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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)

Robert Spertus, Michel Peter Florio, and John F. Elliott, Attorneys at Law, and Sylvia M. Siegel, for complainant.
Peter W. Hanschen, Robert Harris, and Shirley Woo, Attorneys at Law, for defendant.
William L. Knecht, Attorney at Law, for California Association of Utility Shareholders; and Ethan Schulman and Harvey Rosenfield, Attorneys at Law, for Center for Law in the Public Interest, intervenors.
Diane I. Fellman, Attorney at Law, for the Commission staff.

O P I N I O N

Summary

By this decision the Commission grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E.

The decision addresses the effect of prior Commission determinations on the ownership of the billing envelope extra space; procedural issues raised by the parties; jurisdictional attacks on the Commission's authority to grant the relief requested, including constitutional issues; and the merits of the proposal.

Introduction

The parties and subject matter of this case are not new to us. The issue was first raised by TURN as an intervenor in the proceedings of the rate application filed by PG&E in late 1980 (Application 60153). In those proceedings TURN argued, among other things, that this Commission should find PG&E's inclusion of its publication, Progress, in the customers' billing envelopes to be improper because it violated the advertising standards of the Public Utility Regulatory Procedures Act of 1978 (PURPA), 16 U.S.C. Section 2601, et seq., by which PG&E was bound.[1/] At the time TURN's primary concern was not how the billing envelope space should be used but preventing PG&E from using it in a way TURN believed to be illegal.

In developing its argument on this point TURN suggested certain possible legal bases for this Commission's controlling such envelope use. One was for the Commission to restrict PG&E's use based on a finding that the envelope was ratepayer property--an idea first propounded by Justice Blackmun in his dissent in Consolidated Edison Co. v Public Service Commission (1979) 447 US 530, 534, N.1. (Con Ed).

In our decision on the application, Decision (D.) 93887 issued December 30, 1981 (as modified by D.82-03-047 issued March 2, 1982), we concluded that, as TURN asserted, we had adopted the PURPA political advertising standards, that PG&E was bound by them, and that PG&E had engaged in political advertising in the Progress from time to time in violation of the PURPA

1/ The relevant PURPA sections prohibit a utility from recovering from its ratepayers any direct or indirect expenditure for political advertising.

prohibitions. We did not adopt the idea that the envelope itself is ratepayer property, as TURN suggested. However, we did find that the "extra space" in the billing envelope is ratepayer property. (D.93887 as modified, Finding of Fact 58, p.220.) We defined extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.

Our conclusion concerning the ownership of the extra space resulted from our analysis of the unique factors which allow this issue to exist. It was clear then as it is now that envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer, so the costs are a legitimate revenue requirement which we should, and do, permit PG&E to include in the rates it collects from ratepayers. However, due to the nature of postal rates (which are assessed in increments of one ounce) extra space exists in these billing envelopes. If we regarded that extra space as the property of PG&E, then the result would be that along with PG&E's legitimate cost of mailing it would also be entitled to profit from the economic value of that extra space.[2/] Such a result

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2/ As we stated in D.93887, there is no question that this space has value. Quantification of that value, though, is necessarily subjective and imprecise since it is dependent on a number of variables such as the nature of the insert, the identity of the beneficiary or beneficiaries of the communication and some alternative means of conveying the same information to the same people. It may also include such intangibles as the aura of goodwill created around the proponent of the message or some other party, and the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately.

is inequitable because it provides PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope "is properly considered as ratepayer property". (D.93887, Finding of Fact 58, p.220.)

We reiterated our view that such a conclusion was mandated by the equities of the situation when, in our decision in Center for Public Interest Law and Robert L. Simmons v San Diego Gas & Electric Company, D.83-04-020 decided April 6, 1983,[3/] we stated:

> "We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. . . . ...we are saying that the reason the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents together do not generally add up to one ounce...the ratepayer has paid for some empty space..." (P.14.)

3/ This case is also known as the "UCAN" case because it proposed establishment of the Utility Consumers Action Network or UCAN.

In the present matter TURN has filed a complaint against PG&E for not permitting access to the extra space in its billing envelopes by intervenors for the purpose of soliciting voluntary donations to be used to represent residential ratepayers in Commission proceedings involving PG&E. This complaint is a response to the invitation we made in D.93887:

> ". . . We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for the ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (P.159(g) as modified.)

TURN's complaint lists three alternative "Consumer Advocacy Checkoff" proposals. Each alternative proposal calls for a billing envelope extra space insert, as a two-year experiment, which (1) explains the program, (2) sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by consumer organizations (identified on a check-off list by name, address, and date of incorporation) on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to the organization or organizations checked off on the list.

The alternatives differ from one another in the following specifics:

a. Proposal 1 would require the Commission or its designated representative, such as the Public Advisor, to produce and write the insert. Donations would be sent to the care of the Public Advisor for transmittal to the various organizations.

b. Proposal 2 is the same as Proposal 1 except that the functions assigned to the Commission or its designated representative would be performed by or under the supervision of a "blue ribbon" panel appointed by the Commission with the assistance of its Public Advisor.

c. Proposal 3 would allow only TURN to solicit donations by way of an insert, similar in format to the others, but prepared by TURN.

A prehearing conference was held on this matter before Administrative Law Judge (ALJ) Baer on August 9, 1983 in the Commission's Courtroom in San Francisco. A hearing was held in the same place before ALJ Colgan on September 12 through 15, 1983. The right to intervene was requested by two parties: the California Association of Utility Shareholders (CAUS) and the California Public Interest Research Group (Cal PIRG). Both were granted. Only CAUS actually participated in the hearing or filed briefs. The Commission Staff through the Legal Division participated by cross-examining witnesses and filing briefs.

The matter was submitted on September 15, pending receipt of one late-filed exhibit on September 21, 1983, simultaneous closing briefs due September 28, 1983 and simultaneous reply briefs due October 4, 1983.

Effect of Prior Decision

The ordering paragraphs in D.93887 did not address the extra space issue. PG&E's position is that our statements in D.93887 about the extra space are dicta because our discussion of ownership of the envelope space did not address third party access but was only for the limited purpose of "explaining that a value can be assessed to the 'extra' space" in the context of our determination of whether a PURPA violation existed. Therefore, PG&E concludes our statements in D.93887 about the extra space are not subject to the rules of collateral estoppel or to Public Utilities (PU) Code Section 1709 which states:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

We need not decide this issue to arrive at a proper disposition of TURN's complaint. Whether or not the rules of collateral estoppel apply to our findings and statements in D.93887 as to the ownership of the extra space, those findings and statements were made after a full hearing and opportunity to brief the issues. PG&E has not persuaded us that there is any reason to relitigate those questions at this juncture and we shall not do so. We consider findings of fact 58, 58(a), 59 and 60 of D.93887 as being final for purpose of this proceeding.

Disputed Evidence

PG&E Survey

The effect of D.93887 is also important in dealing with an evidentiary matter which arose during the hearing when PG&E attempted to offer a document of over 100 pages (marked Exhibit 12) entitled "Progress: A Readership Study".

According to PG&E's offer of proof, the document would have shown that "Progress is a useful and efficient use of the billing space, that it is a valued publication received by the ratepayers, and that it has an effective conservation measure [sic] to be presented." (RT 597-598.) Counsel for PG&E also claimed that the document would be useful to the Commission as a basis for determining who would use the billing envelope more efficiently and effectively (generally RT 585-599). In conjunction with this exhibit, PG&E also offered questions and answers 10 through 17 of the prepared testimony of its witness, Gerald W. Sword (marked as Exhibit 11).

Counsel for TURN objected to the admission of both documents on the ground of relevancy and as improper rebuttal testimony. The objection was sustained as to both documents by the ALJ.

In its opening brief PG&E again argues that these documents properly rebut the second sentence of paragraph 11 of the complaint, which states:

> "Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the 'PG&E Progress' and/or the non-use of the extra space."

PG&E also argues that the ALJ's ruling, which relied on the impropriety of the evidence as rebuttal, applied the rules of evidence and procedure" so egregiously as to deny PG&E procedural due process". (PG&E's Concurrent Opening Brief, p.16.) As a consequence PG&E requests the Commission to reopen the proceeding and accept the complete testimony of Gerald W. Sword and the study. We decline to do that. The ALJ's ruling on these two documents was proper.

PG&E's argument implies that it is necessary or appropriate to weigh the "value" of inclusion of the Progress--as measured by ratepayer perception--against whatever other use might be proposed for the extra space--apparently as measured by the same yardstick. In so arguing, PG&E ignores the fact that we laid that issue to rest in D.93887. We said:

> "Use of the space for the Progress instead of some other purposes deprives the ratepayers of that 'value' which they own." (P.159b.)

Thus, while in Finding of Fact 60 of D.93887 we stated that the "most efficient means of capturing for ratepayers' benefit the full economic value of the extra space remains to be determined in a future proceeding," we made that statement in

the added context of having determined that the extra space belongs to the ratepayers.

It was not our intent then, nor is it now, to involve ourselves in judging the relative merit of the speech of different factions. "It is not the content /of the Progress/ that we are concerned with," we stated in D.93887 (p.159d).

By our statement in Finding of Fact 60 we intended to suggest to future complainants that we needed more information in order to decide in a constitutionally equitable and practical manner how to neutrally determine who should have access to the extra space and how such access should be apportioned.

Therefore, any evidence proferred for the purpose of establishing the perceived merit of the content of the Progress is irrelevant to this proceeding and was properly excluded.

Thomas C. Long's Testimony

PG&E also offered testimony of Long (Exhibit 10). TURN objected to the admission of questions and answers 5 and 6 and Table 1, and staff joined that objection and also objected to the relevance of questions and answers 7 and 8. After a great deal of oral argument the ALJ took the objections under submission pending receipt of written argument. Examination and cross-examination proceeded as if the testimony had been received.

As counsel for PG&E explained, questions and answers 5 and 6 and Table 1 are for the purpose of showing that the revenue requirement which has been allowed for bill mailing expenses has not been sufficient to cover actual costs due to postage increases in the last several years. We find this evidence is relevant to the jurisdictional issues raised by PG&E and questions and answers 5 and 6 and

Table 1 will be received. Question 7 appears to be addressed to the expertise of this witness; however, part of that answer and all of question and answer 8 go to opinion outside Long's area of expertise. Nonetheless, due to the nature of the inquiry and the extensive cross-examination which took place on these items, we think it inappropriate to delete these questions and answers since it would require a fruitless exercise in determining which part of Long's lengthy cross- and redirect-examination should also be stricken.

Long testified that amounts authorized to be collected for mailing expenses were not sufficient to cover actual costs during certain periods of time between 1971 and 1981 because postage rates rose. He concluded that since PG&E is responsible for bill mailing expense even if rates are inadequate to cover it during the future test year, PG&E "is vested with cost responsibility". This testimony does not alter our opinion regarding ownership of the extra space. Variation between amounts adopted for ratemaking and actual expenses is inevitable in test year ratemaking. It has clearly been this Commission's policy to include in rates an amount sufficient to cover all reasonable bill mailing expense. 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 detract from that fact or justify our treatment of the extra billing envelope space as the property of the utility rather than of the ratepayers.

Motions to Dismiss

In addition to the substantive constitutional grounds which we address elsewhere, PG&E has also moved to dismiss the complaint on a number of procedural bases, which are discussed below.

a. Failure to Follow the Commission's Directive in D.93887 to Discuss the First Amendment in the Complaint.

Pointing to our invitation to parties in D.93887 to file a complaint about matters such as this one, and specifically noting our statement that "the considerable First Amendment problems must be fully addressed in such complaint", PG&E contends TURN's complaint should be dismissed because the complaint itself does not address the First Amendment. PG&E assumes that that is what we meant to require by our statement in D.93887. While our statement might have been more artfully worded, we certainly did not intend to depart from our established practice by requiring legal argument to be part of a complaint. The complaint merely alleges the activity or practice which complainant believes to be improper. Legal principles applicable to the allegations are set forth in briefs or oral argument after the facts have been elicited in a hearing.

Our statement about the First Amendment was merely meant to alert any future litigants on this issue that we would not adopt any proposal unless the proceeding instigated by the complaint presented us with a record which fully addressed the First Amendment problems which such a proposal might raise. In this case, the First Amendment problems were first addressed by PG&E in its Motion to Dismiss filed prior to the hearing. The First Amendment issues were addressed further in the parties' responses to PG&E's motion and in their opening and closing briefs. Since the

First Amendment problems have been fully addressed as required by D.93887, we will reject the motion to dismiss on this procedural basis.

b. Failure to State a Cause of Action.

PG&E states that the complaint does not set forth "any act or thing done by any public utility...in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission..." as required by PU Code Section 1702, the complaint provision.

While this matter may seem to fall between the cracks when PU Code Section 1702 is applied to the facts alleged, there is a broader mandate applicable here. PU Code Section 705 states:

> "Whenever in Articles 2, 3, and 4 of this chapter a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission."

Such a hearing is a prerequisite to our determining whether a utility's practices are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient." Based on that we then, by order or rule, fix the practices to be followed. See PU Code Section 761 (Article 3). PU Code Section 728 (Article 2), which gives us the right to "determine and fix, by order, the just, reasonable, or sufficient...practices..." to be observed should we find a utility's practices affecting rates to be "insufficient, unlawful, unjust, unreasonable, discriminatory, or preferrential...," also requires a hearing.

Thus, we conclude that a complaint alleging unjust or improper practices as was filed here complies fully with statutory requirements and we will deny the motions to dismiss based on that ground.

c. Failure to Sign Complaint

PG&E also notes that TURN's complaint in this matter was not signed as required by Rule 4 of our Rules of Practice and Procedure (Title 20, California Administrative Code, Section 4). While this is apparently accurate, it was not noticed by our Docket Office at the time of filing. If it had been, it would have been rejected until remedied. The matter was in hearing before this technical issue arose.

The prepared testimony of the two witnesses for TURN together sponsors each allegation of the complaint. Sylvia Siegel, executive director, and Michel Peter Florio, attorney, testified extensively under oath on both direct- and cross-examination.

The purpose of Rule 4 is to guard against frivolous vexatious, harassing filings by requiring the responsible parties to attest to the allegations.

As a result of Siegel's and Florio's testimony, all the allegations have been attested to and the purpose of Rule 4 has been served. Thus we think it appropriate to invoke the equitable consideration authorized by Rule 87 which, in pertinent part, states:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. . . ."

Other Jurisdictional Claims

a. The Dedication Issue

CAUS takes the position that this Commission may not order PG&E to allow others to use billing envelope space because PG&E has not dedicated that space to public use. Since the space has not been so dedicated, CAUS asserts, the Commission lacks jurisdiction to grant the relief sought. To support this position CAUS cites our decision in Holocard v PT&T et al. (1981) 6 CPUC 2d 649 as corrected by D.92980; modified and rehearing denied by D.93362 (1981). Holocard is clearly inapposite to the present matter. That case involved a proposed business (Holocard) seeking an order requiring the utility to participate in the operation of the business to the extent of billing Holocard's customers, on Holocard's behalf. In rejecting Holocard's claim we discussed the traditional principle of dedication of utility property to public service which we have relied upon over the years. Obviously, however, where the property in question (the extra space) belongs to the ratepayer, this principle cannot be applied.

Furthermore, all the dedication cases have in common an attempt to require the utility to commence some new service. As TURN properly points out, "[t]his proceeding simply does not present a dedication question, because TURN is not requesting a new public utility service." (TURN reply brief p.33.)

TURN proposes that we order PG&E to refrain from exercising exclusive control over the extra space so that TURN and perhaps some other entities may have access to it. This is not equivalent to new utility service, it is merely a proposal for more efficient use of existing service. Such Commission action is certainly within the ambit of authority described in PU Code Section 761.

b. Management Prerogative

As both CAUS and PG&E note in their post-hearing briefs, the value of utility property that has been rented to others (e.g. pole space or office space) can be credited by the Commission against revenue requirements in rate setting proceedings. PG&E additionally points out that we may not, consistent with the rule set forth in Pacific Telephone and Telegraph Co. v Public Utilities Commission (1950) 34 C 2d 822, and other earlier cases, interfere with actual management decisions regarding the activities themselves. When the subject is utility property, that observation is generally true. However, it does not pertain to the extra space since, as we have explained, that space is not utility property.

Furthermore, as the case above makes clear, "/t/he primary purpose of the Public Utilities Act /citations omitted/ is to insure the public adequate service at reasonable rates without discrimination." 34 C 2d 822, 826.[4/] A practice which recoups the economic value of the extra space for PG&E in addition to recouping the costs of mailing discriminates against the ratepayers since it would be impossible for this Commission to credit any amount certain against revenue requirement because the value of the space might fluctuate from message to message, time to time, and customer to customer, as described in footnote 2, supra. Therefore, we reject the claim of PG&E and CAUS that we lack jurisdiction over the present matter because it constitutes improper interference with a proper management prerogative.

4/ In a recent discussion of the "invasion of management" rationale in this case the Supreme Court stated: "Later cases...have cast serious doubt on the continuing validity of much of the reasoning in Pac. Tel." General Telephone Company of California v Publ. Util. Comm. S.F. 24459 (filed Oct. 20, 1983), slip opinion at 12.

Relative to this management prerogative argument PG&E suggests that even if the billing envelope were public property, the case law still permits PG&E to deny access to third parties. However, in citing Danskin v San Diego Unified School District (1946) 28 C 2d 536; Adderley v Florida (1966) 385 US 39, 17 L ed 2d 559; and Lehman v City of Shaker Heights, et al. (1973) 418 US 298, 41 L ed 2d 770, PG&E misses the crucial point that it is the governmental entity in charge of the public facility which has the prerogative, under certain circumstances, to restrict access to the facility. Presumably, under this line of cases, if we had determined that the billing envelope was public property, which we have not, it would then be the Commission which had the authority to determine how access could be restricted. The conclusion that such authority would rest with PG&E is not supported by these cases.

The Nature of TURN

Both PG&E and CAUS argue that even if the Commission does have the right to order PG&E to make this extra space available to others, allowing TURN such access would still be improper because TURN is not a democratically instituted organization, it is not consumer-controlled, it does not represent a clearly defined class, its claims about whom it represents are inaccurate and overstated, and it has demonstrated that it cannot be trusted to clearly and accurately describe its past role in rate proceedings.

TURN's complaint describes the organization as a

> "...non-profit California corporation... [which] represents the interests of residential utility consumers generally, as well as specific consumer organizations and constituencies, such as the statewide Consumer Federation of California, a federation

> of approximately one hundred organizations; the Consumers Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals."

It is correct that TURN is not a membership organization with voting members who decide its policies. The testimony of TURN's executive director, Sylvia Siegel, illustrated that the organization is funded by donations and some grant funds (as well as some PURPA awards[4/] granted by this Commission). The organization's policy, however, is set by a board of directors which is comprised of representatives from at least five of the consumer organizations mentioned above.

Siegel's testimony made it clear that while there is certainly no uniformity of interests among ratepayers--even among residential ratepayers whom this proposal specifically addresses--there are many positions which TURN takes regarding PG&E that would be shared by substantially all such ratepayers. These include, she testified, a desire to keep rate of return and evaluation of rate base relatively low. As to issues such as rate design and energy conservation subsidies, Siegel testified that TURN takes positions consistent with the policy its board of directors adopts. So, for example, TURN opposed

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4/ The Commission has adopted rules (see California Administrative Code, Title 20, Section 76.01 et seq.) pursuant to PURPA, the Public Utility Regulatory Act of 1978, which provide for the award of reasonable attorneys' fees, expert witness fees, and other reasonable costs to consumer participants in certain hearings involving electric utilities. In order to be eligible for such award the consumer must demonstrate, among other things, significant financial hardship. TURN has received such awards within the past two years, most recently in D.83-05-048 issued May 18, 1983.

the ZIP and RCS[5/] programs in Commission proceedings because TURN took the position that the programs were subsidized by the nonparticipants--primarily low-income, elderly, and renters. Obviously some residential ratepayers liked these programs; however, it must be acknowledged that TURN's position represented the interests of a significant group of such ratepayers.

We are unpersuaded by arguments that TURN's claims about itself are so inaccurate as to cast doubt on its veracity. TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population. It has also demonstrated that it is a properly constituted nonprofit California corporation, and that it is presently involved in Commission proceedings involving PG&E. Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship.

Merits of TURN's Proposals

As noted above, TURN proposes that the extra space in the billing envelope be used in one of three ways. PG&E and CAUS oppose all of TURN's proposals on the grounds that they are unworkable and ill-conceived. Our Legal Division supports TURN's complaint and recommends that we adopt proposal 3.

5/ ZIP or Zero Interest Program and RCS or Residential Conservation Service are programs under which the utility made no-interest loans to ratepayers for certain home conservation devices and conducted free energy conservation audits of ratepayers' homes.

It believes the proposals 1 and 2 would require excessive Commission involvement and that there is insufficient evidence to adopt these proposals at this time.

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. In our UCAN decision, for example, we stated that participation by consumer groups tends to enhance the record in our proceedings and complements the efforts of our Commission staff.

Based on the evidence and arguments presented in this proceeding, we believe that, in general, TURN's proposals are meritorious. Under each proposal, residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. We believe that this would be an appropriate and efficient use of the extra space.

With respect to the specific variations offered by TURN, we believe that it would be premature for us to adopt proposals 1 or 2 at this time. These proposals envision a number of qualified consumer organizations participating in the check-off program. The organizations would be listed on the materials inserted in the envelope, receive monies contributed by ratepayers, and share in program expenses. To date, however, TURN is the only organization which has sought access to the PG&E billing envelope. Thus, it would be the only organization participating in the checkoff program for an indefinite period of time. Under these circumstances, we believe that the mechanisms outlined in proposals 1 and 2 are neither necessary nor practical at this time.

While we are not adopting proposals 1 or 2 in this proceeding, we are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.

In this case, we will follow our Legal Division's recommendation and order that proposal 3 be implemented with some modification. 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.

In this regard, the fact that the extra space is ratepayer property does not affect the fact that PG&E's ability to communicate with its customers also is or may be a beneficial use of that space. Our goal, as expressed in D.93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E. Implicit in this assumption, of course, is the ongoing availability of PG&E's views. Currently, no controls are placed on the content of the Progress and we will not undertake to control the material inserted by TURN.

We will establish certain requirements to ensure that the process works smoothly. First, priority must be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its material during any month because of this priority, it shall be allowed access during another month.

This alternate month shall be at TURN's choosing. Otherwise, TURN shall be bound by the schedule discussed below.

Second, TURN shall reimburse PG&E for any costs the company incurs beyond its usual cost of billing that directly result from the addition of TURN's material. Similarly, shareholders should bear costs associated with inserting the Progress. We note that currently such costs are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes. This practice should cease and all identifiable costs should be assigned to shareholders. We believe that these costs are minimal.

Third, all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

Fourth, funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

Fifth, TURN will be required to establish an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process.

Sixth, we will require TURN to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report should describe TURN's efforts on behalf of PG&E's residential ratepayers in the past year. It should also include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report should be distributed on or before February 1, 1985 and should cover calendar year 1984. A second report should be distributed one year later. Copies of TURN's reports should be filed with this Commission within five days of distribution.

Our order today does not cover every possible contingency. Therefore, in addition to complying with the requirements set forth above, we expect PG&E and TURN to work together in good faith to overcome problems. If insurmountable problems arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work.

Actual insertion of TURN's material shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all contributions received through the insert process. TURN should describe the mechanism in its notice. The notice should also identify the months over the next two years during which TURN plans to utilize the extra space. Both PG&E and TURN will be bound by this schedule.

Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

Constitutionality of Commission Regulating the Use of the Billing Envelope Extra Space

Although we have already stated that the question of who owns the extra space should not be relitigated in this proceeding, we are also mindful that the constitutional arguments which PG&E (and to a lesser extent CAUS) has raised are jurisdictional in nature. Therefore, despite our conviction that the issue was properly determined in D.93887, we address below the constitutional claims made by PG&E. Four such claims were made: that the First Amendment to the United States Constitution prohibits the Commission from regulating envelope use; that the First Amendment prohibits the Commission from requiring PG&E to distribute the message of others; that TURN's proposal violates the equal protection provisions of both the United States and State constitutions; and that TURN's proposal constitutes an unlawful "taking" of property under the Fifth and Fourteenth Amendments to the United States Constitution.

a. Regulation of Use of the Extra Space by the Commission

The most basic opposition to the Commission's adoption of TURN's proposal is grounded in PG&E's claim that the First Amendment to the United States Constitution deprives us of jurisdiction over the regulation of the use of the billing envelope extra space.

The pivotal cases on this issue are Consolidated Edison Co. of New York v Public Service Commission of New York (1980) 447 US 530 (Con Ed) and its companion, Central Hudson Gas & Elec. Corp. v Public Service Commission of New York (1980) 447 US 557 (Central Hudson). These cases both involved attempts by our analogue in New York, the Public Services Commission (PSC) to prevent utilities from including certain kinds of inserts in its billing envelopes. Con Ed involved political advertising in support of nuclear power. Central Hudson involved advertising promoting the use of electricity. The U.S. Supreme Court found that each of these types of expression was protected by the First Amendment.

While PG&E claims that the TURN proposal violates all the constitutional standards for First Amendment regulation, we believe that even assuming these tests are applicable, all those standards have been met by the proposal version we adopt here.

1. Time, Place, and Manner Restriction

The court in Con Ed specifically held that it had long recognized

> "...the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." 447 US at 535.

The court made it clear that such regulation "may not be based upon either the content or subject matter of speech." 447 US at 536. 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. Our order also leaves PG&E with "ample alternative channels for communication." Indeed, PG&E is allowed to use the extra space to communicate to ratepayers two-thirds of the time over the next two years. However, the restriction does not impinge on the content or subject matter of PG&E's messages. Therefore, the proposal as adopted meets this standard.

2. Permissible Subject Matter Regulation

PG&E claims that the TURN proposal requires the Commission to indulge in impermissible subject matter regulation in that it asks the Commission to find that the proposed use of the billing envelope is a better use than PG&E's present use of the billing envelope. In effect, PG&E asserts, TURN is asking the Commission to "evaluate the contents and purpose of its proposed message, versus the contents of PG&E printed materials." (PG&E's Motion to Dismiss, p.16) PG&E mischaracterizes TURN's proposal. The proposal does not require the Commission to look at content at all. It only attempts to respond to our invitation for suggestions on how to use the economic value of the extra space more efficiently for the ratepayers' benefit. To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the ground that the space belongs to the ratepayers, not on the basis of the content. In any case, the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets this subject matter standard.

3. Narrowly-tailored Means of Serving a Compelling State Interest

As PG&E asserts, when a party advocates that the State regulate a fundamental right, such as PG&E's First Admendment right to speak, there must be a demonstrable compelling State interest for such regulation. See, for example, Louisiana v NAACP (1961) 366 US 293, 6 Legal Ed 2d 301 cited by PG&E. In that case the Supreme Court in a 5-page decision found unconstitutional two Louisiana statutes, one of which required certain organizations to file annual affidavits that the officers of their foreign affiliates were not members of subversive organizations, and the other of which required the organization to file a list of the names and addresses of all its members and officers in the State. The court held that such governmental regulation violated First Amendment guarantees because it could have the effect of stifling, penalizing, or curbing "the exercise of First Amendment rights", and was thus not narrowly enough drawn to "prevent the supposed evil" it was meant to prevent. (366 US at 297.)

In the present matter a compelling State interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way.

The compelling State interest is one we set forth in our UCAN decision:

> "The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (D.83-04-020 at p.17.)

The fact that we have adopted a shared approach to use of the extra space surely exhibits the "narrowly-tailored means of serving a compelling state interest" that the Con Ed court contemplated.

Of course this issue only arises where the governmental entity is restricting some right that the party in question possesses. Here, PG&E claims that the right is the right to speak through unregulated use of the extra billing envelope space. As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes.

Distributing the Message of Another

PG&E cites, among others, the cases of Wooley v Maynard (1977) 430 US 705 and Miami Herald Publishing Co. v Tornillo (1974) 418 US 241 for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish. PG&E contends that each of these rights is breached if we order it to permit access by another to the extra space in its billing envelopes and allow messages of those entities to be carried in that extra space.

This argument, of course, again assumes that we are asking PG&E to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PG&E, which has physical control over the extra space belonging to the ratepayers to make it available. We are not asking PG&E to publish anything as its own. In fact, in order to protect against the possibility that one receiving a PG&E billing envelope would assume all its

contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

In addition to ordering PG&E to make the space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space. We do not believe that this act is equivalent to publication. It is merely a requirement clearly within our statutory authority to regulate the practices of the utility. Of course, we will require that TURN pay to PG&E all costs which PG&E incurs beyond its normal billing costs. We have chosen this method of inserting these messages over any other because it appears to be the one which will result in the lowest cost to the ratepayers as well as the least disruption to the utility's billing process.

Distribution of the message here is incidental to the right of the ratepayers to use the extra space. We conclude that these circumstances do not violate the First Amendment protections against being required to publish the statements of others.

Equal Protection

PG&E claims that TURN's proposal violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection provision of the California Constitution at Article I, Section 7, because (1) the consumer advocate is given a preferred position vis-a-vis the utility; (2) consumer advocate groups representing residential ratepayers are treated differently from consumer advocate groups representing nonresidential ratepayers; (3) the Commission is forced to draw distinctions, even among residential consumer advocate groups, between those who meet the criteria of technical

competence and those who do not (see PG&E's Motion to Dismiss, p.31). PG&E's argument implies that because a fundamental constitutional right is involved--First Amendment freedom of speech--the Commission must show a compelling state interest for discrimination of the sort described. We have already described that state interest above.

We believe TURN's proposal, as we have adopted it, furthers this interest by assuring more complete ratepayer understanding and participation in energy issues involving their utility. Furthermore, the discrimination alleged does not exist. First, the proposal as we are adopting it permits TURN and the utility to share the extra space. Secondly, no other ratepayer organizations have sought access to the extra space. As discussed above, nothing in the proposal as we are adopting it prohibits others from seeking access too.

We therefore perceive no equal protection violations.

Taking of Property

Additionally PG&E propounds the argument that use of the extra space in the billing envelope by others constitutes either a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.

Again, the argument rests on PG&E's continued contention that the entire billing envelope, including the extra space, is its private property. Based on this, PG&E distinguishes the circumstances of its billing envelope from the case of Prunevard Shopping Center v Robins (1980) 447 US 74, 64 L ed 2d 741, which upheld an interpretation of the California Constitution's provisions regarding free expression and petition

requiring the owner of a shopping center to permit students to distribute literature and seek support for their petitions. The U.S. Supreme Court found that this interpretation did not amount to a taking under the Fifth or Fourteenth Amendments. PG&E points to the fact that the Supreme Court emphasized that the shopping center differed from other private property in that by choice of its owner it was not limited to the owner's personal use, but was "open to the public to come and go as they please". (Id p.87).

We note, however, that, in context, this observation of the court was used to explain that: "The views expressed by members of the public..thus will not likely be identified with those of the owner." (Id p.87.) We are adopting a similar safeguard by requiring that TURN clearly identify its material and state that it has been neither reviewed nor endorsed by PG&E. So, even if the billing envelope were regarded as PG&E's private property, the distinction cited by PG&E is irrelevant.

PG&E also cites the California Supreme Court's decision in Pacific Telephone and Telegraph Co. v Public Utilities Commission (1950) 34 C 2d 822 as support for its conclusion that no ratepayer property rights can devolve from ratepayer payment of bill mailing expense. PG&E cites the court's quotation from a 1913 case where it states:

> ". . . And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would be better served thereby..." (Id pp.828-829 quoting Pacific Telephone Etc. Co. v Eshleman (1913) 166 C 640, 665.)

We think PG&E's reliance on this language is misplaced. The very central point PG&E ignores here is that the extra space is not "property held by [PG&E] in ownership". It is an artifact which the ratepayers have paid for and which is extraneous to the provision of a bill.

PG&E also cites Board of Public Utility Commissioners v New York Telephone Co. (1926) 271 US 23, 70 L ed 808 for the proposition that ratepayers cannot acquire any interest in the property "used for their convenience". (271 US at 32.) That case, however, had to do with a Commission requiring a utility to set rates at a rate that was conceded to be less than projected costs in order to make up for high returns in a previous year. The court's final statement explains the context in which it discussed ratepayer property rights:

> "The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency [between actual return and conceded expense]."

The Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise, rather it was stating that a Commission could not treat the utility's accounts as if they belonged to the ratepayers who contributed the money to them by paying for service. This concept has no bearing on the one now before us.

Finally, even assuming that the envelope is private property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from this State's constitution. Article XII, Section 4, states:

> "The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Emphasis added.)

Section 5 states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission..."

And, the Legislature has enacted PU Code Section 701, which states:

> "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."

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

However, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has in the past 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.

Findings of Fact

1. This Commission determined in D.93887 as amended that the extra space in PG&E's billing envelopes has economic value, and that the economic value was created by the ratepayers.

2. Quantification of the economic value of the extra space is subjective and imprecise because it is based on many variables.

3. This Commission determined in D.93887 as amended that the 'extra space' in PG&E's billing envelopes belongs to the ratepayers.

4. This Commission determined in D.93887 as amended that PG&E was itself reaping the economic value of the extra space and by such use was depriving the ratepayers of that value.

5. This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.

6. In D.93887, this Commission issued an invitation to TURN or any other interested party to file a complaint with the Commission which would expand the record, especially addressing First Amendment problems, so that the Commission might issue an appropriate order to PG&E regarding how it should use the extra space more efficiently for the ratepayers' benefit.

7. By the present complaint TURN complied with the Commission's invitation in D.93887.

8. TURN's complaint lists three alternatives for utilization of the extra space by itself and possibly other residential consumer advocacy organizations.

9. First Amendment issues were addressed by the parties in written briefs and motions filed with the Commission.

10. At the hearing TURN moved to strike questions and answers 5 and 6 and Table 1 of Exhibit 10, the testimony of PG&E's witness, Thomas C. Long. Staff moved to strike questions and answers 7 and 8 of the same witness. The ALJ took the motions under submission.

11. At the hearing TURN objected to the introduction of PG&E's Exhibit 12, a document entitled "Progress: A Readership Study" and also objected to questions and answers 10 through 17 of Exhibit 11, the prepared testimony of PG&E's witness, Gerald W. Sword, on the same subject. The ALJ sustained the objection.

12. PG&E requests that the hearing be reopened to permit receipt of the excluded part of Exhibit 11 and Exhibit 12.

13. At the hearing PG&E moved to dismiss for failure of TURN to allege a violation as required by PU Code Section 1702. The motion was denied by the ALJ.

14. PG&E moved to dismiss for TURN's failure to address First Amendment problems in the complaint itself, claiming that this was required by this Commission's mandate in D.93887.

15. PG&E moved to dismiss for TURN's failure to sign the complaint as required by Rule 4 of the Commission's Rules of Practice and Procedure.

16. CAUS claims this Commission lacks jurisdiction over this matter because PG&E has not "dedicated" the billing envelope space to public use.

17. PG&E and CAUS both claim this Commission lacks jurisdiction over this matter because it would interfere with a proper management prerogative.

18. PG&E argues that this Commission is forbidden by the First Amendment from regulating the use of the billing envelope or requiring PG&E to distribute the messages of third parties.

19. PG&E claims that TURN's proposal would violate the equal protection provisions of both the United States and State Constitutions (Fourteenth Amendment and Article I, Section 7, respectively).

20. PG&E claims that TURN's proposal would constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. TURN has demonstrated to this Commission an ability to represent a substantial group of ratepayers in Commission proceedings involving the service or rates of PG&E. Further, TURN has demonstrated that it is a properly constituted non-profit California corporation, that it is presently involved in Commission proceedings involving PG&E and that it cannot participate in all PG&E proceedings it might otherwise participate in without significant financial hardship.

22. Proposals 1 and 2 envision the participation of a number of consumer organizations.

23. To date, TURN is the only organization which has sought access to the PG&E billing envelope.

24. Costs associated with inserting PG&E's Progress are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes.

Conclusions of Law

1. This Commission's findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding.

2. Findings of Fact 58, 58(a), 59 and 60 of D.93887 as modified should be considered final for the purpose of this proceeding.

3. Objection to the testimony of Thomas C. Long is properly overruled. The testimony should be received.

4. The ALJ's sustaining of the objection to the introduction of all of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 was proper and the request to reopen should be denied.

5. PG&E's motion to dismiss for failure to allege a violation as required by PU Code Section 1702 was properly denied by the ALJ.

6. The motion to dismiss for failure to address the First Amendment problems in the complaint itself should be denied.

7. The motion to dismiss for failure to sign the complaint as required by Rule 4 of our Rules of Practice and Procedure should be denied.

8. The "dedication" concept does not affect the Commission's jurdisdiction over this matter.

9. The Commission's assertion of jurisdiction over this matter does not interfere with a proper management prerogative.

10. The First Amendment to the United States Constitution does not deprive this Commission of its ability to regulate the usage of the billing envelope or to require PG&E to distribute the messages of third parties.

11. The TURN proposal as implemented by this decision does not violate the equal protection provisions of either the United States or California constitutions.

12. The proposal as implemented by this decision does not constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

13. TURN's access to PG&E's billing envelope should be contingent on its filing with the Commission notice indicating that an acceptable mechanism has been established to account for receipt and disbursal of all funds obtained through billing envelope solicitation and the months over the next two years TURN plans to insert materials.

14. Proposals 1 and 2 should not be adopted at this time.

15. Proposal 3 should be adopted as modified in this decision.

16. Adoption of proposal 3 as modified should not foreclose the implementation of future meritorious proposals.

O R D E R

IT IS ORDERED that:

1. The complete testimony of Thomas C. Long, taken under submission at the hearing subject to legal argument, is received in evidence.

2. The Administrative Law Judge's (ALJ) exclusion of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 is affirmed and the request to reopen the hearing to receive this evidence is denied.

3. The ALJ's denial of Pacific Gas and Electric Company's (PG&E) motion to dismiss for failure to comply with Public Utilities Code Section 1702 is affirmed.

4. PG&E's motion to dismiss for failure of Toward Utility Rate Normalization (TURN) to address, in the complaint itself, the First Amendment problems is denied.

5. The complaint of TURN is granted to the following extent:

(a) 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 months.

(b) PG&E and TURN shall each determine the content of its own material.

(c) Priority shall be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its materials during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing.

(d) Costs of inserting materials in the extra space shall be borne by the sponsor of the materials. PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials. Costs associated with inserting the Progress shall be separated from other billing costs and assigned to shareholders.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. An original and 12 copies of TURN's reports shall be filed with the Commission's Docket Office within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. The notice shall also identify the months over the next two years during

which TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today.

Dated December 20, 1983, at San Francisco, California.

I dissent in part.
/s/ VICTOR CALVO
Commissioner

I dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
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, concurring and dissenting in part,

Today's decision represents a significant step towards broader public participation in our proceedings. The use of the extra space in the billing envelope by organizations representing residential ratepayers can only enhance the decision-making process.

Along with my three colleagues, I fully concur that the value of the extra space which remains in the billing envelope ought to inure to the benefit of the ratepayer. Likewise, I fully concur that providing access to the billing envelope to an organization like TURN is desirable. I also anticipate that the same high quality of performance from TURN will prevail in its use of the billing envelope.

Having said this, I feel compelled to dissent in part from the adopted decision. I do so because I have serious reservations about the procedures adopted in the decision rather than the substance of the decision itself.

Specifically, I am troubled by three aspects. First, the decision gives TURN access to the billing envelope four times a year for the next two years. Although TURN is required to file an annual report with the Commission, I would have preferred a procedure which would have established a complete Commission review of the entire experiment after one year. A year's experience would have allowed this Commission to make valuable comparisons of this proposal and the UCAN experiment. At the end of a year's time we would also have been afforded the opportunity for a full review and a complete evaluation of these programs. My concern is that the decision does not formally allow the Commission a realistic opportunity to review the experiment until after a full two years have passed.

While I recognize that the Commission may reopen this proceeding at any time, the expectation we have created by this decision is that we should not need to do so until the two years have elapsed. I am not comfortable with this approach.

The second aspect which concerns me is that there is no formal creation of a panel or board to resolve disputes which are likely to arise between TURN, or any other representative group, and PG&E. I would have preferred for our order to have directed PG&E and TURN to establish an arbitration-type panel, perhaps consisting of one member each from PG&E and TURN, and a third member chosen by both. By creating an arbitration panel, there would be an incentive on the part of both parties to tailor the ratepayer-sponsored bill inserts in a manner that would encourage greater accuracy of content and also eliminate controversy, thus better serving the ratepayer.

The last aspect which concerns me is that the decision does not sufficiently emphasize that TURN is not to be given exclusive access to the billing envelope. I strongly believe that any other organization meeting the criteria set forth in our decision should be afforded access equal to that given TURN and that there be specified a precise and relatively simplified method for Commission review and decisionmaking.

For all of the reasons set forth above, I concur and dissent.

Victor Calvo

VICTOR CALVO, Commissioner

December 20, 1983
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, 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.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. Copies of TURN's reports shall be filed with the Commission within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. The notice shall also identify the months over the next two years during which TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today
DATED DEC 20 1983, at San Francisco, California

I dissent in part.
VICTOR CALVO
Commissioner

I dissent.
WILLIAM T. BAGLEY
Commissioner

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