalization of economic bargaining power between workers and their employers," perhaps suggesting that furtherance of established governmental policies will justify application of the fairness doctrine. *Id.* at 259. However, the wisdom of the court in establishing yet another factor for consideration must be questioned, since it surely increases the difficulties faced by licensees in comprehending and performing their legal duties as broadcasters. Additionally, in the Retail Stores situation, if the union is awarded air time, the advertiser may suspend its commercials rather than risk the potential adverse economic consequences of explicit countercommercials. For a discussion of the effect of this principle on the cigarette controversy, see note 41 *supra*.

The Commission's reaction to Retail Stores was to issue a Notice of Inquiry to reevaluate its policies on the fairness doctrine. In re Handling of Public Issues Under the Fairness Doctrine, 30 F.C.C.2d 26 (1971). Regarding the problems of advertising and fairness, the notice stated: "[T]he issue really is the right of access, if any, to the broadcast media to respond to product commercials." *Id.* at 30. As one commentator pointed out at the time, it was now appropriate, in light of *Friends of the Earth* and Retail Stores, for the Commission to "reformulate" its position:

"The logic of applying the fairness doctrine to advertisements should not be expansively exploited. To do so would encourage constant recourse to the Commission and promote uncertainty in the industry. In 1966 the FCC received 409 fairness complaints; in 1970 it received just over sixty thousand. The consequent cost in energies expended is not worth the marginal gains in public enlightenment." *Jaffe, supra* note 11, at 779.


64. *Green v. F.C.C.*, 447 F.2d 323 (D.C. Cir. 1971). *Accord*, Neckritz *v. F.C.C.*, 446 F.2d 501 (9th Cir. 1971). The opinion of the D.C. Circuit in *Green* is not a model of clarity, but at one point the court seemed to suggest that *Banzhaf*, which petitioners had cited as controlling, was limited to cigarettes. 447 F.2d at 332–33. However, this
are indistinguishable from Banzhaf, Friends of the Earth, and Retail Stores.\textsuperscript{65} The point is not necessarily that these cases were wrongly decided, but that the court was now doing what they said in Friends of the Earth that the Commission could not do;\textsuperscript{66} treat similar cases differently under the Banzhaf rule.

C. The Commission's Response: Naysaying

Whether due to the conflicting signals from the court of appeals or obstinacy in adhering to its original position, the Commission never again applied the Banzhaf rule to any standard product commercial.\textsuperscript{67} An example of the Commission's recalcitrance is the case of Alan F. Neckritz (Chevron).\textsuperscript{68} The petitioner objected to a Chevron television commercial, aired by several California licensees, which extolled as one of the virtues of its "F-310" gasoline its ability to purify automobile exhaust and thus reduce air pollution.\textsuperscript{69} While several issues were raised,\textsuperscript{70} the Commission determined that the focus of the controversy was the alleged exploitation of public concern about air pollution.\textsuperscript{71} However, the Commission upheld the proposition would not survive Friends of the Earth, decided a scant two months later. See text accompanying note 55 supra. The Ninth Circuit in Neckritz wrote a somewhat more satisfactory opinion, saying that the Commission was correct in finding as a matter of fact that the recruiting advertisements contained no implicit messages on the draft, but merely conveyed the impression that enlistment would be to the personal advantage of the listener. 446 F.2d at 503. It is submitted, however, that this is the same problem as Banzhaf, Friends of the Earth, and Retail Stores—standard commercial copy encouraging the use of a product which is itself controversial. See notes 31, 44 & 59 and accompanying text supra.

65. Attempts to explain the military recruitment cases have relied upon arguments unconnected to communications law, with strong emphasis on national defense and political considerations. As one commentator observed: "[T]he Commission's and the court's implosive reasoning is explicable not in terms of a considered development of precedent, but rather in terms of the traditional deference to national security needs, [and] the intensely political nature of the war issue . . . ." Simmons, supra note 40, at 1092. Similar themes have been echoed elsewhere:

The sensitive political nature of this controversy may have motivated both the Commission and the courts. It is otherwise difficult to explain their conclusion that the recruitment messages do not argue that joining the army is desirable . . . . The outcome in Green may perhaps be best explained as the result of reluctance of both the Commission and the court to take any action that could be characterized as challenging the government's ability to effectively wage war. Comment, supra note 25, at 1433. See also note 64 supra.

66. See note 56 and accompanying text supra.

67. See notes 68--89 & 98--105 and accompanying text infra.


69. 29 F.C.C.2d at 808.

70. Neckritz claimed that the commercials raised two controversial issues. Id. The first was whether or not "F-310" would in fact alleviate air pollution. Id. See note 73 and accompanying text infra. The second issue was whether the commercials were rendered controversial because of a pending Federal Trade Commission (FTC) complaint against Chevron for false advertising. 29 F.C.C.2d at 808. As to this point, the Commission concluded that the mere existence of a contested FTC complaint against an advertiser did not automatically imply that a controversial issue of public importance was involved. Id. at 810.

71. Id. at 808.
licensee's position, finding that the commercials did not deal directly with an issue of public importance since they merely made claims for product efficacy in the context of the subject of air pollution. Such claims, according to the Commission, did not in and of themselves trigger fairness doctrine obligations.

The D.C. Circuit remanded Neckritz to the Commission for reconsideration in light of that court's decision in Friends of the Earth. The Commission first refused to stay its order, and then affirmed its prior decision, asserting that Friends of the Earth was distinguishable. The Commission stated: "[T]here [was] no evidence which would indicate that the Chevron additive F-310 in any way enlarge[d] or aggravate[d] hazards to the public health [and] petitioners [did] not urge the public to abandon the use of gasoline, or even to avoid using Chevron with F-310."}

72. Id. at 812. The "directness" requirement, a further modification of Banzhaf, was a new test which first made its appearance in dictum in the Commission's opinion in Friends of the Earth, 24 F.C.C.2d 743, 749 (1970), rev'd, 449 F.2d 1164 (D.C. Cir. 1971).

73. 29 F.C.C.2d at 812. The Commission's crucial language was:

The Chevron F-310 announcements do not argue a position on a controversial issue of public importance, but rather advance a claim for product efficacy. It is true that this claim relates to a matter of public concern, but making such a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. . . . The Chevron advertisements do not claim there is no danger in air pollution, but assert, instead, that use of the sponsor's product helps to solve the problem.

Id. Indeed, if there is an implicit statement in this commercial, it must be deemed to be an anti-pollution message, i.e., air pollution is a serious problem which this product attempts to alleviate.

74. Id.


76. Alan F. Neckritz, 34 F.C.C.2d 579 (1972). Finding no irreparable injury, the Commission noted that the offending commercials were no longer being broadcast. Id. at 580.

77. Alan F. Neckritz, 37 F.C.C.2d 528, 531 (1972).

78. Id. at 531.

79. Id. In a vigorous dissenting opinion, Commissioner Johnson argued that Friends of the Earth compelled a different result. Id. at 533-35 (Johnson, Comm'r, dissenting). However, the D.C. Circuit affirmed the Commission on appeal. Neckritz v. FCC, 502 F.2d 411 (D.C. Cir. 1974). It is submitted that Neckritz is in fact a different kind of case than Banzhaf, Friends of the Earth, and Retail Stores. While the commercials in Neckritz may well have been an unfair exploitation of public concern over air pollution, any implied statement communicated by the ads on the subject of air pollution must have been an anti-pollution message. See note 73 supra. As the court explained:

'The commercials made no attempt to glorify conduct or products which endangered public health or contributed to pollution. As we noted in the Friends of the Earth decision, the F-310 commercials 'far from suggesting that automobile emissions do not contribute significantly to the dangers of air pollution, urged that the gasoline being advertised was designed to reduce those dangers.' 502 F.2d at 418-19 (citations omitted). Alan F. Neckritz' final attempt was a petition to intervene and deny the renewal of the licenses of those who had broadcast the Chevron commercials. Westinghouse Broadcasting Co., 40 F.C.C.2d 1045 (1973). His petition was denied. Id.
Although the Commission had determined that there was no public health controversy involved in Neckritz,80 a number of environmentally oriented fairness doctrine complaints after Branzhaf were also dismissed by the Commission notwithstanding petitioners' public health allegations.81 These included complaints about commercials for phosphate-based detergents,82 trash compactors,83 a utility company,84 and snow-

81. Gardner, Friends of the Earth v. FCC: Environmentally Oriented Fairness Doctrine Complaints, 5 ENVTL. LAW 159 (1974). The author concluded that "a series of unsuccessful attempts towards redress of alleged fairness doctrine violation [sic] has revealed that the Friends of the Earth v. FCC decision has been a pyrrhic victory for environmentalists." Id. at 164.

However, not all decisions by the Commission during this time period refused to find a fairness doctrine violation. In United People, Dayton, Ohio, 32 F.C.C.2d 124 (1971), there was a fairness complaint against a television licensee which aired public announcements for the United Appeal charity, without permitting the presentation of opposing viewpoints. Id. at 124. Petitioners wished to state that people should give directly to their favorite charity, instead of to the United Appeal, which was accused locally of poorly distributing its funds. Id. at 124-25. The Commission held that the licensee's judgment in determining that the announcements did not constitute a controversial issue of public importance, at least locally, was unreasonable. Id. at 126-27. However, the Commission's brief of opinion did not discuss whether or not the announcements contained any statement or position on the issue. There is no indication in the opinion that the announcements made any direct or explicit statement on how the funds should be distributed, or represented the United Appeal as efficient, well-managed public charity. If the announcements were ordinary solicitations of funds for charitable purposes, then United People, like Banzhaf, again supports the proposition that a commercial announcement whose subject matter itself is controversial implicitly states a controversial position merely by encouraging listeners to use the controversial product (or in this case, donate to the controversial charity). It is submitted that, in light of other Commission decisions in this area, United People was wrongly decided. See note 73 supra; text accompanying note 49 supra.

82. William H. Rodgers, 30 F.C.C.2d 640 (1971). The complainants alleged that the licensees failed to comply with the fairness doctrine by airing commercials promoting phosphate-based detergents as necessary for health and cleanliness standards, while failing to discuss the environmental problems associated with high phosphorous content in water. Id. Relying on prior Commission decisions, the complainants contended that Friends of the Earth was distinguishable since some governmental agencies had advocated an immediate cessation in the use of phosphate-based detergents. Id. at 641. However, in language similar to the opinion in Neckritz (Chevron), the Commission held that the commercials were merely claims of a product's efficacy and utility, and made no "direct" statement on any controversial issue. Id. at 642. See note 73 supra.

83. John S. MacInnis, 32 F.C.C.2d 837 (1971). The crux of this complaint was that trash compacting was antithetical to the concept of recycling waste. Id. Without further discussion, the staff letter read: "The Commission has consistently refused to apply the fairness doctrine to the broadcast of ordinary product commercials, and the commercials herein do not come within the exception to that policy enunciated in Banzhaf... and Friends [sic] of the Earth..." Id. at 838. It is submitted that, to be consistent with the principles in those cases, the Commission here should have held that the commercials implicitly stated that trash compacting was a desirable means of solid waste disposal, and therefore the fairness doctrine required that the opposing view of such a controversial statement be broadcast.

84. Anthony R. Martin-Trigona, 34 F.C.C.2d 118 (1972), application for review denied, 40 F.C.C.2d 327 (1973). Had the complainants conformed to the necessary procedural requirements, this could well have been a meritorious complaint. See Public Media Center, 59 F.C.C.2d 494 (1976), reconsideration denied, 40 P & F RADIO REG. 2d 539 (1977); Media Access Project, 44 F.C.C.2d 775 (1973), dismissed sub nom.
mobiles. In the latter case, Hudson-Mohawk Group, the Commission’s staff forshadowed the policy to be announced in the 1974 Fairness Report by announcing that Friends of the Earth would be limited to its facts. Moreover, the Commission stated that the fairness doctrine would not be applied to the “ordinary product commercial” which does “nothing more than advance a claim for product efficacy or social utility.”

As a result of Neckritz and the environmentally oriented cases, it appeared that the Commission would not abandon its view that cigarettes were a “unique” product. Moreover, it was suggested that the Commission was beginning to regret its decision in Banzhof.

D. The Fairness Report

The Commission’s 1974 Fairness Report codified its reversal of the applicability of the fairness doctrine to the type of commercial advertising at issue in Banzhof. The Commission stressed that its new policy would apply only to “standard product commercials” which did “not look or sound like editorials,” but were subject to fairness complaints solely “because the business, products or service advertised is itself controversial.” The Commission stated its reasoning and the new test it would apply as follows:

Fuqua Television, Inc., 49 F.C.C.2d 233 (1974). For a discussion of these cases, see notes 122–131 and accompanying text infra. In Martin-Trigona, a complaint alleging that institutional advertising of the Illinois Power Company encouraged increased consumption of electric energy was dismissed for failure to show any factual basis to the claim that the broadcast licensee had not presented contrasting viewpoints in its overall programming. 34 F.C.C.2d at 120. In an opinion dissenting from the Commission’s denial of review, Commissioner Johnson asserted that the connection between the advertisement and the controversy was as significant as it was in Banzhof, but “the Commission majority appears to sorrowfully regret” that decision. Martin-Trigona 40 F.C.C.2d at 328 (Johnson, Comm’r, dissenting).

85. Hudson-Mohawk Group, 40 F.C.C.2d 119 (1973), review denied sub nom. Sierra Club, 48 F.C.C.2d 617 (1974). The gist of the complaint in Hudson-Mohawk was that the offending commercials portrayed snowmobiling as highly conducive to outdoor recreational happiness, where in fact the machines ecologically damage the environment, generate noise pollution, encourage vandalism, and facilitate trespassing. 40 F.C.C.2d at 119–20.


87. 40 F.C.C.2d at 123.

88. Id. The opinion noted that the Commission’s definitive ruling on the subject would issue out of the then-current fairness doctrine inquiry, Notice of Inquiry In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 30 F.C.C.2d 26 (1971).


89. See Martin-Trigona, 40 F.C.C.2d 327, 328 (1973) (Johnson, Comm’r dissenting). See note 84 supra.


91. Id. at 26. The Commission, in effect, admitted that it had made a mistake: “In retrospect, we believe that this mechanical approach to the fairness doctrine
We do not believe that the underlying purposes of the fairness doctrine would be well served by permitting the cigarette case to stand as fairness doctrine precedent. . . . It would be a great mistake to consider standard advertisements, such as those involved in Banzhaf and Friends of the Earth, as though they made a meaningful contribution to public debate. . . . Accordingly, in the future, we will apply the fairness doctrine only to those “commercials” which are devoted in an obvious and meaningful way to the discussion of public issues.92

The Commission’s explicit reversal of the Banzhaf rule prompted both favorable and unfavorable reaction.93 Some critics of the Commission’s action, who participated in the 1974 Fairness Report, even suggested that the Commission was without power to effect such a change in the law.94 However, upon petitions for reconsideration, the Commission refused to alter

represented a serious departure from the doctrine’s central purpose . . . . We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue.” Id. at 24.

The Commission, however, refused to take full responsibility for the course of events after Banzhaf. The D.C. Circuit was also faulted for its decision in Friends of the Earth. Id. at 25–26. The Commission emphasized that the Banzhaf “precedent would not have been particularly troublesome if it had been limited to cigarette advertising as the Commission originally intended.” Id. at 25.

92. Id. at 26 (emphasis added). The effect of this ruling is that regardless of the controversiality of the product itself, standard commercial advertisements that attempt only to sell a product are considered by the Commission to be presumptively incapable of meaningful contribution to public debate. Id. at 24–26. The Commission did not state that a commercial advertisement can never have such an effect. Commercials that do, however, are not “standard product commercials,” but “editorial advertisements” — advertorials which, objectively speaking, make either direct editorial statements on controversial issues, or make indirect statements through institutional advertising. Id. at 22–23. What is crucial is the Commission’s newly enunciated test — an objectively obvious and meaningful statement upon a controversial public issue — which separates “editorial advertisements” (commercial which do trigger fairness doctrine obligations) from mere “standard product commercials” (which do not). Id. As a result, it is now a question of fact whether or not a given commercial advertisement can be objectively said to have made an obvious and meaningful statement in public debate.

93. See, e.g., Simmons, supra note 40, at 1108–16 (pro); Note, supra note 2, at 763–82 (con). The latter article raised the following interesting argument: the Supreme Court’s decision in Bigelow v. Virginia, 421 U.S. 809 (1974), holding that commercial speech may be entitled to first amendment protection, refutes the Commission’s premise that the standard product commercial can never give rise to controversial public issues. Note, supra note 2, at 773–75. But see National Citizens Comm. for Broadcasting v. FCC, ___ F.2d ___, 41 P&F RADIO Reg. 1311 (D.C. Cir. 1977) rejecting the significance of the “commercial speech” decisions in this context: “We reject the suggestion that any speech protected by the First Amendment must . . . trigger application of the fairness doctrine.” Id. at 1325. It is submitted that the argument in the note fails into the semantical trap of confusing the Commission’s categories with its test. See note 92 supra. The Commission is not saying that commercials can never give rise to controversial public issues, but that unless there is an “obvious and meaningful” statement, then it is just a “standard product commercial” to which the fairness doctrine does not apply. See 1974 Fairness Report, supra note 13, at 24–26.

The Commission emphasized that the D.C. Circuit’s decision in *Friends of the Earth* was not based upon statutory interpretation, but rather upon the Commission’s own policy as set forth in *Banzhaf*, which it was now free to change.97

E. The Post-Fairness Report Cases

The Commission’s decisions following the 1974 *Fairness Report* have consistently refused to find that fairness doctrine obligations were raised by standard product commercials.98 Even automobile and gasoline commercials, which in *Friends of the Earth* precipitated the descent down the slippery slope,99 are no longer singled out for special treatment.100 A case dealing with an environmentalist attack on snowmobile commercials provides a good example of the Commission’s faithful adherence to its 1974

95. Id. at 1031.
96. Id. at 1032. See note 56 supra.
97. 36 P & F RADIO REG. 2d at 1031–32. See note 56 supra. The power of the Commission to effect this reversal was upheld in Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976). The court held: “In the absence of statutory or constitutional barriers, an agency may abandon earlier precedents and frame new policies . . . . Thus the decision’s mere nonconformity with earlier agency precedent does not render it arbitrary and capricious.” 522 F.2d at 1066 (citations omitted). The same result was reached in National Citizens Comm. for Broadcasting v. FCC, ___ F.2d ___, 41 P&F RADIO REG. 1311, 1327–32 (D.C. Cir. 1977). The National Citizens court also held that the Commission’s distinction between types of commercial advertising for fairness doctrine purposes was not unconstitutional under the first amendment. Id. at 1325–28. Circuit Judge McGowan’s opinion in *National Citizens* is here recommended as an excellent discussion of the issues raised in this comment.
98. See notes 100–103 and accompanying text infra.
99. See notes 43–56 and accompanying text supra.
100. See Columbia Broadcasting System, Inc. (Citizens for Clean Air), 56 F.C.C.2d 313 (1975). In this case, the Commission stated:
    We conclude that advertisements for automobiles and gasoline are standard product commercials, . . . and as such are excluded from the fairness doctrine’s balancing requirements absent a showing that they make an obvious and meaningful contribution to the discussion of public issues . . . despite the fact that the use of that product might be related to a controversial issue of public importance.
    Id. at 315–16.
    A related case which illustrates the importance of the 1974 *Fairness Report* is Sierra Club, 45 F.C.C.2d 833 (1974), review denied, 51 F.C.C.2d 569 (1975). *Sierra Club* involved a complaint against two television broadcast licensees in Los Angeles for broadcasting large numbers of commercials promoting automobile and gasoline products without providing for “substantial treatment” of the environmentalist viewpoint. 45 F.C.C.2d at 834. The complaintants’ theory was that in smog-laden Los Angeles, even the use of small cars and unleaded gasoline posed serious public health hazards. Id. In a ruling issued before the 1974 *Fairness Report*, the Commission staff declined to accept this argument on the ground that the D.C. Circuit in *Friends of the Earth* limited its holding to large cars which consumed high-octane gasoline. Id. at 835–36. The Commission, hearing the case after the 1974 *Fairness Report*, did not rely on such a distinction, but merely observed that the broadcasts attacked were simply standard product commercials without any obvious or meaningful discussion of any public issue. 51 F.C.C.2d at 572–73.
Banzhaf position. In Peter C. Herbst, the Commission observed: “While hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainant’s area, it cannot be said that the announcements in question ‘are devoted in an obvious and meaningful way to the discussion of those issues.’”

Thus, it appears that the Commission has conclusively laid to rest the Banzhaf experiment. Regardless of the controversy surrounding the product itself, standard product commercials which are not in an “obvious and meaningful” way directed at that controversy will not trigger fairness doctrine obligations. As a result of the Commission’s definition of this category, it is unlikely that any “standard product commercial” ever will be held to trigger fairness doctrine obligations.

IV. THE ADVERTORIAL

A. HOW TO MAKE AN IMPLIED STATEMENT OBVIOUS AND MEANINGFUL

If the Banzhaf rule is dead, can the fairness doctrine still be applied to a commercial which goes beyond a mere claim for product efficacy, and makes some nonexplicit statement relating to a controversial issue of public importance?


102. 48 F.C.C.2d at 615-16, quoting 1974 FAIRNESS REPORT, supra note 13, at 26. This statement appears to be the Commission’s first application of the new test established in the 1974 FAIRNESS REPORT to a “standard product commercial.”

103. Furthermore, it appears that the Commission’s struggle on the “slippery slope” of product advertising is an experience which has not been forgotten when the Commission has been asked to apply the Banzhaf controversial-statement-by-implication rule to other potential fairness doctrine situations, such as children’s advertising. See, e.g., Council on Children, 59 F.C.C.2d 448, 452-53 (1976) (“obvious and meaningful” standard will be used to determine fairness issues in children’s advertising); American Broadcasting Co., Inc. (National Organization for Women), 52 F.C.C.2d 98, 115-16 (1975) (entertainment programming bears only a “tenuous relationship” to the controversial issue of the role of women in society).

104. See note 27 supra.

105. See note 158 and accompanying text infra.

106. For prior use of this term, see Comment, supra note 25, at 1427. As defined by the Commission:

Editorial advertisements . . . [are] most likely to arise in the context of promotional or institutional advertising; that is, advertising designed to present a favorable public image of a particular corporation or industry rather than to sell a product. Such advertising . . . ordinarily does not involve debate on public issues . . . . In some cases, however, the advertiser may seek to play an obvious and meaningful role in public debate. In such instances, the fairness doctrine . . . applies.

107. 1974 FAIRNESS REPORT, supra note 13, at 22-23.

108. It is conceivable that a commercial advertisement may make a clear and direct statement of a viewpoint on some controversial public issue, and if so, the Commission has announced that the fairness doctrine will apply. 1974 FAIRNESS REPORT, supra note 13, at 22. The Commission noted, however, that such direct editorial advertisements comprise a very small percentage of commercial air time. Id. A possible example of such a case is Center for Auto Safety, 32 F.C.C.2d 926 (1972). For a discussion of this case, see note 114 infra.
This very issue confronted the Commission in 1971 prior to the issuance of the 1974 Fairness Report's "obvious and meaningful" test.108 This case arose in response to television broadcasts of commercials for the Standard Oil Company of New Jersey (Esso) dealing with the existence of oil reserves on the North Slope of Alaska, America's need for energy, and the ecology of the Alaskan Tundra.109 The complainants contended that the commercials presented an argument in favor of construction of the Alaskan pipeline, and they sought air time to argue against the construction of the pipeline, stressing its adverse environmental effects.110 The commercials, however, never mentioned — at least not directly — the Alaskan pipeline or the controversy surrounding its construction.111 Nevertheless, the Commission staff concluded that these commercials impliedly stated a pro-pipeline position "since the company's large investment in drilling for Alaskan oil quite obviously is based upon the assumption that the transportation of the oil to the other parts of the world will be permitted."112 On application for review, the Commission upheld the staff finding, stating that the question of whether a commercial makes an implicit statement on a controversial issue was primarily a factual one.113 Prior to the 1974 Fairness Report, however,

109. 30 F.C.C.2d at 644-45.
110. Id. at 664.
111. Id. The pertinent excerpts from the scripts of these commercials are as follows:

Here on the North Slope of Alaska it takes 30 days to erect an oil rig, compared with a few days in Texas. Roads scarcely exist. In winter when sealanes are choked with ice, all equipment must be flown in. The freight bill for the first North Slope wells was nearly a million dollars, with no guarantee of finding oil. Is it worth the risk? We at Jersey think so, both for us and for you. The Alaskan oil strikes are big, but so is America's need for energy. . . . If America's energy supply is to be assured in this unpredictable world the search for domestic oil must go on and fast. . . . Experience . . . has shown . . . not only how to look for oil in the far North, but to look for ways to preserve the ecology. To protect the swans and geese and ducks that return each year to nest and raise their young. And to avoid disturbing the migration and grazing habits of reindeer, caribou and other wildlife. By balancing demands of energy with the needs of nature they're making sure that when wells are drilled or pipelines built, the life that comes back each year will have a home to come back to.

Now we believe we know how to restore disturbed tundra to help create a better balance between the need for oil and the needs of nature.
Id. at 643.
112. Id. at 646. The licensees argued that the ads did not discuss controversial issues, but merely sought to create public goodwill for the corporation. Id. at 644.
113. 31 F.C.C.2d 729, 732 (1971). The Commission stressed that it was not attempting to discriminate between institutional and standard product advertising, but that the fairness doctrine would apply to any advertisement which dealt with one side of a controversial issue. Id.

However, the Commission concluded that the licensees in question had given reasonable coverage to the antipipeline point of view in their overall programming. Id. at 733. So, while the conservationists did not prevail in Esso, they established the principle that institutional advertisements, such as the Esso commercials involved in the instant case could raise fairness doctrine obligations.
other Commission decisions in this area were not so clear on the applicability of the fairness doctrine to advertorials.114

B. The 1974 Fairness Report

The 1974 Fairness Report cited the Esso case as an example of institutional advertising which, by seeking to present a favorable public image of the sponsor, may make an indirect statement on a controversial issue of public importance.115 The 1974 Fairness Report stated that such advertisements will be subject to the fairness doctrine if they represent a “meaningful contribution to the public debate.”116 Although there is language in the 1974 Fairness Report addressed to the advertiser’s intentions,117 the Commission explicitly adopted an objective, rather than subjective, test for the “obvious and meaningful” standard:

[W]hat we are really concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser’s actual

114. For example, in Center For Auto Safety, 32 F.C.C.2d 926 (1972), the complainant alleged that a two-minute automobile commercial containing a twelve-second reference to “air bags” portrayed the air bags as being complicated, costly, and unreliable. Id. at 926–27. The Commission staff decided preliminarily that the commercial in question did trigger fairness doctrine obligations because of the explicit reference to air bags. Id. at 931. The opinion stated:

The applicability of the fairness doctrine should not be denied merely because a reference to a controversial issue of public importance may have been a brief one.

... Moreover, the reference in the Ford announcement does not appear to be neutral in tone, nor does the fact that air bags may relate to the broad subject of auto safety prevent the air bag issue from also being a separate issue. Therefore, we hold that the fairness doctrine is applicable to the subject of air bags as raised in the Ford commercials.

Id. However, it was determined that the licensees had fulfilled this obligation during its overall programming. Id. at 932.

On the other hand, the complaint in Wilderness Society (Weyerhauser), 41 F.C.C.2d 103 (1973), was dismissed. In this case, the complainants alleged that Weyerhauser’s commercials indirectly presented the sponsor’s point of view that clearcutting of forests was socially and environmentally desirable. Id. at 103–04. It was requested that the licensee be ordered to air spot announcements editorializing about the harmful ecological effects of clearcutting. Id. However, the Commission never reached the merits of these allegations, dismissing the complaint for the failure to state any factual basis for the claim that the licensee failed to present opposing viewpoints on the clearcutting issue. Id. at 104–07, citing Allen C. Phelps, 21 F.C.C.2d 12 (1969). The complainants had documented that the licensee had not shown any spot countermercials presenting the anti-clearcutting point of view, but the Commission stated that it was the broadcaster’s overall programming which determined whether or not there were fairness doctrine violations. Id. at 107–08.

Since Wilderness Society (Weyerhauser) was decided on procedural grounds and Center for Auto Safety, for all its brevity, was arguably a “direct” controversial statement, (see note 107 supra), Wilderness Society (Esso) remained the only FCC statement of import in this area prior to the 1974 Fairness Report.

115. 1974 FAIRNESS REPORT, supra note 13, at 23.

116. Id. at 22. For a full statement of this rule, see note 92 and accompanying text supra.

117. 1974 FAIRNESS REPORT, supra note 13, at 23. The Commission did state that “[i]n some cases, however, the advertiser may seek to play an obvious and meaningful role in public debate. In such cases, the fairness doctrine ... applies." Id. (emphasis added).
intentions. Accordingly, we expect our licensees to do nothing more than to make a reasonable, common sense judgment as to whether the “advertisement” presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. . . . If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the fairness doctrine would clearly not be applicable.118

Unlike the controversial standard product commercials, there are good policy reasons for why the fairness doctrine should be applied to the advertorial.119 There remains, however, concern about the potential scope of the new test.120 It is submitted that what is crucial is not so much the conclusory categorization of a given commercial, but upon what set of facts the Commission will be willing to find an “obvious and meaningful” statement in an advertisement sufficient to trigger fairness doctrine obligations.121

C. The Post-Fairness Report Cases: Fairness Revisited and Required

The Commission’s initial opportunity to apply the “obvious and meaningful” rule to institutional advertisements arose from complaints lodged against commercials for public utility companies.122 The first complaint was brought against certain Atlanta television licensees who had

118. Id. (emphasis added). Prior to the issuance of the 1974 Fairness Report, Professor Jaffe had suggested a subjective test:

It is not easy to formulate a fully satisfactory rule for applying the fairness doctrine to advertising . . . . The advertiser may avoid the explicit precisely to foreclose a claim to rebuttal, or because he believes the subliminal is more effective. It should suffice to trigger the doctrine that by implication he intends to speak to a current, publicly acknowledged controversy. Jaffe, supra note 11, at 777-78. The Commission indicated that Professor Jaffe’s suggestion came “close to the mark,” but the Commission preferred an objective standard for its new test. 1974 FAIRNESS REPORT, supra note 13, at 323. Professor Jaffe himself admitted that “[i]n the present inflamed state of public opinion, even this ‘intention to address’ limitation may create problems.” Jaffe, supra note 11, at 778 n.43.

119. See Comment, supra note 25, at 1427. As the author therein states: “Advertorial messages are controversial almost by definition; there is little question that they should trigger the fairness doctrine. . . . These television messages can fairly be characterized as political advertisements with a profit motive; it would be strange to shield the advertisements from the fairness doctrine because of that motive.” Id.

120. Simmons, supra note 40, at 1105. As the author stated:
The FCC’s new “substantial and obvious” wording should be strictly construed. Deciding whether an institutional advertisement raises an issue of public importance is simply too difficult a task, and the potential for increased FCC interference with broadcasters’ freedom is too great a danger to tolerate a loose and activist construction of the new definition.

121. See notes 92 & 93 supra.

broadcast Georgia Power Company advertisements while the Georgia Public Service Commission was holding public hearings on a proposed rate increase for the utility.\textsuperscript{123} One such advertisement declared: "In today's economy, it just isn't possible to provide electricity at pre-inflation rates."\textsuperscript{124} The Commission's opinion, written before the 1974 Fairness Report, stated that this statement "[c]learly . . . advocated Georgia Power's position on the rate increases in question."\textsuperscript{125} In a subsequent opinion on the matter written following the adoption of the 1974 Fairness Report, the Commission adhered to its guidelines and stated that these commercials made direct and specific statements in favor of the pending rate increase.\textsuperscript{126}

The complaint in the second case alleged that Pacific Gas & Electric Company (PG\&E) commercials portrayed nuclear power plants as environmentally safe and economical, while characterizing other energy sources as either already developed, costly, scarce or experimental.\textsuperscript{127} These commercials were broadcast at the time when Californians were being asked to sign referendum petitions to halt the construction of nuclear power plants.\textsuperscript{128} The complainants therefore asserted that these advertisements were obvious and meaningful statements advocating the immediate construction of nuclear power plants.\textsuperscript{129} The Commission held that these commercials presented one

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\item Media Access Project, 44 F.C.C.2d 755, 760 (1973).
\item \textit{Id.} at 761.
\item \textit{Id.} The Commission also found that commercials broadcast for the Georgia Power Company (GPC) triggered the fairness doctrine. \textit{Id.} For example, one advertisement stated: "An increase in price will help us borrow the money that's needed, and keep power flowing." \textit{Id.} In a decision reminiscent of Neckritz (Chevron), the Commission also concluded that GPC's advertisement, stressing its efforts at environmental protection did not implicitly state any controversial position on air and water pollution. \textit{Id.} at 759. For a discussion of Neckritz (Chevron), see notes 68–79 and accompanying text supra.
\item \textit{Id.} at 761.
\item Fuqua Television, Inc., 49 F.C.C.2d 233, 235 (1974). If by this observation the Commission was identifying these ads as "editorials paid for by the sponsor" in which a direct statement is made, as opposed to the institutional advertisement in which a position is not taken directly, but inferentially, then it is submitted that the Commission here misapplied its test. See \textit{1974 Fairness Report}, supra note 13, at 22–23; see notes 106 & 107 supra. While the result in this case would not have been any different, application of the correct test would not have deprived the communications bar of a discussion of the new "obvious and meaningful" test.
\item The Commission identified the controversial issue of public importance at stake as the proposed GPC rate increase. 49 F.C.C.2d at 234. GPC's advertisements did not assert that "we are in favor of the proposed rate increase," or that "the proposed rate increase would be in the public interest." These are the kind of direct statements normally associated with editorials. \textit{1974 Fairness Report}, supra note 13, at 22. Instead, GPC's advertisements referred, \textit{inter alia}, to the costs of capital expansion and the effect of inflation on interest rates in such a manner that one could draw the inference that GPC favored the rate increase. 49 F.C.C.2d at 234–35. As a result, by calling these statements "direct" when, it is submitted, the position was advocated only inferentially, the Commission was thereby relieved of any discussion of the new "obvious and meaningful" test.
\item Nevertheless, the complaint was dismissed due to a finding that the licensee in question had afforded a reasonable opportunity in its overall programming for the presentation of views opposing the rate increase. \textit{Id.} at 237.
\item \textit{Id.} at 495.
\item \textit{Id.} at 496, 513.
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side of a controversial issue, and therefore triggered fairness doctrine obligations. As the Commission stated: "It is clear that each of the PG&E 'nuclear power' announcements directly addressed the issue of the desirability of the immediate implementation of nuclear power and addressed the interrelated issues of the safety and environmental cleanliness of nuclear power."

In 1977, the Commission's most important decision in this area was handed down in Energy Action Committee, Inc. In contrast to the two cases above, the Commission in this decision made a thoughtful analysis of the standards for applying the "obvious and meaningful" test to institutional advertisements. In Energy Action Committee, several Washington television licensees broadcast commercials of Texaco, Inc., which allegedly editorialized against the divestiture of major oil companies by claims of consumer benefit from its vertical integration. The complainants asserted that the licensees had violated the fairness doctrine by not broadcasting the pro-divestiture viewpoint. The licensees contended that the ads did not address the divestiture issue in an obvious and meaningful way, and therefore had only a tenuous relationship to the public

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130. Id. at 513.
131. Id. Again, however, through the use of imprecise language, the Commission seemed to be placing these advertisements in the category of "overt editorial advertisements" consisting of "direct and substantial commentary," rather than in the category of institutional advertisements which inferentially raise controversial issues. Id. See note 126 supra. In Public Media Center, both the complainants and the Commission discussed the case in terms of the "obvious and meaningful" test. 59 F.C.C.2d at 513. However, a recital of pertinent parts of the advertisements by the Commission revealed that the obvious and meaningful inference to be drawn from the advertisement was that construction of nuclear power plants is good public policy, even though the PG&E ads nowhere directly advocated such a position. Id. at 523–24. Once again, however, the complaint was dismissed upon a later finding that the licensees in question had made good faith efforts to present viewpoints opposing nuclear power plant construction. Public Media Center, 40 P & F RADIO REG. 2d 539 (1977).
133. For a discussion of the shortcomings of Media Access Project and Public Media Center, see notes 126 & 131 supra.
134. 40 P & R RADIO REG. 2d at 525–30. See notes 139–142 and accompanying text infra.
135. 40 P & R RADIO REG. 2d at 512–13.
136. Id. The advertisements never mentioned the word "divestiture," but rather commented obliquely on the consumer benefits of vertical integration in the oil industry. Id. Against a visual display of pieces of a puzzle, each representing a phase of the oil business falling into place, the voice on the commercial said:

To get you the gasoline and oil you need, a lot of complex pieces must come together very efficiently. Such as finding oil in places where no one has discovered it before, constructing huge pipelines, building complex refineries . . . , supplying these products to thousands of outlets in cities and towns and rural areas across the country. . . . Fortunately, an oil company like Texaco is in all phases of the business so it can link the complex parts together efficiently and economically. It took a great many years to build this organization and it's these various pieces working together that permits a company like Texaco to do its job for you.

Id. at 513.
divestiture debate. The licensees, in effect, argued that the advertisement's position on divestiture was so vague that it could be drawn only by "unnecessary inference."

The Commission noted that a position can be stated without explicit mention of the ultimate issue in controversy, and stated the following test to determine whether or not a statement made inferentially would trigger fairness doctrine obligations:

Most important, it must be reasonably evident that the commercial contributed to the public's understanding of the controversial issue cited in the complaint. To reasonably judge whether an ad advocates a position on a controversial issue of public importance, a licensee therefore must first look at the ad and then to the nature and substance of the ongoing public debate.

Applying that test to the Texaco advertisement, the Commission found:

The ad ties together facts and statements in an attempt to justify the view that it is in the public's interest for one such company to be in all phases of the oil industry. . . . The assertions made therein concerning the economy and efficiency of vertical integration go to the very essence of the divestiture issue. We do not believe that it is reasonable to conclude that the ad discussed the economy and efficiency only of Texaco's operation and not of the entire oil industry.

137. Id. at 524. The licensees identified the commercials as an "institutional message relating to the desirability of Texaco's operation," and patterned their argument around the language used by the Commission in the 1974 Fairness Report dealing with institutional advertising. Id. For the Commission's description of institutional advertisements which would raise fairness doctrine obligations, see note 106 supra. Some of the licensees had also contended that divestiture of the major oil companies was not a controversial issue of public importance, but the Commission summarily rejected this argument as unreasonable. 40 P & F RADIO REG. 2d at 523.

138. 40 P & F RADIO REG. 2d at 525. See 1974 Fairness Report, supra note 13, at 23. The licensees argued:

[I]t would have been different . . . if the commercial had stated that only through the common ownership of various elements may economy and efficiency in the oil industry be achieved. But the spot didn't say that. . . . [T]he spot stated that Texaco achieved economy and efficiency through its operation of various elements in the oil industry.

139. 40 P & F RADIO REG. 2d at 525, citing Wilderness Society (Esso), 30 F.C.C.2d 643, aff'd, 31 F.C.C.2d 729, reconsideration denied, 32 F.C.C.2d 714 (1971). For a discussion of Wilderness Society, see notes 108-113 and accompanying text supra. In discussing the issues in this manner, the Commission avoided the careless "direct and substantial" language used in Media Access Project and Public Media Center. See notes 126 & 131 supra. Consequently, Energy Action Committee was the Commission's first major statement of import analyzing the "obvious and meaningful" test when applied to institutional advertisements carrying implied statements on controversial issues. For the Commission's analysis, see 40 P & F RADIO REG. 2d at 525-30.

140. P & F RADIO REG. 2d at 525.

141. Id. at 527.
Commissioner Margita E. White, in a thoughtful dissent, stated that the majority was incorrectly focusing on the advertiser's subjective intent, when the proper test was the reasonableness of the licensee's judgment on the commercial's objective meaning.\textsuperscript{142}

\textit{Energy Action Committee} was certainly a difficult case.\textsuperscript{143} The Texaco advertisements explicitly asserted that due to its vertical integration, Texaco was benefitting its customers by its efficiency.\textsuperscript{144} Does this contain an implied statement — in an "obvious and meaningful" manner — that divestiture of the major oil companies would be bad public policy? Notwithstanding the Commission's attempt to enunciate an "objective" test in the 1974 \textit{Fairness Report},\textsuperscript{145} it is probably true, as Commissioner White pointed out in her dissent, that "the judgment as to whether an institutional advertisement addresses . . . an issue in an obvious, meaningful and substantive manner is . . . subjective."\textsuperscript{146} The important question then becomes what degree of restraint the Commission should exercise in imposing fairness doctrine obligations on licensees in this gray area of subjectivity.\textsuperscript{147}

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\item \textit{Id.} at 530 (White, Comm'r, dissenting). Commissioner White correctly pointed out that the Commission, in the 1974 \textit{Fairness Report}, recognized that it would be extremely difficult for licensees to determine whether or not an institutional advertisement addressed a controversial issue. \textit{Id.} \textit{See} 1974 \textit{Fairness Report, supra} note 13, at 24. Commissioner White said that the Commission should review licensee judgments "only to determine their reasonableness and good faith under the particular facts and circumstances presented." 40 \textit{P & F Radio Reg.} 2d at 530 (White, Comm'r, dissenting). \textit{See}, Georgia Power Project \textit{v. FCC}, \_\_\_ \textit{F.2d} \_\_\_\_\_\_ 41 P&F \textit{Radio Reg.} 803 (5th Cir. 1977). There the Fifth Circuit, relying on that part of 1974 \textit{Fairness Report} quoted by Commissioner White, stated that the licensee's judgment in this area should be upheld unless clearly unreasonable. 41 \textit{P & F Radio Reg.} at 806.
\item \textit{Id.} at 513. \textit{See} note 136 \textit{supra}.
\item 1974 \textit{Fairness Report, supra} note 13, at 23.
\item 40 \textit{P & F Radio Reg.} 2d at 530 (White, Comm'r, dissenting).
\item \textit{Id.} It is suggested that the contrasting viewpoints on the fairness doctrine should be generally considered in relation to the essentially subjective judgments which licensees are required to make in the area of commercial advertising. \textit{See generally, Panel Discussion, supra} note 2. \textit{See also} note 11 \textit{supra}.
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V. Conclusion

Eleven years after the Federal Communications Commission's initial ruling in Banzhaf,¹⁴⁸ it can now be said that the Commission's application of the fairness doctrine to commercial advertising has been significantly limited. The 1974 Fairness Report abolished the troublesome Banzhaf rule,¹⁴⁹ which had required the allocation of scarce broadcasting time to nonrevenue producing countercommercials in response to commercials whose products had the requisite quality of being a public health hazard.¹⁵⁰ The extreme vagueness of this theory, which entrapped the D.C. Circuit¹⁵¹ and the Commission¹⁵² in illogical line drawing, and its potential for destroying the financial system of broadcasting,¹⁵³ made it inevitable that Banzhaf would eventually be abandoned.

Under the Commission's new rule, fairness doctrine obligations do not arise unless the commercial contains an inferential statement on a controversial issue which, when judged objectively, makes an "obvious and meaningful" contribution to public debate.¹⁵⁴ Although the "obvious and meaningful" test was to apply to all commercials which did not make explicit statements on controversial issues,¹⁵⁵ the Commission in the 1974 Fairness Report seemed to indicate that such statements might be found in institutional advertisements, but almost never in standard product commercials.¹⁵⁶ While it is the "obvious and meaningful" test itself which is important, and not the "institutional advertisement" or "standard product

Nevertheless, it remains true, as pointed out in the introductory quote to this Comment, that commercial advertising may raise first amendment issues. Recently, the Supreme Court stated:

[S]ociety also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest. . . . Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976). The existence of the constitutional element does not resolve the dilemma, but it does make the stakes higher for both broadcast licensees and those demanding access to the airwaves via the fairness doctrine. For an attempted resolution of this conflict in favor of broadcast licensees, see National Citizens Comm. for Broadcasting v. FCC, not 93 supra.

¹⁴⁸. For a discussion of Banzhaf, see notes 28–42 and accompanying text supra.
¹⁵⁰. See text accompanying note 42 supra. For a discussion of the importance of the public health factor, see note 42 supra.
¹⁵¹. For a discussion of this problem in the D.C. Circuit, see notes 64 & 65 supra.
¹⁵². For a discussion of the Commission's problems with this theory, see notes 47–53 and accompanying text supra.
¹⁵³. See text accompanying note 20 supra. See also Friends of the Earth, 24 F.C.C.2d 743, 748–49 (1970). See generally H. Geller, supra note 2, at 87; Simmons, supra note 40, at 1111.
¹⁵⁴. 1974 Fairness Report, supra note 13, at 23.
¹⁵⁵. Id. at 22–26.
¹⁵⁶. Id.
commercial" designation,\textsuperscript{157} the history of cases in this area has yet to yield an exception to these categorical formulations.\textsuperscript{158}

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\textsuperscript{157} For an analysis of the Commission's test, see notes 92 & 93 supra.

\textsuperscript{158} The post-1974 \textit{Fairness Report} cases which have found no fairness doctrine violations have all involved advertisements which would be called "standard product commercials," as they sought only to sell the product. See, \textit{e.g.}, Citizens for Clean Air, 56 F.C.C.2d 313 (1975); Sierra Club, 45 F.C.C.2d 833 (1974); Peter C. Herbst, 48 F.C.C.2d 614 (1974). See notes 100-103 and accompanying text \textit{supra}. On the other hand, all of the post-1974 \textit{Fairness Report} cases in which the fairness doctrine was found to be violated involved "institutional" advertisements because they sought primarily to present a favorable public image of the seller. See, \textit{e.g.}, Energy Action Committee, 40 P & F \textit{Radio Reg.} 2d 511 (1977); Public Media Center, 50 E.C.C.2d 494 (1976); Media Access Project, 44 F.C.C.2d 755 (1973), \textit{dismissed sub nom.} Fuqua Television, Inc., 49 F.C.C.2d 233 (1974). See notes 122-147 and accompanying text \textit{supra}. 

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