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Decision No. 92748 March 3, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion regarding advertising expenditures of PACIFIC GAS AND ELECTRIC COMPANY, PACIFIC POWER AND LIGHT COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, SIERRA PACIFIC POWER COMPANY, SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, and SOUTHWEST GAS CORPORATION.	Case No. 10068 (Filed March 16, 1976) (Discontinued December 20, 1977; reopened November 11, 1978)

Malcolm H. Furbush and Robert L. Harris, Attorneys at Law, for Pacific Gas and Electric Company; John H. Craig and David Gilmore, Attorneys at Law, for Southern California Gas Company; Jeffrey Lee Guttero and Steve Edwards, Attorneys at Law, for San Diego Gas & Electric Company; Earl R. Sample and Carole B. Henningson, Attorneys at Law, for Southern California Edison Company; and Boris H. Lakusta, David Marchant, and Thomas J. MacBride, Jr., Attorneys at Law, for Sierra Pacific Power Company; respondents.

John Witt, City Attorney of San Diego, by William S. Shaffran, Deputy City Attorney, for City of San Diego; Harry R. Warner, Attorney at Law, for California Broadcasters Association; and Edward M. Goebel, Attorney at Law, for Toward Utility Rate Normalization; interested parties.

Elinore C. Morgan and Philip S. Weismehl, Attorneys at Law, for the Commission staff.

(Above appearances refer to the reopened proceedings only.)

O P I N I O N

Introduction

On March 16, 1976 the Commission, on its own motion, issued an order instituting investigation (OII) to determine whether the respondent gas and electric utilities should be

required to identify their advertisements as paid for by their ratepayers or shareholders. We noted that the underlying basis of that order was an increasing number of ratepayer complaints received by the Commission about utility advertising in addition to the fact that utility advertising had been a controversial issue in recent rate proceedings. We pointed out, too, that the Commission expended a significant amount of time and expense in order to satisfy ratepayer complaints and requests for information regarding advertising both in and out of hearings. The Commission noted that this time and expense could be reduced if ratepayers were fairly apprised whether the utility was claiming the cost of each specific advertisement as a ratemaking expense or was accepting the cost thereof as a charge against its shareholders. The Commission proposed that gas and electric utilities include with each advertisement, including published information circulars and displays, presented or broadcast by it or on its behalf, in easily distinguishable and readable print, or in readily discernible voice communication, whichever one of the following statements is appropriate to the advertisement being published, broadcast, or displayed: "(Name of utility) will claim the cost of this advertisement as an operating expense recoverable in its rates" or "(name of utility) will not claim the cost of this advertisement as an operating cost recoverable in its rates."

A prehearing conference was held on this matter on June 25, 1976 during which the assigned Commissioner outlined major defects in the concept and scope of the original order and promised that it would be rescinded or amended before any further proceedings were scheduled. The Commission, upon the recommendation of the Commission staff, thereafter ordered the investigation discontinued in D.88267 dated December 20, 1977. On November 28, 1978, in D.89686, the Commission set aside the discontinuance ordered in D.88267, supra, and ordered that the proceeding be reopened.

The matter was heard before Administrative Law Judge William A. Turkish in San Francisco commencing June 20, 1979. After four days of hearings, the matter was submitted upon the filing of concurrent briefs on September 7, 1979. All named respondents appeared with the exception of Pacific Power and Light Company and Southwest Gas Corporation.

During the proceedings, oral motions to dismiss the OII were made by respondents which, at the request of the Administrative Law Judge, were submitted in writing along with points and authorities.

Testimony was received during the course of these hearings from Bruce M. DeBerry, energy group project manager, Operations Division, Public Utilities Commission; Ralph Miller, Advertising Department manager, Pacific Gas and Electric Company (PG&E); Donald B. Robertson, advertising manager, Southern California Gas Company (SoCal); Edward A. Myers, Jr., vice president, Conservation, Communication, and Revenue Services, Southern California Edison Company (Edison); Herbert Chao Gunther, executive director, Public Media Center; Patricia Preuss, advertising manager, San Diego Gas & Electric Company (SDG&E); Fred W. MacKenzie, director of Information Services, Sierra Pacific Power Company (Sierra Pacific); and Howard J. Smiley, president, California Broadcasters Association (CBA).

Written motions to dismiss this investigation were submitted by CBA, PG&E, SDG&E, SoCal, and Edison. For the sake of brevity and to avoid repetition, the several constitutional and nonconstitutional grounds upon which such motions are based can be summarized as follows:

A. Nonconstitutional Issues

1. Vagueness

It is the consensus among respondents that the OII is vague and ambiguous. Respondents point out that D.88267, supra, discontinued this investigation with the following statement: "At the prehearing conference on June 25, 1976, the assigned Commissioner, Commissioner Ross, outlined major defects in the concept and scope of the original order and promised that it would be rescinded or amended before any further proceedings were scheduled." Respondents point out that D.89686, supra, which reopened this proceeding, failed to correct those defects and thus leaves respondents confused as to the purpose and scope of this reopened proceeding. Since further clarification has not been forthcoming in the order reopening C.10068, they contend that the same reasons exist today for dismissing the case as existed in 1977 when it was previously dismissed. Respondents also allege that although the original OII contains vague references to public complaints received by the Commission regarding utility advertising practices, no specifics as to the substance or source of these complaints are evident from the Commission staff's evidence. (Staff Exhibit 2.)

With respect to the concept of labeling advertisements, respondents argue that the proposed solutions simply cannot result in a more accurate response to consumer complaints. If either the label as originally proposed in the OII: "(Name of utility) will claim the cost of this advertisement as an operating expense recoverable in its rates" or, the staff-proposed alternative, "(name of utility) will claim the cost of this advertisement in its rates", is used, it would only indicate what the utility will claim as an operating cost and not the ultimate fact. Respondents point out that whether or not the expense will be allowed as an operating expense would be subject to the same uncertainties as exist under current practice. To the extent that such label might imply that the claim will be allowed, the public is still not fully or accurately advised.

2. Duplication of Proceedings Required by Public Utility Regulatory Policies Act of 1979 ("PURPA")

Respondents contend that hearings relative to adoption of comprehensive standards on advertising are required by Section 113(b)(5) of PURPA and that it would result in duplicative proceedings on the same issues and be wasteful of Commission time and taxpayer funds.

3. Jurisdiction

Several respondents contend that the Commission lacks jurisdiction over the subject matter of this OII since it is an intrusion into management discretion regarding content of utility advertising and, as such, is impermissible. It is argued that the Commission's jurisdiction is limited to the exercise of powers which the U.S. Constitution and Legislature have given to it. Conceding that Public Utilities Code Section 796 gives the Commission ratemaking powers with respect to utility advertising, respondents argue that Section 796 clearly does not give the Commission power to regulate the content of advertising. Furthermore, respondents allege that the determination of what is reasonable in conducting the business of the utility is the primary responsibility of management and that the Commission does not have the power to substitute its judgment for that of management as to what is reasonable. Thus, it is argued that in the absence of enabling legislation the Commission may not dictate the content of advertising since any order as to content would impermissibly intrude into management discretion. It is further argued that although Public Utilities Code Section 701 appears to give the Commission the broadest source of power, the Supreme Court has declared those powers to be limited. (Pacific Tel. & Tel. Co. v CPUC (1950) 34 C 2d 822.) Respondents also point out the Commission's own recognition of its jurisdictional limitations in NAACP v All Regulated Utilities (1970) 71 PUC 460 wherein we stated the legal test for jurisdiction as follows: "The test for such powers as the Commission may exercise is whether they are 'cognate and germane' to the regulation of public utility services, rates, and charges."

Respondents argue that since the Commission found in NAACP that alleged discriminatory employment practices of utilities, which are of substantial governmental concern, are not within the jurisdiction of the Commission because they are not "cognate and germane" to the regulation of utility services, rates, or charges, it is not logical to find that the regulation of the contents of utility advertisements fall under Commission jurisdiction simply because the Commission may desire or feel it is in the public interest to assert such jurisdiction. Respondents conclude that the Commission's jurisdiction with respect to advertising extends only to the determination of whether the costs of such advertisements are an operating or nonoperating expense.

4. Supremacy Doctrine

CBA, an interested party, in addition to raising constitutional issues, maintains that the Communications Act of 1934, as amended, fully preempts the field governing the regulation of advertising content so as to preclude the adoption of the Commission's proposed labeling regulation. (Head v New Mexico Board of Examiners (1963) 374 US 424, 433.)

B. Constitutional Issues

1. First Amendment Infringement

All appearing respondents, along with CBA, contend that the Commission's proposed labeling regulation is violative of the First and Fourteenth Amendments of the U.S. Constitution in that it would infringe upon a utility's freedom of speech. They point out that commercial advertising has been held to fall within the protection of the First Amendment. (Virginia State Board of Pharmacy v Virginia Citizens Consumer Council (1976) 425 US 748.) It is alleged that any requirement for labeling of utility advertisements would constitute a prior restraint upon publication of speech since it would condition publication by a condition precedent and impair the utility's ability to communicate effectively and freely with its customers. In addition it is argued that the labeling requirement will be a restraint which may not only

confuse and weaken the view which the utility may wish to advance but may, in fact, by its very presence, have a restrictive and "chilling effect" upon the desire or the ability of the utility to express its point of view. They point out that the essence of free speech is that it should be uninhibited and free from manipulation of content. Finally, respondents argue that the labeling regulation contemplated by the Commission cannot be classified as a reasonable time, place, and manner regulation (Virginia State Board case, supra); nor does it serve a significant or compelling government interest which would justify infringement of First Amendment guarantees of free speech. (Huntley v Public Utilities Commission (1969) 69 Cal 2d 67.)

2. Fifth Amendment Infringement

CBA contends that the contemplated labeling regulation is vulnerable to attack on constitutional grounds because it is discriminatory against specifically named gas and electric public utilities while other types of public utilities and municipally owned utilities which advertise extensively are not subject to the contemplated advertising restriction. This is seen by CBA as establishing unjust and illegal discriminations between public utilities in similar circumstances and material to their rights, and that such patent discrimination denies the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.

All motions to dismiss C.10068 were taken under submission and the proceeding continued with the receipt of testimony and evidence on the merits of the proposed regulation.

The project manager in the energy group of the Commission's Operations Division testified briefly for the staff as to the background of C.10068. He also stated that under PURPA, shareholders are required to finance any "promotional or political" advertising as defined in the act and that this policy was consistent with the

Commission staff's recommended treatment of "institutional advertising" expenditures adopted by the Commission in D.86281 (50 Cal PUC 418-419) and used as a guideline for later decisions to differentiate stockholder-financed advertising. The staff witness recommended that utility advertisements be required to identify the sponsor of the advertisements and proposed that advertisements which the utility intends to finance from ratepayer revenues be identified as "paid for by ratepayers of (name of utility)"; or, as an alternative, "(name of utility) will claim the cost of this advertisement in its rates". He further recommended that advertisements not intended to be financed from ratepayer revenues be identified as "paid for by stockholders of (name of utility)". He explained his proposals differ from those proposed in the OII in that they are simpler, shorter, and would be less costly in terms of advertising time as well as having a clearer meaning. The staff witness believes that the labeling of ratepayer-financed advertising will probably create an increased burden on the Consumer Affairs and Conservation Branches of the Commission to respond to ratepayer questions. For this reason, the staff witness proposed alternatively that labeling be limited to stockholder-financed advertising. The staff witness directed attention to a newsletter published by PG&E (Exhibit 1) which is distributed monthly to PG&E's customers as a monthly bill insert. Stating that the insert does not qualify under current Commission criteria as a ratepayer expense, the staff witness pointed out that the advertisement disclaimer "not printed at customers' expense" was an example of what can be done, and is being done, in the area of labeling advertising.

The staff witness explained Attachments C and D to Exhibit 1 as endeavoring to show how examples of the labeling requirement would appear on newspaper and television advertisements which had previously been used by PG&E. He acknowledged that although particular ratepayer-financed advertisements would be claimed by the utility in a future rate case, they would be labeled currently as published in order to differentiate such advertisements from stockholder-financed advertising.

Upon cross-examination the staff witness testified that he could not ascertain how many complaints were received by the Commission for the year prior to March 1976 when this OII was initiated, but he did comment on and sponsored Exhibit 2, "Data on Advertising Complaints", which had previously been requested by and furnished to the respondents. The staff witness testified that it was extremely difficult to ascertain exact numbers of complaints received because the complaints, both written and oral, are received by several branches of the Commission in addition to the offices of the various Commissioners. The staff witness testified that he searched and sampled several customer files which contained letters of complaint received in response to a particular major rate case filed by the individual utility companies. Citing a 1975 rate application by PG&E, the staff witness stated that there were 20 customer files in connection with that application out of which two customer files were sampled. Those two files contained four letters in which some reference was made

to the company's advertising. From this sample, the staff witness stated that it was estimated a total of 40 letters of complaint were received by the Commission on PG&E's application over a two-year period. He used a simple arithmetic method of obtaining his estimated totals rather than a statistical sampling method. Using similar customer file sampling for Edison, SoCal, and SDG&E, in connection with their recent rate applications, the staff witness estimated the Commission received a total of 30, 25, and 14 complaint letters, respectively, over a two- or three-year period. He stated that the sample letters of complaint were letters concerning high bills in general and only incidentally mentioned advertising. He did not quantify the number of complaints concerning who paid for advertising which were received by the Commission from December 1977 to November 1978. The staff witness stated that adoption of his alternate proposal of labeling only stockholder advertising would probably result in a reduction of ratepayer complaints but that if the proposed labeling requirement in all advertisements were adopted, it would probably result in increased complaints to the Commission. Upon further questioning, the staff witness admitted that it was possible that any adopted labeling requirement could result in an increased number of complaints.

Questioned as to the public's understanding of the concept of rate of return, the staff witness acknowledged that whether an advertisement was labeled "paid for by ratepayers" or "paid for by stockholders", in the final analysis, it was quite possible that many people would believe all advertising was ultimately paid for by ratepayers.

The staff witness acknowledged that, under his alternate proposal of labeling only shareholder-sponsored advertisements, in a hypothetical situation where a utility only places advertisements that are properly chargeable to ratepayers as an operating expense and none which would be labeled "paid for by shareholders", etc., there would essentially be no labeling at all of advertisements which would be read or heard by consumers of that utility through the media and thus there would essentially be the same number of complaints received by the Commission as is the case now. He also acknowledged that using the same hypothetical situation for his recommended labeling requirement for both ratepayer- and shareholder-sponsored advertisements, there would probably be an increase in the number of complaints and thus an increased burden on the Commission. The staff witness agreed that although his alternate proposal of labeling only shareholder-sponsored advertisments was a way of alleviating possible problems which could arise with ratepayer-financed advertisements, it was true that the only advertisements that ratepayers could then identify would be shareholder-sponsored advertisements.

The staff witness testified that there had been no report, analysis, memorandum, or other document prepared by the Commission which analyzed the administrative burden of answering utility advertising complaints.

The staff witness testified that approximately 20 questions and responses relating to advertising were received by the Consumer Affairs Branch over an 18-month period, which breaks down to approximately 1.1 questions and answers or complaints per month. He conceded that it was unlikely that the workload of the Consumer Affairs Branch, which received an average of 1,292 complaints and 2,056 inquiries per month between July 1, 1977 and June 30, 1978, would be significantly reduced if all complaints and inquiries from advertising were eliminated.

Responding to questions from respondent Sierra Pacific, which serves approximately 150,000 electric customers of which only about 30,000 are in California, the staff witness stated that staff had not discussed the problem of whether it would be proper for the Commission to propose the labeling requirement on such utility and indicated that perhaps the utility could be excused from such order because of additional costs to the utility from having to prepare two sets of advertisements for its multiple state service areas.

During further cross-examination, the staff witness agreed that if the recommended labeling proposals were adopted, some of the increased inquiries from the public might be why certain advertisements are paid for by shareholders and why certain other advertisements are paid for by ratepayers and that in anticipation of such line of inquiry, the Commission could possibly issue a pamphlet generally explaining allocation of advertising expenses. However, the staff witness did maintain certain reservations about such pamphlets which related to costs.

Following the testimony of the staff witness, testimony was received from several of the respondents' witnesses previously identified in this decision. For the sake of brevity, the relevant portions of their testimony, in opposition to the proposed and/or alternate labeling proposals, are summarized as follows:

1. Labeling Would Detract From the Effectiveness of Advertising Messages

Respondents' witnesses were unanimous in their belief that advertising is the most cost-effective vehicle to communicate information in a comprehensive manner to large audiences. They pointed out that effective advertising is achieved when the intended reader or viewer receives the intended message with as little distraction as possible and that a clear, concise, uncluttered advertisement has a far better chance of being read than one with distracting "business". According to consensus, a labeling requirement contained in each advertisement will tend to detract from the message intended to be communicated by focusing attention on a different issue. Although a label might appear to be a relatively minor burden for the advertising message to carry, it could, in fact, be a mortal blow to the advertisement's effectiveness. As an example, according to the testimony, the promotion of adequate insulation to achieve energy conservation requires a repetition of the advertisement in order to ensure exposure, create new attitudes, and change habits. However, a consumer who at first sight grasps the point of the advertisement might very well become indignant if he is reminded each time that he is paying for the same message more than once. It may even cause him to resist the advertisement's message. Or, another reaction, where the reader, listener, or viewer may see the line and say: "Hey, my house is already insulated. Why should I have to pay for this insulation advertisement?" Either way, there is a considerable loss of message effectiveness and a continuing irritation among consumers according to the witnesses.

It was further pointed out that the proposed labeling might well preempt the whole message in the mind of the reader, listener, or viewer. Respondents suggest that most people know that advertising is a cost of doing business and do not care to be reminded that they are paying for something - especially since many people have the idea that advertising costs fantastic sums of money and what is not realized is that the advertisement costs less than $.01 per person reached. Not knowing this, a typical customer, upon seeing the "paid for by ratepayers" label, which may as well read "paid for by you", figures his share of costs is a frightening number of dollars. It was the opinion of the several expert advertising witnesses testifying for respondents that it is the labeling and the imagined costs which will remain in the mind of the reader, listener, or viewer rather than the desired message about insulation, energy-efficient appliances, conservation, etc.

It was also pointed out in testimony that in those cases where word efficiency is critical, i.e., media which is brief in content or time exposure, such as billboards, radio, and television, the distraction resulting from either the OII proposal or staff-recommended alternative proposals will be greater and thus effectiveness severely reduced.

2. Labeling Would Restrict Use of Various Media For Advertising

Respondents contend that the labeling proposal of staff requiring the label to be "conspicuously visual" in printed advertising, and to be stated vocally as well as visually in television advertising would cause the utilities to restrict or eliminate certain media in their advertising campaigns. They point to outdoor billboard advertising as a medium which would probably have to be eliminated or severely restricted since this is a medium which, for maximum clarity and effectiveness, should have as few words as possible, preferably no more than six or seven.

Thus, adding anywhere from six to 19 words in the several labeling proposals advocated by the Commission OII or by staff to the six or seven words of the main message would cause so much distraction and loss of effectiveness that it would no longer be considered an economical and effective medium. The use of 10-second television spots would also be eliminated, according to the testimony, since it takes a minimum of three seconds to say "paid for by ratepayers of PG&E" and much longer if any of the longer labels suggested by staff are used. It was also pointed out that the various label proposals would consume 10 to 40 percent of a 30-second spot and, as a minimum, one-third of a 10-second spot. The 30-second spot would be significantly reduced in its content and, therefore, its effectiveness, while the 10-second spot would just about be wiped out as a medium for utility advertising.

3. Labeling Would Increase Costs of Utility Advertising

Since 10-second television spots would virtually be eliminated by utilities and the message content of 30- and 60-second spots greatly reduced by the requirement of labeling, it was contended that utility advertisers would have to purchase at least 30-second television spots to replace the 10-second spots plus additional air time to ensure getting their messages across. The same holds true for radio spots. In newspaper advertising, formerly used small space newspaper advertisements would have to be replaced by larger space advertisements to minimize the distraction and loss of effectiveness of a required label. All of the above will necessitate added costs to advertise according to the utility witnesses. The Sierra Pacific witness testified that because of its interstate operations in Nevada and California, it will incur greater costs because it is regulated by two state regulatory bodies and it will be forced to design two advertising programs, one for California newspaper readers containing a label and the other for its Nevada customers, where labeling is not required. In its television and radio advertising, however, a more serious problem will exist.

According to Sierra Pacific, its service area is served by a number of small radio stations located in the Tahoe basin and in Truckee, California, as well as some larger operations located mainly in Reno and in Carson City, Nevada. There are a number of small newspapers located in these areas although only one, located at South Lake Tahoe, operates on a more than once-a-week basis. Newspapers in Reno, Carson City, Sacramento, and San Francisco supplement these small operations. All television in Sierra Pacific's service area originates elsewhere, either through cable television systems or from Reno's three television stations. Reno is the media base for all television and much radio and newspaper information received in eastern California. The problem as seen by Sierra Pacific is that its Nevada customers would be forced to read, see, or listen to a label disclaimer intended primarily for California customers. They foresee a distraction and destruction of their advertising effectiveness and increased costs because materials placed in Nevada and California media would have to be produced separately to ensure that the disclaimer was eliminated from the Nevada advertisements and included in the California advertisements. Radio and television advertisements would create the greatest problem since the airwaves cannot be stopped from crossing state boundary lines.

4. Labeling Will Exacerbate the Complaints and Inquiries to the CPUC

Respondents' witnesses were unanimous in their opinion that requiring the labeling of advertisements would result in more, not fewer, complaints and inquiries to the Commission and to themselves. According to their testimony, these increased number of complaints will increase costs to the Commission and to the utility companies in terms of time, expense, and effort required to respond to each complaint and inquiry. They drew attention to staff witness DeBerry's testimony in which he agreed that it was probably correct that his proposal that all advertisements be labeled would probably increase the burden on the Commission. Respondents pointed out that this result was contrary to the stated goal of the Commission in its OII order.

Proposals Made by Respondents

Although the OII invited proposed alternatives from respondent utilities, only two recommendations were made through testimony of the witnesses. The first recommendation was that the Commission continue the current procedure of reviewing advertising expenses during rate application proceedings and allowing or disallowing such expenses as operating costs. No labeling of advertisements would be required. Complaints and inquiries would be handled as they are currently handled. Under the second proposal, labeling would again not be mandated but instead, a pamphlet would be prepared by the Commission explaining the Commission's procedure of reviewing advertising expenses during rate application proceedings and the Commission's policy with respect to the type of ratemaking allocation of expenses to be charged to shareholders. Such pamphlet would be mailed to all members of the public who phone or write letters of complaint or inquiry to the Commission concerning utility advertising. In this way the public can be properly informed both of the workings of the Commission and how the costs of various types of advertising are allocated between shareholders and ratepayers.

Presentation of Toward Utility Rate Normalization (TURN)

Testifying on behalf of TURN, an interested party, was Herbert Chao Gunther, executive director of Public Media Center, a national public service advertising agency. The relevant portions of his testimony were as follows:

> At the present time, utility customers have no way of knowing who pays for utility advertisements, other than inquiring of the Commission, and this takes up valuable Commission time. It was his belief that this problem can be eliminated simply and easily by merely labeling utility advertisements. He stated that it was important to notify utility customers of the financial

source of utility advertising so that they would be alerted to whose interests are being promoted. He felt that required labeling will alert readers, listeners, and viewers that only one interest, among many, is being advocated at the expense of other interests and other viewpoints and that the contents of the advertisement are not a statement of fact. In addition he contended that since utilities are regulated by a government agency, labeling will dispel any notion that the utilities' advertisements have government support. The witness did not believe that an otherwise effective advertisement would be adversely affected by a mere label.

Rather than support the labels proposed in the original OII order or the alternates proposed by the staff witness, Gunther proposed several of his own labels. As an absolute minimum, he was of the opinion that the label: "The following message is paid for by the (stockholders) (customers) of (utility)" should be required on all advertisements. He also suggested that the term "ratepayer" be replaced with the word "customer" or, even better, to promote communication even more emphatically, the label could be: "You are paying for the following message of (utility)" or "the public is paying for the following message of (utility)". However, the label preferred by the witness, and which he advocated should precede the advertisement rather than be hidden in other parts of the advertisement, is as follows:

For Stockholder-Financed Advertisements

> "The following statement of opinion, paid for by Stockholders in no way reflects the view of all stockholders, or those of utility employees, is not endorsed by any governmental or political agency and is merely the opinion of the management of (Utility)."

For Customer-Financed Advertisements

"The following message, paid for by (Customers) (you) (The Public), in no way reflects the views of all (Customers) (members of the Public), is not endorsed by any governmental or political agency and is merely the statement of the management of (Utility)."

Lastly, TURN's witness recommended that an independent panel should review utility advertisements prior to publication to determine whose interests are being promoted by the advertisement and they would be responsible to assess the costs of such advertisement to either stockholders or customers.

Discussion

Prior to issuing our original OII in 1976, we were concerned with what we perceived as an increasing number of ratepayer complaints about utility advertising in recent years. We were of the opinion that members of the Commission and the staff were expending a significant amount of time and expense in order to satisfy ratepayer complaints and requests for information regarding advertising. We believed that this time and expense could be reduced if ratepayers were better informed as to whether the cost of each utility advertisement was to be claimed as a ratemaking expense or was to be borne by the shareholders of the utility. While it is true that this Commission has long scrutinized advertising expenses in individual utility rate proceedings and has formulated certain policies with respect to those types of advertisements which we would disallow for ratemaking purposes, we are aware that relatively few interested members of the public either attend those proceedings or read the decisions issued by the Commission. Accordingly, we recognize most members of the public are relatively uninformed as to public utility rate application proceedings and the close scrutiny every operational and administrative expense claimed by a utility receives during those proceedings and the reasons we either allow or disallow such expenses.

Thus, in the desire to inform the public, reduce the number of complaints and inquiries concerning advertising, and reduce the time and expense expended by the Commission in answering those complaints and inquiries, we proposed the labeling of all advertisements by energy utilities as the means of accomplishing these goals.

In 1977, following a 1976 prehearing conference in the matter during which the assigned Commissioner outlined major defects in the concept and scope of the original order, he promised that it would be rescinded or amended before any further proceedings were scheduled. Sometime thereafter, upon the Commission staff recommendation, we discontinued the investigation.

In November 1978 information furnished the Commission by staff and others indicated that ratepayer complaints about utility advertising were increasing and, relying upon this information, we set aside the previous discontinuance and reopened this proceeding. In doing so we considered the defects in the original order but considered them only minor and insufficient to warrant amending the order and reopened the proceeding as originally ordered.

After four days of testimony by staff, respondent, and interested party witnesses, we have learned a great deal about the technical aspects of advertising copy design as well as the many concerns expressed by the respondent utility companies and the problems which would be raised were we to order the labeling of all advertisements. Those concerns and problems which have been raised are worthy of consideration and we do not doubt their sincerity. The record in this proceeding clearly indicates that, although the concerns are sincere, they are based on opinion alone.

Similarly, we recognize that the testimony of staff and interested party witnesses was likewise based on opinion alone. We are also mindful of the differences between the opinions of respondents' witnesses and TURN's witness, which quite possibly result from the difference in interests sought to be served by each. This is not surprising since the subject of utility advertising is a controversial issue upon which reasonable persons may differ.

After reviewing and considering the testimony and exhibits presented during this proceeding, we are persuaded that the need for the proposed labeling requirement is less than had previously been believed. Although we still believe that utility consumers have a need to be better informed on all aspects of public utility company operations and the Commission's regulatory process, we are not convinced that requiring labels in utility advertisements can be justified on the ground that it will lessen the burden on the Commission's staff from inquiries and complaints.

The sampling of complaints taken by staff from customer files in connection with recent rate applications filed by respondents indicates approximately 40 letters from customers of PG&E over a three-year period; approximately 30 letters from customers of Edison over a two-year period; approximately 25 letters from customers of SoCal over a two-year-plus period; and approximately 14 letters from customers of SDG&E. It was also estimated by staff that the Commission's Consumer Affairs Branch had responded

to approximately 20 questions pertaining to utility advertising over a one and one-half-year period preceding these hearings. In addition, it was conceded by staff that there may have been some mail overlap between the various divisions of the Commission with respect to the above figures. We also note that the sample complaint letters in the staff's exhibit concern rates generally and mention advertising only in passing. It is highly possible that at least some of these inquiries or complaints would be received regardless of whether utility advertisements were required to contain the proposed labels or not.

The number of complaints received by the Commission about utility advertising has increased markedly in the past year. However, when we consider these figures against the millions of consumers served by the respondent utility companies as well as against the 15,512 complaints and 24,683 inquiries submitted to the Consumer Affairs Branch from July 1977 through June 1978, we must admit that the problem described in our original and reopened OII does not appear to be as significant as earlier believed.

According to PG&E's witness, who testified that PG&E's advertising reaches approximately three million people, the company received approximately 12 complaints relating to this issue in 1978 and none in 1979. Edison's witness testified that the company received 10 complaints in connection with its advertising in 1976, six in 1977, eight in 1978, and two during the first half of 1979. SoCal's witness testified that it received 24 letters in 1978 concerning its advertising, of which 17 were complimentary about SoCal's advertising. Of the seven which were not complimentary, one pertained to the color of the advertisement's background, five objected to receiving insulation advertisements in bill inserts on more than one occasion, and one objected to the proposed location of an LNG plant.

With respect to our concerns that the Commission expends a significant amount of time and expense in satisfying ratepayer complaints and inquiries, and our initial belief that the labeling of advertisements would reduce this time and expense, we must candidly admit that the record is lacking in factual support of such belief.

A great deal of time during this proceeding was spent in discussing whether, in fact, a requirement to label advertisements would decrease the number of advertising complaints and inquiries or actually aggravate the situation and increase the number of complaints and inquiries. Respondents unanimously believe that mandatory labeling would actually exacerbate the problem and actually result in more complaints than previously received. TURN's witness is of the opinion that labeling would decrease complaints while the staff witness is of the opinion that ratepayer-financed labels would probably increase the number of complaints and inquiries received, and shareholder-financed labels would probably not increase or decrease the number of complaints and inquiries received. Staff also believes that even if we could achieve the elimination of all advertising complaints and inquiries, it would not significantly reduce the amount of time expended by the Consumer Affairs Branch in responding to correspondence from consumers. Based on the arguments and examples cited, we concur.

Alternate Proposal

Several respondents suggested that a superior alternative to advertising labels would be for the Commission to develop and distribute a pamphlet upon request, or in response to a complaint or inquiry, which comprehensively explains how test year advertising expense is calculated and what standards are currently applied by the Commission in determining whether the cost of a particular advertising campaign should be allowed in rates. In this way the complexities of ratemaking and the role of the Commission in ratemaking cases could be better explained than could be done by a mere label stating that an advertisement is either "paid for by ratepayers" or "paid for by shareholders". It could even include some of the disclaimer message advocated by TURN so that the consumer can be fully informed. We have considered this proposal and feel it has merit and should be further explored by the Commission staff to determine its feasibility and costs. It appears to be a means of accomplishing our goals without creating the dangers posed with the labeling proposals.

Motions to Dismiss

Because of the evidence developed on the record herein upon which the following findings of fact, conclusion of law, and order are based, we do not deem it necessary to discuss the motions by respondents to dismiss this proceeding. For this reason, the motions will be denied.

Findings of Fact

1. The number of complaints and inquiries received by the Commission concerning utility advertising is not significant when measured against the total number of complaints and inquiries received by the Commission.

2. The probability of an increase in the number of complaints and inquiries received by the Commission regarding utility advertising is high if respondent utilities are required to label advertisements under the proposals outlined in the OII or under those recommended by staff or TURN.

3. The proposed labeling requirement will increase the administrative burden of the Commission because of the likelihood of an increase in complaints and inquiries received by the Commission.

4. The proposed labeling requirement is likely to increase costs to the respondent utilities.

5. A pamphlet or brochure prepared and distributed to the public in response to complaints and inquiries concerning utility advertising, explaining Commission policy on utility advertising for ratemaking purposes and the Commission's ratemaking procedures, is less likely to cause an increase in complaints and inquiries than a labeling requirement.

Conclusion of Law

It has not been demonstrated that directing the labeling of utility advertisements, with respect to whether the shareholders or ratepayers pay for them, is in the public interest or reasonable.

O R D E R

IT IS ORDERED that:

1. Staff shall explore the feasibility and cost of preparing for Commission approval an information pamphlet containing an explanation of the Commission's ratemaking procedures, current policy regarding advertising expenses, and the manner of allocation of advertising expenses between ratepayer and shareholder.

2. In all other respects this investigation is discontinued.

3. All motions not previously ruled on are denied.

The effective date of this order shall be thirty days after the date hereof.

Dated MAR 3 1981, at San Francisco, California.

President

I concur:
See attached
Richard D. Gravelle

Commissioners

C. 10068
D.

RICHARD D. GRAVELLE, Commissioner, Concurring:

I concur in the conclusion that the record in this proceeding does not support a requirement that the energy utilities label their advertising as paid for by ratepayers or shareholders. However, I write separately to emphasize the importance which I attach to one of the goals of this proceeding. That goal is to allow ratepayers to know whether they are paying for a particular advertisement. Ratepayers have a right to know whether their money is being used to further a point of view or an opinion with which they disagree. This is particularly true as rates increase and as ratepayers experience larger and larger bills even while practicing more conservation. This "right to know" on the part of the ratepayers is vastly more important than reducing burdens on our staff from answering inquiries regarding the cost and financing of utility advertisements. In addition, this right encompasses ratepayers learning whether this Commission has endorsed the particular message of any utility advertisement. Perhaps the best tribute to the importance of this right to know is the exaggerated zeal with which the utilities fought against the labeling requirement.

There are a number of practical problems in informing ratepayers whether they have paid for a particular advertisement. In theory, any ratepayer can call or come to the Commission's offices and inquire whether ratepayer money has been or will be used to finance an advertisement. However, in practice, very few ratepayers will take the time to contact staff to try to obtain such information.[1/] At present, a ratepayer who did inquire would

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1/ I recognize that the record in this proceeding shows a minimal number of complaints to the Commission. However, my experience is that there is a vast amount of public dissatisfaction with utility advertising. The low number of complaints may be attributable to two factors: first, customers' ignorance that they may complain to the Commission, and second, public disillusionment with the Commission, leading to the conclusion that making a complaint is a waste of time. I do not accept the idea that the comparatively low number of complaints "proves" that no problem exists in this area.

probably be told to inquire again after the conclusion of the utility's next general rate case. It is obvious that the most efficient manner of informing ratepayers on this subject would be for each advertisement to carry some indication of whether ratepayers or shareholders are paying for that advertisement.[2/]

I recognize that a labeling requirement would place a certain burden upon the utilities' speech. For either a printed or a broadcast advertisement, some page or billboard space or air time is required in order for the label to be seen or heard. The Commission must proceed very carefully where burdens on speech are concerned. (See, e.g., Consolidated Edison Company v. Public Service Commission (1980) ___U.S.___, 100 S. Ct. 2326; Central Hudson Gas v. Public Service Commission of New York (1980) ___U.S.___, 100 S. Ct. 2343). But the practical and constitutional problems are not insurmountable.

I start from the fact that the Commission has directed the utilities to conduct certain types of advertising in connection with achieving conservation goals or alerting customers to new conservation programs. As may be seen from a related matter on today's agenda, namely, a letter thanking Pacific Gas & Electric Co. for its cooperation in reducing unnecessary advertising expenditures, there is already a substantial amount of consultation

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2/ As I note later, a label that an advertisement has been paid for by ratepayers or shareholders presupposes that this fact is known before the advertisement is broadcast or printed. I envision a new system for determining this fact in advance. One of the many defects in this proceeding was the failure to see that our present system would only allow a utility to inform the public that, in its upcoming general rate case, it would claim the cost of the advertisement as an expense legitimately charged to ratepayers. Such a notice would be not only cumbersome but also confusing.

between the utilities and the Commission staff regarding permissible types of advertising. It therefore is, or ought to be, possible for a utility to identify in advance those advertisements the cost of which will be recognized as legitimate expenses. These are precisely the types of advertisements where it would be important for ratepayers to be informed that their rates were paying for the message printed or broadcast. In the future, I expect that these will be the only types of advertisements which this Commission will let the utilities claim as expenses in their general rate cases. All other advertisements would be charged against shareholders and identified as such.

Because we are dealing with commercial speech, which does not ordinarily have a news or time value, it is, or ought to be, possible to identify in advance those advertisements which the utility will claim as legitimate expenses. I envision a generic proceeding in which this Commission could adopt guidelines so that our staff, the utilities and other interested parties could jointly agree on whether a particular advertisement could be claimed as an expense legitimately charged to ratepayers. In those instances where it was determined that the advertisement would be chargeable to ratepayers, I would require a "paid for by ratepayers" label. All other advertisements would carry a "paid for by shareholders" notice.

We were told, however, that such a label would destroy the value of utilities' advertising by distracting the viewer's or listener's attention. We were told that such a label would make billboard advertising impossible. We were told that utilities would have to forego use of the ten-second radio or television "spot" advertisement. Although this testimony was virtually uncontradicted, it nevertheless is completely unpersuasive. A short and simple "paid for by ratepayers" or "paid for by shareholders" label could hardly destroy the value of the advertisement.

Newspaper and magazine cigarette advertisements carry longer and more troubling labels, yet obviously the cigarette companies have not found it pointless to continue pouring millions and millions of dollars into advertising campaigns. Automobile advertisements carry notices that mileage figures are for comparison purposes only, and that actual mileage may differ depending on varying conditions, but obviously such advertisements continue to be used. Bank advertisements carry notices of substantial penalties for early withdrawal of funds from high interest accounts. The short notice I propose, "paid for by ratepayers", could be spoken in less than two seconds. It is no more onerous than the label on political advertising (e.g., "paid for by Citizens for Smith"). Obviously the labeling requirement has not deterred politicians from either advertising or the use of the ten-second spot advertisement.

Under the analysis in Central Hudson Gas, any burden on commercial speech can be sustained only if the government can demonstrate a substantial interest served by its action. Moreover, the regulatory technique used must directly advance that interest and be no broader than necessary. There are two substantial, and I submit, compelling state interests served by labeling utility advertisements as "paid for by ratepayers" or "paid for by shareholders". First, ratepayers would be informed as to how utilities are using revenues collected from them through the rate structure to influence their behavior and opinions. Second, and perhaps more importantly, ratepayers would be informed as to how certain utility expenses are approved and whether or not this Commission endorses the point or view or opinion expressed in the advertising. A "paid for by ratepayers" or "paid for by shareholders" label is a narrowly drawn means of directly accomplishing these purposes. These purposes warrant our again attempting to create a means of labeling utility advertisements.

It is true that this labeling might result in more inquiries to the Commission's staff. However, I would not attempt to justify this requirement on the premise that it was designed to reduce staff work, for in this area I would be happy to see staff effort and resources increased. I look forward to the day when all energy utility advertising will be labeled in this manner.

Richard D. Gravelle

RICHARD D. GRAVELLE, Commissioner

San Francisco, California
March 3, 1981