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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of appellant Central Hudson Gas & Electric Corporation ("Central Hudson") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae.* Copies of the consents have been filed with the Clerk.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns

a vital interest of EEI and its members – their freedom to disseminate truthful and accurate information concerning the uses and availability of electric service.

The Public Service Commission of the State of New York ("Commission") has imposed an absolute ban on all promotional advertising by electric utilities. This ban imposes a significant restriction on the utilities' freedom of speech as well as on the public's ability to gain information on a subject of vital importance to them. In a period in which consumers must make difficult choices among alternative energy sources and difficult decisions concerning the allocation of their limited resources, it is of the utmost importance that they have complete and accurate information to assist in these decisions. Truthful dissemination of information by the electric utilities provides data essential to an informed consumer choice. A complete prohibition imposed by the Commission on electric utilities, in New York, and not on their competitors who supply other forms of energy, deprives the utilities of the ability to compete adequately with those suppliers. In addition to depriving the consumer of complete information on which to rely in his selection of energy sources, EEI believes that such a complete prohibition would seriously impair the ability of the nation's electric utilities to compete with other sources of energy supply.

ARGUMENT

1. The Commission's total ban on promotional advertising concerning electric services violates the First Amendment.

The ban imposed by the Public Service Commission and upheld by the Court of Appeals of the State of New York is a total and absolute prohibition of all unsolicited communications intended to inform the public of uses of electricity. As such, the ban constitutes an unconstitutional abridgement of the utilities' freedom of speech. As Mr.

Justice Marshall wrote for a unanimous Court in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The order under challenge here is precisely such a prohibited restriction. It bans, under any circumstances, the unsolicited communication of information by utilities on the subject of availability and use of electric services.

Any such clearly content-based restriction is subject to a most exacting standard of review. *See Elrod v. Burns*, 427 U.S. 347 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). Absent some compelling justification, such as a likelihood that such speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see Hess v. Indiana*, 414 U.S. 105 (1973); *United States v. O'Brien*, 391 U.S. 367 (1968). The Commission, here, has not shown any imminent public danger which would justify such a total ban on the utilities' ability to speak. At most, the Commission has asserted speculative conclusions concerning the effect of the dissemination of accurate information on energy conservation and utility rates.[1] (Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, at pp. 13-18). Although the purported bases for the Commission's order may constitute laudable goals, they do not meet the standards required by this Court for such a complete abrogation of the right to speak.

Nor is this absolute ban on the dissemination of information an appropriate means to attain the goal of conservation. Other means, such as education of the public, are available to encourage conservation and do not involve such a basic infringement of First Amendment rights.

1. The Court of Appeals relied only on the promotion of conservation as a state interest sufficient to justify the ban (J.S.A. at 13a-14a). (All references to "J.S.A." are to Appellant's Appendix to Jurisdictional Statement filed with this Court on October 5, 1979.)

The Court of Appeals concluded that: "Conserving diminishing resources...constitutes a compelling justification for the ban." (J.S.A. at 14a). However, this Court has stated that regulators are not empowered to limit the free flow of information according to their "own idiosyncratic conception of the public interest." *Red Lion Broadcasting Co. v. Federal Communications Comm.*, 395 U.S. 367, 395 (1969).

Alfred E. Kahn, former Chairman of the Commission, recognized this problem when he concurred "with the greatest reluctance" with the continuation of the promotional advertising ban in February, 1977. (J.S.A. at 51a). In his separate opinion, Mr. Kahn stated that:

> "it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their own judgments of what is good for people for the judgments of the people themselves." (J.S.A. at 51a.)

In the case at hand, the Commission is attempting to substitute its judgment for that of the consuming public by limiting the public's access to information on available energy supplies. But, as this Court held in *Thornhill v. Alabama*, 310 U.S. 88 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102.

There may be no information more important to the consuming public in this time of uncertainty in the cost and availability of fuel supplies than accurate data concerning available sources of alternative forms of energy. The Commission's ban effectively prohibits the public from acquiring such accurate information on electric services.

The Commission's ban evidences a highly paternalistic attitude toward the public. It would seem that the Commission views consumers as unable to choose wisely in their use of energy, and, thus, it feels compelled to dictate a choice to them by means of a restriction of the information made available to them. This approach, however, is clearly impermissible under the First Amendment. Mr. Justice Marshall expressed the essence of this concept in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), writing for a unanimous Court:

> "The constitutional defect in this ordinance, however, is far more basic....The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township....As we said...in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading: 'There is...an alternative to this highly paternalistic approach. That alternative is to assume that this information is not itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them....'" *Id.* at 96-97 [Quoting from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)].

This language is particularly appropriate to the case at bar. The Commission has determined that consumers will not choose a course of action which is in their own or society's best interest if they are allowed free access to truthful data disseminated by the electric utilities. This approach is clearly antithetical to basic constitutional requirements and ignores the ability of the public to act intelligently on the basis of freely circulated data. As the Court wrote in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978):

> "...the First Amendment...prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the free flow of commercial information." *Id.* at 783.

An evolving line of cases has made it clear that commercial speech is entitled to First Amendment protection. *Linmark Associates, supra,* involved speech of a commercial nature ("For Sale" signs posted on homeowners' lawns), as does the case at bar. In *Bigelow v. Virginia,* 421 U.S. 809 (1975), this Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In *Bigelow,* the State of Virginia had attempted to prohibit dissemination of information to Virginians about the availability of abortions in New York. Despite the illegality of abortions in Virginia, this Court upheld the First Amendment rights of the advertisers.

That commercial speech is entitled to First Amendment protection was confirmed in *Virginia State Board of Pharmacy, supra,* where this Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773. In the present case, the Commission has "completely suppressed the dissemination of concededly truthful information" by the electric utilities because of its highly speculative fears about potential consumer actions.

The Court of Appeal's decision to uphold such a restriction is clearly erroneous. As Mr. Justice Blackmun wrote in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), a case involving advertising by lawyers:

> "[T]he prohibition of advertising serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*" *Id.* at 374-75 (emphasis added).

The consumer must have complete and accurate data to make informed decisions among various energy source options. No beneficial public purpose can be served by impeding the flow of such information. As Mr. Justice Blackmun wrote in *Bates, supra*:

> "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue....Advertising, though entirely commercial, may often carry information of import to significant issues of the day....In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." 433 U.S. at 364.

Electric utilities are in a position to provide to the public the data required for informed decision making, but, in New York, are prohibited from doing so. Their knowledge can and should be made available to current and prospective consumers who urgently need such information.

The Commission appears to believe it is justified in ordering this ban because of its extensive regulatory control over the electric utility industry. (J.S.A. at 57a-59a). Ability to control utilities' accurate and truthful speech does not, however, follow from the power to regulate other facets of the industry. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which involved speech by the banking

industry, a heavily regulated industry, this Court flatly rejected the proposition that speech by business entities is not protected by the First Amendment. In the *Virginia Pharmacy* case, the speakers were members of the pharmacy industry over which state bodies have extensive regulatory powers. *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bates, supra*, also involved disseminators of information who were under extensive regulation. Yet, in all of these cases, this Court refused to allow regulation of the content of the industries' speech. Power to regulate rates does not imply power to regulate in the area of First Amendment freedoms.[2]

The Commission has not shown any state interest sufficiently compelling to interrupt so drastically the free flow of information on energy sources. The utilities have a right to communicate, and the public a right to obtain and evaluate, information on these matters. A ban such as that of the Commission is clearly in violation of the First Amendment and should be invalidated.

2. The order and the authorizing statute are unconstitutional under the Equal Protection Clause.

The Commission's promotional advertising ban applies only to utilities. It does not apply to non-utility suppliers of energy, such as heating oil distributors. In view of the stated purpose of the Commission's order, which is to conserve oil supplies, this discrimination against electric utilities is irrational and violates the Equal Protection clause of the Fourteenth Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment rights which

2. In the recent commercial speech case of *Friedman v. Rogers*, 440 U.S. 1 (1979), this Court permitted state regulation of the use of trade names only after finding that trade names are "a form of commercial speech that has no intrinsic meaning" and that the restriction had "only the most incidental effect on the content" of the regulated speech. *Id.* at 12, 16.

forbids the government from discriminating among speakers on the basis of content. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), Mr. Justice Marshall wrote for a unanimous Court:

> "Selective exclusions from a public forum may not be based on content alone....Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." 408 U.S. at 96.

In the case at hand, the Commission has not merely prevented access to a particular forum on the basis of content of speech, but has closed access to all forums to the electric utilities, resulting in the grant of a virtual informational monopoly to the proponents of other energy sources. Although it is true that electric utilities are generally the sole suppliers of electricity within a particular service area, they are faced with continual competition from suppliers of other forms of energy. The absolute ban on all promotional advertising by electric utilities imposes an unreasonable restraint on their ability to compete adequately. This grossly discriminatory scheme violates basic tenets of both Equal Protection and the First Amendment.

Moreover, the imposition of the ban on only electric utilities, among suppliers of energy, is irrational in that the stated purpose of the ban is to conserve oil. Electrical energy is produced from many sources other than oil,[3] and the Commission's ban, accepting its stated purpose, is far too broad. This Court has stated that, "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Mosley, supra,* at 101. In the case at hand, even

3. Seemingly, the Commission's prohibition bars the promotion of the use of electricity derived from sources such as wind or water power, methods which assuredly conserve fuels.

the Commission recognized that "a continued ban...may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion... is not similarly proscribed." (J.S.A. at 37a.). The Commission's order is not "narrowly tailored" to its objective. Rather, it allows many aspects of oil consumption and energy use issues to be aired freely while imposing an absolute ban on the dissemination of information on one view–that of the utilities.

No rational, let alone compelling, state interest has been demonstrated by the government sufficient to justify such discrimination in restricting freedom of speech. Where fundamental freedoms are involved, a compelling state interest must be demonstrated. As Mr. Justice Powell wrote in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), referring to the *Mosley* case:

> "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.' " 411 U.S. at 34, n. 75.

The ban on the fundamental freedom of speech is discriminatory and irrational and no compelling state interest has been demonstrated. The Public Service Law, as construed, and the Commission's order should be held invalid under the Equal Protection clause.

CONCLUSION

The Commission's ban on promotional advertising by electric utilities is in violation of both the Equal Protection clause and the First Amendment rights of Central Hudson and all electric utilities in the State of New York. Therefore, the decision of the Court of Appeals should be reversed and the order of the Commission declared to be unconstitutional.

Respectfully submitted,

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