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Decision 84 05 039 MAY 2 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, Complainant, vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, Defendant.	Case 83-05-13 (Filed May 31, 1983)

ORDER MODIFYING DECISION (D.) 83-12-047
AND DENYING REHEARING THEREOF

Applications for rehearing of D.83-12-047 have been filed by Pacific Gas & Electric Company (PG&E), California Association of Utility Shareholders (CAUS), California Public Interest Research Group (Cal PIRG), and a group of PG&E shareholders (Hannon). An amicus curiae brief in support of PG&E's application was filed by Pacific Legal Foundation (PLF). Toward Utility Rate Normalization (TURN) has filed a response to the various applications, asking that rehearing be denied. PG&E has filed a motion to strike that response as untimely and TURN has responded to that motion asking that it be denied and stricken in part. Such motions are inappropriate and will be denied.

On March 7, 1984, by D.84-03-045, we stayed D.83-12-047 until further order of this Commission so that we might consider the merits of these filings.

We have carefully considered all the allegations of legal error and the responses thereto and are of the opinion that good cause for granting rehearing of D.83-12-047 has not been shown. However, D.83-12-047 should be modified to correct errors and to clarify our intentions. Therefore,

IT IS ORDERED that:

1. D.83-12-047 is modified as follows:

   (a) The following discussion is added following page 7, mimeo.:

> "While our previous decisions on this subject have concluded that the extra space is the property of ratepayers, we should point out that our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space.
>
> "The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility--billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to recover its reasonable expenses--postage, materials, labor, overhead--from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

"Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D.93887)

"Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 20, 1982, p. 3.)--so routinely, in fact, that we have referred to extra space as being that space which is available after legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various energy conservation programs (D.92653) and conservation information (D.89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D.93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the diverstiture of AT&T. (D.84-04-053.) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

"We have also permitted the utilities to use this extra space to communicate with ratepayers. Subject to our general oversight (e.g. P.U. Code Section 453 (c), (d)), utilities have used this space to inform customers of ways to reduce energy consumption, of the availability of special programs, of how to resolve problems with the utility's service, and of other topics. When a utility has used the extra space to engage in political advertising, we expressed our concern that ratepayers should not be required to bear any portion of the direct or indirect expense connected with such advertising. (D.93887.)

"Other uses of the extra space are certainly possible. TURN has presented evidence in an earlier case that a utility in another state has sold the extra space for commercial advertising unrelated the utility's business and used the resulting revenues to reduce rates to customers.

"Viewed in this general context, it appears to us that the issue raised by TURN's complaint is not whether the Commission may exert its authority over the billing space. As the previously stated examples demonstrate, the Commission has repeatedly, and we think properly, required the billing space to be used for the benefit of ratepayers. As we mentioned previously, this power has been exercised so routinely that we have defined "extra space" as excluding the space occupied by notices required by the Commission. The question raised by TURN's complaint, then, is whether TURN has presented a proposal for use of the billing space that is sufficiently beneficial to ratepayers for us to order implementation of the proposal. See, D.93887, mimeo, p. 157g, as modified. For reasons discussed in this decision, we are persuaded that TURN had presented such a proposal."

(b) On page 13, mimeo., the last sentence is modified to read:

"The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not justify treating the extra billing envelope space as the property of the utility rather than of the ratepayers."

(c) On page 13, mimeo., at the end of the last paragraph, a sentence is added to read:

"Nor does this fact change our conclusion regarding this Commission's power to regulate the billing space as part of our overall regulatory authority."

(d) On page 17, mimeo., the last sentence is modified to read:

"Such Commission action is certainly within the ambit of our statutory authority and consistent with our normal regulation of the billing process."

(e) On page 18, mimeo, the third sentence in the first paragraph is modified to read:

"Whatever validity this argument still may have (see General Telephone Co. v. P.U.C. (1983) 34 Cal.3d 817), it does not pertain to property not belonging to the utility."

(f) On page 18, mimeo., the last sentence in the first paragraph and Footnote 4 are deleted.

(g) On page 22, mimeo., the first complete paragraph is modified to read:

"Before addressing the merit of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. Further, in our UCAN decision, we specifically recognized how space in a utility billing envelope could be used to allow a consumer organization to communicate with the ratepaying public and solicit voluntary contributions to support ratepayer participation. We stated:

"There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding Consumers' Lobby Against Monopolies (CLAM) v Public Utilities Commission (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives under certain circumstances. In reaching this conclusion, the Court noted:

"[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code Section 1731) or judicial review (Id., Section 1756) of Commission decisions." (25 C 3d 891, 908.)

We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business

ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings....

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8."

(h) On page 23, mimeo., Footnote 6 is added at the end of the first paragraph to read:

"We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings."

(i) On page 23, mimeo., the last sentence in the second paragraph is modified to read:

"PG&E will be permitted to continue to insert the Progress during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted."

(j) On page 28, mimeo., the second sentence in the first paragraph is modified to read:

"Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers."

(k) On page 28, mimeo., the sixth sentence in the last paragraph is modified to read:

"To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content."

(l) On page 30, mimeo., the second sentence in the first complete paragraph is modified to read:

"Here, PG&E claims that the right is the right to speak through unregulated and exclusive use of the extra billing envelope space."

(m) On page 30, mimeo., the second sentence in the last paragraph is modified to read:

"In fact, as we explained above, we are simply ordering PG&E, which has physical control over the billing space, to make it available for the benefit of ratepayers."

(n) On page 34, mimeo., the last sentence in the first paragraph is modified to read:

"As discussed above, the extra space is a byproduct of the billing process which is paid for by ratepayers."

(o) The following paragraph is added to page 34:

"In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has <u>treated</u> as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

(p) On page 35, mimeo., the first sentence is modified to read:

"Finally even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from the State's Constitution."

(q) On page 35, mimeo., in the fifth line of the first paragraph, delete the numeral "4" and insert the numeral "6".

(r) On page 35, the last sentence is modified to read:

"This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing space available to its ratepayers, or to representatives of those ratepayers."

(s) The first paragraph on page 36, mimeo., is deleted.

(t) The following Findings of Fact are added on page 39, mimeo., to read:

"25. The extra space in the billing envelope is a direct consequence of the utility billing process and the way postal costs are assessed.

"26. The billing space is inextricably related to routine utility activity.

"27. This Commission has allowed utilities to recover all reasonable billing expenses from ratepayers.

"28. This Commission has required and permitted utilities to use the billing space as a communications medium for the benefit of ratepayers.

"29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

"30. TURN's proposal will help assure the fullest possible participation in our proceedings."

(u) On page 39, mimeo., a Conclusion of Law 7A is added to read:

"Under the State Constitution and Public Utilities Code, this Commission has the authority to regulate the billing process and to ensure that billing space is used for the benefit of utility ratepayers."

(v) On page 41, mimeo., Ordering Paragraph 5(a) is modified to read:

> "PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted."

2. PG&E's motion to strike TURN's response to the applications for rehearing is denied.

3. TURN's motion to strike a portion of PG&E's motion is denied.

4. Rehearing of D.83-12-047 as modified herein is denied.

5. The stay of D.83-12-047 is extended until further action of this Commission.

This order is effective today.

Dated MAY 2 1984, at San Francisco, California.

I will file a written dissent.

VICTOR CALVO
Commissioner

I will file a written dissent.

WILLIAM T. BAGLEY
Commissioner

LEONARD M. GRIMES, JR.
President
PRISCILLA C. GREW
DONALD VIAL
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

COMMISSIONER VICTOR CALVO, Dissenting.

This Commission has done much during its history to ensure full and fair public participation in matters heard before it. Our liberal rules of standing, procedure and evidence are a testament to that history. Today, the majority attempts to expand public participation by permitting Toward Utility Rate Normalization (TURN), a respected and frequent intervenor in our proceedings, to directly solicit interest and funding from the ratepayers of Pacific Gas and Electric Company (PG&E) through the use of the extra space in the billing envelope PG&E sends to its ratepayers. I laud the effort, but for the reasons set forth below, I cannot support it.

The "extra" space in the PG&E billing is really not a "property" but is something of an accident. Relevant postage rates, being based on one ounce increments, are indifferent to whether a mailer uses one-quarter of that ounce, three-quarters of it, or the full ounce. The mailer pays for the fraction as if it were the whole. The monthly bill and the return envelope PG&E sends to its customers normally weighs not the full ounce but a fraction of it. So the question arises, what to do with the difference, the "extra" space?

PG&E currently uses this extra space to send its Progress, a shareholder-funded newsletter which, while pleasant and sometimes informative, is nonessential to the provision of safe and reliable utility services. TURN now asks that as a consumer organization it be permitted to periodically use the extra space to reach ratepayers who, if properly informed, might

see fit to morally and/or financially support its efforts. In today's order, the majority reaffirms its earlier decision to grant TURN's request. I must dissent from this order. Some of my concerns were expressed in my earlier separate concurring opinion in this matter in which I dissented in part. I will reiterate them here and, having had time to further reflect on this matter, present additional concerns which now lead me to fully dissent from the majority opinion.

In reviewing this case, I was struck by the similarities between it and the case of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), wherein the Supreme Court struck down a state statute which required newspapers to provide political candidates whom they had criticized an opportunity to respond to the criticism. Similar to the Court's concerns in that case, it is not altogether clear to me that TURN's use of the billing envelope to disseminate its literature is required as a matter of either necessity or right. Thus, I am persuaded that we should not infringe on PG&E's rights of free speech guaranteed to it by the First Amendment.

TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party needs access to the billing envelope in order to be an effective participant in our proceedings. As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted

access to the billing envelope. And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980).

As to the practical shortcomings of this order, I noted in my separate opinion to Decision 83-12-047 that it is incumbent upon the majority to specify a precise and relatively simple method to resolve these sorts of disputes. Yet once again that necessity has been avoided by the majority. Also, in my opinion, granting TURN access to the PG&E billing envelope on eight occasions (four times per year for two years) is undue. A meaningful evaluation could take place with respect to a program of this nature within a year, yet the majority grants TURN use of the billing envelope for two full years. I have found both TURN and PG&E to be vigorous advocates and constant adversaries and I would not look forward to resolving additional unnecessary confrontations between them.

I point out here that I found my concerns to be less compelling and urgent in Decision 83-04-020, Center for Public Interest Law, et al. v. San Diego Gas and Electric Company. The "UCAN" organization of that case is a ratepayer founded and comprised group with closer links to its constituency than is the case with TURN. That case was also void of the internecine rivalries between consumer groups with which I am concerned, a rivalry manifested in this case by the presence of the California Public Interest Research Group.

The Legislature has often expressed interest in the issue of public participation in Commission proceedings. Proposals for a consumer utility board comprised of ratepayers have been introduced by various legislators. I would be more

inclined to support the majority if some express statutory provision addressed the request now before us. Instead, the majority essentially relies upon implicit authorities found in Public Utilities Code Section 701. I am not wholly convinced by their arguments. But, assuming that the majority is correct, having the authority to do something and deciding whether or when to exercise it are two separate questions. In this case and again assuming we have authority in this matter, I would not exercise our jurisdiction. Therefore, I must respectfully dissent.

Victor Calvo

VICTOR CALVO,
Commissioner

C.83-05-13
D.83-12-047
D.84-05-039

WILLIAM T. BAGLEY, Commissioner, Dissenting:

This is written to reiterate and emphasize one aspect of my prior dissent in this matter (see D.83-12-047, Dissent of W.T. Bagley). That dissent is attached hereto, incorporated by reference, and is made a part of this dissent to the final order issued by the Commission majority today. After acknowledging an understandable societal dilution of property rights over the years, that dissent stated at page 7:

> But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property per se. Though certain 14th Amendment property rights have been diluted over the years vis a vis an owner's claimed right of usage of the property itself, it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.

To restate this basic distinction, it is submitted that there is absolutely no precedent for, or constitutional basis of, a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech. Where a claimed property or governmental right conflicts with the First Amendment, the First Amendment prevails.

Conscious of the fact that the theory of an "equitable property right" in the envelope is illusory at best, the Commission majority now searches for an additional ground or rationale for its decision. The majority would now, additionally, rely upon an omnibus powers section of the Public Utilities Code.[1/]

1/ "The Commission may supervise and regulate every public utility in the State and may do all things whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Section 701).

The majority also would amend a statement made in a most objectionable footnote to the original opinion and order, by adding the thought that defendant PG&E "may use any of the extra space not used by TURN...".[2/]

Indulging in further contortions, the majority now adds the following paragraph to its original decision at page 34:

> "In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has treated as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

That last postulate immediately brings to mind the very recent U.S. Supreme Court decision, reversing the California Supreme Court, and saying that if there were a public trust to be imposed on the subject privately held lagoon, it should have been asserted during its inceptive years and not 130 years later. Summa Corp. v. California Ex Rel. State Lands Commission et al, 52 LW 4433 (April 17, 1984).

Putting that apt analogy aside, the basic fact remains that the shareholder's right, exercised at shareholder's expense, to use the company's envelope for a First Amendment-protected message is being curbed and transferred to others.

2/ See page 23 of the original opinion: "It is reasonable to assume that ratepayers will benefit more from exposure to a variety of views --- we will require PG&E to give TURN access to the extra space in the billing envelope four times a year --- PG&E will be permitted to continue to insert the Progress during the remaining months".

This is now modified by adding: "and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted." (Emphasis added).

And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not, and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder. See footnote 2, supra. Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

It is of one genre to limit, for example, the size and nature of improvements on ocean and bay front property in order to preserve public view and enjoyment of our natural resources; it is quite another to order such property owner to organize public meetings on his or her view property (four times a year) for the benefit of extraneous interests and to forbid that owner from speaking at such gatherings if the other interests object. Literally, the free speech forum - the podium if you will - is being transferred from one party to another by this governmental decision.

The majority's basic problem is that it refuses to recognize that corporate entities are granted and continue to enjoy First Amendment rights. That is exemplified by its facade-like transfer of ownership of the forum, and likewise by its new reliance on Section 701. Just because the legislature grants to the PUC a broad set of powers over public utilities does not make those utilities any less the beneficiaries of First Amendment protections and does not make deprivation of speech rights anymore constitutional.

It is not inordinate to assume that government at some future time would assert additional authority over the newspaper industry, and the many corporate owners thereof. Gasoline rationing was a fact of life not too many years ago. Conceivably there may come a day when we would face the necessity of paper or newsprint rationing in a monopolized, short supply industry.

Congress could, constitutionally, declare suppliers and even a limited number of distributors to be "Public Utilities". But neither Congress nor the Legislature - nor the designated regulatory body - could instruct the corporate newspaper owner to use or not use fuel in pursuit of a given story, nor could the newspaper supplier be ordered to limit its sales to certain desirable news usages, even though those suppliers were legally denominated "monopoly public utilities" and placed under a statute comparable to Section 701.

In its verve to support "consumer rights", this majority has run rough-shod over basic constitutional rights of free speech - and without giving thought to logical extensions of its act. Would it extend its free speech constrictions to other corporate entities which might be regulated in the future just because they are regulated. And who, after TURN gets its chance, will next be able to control this defendant's right to speak. In the context of the First Amendment, this is a very illiberal decision by a majority who would seek to liberalize consumer rights at the expense of the right of Free Speech. I would remind the majority that in the past other seeming Democratic societies, on a larger scale, have followed a similar path. They are no longer Democratic societies.

/s/ WILLIAM T. BAGLEY, Commissioner

May 2, 1984
San Francisco, California

Decision 83-12-047

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, Complainant, vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, Defendant.	Case 83-05-13 (Filed May 31, 1983)

DISSENT OF COMMISSIONER

WILLIAM T. BAGLEY

December 29, 1983

WILLIAM T. BAGLEY, Commissioner, Dissenting:

The Commission majority would create a ratepayer property right, equitable in nature, in the surplus space (i.e., unused postal weight allowance) of billing envelopes mailed to customers by the Pacific Gas and Electric Company. The Commission's acknowledged premise is that such unused space has economic value (which could be sold) and that such value is contributed to and thus created by the utility ratepayer.[1]

The conclusion in this proceeding, flowing from such premise, is that a single entity representing ratepayers (TURN) is clothed with a property interest in and is thus granted the right to use this "extra space" in four of the monthly billings per year and, by so doing, to preempt and supplant the otherwise constitutionally protected rights of the defendant.[2]

1/ Pacific Gas and Electric Co. (1981) ____Cal.P.U.C.2d____, Decision (D.) 93887 (as modified by D.82-03-047 issued March 2, 1982), "We think there are or may be many other uses for the 'extra' space. That such space could be sold to public advertisers (without any extra postage costs) at once demonstrates that the space surely has value. That economic 'value' belongs to the ratepayers, who create the space by paying for the envelope and postage." (Mimeo at p.159b.) See related Findings of Facts 58, 58a, and 59. (Mimeo at pp.220-221.)

2/ "We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the Progress during the remaining months." Further, "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views . . . ." (Majority opinion at p.23). It is reasonable to state that this last sentence demonstrates the unconstitutional rationale of the majority opinion. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." Consolidated Edison v. Public Service Commission (1980) 447 U.S. 530, 538 (62 L.Ed.2d 319, 100 S.Ct. 2326).

As admirable as the intent may be and as helpful to this Commission and to the ratepayer as the TURN organization is, the majority thus embarks upon a legal journey which reduces itself to an absurdity. Further, basic free speech constitutional rights would be overridden by this question-begging creation of the equitable right in question. In that context, this is a very illiberal decision.

This decision comes complete circle in its rationale and also in its attempt at an evolutionary creation of an equitable-type property right. Its ostensible ingenuity is only surpassed by its legal illogic. Seemingly taking a cue from the early English High Court of Chancery and finding no remedy at law (i.e., constitutional and statutory authority), and also finding First and 14th Amendment obstacles, it creates an in personam right to speak forthcoming from a "property" right in the forum. It thus would obviate all constitutional questions.

This rationale attempts to follow some early equitable principles and at the same time begs the question at issue - whether this Commission has constitutional and statutory powers to order this procedure. This is made evident and obvious by the decision's limited two page (pp.15, 38) discussion of statutory authority and the extensive discussion of the ostensible equitable right.

That such statutory powers of this Commission are limited is the subject of the recent California Supreme Court decision in Consumers Lobby Against Monopoly v. Public Utility Commission (1979) 25 Cal.3d 891 (160 Cal.Rptr. 124, 603 P.2d 41). The Court there commented upon both equitable and statutory (Sections 701 and 728 of the Public Utilities Code) powers. The lead opinion stated that the Commission's statutory powers did not extend to awarding attorneys fees, and that its equitable powers only applied in quasi-judicial reparations cases but not in quasi-legislative ratemaking proceedings. (At pp.909-910.)

"TURN's theory [of public participation costs] cuts far too broadly . . . and the consequences of such an interpretation would go far beyond the circumstances presented in this case." (Emphasis added). (At p.911).

That latter quotation of our Supreme Court could not be more appropriate in this instant matter. What is this illusory equitable right which would be created and how far would it extend? Is it a constructive trust based on some type of wrongdoing or mistake or perhaps a resulting trust based upon implied intent? Can there be, in California, any type of trust not based upon statute? (McCurdy v. Otto (1903) 140 Cal. 48, 73 P. 748.) Or is it an equitable lien which if not imposed would result in unjust enrichment? (Restatement of Restitution, Section 161.) Perhaps its basis is Henry VIII's Statute of Uses (1536), the central provision of which according to Maitland was "the declaration that where ever one was seised to the use of another, he who had the use should be deemed to have a legal estate corresponding to the interest he had in the use." (J. Cribbet, C. Johnson, Cases and Materials on Property, (4th Ed. 1978) p.297. But the statute of uses has no application under California law. (Estate of Fair (1901) 132 Cal. 523, 60 P. 442.)

Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle - to name just a few relevant examples - have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . . ."Is it the postulate of this Commission, flowing from the decision's stated premise,

that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space? Could the Gun Owners of California, Inc., headed by a politically-active State Senator, convince three future members of this Commission that it should be allowed to promote wood-cutting and wood burning messages to ratepayers as a fuel conservation aspect of the group's espoused rural ethic? And then use that "excess space" message to raise funds to be used by it on behalf of ratepayers. Similarly, the Sierra Club, by a finding of three Commissioners, after an on-the-record proceeding, could be said to represent the conservation interests of ratepayers in ratemaking cases and thus, also, be allotted some of the excess space for recruiting and fund-raising purposes.

And once established as a right, perhaps ultimately in rem rather than in the ad hoc, in personam method here established, is the right subject to defeasance? Will there not be writs of mandate entertained to protect this established property right in the valued excess space? Of interest, see Sierra Club v. Morton (1972) 405 U.S. 727 (92 S.Ct. 1361) which affirmed the Circuit Court and held against plaintiff's standing to sue:

> But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. (At p.739)

This dissent need not elaborate on the freedom of speech issue which permeates this proceeding. It is sufficient to refer to Consolidated Edison v. Public Service Commission (1980) 447 U.S. 530, 537 where the Supreme Court states:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

But it should be specially noted that this very same Commission, with three of the present majority sitting and without dissent recently stated in Frankel v. Pacific Gas and Electric Company (1982) ____Cal.P.U.C.2d____, D.82-07-009 at mimeo p.3:

> We have ruled that while we may disallow advertising expenses [to be charged to ratepayers] which we will find unreasonable, we cannot issue gag orders without interfering with a utility's freedom of speech rights. We adhere to this determination. The U.S. Supreme Court has specifically disapproved advertising prohibitions by regulatory commissions, and has specifically held that the right of free speech extends to corporations. (Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y. (1980) 447 U.S. 557; Consolidated Edison Co. v. Pub. Serv. Comm. of N.Y. (1980) 447 U.S. 530. (Emphasis added.)

The Frankel decision responded to a specific complaint asking that this Commission prohibit the Pacific Gas and Electric Company from publishing certain post-storm promotional messages. It should also be noted that the instant decision effectively prohibits the same defendant from bill-mailed free speech messages during four months of the year. Free Speech is allowed

for the remaining two-thirds of the billing year.[3/] On that very point, and with the same parties before it, this Commission in the immediate predecessor decision to this proceeding said:

> Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the Progress entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. Pacific Gas and Electric Co. (1981) _____Cal.P.U.C.2d_____ _____, D.93887 mimeo at p.159e.

Much of the above makes reference to the formation and characterization of certain property and equitable rights and may leave the impression that such rights are thought to be static and sterile - that the defendant's physical ownership and possession of property alone should dictate the result. Such intent should not be inferred. To the contrary, it is acknowledged that:

> (A)n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion. (5 Powell, Real Property (1970) Section 745, pp.493-495.)

3/ "PG&E will be permitted to continue to insert the Progress during the remaining months." (Majority opinion at p.23.)

But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property per se. Though certain 14th Amendment property rights have been diluted over the years vis a vis an owner's claimed right of usage of the property itself,[4] it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.[5]

In the face of these basic constitutional rights, applicable to all, the majority proposes to create an equitable right which it states will, in the name of ratepayer protection, obviate all concerns and supervene all constitutional constraints. Additionally and unavoidably, the majority decision would result in a legal and administrative morass caused by future extensions of the Commission's decreed property right. Such an exercise is as dangerous as it is unprecedented and unwarranted in the law. If further citation is desired for the proposition that no such right exists, see Fields v. Michael (1949) 91 Cal.App.2d 443, (205 P.2d 402).[6]

/s/ William T. Bagley
WILLIAM T. BAGLEY, Commissioner

4/ See discussion in County of Los Angeles v. Berk (1980) 26 Cal.3d 201 (161 Cal.Rptr. 742, 605 P.2d 381) including references to Civil Code Section 1009 adopted after Gion-Dietz. See also discussion in Agins v. City of Tiburon (1979) 24 Cal.3d 266 (157 Cal.Rptr. 372, 598 P.2d 25).

5/ See Consolidated Edison v. Public Service Commission (1980) 447 U.S. 530, 540, "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests in a government in overseeing the use of its property."

6/ "That no direct authority upon it has been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." 91 Cal.App.2d at p.451.

ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings. ~~The Legal Division agrees with us, since its post-hearing brief supports the UCAN concept.~~

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8."

(h) On page 23, mimeo., Footnote 6 is added at the end of the first paragraph to read:

"We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings."