TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 FOR APPELLANT

Central Hudson Gas and Electric Corporation, appellant, appeals from the final judgment of the Court of Appeals of the State of New York, entered July 9, 1979, denying rehearing of a judgment entered May 1, 1979 which affirmed judgments of the Appellate Division, Third Department, and the New York Supreme Court, Albany County, and upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York in its orders of February 25, 1977 and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from promoting the use of electrical energy by advertising. These orders are contemporaneous with the order challenged in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134), probable jurisdiction noted October 1, 1979, which has been scheduled for argument with the present case.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 47 NY 2d 94, 417 NYS 2d 30, and is set forth in the Appendix to the Jurisdictional Statement (J. S. App.

A, pp 1a-14a).[1] The opinion of the Appellate Division, Third Department, is reported in 63 AD 2d 364, 407 NYS 2d 735, and is set forth at J. S. App. B, pp 15a-21a.

The opinion of the New York Supreme Court is not reported and is set forth at J. S. App. C, pp 22a-25a. The three opinions of the Public Service Commission are reported in 13 NY PSC 2072, 17 NY PSC 1-R, and 17 NY PSC 17-R and are set forth at J. S. Apps. D-1, D-2 and D-3, respectively.

Jurisdiction

Appellant (hereinafter "Central Hudson") commenced this action, seeking review of and declaratory relief against the Commission's orders of February 25 and July 14, 1977 under Article 78 of the New York Civil Practice Law and Rules, on November 10, 1977 in the Supreme Court, Albany County. As it had before the Public Service Commission (hereinafter the "Commission"), Central Hudson challenged the order banning promotional advertising as in violation of the First and Fourteenth Amendments to the United States Constitution.[2] The New York Supreme Court rejected Central Hudson's constitutional contentions, affirmed the validity of the Commission's orders, and denied the relief sought. The Appellate Division, Third Department, on July 27, 1978, affirmed the judgment below, and rejected appellant's attacks on the orders as unauthorized by statute and invalid under the federal and state constitutions.

The judgment of the Court of Appeals, rejecting all of appellant's statutory and constitutional contentions and affirming the

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[1] "J. S. App." refers to the Appendix to the Jurisdictional Statement (a separate volume filed with the Jurisdictional Statement). "A." refers to the Appendix filed with Appellant's Brief. "R." refers to the Record on Appeal in the court below.

[2] Appellant's petition to the New York Supreme Court is set forth at J. S. App. E, pp. 68a-73a. It also challenged the validity of the order under the state constitution, and other features of the Commission's order not involved in this appeal.

judgment below, was entered May 1, 1979 (J. S. App. F-1, p 74a). Appellant's motion for reargument was timely filed on May 30, 1979, and was denied on July 9, 1979 (J. S. App. F-2, p 75a). Appellant's Notice of Appeal to this Court was filed with the Court of Appeals and the New York Supreme Court on August 22, 1979 (J. S. App. G, pp 76a-79a). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1257 (2). The following cases, *inter alia,* sustain this Court's jurisdiction on appeal: *Williams* v *Bruffy,* 96 US 176, 183; *Live Oak Ass'n.* v *Railroad Commission,* 269 US 354; *Lake Erie & Western R. Co.* v *Public Utilities Commission,* 249 US 422; *Hamilton* v *Regents,* 293 US 245; *Atchison R. Co.* v *Public Utilities Commission,* 346 US 346, 348-49; *Lathrop* v *Donohue,* 367 US 820, 825.

On November 26, 1979 this Court noted probable jurisdiction.

Statutes Involved

The Commission's initial order banning promotional advertising by electric utility companies, issued December 5, 1973, provides, in pertinent part (J. S. App. D-1, p 31a):

> All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . .[3]

This order was continued in effect by the Commission's orders of February 25 and July 14, 1977, as set forth in J. S. Apps. D-2 and D-3, and it is these continuing orders which are challenged in this appeal. The relevant provisions of the New

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[3] The remainder of the order treats with promotion of the use of electricity through subsidy payments and employee incentives. Central Hudson is not here contesting the Commission's authority to prohibit such subsidy payments or employee incentives.

Despite the fact that the document establishing the ban is captioned "Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy" (J. S. App. D-1, p 25a), the portion which referred to the ban on promotional advertising by electric utilities is a final order (J. S. App. D-1, p 31a par. 2).

York Public Service Law, held by the Court of Appeals to authorize the promulgation of these orders by the Commission, are set forth in J. S. App. H, pp 80a-83a.

Questions Presented

The Court of Appeals of New York State rejected appellant's contentions that the New York Public Service Law gives the Commission no authority to issue the orders here in question and that the orders are in violation of the First and Fourteenth Amendments to the Constitution of the United States. The questions presented are:

> (1) Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Commission, and the Commission's orders banning advertising by electric utility companies, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and
>
> (2) Whether the Public Service Law, as so construed and applied, and the Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statement of the Case

The Commission's initial order banning "promotional advertising" by electric utility companies,[4] was issued in Decem-

[4] In 1970 and 1971 the Commission had banned promotional advertising respectively by telephone and gas companies, at a time when lack of telephone capacity and natural gas supplies jeopardized continuing service to existing customers. The gas companies were also ordered, pursuant to explicit statutory authority (Public Service Law Section 66-a), to conform to specified limitations on the attachment of new customers (11 NY PSC 1257). On June 21, 1972 the Commission declined to impose a similar advertising prohibition on electric utilities (12 NY PSC 108-R). The ban on telephone company advertising was lifted in March, 1973 (13 NY PSC 461). The ban on gas promotional advertising has recently been lifted for some gas utilities (including Central Hudson) due to the recent increased availability of natural gas (Case No. 25766, *Gas Restrictions,* Order dated September 6, 1979).

ber, 1973, at the height of the oil supply constraint consequent upon the Arab oil embargo following the October 1973 Arab-Israeli conflict, and was based on the Commission's conclusion that the electric utility system in New York State "does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter." (J. S. App. D-1, p 26a).[5] At about the same time the Commission ordered a state-wide voltage reduction (13 NY PSC 2183). The latter order was rescinded on March 29, 1974 after the Arab oil embargo had been lifted, and upon a finding that New York electric utilities had "substantial inventories" of fuel (14 NY PSC 551); the advertising ban, however, remained in effect.

Opposition to continuance of the ban was publicly voiced, and on July 28, 1976 the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices" (the pertinent provisions of which are set forth in J. S. App. I, pp 84a-87a). Numerous written comments were received, including Central Hudson's letter of September 10, 1976 (A. pp A10-A12), urging that the ban be lifted on grounds both of policy and of constitutional law as then recently determined in *Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748 (1976). No evidentiary hearing or adversary process was given, despite requests to that effect by the Attorney General and the Consumer Protection Board of New York State (R. 645 and 502).

On February 25, 1977, the Commission issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (J. S. App. D-2, p 32a), directing that "the existing ban on promotion of electricity sales shall be continued". There was no evidence before the Commission of any shortage of fuel

[5] The validity of the Commission's original ban of December, 1973 on promotional advertising is not in question on this appeal. At the time of its issuance there was real doubt that fuel supplies for electric generation would remain sufficient even to maintain existing service, and there was no reason for Central Hudson to contemplate promotional advertising.

oil or electrical capacity; the Commission relied primarily on its conclusion that (J. S. App. D-2, p 37a) increased use of electrical energy "would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts". Dr. Alfred E. Kahn, the then Commission Chairman, concurring "with the greatest reluctance and distaste", relied also on the ground that promotion of electricity usage would cause an increase in peak consumption which, under the existing rate structure, "is artificially subsidized." (J. S. App. D-2, p 51a).

On March 28, 1977 Central Hudson petitioned the Commission for a rehearing. This and other such petitions were denied by the Commission in an opinion and order issued July 14, 1977 (J. S. App. D-3). The Commission relied primarily on the ground previously voiced by Chairman Kahn, i.e. that the existing "imperfectly structured electric rates" do not "fully reflect the much higher marginal costs of on-peak consumption", and that: "The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*." (J. S. App. D-3, p 58a).

Thereafter, Central Hudson commenced the present action, as described above.[6] In the New York Supreme Court, the ban on promotional advertising was upheld solely on the ground (originally set forth by Chairman Kahn) that "because of inefficient rate structure" increased peak usage of electricity would not be "properly priced", and that therefore the ban "advances a significant public interest" sufficient to justify the incursion on

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[6] In the New York courts, Central Hudson challenged other features of the Commission's order of February 25, 1977, which are not involved in the present appeal.

This appeal raises no question with respect to payment for the costs of promotional advertising. The Commission's ban applies regardless of how the costs of promotional advertising are allocated. Pursuant to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. § 2623(b)(5), a Federal standard is established, for consideration by state regulatory bodies, requiring that the costs of promotional advertising be borne by the shareholders or other owners.

First Amendment values (J. S. App. C, p 23a). Affirming, the Appellate Division, Third Department, cited, as establishing a "compelling" state interest in the ban, three matters relied on by the Commission, to wit: (1) increased use of electricity would cause "spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity"; (2) advertising "provides misleading signals" that energy conservation is unnecessary; and (3) additional usage will "increase the level of dependence on foreign sources of fuel oil." (J. S. App. B, p 19a).

On appeal, the Court of Appeals rejected Central Hudson's threshold challenge to the statutory authority of the Commission (which had also been raised below), ruling (J. S. App. A, pp 3a-7a) that "the legislature has conferred vast power upon the Public Service Commission", including "general supervision" of electric utilities, and the duty "to encourage . . . the preservation of environmental values and the conservation of natural resources." The prohibition of promotional advertising was held to be a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services." (J.S. App. A, p 5a).

Turning to the First Amendment issue, the Court of Appeals acknowledged (J. S. App. A, p 10a) that the Commission's ban "works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society", and that such regulations "have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication." However, relying principally on *Ohralik* v *Ohio State Bar Ass'n.*, 436 US 447, the Court of Appeals ruled that (J. S. App. A, p 13a) "the ban on promotional advertising of electricity is consistent with First Amendment strictures".

In support of this conclusion the Court of Appeals first cited the "extensive government regulation" to which public utilities are generally subjected, and then concluded that since there is no "competitive shopping" for electricity on the basis of price, because the rates are fixed by the Commission, promotional advertising conveys no information of value to the recipient. Furthermore, in view of "the present energy crisis" (of which

the Court took judicial notice), such communications might be "affirmatively detrimental" and "exacerbate the crisis". This hazard, said the Court, "constitutes a compelling justification for the ban".

Central Hudson's motion for reargument was denied without opinion.

SUMMARY OF ARGUMENT

The Commission's order is unconstitutional under *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 US 748, and this Court's subsequent decisions dealing with "commercial speech". The advertising here in question does much more than propose a commercial transaction; it conveys information of value to the energy consumer and is entitled to substantial First Amendment protection. The asserted contervailing state interests are insufficient to justify the prohibitory order.

I.

Important First Amendment Interests are Infringed. The recent "commercial speech" decisions are in line with this Court's increasing concern for the rights of the recipient of information. The interests of the energy consumer in the free flow of information were overlooked by the New York court.

A. Although appellant has a franchised monopoly of the distribution of electrical energy in its service area, it has no monopoly of the uses to which that energy is put. The New York court mistakenly conceived that Central Hudson operates in a "noncompetitive market", whereas in fact the market for the supplying of heat and power is highly competitive between electricity, natural gas, and house heating oil, and electricity has only a minor fraction of that market. Although Central Hudson does not presently intend to promote electrical resistance heating (a situation which cost and supply factors could readily change), it does wish to promote off-peak consumption and energy-saving electrical uses and devices, among which the heat pump is most important, as both state and proposed federal

legislation have recognized. Appellee's attempts to belittle these considerations are unconvincing.

B. Appellant's First Amendment rights are not diminished by its status as a regulated public utility corporation, since it is not only appellant's self-interest but also the interests of the energy-consuming public which are governing. *First National Bank of Boston* v. *Bellotti,* 435 US 765. Making full allowance for the "commonsense differences" between commercial and non-commercial speech, which the Court has previously noted, there is no feature of the present case which renders the caveats so voiced applicable here. The Commission's ban is not directed at deceptive or misleading advertising, no person-to-person solicitation is involved, and the challenged order is an absolute prohibition and not a mere regulation of time, place and manner. The order bans speech which is entirely lawful and inoffensive, and the order's application is determined solely by the content of the speech.

II.

The state interests advanced to justify the suppression of speech effected by the order are insufficient. Three such interests are asserted by the Commission. The New York court relied only on one of them, *i.e.* oil conservation.

A. *Oil conservation.* The New York court took judicial notice of "the present energy crisis" and summarily concluded (App. A, pp 13a-14a) that promotional advertising of electric energy "would only serve to exacerbate the crisis", and that this constituted a "compelling justification for the ban." The Commission's claim of conservational benefits from the advertising ban was modest, and is not the primary factor invoked by the Commission in its defense. Although the energy crisis (and specifically dependence on foreign oil supplies) is a national problem, no other state imposes such a prohibition, and the pertinent federal legislation affirmatively recognizes the legitimacy of promoting the use of electrical energy. The quantum of energy economy achieved by prohibiting the promotion of electric resistance heating is insignificant, especially in compari-

son to luxury wastage of oil in, for example, large automobiles and snowmobiles, the use and promotion of which the government continues to tolerate. Inasmuch as the Commission's order prohibits promoting electrical usage which conserves energy and diminishes the use of oil, it is counterproductive.

B. *Ratemaking*. The Commission's principal defense of the promotional ban is based on the "marginal cost" theory of ratemaking, which focuses on the proposition that unit-of-energy costs are higher at peak load than off-peak periods, and therefore rates should be higher during peak periods. On this footing, the Commission argues that promotion of electrical usage will tend to increase peak loads, and that under presently used "average cost" ratemaking the off-peak user subsidizes the on-peak user. Therefore, the Commission concludes, promotion must be prohibited until such "marginal cost" ratemaking can be put into effect.

What this overlooks, however, is that prohibiting promotion of electrical usage contributes nothing to a resolution of the marginal cost ratemaking problem. The Commission has ample power within the traditional bounds of utility regulation, by the exercise of its authority over rates, accounting, metering, etc., to introduce marginal cost theory into the ratemaking process. Marginal cost problems confront all the state utility regulatory bodies, yet not a single other such agency has recognized any need to prohibit promotion of electrical usage. Advertising is but one of a myriad of factors that may increase peak load. The Commission's argument is of extraordinary breadth, and would appear to justify the suppression of speech whenever its content may have collateral effect in the exercise of its traditional and acknowledged powers.

C. *"Misleading Signals"*. The Commission contends that promotion of electricity will give to the public "misleading signals" that energy conservation is unnecessary. There is nothing in the record to support the suggestion that Central Hudson's proposed advertising will convey any such impression. Even if that assumption is indulged, this sort of argument is not new and has been repeatedly rejected by this Court. *Va. Pharmacy*

Bd., supra at 769-70 and 773; *Linmark Associates, Inc.* v. *Willingboro,* 431 US 85, at 96-97; *Bates* v. *State Bar of Arizona,* 433 US 350 at 374-75. Furthermore, since the order does not prohibit utility companies from responding to inquiries about the advantages of particular electrical uses, the effect of the ban is to conceal from the public the fact that such information is obtainable from the companies.

III.

The order, and the Public Service Law as construed and applied, are unconstitutional for vagueness, overbreadth, and lack of standards.

A. *The Public Service Law.* The governing statute suffers from no inherent or facial constitutional defect, but in this case has been construed and applied by the highest state court as giving the Commission speech-limiting powers which are nowhere specified in the statute and which are thus wholly lacking in legislative standards. The Commission concedes that the Public Service Law "is not a statute designed to regulate speech." Its structure and provisions are comparable to those of at least 47 other states having regulatory bodies with supervisory power over electric utilities. The "public interest" and "public welfare" standards, while accepted as sufficient for ratemaking and other economic purposes, are insufficient for the regulation of speech. *Hannegan* v. *Esquire,* 327 US 146. The New York court did nothing to limit its construction, and the result of its decision is to confer broad and unspecified speech-limiting powers on the Commission. To affirm the decision below would be to open the door, constitutionally, to like construction of the statutes in the other 47 states.

B. The Commission's order itself is unconstitutional on grounds of both overbreadth and vagueness. As far as concerns oil conservation (the only ground regarded by the New York court) the order is overbroad because it prohibits advertising of electrical uses which conserve oil. Although the Commission's opinions are exclusively concerned with space heating and cooling, the order is not so limited, and covers electrical use for

lighting, and for transportation and other power purposes. It likewise suffers from vagueness, for the phrase "promotional advertising" is susceptible to a variety of interpretations. Does it cover only public and general advertising, or apply also to individual or institutional solicitation? These defects are, in all probability, due to the lack of any evidentiary basis for the order, which is based on little but the Commission members' *a priori* conclusions.

IV.

The Order and the authorizing statute are unconstitutional under the equal protection clause. The prohibitory order applies only to promotion by the regulated electric utility companies. The dealers in home heating oil remain free to advertise. The classification is irrational, as the oil sold by these dealers constitutes over three-fourths of all residential heating energy in Central Hudson's service area. The fact that the utility companies and not the oil dealers are subject to the Commission's jurisdiction is constitutionally irrelevant. The standard of review to be applied here is a rigorous one, since the discrimination is in terms of First Amendment rights. *Police Department of Chicago* v. *Mosley,* 408 US 92, at 95-96; see also *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 US 1, at 34 n. 75, 61, 63, and 112-15.

ARGUMENT

The Public Service Commission's order prohibiting "promotional advertising"[7] by electric utilities is plainly unconstitutional under the principles repeatedly laid down by this Court in the *Virginia Pharmacy* case, *supra,* and its other recent decisions dealing with "commercial speech". The Commission's order bans speech which is entirely truthful, and lawful in all respects save under the order itself.

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[7] The term thus employed by the Commission embraces a wide range of informational and invitational activities, from those whose sole purpose is to increase existing types of consumption to those which inform potential customers of new or little known uses or devices in which they may find improved quality or economy.

Furthermore, the order bans speech which does much more than propose a commercial transaction—speech which conveys information of great importance to the consumer of energy and touches closely on vital societal interests. Central Hudson asserts, therefore, that its promotional speech is entitled to substantial protection under the First Amendment, which is intended, above all, to protect the free flow of information from the efforts, however well intentioned, of governmental officials to prescribe what is "good" or "bad" for the public to know.

Accordingly, Central Hudson contends that the Commission's order is facially unconstitutional, and that the Commission lacks constitutional authority to prohibit electric utility companies from promoting the use, for any lawful purpose, of the electric energy they distribute. Although Central Hudson does not presently intend to promote electric resistance space heating or conventional air conditioning, it does wish to increase its off-peak load and to publicize new and improved uses of electricity which are conducive to energy conservation and diminished reliance on oil. These devices, despite their energy-saving characteristics, do involve increased use of electricity, and their promotion is therefore prohibited by the Commission's order. It is Central Hudson's immediate purpose in this litigation to be freed of these restrictions on the promotion of electrical uses which will benefit the public and, in the long run, help to alleviate the national energy problem.

I.

Important First Amendment Rights Are Infringed By the Commission's Order Prohibiting Promotional Advertising By Electric Utility Companies.

This Court's abandonment of the rule in *Valentine* v. *Chrestensen,* 316 US 52, and recognition of First Amendment protection for commercial speech, was not an isolated decisional development. Rather it was a logical outgrowth of the principle, increasingly stressed during the last twenty-five years, that the First Amendment is not for the sole benefit of those who speak

and write, but also of those who listen and read. *Martin* v. *Struthers,* 319 US 141, 143 (1943); *Lamont* v. *Postmaster General,* 381 US 301, 307-08 (1965); *Red Lion Broadcasting Co.* v. *FCC,* 395 US 367, 390 (1969); *Kleindienst* v. *Mandel,* 408 US 753, 762-63 (1972); *Procunier* v. *Martinez,* 416 US 396, 408-09 (1974). The applicability of this principle was recognized in the first decision[8] applying First Amendment values to commercial speech, *Bigelow* v. *Virginia,* 421 US 809, 818-26, and was the fulcrum of decision in Mr. Justice Blackmun's germinal opinion in the *Virginia Pharmacy* case, 425 US at 763-65, 769-70.

To be sure, the interests of the advertiser are not negligible, and have weight in the First Amendment decisional scales. See e.g., the *Virginia Pharmacy* case, *supra* at 762-63. But societal rather than individual interests have been the principal focus of decision in subsequent commercial speech cases involving advertising. *Linmark Associates, Inc.* v. *Willingboro,* 431 US 83 at 92, 96-97; *Bates* v. *State Bar of Arizona,* 433 US 350 at 363-64, 368-79.

We believe that it was the tendency of the Commission and the New York courts to center their discussion on the interests of Central Hudson as they perceived those interests, and their insufficient attention to societal values—primarily those of the energy-consuming public—that led the Commission and the State courts into grievous error in their disposition of the constitutional issues in the present case.

A. The First Amendment Values here at Stake are Substantial and Merit a High Degree of Protection Against State Infringement.

Energy, be it electrical or in some other form, is not socially useful in and of itself, but for the services it provides—chiefly light, heat, and motive power. The ultimate source of energy is the sun, but in terrestrial terms it is found not only in the sun's

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[8] The demise of *Valentine* v. *Chrestensen, supra,* had been adumbrated in *Pittsburgh Press Co.* v. *Human Rel. Comm'n.,* 413 US 376, 384-88, 393, 398, 401-02 (1973).

direct radiation, but in coal, oil, and other fossil fuels, the natural movement of water, and many other forms including, most recently, nuclear fission. Some of these sources are useable only by their conversion into electricity, while others (notably the fossil fuels) can be tapped directly by the user.

Thus the consumer of energy is often confronted with options, for these several sources of energy, and forms of energy distribution, have radically differing qualities and characteristics, and comparative advantages and disadvantages, depending upon the use to which they are to be put. Furthermore, these comparative factors are unstable, for both natural and human events may and often do alter the circumstances in which consumer choice must be made.

This is the complicated and fluctuating milieu to which promotional advertising of any basic energy form such as electricity must be addressed. But one would never realize this from the opinion of the New York Court of Appeals, which makes no reference to energy sources that compete with electricity, and reduces the First Amendment values at stake here to the "nadir", by reasoning as follows (J. S. App. A, pp 12a-13a):

> In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping.* * *
>
> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society.

It is true, of course, that Central Hudson is the sole distributor of electrical energy in its operational area, and that the price is regulated by the Commission. But the description of the mar-

ket in which electric utilities operate as "noncompetitive" reveals the depth of the court's misunderstanding, for while electricity does furnish virtually all light, it is in competition with other forms of energy in supplying heat and power.[9] Furthermore, it is apparent from the Commission's two opinions continuing in effect the promotional ban (J. S. Apps. D-2 and D-3), that the Commission was primarily concerned with the use of electricity for space and water heating and air conditioning.

In the market for space and water heating, there is intense competition between electricity, natural gas (which Central Hudson also distributes), and house heating oil. Electricity has the smallest share of the three, and electricity and natural gas together have less than one-quarter of the market.[10] Each of the three rival energy sources has comparative advantages and disadvantages, in terms of both price and quality. The significance of all this for First Amendment purposes was well described by Judge Pratt in the *Long Island Lighting* case[11] (J. S. App. J, pp 92a-93a):

> Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's

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[9] Of total end use energy consumption in New York State in 1978, it is officially estimated that electricity supplied only 11.5%. Petroleum products account for 67.5%, natural gas comprises 18.3%, and coal furnishes the remaining 2.7%. See *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, Figure IV-14.

[10] In 1978 in Central Hudson's service territory, residential heating was 9.3% electric, 12.4% gas, and 78.3% oil. See Central Hudson's Annual Report for the Year Ended December 31, 1978 to the Public Service Commission. Natural gas distribution facilities are available in Central Hudson's service territory only in and near cities.

[11] *Long Island Lighting Co.* v. *Public Service Commission,* —F. Supp — (E.D.N.Y., Docket No. 77C972, March 30, 1979), now pending on appeal in the Court of Appeals for the Second Circuit.

> economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently.[12]

In contrast to the foregoing, the state court's opinion in the present case would give one to believe that Central Hudson proposes, by advertising, to urge its customers to keep their buildings hotter in winter and cooler in summer. Whatever might be said for or against constitutional protection for such speech, no such question is raised in this case.

Electrical resistance heating (the electrical method presently in common use), is clean, odorless, and cheap to install, but it entails running costs which have generally been higher than those for gas or home oil, and it is this factor which accounts for its present minor share of the space heating market.[13] Apart from resistance heating, however, there are heating uses for electrical energy which are both economical and efficient, and the use of which is highly conducive to energy conservation.

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[12] See also comparable portions of Chairman Kahn's separate opinion (J. S. App. D-2, pp 49a-51a).

[13] By letter dated September 6, 1979, the Commission granted Central Hudson permission to engage in promotional advertising of gas heating. Central Hudson has subsequently done so, but piped gas is available to customers only in urban areas, so that in the non-urban areas of Central Hudson's service territory the competition is between electrical and home oil heating. Despite the higher cost, electrical heating's advantages continue to attract customers.

In the past, the difficulty with gas heating has been the serious fluctuations, for reasons largely unrelated to the world oil situation, in the available supply of natural gas. In recent years, shortages in New York State have been so acute that the Legislature has authorized the Commission to control the attachment of new customers, and the extent of service to existing customers (Public Service Law Sections 66(2) and 66-a). As noted above (footnote 4), in 1971 the Commission banned promotional advertising by gas companies, but more recently has been lifting the prohibition on a piecemeal basis.

Of these, the electrically-powered heat pump[14] is the most immediately promising, as its technology is relatively advanced and it is far more energy-efficient than any heating equipment presently in general use.[15] The New York State Legislature, by amendment to the Home Insulation and Energy Conservation Act of 1977 (L. 1977, c. 858), has very recently specified the installation of a heat pump as an "energy conservation measure" eligible for financing by public utilities under an approved "home conservation plan".[16] Since heat pumps are electrically powered, this has resulted in the anomalous situation that Central Hudson is forbidden by the Commission's order to promote the use of a device the home installation of which, under the state's conservation program, Central Hudson may be obligated to finance.

With improving technology, self-generating energy sources such as private hydro, solar, and windmill systems are now

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[14] Although the Commission's order does not so specify, its opinion on rehearing makes it clear the promotional ban applies not only to advertising electric energy, but also to utility company advertising of appliances that consume electric energy (J. S. App. D-3, p 59a).

[15] A heat pump heats a building by drawing in heat from the outside air, and cools it (like an air conditioner but more efficiently) by expelling interior heat to the outside air. The pump heats effectively as long as the outside air temperature is over 30° Fahr. which, in Central Hudson's area, is about 78% of the time during the heating season. When temperatures drop below this level a back-up system (oil, gas, or electricity) is required. In his opinion Chairman Kahn expressed concern about the air conditioning capability of the heat pump (J. S. App. D-2, p 51a), but the price of a heat pump is high enough so that few would buy it who would not otherwise install a less efficient air conditioner. Furthermore, pumps which heat but do not cool are available.

[16] Public Service Law Section 135-a, as amended November 6, 1979, by L. 1979, c. 741. See also the Senate Finance Committee's Rep. 96-394 (96th Cong. 1st. Sess., Nov. 1, 1979), reporting favorably H.R. 3919, which provides in Sec. 202(a)(2) for a "residential energy" tax credit for heat pumps which replace electric resistance space or water heating, or are used as a back-up system for a solar water heating system.

becoming practical. Electricity is the most suitable supplement or back-up for these systems, and it is electrical uses such as these, embodying improvements in quality or economy, which Central Hudson presently wishes to promote.[17]

The Commission's effort to belittle these values (in their Motion to Dismiss or Affirm at pp. 12-13) is unconvincing. True it is that heating systems are not changed "every few years", but new homes are built, and existing systems may be converted. Whether the initial choice is made by the builder or the householder is irrelevant. The suggestion that the availability of information from electric appliance dealers justifies silencing the utility companies is the same argument that this Court categorically rejected in the *Virginia Pharmacy* case, 425 US at 757: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . ."

Accordingly, the state court's discussion of the First Amendment issue in terms of the price of electricity is far wide of the mark. The question is not one of shopping for cheap electric energy, but of comparing electricity with other available energy sources for furnishing heat and power. One of the most serious concerns of electric and other utilities is technical obsolescence or changing public life styles which may endanger the utilities' survival, just as the urban electric trolley car and the railroads are presently threatened. Thus the continued health of electric utilities depends on the development and publicizing of new and

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[17] It is, however, our contention that the Commission's prohibition is unconstitutional *in toto,* including its application to electrical resistance heating, as was held by Judge Pratt in the *Long Island Lighting* case, *supra* n. 11. The reasons why Central Hudson has no present intention of promoting resistance heating are its presently higher cost and Central Hudson's reluctance to increase its peak loads. Although Central Hudson has excess generating capacity for present loads, a large increase in peak load might require construction of additional generating plant at a time when the cost of capital is extremely high. However, the field of competitive energy is multi-faceted and volatile, and changing technical or cost factors may well justify altered policies in the future.

improved methods which will redound to public benefit in terms of cost and quality.

Of course, Central Hudson's self-interest is very much a part of its position on these issues. But that factor in no way limits its right to promote its own interests and point of view. See *Eastern R.R. Presidents Conference* v. *Noerr Motors Freight,* 365 US 127, at 139: "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which government must act." So must individuals. Whether or not Central Hudson's voice is heeded, it is entitled under the First Amendment to be heard. And, as we will now show, its stifling cannot be justified by the fact that the voice is that of a public utility corporation.

B. Appellant's First Amendment Rights Are Not Diminished by its Status as a Regulated Public Utility Corporation, or by the Commercial Character of Its Advertising Message.

In First National Bank of Boston v. Bellotti, 435 US 765, this Court dealt with a Massachusetts statute which severely limited the right of specified types of corporations, including banks, public utilities,[18] and business corporations, to spend money in order to influence elections or referenda. Holding that the statutory restrictions violated the First Amendment, the Court (per Justice Powell) observed (435 US at 775-76):

> The court below framed the principal question as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amend-

[18] Appellants in the *Bellotti* case included two banks and three business corporations, but no public utilities. However, there is nothing in the wording or logic of the Court's opinion to suggest that the ruling or opinion would have been different as applied to public utility corporations.

> ment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] . . . abridges expression that the First Amendment was meant to protect. We hold that it does.

The fact that the *Bellotti* case concerned "political" and the present case "commercial" speech subtracts nothing from the force of the point made: that the test is not the identity of the communicator but the First Amendment interests of the communicants. Indeed, Justice White, dissenting (with Justices Brennan and Marshall), thought that the communicants' interests would have been greater had the speech been commercial-promotional (435 US at 807-8):

> I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by corporations would be significantly impeded.

Accordingly, the emphasis laid by the New York court upon the "vast power" of the Commission (J. S. App. A, p 4a) and the "regulated and franchised" status of public utilities (J. S. App. A, p 13a) as justifying restricting their right of speech, is misplaced,[19] for these characteristics do not determine the communicant interests involved in utility advertising. Furthermore, just as the banks in the *Bellotti* case were under "extensive government regulation" (J. S. App. A, p 13a), so were the pharmacists in the *Virginia Pharmacy* case, 425 US 748, 750-51, and *Carey* v *Population Services*, 431 US 678, 701, as well as the lawyers in *Bates* v *State Bar of Arizona*, 433 US 350, 353 et seq. In all these cases the ban on advertising was invalidated.

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[19] See also the remarks of Chairman Kahn in his concurring opinion (J. S. App. D-2, p 52a: "I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to a monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise."

Nor do *Ohralik* v. *Ohio State Bar Ass'n,* 436 US 447, and other decisions noting "commonsense differences" between commercial and other speech, support the validity of the Commission's promotional ban, for none of the factors remarked or relied on in those cases are relevant to the present one. The *Virginia Pharmacy* case, 425 US at 771, referred to "deceptive or misleading" advertising, as did also the *Bates* case, 432 US at 383-84. The *Ohralik* case, *supra,* particularly relied on by the New York Court of Appeals (J. S. App. A, pp 12a-13a), and *In re Primus,* 436 US 412, both turned on the characteristics and dangers of in-person solicitation of a lawyer-client relation, and weighed the hazards of (436 US at 461): ". . . stirring up litigation, assertions of fraudulent claims, debasing the legal profession, and potential harm to the client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." The decision in *Friedman* v. *Rogers,* 440 US 1, at 9-11, involved the allegedly deceptive and misleading use of optometrical trade names.

None of these matters is involved in the present case, and the Commission's ban on promotional advertising is not directed at any of these problems or hazards. It is a total ban on all such advertising, regardless of its character, quality, style, or purpose. It bans speech which advocates no unlawful conduct, and is neither fraudulent, deceptive, obscene, libelous, nor provocative of violence. The order is not a regulation of "time, place and manner"; its limits are fixed exclusively by the content of the speech and, given the prohibited content, the ban is absolute and all-inclusive.

In the light of the foregoing circumstances and considerations, we respectfully submit, the Commission's order cannot survive scrutiny under the First and Fourteenth Amendments.

II.

The State Interests Asserted By Appellee Are Insufficient to Justify the First Amendment Infringements Effected By Appellee's Order.

Although the Public Service Commission and the lower New York Courts relied on three separate reasons to support the promotional advertising ban, the Court of Appeals made no

mention of two of them, and relied solely on the argument that the prohibition would aid in "conserving diminishing resources" of energy. However, in its Motion to Dismiss or Affirm (pp 16-18) the Commission continued to press the arguments disregarded by the Court of Appeals, and accordingly we deal with them following our discussion of the conservation argument.

A. Oil Conservation.

The sole state interest relied on by the Court of Appeals was described, at the very end of its opinion (J. S. App. A, pp 13a-14a), as follows:

> It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interest. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Assuredly, oil conservation is a most important national policy, but the question remains whether or not the promotional advertising ban will measurably contribute to its fulfillment. The Commission itself made but a faintly affirmative claim (J. S. App. D-2, p 37a), acknowledging that the promotional ban "may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed", and that the ban "will be less than optimally effective, in a national context", while lamely concluding that it "will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."[20]

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[20] If it is true, as indicated in the Commission's Motion to Dismiss (p 12, n. 4), that there is a shortage of the No. 2 oil used in home oil furnaces, conservation considerations would suggest that electric heating is now preferable, as there is no current shortage of the residual oil used in the generation of electricity, and there is no suggestion in the record that there was any such shortage at the time of the Commission's decision to continue the promotional ban. Moreover, the record shows (contrary to the cited footnote) that the heating oil dealers do in fact advertise (R. 351-52 and 579).

Now, if this were a case such as *Wickard* v. *Filburn,* 317 US 111, in which a general and nationwide prohibition is enforced against persons whose individual impact on the problem is negligible, on the basis that the impact of many such persons is substantial, the New York regulation, whether or not constitutional, might be rationally related to its avowed aim. But the present case is not in that posture, for *no other state is imposing a similar ban.* In no state save Oklahoma has a like prohibition ever been imposed—even in 1973 at the time of the Arab oil embargo—and in Oklahoma the promotional advertising ban was held invalid as "arbitrary". *State* v *Oklahoma Gas & Electric Co.,* 536 P 2d 887, 895 (Okla. 1975).[21]

Furthermore, the "present energy crisis" of which the New York court took notice, is a national problem dealt with primarily by policies fixed at the national level. Federal energy policies do not prohibit promotional advertising by electric utilities, and by plain implication recognize their legitimacy. Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), provides: "No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising . . ." The incompatibility of this provision with prohibition of promotional advertising is confirmed in the Report of the Joint Conference Committee, which explicitly states that no prohibition of either promotional or political advertising by electric utilities was intended.[22]

Thus the Commission's concern for the effect of electric utility advertising on the energy crisis is shared neither by the federal nor the other state governments.

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[21] In Nebraska, where electric utilities are publicly owned, a promotional advertising ban for other privately owned utilities was considered, but discarded after the State Attorney General ruled that such a ban would be unconstitutional as an impairment of freedom of speech. Neb. Op. Att'y Gen. No. 8 (1979).

[22] Pertinent extracts from the United States Congressional Committee Reports relating to Section 113(b)(5) of the Public Utilities Regulatory Policies Act of 1978 and its predecessor bill are set forth in J. S. App. K pp 98a-100a.

In its Motion to Dismiss or Affirm (p 14) the Commission professes that it "fails to understand" the relevance of these circumstances. This Court's recent commercial speech cases have all involved the assertion of state interests to justify the limitation on speech, and a balancing judgment by the Court.[23] Full recognition of the importance of oil conservation does not obviate the necessity of scrutinizing the necessity for and efficacy of official measures, adopted in the name of conservation, which abridge fundamental rights. Certainly the fact that neither the federal government (the authority primarily charged with responsibility for dealing with the national energy shortage), nor any of the 49 other states, has applied a similar ban reflects adversely on the need for and wisdom of the Commission's order. Equally, the universally negative attitude in the federal and other state jurisdictions indicates that enforcement of the advertising ban in New York State alone will have insignificant results quantitatively.

Contrary to the Commission's argument (Motion to Dismiss, pp 15-16) there is no inconsistency between Central Hudson's support of conservation and its desire to regain freedom of speech. As shown heretofore (*supra,* pp 17-19), there are uses of electricity which will diminish the use of oil, and it is these energy-saving devices which Central Hudson presently wishes to promote. Neither the National Energy Conservation Policy Act of 1978 nor the 1977 amendments to the New York Public Service Law, cited by the Commission (Motion to Dismiss, pp 15-16), lend any support to its arguments for, as we have seen, the sponsors of the federal act consciously rejected the idea of an advertising ban, and the New York conservation amendments now provide for utility financing for heat pumps, which the Commission's order forbids utilities from publicizing.

Assuming that electric resistance heating powered by oil-fired generators uses somewhat more oil than home oil furnaces,[24] the

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[23] See, e.g., the *Virginia Pharmacy* case, 425 US at 766-70; *Linmark Associates, Inc.* v. *Willingboro,* 431 US at 94-97; *Bates* v. *State Bar of Arizona,* 433 US at 368-79.

[24] As Chairman Kahn's concurring opinion shows (J. S. App. D-2, p 50a), the additional amount of oil used in resistance heating is difficult to quantify.

fact remains that the Commission has not seen fit to limit its use, but only its promotion by advertising.[25] Perhaps our society should by now have concluded that no uses of oil which, in the strictest sense, are unnecessary, should be advertised. But it has not done so, and there is something more than faintly absurd about praising the promotional ban on electric heating as a conservation measure, while Cadillacs and snowmobiles are not similarly treated.

Given the freedom of Central Hudson's oil furnace competitors to cry their wares, and the public tolerance of flashy television advertisements for powerful cars and potent gasoline, inviting consumer spending for services far less necessary than home heating, it is nothing short of ludicrous to describe the Commission's order as serving any substantial, let alone compelling, state interest in terms of oil conservation.

B. Ratemaking.

Despite the Court of Appeals' disregard of it, the Commission continues to place primary reliance[26] on the "marginal cost" rate problem as justification for the promotional ban. In summary form, this problem, in its supposed application to promotional advertising, may be described as follows: (1) electric utilities confront both hour-of-the-day and seasonal fluctuations of customer demand, resulting in "peak" and "off-peak" loads; (2) most utilities have several sources of supply (i.e. generating plants, contract suppliers, etc.) of varying cost-efficiency; (3) economy dictates that the most cost-efficient sources be used first, and the less cost-efficient be drawn on only

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[25] To whatever extent the appellee's argument that the competition between oil and electricity is quantitatively insignificant (Motion to Dismiss, p. 13) may be taken is valid, it *pari passu* diminishes the quantitative significance of the appellee's arguments in support of the ban.

[26] See the Motion to Dismiss (p 18) repeating the Commission's intention to review the promotional ban "at such time as the problems presented by an inadequate utility rate design no longer exist." This suggests that the other arguments are makeweight, and that the ban would be continued, even if New York State were awash with oil, until the rate structure is adjusted to the Commission's satisfaction.

when necessary to meet increasing load, i.e., approaching peak; (4) if there are reliable indications of future demand that will create peaks beyond the company's existing capacity, additional plant must be constructed which, because of inflation, high interest rates, and increased capital costs will probably be more costly than existing sources; (5) therefore, the unit cost of electricity will be higher during peak than off-peak periods; (6) average cost, which has been the basis of ratemaking in the past, does not reflect the aforesaid differential, with the result that the off-peak consumer is overcharged and the on-peak consumer undercharged; and (7) increased demand, which promotional advertising may stimulate, will raise the peaks, and increase both the unit cost of the energy and the degree to which the off-peak consumer subsidizes the on-peak consumer.[27] The term "marginal cost" denotes the cost of the last unit of energy furnished to meet peak demand.

The New York Public Service Commission has concluded, with regard to both electricity and gas, that marginal costs "provide a reasonable basis" for rate structure, and must be treated as "an important element of rate design."[28] Appellant did not oppose those determinations and does not question their rational basis. But in assessing the validity under the First Amendment of the promotional ban, it must be realized that, while there is widespread professional agreement with the conceptual basis of the marginal cost theory, there is equally widespread disagreement and controversy concerning the extent, if any, to which marginal cost theory can be used as the basis of utility ratemak-

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[27] The "marginal cost problem" was not one of the factors listed by the Commission for consideration when it opened the proceeding leading to continuation of the promotional ban (J. S. App. I, pp 85a-87a). Nor was it mentioned in the Commission's statement of policy continuing the ban (J. S. App. D-2, pp 36a-38a), but first surfaced in Chairman Kahn's concurring opinion (J. S. App. D-2, pp 51a-52a), and then was picked up and stressed by the Commission in its opinion and order denying rehearing (J. S. App. D-3, pp 58a-59a).

[28] Case No. 26806, *Electric Rate Design,* 16 NY PSC 671 (1976); Case No. 26835, *Relevance of Marginal Costs to Regulation of Gas Distribution Companies,* Opinion No. 79-19, issued September 17, 1979.

ing,[29] in view of the many difficulties and complexities which must be confronted.[30] The Commission itself has characterized its approach to the practical implementation of marginal cost theory as one of "gradualism consistent with appreciable improvement",[31] and it is indisputable that resolution of the marginal cost "problem" will be a long and tortuous process, as the Commission reveals (Motion to Dismiss, pp 17-18 and n. 6) by its observation that after a proceeding commenced in January of 1975 and concluded in August of 1976 "sufficient data has not yet been accumulated", and that "economically practical time-of-day metering equipment" has not yet been devised.

Appellant possesses in ample degree the traditional utility-regulatory powers over such matters as ratemaking, accounting, and metering. The exercise of these powers to resolve the marginal cost problem presents, within the range of rationality, no

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[29] For example, the Public Utilities Commission of Colorado, after a lengthy proceeding, recently decided that "marginal cost analysis as a basis for determining costs upon which rates are established is not now appropriate for implementation in Colorado. . . ." Case No. 5963, *Rate Structure of All Electric Utilities,* July 27, 1979, p 100.

In New York State there is disagreement among state agencies on marginal or incremental pricing of natural gas. While the Commission supports such pricing (see n. 28), the New York State Energy Office opposes it because of its concern that such pricing will increase the cost of gas to industrial customers and drive them from using gas to using oil. *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, Section V-D, pp 46 and 49-50.

[30] See, e.g., the Colorado decision cited in note 29 at pp. 84-101, and the testimony of Dr. W. H. Melody in Case No. 26806, *Electric Rate Design, supra,* n. 26, Tr. pp. 2624 et seq. Marginal cost-based rates often must be scaled down to avoid exacting more than a fair return on capital. If computed on a long-term incremental basis, long-term forecasts are involved which are subject to inherent uncertainty. The costs of metering for time-of-day rate purposes is substantial. Furthermore, marginal cost theory appears to be of comparatively little immediate value as applied to companies such as Central Hudson, since its existing energy sources do not vary greatly in cost-efficiency, and the load capacity (existing or contracted for) is sufficient so that the need for additional capacity is not immediate.

[31] Case No. 26806, *Electric Rate Design, supra,* at 692.

constitutional problems. *Matter of New York State Council of Retail Merchants* v. *Public Service Commission,* 45 NY 2d 661, 412 NYS 2d 358 (1978). Furthermore, these are the *only* powers by which the problem can be alleviated or eliminated; the promotional advertising ban contributes *nothing* toward a solution. At most, it artificially limits one of a host of factors which may (but not necessarily will) exert an upward pressure on rates.

For nearly a century utility rates have been based on average cost theory, and if the result is less than perfect, neither is it catastrophic. The issues of whether, when, and how to shift to marginal cost ratemaking confront the Commision irrespective of the predicted effects of promotional advertising—indeed, the problem would be there even if present peak consumption should decline. If peak loads increase, the causes may be population growth or shifts, location of new business enterprises, greater customer demand attributable to prosperity, weather change, or all or any of these and other factors, singly or in combination. Advertising is but one among these many possible factors, and there is no evidence that it would be of much significance.

The proper role of marginal cost in ratemaking is a question that confronts all utility regulatory bodies. Not one of the state regulatory agencies that have seriously considered the adoption of marginal cost ratemaking, including the eleven or more others that have decided to move in that direction, has prohibited advertising as an adjunct to resolution of the problem nor, so far as we know, has even considered such action.[32] It is hard to escape the conclusion that, as far as marginal cost ratemaking is involved, the Commission's order is in the nature of an aspirin taken to alleviate the headache caused by contemplation of a difficult question. It is by the considered and energetic application of its ratemaking powers, rather than by taping the mouths of electric utility managers, that the Commission should engage the problem.

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[32] It may be noted that while the appellant has now approved marginal cost ratemaking for natural gas (footnote 28, *supra*), it has almost simultaneously *lifted* in large part the preexisting prohibition of promotional gas advertising. Case 25766, *Gas Restrictions,* order issued September 6, 1979.

In conclusion, we invite the Court's attention to the extraordinary breadth of the argument which appellee has based on the marginal cost issue. Carried to its logical conclusion, the argument is that the Commission has constitutional authority to limit or prohibit the utility companies' speech whenever, in the Commission's judgment, the effect of the speech is to render more difficult the exercise of its other powers, and to maintain the prohibition in effect until it is satisfied that the other powers are functioning satisfactorily. Surely there is no constitutional warrant for subjecting appellant to such a virtually unlimited reach of state-censorship of speech.

C. "Misleading Signals."

The third reason advanced by the Commission in support of its prohibitory order is that (J.S. App. D-3, p 57a) "promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary." The Commission further observed this is "especially true since the utilities in this State are expected to promote conservation by their customers", and (p 59a) distinguished the promotion of "electric equipment and appliances" by manufacturers and dealers, whose advertising "will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives."

Why the Commission thought that manufacturer or dealer advertising of electricity-consuming devices would not carry the same "misleading signals" as the advertising of the same sorts of devices (such as heat pumps) by the utility companies, is not apparent. Of course, the manufacturers and dealers are not subject to appellee's regulatory jurisdiction, and it may be that this was an ineffectual effort to obscure the fact that silencing only the utility companies may not, after all, protect the public against the dangerous knowledge.

However that may be, the Commission's suggestion that Central Hudson's First Amendment rights can more justifiably be infringed because manufacturers and dealers can say the things about which the utility managers' lips are sealed, is an

argument which this Court decisively rejected in the *Virginia Pharmacy* case, 425 US at 757. Obviously, manufacturers and dealers may say things that Central Hudson would not wish to say, and fail to say the things that Central Hudson might deem important.[33]

Conservation, of course, is not incompatible with necessary or socially desirable consumption; indeed, it serves those ends. There is absolutely nothing in (or outside) the record to suggest that Central Hudson will cease promoting conservation, or that its advertisements would raise doubts of its desirability. Essentially, the Commission is saying that the public cannot be trusted to read appellant's advertising of the availability and uses of electric energy, because it will be confused and likely to forget the continuing flow of conservation messages in the communications media.

That is a pretty severe reflection on the public intelligence, and it is particularly surprising to see such a point made in the light of the Supreme Court's recent decisions which, in three opinions issued in 1976 and 1977, decisively rejected such arguments based on fear of public misunderstanding. In the *Va. Pharmacy case, supra,* the Court wrote (425 US at 769-70 and 773):

> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price . . . . All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

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[33] It should be noted, as appellee agrees (Motion to Dismiss, p 15), that with regard to the question of electric appliances and the merits of alternative uses of electricity, "utilities remain free to provide advice to customers if they request it." The effect of the advertising ban, therefore, is to conceal from the public the knowledge that the utility company is able and willing to supply electrical use information.

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in 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. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. . . .
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> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions [footnote deleted], we conclude that the answer to this one is in the negative.

A year later, in the *Linmark* case, *supra,* the Court re-affirmed the principle thus established, in the context of an ordinance prohibiting "For Sale" or "Sold" signs on real estate, in order to stem what was believed to be the flight of white homeowners from a racially integrated neighborhood. Holding the ordinance unconstitutional under the First Amendment, the Court wrote (431 US at 96-97):

> The Township Council here, like the Virginia Assembly in Virginia Pharmacy Bd., acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. 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: they will choose to leave town . . . If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally'. Virginia Pharmacy Bd. denies government such sweeping powers.

Seven weeks later, in the *Bates* case, *supra,* the Court struck the same note in the context of Arizona's ban on advertising by lawyers (433 US at 374-75):

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers [footnote omitted]. 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. . . .

The fact is, of course, that the communications media are full of "signals" of the most varied kind, which are generally conflicting. But the First Amendment says that there is no referee empowered to identify and choose among these conflicting signals. This is to be left to the discretion of the public. The decisions quoted above have determined that, for better or worse, "concededly truthful information about entirely lawful activity" (*Va. Pharmacy Bd., supra* at 773) cannot be suppressed because of fear that the public will draw what officials believe to be wrong conclusions.

III.

The Order, and the Public Service Law as Construed and Applied By the New York Courts, are Unconstitutional for Vagueness, Overbreadth, and Lack of Standards

The two points now to be addressed are related but basically distinct, as independently based. The imprecision and breadth of the Commission's order are facially apparent, and were attacked by Central Hudson in presenting the case to the New York Court of Appeals. Unlike the Commission's order, the Public Service Law, which establishes the Commission and specifies its

powers, suffers from no inherent or facial constitutional defect, but has now been interpreted by the highest court of the state as giving the Commission powers, to limit and prohibit speech, which are no where specified in the statute and which, therefore, are wholly lacking in guiding legislative standards.[34] We will address the second of these points first.

A. Vagueness, Overbreadth, and Lack of Standards of the Public Service Law as so Construed and Applied

The provisions of the New York Public Service Law (McKinney 1955; Supp. 1978) empowering the Public Serivce Commission to regulate electric utility companies (see J. S. App. H), closely resemble those of at least 28 jurisdictions, including the District of Columbia.[35] The Commission is given

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[34] In its Motion to Dismiss or Affirm (p 19), the Commission contends that these points were not raised below and therefore are not properly before this Court. As shown in appellant's Brief in Opposition to the Motion (pp 2-3), there is no basis for this contention. The second point obviously did not arise until the Court of Appeals had authoritatively construed the Public Service Law; it was a principal point in Central Hudson's Motion for Reargument in that court, and was replied to by appellee. In presenting the statutory point, Central Hudson had argued that to construe the Public Service Law as authorizing speech-limitation would raise grave First Amendment questions.

[35] The approximately 48 states which regulate investor-owned electric utilities grant their respective public utility regulatory bodies general supervisory powers over such utilities. In addition, the following 28 statutes grant their public utility regulatory bodies implied powers similar to the "powers necessary and proper" conferred upon the Commission by New York Public Service Law § 4, subd. 1 (McKinney 1955) and upon which the New York Court of Appeals based its determination that the Commission had authority to promulgate the ban on promotional advertising: Ala. Code tit. 37, § 37-1-31 (1977); Alaska Stat. § 42.05.151 (1978); Ariz. Rev. Stat. § 40-202(a) (1974); Ark. Stat. Ann. § 73-202 (1957); Cal. Public Utilities Code § 701 (West 1975); Conn. Gen. Stat. Ann. § 16-6b (West Supp. 1979); D. C. Code Encycl. § 43-1003 (West 1968); Fla. Stat. Ann. § 366.05 (West 1968); Idaho Code § 61-501 (1976); Iowa Code Ann. § 476.2 (West Supp. 1979); Kan. Stat. § 66-101 (1972); La. Rev. Stat. Ann. § 45:1164 (West 1979); Md. Ann.

(Footnote continues on next page)

(Section 4, subd. 1) "all powers necessary or proper to enable it to carry out the purposes" of the Law; it is directed (Section 5, subd. 2, added in 1970) to "encourage" the companies subject to its jurisdiction to plan and carry out their functions "with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources"; it is endowed (Section 66, subd. 1) with "general supervision" of all electric corporations, and is empowered to order (Section 66, subd. 2) such "reasonable" service improvements "as will best promote the public interest, preserve the public health and protect" customers and employees, to prescribe uniform accounting methods (Section 66, subd. 4) and "just and reasonable rates" (Section 66, subd. 5) and to fulfill a variety of administrative and investigative duties ancillary to the specified substantive powers.

Code art. 78 § 1 (Supp. 1978); Mich. Comp. Laws Ann. § 460.6 (1967); Miss. Code Ann. § 77-3-45 (1972); Mont. Rev. Codes Ann. § 70-104 (Supp. 1977); N.M. Stat. Ann. § 62-6-4 (1978); N.C. Gen. Stat. 62-30 (1975); N.D. Cent. Code § 49-02-02(2) (1978); Okla. Stat. Ann. tit. 17 § 153 (West 1953); Or. Rev. Stat. § 756.040(2) (1975); Pa. Cons. Stat. Ann. tit. 66, § 501-(b) (Purdon Supp. 1979); R.I. Gen. Laws § 39-1-38 (1977); S.C. Code § 58-27-150 (1977); Tex. Rev. Civ. Stat. Ann. art 1446(C) (Vernon Supp. 1978); Utah Code Ann. § 54-4-1 (Supp. 1979); Wis. Stat. Ann. § 196.02 (West 1957); and Wyo. Stat. § 37-2-127 (1977).

While the Court of Appeals cited New York Public Service Law § 5, subd. 2, which empowers the Commission to "encourage" conservation, in its discussion of the authority of the commission to issue the order, it is difficult to understand how a statute which authorizes a governmental body to "encourage" the companies it regulates can be regarded as limiting or rendering more precise the Commission's power to regulate and prohibit speech, with which (under the New York court's decision) it is now vested. Statutes in at least five states empower their respective public utility regulatory bodies to consider or encourage conservation, in a manner analogous to New York Public Service Law § 5, subd. 2 (McKinney Supp. 1978); Colo. Rev. Stat. § 40-2-117 (Supp. 1978); Md. Ann. Code art. 78, § 56 (Supp. 1978). Nev. Rev. Stat. § 703.260(4) (1979); Ohio Rev. Code Ann. § 4905.70 (Anderson Supp. 1978); and Pa. Cons. Stat. Ann. tit. 66, § 308 (Purdon Supp. 1979).

These are the provisions which the New York courts have now construed as authorizing the Commission to prohibit advertising by electric public utilities. The construction so placed on the New York Public Service Law is, of course, beyond the province of this Court to review, but the *fact* of the construction is directly relevant to the federal constitutionality of the Commission's orders, and of the Law itself as so construed and applied.

It is apparent that the Public Service Law sets forth no standard appropriate for or sufficient to sustain a delegation of authority to the Commission to determine what the companies subject to its jurisdiction may or may not say publicly. Standards such as "public interest" or "public welfare" are accepted as sufficient for rate and other economic legislation, but are wholly insufficient for speech-limiting regulation. Appellee concedes (Motion to Dismiss, p 20) that "the Public Service Law is not a statute designed to regulate speech. . . ."

In *Hannegan* v. *Esquire,* 327 US 146, the Postmaster General contended that a federal statute authorized him to suspend second class mailing permits for publications if he had determined that they did not contribute "positively" to the "public good or public welfare". This Court refused so to construe the statute, saying it would be tantamount to deciding whether a publication's contents were "good" or "bad", and added (327 US at 151): "To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be lightly inferred."[36]

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[36] *Arnett* v. *Kennedy,* 416 U S 134, cited in the Motion to Dismiss (at p. 20) is not germane. The federal statute there involved was not one setting up an administrative agency with "vast power"; it was a statute narrowly targeted at relations between the federal government and its own employees, and the statutory standard for employee discharges was geared to that specific problem, and was held sufficient by a majority of this Court.

This Court has emphasized that in the First Amendment area the "government may regulate . . . only with narrow specificity." *NAACP* v *Button,* 371 US 415, 433. Thus a delegation of power to regulate speech requires much more precise guiding standards than might pass muster in other areas. *Hynes* v *Borough of Oradell,* 425 US 610; *Coates* v *Cincinnati,* 402 US 611; *Keyishian* v *Board of Regents,* 385 US 589; *Lovell* v *Griffin,* 303 US 444. Otherwise such delegation would allow government officials "to pursue their personal predilections." *Smith* v *Goguen,* 415 US 566, 575.

The Court of Appeals has done nothing to narrow, by construction, the circumstances in or purposes for which the Commission may prohibit or otherwise limit speech. It relied on the "present energy crisis" as justifying the promotional advertising ban, but said nothing to suggest that other state interests might not support the promotional advertising ban or other speech limitations. The Commission and the lower New York courts relied on other factors, and their invocation of the "marginal cost" theory, by its logic, would justify a promotional advertising ban at any time the Commission deemed the rate structure incongruent with real costs. The Court of Appeals did not negate other justifications which might be put forward by the Commission for restricting the speech of companies subject to its jurisdiction.[37]

B. Vagueness and Overbreadth of the Commission's Order.

Apart from the lack of guiding standards in the authorizing legislation, the Commission's order itself suffers from both vagueness and overbreadth. In part this is probably the consequence

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[37] The New York courts' cavalier disregard of these questions of precision and authority may be compared with the thoughtful treatment of a comparable problem in the Supreme Court of Idaho's recent decision in *Washington Water Power Co.* v *Kootenai Environmental Alliance and Idaho Public Utilities Commission,* 99 Ida. 875, 881-82, 591 P 2d 122, 128-9 (1979).

of the wholly insufficient evidentiary procedures and record on which the order is based. The Commission's initial order in 1973 was based on general information and inference concerning the effect of the Arab oil embargo on the supply of oil for electric generation (J.S. App. D-1). Although the factual situation on which the order was based did not last beyond the spring of 1974, in 1977 the Commission continued the ban on the basis of comments received by mail. The suggestion of the State Attorney General and State Consumer Protection Board, that an evidentiary hearing be held (R. 645 and 502), was disregarded. In the *Bellotti* case, 435 US at 789, Justice Powell referred critically to the lack of any "record or legislative findings" in support of the challenged statute. In the present case, the legislature has never considered, much less acted upon, the promotional advertising ban, and this, together with the lack of any evidentiary record made by the Commission, has basically flawed the decision-making process.

For whatever reason, the Commission's inclusive and unqualified order is fatally overbroad.[38] Although it is apparent from its opinions that the Commission was concerned primarily if not exclusively with space heating and cooling, it made no effort to confine its order to that area. For example, the order covers the use of electricity for lighting, which uses far less energy than what is required for heating and air conditioning, and which involves safety and human efficiency and productivity values. The order also applies to the use of electricity for power;

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[38] We are mindful of the passage in the *Bates* opinion (433 US at 380-81) stating that the "overbreadth doctrine" does not apply to "professional advertising". But there the Court was discussing overbreadth in regard to its relaxation of the standing limitation, so that a party whose own conduct is not constitutionally protected is allowed to challenge a statute on the ground of its possible application to others whose conduct would be constitutionally protected. No standing problem is involved in the present case, since the Commission's ban is absolute, it applies directly to Central Hudson, and no assertion is made that Central Hudson has not observed its terms.

it would prohibit Central Hudson from promotional advertising of electric vehicles, despite their energy economy and pollution-free performance. Furthermore, the order is more fundamentally flawed in that it is not confined to speech that promotes the use of *energy* or of *oil,* but of electricity. Thus it applies to the promotion of devices and methods for the use of electricity in ways which diminish the use of oil, as where electricity is used to power energy-efficient new devices such as the heat pump, or, in small quantities, to supplement solar or windmill heating systems.

Despite its all-inclusive coverage, the order is vague in that the contours of "promotional advertising" are foggy. Does it cover a consultation initiated by an officer of Central Hudson with an industrial concern on improved and expanded lighting? A speech by the president of Central Hudson to a businessmen's club describing various ways in which electricity can serve their needs? Would it be permissible for Central Hudson to launch a public attack on the wisdom of the Commission's order, when the most publicly effective means of attack would be to portray the diverse uses and other merits of electrical energy? Under the challenged order, the management of Central Hudson is continually faced with questions of this nature in which it must determine whether informational activities in which it wishes to engage are proscribed by the order or not. This, Central Hudson believes, improperly places a cloud over a matter which should be unrestricted, namely the furnishing of truthful information about its own business.

The result of the decision in the Court of Appeals is that the Commission has been allowed to exert prohibitory authority in the sensitive area of freedom of speech, although the New York legislature has never considered the conferring of such authority and there are no appropriate legislative guidelines for its exercise. Since comparable statutes prevail in a majority of the states, affirmance by this Court may well result in similar assertions of authority by state public utility commissions in many other states,

and involve them in problems for which their traditional areas of expertise are wholly unsuited.[39] The lack of governing standards here is reflected in an unqualified order with no evidentiary basis, and thoughtlessly vague and overbroad.

IV.

The Order and the Authorizing Statute are Unconstitutional under the Equal Protection Clause.

As the Commssion itself recognized (J.S. App. D-2, p 37a), the promotional ban to which appellant is subject does not apply to Central Hudson's non-utility competitors, such as oil furnace and heating oil distributors. In the light of the purpose—i.e., oil conservation—on the basis of which the Court of Appeals sustained the order, we submit that the discrimination thus worked between electric utilities and their competitors is irrational, undermines the plausibility of the "compelling interest" so relied on by the Court of Appeals, and violates the equal protection clause of the Fourteenth Amendment.

It is true, of course, that oil furnace heating enterprises are not subject to the Commission's jurisdiction. But its lack of authority over these dealers is not constitutionally significant except to show that it is the state government as a whole, and not the Commission alone, which is responsible for the discrimination. The Court of Appeals has interpreted New York law as authorizing limitations on advertising by utilities but not by their competitors, and that is the discrimination here challenged.

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[39] Cf. The view of the Supreme Court of Idaho in the *Washington Water Power* case, *supra,* addressed to the type of regulation at issue in the *Consolidated Edison* case now pending in this Court: "The subject matter of the Commission's order at issue here does not deal with the subject matter traditionally regulated by public utility commissions and does not fall into a category of regulation which requires the technical expertise of a commission as contrasted with a legislature." 99 Ida. 881-82, 591 P 2d 129.

The constitutional validity of the discrimination must be assessed in the light of the objective the order purports to advance. Since over three fourths of all residential heating in Central Hudson's service area is accomplished by individual oil furnaces, the exclusion of direct oil heating from a prohibition, the purpose of which is to limit the use of oil, is irrational on its face. The situation is an aggravated version of the one confronting this Court in the *Bellotti* case, where (435 US at 793-95) the prohibition applied to banks, utilities, and business corporations but not to "entities or organized groups" with "resources comparable to those of large corporations." The discrimination caused Justice Powell, writing for the Court, to observe (435 US at 793): "Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by [the statute]. . . ."

This Court's decisions have long recognized a close relation between equal protection and freedom of speech in other cases where speech restrictions were applied in a discriminatory way. *Williams* v *Rhodes,* 393 US 23; *Cox* v *New Hampshire,* 312 US 569, 576; *Cox* v *Louisiana,* 379 US 536, 558. In the latter case Justice Black, concurring separately in this portion of the decision, and speaking of a statute which prohibited obstruction of traffic while excepting labor union picketing from its scope, wrote (379 US at 581): "This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." See also *Erznoznik* v *City of Jacksonville,* 422 US 205, 215; Kalven, *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 30.

A comparable situation, confronting the Court more recently, involved a Chicago ordinance which exempted peaceful labor picketing from a general prohibition of picketing within 150 feet of a school. *Police Department of Chicago* v *Mosley,* 408 US 92. Holding the ordinance unconstitutional, Justice Marshall wrote for the Court (408 US at 95-96):

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. * * * *
>
> Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

It is plain from these and other cases that the equal protection standard of review is strict in cases such as the present one, where First Amendment impingements are involved. In the *Mosley* case, *supra,* the Court stated that (408 US at 101): "The Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." And in *San Antonio Ind. School Dist.* v *Rodriguez,* 411 US 1, the Court's opinion (per Powell, J.) referred approvingly to the *Mosley* case, saying (411 US at 34, n. 75): "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests'." See also the comparable statements by the other Justices, 411 US at 61 (Stewart, J.), 63 (Brennan, J.), and 112-15 (Marshall, J.).

There is no rational, let alone compelling, interest to justify the discrimination here in question, and accordingly the Public Service Law as construed and the Commission's order, taken together, should be held invalid under the equal protection clause.

Conclusion

Appellant respectfully submits that the judgment of the Court of Appeals of the State of New York should be reversed and the case remanded with directions that judgment be entered annulling the order of the Commission.

Respectfully submitted,

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