dlm

Decision No. 85823

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ELEANOR B. BOUSHEY, customer of the Pacific Gas and Electric Company, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Defendant.	Case No. 9455
ELLEN STERN HARRIS, stockholder and customer of the Southern California Edison Company, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation, Defendant.	Case No. 9456
SHERMAN W. GRISELLE, customer of the Southern California Edison Company, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation, Defendant.	Case No. 9457

ORDER DENYING REHEARING AND RESCINDING

DECISION NO. 84485

On June 13, 1975, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison) filed separate petitions for rehearing of Decision No. 84485, issued on June 3, 1975. The effective date of Decision No. 84485 was June 23, 1975. However, since the above-described petitions for rehearing were filed ten days prior to the effective date of Decision No. 84485, the decision was stayed.

By Decision No. 84768, issued on August 5, 1975, the Commission extended the stay of Decision No. 84485 until further order of the Commission. The sole purpose of the extension of the stay was to allow the Commission time to consider adequately the contentions raised in the petitions for rehearing of Decision No. 84485.

PG&E and Edison (petitioners) allege that Decision No. 80711, which dismissed the complaints herein, is final and not subject to readjudication; that the complaints should have been dismissed for failure to state a cause of action, since the facts stated therein showed no violation of any existing law or order or rule of the Commission; that the Commission lacks jurisdiction, power or authority to order the utilities to desist from including any political material in any mailing charged wholly or partly to operating expenses; that Decision No. 84485 is not supported by the evidence and is without statutory justification; that Decision No. 84485 denies the utilities the right of free speech and equal protection; and that the scope of Decision No. 84485 is unlawfully broad, thereby denying defendants due process of law.

By Decision No. 84485, the Commission ordered that PG&E and Edison desist from including any political material in any of their mailings charged in whole or in part to operating expenses. For the purposes of D. 84485 political material includes:

> "... any publication, article, letter, cartoon, or other communication which: (1) Supports or opposes any candidate for political office. (2) Supports or opposes any state or local ballot proposition which appears on the ballot in any election in the State of California. (3) Supports or opposes the appointment of any person to an administrative or executive position in federal, state, or local government. (4) Supports or opposes any change in federal, state, or local legislation or regulations."

On January 1, 1976 Section 453(c) of the Public Utilities Code became effective. The statute provides as follows:

> "No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations."

In light of the enactment of Section 453(c) of the Public Utilities Code the Commission believes that Decision No. 84485 is now moot. Therefore, we shall rescind the decision.

The California courts have held that where future, rather than past action is involved (as in the case of an injunction prospective in effect), a law passed during the pendency of an appeal has been given effect. (Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal. 2d 489, 526 (1935); see also Ball v. American Trial Lawyers Assn., 14 Cal. App. 2d 289, 305 (1971)). In D. 84485 the Commission issued a cease and desist order prospective in effect. However, the decision has been stayed since the date of issuance. Since the issuance of D. 84485, Section 453(c) has become effective. The Commission is bound to enforce the statute. Therefore, any discussion by the Commission of Decision No. 84485 would merely constitute an academic exercise.

dlm 9455 et al.

IT IS ORDERED that

1. Decision No. 84485 is hereby rescinded.
2. Rehearing of Decision No. 84485 is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 11th day of MAY, 1976.

President

Commissioners

I will file a concurring opinion
William Symons Jr.

I concur to the denial of rehearing but I feel the Commission should have modified its original decision as was done in the alternate rather than rescinding its order.

Commissioner

I will file an opinion concurring in part and dissenting in part

C. 9455)
C. 9456) D. 85823
C. 9457)

COMMISSIONER WILLIAM SYMONS, JR., Concurring in Part and Dissenting in Part

COMMISSIONER VERNON L. STURGEON, Concurring in Part and Dissenting in Part

We clearly agree that Decision No. 84485 should be rescinded. It was a bad decision from the start.

Here, an agency of the state had imposed a ban on PG&E and on Southern California Edison prohibiting the expression of the utilities' views to its customers in a convenient and common-sense manner, even where there is found to be no expense burden experienced by the customer. Faced with the question of interference with First Amendment rights to free speech, the majority failed to give a rational explanation requiring such a ban, much less a compelling state interest.

But that decision has done its mischief. Rescinding the order does not remedy the wrong. Perhaps emboldened by the majority's initial foray into censorship, the Legislature wrote most of the operative language of Decision No. 84485 into state law. Public Utilities Code 453(c). It is true that the decision and the statute use a different classification for when the ban will apply: the Commission uses "mailings which are charged in whole or in part to operating expenses," as opposed to the new Public Utilities Code Section 453(c) which uses "bill for services or commodities furnished any customer or subscriber." Yet, the Commission-authored definition of "political" speech to be banned is used verbatim:

> "...any publication, article, letter, cartoon, or other communication which: (1) Supports or opposes any candidate for political office. (2) Supports or opposes any state or local ballot proposition which appears on the ballot in any election in the State of California. (3) Supports or opposes the appointment of any person to an administrative or executive position in federal, state, or local

government. (4) Supports or opposes any change in federal, state, or local legislation or regulations."

Rescission, based on mootness is not accurate, but it is a convenient cover for the majority to finesse the defendants into a difficult position. How will the defendants now obtain judicial review of their rights to free speech? This record is lost to them. The posture we have put each of these utilities into is intimidating to the full exercise of its free speech rights, for it means provoking a confrontation with the law: a court test of the new statute. This is extremely difficult for a large and visible institution to do, particularly when the presumptions of public opinion and law run with the statute, until the day it is overturned.

We conclude that it would require a heroic choice to raise such a challenge; we understand that business judgments are properly and generally made within the realm of the prudent and the practical. Therefore, no challenge is likely, and regrettably so, for an important delineation as to free speech rights will be lost.

We believe that the state's prohibition under the circumstances -- whether by act of this Commission or of the Legislature -- to be an unconstitutional interference with the right of free speech. We stand fully behind the analysis contained in our dissent[1] to Decision No. 84485 dated June 3, 1975, appended as Attachment "A" hereto.

San Francisco, California
May 11, 1976

William Symons, Jr.
WILLIAM SYMONS, JR.
Commissioner

Vernon L. Sturgeon
VERNON L. STURGEON
Commissioner

[1]The following cases referred to in the dissent were published subsequently in the United States Supreme Court Reports and now bear these citations: Jackson v Metropolitan Edison Co. (1974) 419 US 345, 42 L Ed 2d 477 (Dissent p. 13); Miami Herald Publishing Co. v Tornillo (1974) 418 US 241, 41 L Ed 2d 730 (Dissent, pp 18 and 21); Lehman v City of Shaker Heights (1974) 418 US 298, 41 L Ed 29 770, (Dissent pp 18 and 20)

C. 9455)
C. 9456) D.84485
C. 9457)

COMMISSIONER WILLIAM SYMONS, JR., DISSENTING

COMMISSIONER VERNON L. STURGEON, DISSENTING

The majority inadequately treats the constitutional issues raised in the consolidated cases before us. We would analyze and resolve the case as follows:

Concern for Free Speech Rights

By Decision No. 81660 the Commission reopened this case for "a more thorough examination" of issues which are admittedly difficult, complex, and involving broad consideration of its regulatory authority. As the original decision (Decision No. 80711) cautions, complainants' demand "raises serious issues containing freedom of speech and of the press".

In the name of the First Amendment complainants urge that the Commission compel action which the two private utilities protest as drastic interference with their rights to free expression guaranteed by the same First Amendment.

Complainants assert with regard to any intended written communication by the utility to its customer which contains in any part a political comment and a bill, the Commission must (1) ban any comment of political content from the mailing, or alternately (2) promulgate an access doctrine requiring the utility to include alternate political statements even if the utility is not in agreement.

The First Amendment to the United States Constitution, as made applicable to the states under the due process clause of the Fourteenth Amendment, provides that no state agency shall make any law or rule "...abridging the freedom of speech, or of the press..." of any person.

Pacific Gas and Electric Company and Southern California Edison Company are private corporations. Even though the fact of regulation may make certain of their activities, state action within the purview of the Fourteenth Amendment, they are not precluded from advancing their corporate interests in accordance with law. They, too, have First Amendment rights to assert their corporate positions. (Grosjean v American Press Co. (1935) 297 US 233, 244; Seiden v PG&E (1972) 73 CPUC 419.)

ATTACHMENT "A"

The Record

The record indicates that defendant Pacific Gas and Electric Company (PG&E) mails monthly to each of its customers a newsletter called "PG&E Progress"; the newsletter is sent together with the customers' monthly bill in the same envelope. Additional printed materials, such as PUC hearing notices or energy conservation inserts are enclosed on some occasions. The utility shareholders pay the cost of the newsletter publication and costs are not claimed as an expense in rate proceedings (see Decision No. 47832, October 15, 1952); general costs of the monthly mailing are recognized as operating expense in rate proceedings. Articles in the first three pages of the October 1972 issue of "PG&E Progress" dealt specifically with a potential crisis in electrical energy supply and major opposition arguments to the California Coastal Zone Conservation Act Initiative--Proposition 20--were expressly mentioned. Defendant Southern California Edison Company (Edison) does not have a similar newsletter. On or about September 15, 1972, Edison included along with its bimonthly bill to its customers a letter published at its shareholders' expense from its president opposing Proposition 20.

Complainants called upon each of the utilities to distribute material by the proponents of Proposition 20, at each utility's expense, to those customers who had received defendant's comments, and called upon defendants to immediately cease distributing the material commenting on Proposition 20 to those who had not. Each of the utilities refused these demands.

The record is devoid of any evidence which would indicate that Edison ever offered to or actually transmitted any material for another party in its billing envelope. Similarly, there is no evidence that PG&E ever offered to or actually accepted advertisements or messages from another party in its Progress.

Position of the Parties

Complainants contend that the practice of political comment in this manner by the utilities is unlawful discrimination against them and that under the Public Utilities Code and general regulatory principles the Commission should prohibit the complained of activity. Complainants further contend that defendants, as public utilities, perform a governmental or public function; that the regulation of the defendants by the State is pervasive; that defendants are state-protected monopolies; and that the actions of defendants constitute state action within the purview of the Fourteenth Amendment. Complainants next contend that the First Amendment right of free speech encompasses the right to receive information and the right of access to public forums to disseminate information. Complainants designate the envelope which contains a customer's periodic utility bill and any other enclosures therein as a "billing packet". They assert that the billing mailings became public forums when the defendants included therein political statements designed to influence the public's vote in an election. Complainants urge that defendants be restrained from utilizing the billing mailing for political purposes and that if it is so used, the Commission order the defendants to include, at defendants' expense, a statement setting forth the proponents' position on the political issue.

The defendants contend that they are lawfully expressing themselves on public issues under their right to free speech. Defendants maintain that the mere fact they operate as regulated public utilities is not sufficient to make their activities state action. Defendants also contend that the inclusion of the complained of material along with customers' bills did not make the billing envelope a public forum. Defendants further assert that these proceedings are governed by the Commission's decision in Seiden v PG&E (1972), supra, which, it is contended, precludes the granting of any relief herein.

Discussion

The material issues presented in these consolidated proceedings are:

I. The propriety of a utility including communications making its views known on matters of political and public interest in the same envelope with the bills which each utility periodically mails to its customers.

II. If the activity is found lawful, do any rights accrue to complainants by virtue of regulatory rule or law?

I. The Question of Enclosures of Utility Comments on Public Issues

Complainants would allow PG&E to continue communication via monthly issues of "PG&E Progress" inserted in billing mailing if the publication were changed so that any expression of the company's political thoughts was removed. (Complainants' Concurrent Opening Brief, p. 34.) Complainant Boushey would limit the category of permissible discussion to "noncontroversial" matter (Complaint, p. 4). Complainant did not define what is encompassed by the classification "noncontroversial".

In California, there is no law which prohibits a privately-owned business from distributing to its customer with its bill for services or goods, a message, be it commerical or political in nature. For example, American Express may insert announcements as to goods for purchase or a doctor may enclose a statement on National Health Act proposals. Even publicly-owned transit enterprises with "monopoly" features have been known to display political, as well as commercial, advertisements placed by third parties on their transit vehicles. Our Supreme Court has not prohibited such practice, but did require that all third parties must be treated equally. (Wirta v AC Transit (1967) 68 C 2d 51.)

Here, we have not a case of commercialization, with access to third parties but rather the companies expressing their own political views to the customers via letter insert (Edison) and Newsletter (PG&E) sent with their bills.

For the state, through its Public Utilities Commission, to ban such activity absent a showing of compelling state interest would unconstitutionally interfere with free speech rights of defendants. As the California Supreme Court instructed in Huntley v Public Utilities Commission (1968) 69 C 2d 67 at p. 73:

> "The Commission correctly asserts that freedom of speech is not absolute. However to justify any impairment, there must be compelling state interest... [which] justifies the substantial infringement of appellants' First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" (Citations omitted.)

The Commission exercises heavy regulation and control over defendants in those areas which affect defendants' service to customers or rates,[1/] yet as any institution wielding governmental power it must be properly circumspect when approaching the field of restraining free speech. As the Supreme Court of the United States has stated in United States v Congress of Industrial Organizations (1948) 335 US 106, p. 121:

> If Section 313 [of the Federal Corrupt Practices Act] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

1/ "The primary purpose of the Public Utilities Act...is to insure the public adequate service at reasonable rates without discrimination." (Citation omitted.) (Pacific Tel. & Tel. Co. v Public Utilities Commission (1950) 34 C 2d 822, 826.)

Since it is defendants' comment on public issues, the content of the message must be classified as that type "...undeniably protected by the First Amendment." (Wirta, supra, p. 54.) As we are advised by the California Supreme Court in Huntley v Public Utilities Commission, supra, at p. 72:

> "[t]he clearest abuse is an outright prohibition of constitutionally protected form of speech. . . . Regulation short of absolute prohibition is also invalid when expression is made dependent on state approval by the obtaining of a permit ...or is conditioned upon obtaining the approval of a board of censors. . . . Nor does the restriction become permissible because it merely limits the manner of expression rather than the initial right to communicate. . . . First Amendment freedoms are not only protected from patent restraints, but also from more subtle forms of governmental interference." (Citations omitted.)

In their demand for differential treatment between political and other-than-political speech, complainants have made no showing of compelling state interest justifying a ban on the first but not on the second; nor does this Commission find a rationale compelling such an order.

Complainants initially cited Public Utilities Code Section 202 as requiring this result. This section reads:

> "Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States; but with reference to passenger stage corporations operating in interstate commerce between any point within this State and any point in any other state or in any foreign nation, the commission may prescribe such reasonable, uniform and nondiscriminatory rules in the interest and aid of public health, security, * * * convenience, and general welfare as, in its opinion, are required by public convenience and necessity."

However, the citation is inappropriate since by its own terms, the portion sought to be invoked applies to passenger stage corporations, not electrical and gas corporations.

Likewise inappropriate are later citations by complainants to the Public Utilities Code Section 453, which provides:

> "No public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice of disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

and Public Utilities Code Section 761, which provides:

> "Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

(Complainants' Concurrent Opening Brief, p. 39.) These sections in context relate to rates and service, and should not be stretched to prohibit expression of political comment by utilities in a normal manner available to all other businesses and individuals.

Neither do complainants reference previous Commission rule or decision. On the contrary, the Commission has consistently held that political activity, such as the publication of "PG&E Progress", is not in violation of law. (Miller v PG&E, Decision No. 67946 dated September 30, 1964 in Case No. 7603[2]; Seiden v PG&E (1972) 73 PUC 419, 421.)

2/ In its 1964 decision, page 7, the Commission states, "The record presents no substantial factual issue, since defendant has conceded that it performs the activities complained of [political and educational activities of PG&E, including publication of 'PG&E Progress'] while asserting their propriety... [T]here is no showing that any activity complained of was in violation of any rule, regulation or order of this Commission, was improperly accounted for, or was otherwise unlawful or unreasonable."

Proceeding under an adopted Uniform System of Accounts, substantially similar to that utilized by the Federal Power Commission, the Public Utilities Commission has relegated expenditures for political activity to Account No. 426.4 and has treated that account as a "below-the-line" account; in other words, not allowing any cost to be considered as a rate-making expense. This cost analysis was sustained as reasonable by the California Supreme Court, in discussing the Commission's disallowance of costs for legislative advocacy in setting rates for a public utility communication company:

> "...we agree with the general policy of the Commission that the cost of legislative advocacy should not be passed on to the ratepayers and find the disallowance proper." (Pacific Tel. & Tel. Co. v Public Util. Com. (1965) 62 C 2d 634, 670.)

The historical policy of the Commission is stated in Pacific Gas and Electric Co. (1952) 52 CPUC 111, 119, as follows:

> "It is the Commission's practice in arriving at expense to be allowed for rate-making purposes to exclude...expenditures for political purposes... Thus such expenditures...come out of the stockholders' portion of earnings and are not a burden on the ratepayers." (Emphasis added.)

And the record in this case indicates that no costs or burdens have been passed on to the ratepayers.

Yet, for this one issue, complainant would have us abandon standard cost/burden analysis and embark on a "benefit" analysis to support the banning of the communication complained of in the utilities' periodic mailings. No citations for this significant conceptual departure are given, either to Commission rulings or court decisions.[3/]

3/ We note that the term "benefit" is used in C. F. Stahl (1965) 64 CPUC 405, 408, but the case is inapposite. There, in an unprotested application for a charter-party permit, the Commission found that a so-called "free" bus ride for potential customers by a skating rink proprietor to his place of business, where he charged admission, was "for compensation" in that part of the economic benefit derived from the admission charge was imputed to the transportation service, thus bringing such service under provisions of the Public Utilities Code.

Under the beguiling slogan of avoiding a "free ride" to the utilities, the complainants advance their novel theory and obscure the fact that no increased cost is being created or is being transferred to the ratepayers. Complainants are disturbed at the fact that utility companies in their proprietary relationship with their customers, maintain, in the regular course of business, periodic contact by means of mail billing procedures and are able to avail themselves of otherwise unused postal weight allowances by sending with the bill additional written materials. Whether this material is a Public Utilities Code Section 454 notice of rate increase application, a newsletter to customers, or a conservation reminder, we judge the practice to be sensible conduct on the part of management since it avoids the generation of totally unnecessary costs for envelopes, handling, and postage of a second mailing. In the instant case, undisputed testimony is that one mailing to Edison customers using such inserts prevents $200,000 in new costs from coming into existence.

We do not think it reasonable to require the elimination of this common sense efficiency. We are particularly constrained not to single out those occasions in which company communications contain expressions of political comment as the time to invoke this "make-expense" doctrine. The most predictable and readily foreseeable consequence of requiring a second mailing will be its chilling effect on discussion of vital public questions and exercise of free speech by the utilities.

The cost alone will establish a monetary threshold under which it is unlikely that issues involving minor sums or issues concerning more remote interests will henceforth be discussed.

Additionally, in the case when a company operates under an imposed ban on certain speech and continues to use the single mailing to communicate with its customers, it will have to exercise self-censorship lest a complaining party bring it before the Commission

for violating the ban. In screening material from their newsletter, prudence would normally dictate a policy to interpret the unpermitted speech definition on the cautious side and could be expected to have an additional dampening effect on what is said. The requested special rule of this Commission would in effect regulate, burden, and restrain political speech, while allowing all other forms of speech free and unfettered expression. We consider this result anomalous in view of the favored position political speech holds. (Wirta v AC Transit (1967) 68 C 2d 51, 57; In re Porterfield (1946) 28 C 2d 91, 101.)

The importance of public issues in the energy area such as future energy supply, nuclear power generation, priority for energy use, all benefit by free and full discussion. It is in the public interest to promote discussion, not reduce it. No good purpose is served by adopting complainants' theory and moving to hinder or close down a reasonable avenue of communication between the company and its customers. The Commission, having received no evidence from complainants of any increase in costs borne by the ratepayers as a result of defendants' activities, and having received no argument from complainants of compelling State interest necessitating the interference in defendants' activities in expressing its views to its customers, has no reason to ban or enjoin defendants' activities which are within the law and our prior decisions.

II. The Question of State Action and Right of Enforced Access

Complainants argue, alternately, that if utilities are permitted to continue their activity, complainants, being the holders of political views opposite to those being expressed by the utilities, have the right of access to the billing mailing to express complainants' views - this right assertedly being derived under the provisions of the United States and State of California Constitutions.

They quote as their authority:

"Congress shall make no law...abridging the freedom of speech..." (U.S. Constitution, First Amendment.)

"No State shall...deny to any person within its jurisdiction the equal protection of the laws." (U.S. Constitution, Fourteenth Amendment.)

"Every citizen may freely speak, write, and publish his sentiments on all subjects...and no law shall be passed to restrain or abridge the liberty of speech..." (California Constitution, Article I, Section 9.)

"All laws of a general nature shall have a uniform operation." (California Constitution, Article I, Section 11.)

"[N]or shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (California Constitution, Article I, Section 21.)

Though both State and Federal constitutional provisions were enumerated, complainants' discussions, arguments, and case citations refer exclusively to the Federal Constitutional Amendments. We will likewise discuss these authorities inferring from complainants' procedure that the essential rights guaranteed in the State constitutional provisions are included in the two Federal Amendments cited.

Complainants espouse the view that the actions of the utilities should be evaluated as the action of the State; second, that, as an actor for the State, in enclosing a statement of their political views with the bill mailing, the utilities had created a "public forum" to which complainants' rights to access attach. Defendants take the position that they are private corporations and the fact they are subject to governmental regulation does not change the character of their activities in this instance, which defendants contend are essentially private rather than state actions.

A. The Question of State Action

There is wide difference between the parties on the question of whether the conduct of the defendants constitutes state action. As stated by the Supreme Court in Columbia Broadcasting System v Democratic National Committee (1973) 412 US 94, 115:

> "When governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question. 'Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.' Burton v Wilmington Parking Authority, 365 US 715, 722, 6 L Ed 2d 45, 81 S Ct 856 (1961)."

Not all conduct of a regulated public utility constitutes state action. (Martin v Pacific Northwest Bell Telephone Co. (9th Cir. 1971) 441 F 2d 116, cert. denied, 404 US 873.)

Complainants advance a series of contentions which, in their view, lead to the conclusion that particular conduct of defendants is state action. Applying the principles established in a series of the U. S. Supreme Court cases, the latest of which is Jackson v Metropolitan Edison Co. (1974) _____ US _____, 42 L ed 477, we find none of complainants' contentions persuasive.

The Jackson case concerned the utility termination of service upon reasonable notice of nonpayment of bills. Here, as in that case, the action complained of was taken by utility companies which are privately owned and operated, but which in many particulars of their business are subject to extensive state regulation. The court stated, pp. 483-484:

> "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, [407 U.S. 163] at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

> Public Utilities Comm'n v. Pollak, 343, U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Moose Lodge No. 107, supra, at 176."

Complainants first argue that "state action" is present because defendants provide a service of providing electricity, a "necessity of life", which it characterizes as a "public function". (Complainants Concurrent Opening Brief, p. 8.) However, the understanding of "public function" as discussed in Jackson, supra, p. 485, is "The exercise...of...some power delegated to [utility] by the State which is traditionally associated with sovereignty, such as eminent domain..."

Complainants make the claim that "...providing electric power is primarily a governmental activity which is often delegated to invester-owned corporations..." (Brief, supra, p. 11.) Yet, complainants contentions are historically inaccurate - putting the cart before the horse. Private companies existed before municipal action in this area. Complainants reference Article II, Section 19, of the California Constitution. Yet, as the California Supreme Court observed:

> "There was some doubt whether municipal corporations could acquire and operate public utilities until the Amendment to Article XI, §19 in 1911, authorizing such corporations to supply their inhabitants with light, water, power, heat, transportation and means of communications. City of National City v. Fritz (1949) 33 Cal. 2d 635, 204 P. 2d 7)."

As discussed by U. S. Supreme Court in Jackson, supra, p. 485, the operation by a private corporation of an election, town, or city park would fit powers traditionally reserved to the State, but operation of an electrical service would not.

Complainants next urge that "state action is present because...the regulation...by the state is pervasive and includes authority over use of the billing packet". (Brief, supra, p. 13.) But as the Jackson case instructs, it is not the presence of heavy regulation in general, but whether the action in question has been specifically authorized and approved.

The standard of approval is not one found in state silence on a subject or state inaction permitting a utility to employ such procedure. The state role must be more actively direct. In Jackson Metropolitan Edison had filed a tariff with the State which became effective 60 days after filing when not disapproved by the Commission. No state action was found. In the instant case, complainants have shown even less connection between the State of California and defendants' action. Since defendants are operating within state law, no tariffs have been filed as to political practices, nor are they required. The activity does not even rise to the standard cited in Jackson, supra, p. 487:

> "Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action'. At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (Emphasis added.)

Complainants finally argue that "state action" is present because of the monopoly status allegedly conferred upon each of the utilities by the State of California. The argument of monopoly status was raised in Jackson as well but the Court found it not determinative of changing utility's private action to state action. Citing the factual situations in prior cases Public Utilities Commission v Pollak (1952) 343 US 451 and Moose Lodge No. 107, supra, the Court pointed out that the monopoly features in either of these cases was insufficient to find state action.

Pollack involved broadcasting a commercial radio station with music, advertisements, and news on a monopoly bus line. As in our instant case with the transmittal of political views with the bills by a utility with a service territory monopoly, the connection between the monopoly feature and the complained-of activity provide an insufficient relationship to constitute state action. Mailing of political messages is an activity freely open to complainants. They may use the auspices of the U. S. Mails and, as opposed to the utility's customer list which contains many businesses and non-voters, complainants' message could be sent to voters from a current listing provided by the registrar of voters. Contrast this to Jackson, where the relationship between the activity complained of (a service discontinuance) and the monopoly (electrical service) were much closer and still held insufficient to constitute state action.

No argument or evidence is offered by complainants to suggest a symbiotic relationship presented in Burton v Wilmington Parking Authority (1961) 365 US 715.

In summary, following the analysis laid down in Jackson, supra, it can be said that all of complainants' arguments taken together show no more than that each of the defendants is a heavily regulated private utility, enjoying at least a partial monopoly

in providing an electrical or electrical and gas service within its territory; and that each utility communicated its own political views to its customers in a manner which this Commission finds permissible under state law. Under the rule of the U.S. Supreme Court, as laid down in Jackson, supra, this is not sufficient to connect the State of California with each of the complainants' action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

Nor is this a situation of state action analogous to the case cited by complainants of Bonner-Lyons v School Committee of the City of Boston (1973) 480 F 2d 442. (Court of Appeals, First Circuit, unreviewed by U.S. Supreme Court.)

Here, we have a private company using the mails; there, the Boston school board, a governmental agency, in one instance drafted its own political message and in the second instance selected private parties to express the view the school board favored. Further, instead of using the mails, the board used the government-owned school system in the following manner: "A message which is ready for distribution is first transmitted by telephone from the Deputy Superintendent to six area Assistant Superintendents and then by them to the individual schools in their charge. At the schools the message is typed, reproduced, and distributed to teachers who then deliver it to each individual student." (480 F 2d at p. 443, fn. 1.) The facts clearly distinguish the two situations.

B. The Question of the Right of Enforced Access

Without the determination that the private action of the utilities constitutes state action, there can be no finding of "public forum" or the enforced right of access. (Lloyd Corp. v Tanner (1971) 407 US 551, 567; Shelley v Kraemer (1948) 334 US 1.)

However, in order that a principal issue raised by complainants may be determined we will assume, arguendo, the presence of "state action" and examine whether complainant has the constitutional right to the relief requested, namely access to the billing envelopes.

Complainants argue that they have a constitutional right to include their "reply" to comments of the utilities in the same envelope, citing "public forum" cases and The Federal Communication Commission's "fairness doctrine".

We note at the outset that many major cases relied upon by complainants have been overturned, distinguished, or modified by subsequent decisions of the United States Supreme Court: 1. Business Executives Move For Vietnam Peace v Federal Communications Commission, (1972) 450 F 2d 642 overturned in Columbia Broadcasting System v Democratic National Committee (1973) 412 US 94. 2. Tornillo v Miami Herald Publishing Co., (1973) 42 U.S.L.W. 2074 overturned in Miami Herald Publishing Co. v Tornillo (1974) ___ US ___ 41 L ed 2d 730. 3. Red Lion Broadcasting Co. v FCC (1969) 395 US 367 modified in CBS v Democratic National Committee (1973), supra. 4. Wirta v AC Transit (1967) 68 Cal 2d 5 L and PUC of District of Columbia v Pollak (1952) 343 US 451 distinguished in Lehman v City of Shaker Heights (1974) ___ US ___, 41 L ed 2d 770. 5. Marsh v Alabama (1946) 326 US 501 and Local 590. Amalgamated Food Employees v Logan Valley Plaza, Inc. (1968) 391 US 308 distinguished in Lloyd Corp. v Tanner (1971) 407 US 551.

Cases establishing "public forums" possess three characteristics which we do not find present here: (1) Either the property in question is owned by a governmental agency or it was private property which had been opened to the general public for the benefit of the property owner but then denied to a particular individual or group because of the views they wished to express,[4/] (2) The free speech issue was uniquely related to the property in question,[5/] or (3) The scarcity or absence of other avenues of communication to reach the appropriate audience.[6/]

In Lloyd Corp. v Tanner (1971) 407 US 551, the Court limited such cases as Marsh v Alabama (company-owned town), supra, and Local 590 v Logan Valley, supra, to cases where exceptional circumstances would justify impairment of private property rights. In not finding a "public forum" for pamphleteering in a shopping center mall, the Court required the presence of both the second and third conditions described above before it could make such a finding.

In the instant case the property involved is not that of government but that of the utilities, and they have not opened their publications nor the billing envelope to any member of the general public. As the record indicates, there is no evidence that either utility ever accepted advertisements or messages for this mailing from third parties. In examining defendants' conduct we find expression of their own thoughts but no others. Thus, we do not have a situation where either defendant has gone into the business of accepting advertising and has tried to limit the scope thereof.

4/ For instance, Wirta v AC Transit (1966) 68 C 2d 51, the district accepted commercial and selected political advertisements from the public but refused to accept plaintiff's advertisement.

5/ Example, in Logan Valley the picketers were challenging labor practices at the shopping center.

6/ Example, in Red Lion, the court found significant the physical fact of the limited number of airwaves available.

Contrast that with Wirta v AC Transit, supra, where defendants solicited third party commercial and limited political advertisements or Lehman v City of Shaker Heights, supra, where third party commercial advertisements were present. We do not find that the exercise of first amendment rights of self-expression carries with it, by virtue of constitutional mandate, equal time or access provisions. Additionally, the issue - coastline conservation - was not uniquely related to the billing packet. Proposition 20 affected the State in general and the utility only insofar as generation and environmental protection programs may have been effected. But no significant correlation is present between proposed forum and issue, unlike the union with grievances against a particular shopping center. Further, unlike allegations in radio broadcasting and newspaper cases, the medium of communication is not affected with scarcity or special problems. The medium used is the U. S. Mails, open to all complainants and defendants alike. We are not convinced by complainants' arguments of the uniqueness of defendants' medium. The recipient is not required to read all inserts in the billing packet. Discretion not to read is amply available - unnecessary inserts can be tossed away. As Justice Douglas observed in distinguishing billboards from newspapers in Lehman v City of Shaker Heights (1974) _____ US _____ 41 L ed 2d 770, p. 780:

> "'Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement.'" (Citation omitted.)

As mentioned earlier, existence of addresses is not unique; complainants may obtain a more concentrated list of those able to affect elections from the local registrars of voters.

Complainants seem to argue that inherent in the First Amendment is a "fairness doctrine" analogous to the statutory requirement found in the broadcast field. Yet, the two cases complainants cited in this field, Red Lion Broadcasting v FCC (1969) 397 US 367 and Columbia Broadcasting System v Democratic National Committee (1973) 419 US 94, do not bear this out. Red Lion stands for the proposition that the statutorily permitted FCC "fairness doctrine" is not violative of the broadcasters' First Amendment rights. Yet, the Court noted in CBS, supra, p. 110, "...Congress' flat refusal to impose a 'common carrier' right of access for all persons wishing to speak out on public issues..." Moreover the Court notes FCC policy at p. 113, "...no private individual or group had the right to command the use of broadcast facilities." It proceeds to find no right to access on part of plaintiffs.

Complainants also rely on Florida's Supreme Court decision in Tornillo v Miami Herald Publish Co. (1973) 287 So 2d 78 which upheld the Florida "right of reply" statute which granted a political candidate a right to equal space to reply to criticisms on his record by a newspaper. The U. S. Supreme Court overturned the case in Miami Herald Publishing Co. v Tornillo (1974) _____US_____, 41 L ed 2d 730 finding the "right of reply" statute violative of the guarantees of the First Amendment. Though speaking principally to the right of free press, the application to the right of free expression in general is apt when the Court said:

> "[5] Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'...." (Citations omitted.) (41 L ed 2d 730.)

Complainants argue for a different result if the newspaper is state-supported and cite Lee v Board of Regents of State Colleges (1971) 441 F 2d 1257. (Distinguished by the U.S. Supreme Court in Columbia Broadcasting System v Democratic National Committee at 36 L ed 2d 798, fn. 23.1.) In Lee the publishers made their medium open to commercial and selected political advertisements of third parties, but such is not the fact with the utilities in the instant case who have not opened their communications to third parties, commercial or noncommercial. More appropriate is Avins v Rutgers, the State University of New Jersey (1967) 385 F 2d 151. (Cert denied 390 US 920, 19 L ed 2d 982.) The case has been cited as authority in two cases arising out of California: the Court of Appeals, Ninth Circuit, cited Avins as authority for including among a publisher's rights, the right to decide what to print, Bursey v United States (1972) 466 F 2d 1085; the U.S. Supreme Court cited Avins for the principle that "...the constitutional right of free speech has never been thought to embrace a right to require a journalist or any other citizen to listen to a person's views, let alone a right to require a publisher to publish those views in his newspaper", Pell v Procunier (1974) 41 L ed 2d 495, p. 501.

Under the facts in Avins, supra, complainant argued that editors of the law review published by a state-supported university refused to accept an article with political views unacceptable to the editors. While admitting that Rutgers is a state institution, the court found no right to enforced access arising from the First Amendment. As the court stated, "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." (385 F 2d at 153.)

We would make the following findings of fact and conclusions of law:

Findings of Fact

1. PG&E mails monthly to each of its customers a newsletter called "PG&E Progress". The newsletter is sent together with the customers' monthly bill in the same envelope.

2. Edison does not have a similar newsletter, but occasionally includes additional printed materials in the same envelope with bills.

3. Proposition 20 provided for the enactment of the Coastal Zone Conservation Act and was one of the propositions on the statewide ballot of the November 7, 1972 elections.

4. In the October 1972 issue of "PG&E Progress" some of the articles discussed the potential crisis in electrical energy supply and opposition arguments to Proposition 20 were mentioned.

5. On or about September 15, 1972, Edison included along with its bimonthly bill to its customers, a letter from its president opposing Proposition 20.

6. The cost of the publication of "PG&E Progress" and the letter from Edison's president were paid for by shareholders.

7. The mailing expenses connected with periodic billings are recognized as operating expenses in rate proceedings in determining the amounts paid by the ratepayer.

8. The combining of utility company comments on public issues with utility bills did not increase operating costs or result in a situation causing higher rates to the ratepayer.

9. A separate mailing of utility company comments and utility bills would create greatly increased costs over that of distributing the materials together. In the case of one Edison mailing, postage costs alone would approximate $200,000 in new costs.

10. Complainant Boushey demanded that PG&E stop distributing with its bills "PG&E Progress" containing PG&E's comments on Proposition 20; and further that PG&E at PG&E's expense, distribute to its customers who had received "PG&E Progress", material by complainant commenting on Proposition 20.

11. Complainants Harris and Griselle demanded that Edison stop distributing with its bills, the letter from Edison's president commenting on Proposition 20; and further that Edison at Edison's expense, distribute to its customers who had received the letter, material by complainants commenting on Proposition 20.

12. PG&E did not agree or comply with complainant Boushey's demand. Edison did not agree or comply with complainants Harris and Griselle's demand.

13. In no instance was it shown that PG&E ever offered to or actually transmitted any material for another party in its billing envelope.

14. In no instance was it shown that Edison ever offered to or actually transmitted any material for another party in its billing envelope.

Conclusions of Law

1. The Commission has jurisdiction to order reopening of these consolidated matters on its own motion and to enter an appropriate order herein.

2. The issues raised herein are not moot because they relate to potential conduct in forthcoming elections.

3. The inclusion by an individual business of written comments by that company, including political statements, with a bill to its customers is not illegal under general case or statutory law of the United States or the State of California.

4. Complainants are not precluded from general use of the mails in distributing to the electorate their views on Proposition 20.

5. No Commission rule, Commission decision, or provision of the Public Utilities Code prohibits a regulated utility from communicating its views, political or otherwise, to its customers with its periodic billing where cost of publication is borne by the shareholders and operating costs to the ratepayer are not increased thereby.

6. No compelling state interest exists which necessitates or justifies the State of California, through the agency of this Commission, from interfering with either PG&E's or Edison's activities in expressing its views by way of newsletter or letter with its bills to its customers.

7. The utilities are persons under the provisions of the Fourteenth Amendment of the United States Constitution and as such the State must safeguard the right of the utilities, as of any person, to the freedom of speech and freedom of the press guaranteed in the First Amendment of the United States Constitution.

8. The actions of the utilities do not constitute state action but are private acts of individual companies.

9. The actions of the utilities do not violate any of the complainant's rights under the United States Constitution or the California Constitution.

10. The actions of the utilities do not make their billing envelopes "public forums".

11. The actions of the utilities and the circumstances do not give rise to a right of enforced access on the part of any of the complainants to utilities' newsletters, letters, or billing packets.

12. The relief requested by complainants should be denied.

Given these facts and the relevant law, the Commission should deny the relief requested in Cases Nos. 9455, 9456, 9457.

San Francisco, California
June 3, 1975

WILLIAM SYMONS, JR.
Commissioner

VERNON L. STURGEON
Commissioner